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2019 No: 14608

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPEAL BY THE DEPARTMENT OF JUSTICE OF A DECISION BY THE TAXING MASTER TO THE QUEEN'S BENCH JUDGE IN RESPECT OF A DECISION CONCERNING PAYMENT OF FEES TO A COUNSEL

PURSUANT TO RULE 15 OF THE LEGAL AID IN CROWN COURT PROCEEDINGS (COSTS) RULES (NORTHERN IRELAND) 2005 AS AMENDED

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BETWEEN:

DEPARTMENT OF JUSTICE

Appellant

and

PETER IRVINE QC

Respondent

_____

MAGUIRE J

Introduction

[1] The appellant in this case is the Department of Justice. The respondent is Mr Peter Irvine QC. The issue before the court concerns the payment of fees under the legal aid arrangements established by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ("the 2005 Rules").

The Factual Background

[2] The factual background is little in dispute and can be summarised as follows:

(a) A Mr Nathan Ward ("the defendant") was facing an indictment containing 11 charges in the Crown Court. He was the beneficiary of a legal aid certificate which entitled him to, inter alia, representation at his trial by Senior Counsel.

(b) His Senior Counsel was Mr Peter Irvine QC, the respondent to this appeal.

(c) Mr Ward's trial took place between 12 March 2018 and 15 March 2018 at Downpatrick Crown Court. It took place, as is usual, before a judge and jury.

(d) The jury's verdict was provided on 15 March 2018. The defendant was acquitted of all charges, save for charges 1, 9, 10 and 11, in respect of which the jury could not agree.

(e) The issue then became whether, the decision being one for the PPS, there should be a retrial in respect of the charges on which the jury could not agree.

(f) The case was listed for a review at Craigavon Crown Court on 23 March 2018. At that review the PPS indicated that it was not seeking a retrial in respect of the unresolved charges.

(g) It was arranged that on 9 April 2018 the case would be listed for the purpose of enabling the PPS formally to offer no evidence in respect of these charges before a judge and jury convened for this purpose. The jury, it was anticipated, would be sworn and the judge would, having been told that the prosecution offered no evidence, direct the jury to acquit the defendant.

(h) On 9 April 2018 events unfolded in the manner envisaged. Mr Irvine QC attended at court appearing for the defendant. The forensic exercise took less than half a day.

Senior Counsel's Fees

[3] In respect of the original trial which lasted four days Senior Counsel sought his fees, the principal element of which was what is described as a basic trial fee (BTF). There was and is no dispute that he was entitled to that fee and it has been discharged by the Legal Services Agency ("LSA"). The BTF amounted to a sum of £4,000.

[4] Later Senior Counsel sought payment of his fee in respect of the proceedings which occurred on 9 April 2018, described above.

[5] In respect of those proceedings Senior Counsel sought a further BTF i.e. a second basic trial fee. The sum of the fee, if payable, is £4,000.

[6] The LSA ("the Payor") refused to pay this sum as, in their view, the fee Senior Counsel was entitled to was one of £200 which takes the form of a half day refresher fee.

[7] This dispute is therefore in respect of whether £4,000 or £200 is the fee which Senior Counsel is entitled to for his appearance on 9 April 2018.

[8] It is unnecessary for this court to set out in detail the route by which the dispute has made its way to this court. It will suffice to indicate that the decision appealed to this court is one made by a Master, which is dated 18 January 2019. That decision resolved the issue in dispute in favour of the respondent so that the effect is that the respondent currently is entitled to a BTF of £4,000 (plus VAT). There was also an earlier decision in respect of the same matter, to the same effect, by another Master.

[9] It is not in dispute that the resolution of this appeal is by way of a *de novo* hearing.

[10] The court is grateful to Dr McGleenan QC and Mr Henry BL, who appeared for the Department, the appellant herein, and to Mr Nick Jones BL, who appeared for the respondent, for their helpful oral and written submissions.

The 2005 Rules

[11] The court has had reason to consider these rules recently in the case of *Department of Justice v Tiernan*. In that decision it offered some general remarks about the rules which apply equally in the present case.

[12] What the court was considering in that case, as in this, was the notion of "standard fees" which are calculated in accordance with Schedule 1 to the Rules. These deal, in some detail, with the calculation of both counsel's and solicitor's costs. As the court put it in *Tiernan*, the Schedule "descends to a high level of particularity". While there are some general sentiments referred to in the Rules, the payment of standard fees is very much grounded in a rules based system. Like any rules based system, from the point of view of the payor and payee alike, there will be swings and roundabouts and the intention behind the rules appears to be to provide a specification of what is payable in respect of the great bulk of situations which may arise.

[13] The court in *Tiernan* also noted that:

> "It is also useful to stand back and bear in mind that the rules are written in plain language and accordingly ordinarily should be given their natural meaning. In particular, it seems to the court that it should seek to avoid stretching the language unduly in order to promote

> any particular outcome. If, on a straightforward reading of the provision, a payment should be made, even if there are arguments which can be made against interpreting the provision in that way, the court should be wary about trying itself to find a way round it. After all, the rules, if inconvenient, can relatively easily be the subject of amendment if this is necessary."

The key regulations in this case

[14] The parties are agreed that there are two particular paragraphs in the schedule which are at the centre of this case. The dispute is, in effect, as to which of the paragraphs apply to the factual situation before the court.

[15] Paragraph 23 reads as follows:

> "23.—(1) Subject to sub-paragraph (5), this paragraph applies if a trial was ended by direction of the judge, or it ended with the jury being unable to agree a verdict, and an order was made for a new trial.
>
> (2) Where the new trial began either on the same day or within fifteen working days, the case shall be considered as having comprised one trial for the purposes of determining the fees payable under these Rules.
>
> (3) Where the period of time between the first trial ending and the new trial beginning exceeded fifteen working days, a second fee shall be payable in accordance with sub-paragraph (4).
>
> (4) The second fee payable to a representative under sub-paragraph (3) shall be calculated in accordance with paragraph 6 (or paragraph 8, if applicable) except that each of the elements of the formula set out in paragraph 6 (or paragraph 8, if applicable) shall be reduced by –
>
> (a) forty per cent, where the new trial started within two calendar months of the conclusion of the first trial; and
>
> (b) twenty-five per cent, where the new trial did not start within two calendar months of the conclusion of the first trial,

except for the refresher and travelling allowance elements which shall not be so reduced.

(5) This paragraph shall not apply where a different representative acted for the assisted person at each trial."

[16] Paragraph 26 reads as follows:

"26. Any case in which –

(a) the prosecution offered no evidence (or no further evidence) and which was discontinued; or

(b) the prosecution entered a nolle prosequi,

shall be treated as a substantive trial and a Basic Trial Fee, together with Refresher Fees if applicable, shall be payable in accordance with paragraphs 6 and 7."

The Appellant's Case

[17] Mr McGleenan QC and Mr Henry BL appeared for the appellant before the court. In their submission paragraph 23 was the provision which ought to apply in the present case, not paragraph 26. This was consistent with the scheme of the Rules, as well as the terms in which the particular provisions were cast. Counsel took the court through the Rules, including key definitions within Rule 2, Rule 4, which provided general principles underpinning the Rules, and Rule 11 which dealt with the determination of advocate's fees.

[18] In relation to Schedule 1 to the Rules references were made to paragraphs 1, 4 and 6, as well as 23 and 26.

[19] Without setting out every submission in detail, in summary, the appellant submitted that:

- Here, there were multiple counts on one indictment which met the definition of "a case".

- The case resulted in a trial that ended with a jury being "hung" on some of the counts prosecuted.

- There were outstanding counts on an extant indictment so the case was not disposed of.

- There were three options for disposal of counts on an indictment given that the prosecution is not empowered to withdraw an indictment: (i) by *nolle*

prosequi…(ii) by the counts being left on the books…(iii) by a jury being sworn and returning a verdict …

- A basic trial fee had already been paid for the case. Rule 26 is only engaged in circumstances where there had been no trial but resort is had to the legal fiction that a substantive trial has occurred where the prosecution has offered no evidence and the case was discontinued.

The Respondent's Case

[20] Mr Nick Jones BL appeared for the respondent.

[21] In his submission paragraph 26 was the provision which was appropriate to this case and the court should apply it. This had been the conclusion of the two Masters who had dealt with the case and the court should follow their reasoning.

[22] Counsel argued that it would not be correct that what had occurred in this case on 9 April 2018 was a "new trial" and it could not be said that, as required by Rule 23, an order had been made for a new trial. Such an order, it was pointed out, could only be made by the PPS.

[23] In particular, emphasis was placed on what those concerned at the time thought. As Mr Jones' skeleton argument records:

- It was not envisaged by anyone involved in the proceedings on 9 April 2018 that this case would proceed as a trial.

- In fact, it had been confirmed by the PPS (on 23 March 2018) that it would not be continuing with the case.

- Consequently, no case was listed for a trial to take place and no trial took place or begun.

[24] Further, Mr Jones submitted that the case fell squarely within paragraph 26. The prosecution offered no evidence and the case was discontinued. Hence it had to be treated as a situation where it was mandatory to make a BTF payable.

The Court's Assessment

[25] In the court's opinion, this case is covered by paragraph 23 of Schedule 1 and is not covered by paragraph 26 of the same Schedule.

[26] In order to meet the requirements of paragraph 23 there are two central pre-conditions which must be fulfilled. These are:

(a) That the trial was ended by direction of the judge or it ended with the jury being unable to agree a verdict.

(b) That there was an order made for a new trial.

[27] As regards (a), there is no dispute between the parties that the trial in this case ended with the jury being unable to agree a verdict. That is precisely what occurred on 15 March 2018.

[28] As regards (b), it seems to the court that, while the decision whether or not to proceed to any form of new trial is one for the PPS, the Crown Court will, if a new trial is to materialise, have to make an order for the holding of it. In this case that is what the judge did on the occasion of the review which took place on 23 March 2018. Such an order does not have to be in writing and the setting of a date for a new trial appears to the court to be implicit in what occurred on that day.

[29] Thereafter, what occurred in this case comfortably fits within the terms of paragraph 23(2), as the events of 9 April 2018 – the accused appearing, the accused pleading not guilty, the jury being sworn, the PPS offering no evidence, and the judge directing the jury to find the accused not guilty and the finding of the jury aforesaid – constitute, in the court's opinion, a new trial which resulted in a jury verdict of not guilty. All of this – it is not disputed – occurred within 15 working days of the end of the original trial. It follows, therefore, that the correct analysis is that the case is to be considered as having comprised one trial for the purposes of determining the fees payable under the Rules.

[30] The objection made by the respondent to the proposition that what occurred on 9 April 2018 was a new trial was not, in the court's judgment, sustainable as undoubtedly what took place on that day was the determination of the charges in question by a verdict of "not guilty" by a Crown Court judge and jury. Such an outcome uniquely can be provided by the Crown Court and is the result of "a trial", albeit that in this case the choreography of what was going to occur was agreed in advance.

[31] In the court's opinion, paragraph 23 is a tailor made provision for this very type of situation.

[32] It follows from the above that the court does not view paragraph 26 as the provision which applies to this case as paragraph 23 is the *lex specialis* for this situation.

[33] The court, however, would go further than simply saying that the point made in the last paragraph is the sole reason for it rejecting the argument that paragraph 26 applies to this case.

[34] Paragraph 26's terms, in the court's opinion, are not met in this case when subjected to analysis.

[35] For paragraph 26 to apply there are two pre-conditions which must be fulfilled:

(a) The case must be one in which the prosecution has offered no evidence.

(b) The case must be one which was discontinued.

[36] When these tests are applied to the events of 9 April 2018 it seems to the court that while (a) can be said to have occurred by virtue of events that day (b) did not occur. It is the court's view, that it is unrealistic and incorrect to claim (as the respondent does) that a jury verdict of "not guilty" can be viewed as a form of discontinuance. On a proper analysis, a not guilty verdict is a final disposal of the case based as it is on the pronouncement of that position by the jury.

[37] The court is conscious that in making the assessment it has it is rejecting the decisions made heretofore in this case by not just one but two Masters. The first Master's reasoning appears to be that:

(a) There was no order for a new trial made by the court.

(b) What was to occur on 9 April 2018 was purely to allow a jury to be sworn to return verdicts of not guilty by direction on counts that the prosecution were offering no evidence on and it never was, she thought, the judge's intention that the matter would proceed to a trial on that date.

(c) The notion that there was a "form of trial" which occurred on 9 April 2018 was wrong.

(d) The case fell within paragraph 26 so that a BTF should be paid.

[38] Respectfully, the court for the reasons already advanced, is unable to view this reasoning as correct. What the Master appears to have done is to neglect the legal significance of the Crown Court (composed of judge and jury) finally disposing of the charges at issue by a verdict of not guilty. To focus unduly on the arrangement made by the parties beforehand misses the significance of the main event itself. The Master, moreover, makes no comment on the specific phraseology of paragraph 26 and, in particular, the use of the word "discontinued".

[39] Unfortunately, the second Master also seems to have put emphasis on what he viewed as the purpose of the listing on 9 April 2018. He did not view this as being the holding of a trial. As he put, at paragraph 15, "it appears that the purpose of the hearing on 9 April 2014 (*sic*) was for the Crown to offer no evidence and for the jury to be directed to return a formal acquittal. It was not intended that a trial

take place." He, therefore, saw the case as falling within paragraph 26, though he made no comment about the meaning of the word "discontinued".

[40] The court has the misfortune to disagree with the reasoning of the Masters for the reasons it has provided. While the purpose of the steps taken, as found by the second Master was unexceptional, it does not follow from that that there was no trial as a legal means of achieving a not guilty verdict.

Conclusion

[41] The court, finally, wishes to indicate that it doubts that the outcome it has arrived at abrades with the statutory scheme. At a policy level the thinking of the rule maker is captured within Rule 23 which is plainly there to provide a way of dealing with such cases without a full BTF becoming payable. The mechanism used in Rule 23 is to treat the new trial as falling within the ambit of the original trial for the purpose of fee calculation where the new trial occurs within 15 working days of the end of the earlier trial (see 23(3)). In such circumstances only a further refresher fee and matters like travel costs would be payable but not a BTF. However, if the distance in time between the end of the earlier trial and the beginning of the new trial increases beyond 15 days a percentage of what would otherwise be payable if the new trial was separate from the first trial would be deducted: 40% of the new trial fee is payable if it starts within two calendar months of the conclusion of the first trial and 25% of the same fee if the new trial starts outside two calendar months of the first trial. The payment, therefore, appears to be linked to the extent of the additional work which may be required on the part of the legal representative as time goes on.

[42] In all the circumstances of this case the court allows the appellant's appeal.