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No: 2011/5884/C5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 15 February 2012

B e f o r e:

THE VICE PRESIDENT
LORD JUSTICE HUGHES
MR JUSTICE FIELD

MR JUSTICE BEATSON

- -

R E G I N A
v

SVS SOLICITORS

- -

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Mr P Upward QC appeared on behalf of the **Appellant**

Mr T Little appeared on behalf of the **Crown**

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J U D G M E N T

1. MR JUSTICE FIELD: This is an appeal against an order made by His Honour Judge Pawlak on 29th July 2011 at Wood Green Crown Court that the appellant firm of solicitors should pay £3,042.50p in respect of wasted costs incurred by the CPS in flying a witness from Australia to give evidence in the case of R v Nseki. The power to make wasted costs orders in criminal proceedings derives from section 19A of the Prosecution of Offences Act 1985, which provides in relevant part, 19A(1):

> "In any criminal proceedings-
>
> ...
>
> (b) the Crown Court
>
> ...
>
> May disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with regulations.
>
> (3)In this section—
>
> ...
>
> 'wasted costs' means any costs incurred by a party—
>
> (a)as a result of any improper, unreasonable, or negligent act or omission on the part of any representative or any employee of a representative; or
>
> (b)which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."

Wasted costs orders against legal representatives is one of the matters dealt with in the Practice Direction (Costs in Criminal Proceedings) issued by the Lord Chief Justice on 30th July 2010 - see paragraphs 4.2.1 to 4.2.8. Incorporated into the Practice Direction is the guidance given by this court in Re: a Barrister (Wasted Costs Order) (No 1 of 1991) [1993] QB 293 and in Re: P (a Barrister) [2001] EWCA Crim. 1728, [2002] 1 Cr.App.R 2007. The paragraphs of relevance in this appeal are:

> "4.2.4(iv) A three stage test or approach is recommended when a wasted costs order is contemplated: (a) Has there been an improper, unreasonable or negligent act or omission? (b) As a result have any costs been incurred by a party? (c) If the answers to (a) and (b) are 'yes', should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved?"
>
> 4.2.5(i):

> "The primary object is not to punish but to compensate, albeit as the order is sought against a non party, it can from that perspective be regarded as penal."

4.2.5(iv):

> "Because of the penal element a mere mistake is not sufficient to justify an order: there must be a more serious error."

4.2.5(vi):

> "The normal civil standard of proof applies but if the allegation is one of serious misconduct or crime clear evidence will be required to meet that standard."

2. The definition of "wasted costs" in section 19A is identical to the definition of "wasted costs" in section 51(7) of the Senior Courts Act 1981. The meaning of the terms "improper", "unreasonable" and "negligent" was considered by Sir Thomas Bingham, MR, in Ridehalgh v Horsefield [1994] Ch. 205, at pages 232D to 233D:

> "'Improper' means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which could be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> 'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
>
> The term 'negligent' was the most controversial of the three. ... we are clear that 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.
>
> In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion

that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence-

'advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well informed and competent would have given or done or admitted to do ... [an error of judgment] such as no reasonably well informed and competent member of that profession could have made.'"

It is also convenient at this point to set out the relevant provisions of Part 34.3 of the Criminal Procedure Rules as they applied in March/April 2011

"CPR 34.3 (1) This rule applies where a party objects to the introduction of hearsay evidence.

(2) That party must—

(a) apply to the court to determine the objection;

(b) serve the application on—

(i)the court officer, and

(ii)each other party;

(c) serve the application as soon as reasonably practicable, and in any event not more than 14 days after—

(i) service of notice to introduce the evidence under rule 34.2

(ii)service of the evidence to which that party objects, if no notice is required by that rule, or

(iii)the defendant pleads not guilty

Whichever of those events happens last; and

(d) in the application, explain—

(i) which, if any, facts set out in a notice under rule 34.2 that party disputes

(ii)why the evidence is not admissible

(iii)any other objection to the application."

3. We turn to the factual background that led to the making of His Honour Judge Pawlak's order.

4. The appellant firm represented the defendant Luke Nseki on a single count indictment alleging aggravated burglary. The prosecution case was that on 10th November 2010, Nseki was one of three men who took part in a burglary at 92 Hartford Road, London. The occupants of the house were a lady named Mrs Bates, her two sons (both over 20 years old) and a lodger, Samuel Amoako. At 2.00am on 10th November 2010 the occupants of the house heard the sound of breaking glass and young males shouting "police, police". Three men then ran up the stairs past Mr Amoako's room. They were wearing balaclavas. When they got to the first floor they made the three members of the Bates family lie on the ground, tied their wrists behind their backs and threatened them. The men seemed to be under the belief that there was a safe and drugs in the house. One of Mrs Bates' sons was assaulted, punched and possibly hit with a garden fork. He was told that if he did not say where the safe was he would have his fingers cut off. There was also a suggestion that one of the men had a gun.

5. During the burglary, one of the men was called on his mobile phone and it transpired that the men had burgled the wrong house. The men then proceeded to look for other items to steal. Meanwhile, Mr Amoako escaped through the window of his room and called the police. When two police officers arrived he took them to the house. At this point the burglars were still in the house but when they realised that the police were on the scene they escaped through the back door and ran in different directions. Nseki was heard crossing garden fences and a police officer followed the noise along the street and saw Nseki emerging from a side passage. Nseki tried to run away, but he was caught and detained. The police later found a balaclava not far from where Nseki was first seen. The balaclava was analysed and found to have DNA from at least three people on it, including Nseki. Fragments of two types of glass matching the window smashed by the intruders were also found on Nseki's clothing. Nseki was interviewed on 10th November 2010 but made no comment.

6. The matter first came before the court on 17th November 2010 when it was listed for a plea and case management hearing on 12th January 2011. On that date defence counsel, Mr Brian St. Louis, told the court that there would be an application to dismiss as there was no identification or forensic evidence connecting Nseki to the premises. The matter was then listed on 26th January 2011 when defence counsel advised the court (His Honour Judge Morrison) that the application to dismiss would be withdrawn as the prosecution had served the forensic evidence we have referred to. His Honour Judge Morrison enquired about the defence case and asked how an effective plea and case management hearing could be conducted without a defence case statement. The hearing was adjourned to 1st February 2011 for a further plea and case management hearing. The plea and case management hearing form from this date is not available, but the court record indicates that the case was to be listed for trial in the week commencing 18th April 2011.

7. On 28th February 2011 before His Honour Judge Pawlak, the prosecution applied to take the case out of the list as a police witness was unavailable. The learned judge refused the application as he could not see why the officer was required to attend. Defence counsel, not Mr St. Louis, was asked why the witness was required and was unable to give any reason. The learned judge drew attention to the continued absence

of a defence case statement and the fact that there was still no indication of what the defence case was.

8. On 10th March 2011 prosecution counsel told His Honour Judge Lyons that there was a witness in Australia, Mr Amoako, and that a decision was to be made whether to bring him back for the trial, but the prosecution were not making an application to vacate the trial. His Honour Judge Lyons could not understand why the case had been brought back before the court simply for counsel to give that information, and he ordered the Crown to pay costs of £100 plus VAT.

9. On 23rd March 2011, the prosecution served a hearsay notice on the defence in relation to the evidence of Mr Amoako who was in Australia. On 28th March 2011 there was a trial readiness hearing before Her Honour Judge May. Nseki was present at this hearing. The prosecution told the judge that there was a hearsay application and explained that Mr Amoako was in Australia. The prosecution and the defence advised the court that they were ready for trial. No defence case statement had yet been served. Her Honour Judge May directed that the hearsay application should be dealt with on the morning of the trial. Her note reads:

> "Still no defence statement, no comment interview; so, when Mr St. Louis tells me that both of the above - that is the witness Mr Amoako and PC Rongly(S) are 'essential' to the defence case', I cannot evaluate this."

10. On 6th April 2011 the time under CPR34.3(2)(c) for service of a cross-application in objection to the prosecution's hearsay notice expired. No such application was ever served.

11. The trial commenced at the Crown Court at Wood Green before His Honour Judge Pawlak on 26th April 2011. At the start of the trial the judge asked Mr St. Louis what the defence was and was told that a defence case statement had just been drafted. An unsigned defence case statement was then served on the court and the prosecution, although the appellant was apparently in possession of a copy signed by Nseki. In this defence case statement Nseki denied entering 92 Hartford Road as a trespasser and stated that he had no intention to steal and did not participate in the burglary. He asserted that he had travelled to the property on a borrowed scooter and had worn a face mask under his helmet. He had been invited into the property by Mr Amoako as the two men were in a homosexual relationship. Mr Amoako had not told his friends and relatives that he was homosexual and so the appellant had entered his room surreptitiously. Whilst Nseki was with Mr Amoako, they heard a loud smashing noise from the back of the property and the word "police". Mr Amoako told Nseki to leave because he would have to fetch help. Nseki left the house through the broken patio door in the kitchen and went to retrieve his scooter. He then heard a shout directed at him and so he ran and was arrested.

12. The defence case statement required Mrs Bates' two sons, Mr Amoako and two police officers to give evidence. Mr St. Louis then sought an adjournment to trace two witnesses to confirm that Nseki was homosexual and that he used a scooter and to have Nseki's mobile telephone interrogated. Mr St. Louis also indicated that there were

other matters on which he needed to take instructions and he was not yet in a position to cross-examine any witnesses. Later, the morning having been occupied by Mr St. Louis taking instructions, Mr St. Louis told the court that he was professionally embarrassed and sought an adjournment. The learned judge refused the application and Mr St. Louis then withdrew from the case.

13. The trial resumed the following day, Mr Nseki having secured the services of fresh defence counsel in the interim. The appellant firm was replaced by new solicitors. A second defence case statement was then provided to the court in which Nseki denied the burglary and denied entering the building and stated that he was selling cannabis near to the house when a man ran up to him and put his hand on him. The man asked Nseki if he had credit on his mobile telephone or money to call a taxi. The man then tried to snatch his mobile telephone and there was a struggle between them. Nseki escaped by pushing the man away and the man ran off. Nseki then saw a policeman. He became anxious as he had three bags of cannabis in his possession and so he tried to run away. He discarded the cannabis before he was arrested. The defence case statement said that it reflected Nseki's instructions and the previous statement that was served on the court was not signed by him and did not have his authorisation. Defence counsel told the court that Mr Amoako's statement could be read, but as Mr Amoako was at court he went ahead and gave oral evidence which was not challenged.

14. On 25th May 2011 Nseki was convicted by a majority of ten to two of burglary and on 10th August 2011 he was sentenced to 10 years' imprisonment.

15. The Crown Court then wrote by letter dated 1st June 2011 under the direction of His Honour Judge Pawlak to the appellant firm inviting written representations as to why they should not be ordered to pay the wasted costs of Mr Amoako's attendance since they had opposed the hearsay notice and required Mr Amoako to attend at a time when nothing was known of what the defence might be.

16. In their reply dated 2nd June 2011 the appellant firm stated that it was not appropriate for a wasted costs order to be made against it. They had instructions consistent with the unsigned defence case statement and were accordingly obliged to challenge the evidence of Mr Amoako and put the defence case to him. They were also instructed by Nseki that he did not wish to serve a defence case statement at that stage, notwithstanding advice to the contrary.

17. His Honour Judge Pawlak heard oral submissions on 25th July 2011 when the appellant was represented by Mr Upward QC, who represents the firm today on this appeal. The judge gave detailed written reasons for the order he made against the appellant. He began by setting out at length the procedural history. In doing so he stated on the basis of a date specified in Mr Upward's skeleton argument that Mr St. Louis was provided with a proof of evidence on 21st March and instructed to draft the defence case statement. It seems that this was a typographical error on the part of Mr Upward, but this error does not undermine the judge's decision since it is plain that the appellant was in receipt of Nseki's instructions consistent with the first unsigned defence statement by 28th March when the court was told by the defence that it was "essential" that Mr Amoako give live evidence.

18. In his judgment the judge went on to cite the passage in the judgment of Sir Thomas Bingham, MR, in Ridehalgh on the meaning of "improper", "unreasonable" and "negligent", to which we have already referred. He also referred to part 3.5(6)(b) of the Criminal Procedure Rules that provides that if a party fails to comply with a rule or direction the court may exercise its powers to make a costs order. The judge observed that most defendants have no assets and certainly the defendant in this case had none. The judge then said:

> "Plainly, solicitors act on their client's instructions, but they also owe a duty to the court, a duty which is identified by the overriding obligation. A solicitor is not entitled to break the rules with impugnity. In the context of a Defence Statement it seems to me that, although a solicitor is required to advise his client that he should comply with a requirement to serve a Defence Statement, if the client, having been given proper advice by the solicitor, still refuses to permit the solicitor to serve the Defence Statement or any Defence Statement, then the solicitors themselves commit no breach of the rules which could be punished by way of a Wasted Costs Order. There is a sanction for the failure to serve a Defence Statement and, in effect, to ambush the prosecution in the form of the inference direction, always assuming that a jury will understand the meaning of that direction, limited as it is by the various qualifications which the judge summing-up to a jury is required to introduce.
>
> Different considerations apply relating to an application opposing the introduction of hearsay evidence. In my judgment, a solicitor must tell a client that he has to comply with that rule even if that will mean revealing the nature of the defence case, or at any rate, in relation to that particular witness. If his client tells him that he will not allow the solicitor to comply with the rules, it seems to me that the solicitor must tell the client that they will have to part company, unless the client enables him to comply with the rules. The solicitor owes a duty to the court and is subject to the overriding obligation. In such circumstances all the court need be told is that the client is not permitting the solicitor to comply with the rules. No breach of professional privilege is involved in the process whereby the solicitor would then be permitted by the court to come off the record. So if a solicitor fails to comply with his obligations to give reasons as to why a Hearsay Notice is opposed, one is entitled to assume, where the solicitor continues to act, that it is the failure of the solicitors in providing any reason. In requiring the witness to attend, the solicitor was acting on his client's instructions and implementing them, but, he was not entitled to break the rules in order to do so."

19. The judge went on to conclude that the appellant's breach of part 34.3(2) of the CPR had been a deliberate breach which incidentally kept the defendant's options open and that this was "improper" conduct, and on the basis that that conduct did not admit of a reasonable explanation, it was unreasonable. It was also negligent. In withholding their grounds on which the application opposing the Crown's hearsay notice was being made, the appellant had failed to act with the competence reasonably to be expected by

ordinary members of the profession. Ordinary members of the profession are expected to know the rules and to comply with them. Further professional legal privilege was not relevant to the choice they made to object to the hearsay notice without disclosing the defendant's defence, at least so far as concerned the evidence of Mr Amoako.

20. The judge also held that the breach of the rule was causative of the wasted cost of flying Mr Amoako to London and putting him up in a hotel. In his judgment, if Nseki had disclosed by 6th April 2011 that it was desired to put to Mr Amoako his incredible defence that he had been invited by Mr Amoako into the house to engage in homosexual activity, Nseki might well have changed his instructions; and if the appellant firm had advised Nseki that they had to disclose his incredible defence, this might have resulted in the client himself changing his instructions without there being any professional embarrassment and with the consequence that Mr Amoako's statement could have been read.

21. In challenging His Honour Judge Pawlak's order, Mr Upward's first submission was that the judge allowed an understandable irritation as to how matters had gone to lead him to a conclusion that was unfair and unreasonable. We have no hesitation in rejecting this submission. The judge made his decision on the facts that were established prior to and at the oral hearing, and his reasoning and conclusion is not tainted with any illegitimate predisposition to punish the appellant for the way the case had gone after the hearing on 28th March 2011. Mr Upward's next submission was that the judge's finding on the issue of causation was flawed and unsustainable. He contended that the real cause of the wasted costs was Nseki's change of instructions on the second day of the trial, which was an occurrence that the appellant firm could not reasonably have foreseen. The cause of the loss was not the appellant's breach of CPR34.3(2). Accordingly, there was no proper basis for the judge's finding that the breach had caused the wasted expenditure.

22. The causation issue was an issue of fact to be decided by the judge on the evidence before him, applying the civil standard of the balance of probabilities. In our view the judge was plainly entitled to take into account what had actually happened on 26th and 27th April 2011, with the defendant first putting forward a fanciful defence based on an alleged homosexual relationship with Mr Amoako and then the next day putting forward the entirely different defence that he was not involved in the burglary but just happened to be close to the scene with some cannabis in his pocket when the police arrived. We are also of the opinion that the fact that the appellant firm may not actually have foreseen the consequences of their failure to serve a compliant cross-application or come off-the-record is nothing to the point. The judge set out his reasons for his conclusion on the causation issue. In our judgment his finding was a finding of fact that was open to him for the reasons he gave.

23. Mr Upward next submitted that even if there had been a breach of CPR 34.3(2) and that breach was causative of the wasted costs, the judge was wrong to find that this breach involved improper or unreasonable or negligent conduct and was wrong to penalise the firm by making the order he made. In Mr Upward's submission the appellant firm was a perfectly respectable firm that had acted in a way that they were entitled to think was proper. The client had given the firm instructions, but these not were not sufficiently

firm, despite their efforts, for a defence statement to be served until the first day of trial on 26th April. The appellant had had to balance its duty to the court with its duty to the client and was guilty only of an error of judgment. It was not reasonable to require the firm to withdraw unless they were instructed to disclose the client's defence to the extent necessary to justify a challenge to the hearsay notice. If there were such requirement, cases in the Crown Court would grind to a halt instead of coming on for trial.

24. We decline to accept this submission. No application setting out the grounds of objection to the admission of Mr Amoako's statement was served within the stipulated time or at all. This in our judgment, as the judge found, was a clear breach of CPR 34.3(2)(d). The judge was entitled to conclude that a cross-application setting out that part of Nseki's case that he had to put to Mr Amoako should have been served or, if the client refused to sanction this step, the appellant firm should have ceased to act for him. The appellant's failure to take either of these steps was not a mere error of judgment. The defendant Nseki was manifestly seeking to manipulate the court's process. By insisting on the appearance of Mr Amoako without disclosing the defence case that was to be put to the witness, the appellant firm made itself complicit in the manipulation being practised by their client. The judge was entitled to hold that the failure to comply with the rule was deliberate and that it was a serious breach. He was also entitled to find that the appellant's conduct was improper, unreasonable and negligent, for the reasons he gave.

25. For these reasons we are unpersuaded that the wasted costs order made against the appellant firm should be set aside. We dismiss this appeal.