

ENGLAND AND WALES / JUDGMENT

R v Andrew Dempsey

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IN THE HIGH COURT OF JUSTICE SENIOR COURTS COSTS OFFICE Neutral Citation No. [2025] EWHC 1158 (SCCO) Case No: 47CC2581221 SCCO Reference: SC-2024-CRI-000137 Thomas More Building Royal Courts of Justice London, WC2A 2LL Date: 13 May 2025 Before: COSTS JUDGE ROWLEY R v ANDREW DEMPSEY Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013 Appellant: Mackrell Marsh & Co Solicitors The appeal has been dismissed for the reasons set out below. COSTS JUDGE ROWLEY COSTS JUDGE ROWLEY Approved Judgment Costs Judge Rowley: R v Dempsey 1. 2. 3. 4. 5. 6. This is an appeal by Mackrell Marsh & Co solicitors against the decision of the determining officer to allow 109 pages of prosecution evidence (“PPE”), rather than 6,450 pages as contended for by the solicitors, in determining the appropriate graduated fee in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013, as amended. The solicitors were instructed on behalf of Andrew Dempsey who was charged with five counts of exposure which took place between 30 June 2021 and 1 August 2021. According to the solicitors’ description of the case, Mr Dempsey matched the description given by the two victims of the exposure and he was positively identified by one of them. He lived near to the park where the offences were said to have taken place. However he denied the offences saying it was not him and he was at home during this period given the pandemic. He pleaded not guilty and a trial took place. The description of the outcome by the solicitors is that on the third day the prosecution offered no evidence. Mr Dempsey’s telephone was seized by a PC Elliott and was downloaded and analysed. The solicitors have asked for this appeal to be dealt with in their absence and therefore the description of the delivery of this evidence to the defendant’s team lacks a little clarity. The appeal notice says that “the police served the client’s telephone via our expert, as unused newest material, who provided a download and report looking at location data.” I take from that sentence that the evidence was not relied upon by the prosecution at the time it was sent to the defendant’s expert and that the defendant’s expert produced the report. The appeal notice goes on to say that the officer in the case provided a statement which referred to the defendant’s phone “and in particular taken [sic] information from the download and set out locations from the Places (locations) section of the download across different dates within the offences date bracket.” The solicitors say that the officer in charge made another statement on the same day again referring to the defendant’s phone download: “...and comparing information on that to the allegations and the defence statement. The OIC then refers to numerous photos from the NAE/161121/1405 download, as well as messages sent by people attaching the photos, and asserts their opinion that this information undermines the defence raised in the defence statement and we say is therefore pivotal evidence in the prosecution case. The OIC then exhibits AG/060824/1012 which is a 28 pages extract from

the telephone download which shows photos and location data and importantly supported the OIC's statement which attacked the defence. Therefore pivotal evidence which was relied on heavily by the Crown. COSTS JUDGE ROWLEY Approved Judgment R v Dempsey Given the clear importance of the telephone download to the Crown's case, we were under a duty obtain to check the accuracy and veracity of the information set out in the OIC statement and also the exhibit (extracted from the telephone download) and consider all the surrounding evidence to the evidence, given our client disputed the allegation." 7. 8. 9. 10. 11. 12. 13. The solicitors say that the analysis of the raw data led them to find messages in support of the defence and undermined the officer in charge's statement and that is what led to the Crown offering no evidence three days into the trial. I have set out the description of what occurred from the solicitors own application notice because the case law makes it clear that each case is fact specific in terms of the question of PPE that needs to be considered. In his written reasons, the determining officer has revealed the fact that the advocate for Mr Dempsey considered the relevant material to have been disclosed as unused evidence and consequently claimed time for 10 hours' work in considering that material. The determining officer very sensibly suggested that the litigator and advocate should seek to agree the status of the material given the different claims but, according to the determining officer, the litigator i.e. the solicitors in this appeal refused to do so. The determining officer then stated that as the advocate had already claimed and been allowed the same evidence as unused material, it could not be allowed even as informal service in respect of the litigator. I have to say that I do not understand this reasoning. It does not occur very often but we do get appeals where recoupment has taken place by the Legal Aid Agency in circumstances where the advocate or litigator has been overpaid in the LAA's opinion. On some occasions that results from a subsequent assessment of a different claim for a different advocate or litigator. There has never been any suggestion that because one advocate or litigator's claim has been paid on a particular basis, there was then no ability for the determining officer to reconsider that fee or that it was in any way binding on any subsequent claim for fees. Whilst it is obviously desirable for all the fees to be calculated on the same factual basis, I am afraid I do not understand the determining officer's approach in this case. However, that does not mean the solicitors are successful in their appeal. They are right to say that documents which were originally provided as unused material – which appears to be the case here – can be treated as served material if it is sufficiently pivotal to the case. That is the guidance given by Holroyde J (as he then was) in the Lord Chancellor v SVS solicitors [2017] EWHC 1045 (QB). The solicitors rely on an extract from the Crown Court Fee Guidance from 2016 (version 1.5) although why that edition has been used is not explained. The most recent version (version 1.20) has considerably more guidance in it regarding PPE. The paragraph relied upon by the solicitors is no longer present in the guidance. But, in my view, even the old terminology does not assist the solicitors. COSTS JUDGE ROWLEY Approved Judgment R v Dempsey 14. 15. 16. 17. 18. 19. Reliance is placed upon an example of documentary or pictorial exhibits that will ordinarily be counted as PPE such as "raw phone data where a detailed schedule is created by the prosecution which is served and relied on and is relevant to the defendant's case." It can be seen from the description of the facts of the case that I have quoted from the solicitors' appeal notice that the defendant say the description of raw phone data as an example of PPE is clearly made out. The difficulty however is that in order for it to be

pivotal to the case, it has to be pivotal to the prosecution's case and not simply the defendant's. It is clear that the officer in charge's witness statement which extracted some of the information from the telephone download, was made in response to the defence statement. It did not relate to the prosecution's own case but came about as an attempt to challenge the defendant's case. It is clear from previous case law that this is insufficient to be pivotal to the case overall in the manner required in this situation. In my view, these circumstances do not get the solicitors over the hurdle of demonstrating that evidence originally served as unused material was sufficiently important for it to become served so that it can amount to PPE in the first place. But even if that were so, there is a further hurdle for electronic PPE to be regarded as sufficiently important for it to be considered as PPE rather than as something which ought to be remunerated in a different fashion. The tests are in fact quite similar and therefore if one hurdle is surmounted, the other is likely to be overcome as well. But it does not seem to me in either case the solicitors can demonstrate that the evidence was ever going to be relied upon in respect of the prosecution itself as opposed to combating the defendant's case. It might be a fine line to draw as to whether or not seeking to undermine the defendant's case is in fact merely one front in the battle to pursue a successful prosecution, but that is a line that has been drawn previously and in my view for good reason. PPE relates to prosecution evidence served by the Crown as being sufficient to convict the defendant. It does not relate to a response to the defendant's case. Therefore, whilst I do not consider the determining officer's reason for calculating the PPE without the electronic evidence contended for by the solicitors can be upheld, the outcome remains the same in that the determining officer's calculation of the fee to date is the one which I upheld and accordingly this appeal fails.

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