Case No: T20137653

IN THE CROWN COURT IN NOTTINGHAM

The Law Courts, 60 Canal Street
Nottingham NG1 7EL

Date: 21/01/2015

Before:

MR JUSTICE HADDON-CAVE

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R
- and -
(1) MICHAEL FURNISS

(2) STUART HALL

(3) JAMES STACEY

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David Herbert QC & Daniel Bishop (instructed by **the CPS**) for the **Crown**
Icah Peart QC & Paramjit Ahluwalia (instructed by **Imran Khan and Partners**) for **Michael Furniss**
Martin Heslop QC & Adrian Langdale (instructed by **The Johnson Partnership of Nottingham**) for **Stuart Hall**
Shaun Smith QC & Steven Gosnell (instructed by **VHS Fletchers of Nottingham**) for **James Stacey**

Hearing dates: 13 October 2014 – 10 November 2014

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APPROVED RULING

Approved Ruling by the court
for handing down

MR JUSTICE HADDON-CAVE:

Introduction

1. This case illustrates the importance of 'cell site', telephone and text evidence in modern prosecution of crime. It is also a paradigm example of why cell site, telephone and text evidence served by the Prosecution in digital form should be included as 'Pages of Prosecution Evidence' ("PPE") for Graduated Fee Scheme purposes.

2. Cell site, telephone and text evidence is now routinely served by the Prosecution on the Defence in major criminal trials. In the past, such material used to be served in paper form. It is now, for obvious reasons of technical convenience and cost, invariably served electronically in digital form. This is part of the inexorable, and sensible, shift towards electronic service of documents in criminal cases.

3. The fact of electronic service is not a proper reason for Prosecution refusing to include such material in the PPE and to make payment to Defence advocates accordingly. A refusal by prosecution to include such material in the PPE is a clear breach of the Legal Services Commission's own guidance (see below). Further, a failure to ensure that Defence advocates are remunerated for examining material relied upon at trial by the Prosecution may amount to a breach of Article 6 ECHR.

4. Remuneration should not be blind to the digital age.

Background

5. In the early evening of Monday 11th November 2013, Nottinghamshire police discovered the body of Andrew Dosiuk in the upstairs bedroom of the house in Arnold where he lived. He was 33 years old. It was clear that he had been shot dead in his bed at close range. There was no evidence of a struggle or resistance.

6. The Prosecution contend that this was a 'contract' killing linked to the drugs world and the three defendants were responsible for his murder. It was alleged that the First Defendant was the hired gunman, the Second Defendant was the arranger and middleman and the Third Defendant ordered the killing and was the paymaster.

7. At the trial, which has lasted over 8 weeks, the Prosecution relied principally on cell site, telephone and text evidence, together with some CCTV evidence. The cell site, telephone and text evidence comprised: (i) telephone and text evidence of contact between all three defendants, (ii) telephone and text evidence of contact between the Third Defendant and the deceased Andrew Dosiuk (from billing), (iii) cell site evidence showing the movement and position of the three defendants (from billing) and (d) text evidence showing the content of their contacts with each other (from text messages recovered from the phone downloads), including *e.g.* evidence of what is said to be an interest in and access to firearms on the part of the Third Defendant.

Cell site/ telephone/ text messages schedules

8. The backbone of the Prosecution case was a cell site/ telephone/ text message/ CCTV schedule ("the Schedule") of the classic sort which has increasingly becoming an indispensible tool in modern criminal trials and the bedrock of many prosecutions of serious crime. The Schedule in this case runs to 163 pages and contains 774 entries over a period from 17th August to 13th November 2014. It comprises a meticulous, chronological, second-by-second, colour-coded tabulation of cell site, telephone and text message contacts and CCTV and ANPR sightings relating to the three defendants and their vehicles as well as the victim.

9. The Prosecution relied upon the Schedule in order to seek to prove (a) the Defendants links to each other, (b) their involvement in drug-dealing and the hierarchy, (c) their connections to the victim, (d) the motive for the killing, (e) their movements relative to each other and relative to the scene of the shooting in the days and weeks leading to the shooting and (f) their precise movements and contacts on the day of murder itself.

Telephone material served by the Prosecution

10. The substratum of the Schedule, *i.e.* the evidence which underpins it, comprises voluminous cell site, telephone, text and other evidence which was served by the Prosecution upon the Defence electronically. The material is listed in the Schedule attached to the Order to this Ruling drawn up by Counsel. All of this electronic material has formed Crown 'exhibits' in the case. It was used by the Prosecution as the fulcrum of their case before the jury, both as the underlying basis for the evidence in the Schedule, but also in the form of selected material from the downloads. The major part of the Prosecution evidence has comprised telephone records (mainly of the defendants or those closely linked to them) and telephone downloads from the defendants. Such downloads comprise numerous text messages and details of contacts and attribution. The Schedule has been central to the Prosecution case. During the course of cross-examination of the Defendants, further such material was also (properly) introduced for the first time into evidence by Prosecuting Counsel and placed before the jury.

This material was not included in PPE

11. The Prosecution has not paginated the material underpinning the Schedule, nor included it as part of the Page Count of served material, *i.e.* the PPE. The Prosecution's Notice of Additional Evidence ("NAE") dated the 3rd November 2014 purported to cover the service of only 3,446 pages of PPE, comprising 2,679 pages of exhibits and 767 pages of statement. This additional material amounted to a further 24,407 of served pages of evidence. I understand that the additional material itemised in the schedule to the Order attached to this Ruling includes only the most relevant material served by the Prosecution on the Defence and does not include material not covered by the Graduated Fee Scheme (see below), such as the numerous video exhibits in this case. I also understand that the page count of 24,407 has been done on a conservative basis, *i.e.* on the PDF file pagination, which is more modest than the Word or Excel exhibits of the same material.

12. It is clear, in my judgment, that the material listed in the schedule to the Order was integral to the Prosecution case and required the Defence to review and examine it in detail for the purposes of properly preparing the Defence cases. The crucial nature of this material to the trial was not in any dispute.

Defence co-operation

13. Defence Counsel are concerned that they will not be remunerated, properly or at all, for the considerable work which they have clearly carried out in relation to this electronic material.

14. It would have been open to the Defence teams in this case to have refused to agree any schedules or charts or agreed facts, or indeed any sections of additional phone material used during the trial, until the Crown had properly served all material in accordance with the regulations, *i.e.* by printing them out and paginating them as part of the PPE. Defence lawyers in other cases have made such a stand and refused to accept such electronic un-paginated material unless and until included in the PPE. This stance can lead to considerable cost and delay in a trial.

15. In the present case, however, the Defence teams have not stood on their rights. They have, to their credit, at all material times co-operated with the Prosecution to ensure the smooth-running of this trial. They have chosen not to object to the Prosecution serving material electronically and to accept it *de bene esse*, no doubt in the belief that the Prosecution would reasonably accept in due course that such material should clearly part of the Prosecution Page calculation. Unfortunately, however, it appears that, so far, the Prosecution has refused to include this material in the PPE. The reasons for this refusal are not explained or pellucid.

Agreement sought as to Schedule

16. It should be emphasised that the Prosecution sought agreement from the Defence as to the accuracy of the Schedule. In order to satisfy themselves as to the accuracy of the Schedule and to be able to give their agreement, the Defence teams had to go through all of the records and downloads with care. I understand that the Defence teams pointed out a number of respects in which the Prosecution Schedule was wrong, inaccurate, or incomplete. In addition, on a number of occasions during cross-examination, the Defence introduced further telephone evidence from the pool of Prosecution telephone material in order to supplement aspects of the Prosecution Schedule or to put telephone calls or texts or silences in proper context. None of this would have been possible had not the Defence advocates spent a considerable amount of time, and effort, reading and studying this base material served and exhibited by the Crown as part of their case.

17. The Prosecution were, thus, able to produce and rely upon edited and selected parts of phone downloads during the course of the evidence and during cross-examination. This was only possible because of the agreement and co-operation of the Defence teams, who had worked hard to review, at short notice, the whole of the subject material (running to hundreds of pages at a time) and correct the proposed material in order to accurately reflect the actual evidence. Further, during the trial, Defence counsel were able to refer to and rely upon other various aspects of the served Prosecution cell site, telephone and text

material in order to rebut the Prosecution case and advance their own cases. This may have contributed to the eventual acquittal of the Second and Third Defendants.

Order sought and granted

18. All Defence counsel in this case sought an Order that the contents of the Prosecution's electronically served exhibits should be included as PPE and that the total page count should therefore be 27,853. I granted such an order in my Order dated 3rd December 2014. This Ruling contains the reasons for my Order.

Graduated Fee Scheme

19. When the Graduated Fee Scheme ("GFS") was introduced in 1997, payment for advocacy in the Crown Courts moved to a system of remuneration which was based on a set fee, traditionally referred to as a 'Brief Fee', which was dependant on the category of case and whether Counsel was a Q.C, led junior or leading junior. In addition, in the GFS there are two multipliers which are meant to ensure that the amount of work involved in preparing and presenting a particular case is, in very broad terms, reflected in the remuneration. These multiplying factors are: (i) the number of Crown witnesses served by the Crown, and (ii) the number of pages of Prosecution Evidence served by the Crown, (*i.e.* PPE) up to the maximum covered by the GFS of 10,000 pages.

20. The material covered by PPE are all matters of evidence in 'document format' (*i.e.* which could have been traditionally written/typed/printable evidence) which the Crown serve as part of their case in the form of the Committal Bundle: *viz.* statements and exhibits and NAE, normally including witness statements, interviews, photographs, charts *etc*.

'Unused material'

21. The Defence do not normally get remunerated for material which falls into the category of "unused material". This is despite the fact that it might run to many hundreds or thousands of pages and may require many hours to read and study it. "Unused Material" covers matters which the Crown do not rely on as part of their case or in support of their case, but which is served on the defence as "disclosable material" as it either supports the Defence case or undermines the Prosecution case, examples of this could be witness antecedent history, intelligence reports, custody records *etc*.

'Used' material

22. Matters which form part of the Crown's case but are not in "document form", *i.e.* written or printable form, are 'used' material but are not covered by the GFS. If they are to be the subject of remuneration, a separate claim has to be made for "Special Preparation", which will only cover work which is deemed to be 'over and above' the usual preparation undertaken for a case of a similar nature. It is a matter at the 'discretion' of the taxing officer as to whether the advocate will be remunerated for this work or not and if so the extent.

23. In the present case, there are many hundreds of hours of telephone calls and texts, together with Police Advisory Service ("PAS") evidence from Custody. All of this evidence has had to be viewed, or listened to, and studied by the advocates and submissions made in relation to them. The advocates face the uncertain prospect of having to persuade the taxing officer, in due course, that this is all work for which it is 'reasonable' for them to be remunerated. There is no guarantee, however, that a taxing officer (who has not had the benefit of sitting through the trial like the trial judge) will make any, or any sufficient, allowance for it. Experience suggests that the Legal Aid Agency ("LAA") will not usually agree to pay anywhere near the actual amount of time and work which was expended by the advocates in studying and marshalling this sort of evidence.

Digital working

24. Prosecuting authorities have, for quite understandable reasons of technical convenience and saving printing costs, taken to serving large tranches of material on disc which would have previously appeared in written/printed form by way of un-paginated electronic format. In the past, material such as telephone records, telephone downloads, even photographs, would have been printed off in paper format and would, therefore, automatically have formed part of the printed PPE material served by the Prosecution. Now such material is served electronically in digital format as explained above.

25. Prosecuting authorities have not always counted such telephone material as part of the PPE. This has lead to an increasing number of appeals to Costs Judges against decisions of the Prosecution and LAA. The Costs Judge's rulings have all been to the effect that such materials should be included in the PPE since the material would previously have been served on paper (see below). Regrettably, the rulings of Cost Judges do not seem to have always been heeded by the Crown Prosecution Service or LAA.

26. It should be noted that there have been a number of large and complex cases piloted recently where the *entire* case has been served electronically (including Indictment, statements, exhibits *etc*). These cases have not caused a problem or conflicted with the GFS, since the Prosecution have very properly counted all such pages served in electronic format as 'served' material included in the PPE and evidenced this with an appropriate NAE cover sheet. Indeed, as noted above, the direction of travel is now more and more towards electronic service. This is to be welcomed in the digital age.

The Law

Funding Order (2012 amendment)

27. Remuneration for the Defence is provided for under the Funding Order 2007 as amended. Following the first amendment of 2012 (SI 2012/750), material is now to be included in the Graduated Fee Page Count (PPE) if it would have existed originally in paper form but was served electronically. That was an amendment designed to herald digital working in the Criminal Justice System. Importantly, however, the amendment went on to state that:

> "(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court shall be determined in accordance with paragraphs (2A) to (2C).

(2A) The number of pages of prosecution evidence includes all—

(a) witness statements;
(b) documentary and pictorial exhibits;
(c) records of interviews with the assisted person; and
(d) records of interviews with other defendants, which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.

(2B) Subject to paragraph (2C), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(2C) A documentary or pictorial exhibit which—

(a) has been served by the prosecution in electronic form; and
(b) has never existed in paper form, is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

28. That amendment applied to all cases where the Representation Order was granted on or after 1st April 2012. This case is, therefore, caught by the amendment.

LSC Guidance (April 2012)

29. Guidance was issued on the amendment by the then Legal Services Commission ("LSC") in April 2012. It stated that, "if material that would *previously have been served in paper form* is served electronically instead, it should be included in the PPE". Further paragraphs stated:

"(5) In relation to documentary and pictorial exhibits, although it has not been possible to draft the wording of the Funding Order in such a way as to make this explicit, it is intended that where the prosecution serve a digital document, which has never existed in paper form, the appropriate officer will assess whether this would previously have been served in digital form or printed out.

(10) Therefore, the only difference between the old and new system is that whereas previously the relevant material would have been printed and served in paper form, now it will remain in digital form, but will be paid as PPE if the Determining Officer considers that it would previously have been printed. Any material that would not normally have been printed (whether specifically relied on or not) will not be paid as PPE but as special preparation."

30. I understand from Counsel that it is within the memory of all who have defended in this case that, ten years or so ago and before the advent of digital working, such telephone billing data and telephone downloads and material of this nature would invariably have been served in paper form, as material that the prosecution intended to rely upon.

31. It is clear from the LSC Guidance that the Statutory Instrument was not aimed at excluding this category of material from the PPE merely because it was increasingly served in a new digital form. On the contrary, the intention was that it would continue to form part of the PPE and be remunerated on that basis. In my judgment, the failure or refusal of the Prosecution in this case to include the telephone material as part of the PPE is a clear breach of the LSC Guidance.

Cases

32. The *plethora* of recent cost cases on this subject have all been to the same effect: cell site, telephone and text evidence served digitally form is to be included as part of the PPE because such material would previously have been served in a printed form.

Nutting [2013]

33. The case of *Nutting* [2013] 6 Costs LR 1037, involving a large-scale drugs conspiracy, is relevant to the present case. The Prosecution served telephone schedules and material on the Defence in digital form but refused to include it in the Graduated Fee page count form. The trial judge, HHJ De Bertodano, ruled that this approach was not acceptable and ordered the Crown Prosecution Service to effect proper service, which was done. Following the conclusion of the case, however, the LSC still refused to make payment in respect of the material. The Defence appealed. The Costs Judge took a clear and principled approach to the matter. He succinctly summarised the Defence objection to the manner of service of the material by the CPS as follows:

> "What lay behind [the defence] concern was the fact that unless the background telephone material was either served on paper or electronically attached to a NAE, the defence would not be paid for considering it. The potential to be remunerated by way of "special preparation" gave no guarantee of payment, whereas service of the material with an NAE and updated page count, did. For that reason, the defence teams were not prepared to agree the Schedule which the Crown had intended to present to the jury."

34. The Costs Judge ruled in favour of the Defence, and held that the LSC should not have limited the PPE to 1,235 pages but must pay the full claim of 13,658 pages because, following HHJ De Bertodano's order, the telephone evidence had been served electronically with an NAE dated 8th March 2012 fully paginated. Accordingly, the telephone material must be remunerated as PPE and the LSC was wrong to require the Defence to submit a claim for "special preparation". The Costs Judge summarised his reason for reaching this conclusion as follows:

> "Had the material which was served electronically in the present case instead been relied on by the Crown before the "digital age", it would have been printed out on paper. Here, following the judge's direction, the material in question was served under an NAE with each document sent electronically

> having been given a page number. … The judge ruled against the Crown on that point and having done so, in my judgment the LSC cannot now contend that the material in question should not count as pages and must be excluded from the page count."

35. The learned Costs Judge added the following pertinent observations at the end of his judgment which are worth quoting in full:

> "30. That in itself is sufficient to decide the appeal in the appellant's favour. However, I would add the following:
>
> (1) The amended NAE was signed off by the court as being "for graduated fee purposes", the updated page count. It is my view that that is the page count that the case worker should have accepted, as had been the case for counsel and other litigators.
>
> (2) The case worker's decision is contrary to the outcome which would have resulted had the determination arisen after the change made to the Funding Order and Guidance for representation orders made on or after 3 October 2011.
>
> (3) The reason why the defence teams would wish to be remunerated by way of PPE is plain. The agreed page count should (and ought to) provide certainty. Special preparation does not. This court frequently hears appeals in which the advocate or litigator contends that the LSC has failed to allow sufficient remuneration for work reasonably carried out, or has decided that the material in question does not fall within the criteria for PPE, for example because it has not been served on the court, so the legal representative receives nothing. For a recent appeal involving such a dispute, see ***R v Dunne*** [2013] 6 Costs LR 1031 (201/13) (Master Simons). That might have occurred here but for the judge deciding the contest against the LSC and directing that the material in question should count as pages.
>
> 31. It follows that even if the LSC would wish to process the claim on the basis of special preparation in order for the burden on public funds to be less, on the facts of this case, the Funding Order does not permit it to do so. The appeal therefore succeeds."

36. I respectfully agree with both the ruling of HHJ De Bertodano (which resonates with my own ruling in the present case) and the decision of the Costs Judge in *Nutting* and his observations. There is simply no proper basis upon which either the CPS or LAA can refuse to include telephone material served in digital form in the PPE, or caseworkers can refuse to make payment according to that PPE page count.

R v Renata Andrews (2013) and other cases

37. In *R v Andrews* (19th May 2013 Blackfriars Crown Court), HHJ Murphy stayed proceedings when the Prosecution initially refused to serve the telephone billing data as part of the PPE page count and made the following robust observations with which I respectfully agree (emphasis added):

> "What is disturbing about this is that I was told very candidly that the application by the Crown was being made primarily on financial grounds. If I am understanding that correctly, I think it means that there are financial implications in serving a large number of pages of evidence that then have to be reviewed by defence counsel. Of course, once so many pages are explicitly identified, that obviously does have financial implications - and so it should. Why the CPS should concern itself with considerations of that kind was not explained, although it certainly calls for some explanation. But whether this or any other financial considerations are involved, it is in my view quite wrong for such considerations to stand in the way of the Crown properly complying with its disclosure obligations."

38. In *Howden and Khan* (16th May 2014, reference 34/14 and 35/14), a case of conspiracy to defraud, the Defence claimed a PPE page count of 10,000 pages whereas the Legal Aid Agency contended for a page count of 2,852 pages. The difference was accounted for by telephone evidence that was served on disc and not on paper. The Legal Aid Agency caseworker refused to treat the telephone evidence as PPE on the basis that it had never existed in paper form. The Costs Judge ruled that this was not a correct analysis of the position: the correct test was whether, before the advent of digital working, the evidence would have been served on paper – to which the answer was 'yes'.

39. In *Nicholson* (SCCO 197/14), a drugs conspiracy case, the Crown served telephone, text and cell site data on disc and relied on schedules based on that raw data. The judge ruled that such material was part of the served case:

> "Where … the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count".

40. In a very recent ruling, *R v Douglas* (SCCO 130/14) handed down on 27th November 2014, a senior Costs Judge upheld similar arguments to those outlined above and held that telephone, text and cell site evidence served electronically was central to the Prosecution case and must be included in the page count.

POCA cases

41. The problems encountered in the current case appear also to extend to POCA cases. Documents exhibited to a financial statement pursuant to s.16 of the Proceeds of Crime Act 2002 ("POCA") are increasingly served on disc rather than in hard copy. The disc is, however, often not treated as part of the page count, but only selected hard copy extracts produced by the Prosecution are included in the PPE. This approach breaches the *LSC Guidelines* and is not correct. The entire disc is served by Prosecution under s.16. The entire disc is, therefore, deemed to be an exhibit in the case, duly served and relied upon by the Prosecution. Accordingly, the Defence are enjoined to examine the material as part of the body of financial documentation served by the prosecution in order to meet the issues raised by the prosecution for the purposes of any s.17 POCA response. The entire disc must, therefore, be included in the PPE.

Case Management Powers

42. The Court has the power and the duty to exercises its case management powers under the Criminal Procedure Rules. The CPR enshrines various overriding objectives under CPR R.1.1(1) and (2)(e), including ensuring cases are dealt with "justly" and "efficiently and expeditiously". Under R3.2 the Court has a duty to "further the overriding objective by actively managing the case". This includes under R3.2(c) "encouraging the participants to co-operate in the progression of the case". In my judgment, quite apart from the LSC Guidance and the substantive merits, the Court would have the power under its said CPR case management powers at any stage to order to the Prosecution to include the telephone material as part of the PPE to ensure the smooth-running of a trial.

Article 6 ECHR

43. Article 6 of the European Convention on Human Rights ("ECHR") provides as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and the facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

44. Article 6(3) sets out a number of minimum rights to which everyone charged with a criminal offence is entitled. This specifically includes the right under Article 6(3)(c), subject to means, to free legal assistance "when the interests of justice so require". The

considerations to be taken into account when determining whether the interests of justice so require include the seriousness and complexity of the case and the importance of what is at stake for the accused.

45. By virtue of section 6 of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a convention right. Section 8(1) of the Act further provides that:

> "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such Order, within its powers as it considers just and appropriate."

Brownlee [2013]

46. Inadequate remuneration within a legal aid scheme may breach a defendant's right to a fair trial under Article 6 ECHR.

47. In *Raymond Brownlee* [2013] NIQB 47, a defendant was convicted of various serious offences including false imprisonment, making threats to kill and wounding with intent. In the course of his trial, his Defence team withdrew and subsequently new solicitors were instructed prior to sentencing who decided that, in view of the complexity of the sentencing exercise, counsel should be instructed. The solicitors were, however, not able to secure the services of counsel to represent the defendant because the legal aid scheme only provided for fixed fees with no allowance for preparation, or exceptional fees, and no counsel was prepared to take the brief on this basis. In the course of his judgment, Treacy J observed (at para. 3):

> "The right of everyone charged with a criminal offence to be <u>effectively</u> defended by a lawyer is one of the fundamental features of a fair trial" (emphasis added).

48. Treacy J went on to state (at para. 4):

> "[4] The person entitled to legal aid must be able to make his right to legal aid effective as the Court of Appeal recognised in the Finucane case [*Re John Finucane* [2012] NICA 12]. The nature of the preparatory work involved in this case for the deferred sentencing hearing in the circumstances which have arisen is likely to be substantial. As the court noted in its earlier judgment it is not in the public interest that the legal aid scheme as presently formulated or operated should lead to the rejection of instruction in this case by competent and experienced counsel supported by the Bar Council itself. Part of the reason for this rejection appears to be because the rules do not allow payment for preparatory work and because, relatedly, the Scheme has no exceptionality provision. It is clear, as the court recorded earlier, that the inflexibility of the impugned Scheme is preventing the applicant from being able to make his right to legal aid effective.

49. Treacy J granted an order of *mandamus* requiring the Northern Ireland Legal Services Commission "to take all necessary steps to make the applicant's right to legal aid effective" (para. 8).

50. The Department of Justice appealed Treacy J's order. The Court of Appeal ([2013] NIQB 57) allowed the appeal on the basis that the defendant was the author of his own misfortune for having dismissed his legal team and relied on *R(Kebilene) v. DPP* [2002] 2 AC 326. However, in the course of his judgment, Morgan LCJ acknowledged the potential role of Article 6 in this arena:

> "An accused who loses his legal representation in the course of a trial through no fault of his own should be given the opportunity to obtain alternative representation. *Where he cannot do so because of the inadequacy of legal aid funding a breach of article 6 may well follow*. The inflexibility of these Rules potentially raises the possibility of such an outcome. In this case, however, the material before us suggests that the accused dismissed his counsel and solicitors without any reasonable explanation at a late stage of his trial. …" (emphasis added)

51. The Supreme Court ([2013] UKSC 4) reversed the Court of Appeal and, in effect restored Treacy J, on the basis that (i) the defendant had not dismissed his legal team or sought to manipulate the legal process and (ii) the legal aid rules were flawed and *ultra vires* in that they failed to make adequate provision for a self-evidently material consideration, namely, the possibility of one legal representative being replaced by another. An order of *mandamus* was, however, no longer required because the legal aid authorities had already rectified the defect in the rules.

52. In the course of his leading judgment, Lord Kerr noted without demur (at [16]) the operation of the Article 6 and the principle touched on by Morgan LCJ:

> "Morgan LCJ, delivering the judgment of the court, acknowledged that inadequate remuneration within a legal aid scheme can give rise to a breach of a defendant's right to a fair trial under article 6 of the European Convention on Human Rights and Fundamental Freedoms, if an accused consequently finds it impossible to obtain the services of an appropriate lawyer to represent him."

53. As Treacy J said, the right to a fair trial under Article 6 includes the right to be effectively defended by a lawyer. In my judgment, the same principle applies to the situation where inadequate remuneration within a legal aid scheme means an accused cannot be assured that his lawyers will be properly paid, or incentivised, to read relevant material served and relied upon by the Prosecution at the trial, such as electronic material not included in the PPE. Whilst, as Morgan LCJ observed (at [15]), Article 6 does not guarantee any particular level of remuneration to lawyers, nevertheless, in my view, it is axiomatic under Article 6 that Defence lawyers are adequately remunerated so that they can properly prepare an accused's defence and effectively represent their client. A legal aid scheme which is operated arbitrarily in a way such that counsel are paid for reading only parts of the Prosecution material actually served and relied upon at trial but not others, is flawed and gives rise to a potential breach of Article 6 as elucidated in *Brownlee* (*supra*).

Conclusion

54. In my judgment, the correct approach in this area of costs is clear and may be encapsulated in the following proposition:

> Where 'cell site', telephone and similar material is served by the Prosecution upon the Defence in digital form, such material must be included as PPE for Graduated Fees Purposes, and payment made to Defence advocates on that basis.

55. This proposition flows from the LSC Guidance and Article 6. It is also consonant with the case law set out above, to which I would add with one small gloss: it is not necessary, in my view, to demonstrate that the digital material in question is 'important' or 'central' to the Prosecution Case. The fact that such material is served by the Prosecution as part of its case means that, *ex hypothesi*, it is 'relevant' and required to be read by the Defence.

56. As was observed by the Costs Judge in *Jalibaghodelehzi* (SCCO (354/13), appeals to the Costs Court by Defence advocates regarding non-payment by Prosecution in respect of telephone evidence served digitally are becoming numerous. There should be no need for such appeals. The position in law is clear: telephone, text and cell site evidence served by the Prosecution in digital form must now be included in the PPE page count and paid as such. Defence advocates should not be put to the time, trouble and expense of bringing costs appeals or required to prove "special preparation" *in lieu* of the page count. If they are forced to do so, consideration should be given to awarding indemnity costs against the LSC or LAA in respect of the unnecessary appeal hearing in question.

GFS 'Maximum' 10,000 page count

57. As noted above, the GFS currently provides a PPE 'maximum' page count of 10,000 pages. The rationale for this apparently arbitrary ceiling is unclear. Its effect is to impose an artificial cap on advocates' remuneration irrespective of the work actually done. In my judgment, where the actual page count is not significantly above the maximum (say 20-30% more), one can divine a pragmatic reason for a rough-and-ready cap on remuneration of this sort of order. Where, however, the actual page count vastly exceeds the 10,000 pages, such a restriction is manifestly disproportionate and cannot rationally have been intended to apply. The present case is just such a case: the actual page count is 24,407 pages, *i.e.* more than double the 'maximum'. Accordingly, the 'maximum' must yield and remuneration should be made on the actual PPE, namely 24,407 pages.

Order of 3rd December 2014

58. For all the above reasons, I made the attached Order dated 3rd December 2014 requiring the Crown properly to serve the telephone evidence material listed in the Schedule attached to the Order so that it was included in the PPE for Graduated Fee Purposes.

IN THE NOTTINGHAM CROWN COURT **T2013 7653**

REGINA

– v –

MICHAEL FURNISS
STUART HALL
& JAMES STACEY

ORDER

IT IS HEREBY ORDERED AND DIRECTED as follows:

The Crown shall forthwith properly serve the telephone evidence material listed in the Schedule attached to this Order so that it is included in the Pages of Prosecution Evidence ("PPE") for Graduated Fee Purposes, either by:

(1) serving a paper copy of all of the listed material; and/or

(2) re-serving the listed material in electronic form (with a written assurance from the appropriate officer that the listed material is included in the PPE in accordance with paragraph 2(C) of S.I. 2012/750); and/or

(3) serving a Notice of Additional Evidence (NAE) coversheet evidencing the inclusion of the said listed material in the PPE.

THE HON. MR JUSTICE HADDON-CAVE

3rd December 2014

IN THE NOTTINGHAM CROWN COURT **T2013 7653**

REGINA
- v –

MICHAEL FURNISS, STUART HALL & JAMES STACEY

PAGES OF EVIDENCE SCHEDULE

Figures based on PDF (simplified) version of the files.

Phone Downloads relied upon by Crown

NIP (Stacey Phone)	3840
PDB	13202
JD/1	314
PR/9	3
OJM/7	3
CJB/283	4
KLR/1	36
PRS/1	4
MRP/1	3
ART/1	37
MSV/1	57
MSV/1(Sim)	23

Phone Billing relied upon

MRE/2= (Dosuik 1)	110
MRE/3= (Dosuik 2)	40
MRE/4= (Dosuik 3)	27
MRE/5= (Furniss 1)	93
MRE/6= (Hall 1)	1544
MRE/7= (Hall 2)	36
MRE/8= (Hall 3)	2661
MRE/9= (Stacey 1)	1
MRE/10= (Stacey 2)	9
MRE/11= (Stacey 3)	280
MRE/13= (Sarah Stacey)	892
MRE/14= (Dosuik 2)	45
MRE/15= (Furniss 1)	171
MRE/19= (Dosuik 4)	47
MRE/20= (Hall 4)	120
MRE/21= (Hall 5)	2
MRE/22= (Hall 6)	144
MRE/23= (Hall 7)	81
MRE/24= (Hall 8)	149
MRE/25= (Hall 9)	105
MRE/26= (Hall 10)	143
MRE/27= (Stacey 1)	130

MRE/28= (Stacey 2)	17
MRE/29= (Stacey 3)	13
MRE/30= (Stacey 4)	10
MRE/31= (Stacey 5)	41
Total =	**24,407**