

Auditor of the Court of Session

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30th June 2004

Dear Sir,

HMA v. [REDACTED]

I refer to the above case and enclose, for your information, the Auditor's Report.

Yours faithfully,

Jane Wright

p.p. Principal Clerk
Enc.



The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

COURT OF SESSION, SCOTLAND

REPORT

by the

AUDITOR OF THE COURT OF SESSION

in the cause

HER MAJESTY'S ADVOCATE

against

[REDACTED]

EDINBURGH. 30th JUNE 2004

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board" and Donald R MacLeod, Advocate, in relation to fees claimed by counsel for representing Wendy Gillespie at Trial in the High Court in Glasgow involving a charge under Section 4(3)(b) of the Misuse of Drugs Act 1971.
2. At the Taxation on the 14 June 2004, the Board were represented by [REDACTED] Solicitor. Mr MacLeod did not appear, but elected to exhibit written submissions for the Auditor's consideration.
3. The only Fee Notes in dispute are the fees for the Trial Days. All other Fee Notes have been agreed following negotiations between the 'Board' and Counsel.

4./

4. The Fees issued by Faculty Services Ltd., in dispute are as follows:

04.09.03 – Trial Day, Glasgow - £450.00

05.09.03 – Trial Day, Glasgow - £450.00

08.09.03 – Trial Day, Glasgow - £450.00

4. In his submissions counsel outlines the background to the case. [REDACTED]

[REDACTED] was indicted along with her male co-accused at the High Court in Glasgow, on a charge of an alleged contravention of sections 4(3)(b) of the Misuse of Drugs Act 1971.

[REDACTED] defence was straightforward. She had been proceeding along the street beside the co-accused when he pushed a package into her hand. She had no idea what was in the packet. She had received it spontaneously from the co-accused. A police vehicle had passed by and the officer's having witnessed the incident, stopped and searched both parties and recovered the package which contained drugs from the accused. Both were detained, charged and indicted.

Counsel goes on to explain that this case was not as simple as first appears. He had to cross-examine the police officers, who were in the vehicle carefully in a way as not to risk prejudicing his client's defence. 'The questioning has to be advanced in a way which is designed to enhance in the minds of jurors the likelihood that its basic premise is tenable'. Counsel goes on to describe his client's appearance at court making reference to the colour of her teeth being typical of a drug addict. The accused was adamant that she was innocent and did not want to consider any other options open to her and wished to proceed to trial. She had previously been sentenced to three years imprisonment for drug-dealing. Counsel had concerns following a conversation at a consultation that she would present 'management problems' for him and if convicted of the offence would make a complaint

against him. Counsel refers to the case of *Anderson and E*, and the consequences of Lord Hamilton's comments and outlines the risks facing defence counsel.

In Counsel's submissions he refers to fees paid by the 'Board' to counsel in the Outer House, of the Court of Session receiving upwards of £1100.00 per day and in the Inner House being as high as £1500.00. "Now it is being said that the modest day-rate which I have charged for days in court in Glasgow in this really quite serious case is excessive. When compared to payments made to other legal personnel as set out above, I consider that the day-rate which I have proposed truly merits the appellation "modest" and I have absolutely refused to accept a lesser sum, no matter what threats have been made against me by SLAB. Had I been aware in advance that all I was going to be offered in this case was £370.00 per day, I would have refused to take instructions on the basis that I was not being offered a reasonable fee.

There is now increasing public concern that the low rates of pay traditionally imposed upon criminal counsel is having a deleterious effect on the profession. Here are the words of Lord Bony in *Improving Practice – A Review of the Practices and Procedures of the High Court 2002* at paras. 5.27-8:

"There is increasing expectation that lawyers, like other professionals, should specialise in particular fields of work. A number of counsel largely confine their practices to criminal defence work. That tendency in my opinion should be encouraged. Those counsel recognise that it is inevitable that work which is privately funded will tend to produce better rewards than that which is funded by legal aid. However, it is an important element in securing the continued commitment of able and experience counsel to criminal work that the scheme under which they are paid should be seen by them to be fair and correctly structured. That is not their current perception..... In recent times there has been a significant

exodus of experienced counsel from the Bar to take up appointments as sheriffs. Taking up such an appointment is part of the normal career progression of many advocates, but the number of experienced counsel taking this path recently has been high. That exodus has increased the pressure of work on the remaining experienced criminal counsel. The regular influx of new counsel to the Bar is not reflected in an equivalent increase in the number of counsel appearing regularly in the High Court”.

.....My fellow counsel in this case was offered and accepted a rate far higher than that which I was originally offered.....

“It is clear from Schedule 2 para.3 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 that the intention of the regulation is to provide reasonable remuneration for the work undertaken. As the distance in time between the scales set down in the Table of Fees increases, the rate set down in the scale becomes less reasonable. Further, the responsibility of defence counsel these days is infinitely more complex than it was in 1992. They have to undertake CPD, they have had to become acquainted with new legislation or case law which appears day after day or so it seems, their conduct of cases is now open to review by SCCR, peer review is being introduced and their professional indemnity is at risk all the time..... How can it be said that my fees of £450.00 per day in Glasgow are excessive.....

I have been in practice for twenty six years as an advocate. I have prosecuted and defended at the highest level and my services are in constant demand. I have served as a temporary Sheriff.... In my submission, this fee does not approach reasonable remuneration for the high degree of responsibility which I took on and the difficulty which I encountered in conducting this case. I cannot understand why a case resulting in such a long term imprisonment is regarded as meriting less than a trainee solicitor earns

in the District Court. Nonetheless it is what I chose to charge and I ask that it be upheld at taxation.”

5. [REDACTED] had lodged points of objection as follows:

This case proceeded to trial in Glasgow High Court and involved a charge under Section 4(3)(b) of the Misuse of Drugs Act 1971.

The fees are prescribed by the Criminal Legal Aid (Scotland)(Fees) Regulations 1989, Regulation 10 (1) (the “Criminal Fees Regulations”) which provides that counsel shall be “allowed such fee as appears reasonable to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard being had to economy”.

The fee prescribed by Schedule 2 of the Criminal Fees Regulations for junior counsel in respect of the “Trial per day” is £298.50. The fee prescribed for consultation in Glasgow is £133.50.

Claim

Counsel has claimed £150.00 for a consultation and two days (1 and 2 September 2003) attendance at Glasgow High Court on an accused and counsel basis at £200. The claim for three days at trial is £450.00 a day.

The only information in support of enhanced fees is that provided in counsel’s submissions of 4 June 2004.

Accordingly, the Auditor taxes counsel's fees at £1,125.00 allowing 3 days at £375.00 per day for the Trial Days, subsuming all preparation undertaken.

Henry Sullivan

AUDITOR OF THE COURT OF SESSION