

IN THE COURT OF SESSION

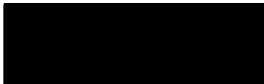
R E P O R T

by

AUDITOR OF THE COURT OF SESSION

in the cause


BY

 - SL/5191135505

regarding the fees
of

FRANCES McMENAMIN, SENIOR
COUNSEL

EDINBURGH. 22 July 2008.

In attendance at a diet of taxation on 5 June 2008 were,  on behalf of the Scottish Legal Aid Board and Ms Frances McMenamin, Q.C., and her clerk. The Auditor had before him the following papers. Points of Objection for Scottish Legal Aid Board. Senior Counsel had produced copy Indictment, Joint Note by Counsel dated 28 January 2008, which had been seen and approved by The Rt. Hon. Lord Hardie, a further Note by Senior Counsel dated 7 February 2008 and a Note by Ian Duguid, Q.C., dated 14 February 2008.

Counsel's fees for appearances in the High Court of Justiciary are now regulated by the Criminal Legal Aid (Scotland) (Fees) Amendment (No. 3) Regulations 2005. Chapter 2 sets out the fees payable to senior counsel and section 3 distinguishes categories of

charges prosecuted in the High Court. The Auditor does not understand that these categories are exhaustive and note 2 of the notes on the operation of Schedule 2 of the regulations gives the Auditor authority to allow, "such fee as appears appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Table of Fees".

The charges against [REDACTED] are set out in charge (2) of the Indictment which desiderates actings or defaults in the treatment of [REDACTED] contrary to the Children and Young Persons (Scotland) Act 1937, Section 12(1) as amended. Charges 1 and 3 of said Indictment are directed against [REDACTED] husband and co-accused, [REDACTED]. Charge 1 desiderates alleged assaults of [REDACTED] and charge 3 desiderates a charge of murder of [REDACTED].

The sole matter for the Auditor to determine is whether senior counsel for [REDACTED] is entitled to be remunerated under (a) or (b) of Chapter 2 section 3 of said regulations.

Senior counsel referred to the papers lodged and made the following submissions. The interlinking of charges 2 and 3 potentially had catastrophic consequences for Mrs. [REDACTED]. The offences in charge 2 had a significant bearing on the evidence in the murder charge, charge 3. The Crown's evidence in relation to the murder charge, which in essence meant the death of the child resulting from a deliberate attack on her, rested on everything that had happened to the child from birth until the child was found to be fatally ill. The Crown's position was that a great many things had happened to this child in her short life which indicated a pattern of behaviour to her. Only two people had looked after her. The Crown had a specific interest to lead the background to convince a

jury to prefer the medical experts' reports who favoured a non accidental injury as being the cause of death. It was clear from the experts' reports for the prosecution and defence (twelve in total) that in reaching their opinions on how the child sustained the fatal brain injury that they took into account all the evidence relevant to charge 2 which affected [REDACTED] e.g., GP records, health visitor records, social work records, Yorkhill Hospital records and police statements taken from every witness who had come into contact with the family including one neighbour who reported [REDACTED] and said she did not want the baby. This involved a detailed examination of [REDACTED] medical records since the birth of her first child.

The Crown lead a number of medical witnesses who saw both mother and father at every presentation of this child to doctors, nurses and paramedics about the mother's interaction with the baby. Every single doctor, nurse and paramedic observed the mother's reactions on 16 to 18 September 2005 and subsequent days to speak to the parents' reaction to these events.

Both accused had interpreters present. [REDACTED] English was much better than her husband's. Much of the explanation of the events on 16 September was done by Mrs. [REDACTED]

The consequences of conviction were catastrophic. The parties' other two children were in care and the second child, who was born in July 2006, was removed and no more than two hours contact at any time with the child had been allowed. The Social Work Department wanted the children freed for adoption. [REDACTED] was sentenced to six years imprisonment for culpable homicide and Lord Hardie, the trial Judge, intended to

refer the case to the Home Secretary for deportation of [REDACTED]. All the immigration documentation had been lodged at the eleven preliminary hearings, although senior counsel tried to have these excluded, without success. These records were used to attack the credibility of the accused.

Referring to the further note, senior counsel stated that the nature of the case and the huge amount of out of the ordinary work and responsibility rendered it reasonable that counsel's fees be allowed under category A or alternatively the Auditor should allow a fee under 2 of the Notes on the operation of Schedule 2.

[REDACTED] referred to his Points of Objection and made the following submissions. He did not think that the resolution to this dispute between the Board and senior counsel would create a precedent. This was not work which fell under category A. It was essential at the outset to identify the nature of the charge and then allocate the appropriate fee. A lot of what senior counsel had said was of limited relevance as the prescribed fees relate to the nature of the offence. The number of witnesses and the number of documents are again irrelevant as the work done in connection therewith was reflected in the number of days at the trial. There are many circumstances where parents can be denied access to children but that does not bring it under category A which is for the most serious crimes which can be faced. There is a discretionary provision for the Auditor but he does not require to exercise that discretion as this charge fits in category B. He conceded that some consideration be given to the gravity of the charge. Senior counsel for [REDACTED] was being paid under category A and the gravity of the charge faced by [REDACTED] was not as grave. There was a complete difference in the nature and

consequence of the charges and that was the reason for distinguishing between the charge of [REDACTED] and the charges of omission under the 1937 Act.

Senior counsel responded that the Crown dropped the charge from murder to culpable homicide and had that not been done she would have made submissions of no case to answer. The evidence which had been lead had not established charge 2 of the indictment because wickedness could not be proved up to 16 September.

This is a novel and difficult matter and the Auditor was encouraged by [REDACTED] affirmation that the decision here would not create a precedent. There is no doubt that senior counsel was put to an enormous volume of work which was far out of the ordinary in a case where an accused was facing the charges similar to those in charge 2 of the Indictment. The Auditor notes that in senior counsel's further Note of 7 February 2008 she confidently states that no senior counsel would accept instructions in a matter which involved so much time and effort outwith the court room and be happy with remuneration under category B.

In Uisdean McKay against Her Majesty's Advocate 25 June 1999 (unreported) the Lord Justice Clerk writes,

“It is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case that set out in Schedule 2. The rules bind the Auditor, and they bind counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them.”

Offences against children under the 1995 Consolidation Act fall to be remunerated under category B. Senior Counsel should be aware of this. There are no grounds for the Auditor to allow a fee outwith B as envisaged in Note 2 on the Operation of Schedule 2. Senior counsel for the co-accused will properly be remunerated under A. Despite senior counsel's eloquence, the Auditor has reached the conclusion that she falls to be remunerated under category B.

In an attachment to an email of 6 June 2008 from counsel's clerk, the fees payable to senior counsel under category B are as follows:

Trial Diets x 33	£23,100.00
Preparation of written record under Chapter 2 para 1B(d)	350.00
Further preliminary hearings x 10	4,666.67
Hearing on commission x 3	<u>2,100.00</u>
	<u>£30,216.67</u>

The Auditor taxes Senior Counsel's fees at THIRTY THOUSAND TWO HUNDRED AND SIXTEEN POUNDS AND SIXTY SEVEN PENCE (£30,216.67).



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