



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ADETORO v. THE UNITED KINGDOM

(Application no. 46834/06)

JUDGMENT

STRASBOURG

20 April 2010

FINAL

20/07/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Adetoro v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,

Nicolas Bratza,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 23 March 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 46834/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Mr David Adetoro (“the applicant”), on 30 October 2006.

2. The applicant was represented by Stephenson Solicitors, a firm of solicitors practising in Wigan. The United Kingdom Government (“the Government”) were represented by their Agent, Ms J. Gladstone, of the Foreign and Commonwealth Office.

3. The applicant alleged that he did not have a fair trial as a result of the trial judge's misdirection to the jury on the drawing of adverse inferences as regards his refusal to answer questions during police interviews.

4. On 25 May 2009 the Acting President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background facts

5. The applicant was born in 1972 and is currently detained in HMP Whitemoor, Cambridgeshire.

6. Between June 1995 and March 1997 eight robberies and six aborted robberies took place in the Manchester area. The robbers targeted security vehicles carrying cash; banks; one post office; and one supermarket. More than once, firearms were discharged. Police officers chasing the robbers were fired upon and on one occasion a lorry driver who used his vehicle to ram the robbers' getaway car was shot and seriously injured.

7. The prosecution case was that the applicant joined the conspiracy in around April 1996 after his release from prison, after four of the robberies had been committed. The evidence against the applicant was almost entirely circumstantial and the case relied heavily on evidence from a police surveillance exercise carried out over a period of about one year. The prosecution argued that the applicant's recorded movements were consistent with his playing an active part in the conspiracy.

8. The applicant was arrested on 21 March 1997. He denied any involvement in the conspiracy to rob and was interviewed under caution in March and June 1997. The terms of the caution were that he did not have to say anything but that it might harm his defence if he did not mention when questioned something on which he later sought to rely in court. During the interviews, he was asked to give an explanation for his movements as recorded by the police in their surveillance exercise, his association with a variety of individuals and his whereabouts at the time of the robberies. On each occasion, he replied "no comment".

B. Domestic proceedings

9. The applicant subsequently pleaded not guilty to conspiracy to rob and other offences arising out of the conspiracy.

1. Proceedings before the Crown Court

10. At trial before the Crown Court, the applicant gave evidence in his own defence. His case was that he was not involved in the conspiracy. He claimed that he was not even aware of the robbery conspiracy or his associates' involvement. However, he admitted being involved in the buying

and selling of stolen cars and argued that the police observations showed his involvement in that business, rather than in any conspiracy to rob.

11. The applicant also provided answers to all the questions which he had declined to answer during the police interviews in March and June 1997. In particular, he accounted for his association with various individuals, provided explanations for why he had moved certain vehicles on certain dates, gave detailed accounts of his movements on relevant dates, provided reasons why he was observed wearing gloves on specific occasions and gave explanations for conversations recorded by covert surveillance.

12. The applicant was asked why he had not provided these explanations at the time of the police interviews. He responded that he had not wanted to incriminate people in relation to the stolen vehicles.

13. In his summing up to the jury, the judge directed them as to the burden of proof and the standard of proof in the case:

“...The burden [of proof] lies upon the prosecution throughout the case, to prove their case against the defendant. The defendant does not have to prove anything at all, there is no burden upon him to prove anything.

...

The next matter of law, is the standard of proof, this is a very simple concept, the standard is, that you must be sure. You must not convict this man unless you are sure he is guilty and nothing less than being sure will do.”

14. He subsequently gave them the following direction regarding lies:

“Another matter of law, ... which I should mention, concerns the telling of lies or being untruthful. You may come to the conclusion that this defendant has told you a lie or a number of lies; I'm not suggesting that he has or he hasn't, it is simply a matter that you may wish to consider. Because, I have to tell you as a matter of law, that the fact that a defendant tells a lie, is not of itself, evidence of guilt. A defendant may lie for many reasons. He may lie because he doesn't want to disclose something or out of confusion, panic or something of that sort.

If you think that the defendant has lied in evidence, but you think that there is or might be some innocent explanation for any lie, then ignore it, take no notice of it at all. If, on the other hand, you were to find that the defendant did lie and you are sure that he didn't lie for any innocent reason, then any such lie can be evidence going to support the prosecution's case.”

15. The judge went on to deal with the questioning of the applicant by the police. In this regard, he noted:

“... there [were] some six hours – if I've added it up correctly – of interviews between the police and the defendant, from the day of his arrest in March through to June of last year and at each of those various interviews, he was cautioned. The words of the caution being, that he was told that he did not have to say anything, but that it may harm his defence if he didn't mention when questioned, something which he may later rely on in court. He was told that anything which he might say may be given in evidence.”

16. The judge noted that the applicant had not answered questions put to him during the police interviews, replying “no comment” to each of the questions posed. He reminded the jury that the applicant did not suggest that he was advised by his lawyer not to comment but said that he had not answered questions because he did not want to incriminate people in relation to stolen vehicles. The judge also reminded the jury of some of the specific questions asked of the applicant during the police interviews and of the subsequent answers relied upon by the applicant during his evidence at trial and added:

“[The applicant] knew, as he accepted when he gave evidence before you, that he had been arrested for armed robbery. He admits that he failed to mention any of the facts to which I have just referred, when he was interviewed and he says his reason for that, was that although well knowing that others had been arrested for the much more serious offence of armed robbery, as he had been, he didn't want to incriminate them in the stealing of cars.”

17. The judge concluded with the following direction:

“You must decide, whether in the circumstances, these facts to which I have referred, were facts which the defendant could reasonably have been expected to have mentioned in the light of that caution, which was repeatedly given to him, over that period from March to June.

If you find that he could reasonably be expected to have mentioned those facts, then the law is, that you may draw such inferences as appear proper, from his failures to mention such matters when interviewed.

I reminded you of the period of the interviews. Failures to mention such matters cannot on their own prove guilt, but you may hold such failures against the defendant when deciding whether he is guilty, that is to say, you may take them into account as some additional support for the prosecution's case. You are not bound to do so, it's a matter entirely for you to decide whether it is fair to do so.”

18. On 18 June 1998 the jury found the applicant guilty of the offences charged. He was sentenced to 26 years' imprisonment. The Criminal Cases Review Commission (see paragraph 21 below) summarised the comments of the trial judge on sentencing as follows:

“111. In sentencing Mr Adetoro, the judge noted that he had six previous convictions dating from 1998, including a conviction for conspiracy to rob ... The trial judge described him as a dangerous, cunning and intelligent man and he was satisfied that after he had joined the conspiracy, he had played a commanding role ...

112. Mr Adetoro did not take part in the first four robberies because he was in prison in respect of a previous matter connected with armed robbery. He was released in September and by October was associating with his co-accused ... Thereafter he joined the conspiracy. Once he had joined the tactics and execution of the various robberies increased in gravity. The judge noted that he was satisfied that Mr Adetoro was involved in the sixth robbery and ignored his assertion that he was with Mr Shearer and Mr Stephenson at the material time. He was a 'rather clever and determined liar' and his alibi 'fell apart'. The judge was not prepared to place reliance

on anything he said and made no finding in respect of Mr Shearer and Mr Stephenson's presence or absence in the circumstances of the sixth robbery.”

2. First appeal to the Court of Appeal

19. The applicant appealed to the Court of Appeal arguing, *inter alia*, that the summing up contained a *Lucas* direction (a direction to the jury in relation to lies – see paragraph 33 below) where it was wholly inappropriate; and that the trial judge had not given any direction to the jury regarding the drawing of adverse inferences from the applicant's silence during the police interviews in circumstances where such a direction was appropriate.

20. On 21 June 1999, the Court of Appeal handed down its judgment. It agreed that there had been no need for a *Lucas* direction. However, it considered that the fact that one was given did not prejudice the applicant's defence or the safety of his conviction. Regarding the adverse inferences direction, the court concluded, having regard to the transcript of the trial judge's summing up, that the judge had given such a direction to the jury. It considered the applicant's case in the round and noted that the evidence against the applicant was overwhelming. The applicant's appeal against conviction was dismissed. However, his sentence was reduced to 22 years' imprisonment.

3. Second appeal to the Court of Appeal

21. On 20 July 2005, the Criminal Cases Review Commission (“CCRC”) referred the applicant's conviction to the Court of Appeal on the basis of the trial judge's direction to the jury in relation to the applicant's silence at the police interviews. The main ground of appeal was that the direction on adverse inferences was defective in that the jury were not directed that an adverse inference could only be drawn where it was satisfied that the real reason for the applicant's silence was that he had no answer to the questions asked, or no answer that would hold up to scrutiny. The CCRC report noted that legal advice dated 9 July 1998 on the merits of an appeal made reference to the omission in the jury direction but that this issue was not pursued beyond the initial advice and was not incorporated into the applicant's grounds of appeal at that time. The Court of Appeal subsequently observed that this ground:

“was not one of the ten grounds of appeal advanced by experienced counsel who appeared for the appellant at trial.”

22. On the morning of the appeal hearing, counsel for the prosecution informed counsel for the applicant that he considered there to be no justification for opposing the appeal and that the only issue would be whether or not there ought to be a retrial.

23. The Court of Appeal disagreed and found that, despite the misdirection by the trial judge, the conviction was safe. It distinguished between cases where an accused exercised his right to silence pursuant to legal advice or because he was tired or ill and those where, as in the present case, the reason for not answering questions was linked to the accused's defence itself. It found that the jury had rejected the applicant's defence and, in doing so, must also have rejected the applicant's explanation of why he failed to answer questions in the police interview, noting:

“Here the appellant's explanation was inextricably linked to his defence which was: 'I was involved with the others in buying and selling stolen cars, but not in armed robbery'. In saying that he did not answer questions because he did not wish to implicate others in this business, the appellant was necessarily advancing his own defence. The jury rejected this defence and it seems to us that in doing so they must also have rejected the appellant's explanation for his failure to mention facts at interview.”

24. The court also noted that the judge had given the jury an unnecessary *Lucas* direction which, in the event, provided assistance to the jury in how to approach the question of adverse inferences which could be drawn from the applicant's failure to provide an explanation of his conduct during the police interviews. It concluded that:

“The direction the judge gave could only have related to lies told by the appellant in court. The jury were told that if they thought there was an innocent explanation for any such lie told by the appellant they should not hold it against him. So, as the jury must have concluded that the appellant's explanation for his silence ('I wanted to protect others') was a lie, following the judge's direction they would have had to consider whether there was an innocent explanation for it before they could have used it as supportive of the Crown's case. If therefore they did use his lying explanation against him, the jury must have concluded that the lie was not innocent – in other words the reason he was lying about why he had not answered the questions was because he had no answer to them or none which would withstand scrutiny.

... So on analysis if the jury in this case did draw adverse inferences against the appellant from his silence at interview, they could only have done so by following the same thought processes as they would have had to follow if the proper section 34 direction had been given. This is therefore not a case in which one cannot say what the jury would have done if such a direction had been given. Put shortly, if they did draw adverse inferences against the appellant following the directions which they were given, they could only have done so if they considered that the reason for his silence was that he had no or no sustainable answer to the questions he was asked.”

25. The court referred to the earlier judgment of the Court of Appeal, which found the evidence against the applicant to be overwhelming, and concluded:

“This was not therefore a case in which one could say that the correct direction would have tipped the balance”.

26. The applicant's appeal against conviction was dismissed on 7 June 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Section 34 of the Criminal Justice and Public Order Act 1994

27. Section 34 of the Criminal Justice and Public Order Act 1994 provides that:

“(1) Where in any proceedings against a person for an offence, evidence is given that the accused—

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings;

...

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies

...

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

...”

28. Section 38(3) provides that:

“A person shall not ... be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2) ...”

29. A number of domestic cases have considered the application of section 34 in practice. In *R v. Cowan* ([1996] 1 Criminal Appeal Reports 1), Lord Taylor CJ set out five “essentials” when making a direction on adverse inferences:

“We consider that the specimen direction is in general terms a sound guide. It may be necessary to adapt it to the particular circumstances of an individual case. But there are certain essentials which we would highlight:

1. The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the standard required is.

2. It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice.

3. An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act.

4. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a *prima facie* case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence.

5. If despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

30. Subsequently, in *R v. Argent* ([1997] Criminal Appeal Reports 27), Lord Bingham CJ (as he was then) added a sixth condition that had to be met before section 34 of the 1994 Act would allow inferences to be drawn:

"The sixth condition is that the appellant failed to mention a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when questioned. The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at the time. The courts should not construe the expression 'in the circumstances' restrictively: matters such as the time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant ...

Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common-sense, experience and understanding of human nature. Sometimes they may conclude that it was reasonable for the defendant to have held his peace for a host of reasons, such as he was ... worried at committing himself without legal advice, acting on legal advice, or some other reason accepted by the jury."

31. Guidance as to the direction which the judge should give the jury are provided by the Judicial Studies Board, which provides specimen directions. The present specimen direction on section 34 is based on the five "essentials" listed in *R v. Cowan*, as applied in subsequent section 34 cases before the domestic courts, including *R v. Argent*, and by this Court in *John Murray v. the United Kingdom*, 8 February 1996, *Reports of Judgments and Decisions* 1996-I and *Condron v. the United Kingdom*, no. 35718/97, ECHR 2000-V).

32. The Judicial Studies Board specimen direction, which was last amended in December 2004, prior to the applicant's second appeal, provides as follows (the sections in bold indicate substantive differences from the version of the guidelines in force at the time of the applicant's trial):

“1. Before his interview(s) the defendant was cautioned ... He was first told that he need not say anything. **It was therefore his right to remain silent.** However, he was also told that it might harm his defence if he did not mention when questioned something which he later relied on in court; and that anything he did say might be given in evidence.

2. As part of his defence, the defendant has relied upon (here specify the facts to which this direction applies - see Note 10). But [the prosecution say][he admits] that he failed to mention these facts when he was interviewed about the offence(s). [If you are sure that is so, this/This] failure may count against him. This is because you may draw the conclusion ... from his failure that he [had no answer then/had no answer that he then believed would stand up to scrutiny/has since invented his account/has since tailored his account to fit the prosecution's case/(**here refer to any other reasonable inferences contended for ...**)]. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it ...; but you may take it into account as some additional support for the prosecution's case ... and when deciding whether his [evidence/case] about these facts is true.

3. However, you may draw such a conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about three things: first, that when he was interviewed he could reasonably have been expected to mention the facts on which he now relies; second, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny ... ; third, that apart from his failure to mention those facts, the prosecution's case against him is so strong that it clearly calls for an answer by him ...

4. (Add, if appropriate:) The defence invite you not to draw any conclusion from the defendant's silence, on the basis of the following evidence (here set out the evidence ...). If you [accept this evidence and] think this amounts to a reason why you should not draw any conclusion from his silence, do not do so. Otherwise, subject to what I have said, you may do so.”

B. *Lucas* directions

33. A *Lucas* direction is a direction from the judge to the jury to the effect that the fact that the accused has told lies, or is alleged to have told lies, does not in itself indicate guilt. The jury should be invited to consider other explanations why the accused might have lied, including any he provides during the trial. The relevant case is *R v. Lucas* ([1981] Q.B. 720), in which it was held that:

“To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.”

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant complained that the trial judge's direction to the jury on the making of adverse inferences as regards his silence during the police interviews violated his right to a fair trial as provided in Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

35. The Government contested that argument.

A. Admissibility

36. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicant

37. The applicant alleged that he did not have a fair trial as a result of the trial judge's misdirection to the jury on the making of adverse inferences as regards his silence during the police interviews, in particular the omission of a direction to the effect that adverse inferences could only be drawn where the jury was satisfied that the real reason for the applicant's silence was that he had no answer to the questions asked, or no answer that would hold up to scrutiny.

38. The applicant refuted the argument that his explanation for his silence at police questioning was the same as his defence to the substantive charges. The fact that a section 34 direction was given at all made it clear that the question of the silence of the applicant was potentially an important one, and the prosecution had argued at trial that his silence gave additional support to their case. According to the applicant, members of the jury may well have concluded that the applicant had refused to answer questions in interview in order to avoid implicating others in the stolen car ring. However, because of the deficient direction, they would nonetheless have

been at liberty to draw an adverse inference against him, despite the fact that they were not entitled to do so. He argued that it was impossible to know if this was what happened and whether any adverse inference, wrongly drawn, had contributed to the rejection of his defence. It was for this very reason that the Court had made it clear that careful directions safeguarding an accused's Article 6 rights had to be in place in cases involving the drawing of adverse inferences.

39. The applicant further argued that the *Lucas* direction, given in a different part of the judge's summing up with no reference to the applicant's explanation for his silence during questioning, was insufficient to remedy the unfairness caused by the deficient section 34 direction.

40. Although defence counsel had failed to complain about the misdirection at the time, the applicant argued that this was a mere oversight and did not diminish the fact that the jury were wrongly directed and that the safeguards designed to protect the applicant's rights were not present.

41. Finally, the applicant did not consider that the review of his conviction by the Court of Appeal was sufficient to remedy any defect in the judge's direction on adverse inferences.

b. The Government

42. The Government considered that, while the terms of the trial judge's directions to the jury were of particular relevance to the assessment of the fairness of the trial (citing *Beckles v. the United Kingdom*, no. 44652/98, § 59, 8 October 2002), they were not decisive. Whether the direction resulted in a violation of the applicant's Article 6 rights was a question to be assessed in light of all the circumstances of the case, including the situations in which adverse inferences could be drawn, the weight attached to them and the degree of compulsion inherent in the situation (citing *John Murray*, cited above, § 47). The Government highlighted that the legislative scheme itself contained safeguards to prevent adverse inferences being drawn in situations where it would be unfair to the accused, pointing out in particular that no adverse inferences could be drawn where a person had not been cautioned or where a person did not later seek to rely on a fact which he might reasonably have been expected to mention during police questioning.

43. The Government acknowledged at the outset that the trial judge had failed to direct the jury that adverse inferences could only be drawn where the jury was satisfied that the real reason for the applicant's silence was that he had no answer to the questions asked, or no answer that would hold up to scrutiny. However, they argued that it did not follow that the applicant's trial as a whole was unfair within the meaning of Article 6 § 1. They contended, first, that there was formidable prosecution evidence in the case, a factor which was relevant to the Court's assessment (citing *John Murray*, cited above, §§ 52 and 54). They accepted that the evidence against the applicant was mostly circumstantial but explained that most of it was not disputed and

was simply read to the court. They also highlighted that, in sentencing the applicant, the trial judge had made a number of findings as to his involvement in the conspiracy and his credibility (see paragraph 18 above). The Government, referring to the findings of the Court of Appeal (see paragraph 25 above), maintained that this was not a borderline case in which an adverse inference might have tipped the balance between a guilty and a not guilty verdict.

44. The Government further argued that the jury had clearly given consideration to the applicant's explanation for his silence and had rejected it: his explanation for his silence at the police interviews and his defence to the substantive conspiracy charge were fundamentally one and the same, namely that he and his co-accused had been involved only in selling stolen cars and had not participated in the armed robbery. In the context of the direction to the jury as a whole, and in light of the direction that the jury could not hold a lie against the applicant in considering his defence except where there was no innocent explanation for that lie, the jury could not have been in any doubt that if they had thought that the explanation advanced by the applicant was, or may have been, true, they should not draw an adverse inference against him. Accordingly, the Government concluded, there was no realistic possibility on the facts that the jury believed the applicant's story to be true but at the same time drew an adverse inference against him. They distinguished *Condron* and *Beckles*, both cited above, on the grounds that in *Condron* the applicants were suffering from heroin withdrawal and the concern was whether they were sufficiently lucid to understand the consequences of their silence, while in *Beckles* the trial judge had potentially positively undermined the value of the applicant's explanation for his silence by wrongly referring to the lack of independent evidence as to the legal advice given.

45. The Government also emphasised that the applicant's defence counsel had made no complaint regarding the terms of the trial judge's direction either at the time or on his first appeal to the Court of Appeal. Relying on, *inter alia*, *Wood v. the United Kingdom* (dec.), no. 23414/02, 20 January 2004, the Government argued that this consideration was relevant in assessing whether the misdirection had resulted in unfairness.

46. Finally, and in any event, the Government considered that any unfairness which resulted from the trial judge's direction was remedied by the full consideration given to the applicant's case by the Court of Appeal. The Government distinguished *Condron* in this regard, arguing that in that case the Court was concerned that the Court of Appeal had no way of knowing whether the applicant's silence played a significant role in the jury's decision to convict them. In the Government's view, the Court of Appeal in the present case was able to assess what the jury's approach had been.

2. *The Court's assessment*

a. General principles

47. The Court recalls at the outset that the right to silence is not an absolute right (see *John Murray*, cited above, § 47; *Condrón*, cited above, § 56; and *Beckles*, cited above, § 57). The fact that a trial judge leaves a jury with the option of drawing an adverse inference from an accused's silence during police interview cannot of itself be considered incompatible with the requirements of a fair trial. However, as the Court has previously emphasised, the right to silence lies at the heart of the notion of a fair procedure under Article 6 and particular caution is required before a domestic court can invoke an accused's silence against him (see *Beckles*, cited above, § 58; and *Condrón*, cited above, § 56).

48. It would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions. However, it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution (see *Condrón*, cited above, § 56; and *Beckles*, cited above, § 58).

49. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (*John Murray*, cited above, § 47; and *Condrón*, cited above, § 56). In practice, adequate safeguards must be in place to ensure that any adverse inferences do not go beyond what is permitted under Article 6 § 1 of the Convention. Of particular relevance are the terms of the trial judge's direction to the jury on the issue of adverse inferences (see *Beckles*, cited above, § 59).

b. Application of the general principles to the present case

50. The Court observes, first, that the applicant was under no compulsion to answer the questions put to him by the police. Before each of the police interviews conducted with him, he was cautioned in terms which made it clear to him that he did not need to say anything but that his silence could be held against him at any subsequent trial (see paragraphs 8 and 15 above). The applicant does not contest the clarity of the caution.

51. The Court further observes that an accused may choose to remain silent during police interviews for a number of reasons. Some will be unconnected with the accused's substantive defence. Such cases include where the accused has remained silent on the advice of his lawyer or

because he does not consider that he is sufficiently lucid to understand the questions asked or the nature of the proceedings (see, for example, *Beckles* and *Condron*, both cited above). In other cases, an accused will choose not to answer questions at a police interview for a reason which is inherently linked to his substantive defence. Such cases generally arise where the accused has some reason to conceal the truth. In such cases, it is artificial to separate consideration of the substantive defence from consideration of the explanation for the accused's silence because in order to accept the plausibility of the explanation for the applicant's silence, the plausibility of the applicant's account of events from which the reason for silence stems must also be accepted.

52. In the present case, the applicant refused to answer questions put to him by the police. At trial, his defence was that he had not participated in any robbery conspiracy but had merely been involved in the buying and selling of stolen cars. His explanation for his failure to mention this in response to direct questions during the police interviews was that he did not wish to incriminate others in respect of the buying and selling of stolen cars. The Court therefore concludes that the reason for the applicant's silence falls into the second category outlined in the preceding paragraph.

53. In his summing up, the judge reiterated that the applicant had been cautioned prior to the police interviews and that he had refused to explain his movements on certain days and at certain times, as well as his connection with particular individuals (see paragraph 15 above). The judge reminded the jury members of the applicant's explanation for this refusal (see paragraph 16 above). He further reminded them that it was for the prosecution to prove its case and that the applicant was not required to prove anything (see paragraph 13 above). He concluded by advising them that if they found that the applicant could reasonably have been expected to mention during the police interviews the facts on which he later relied in court, then they could draw such inferences as appeared proper from his failure to mention the facts when interviewed. In this context, the judge emphasised that such failure could not on its own prove guilt (see paragraph 17 above). However, he omitted to advise the jury members that no inferences could be drawn unless they were satisfied that the reason for the applicant's silence was that he had no answer to the questions asked or none that would stand up to cross-examination. The Court notes that the Court of Appeal accepted that, in omitting this detail, the judge's direction to the jury was deficient. However, the finding by a domestic court that a direction was deficient does not necessarily lead to a conclusion by this Court that the trial was unfair (see, for example, *Wood*, cited above). It is for the Court to assess whether, on the facts of the present case and in light of all the relevant circumstances, the applicant's trial was fair notwithstanding the omission in the judge's direction. In making this assessment, the Court will have regard to the overall summing up to the jury as outlined above, the

effect of the omission in the judge's direction, insofar as this can be identified, and any other safeguards present to protect the applicant's right to a fair trial.

54. As regards the effect of the omission, the Court observes that in light of the defective direction, the jury members might well have considered themselves able to draw an adverse inference from the applicant's silence even if they were satisfied with his explanation that the reason he did not respond to police questions was that he was afraid of incriminating others. However, as noted above (see paragraph 52), the applicant's explanation for his silence was inherently linked to his substantive defence. Accordingly, unlike in *Condron*, cited above, § 63, there is some indication of how the jury approached the question of the weight to be given to the applicant's silence during the police interviews. The Court of Appeal concluded that, as the jury had convicted the applicant, it had clearly rejected his defence and in doing so must also have rejected his explanation for his silence. The Court agrees that in order to consider plausible the applicant's explanation that he was afraid of incriminating others, the jury would have had to accept that the applicant's movements on certain days and at certain times, as well as his connection with certain people, was explained by his involvement in buying and selling stolen cars and not by his participation in a robbery conspiracy. It can be concluded from the fact that the jury rejected the applicant's defence that it also rejected his explanation for his silence. It is not plausible to suggest that, having accepted the applicant's explanation for his silence, wrongly-drawn adverse inferences led the jury to reject the applicant's overall defence to the robbery charges. Moreover, the jury's conclusions as to the lack of credibility of the applicant's explanation are supported by the comments of the trial judge when passing sentence on the applicant (see paragraph 18 above).

55. The Court further notes that the applicant was represented by senior counsel during the trial proceedings. However, no complaint was made about the judge's summing up, and in particular the direction on adverse inferences, at the time, a fact to which the Court has previously attached some importance (see *Wood*, cited above). Moreover, the complaint that the direction was deficient in omitting to specify that adverse inferences could only be drawn where the jury was satisfied that the applicant's failure to answer questions was because he had no answer or none that would stand up to scrutiny was not included in the ten grounds of appeal advanced during the applicant's first appeal, despite the fact that the applicant and his counsel were aware of the deficiency at the time (see paragraph 21 above).

56. Finally, the Court notes that the Court of Appeal reviewed the evidence against the applicant and found it to be "overwhelming" (see paragraph 20 above). In its subsequent reconsideration of the case, the same court referred to its previous finding and concluded that this was not a case where a technically correct direction on adverse inferences would have

tipped the balance between a guilty and a not guilty verdict (see paragraph 25 above).

57. The Court therefore concludes that this is not a case where the applicant was convicted on the strength of his silence alone. Taking into consideration all the circumstances of the present case, the Court finds that notwithstanding the deficient direction to the jury, there was no unfairness in the applicant's trial as a whole.

58. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 20 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President