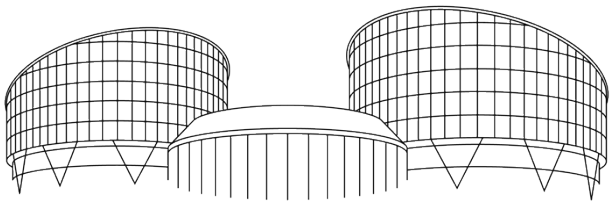

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 7618/07
by Yakiya MINHAS
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 10 November 2009 as a Chamber composed of:

Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 2 February 2007,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Yakiya Minhas, is a British national who lives in London. He is represented before the Court by Mr E. McKiernan, a lawyer practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

Shortly after 9 a.m. on 18 December 2003, two males entered a jewellery shop in Nuneaton. Both had T-shirts wrapped around their faces as masks and both were wearing dark clothing and gloves. The first male brandished a black handgun. The second was carrying a bat. After taking a quantity of diamond rings, watches and other jewellery, they left the shop. Outside the shop, a witness saw a third man wearing a balaclava and black clothing. He was standing next to a black sports car which was later found to have been stolen at gunpoint the previous month. The two males who left the shop got into the black car together with the third male and the car drove off at speed. The third male was driving. The total value of the property stolen from the jewellery shop was GBP 580,112.

The applicant's DNA was found on clothing later recovered with the car and some items of the stolen jewellery. The applicant and another man, L.C., were charged with robbery and possession of an imitation firearm. The prosecution case was that the robbers could be identified using a combination of imagery analysis and circumstantial evidence. It was their case that the applicant was the gunman. The defence case was denial. It was the applicant's position that he was not present at the robbery. He alleged that a bag of his clothes had been stolen during a burglary at his brother's home in late 2003, which explained why his DNA had been found on the clothing.

Prior to the commencement of trial, counsel were advised of ongoing inquiries into L.C.'s activities. One operation consisted of a general investigation into the criminal behaviour of L.C. and his associates between the mid-1990s and 2004. That inquiry involved armed robberies with the possible use of T-shirts as masks. Another operation related to arms importation.

When he gave evidence at trial, L.C. introduced evidence of his bad character, consisting of minor offences. His case was put to the jury on the basis that he was a petty criminal. The applicant had a number of previous convictions for a range of offences between 1997 and 2003 and he chose not to disclose his character in evidence.

On 19 April 2005, the applicant was convicted in Birmingham Crown Court of robbery (count 1) and possession of an imitation firearm when committing a relevant offence (count 2). He was sentenced to 15 years' imprisonment on each count, to run concurrently. L.C. was acquitted on count 1 and the jury were directed to return a not guilty verdict in relation to count 2.

It subsequently emerged that, following his acquittal, L.C. had been arrested and charged with a number of serious offences from 1998 to 2004,

including robberies which involved similar features to the Nuneaton robbery. There was DNA evidence linking L.C. to the robberies. The applicant considered that the evidence gathered by the Crown in respect of these charges showed a lack of association between him and L.C. and a course of conduct by L.C. linking him to the particular kind of robbery for which the applicant had been convicted. He argued that the material ought to have been disclosed prior to his trial as it would have affected the way in which he presented his defence. The Crown disputed that there was any obligation to disclose the material, arguing that the revelation of the applicant's true antecedents was a matter for the applicant and his counsel alone. Evidence tending to support the allegation that L.C. had been involved in other robberies was irrelevant to the question of the applicant's participation in the Nuneaton robbery. In any event, the Crown argued that the material, even if disclosed, would have been inadmissible in the applicant's trial.

The applicant sought leave to appeal to the Court of Appeal against conviction and sentence on the ground that he did not receive a fair trial. He complained that the failure of the prosecution to disclose the information regarding L.C. put the applicant at a disadvantage in the trial. He also criticised the judge's summing-up to the jury and the giving of a *Lucas* direction on lies. Finally, he argued that the sentence was manifestly excessive.

On 6 April 2006, leave to appeal against conviction and sentence was refused on all grounds, with the exception of the ground of appeal against conviction based on non-disclosure, which was adjourned for the Crown to attend.

On 8 June 2006, confiscation proceedings took place under the Proceeds of Crime Act 2002 ("the 2002 Act"). In the context of the proceedings, the applicant continued to deny his participation in the robbery and so gave no evidence as to the identities of the other two men involved or what had happened to the proceeds of the robbery. He was questioned about his assets, and in particular about a house which he purchased in 2004. In April 2004, some four months after the robbery, the applicant had made a mortgage application in which he alleged earnings of GBP 33,000 per year. He obtained a mortgage of around GBP 114,000. The judge noted that the applicant's actual earnings of around GBP 9,000 from his job as a supervisor in a warehouse were insufficient to service such a mortgage. Furthermore, the applicant had provided a deposit of GBP 20,000, which he claimed came from members of his family. No documents to this effect were submitted and no family members gave evidence in the confiscation proceedings to support the claim. Accordingly, the judge refused to accept that the money was provided by family members, considering it more likely that it came from the proceeds of the robbery.

Counsel for the applicant urged the judge to bear in mind, in assessing the amount of the benefit that the applicant had obtained from his criminal conduct as required under the 2002 Act, that the prosecution case was that the robbery had been committed by three men. Accordingly, he argued, the proceeds of the robbery should be apportioned, with the applicant's share amounting to around GBP 200,000. Counsel invited the judge to say that one of those three men must have been L.C. He further invited the judge to take into consideration the experience of the courts that those who seek to sell stolen goods receive but a fraction of their proper retail value.

The judge rejected counsel's submissions. As to the suggestion that he should find one of the three men to have been L.C., he said:

> "[The applicant's counsel] in effect urges me to reject the jury's finding by implication and say that one of those three men must have been [L.C.]. I could not possibly go behind the verdict in that way."

He found that:

> "The value of the benefit was the value of the benefit at the time it came into the defendant's hands. How it was dealt with thereafter does not in any way affect the value of that benefit. This is predicated upon an assumption that it was all sold, and all sold to knowing buyers. There is no evidence from the defendant as to what he did with the proceeds of the robbery. And equally, in terms of the way in which the legislation is structured, there seem to me to be no grounds for saying that the total benefit should not be ascribed to this single defendant. The defendant has had the benefit of advice from leading and junior counsel and his solicitors throughout. He was given the opportunity in these proceedings to support his counsel's submission in apportionment in relation to the possible identities or destination of the proceeds of the robbery; he declined to provide any information to the court in relation to that."

He concluded:

> "I therefore declare in his case a total benefit, allowing for the increase in the value of money, of GBP 600,809. The state of the law is such that because this defendant has not revealed what happened to the proceeds of the robbery, and particularly in light of the fact that he has told lies in connection with these proceedings, it seems to me that the law permits me, and in this case it is appropriate for me, to declare realisable assets to be GBP 600,809."

Following clarification as to the correct adjusted figure, a confiscation order for the sum of GBP 602,812 was made. The applicant was ordered to serve five years' imprisonment in default, to run consecutively to his 15-year sentence.

The applicant subsequently applied for leave to appeal against the confiscation order on the grounds that the judge had erred in failing to take into account the fact that the robbery was committed by three men and that it was unlikely that the stolen jewellery had been sold for its full value.

On 13 November 2006, the Court of Appeal refused leave to appeal in respect of the remaining ground of appeal against conviction and the appeal against the confiscation order.

As to the disclosure of material from investigations into L.C.'s activities, the court concluded that the Crown had complied with their duty of disclosure and that, even if this were not the case, the contested material if disclosed could not have been admitted as evidence in the applicant's trial proceedings.

Regarding the confiscation order, the Court of Appeal concluded (at paragraph 32):

> "...There is no doubt that the provisions of the Act are draconian, as were the provisions of Acts which preceded this recent Act. But we have examined the way in which the judge came, first of all, to the conclusion that this was the most appropriate figure by way of benefit. In our judgment, there is nothing wrong with that approach at all. He was perfectly entitled, having come to the conclusion that the applicant had lied during the course of the proceedings, to conclude that the amount of the applicant's benefit was the total value of the jewellery as updated, and not in any way obliged, particularly when the applicant, in the light of his defence that he had not been involved, had not given any evidence whatsoever as to what had happened to the proceeds of the robbery. In the result, the order for confiscation in the sum of GBP 602,812 was equally unimpeachable."

The court also refused to vary the term of imprisonment in default of payment.

B. Relevant domestic law and practice

Confiscation proceedings are governed by the Proceeds of Crime Act 2002 ("the 2002 Act"). Section 6(4) sets out the approach to be followed by the court:

> "(a) it must decide whether the defendant has a criminal lifestyle;
>
> (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
>
> (c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct."

Section 6(5) provides that where the court decides that the defendant has benefited from the conduct referred to, it must decide the recoverable amount and make a confiscation order requiring him to pay that amount. Section 6(7) requires any question arising under subsections (4) or (5) to be decided on a balance of probabilities.

Under section 76(4), a person benefits from conduct if he obtains property as a result of or in connection with the conduct. Section 76(7) provides that if a person benefits from conduct, his benefit is the value of the property obtained.

Sections 79 and 80 provide guidance as to the assessment of the value of property. The relevant extracts provide as follows:

> "79(1) This section applies for the purpose of deciding the value at any time of property then held by a person.

(2) Its value is the market value of the property at that time.

80(1) This section applies for the purpose of deciding the value of property obtained by a person as a result of or in connection with his criminal conduct; and the material time is the time the court makes its decision.

(2) The value of the property at the material time is the greater of the following—

(a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money;

...

(4) The references in subsection (2)(a) and (b) to the value are to the value found in accordance with section 79."

Section 7 provides guidance on fixing the recoverable amount:

"(1) The recoverable amount for the purposes of section 6 is an amount equal to the defendant's benefit from the conduct concerned.

(2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is–

(a) the available amount, or

(b) a nominal amount, if the available amount is nil."

C. Relevant international instruments

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990 entered into force in September 2003. It aimed to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. Parties undertake in particular to criminalise the laundering of the proceeds of crime and to confiscate instrumentalities and proceeds (or property the value of which corresponds to such proceeds).

COMPLAINTS

The applicant complained under Article 6 § 1 of the Convention about the failure of the Crown to disclose information regarding L.C. and about the confiscation order. He also complains that his sentence was disproportionate.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION REGARDING THE CONFISCATION ORDER

Article 6 § 1 of the Convention provides:

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

A. General principles

The Court has previously held that the making of a confiscation order under the Drug Trafficking Act 1994 was analogous to a sentencing procedure. Article 6 § 1, which applies throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed, was therefore applicable (see *Phillips v. the United Kingdom*, no. 41087/98, § 39, ECHR 2001-VII; and *Grayson and Barnham v. the United Kingdom*, nos. 19955/05 and 15085/06, § 37, 23 September 2008). The provisions relating to confiscation orders in the 2002 Act merely update and consolidate the previous legislation. Accordingly, Article 6 § 1 under its criminal head applies to the confiscation proceedings in the present case.

Although it is clear from the Court's case law that Article 6 § 2 is not applicable to such proceedings (as the protection offered by that Article ceases once an accused has been proved guilty of an offence), the presumption of innocence is inherent in the notion of a fair trial guaranteed by Article 6 § 1 (*Phillips*, cited above, §§ 35 to 36).

The presumption of innocence and the notion of a fair trial require that the burden of proof must generally fall on the prosecution in criminal proceedings (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77, Series A no. 146). However, once discharged it may be transferred to the accused when he is seeking to establish a defence (see *Lingens and Leitgeb v. Austria*, no. 8803/79, Commission decision of 11 December 1981, Decisions and Reports 26, p. 171). In *Phillips*, the Court emphasised that the right to the presumption of innocence is not absolute, since presumptions of fact or of law operate in every criminal law system (cited above, § 40). Accordingly, the Convention does not prohibit presumptions of fact or law that may operate against an accused, but any such presumptions must be confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A). The Court's review of the application of presumptions is limited to determining whether the way in which they were applied in the particular

proceedings offended the basic principles of a fair procedure inherent in Article 6 § 1 (*Phillips*, cited above, § 41; and *Grayson and Barnham*, cited above, § 42). As a general rule, it is for domestic courts to assess the evidence before them and it is not within the province of the Court to substitute its own assessment of the facts for that of the domestic courts. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (*Edwards v. the United Kingdom*, judgment of 6 December 1992, Series A no. 247-B, § 34; and *Grayson and Barnham*, cited above, § 42).

B. Application of the general principles in the present case

The 2002 Act sets out the two stages of the confiscation procedure. In the first stage, the court is required to consider whether the defendant has benefited from his criminal conduct and, if so, what the extent of that benefit was. Section 76(4) provides that a person benefits from conduct if he obtains property as a result of that conduct. Section 76(7) provides that the benefit is the value of the property obtained. In the second stage, the court assesses the amount of the recoverable benefit and makes a confiscation order in that amount. Section 7 provides that the recoverable amount is the amount of the benefit, unless the defendant demonstrates that the available amount is less than the benefit.

The confiscation proceedings took place following the applicant's conviction for robbery. It was not disputed that jewellery with a value of GBP 580,112 was stolen. It was therefore clear that the applicant had benefited from his criminal conduct. As his starting point, the judge took the benefit to be GBP 602,812, which reflected the full amount of the stolen jewellery, adjusted to take account of later changes in the value of money as required by section 80(2)(a) of the 2002 Act. The Court considers that it was not inappropriate, in light of the applicant's conviction and once the value of the jewellery had been established, for the burden to pass to the applicant to demonstrate, on a balance of probabilities, that the proceeds of the robbery had been apportioned and that his benefit was therefore less than the full value of the jewellery. Such information fell within the applicant's particular knowledge and the burden on him would not have been difficult to meet (see, *mutatis mutandis*, *Grayson and Barnham*, cited above, § 49). However, the applicant did not provide evidence to support his counsel's submissions for apportionment. Instead, he chose to continue to deny his participation in the robbery. Accordingly, he declined to be drawn as to the identities of the other two men involved or what had happened to the proceeds of the robbery.

The second stage of the procedure involved the calculation of the recoverable amount. Here, the legislation stipulated that the recoverable amount was equal to the defendant's benefit, unless he showed that the

available amount was less than the benefit. Again, the Court is satisfied that it was not unduly burdensome on the applicant to demonstrate, once the amount of the benefit had been assessed, that his assets were insufficient to meet a compensation order made out for that sum (see, *mutatis mutandis*, *Grayson and Barnham*, cited above, § 49). In order to support his case, it was open to the applicant to give evidence as to how he had disposed of the jewellery and to provide full disclosure as to the assets that he held. However, the applicant did not even attempt to explain what happened to the proceeds of the robbery. Further, when questioned as to the source of funds for the deposit on his house, the applicant provided an unlikely explanation and failed to produce any evidence to support his claim. Accordingly, the judge concluded that the applicant had lied during the proceedings. As previously stated, it is not for the Court to substitute its own assessment of the evidence for that of the national courts.

The Court further observes that throughout the proceedings under the 2002 Act, the rights of the defence were protected by the safeguards built into the system. The assessment was carried out by a court with a judicial procedure including a public hearing and advance disclosure of the prosecution case (see also *Phillips*, cited above, § 43; and *Grayson and Barnham*, cited above, § 45). The applicant was represented by junior and leading counsel of his choice. He gave oral evidence at the hearing and had the opportunity to adduce documentary and oral evidence in order to support his counsel's submissions that the value of the benefit or the recoverable amount were less than the full value of the stolen jewellery.

In light of the above, the Court does not consider that it was incompatible with the concept of a fair trial under Article 6 to place the onus on the applicant, once he had been convicted of the robbery, to provide credible information as to the identities of other recipients and the destination of the proceeds of the robbery in order to support his counsel's submissions for a reduction in the value of the benefit under the applicable legislation. Nor was it incompatible with the notion of a fair hearing in criminal proceedings to place the onus on the applicant to give a plausible account of his current financial situation if he wished to argue that the recoverable amount was less than the full value of the benefit. The application of the relevant provisions of the 2002 Act, including the reversal of the burden of proof, was confined within reasonable limits given the importance of what was at stake for the applicant. The procedure was attended by procedural safeguards and the rights of the defence were fully respected. It follows that the provisions of the 2002 Act and the manner in which they were applied to the applicant did not violate his right to a fair trial.

The Court therefore finds the complaint under Article 6 § 1 of the Convention as regards the making of the confiscation order to be manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected under Article 35 § 4.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 AS REGARDS DISCLOSURE

The applicant also complained under Article 6 § 1 of the Convention about the failure of the Crown to disclose information regarding L.C..

The Court recalls that the right to an adversarial trial under Article 6 requires that the prosecution disclose to the defence all material evidence in their possession for or against the accused (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X).

In the present case, the applicant's complaint concerned material relating to ongoing investigations into his co-defendant's criminal activities. The Court considers that, in the circumstances of the applicant's trial, such material cannot be described as "material for or against the accused". As the prosecution pointed out before the Court of Appeal, the question of how to present the applicant's defence was a matter for the applicant and his counsel. While material relating to the co-defendant might arguably have been relevant to the applicant's defence had he pursued a "cut-throat" defence, i.e. a defence in which he sought to incriminate his co-defendant, this was not the case here. The applicant's defence was one of complete denial. Accordingly, the fact that L.C. may have committed further offences with people other than the applicant was irrelevant to the question of the applicant's guilt in respect of the Nuneaton robbery.

In conclusion, the failure to disclose such material did not adversely affect the fairness of the applicant's trial within the meaning of Article 6 § 1. It follows that the complaint regarding disclosure is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must therefore be rejected under Article 35 § 4.

III. ALLEGED VIOLATION AS REGARDS THE PROPORTIONALITY OF THE SENTENCE

The applicant complained that his sentence of 15 years was disproportionate. He does not rely on a specific article of the Convention.

The Court observes that the Court of Appeal refused leave to appeal against sentence on 6 April 2006. However, the applicant's application to the Court was only lodged on 2 February 2007, almost ten months later. The complaint was therefore lodged out of time. It must therefore be declared inadmissible for non-compliance with the six-month rule provided for in Article 35 § 1 of the Convention and must be rejected under Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President