CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41525/98
by Paul ROCK
against Ireland

The European Court of Human Rights (Fourth Section), sitting on 11 May 2000 as a Chamber composed of

Mr G. RESS, *President*,
Mr A. PASTOR RIDRUEJO,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 12 May 1998 and registered on 8 June 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

Commented [Note1]: Judges names are to be followed by a **COMMA** and a **MANUAL LINE BREAK** (Shift+Enter). When inserting names via *AltS* please remove the substitute judge's name, if necessary, and the extra paragraph return(s). (There is to be no extra space between the judges' names and that of the Section Registrar.)

THE FACTS

The applicant is an Irish citizen, born in 1968 living in Dublin. He is represented before the Court by Ferry's, Solicitors, Dublin.

A. Particular circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows. On 4 May 1994, and following the receipt by the police of anonymous information, the applicant was arrested by police detectives in the toilet of a hotel in possession of a plastic carrier bag containing a substantial quantity of forged dollars. The High Court later recorded the prosecution case against the applicant as follows:

> "In or about the afternoon of 4 May 1994 the applicant was arrested in a cubicle in the public toilet of <a hotel>. The door had been forced open. The prosecution alleges that on the floor between the legs of the accused was a bag marked "Aer Rianta Duty Free at Shannon". Inside the bag was a quantity of notes which appeared to be US dollars. The prosecution intends to call evidence from a member of the United States Secret Service Treasury Department that the dollars are forged.
>
> The applicant was conveyed to <a police> station where he was detained under Section 4 of the Criminal Justice Act 1984. The applicant was taken to an interview room by <two detectives>. In the course of the interview <Detective R> alleges that he explained sections 18 and 19 of the Criminal Justice Act 1984 to the applicant. The applicant gave his name and address in response to questions and in one instance replied <with the name of his girlfriend>.
>
> At 10.05pm the applicant was again taken to the interview room. Present were <two detectives>. Detective R alleges that he produced a copy of <a police manual> and read sections 18 and 19 of the Criminal Justice Act 1984 to the applicant and that he explained the meaning of the sections in ordinary language. He also made certain statements to the accused as to the meaning in law in regard to the sections. The applicant declined to reply to questions put to him during the interrogation."

The applicant does not dispute in his application to the Court that when he was arrested by the detectives, he was in a cubicle in the toilets of the hotel with the plastic carrier above-described bag between his legs. He does not dispute that, when he was asked what was inside the bag, he replied "What bag?" or that the plastic bag contained forged dollars. He accepts that he was cautioned on arrest as follows:

> "You are not obliged to say anything unless you wish to do so but anything you do say will be taken down in writing and may be given in evidence."

He also accepts that he responded a second time "What bag?" when asked about the bag. He also accepts that after one hour in the police station he was brought to an interview room and again cautioned in the above terms and that when he was again asked about the bag he replied giving his name and address only. The applicant does not dispute that he was interviewed a second time, given a copy of the police manual, that the detective in question read sections 18 and 19 to him and explained the meaning of those sections in ordinary language. He confirms that he did not proffer any explanation to the detectives.

When the period of the applicant's detention expired the applicant was arrested for an offence under section 8 of the Forgery Act 1913 and he was brought before the District Court where evidence was given of arrest, charge and caution. He pleaded not guilty and he was remanded on bail from time to time until he was returned for trial to the Dublin Circuit

Criminal Court. His trial was subsequently adjourned pending his constitutional challenge to sections 18 and 19 of the Criminal Justice Act 1984.

In its judgment of 10 November 1995, the High Court quoted, with approval, the judgment of the High Court in the case of Heaney v. Ireland ([1994] 3 IR 593) and considered that the constitutional right to remain silent could be diluted in certain circumstances. The constitutional validity of any such reduction in protection would depend on whether it was considered proportionate given the competing public and individual interests involved. Applying that test, the High Court found that the sections were not an excessive intrusion on the rights of an accused and were therefore not unconstitutional.

The applicant appealed to the Supreme Court. That court considered that the above-cited case of Heaney v. Ireland did not automatically dispose of the issues in the case. Having analysed the provisions of section 18 (which operated in the same manner as section 19), the Supreme Court pointed out that the courts were not obliged to draw negative inference but could draw such inferences as appeared proper. It was a matter for the court, or the jury subject to the court's directions, to decide whether any such inferences would be drawn. In so deciding, the court was obliged to act in accordance with the principles of constitutional justice and was under a constitutional obligation to ensure that no improper or unfair inferences were drawn or permitted to be drawn from such failure or refusal.

Moreover, it was clear from the provisions of the section 18 that it did not interfere in any way with the accused person's right to be presumed innocent or with the obligation on the prosecution to establish guilt beyond all reasonable doubt. The burden of proof on the prosecution in a criminal charge was not in any way affected by the provisions of the relevant sections, which merely provided a factor which might be adduced as evidence in the course of the trial. Furthermore, if such inferences were properly drawn, they amounted to evidence only and were not taken as proof. A person could not be convicted solely on the basis of such inferences, the inferences being corroborative of other evidence in relation to which the failure or refusal is material.

As regards the right to remain silent, in particular, the Supreme Court noted that the State was constitutionally obliged to protect its citizens from attacks on their person or property but was obliged to have due regard for the constitutional rights of accused persons. The question was whether the restrictions which the relevant sections placed on the right to silence were any greater than was necessary to enable the State to fulfil its constitutional obligations, the court noting that the "principle of proportionality" was a well established tenet of Irish law. The court considered that sections 18 and 19 of the 1984 Act sought to achieve that balance. It was not the court's role to decide whether a perfect balance had been reached but merely to decide whether the legislature had acted within the range of what was permissible. The court found that the legislature had done so, considering two factors limiting sections 18 and 19 important; an inference could not form the basis of a conviction in the absence of other evidence and an adverse inference could only be drawn where the court deemed if proper to do so. An example of where it would be improper would be where the prejudicial effect of an inference would wholly outweigh its probative value as evidence.

On 20 October 1998 the applicant's case came on for trial in the Dublin Circuit Criminal Court. The applicant pleaded guilty and he was given a five-year suspended sentence on condition that he enter a bond of good behaviour for three years. The applicant entered the bond.

B. Relevant domestic law and practice

Section 18 of the 1984 Act, in so far as relevant, reads as follows:

"(1) Where

(a) a person is arrested without warrant by a member of the <police>, and there is;

(i) on his person, or,

(ii) in or on his clothing or footwear, or

(iii) otherwise in his possession, or

(iv) in any place in which he is at the time of his arrest

any object, substance or mark, or there is any mark on any such object, and the member reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of the offence in respect of which he was arrested, and

(b) The member informs the person arrested that he so believes, and requests him to account for the presence of the object, the substance or mark, and

(c) The person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such refusal or failure.

(2) References in subsection (1) to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of evidence to be given by a witness at the trial.

(3) Subsection (1) shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon.

(4) Subsection (1) shall not have effect unless the accused was told in ordinary language by the member of the <police> when making the request mentioned in subsection (1)(b) what the effect of the failure or refusal might be.

(5) Nothing in this section shall be taken to preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section. …"

Section 19 relates to the presence of an accused at a particular place and is similar in its effect to section 18. It reads, in so far as relevant, as follows:

(1) Where

(a) a person arrested without warrant by a member of the <police> was found by him at a particular place on or about the time the offence in respect of which he was arrested is alleged to have been committed, and

(b) the member reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence, and

(c) the member informs the person arrested that he so believes, and requests him to account for such presence, and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such refusal or failure.

(2) References in subsection (1) to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of evidence to be given by a witness at the trial.

(3) Subsection (1) shall not have effect unless the accused was told in ordinary language by the member of the <police> when making the request mentioned in subsection (1)(c) what the effect of the failure or refusal might be.

(4) Nothing in this section shall be taken to preclude the drawing of any inference from a failure or refusal to account for his presence which could properly be drawn apart from this section. …"

COMPLAINT

The applicant complains that sections 18 and 19 of the Criminal Justice Act 1984 are incompatible with the rights against self-incrimination, to silence and to be presumed innocent guaranteed by Article 6 §§ 1 and 2 of the Convention.

THE LAW

The applicant complains that sections 18 and 19 of the Criminal Justice Act 1984 violate his right not to incriminate himself, his right to remain silent and his right to be presumed innocent, all of which rights are guaranteed by Article 6 §§ 1 and 2 of the Convention. Article 6 §§ 1 and 2, in so far as relevant, read as follows:

"1. In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law. …

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The applicant points out, in the first place, that there were three elements of the alleged offence to be proven by the prosecution - that the notes were forged, that they were in the applicant's possession and that the applicant knew them to be forged. While there was direct evidence of the first two elements, the prosecution would be relying on inferences being drawn from his silence in order to constitute the third element of the offence.

Commented [Note2]: In your reasoning specify: Complaint / Article of the Convention [/ Succinct summary of Government's submissions / Succinct summary of applicant's submissions in communicated case] / Court's [Commission's] case-law, if any / Application of case-law to facts of particular case or considerations for specific facts of case.

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The applicant relies on the principles outlined in the Saunders judgment (Saunders v. the United Kingdom judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, no. 24) but considers that the John Murray v. the United Kingdom judgment (of 8 February 1996, *Reports* 1996-I, no. 1) should be distinguished from his case for four main reasons. In the first place, the Criminal Evidence (Northern Ireland) Order 1988 at issue in the John Murray case required, as confirmed in the case of R. v. K.S. Murray (1993 97 Cr. App. R. 151), that the prosecution adduce a *prima facie* case prior to any inference being drawn. The applicant argues that under Irish law the judge (or jury directed by the judge) is entitled to draw inferences, albeit limited to such inferences that are "proper", in deciding whether a case has been made out at the committal or return for trial stage. Secondly, the Court was influenced by the fact that the person having the task of with drawing proper inferences were "experienced judges" whereas in his case the responsibility would have rested with a jury the members of which, despite direction by a judge, have no training, expertise or appreciation of the finer points of law. Thirdly, the Court in the John Murray case was influenced by the fact that there was a "formidable" case against the accused independent of the inference. In the applicant's case, the prosecution would have had to rely on an inference from his silence to establish the third constitutive element of the offence. Fourthly, judges explain their reasons for drawing inferences views whereas juries do not. The effectiveness of any appeal is therefore reduced in the latter context.

The Court recalls that the it cannot examine *in abstracto* the compatibility of national law with the Convention (no. 17187/90, Dec. 8.9.1993, D.R. 75, p. 57). In particular, it is not the Court's role to examine whether, in general, the drawing of inferences under domestic legislation is compatible with the notion of a fair hearing under Article 6 (the above-cited John Murray judgment, at p. 49, § 44). In the present case, there is no evidence that any negative inferences were drawn from the applicant's silence when the case was committed for trial (see sections 18(1) and 19(1)), and the Court notes that neither the High Court nor the Supreme Court referred to any such inferences having been drawn at that stage. The applicant did not argue at the committal stage that there was no case to answer (see again section 18(1) and 19(1)). The applicant then pleaded guilty as charged and, as a result, sections 18 and 19 of the 1984 Act did not subsequently come into play at all in the determination of his guilt or innocence. Moreover, the applicant cannot argue that negative inferences would have automatically been later drawn from his silence had he not pleaded guilty. The impugned legislation provides, and the Supreme Court made it clear during the proceedings regarding the constitutionality of those sections, that the silence of an accused does not automatically lead to negative inferences being drawn, such inferences only being drawn when the court considers it proper in the circumstances to do so.

It is true that the imposition of the sentence constitutes as much an aspect of the determination of a criminal charge as the determination of guilt or innocence (see, for example, Findlay v. the United Kingdom judgment of 15 February 1997, *Reports* 1997-I, no. 30, p. 279, § 69). However, in the present case, the impugned provisions apply solely, and are relevant to, the examination and establishment of the guilt or innocence of an accused person. In addition, since there is no evidence that negative inferences were drawn at the committal stage and since there was no trial, it cannot be argued that inferences drawn affected the severity of the applicant's sentence.

In such circumstances, the Court finds that after having chosen to plead guilty the applicant can no longer claim to be a victim of the particular violations of the Convention alleged within the meaning of Article 34 of the Convention plea (see also no. 24520/94, Caraher v. the United Kingdom, Dec. 11.1.2000, as yet unpublished).

This application must therefore be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Georg Ress
President