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

FOURTH SECTION

CASE OF BECKLES v. THE UNITED KINGDOM

(Application no. 44652/98)

JUDGMENT

STRASBOURG

8 October 2002

FINAL

08/01/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Beckles v. the United Kingdom,

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

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mrs E. PALM,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 17 September 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44652/98) 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 United Kingdom national, Mr Keith Anderson Beckles ("the applicant"), on 4 November 1998.

2. The applicant, who had been granted legal aid, was represented before the Court by Hickman & Rose, Solicitors, London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.

3. The applicant, relying on Article 6 of the Convention, alleged that he had been denied a fair hearing since the judge at his trial misdirected the jury on the issue of the exercise by him of his right to silence during police interview.

4. The application was originally allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court), which declared it admissible on 28 August 2001.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). The application was allocated to the Fourth Section of the Court. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 3 January 1997 the applicant and a co-defendant, M., were convicted of the robbery, false imprisonment and attempted murder of Mr Mohamed Mohamoud. The applicant was sentenced to fifteen years' imprisonment. A third co-defendant, W., was convicted of robbery and false imprisonment.

8. According to the prosecution's case, on 3 January 1996 Mr Mohamoud, who had spent some of the day selling Khat (a stimulant leaf), picked up W., a prostitute, and arranged to go to her home for sex. W. lived in a fourth-floor council flat which was also occupied by M. When they arrived there were three men, a woman and two teenagers in the flat. Mr Mohamoud was held by the applicant and searched at knife-point by M. who took thirty to forty pounds in cash from him and then left to buy drugs. M. later returned with a quantity of crack cocaine which the occupants of the flat, but not Mr Mohamoud, smoked.

9. Mr Mohamoud was then searched a second time by the applicant and W. and a further sum of money was taken from him. He was prevented all this time from leaving the flat by the applicant.

10. At some stage M.'s mood changed under the effects of the drugs and he became angry. M., together with the applicant and an unidentified woman, lifted Mr Mohamoud up and threw him out of the window. He fell four floors. He survived, although he was left paralysed from the waist down. The occupants of the flat made no attempt to call an ambulance. He managed to attract attention by throwing stones at the window of a ground-floor flat. An ambulance eventually arrived to take him to hospital.

11. M. was arrested on 13 January 1996, the applicant on 24 January and W. on 26 January.

12. The applicant was cautioned by the police in the following terms:

> "You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence."

13. The applicant then told the police:

> "I'm relieved. I've expected this every time I've been to the shops."

14. When being taken to the police station he further stated:

> "He wasn't pushed. He jumped. How is he?" and "I can tell you everything, he jumped."

15. The applicant was advised to wait until he was interviewed at the police station.

16. At the start of the interview on 24 January 1996 the applicant's solicitor informed the police that he had had a lengthy private conversation with his client and had advised him not to reply to any questions at the present time. His reasons were based on what he had been told about the allegations and his view that it would not be reasonable for the applicant to answer questions at that stage. He informed the police that the applicant would be willing to take part in an identification procedure.

17. The applicant was reminded by the police that he was under caution and he confirmed that he understood the implications of the caution. Thereafter, the applicant answered "no comment" to each question and in particular did so when asked whether he was present at the flat at the time of the offences, whether he knew Mr Mohamoud, whether the latter was thrown out of the window and whether he would like to offer any account of the events in question. The applicant points out that the police never put to him his remark "He wasn't pushed-he jumped" (see paragraph 14 above). The applicant submits that this statement was at the core of his defence and should have been referred to during interview.

18. At the end of the interview the applicant was reminded of the terms of the caution.

19. On 31 May 1996 Mr Mohamoud identified the applicant and the other co-accused in a videotape identification procedure conducted at the hospital where he was being treated.

20. On 17 September 1996 the applicant was again interviewed by the police in the presence of his solicitor and under caution. On that occasion he admitted being in the occasional presence of Mr Mohamoud at the flat and being in the flat on the night of 3-4 January 1996. The applicant denied being in the room when Mr Mohamoud fell from the window and repeated that Mr Mohamoud had not been pushed out. He stated that Mr Mohamoud had not been threatened and that "he was sitting there quite happy". The applicant declared that he had been told by W. that Mr Mohamoud had "gone out the window". He had not believed this and looked out to check. He saw Mr Mohamoud lying on the ground below. He did not go to help him because he was "scared" and thought he was dead. The applicant admitted that on the day(s) in question he was the only person in the flat who fitted the very distinctive features in the description given by Mr Mohamoud of his attackers.

21. At his trial the applicant testified that he had seen Mr Mohamoud drinking beer in the flat and spoke to him briefly on one occasion. He learnt of the incident from W. who informed him that "he's gone out of the window". The applicant thought she was joking. He went into the living room, looked out of the window and saw Mr Mohamoud lying on the ground below. W. then told him that Mr Mohamoud had jumped out of the window. He watched the police and ambulance arrive from a neighbouring flat.

22. When asked during his evidence why he had not answered some or all of the questions put to him during the police interview the applicant replied that he had done so on the advice of his solicitor.

23. During the course of the applicant's evidence, and without seeking the views of the applicant's counsel in the absence of the jury, the trial judge asked the applicant if he was prepared to testify as to what he had told his solicitor prior to the first interview during the lengthy consultation. His counsel stated that since the question had been asked in the presence of the jury he would not object to the question being put to the applicant. The applicant then stated that he too had no objection to answering the question. The matter was not thereafter pursued by the prosecution or the trial judge.

24. In his summing up to the jury the trial judge, with reference to section 34 of the Criminal Justice and Public Order Act 1994, directed the jury in the following terms:

> "... you may draw such inferences as seem to you to be fair and proper from that failure of [his] to mention [the points identified in his interview relating to his presence in the flat on that evening]. You could, for instance, infer that the [applicant and W.] have fabricated their evidence, made it up, after those first interviews. You could infer that they were indeed biding their time and seeing whether or not they would be identified. That failure to mention the sort of things or give answers to the sort of questions that I have listed, as [the applicant] failed, cannot of itself prove guilt. So, of course, if you were not sure of [Mr Mohamoud's] identifications of any of these defendants, that would be the end of the case even if you thought they were behaving in the way I have just described over their first interviews. But although they cannot of themselves, those failures, prove guilt, you may hold that failure against them in deciding whether he is guilty. You don't have to. It is for you to decide.
>
> [The applicant] told you that his reason for not answering some of the questions was that he had received advice from his solicitor that he should make no comment ... Of course, we have – you have – no independent evidence of what was said by the solicitor, but if simply saying 'Oh my solicitor advised me not to answer questions' was by itself a good and final answer, any competent solicitor and a defendant would have the power to strangle at birth any interview and that would make, you may think, a mockery of the Act of Parliament which allows a jury, if they think it is right and proper, to make an adverse inference and that could not have been Parliament's intention. The fact is that it is [the applicant's] choice ... whether or not to accept [his] solicitor's advice or not, and any solicitor worthy of his or her name should have included in the advice the various pros and cons of saying no comment and in particular should have included the possibility, even the probability, that his or her defence could be harmed if they failed to mention facts that they could so easily do and that if they did not mention them, why then an adverse inference could be drawn. But as I say, you have no independent evidence as to what the solicitor said or did not say.
>
> But whether or not the solicitors said that, the officers certainly did. They [administered the caution] more than once ... .

> So it is for each defendant ... to decide whether to answer or not. You decide what you make of the reasons given for not answering. If you thought that the reason given was a good one, then of course you could not hold it against them. If you thought that they were failing to answer certain awkward questions because, for example, they were keeping their powder dry, as it were, hoping against hope they would not be identified and the other reasons I mentioned a moment ago, or because they had not yet worked out what their defence was going to be, you could draw the inference that I have mentioned and, if you did, that might point towards guilt, but it is you who decide whether it is fair and proper to draw those adverse inferences."

25. At the request of the applicant's counsel the trial judge gave the following further direction to the jury:

> "When dealing with the [applicant's] first [interview] when [he] failed to answer questions. I did not specifically remind you, though you have heard it any number of times, that the defendants were cautioned that they do not have to say anything. That is of course the position, they do not have to say anything, but the inferences I suggested that you can draw nevertheless remain if you think they have not mentioned things that they could reasonably have been expected to mention and if you think it is fair to take the inferences of the sort I have mentioned, but there is that right to silence."

26. On 23 May 1997 the applicant was convicted of robbery, false imprisonment and attempted murder and sentenced to a total of fifteen years' imprisonment.

27. The applicant and his co-accused appealed against conviction to the Court of Appeal. The applicant relied, *inter alia*, on the ground that the trial judge misdirected the jury on the proper inferences to be drawn under section 34(2) of the Criminal Justice and Public Order Act 1994 from the exercise of his right of silence at the police interview.

28. On 7 May 1998 the Court of Appeal in a reserved judgment and following a hearing dismissed the appeal. Lord Justice Henry stated in his judgment, with reference to section 34 of the Criminal Justice and Public Order Act 1994, that it could not have been the intention of Parliament to provide that the only adverse inference that could be drawn from failure to disclose facts was recent fabrication. He quoted with approval the judgment of Lord Justice Rose in the case of *R. v Roble* (judgment of 21 January 1997, unreported).

> "The purpose of the statutory provisions is to permit adverse inferences to be drawn where there has been late fabrication, to this extent, to encourage speedy disclosure of a genuine defence. If a defendant disclosed to his solicitor, prior to a police interview, charging or trial, information capable of giving rise to a defence, it will always be open to the defence to lead evidence of this to rebut any inference of subsequent fabrication. But if such evidence was not disclosed or was not disclosed at a late stage in the sequence of interview, charge and trial, adverse inferences can be drawn by the jury."

29. Lord Justice Henry added:

> "Thus the statutory objective designed to discourage surprise and "trial by ambush" is achieved. If the applicant was right in submitting that the only adverse inference

that could be drawn was subsequent fabrication, the only purpose of the legislation (to encourage speedy disclosure of genuine defences) would be easily defeated. But in our judgment that is not the case...

The complaint made ... is that under the Act a 'proper inference' is one relevant to 'in determining whether the accused is guilty', and not simply adverse to a Defendant. We agree with the first proposition contained in that sentence, but not with the second. As section 34(2)(d) [of the 1994 Act] makes clear, the jury may make such inferences as they think proper in their task of considering their verdict. Clearly such inferences must be properly drawn, that is to say drawn from facts relevant to the verdict. The inferences that are complained of are not simply 'adverse'... When it is proper to take them into account the Judge rightly reminded the jury that they could draw the adverse inference that [the applicant] was biding his time and seeing whether or not he would be identified, and it was for the jury to decide whether or not 'to hold that failure against [him] in deciding whether [he was] guilty'."

30. With respect to the applicant's argument that the trial judge should not have intervened to request the applicant whether he wished to relate what he had said to his solicitor before the first police interview, Lord Justice Henry considered that this intervention was improper and an invitation to the applicant to waive legal professional privilege. However he concluded that, in the circumstances, the applicant had not been prejudiced as a result of the intervention.

31. On 2 June 1998 the Court of Appeal refused to certify that that the case raised a point of public importance and refused leave to appeal to the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Criminal Justice and Public Order Act 1994

32. 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; or

(b) ... 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 ...

(c) the court, in determining whether there is a case to answer; and

(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."

33. Section 35 (2) and (3) provides:

"(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question."

34. Section 38 (3) adds 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)..."

35. Guidance as to the direction which the judge should give the jury in respect of section 35 of the Criminal Justice and Public Order Act 1994 are provided by the Judicial Studies Board specimen directions and by the *dicta* of Lord Taylor CJ in R. v. Cowan ([1996] 1 Criminal Appeal Reports 1). The relevance of these *dicta* to directions under section 34 of the same Act was confirmed by the Court of Appeal in R. v. Condron ([1997] 1 Criminal Appeal Reports 185).

36. The Judicial Studies Board guideline direction at the time of the Court of Appeal's consideration of the applicant's appeal provided that:

"If he failed to mention [a fact] ... when he was questioned, decide whether in the circumstances which existed at the time, it was a fact which he could reasonably have been expected then to mention.

The law is that you may draw such inferences as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention such a fact at that time cannot, on its own, prove guilt, but depending on the circumstances, you may hold that failure against him when deciding whether he is guilty, that is, take into account as some additional support for the prosecution's case. It is for you to decide whether it is fair to do so."

37. The *dicta* of Lord Taylor CJ are as follows:

"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 that 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."

38. The specimen direction for section 34, up-dated in May 1999 in the light of the judgments of the Court of Appeal in cases such as R. v. Argent ([1997] Criminal Appeal Reports 27), provided:

"[When arrested, and at the beginning of each interview] this defendant was cautioned, he was told that he need not say anything, but that it may harm his defence if he did not mention something when questioned which he later relied on in court. Anything he did say may be given in evidence.

The defendant as part of his defence has relied upon [...] (*here specify precisely the fact(s) to which this direction applies*). But [the prosecution case is] [he admits] that he did not mention this [when he was questioned before being charged with the offence] [when he was charged with the offence] [when he was officially informed that he might be prosecuted for the offence].

The prosecution case is that in the circumstances, and having regard to the warning which he has been given, if this fact had been true, he could reasonably have been expected to mention it at that stage, and as he did not do so you may therefore conclude that [it has since been invented/tailored to fit the prosecution case/he believed that it would not then stand up to scrutiny].

If you are sure that he did fail to mention [...] when he was [charged] [questioned] [informed], it is for you decide whether in the circumstances it was something which he could reasonably have been expected to mention at that time. If it was, the law is that you may draw such inferences as appear proper from his failure to do so.

Failure to mention [...] cannot, on its own, prove guilt. But, if you are sure that quite regardless of this failure, there is a case for him to meet, it is something which you are entitled to take into account when deciding whether his evidence about this matter is true, i.e. you may take it into account as some additional support for the prosecution's case. You are not bound to do so. It is for you to decide whether it is fair to do so.

[There is evidence before you on the basis of which the defendant's advocate invites you not to hold it against him that he failed to mention this fact when he had the opportunity to do so. That evidence is [...]. If you think this amounts to a reason why you should not hold the defendant's failure against him, do not do so. On the other hand, if it does not in your judgment provide an adequate explanation, and you are sure that the real reason for his failure to mention this fact was that he then had no innocent explanation to offer in relation to this aspect of the case, you may hold it against him.]"

39. The most recent version of the specimen direction was published by the Judicial Studies Board in July 2001 and takes account of case-law developments in the interpretation of section 34. The new direction provides:

"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 - ...). 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. 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.

> 5. (Where legal advice to remain silent is relied upon, add the following instead of paragraph 4:) The defendant has given evidence that he did not answer questions on the advice of his solicitor/legal representative. If you accept the evidence that he was so advised, this is obviously an important consideration: but it does not automatically prevent you from drawing any conclusion from his silence. Bear in mind that a person given legal advice has the choice whether to accept or reject it; and that the defendant was warned that any failure to mention facts which he relied on at his trial might harm his defence. Take into account also (here set out the circumstances relevant to the particular case, which may include the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts on which he relied at the trial). Having done so, decide whether the defendant could reasonably have been expected to mention the facts on which he now relies. If, for example, you considered that he had or may have had an answer to give, but reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him. But if, for example, you were sure that the defendant had no answer, and merely latched onto the legal advice as a convenient shield behind which to hide, you would be entitled to draw a conclusion against him, subject to the direction I have given you (...)".

40. In R. v. Argent the Court of Appeal confirmed that legal advice is one circumstance to be taken into account by the jury. The Court of Appeal explained six conditions that had to be met before section 34 of the 1994 could allow inferences to be drawn. As regards the sixth condition, Lord Bingham CJ stated:

> "The sixth condition is that the appellant failed to mention a fact which in the circumstances existing at the time the accused could be 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."

41. In R. v. Roble ([1997] Criminal Law Reports 449) the Court of Appeal stressed the defendant's right to reveal to the jury not only the fact that he remained silent on legal advice but also his right to adduce evidence before the jury (by way of oral evidence from the defendant himself and / or the solicitor who gave the advice) about the contents of the advice, that is the reasons why he was so advised.

42. The approach in R. v. Roble was confirmed in the later cases of R. v. Daniel ([1998] 2 Criminal Appeal Reports 373), R. v. Bowden ([1999] 1 Weekly Law Reports 823), and R. v. Fitzgerald (judgment of 6 March 1998, unreported).

43. In R. v. McGarry ([1999] 1 Criminal Appeal Report 377) the Court of Appeal held that where a trial judge decides, as a matter of law, that no jury could properly conclude that the requirements of section 34 of the 1994 have been satisfied and, therefore, it is not open to the jury to draw an adverse inference under section 34(2), he must specifically direct the jury not to draw any inference. In R. v. Doldur ([2000 Crim L. R. 178]) the Court of Appeal (per Lord Justice Auld) stated:

> "Acceptance of the truth and accuracy of all or part of the prosecution evidence may or may not amount to sureness of guilt. Something more may be required, which may be provided by an adverse inference from silence if they think it proper to draw one. What is plain is that it is not for the jury to repeat the threshold test of the Judge in ruling whether there is a case to answer on the prosecution evidence if accepted by them. The direction approved in Cowan has a different object. It is to remind the jury that they cannot convict on adverse inferences alone. It is to remind them that they must have evidence, which, in the sense of section 34 inferences, may include defence evidence where called and which, when considered together with any such adverse inference as they think proper to draw, enables them to be sure both of the truth and accuracy of that evidence and, in consequence, guilt."

44. In the Government's submission in the case of *Condron v. the United Kingdom* (judgment of 2 May 2000, no. 35718/97, § 38, ECHR 2000-V), the case of R. v. Doldur is authority for the proposition that the jury must be satisfied that the prosecution have established a *prima facie* case of guilt before inferences may be drawn under section 34 of the 1994 Act.

45. In R. v. Birchall ([1999] Criminal Law Reports) Lord Bingham CJ stated, with reference to section 35 of the 1994 Act:

> "Inescapable logic demands that a jury should not start to consider whether they should draw inferences from a defendant's failure to give oral evidence at his trial until they have concluded that the Crown's case against him is sufficiently compelling to call for an answer by him. ... There is a clear risk of injustice if the requirements of logic and fairness are not observed (...)"

46. In R. v. Bowden ([1999] 2 Criminal Appeal Reports 176) the Court of Appeal confirmed that if a defendant seeks to rely on reasons given in the course of an interview by a solicitor for advising his client to remain silent this would constitute a waiver of privilege even if the solicitor was not called to give evidence at the trial.

47. In R. v. Betts and Hall ([2001] 2 Criminal Appeal Reports 257)], the Court of Appeal stated that the effect of the above-mentioned *Condron v. the United Kingdom* judgment was that it was not the quality of the decision to remain silent that matters but the genuineness of the decision. For the Court of Appeal, this was not a shield for a guilty person to hide behind. The adequacy of the explanation advanced may well be relevant as to whether or not the advice was the true reason for not mentioning the facts.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

48. The applicant maintained that he was denied a fair hearing on account of the manner in which the trial judge in his direction left the jury with the option of drawing an adverse inference from his silence during police questioning. He relied on Article 6 § 1 of the Convention, which provides in relevant part:

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

49. The Government disputed the applicant's assertion with reference to the principles laid down by the Court in its *Condron v. the United Kingdom* judgment of 2 May 2000 (no. 35718/97, ECHR 2000-V). In the Government's submission, the direction given by the trial judge was fully in line with the Court's requirements as stated in the *Condron* judgment, confining as it did the jury's discretion much more narrowly than was the case of the direction impugned in the *Condron* case. They argued that there was evidence before the police interview of the applicant's involvement in the incident such as to give rise to a case to answer. The Government noted in this connection that there was evidence from the applicant himself that he had been present during the events in question and that a description given by the victim of one of his assailants plainly fitted the applicant. Furthermore, the applicant's fingerprints were found on the frame of the window from which the victim fell. These and other incriminating matters were put to the applicant at the first interview and the evidence against him clearly called for an explanation. It was not unfair for the jury to be made aware both of the applicant's intimations at the time of his arrest and his later silence during police interview on 24 January 1996.

50. The Government further stressed that, over and above the terms of the direction, the other safeguards identified by the Court in its *Condron* judgment were present in the instant case. In particular, the applicant was cautioned repeatedly in clear terms and on each occasion confirmed that he understood the implications of remaining silent. He had the benefit of legal assistance at the police station. The burden of proof lay with the prosecution throughout the trial and the jury was reminded in substance that it could only draw an adverse inference if satisfied that the applicant's silence could only be sensibly attributed to him having no answer or none that would withstand scrutiny and that he later fabricated his defence after waiting to see how the evidence against him emerged. The jury was also told that if it was satisfied that the applicant's reason for not answering questions (receipt of legal advice) was a good one, it could not hold it against the applicant by

drawing an adverse inference. Furthermore, Mr Mohamoud's identification of the applicant constituted a compelling case against the applicant and no plausible explanation was advanced by the defence as to why Mr Mohamoud would have thrown himself out of the window of his own volition. There was also the evidence of W. who testified that the applicant had lied or invented his evidence.

51. As to the specific issue of the applicant's reliance on legal advice to explain his silence, the Government stated that the fact that the applicant was asked by the trial judge in the presence of the jury whether he was prepared to tell the court what he had said to his solicitor before the police interview did not undermine the fairness of the proceedings. They found support for this proposition in the above-mentioned *Condron* judgment and pointed out that the jury was in any event well aware that the applicant had spoken to his solicitor before the police interview and had been advised not to answer questions. They stressed, in addition, that the trial judge left it open to the jury to decline to draw any adverse inferences against the applicant because of the legal advice even though no evidence had been adduced by the applicant about the content of the advice. On this last point, the Government emphasised that the applicant could have explained in court the reasons for his solicitor's advice and why he had chosen to follow it. Alternatively, he could have called his solicitor to testify to these matters. The applicant's failure to pursue either course cannot engage the responsibility of the Government. The fault lay with the applicant's defence counsel.

52. The applicant asserted in reply that adverse inferences are only justified where silence can only sensibly be attributed to guilt or to the accused having no answer or none that would stand up to cross-examination. However, the jury in his case was permitted to hold his silence against him on the basis that it found his decision to do so unreasonable without necessarily also finding that it was only sensibly attributable to guilt. Indeed, the jury was effectively directed that it could draw adverse inferences if the applicant had stayed silent for innocent reasons.

53. Elaborating on this argument, the applicant contended that his remarks on arrest implied that he had an explanation for his conduct and that at the time of the first interview there was no evidence against him which clearly called for an answer. The applicant observed that at no stage during the police interview was he ever invited to comment on his pre-interview statement: "I can tell you everything-he jumped." (see paragraph 17 above). That statement lay at the heart of his defence. Had it been put to him during interview, it would have been capable of constituting a fact relied on in his defence in response to police questioning and may have prevented the drawing of an adverse inference at his trial. The applicant further stressed that interview questions cannot in themselves constitute evidence that call for an answer, otherwise the only requirement

for an inference to be fair and proper is that questions were asked but not answered. Given that he was presumed innocent at the time of the interview and that no burden lay on him to prove his innocence, he was entitled to await any prosecution evidence such as, for example, a positive identification, before admitting his presence at the scene. In these circumstances he had been properly advised by his solicitor not to answer the questions put to him by the police at the first interview.

54. The applicant disputed the Government's view that the terms of the trial judge's direction confined the jury's discretion within the limits set by the Court's *Condron* judgment. The applicant reiterated that the trial judge failed to direct the jury that it could only draw an adverse inference if it was satisfied that the sole explanation for his silence was that he was guilty. The trial judge wrongly allowed the jury to draw an inference if it believed that the applicant held his silence because he was "keeping his powder dry."

55. The applicant further stressed that the trial judge failed in his direction to inform the jury that it should give sufficient weight to the fact that he had stayed silent under police questioning on the advice of his solicitor. He drew attention to the fact that his solicitor's advice appeared in the transcript of the police interview (see paragraph 16 above). It was therefore wrong for the trial judge to have told the jury that there was "no independent evidence" of what the solicitor had said. By informing the jury of this, the trial judge effectively withdrew the jury's consideration of whether the fact of legal advice was capable of preventing an adverse inference. In any event, the trial judge in effect directed the jury that the legal advice to remain silent was not "a good ... answer" (see paragraph 24 above). Moreover, the applicant had been willing at his trial to testify to the content of his solicitor's advice. However, the trial judge improperly raised the issue of waiver of privilege in the presence of jury, put pressure on the applicant to waive privilege and then denied him the opportunity to relate to the jury what his solicitor had told him at the police station (see paragraph 23 above).

56. The applicant further contended that the evidence against him was not compelling, as the Government claimed. For example, there was a number of inconsistencies in Mr Mohamoud's identification and other evidence relied on by the prosecution. It was the applicant's case that the latter, fearing violence, may have panicked and tried to escape through the window without realising the height and there was no expert evidence that Mr Mohamoud would have left fingerprints on the window frame if he had jumped. The absence of prints did not mean that a surface had not been touched.

57. The Court recalls that in its above-cited *Condron* judgment (§§ 56-57) it confirmed in line with its earlier John Murray v. the United Kingdom judgment (*Reports of Judgments and Decisions* 1996-I) that the right to silence is not an absolute right. Accordingly, the fact that a trial judge leaves

a jury with the option of drawing an adverse inference from an accused's silence either, as in the instant case, during police interview or during his trial cannot of itself be considered incompatible with the requirements of a fair trial.

58. The Court further stressed in its *Condron* judgment that since the right to silence, like the privilege against self-incrimination, lay at the heart of the notion of a fair procedure under Article 6, particular caution was required before a domestic court could invoke an accused's silence against him. Thus 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 or to give evidence himself. Nevertheless, 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 (ibid.).

59. For the Court, 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 (ibid.). Of particular relevance are the terms of the trial judge's direction to the jury on the issue of adverse inferences.

60. The Court observes at the outset that the applicant held his silence at the police interview on 24 January 1996 following the administration of a caution. The terms of that caution, which were repeated during the interview, were clear as to his legal rights and the applicant has not disputed that he understood their meaning, in particular the possible implications of refusing to answer the questions put to him. He was under no compulsion to speak and he could not be exposed to any criminal penalty for holding his silence. Moreover, the applicant's solicitor was present during the interview to advise him on what served his interests best at that stage of the investigation, namely silence or co-operation. The applicant chose to remain silent on the advice of his solicitor, advice which the solicitor related to the police and which was entered on the record of the interview (see paragraph 16 above). The Court would also note at this stage that the matters put to the applicant during interview were incriminating and clearly called for an explanation. It would further observe that the applicant, prior to receiving legal advice, had shown his readiness to account for his presence in the flat at the time of the incident, but was told by the police not to say anything at that juncture (see paragraph 15 above).

61. At his trial the applicant explained to the jury that he did not respond to police questioning since he had been advised not to do so. The applicant was prepared to elaborate on this reason and to testify to the content of his solicitor's advice at the police station. However, and this has not been

explained, neither the applicant's counsel nor the prosecution pursued the applicant's willingness to waive legal professional privilege and to have confirmed his explanation for his silence. The Government consider that the fault lay with the defence.

62. However, the fact remains that the trial judge emphasised to the jury on two occasions in the course of his direction that there was "no independent evidence" of what the solicitor said at the police station (see paragraph 24 above) without any reference to the fact that the applicant had been prepared to provide details of the exchanges which he had with his solicitor at the police station and that he had manifested his willingness to co-operate with the police on the way to the police station. It must be further observed that it was the trial judge who had first enquired of the applicant whether he was willing to reveal the content of his discussions with his solicitor. It cannot be overlooked either that the solicitor's advice appeared in the record of the police interview (see paragraph 16 above) and was entirely consistent with the applicant's own explanation for his silence. Moreover, the applicant remained steadfast at the trial as regards his initial, pre-interview explanation as to why Mr Mohamoud fell from the window. He did not seek at any stage to rely on new facts or circumstances which he might have been expected to reveal had he chosen to co-operate with the police at the interview in defiance of his solicitor's advice (c.f. *Kavanagh v. the United Kingdom*, application no. 39389/98, inadmissibility decision, 28.08.2001).

For the Court, these are all matters which go to the plausibility of the applicant's explanation and which, as a matter of fairness, should have been built into the direction in order to allow the jury to consider fully whether the applicant's reason for his silence was a genuine one, or whether, on the contrary, his silence was in effect consistent only with guilt and his reliance on legal advice to stay silent merely a convenient self-serving excuse.

63. It is true that the trial judge put the applicant's explanation for the applicant's silence to the jury and informed the jury "If you thought that the reason given was a good one, then of course you could not hold it against [the applicant]". It is also true that the judge's statement was made in the context of his general warnings to the jury that the applicant's failure to reply to police questioning "cannot of itself prove guilt" and that it was for the jury to "decide whether it was fair and proper to draw those inferences" and that "there is that right to silence."

64. Nevertheless, the Court considers that the trial judge failed to give appropriate weight in his direction to the applicant's explanation for his silence at the police interview and left the jury at liberty to draw an adverse inference from the applicant's silence notwithstanding that it may have been satisfied as to the plausibility of the explanation given by him (c.f. the above-mentioned *Condron* judgment, § 61). Quite apart from the fact that the trial judge had undermined the value of the applicant's explanation by

referring to the lack of independent evidence as to what was said by the solicitor and by omitting to mention that the applicant was willing to give his version of the incident to the police before he spoke to his solicitor, it is also to be noted that he invited the jury to reflect on whether the applicant's reason for his silence was "a good one" without also emphasising that it must be consistent only with guilt.

In the Court's opinion, the jury should have been reminded of all of the relevant background considerations referred to above and directed that if it was satisfied that the applicant's silence at the police interview could not sensibly be attributed to his having no answer or none that would be stand up to police questioning it should not draw an adverse inference (c.f. § 61 of the above-mentioned *Condron* judgment). It notes in this connection that the case-law of the domestic courts in this area has steadily evolved and that the Court of Appeal in R. v. Betts and Hall has recently noted the importance of giving due weight to an accused's reliance on legal advice to explain his failure to respond to police questioning (see paragraph 47 above). The current specimen direction for section 34 also provides guidance on how this issue should be addressed (see paragraph 39 above).

65. Having regard to the fact that it is impossible to ascertain the weight, if any, given by the jury to the applicant' silence, it was crucial that the jury was properly directed on this matter. It finds that in the instant case the jury's discretion on this question was not confined in a manner which was compatible with the exercise by the applicant of his right to silence at the police station.

66. For the above reason, the Court finds that there has been a breach of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

68. The applicant claimed compensation for non-pecuniary damage in an amount to be determined by the Court on the basis of what it considered equitable in all the circumstances.

69. The Government stated that there was no justification for making an award.

70. The Court has found a violation of Article 6 of the Convention. It considers that that finding constitutes in itself sufficient just satisfaction in this case.

B. Costs and expenses

71. The applicant claimed a total amount of 21,194.06 pounds sterling ("GBP") in respect of costs and expenses. This amount, which included value-added tax, comprised solicitors' costs (GBP 3,037.50) and the fees charged by a Queen's Counsel (GBP 11,456.25) and junior counsel (GBP 6,168.75). The applicant submitted detailed specifications of the various heads of claim including the type of work carried out on the case in the proceedings before the Court and the hourly rate charged.

72. The Government considered the amount claimed to be "manifestly excessive". In their view, it was unnecessary to instruct leading and junior counsel to work on the case, especially since one of them had extensive experience in dealing with the sort of complaint declared admissible by the Court. Furthermore, it was unreasonable to charge for almost eighty-four hours' work on the case. In their submission, the fees claimed by counsel would have been more appropriately fixed at two thirds of the hourly rates charged. The Government also questioned why it was necessary for the solicitor involved in the case to submit a claim for one hour's travelling time.

73. For the Government, a more reasonable figure for costs and expenses would be in the region of GBP 7,000 including value-added tax.

74. The Court, like the Government, questions the need to engage two counsel to work on the case. Whilst noting that the junior counsel became a Queen's Counsel before the close of the pleadings and only charged fees at the junior counsel rate, it nevertheless considers that the decision to instruct two counsel unnecessarily inflated costs.

75. Deciding on an equitable basis, and having regard to the sum which the applicant received by way of legal aid from the Council of Europe (4,100 French francs), the Court awards the sum of 19,000 euros ("EUR") to be converted into the national currency at the date of settlement.

C. Default interest

76. The rate of the default interest will be based on the marginal lending rate of the European Central Bank to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], application no. 28957, § 124, to be published in ECHR 2002-).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 19,000 (nineteen thousand euros) in respect of costs and expenses, plus any value-added tax that may be chargeable, to be converted into pounds sterling at the rate applicable at the date of settlement;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President