CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 67930/01
by Pierre BÄCKSTRÖM and Mattias ANDERSSON
against Sweden

The European Court of Human Rights (Second Section), sitting on 5 September 2006 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having regard to the above application lodged on 24 January 2001,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

Having regard to the partial decision of 22 March 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Pierre Bäckström and Mr Mattias Andersson, are Swedish nationals who were born in 1971 and 1972 respectively. They are presently serving prison sentences in Sweden. They were represented before the Court by Mr B. Schultz, a lawyer practising in Askersund. The Swedish

Government ("the Government") were represented by their Agent, Ms A. Linder, of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

By a bill of indictment (*stämningsansökan*) of 11 February 2000, the Public Prosecutor's Office in Örebro charged the applicants with a number of criminal offences, including several counts of theft and handling of stolen goods, violations of the Inflammable and Explosive Products Act (*Lagen om brandfarliga och explosiva varor*, 1988:868) and the Weapons Act (*Vapenlagen*, 1996:67) and, most importantly, attempted aggravated robbery and attempted murder. Describing the robbery offence, the prosecutor, *inter alia*, stated the following:

> "[The applicants] have ... on 25 November 1999 ... attempted with threats and physical violence to steal from a money transport vehicle operated by the security company Securitas on behalf of the Swedish Central Bank. ... The robbery was not successful but there was a risk of the crime being completed. ...
>
> The second applicant has forced his way into the driver's seat of the money transport vehicle and driven it ... to a secluded place on a smaller road about 2 kilometres away from [the place where it was halted]. The first applicant has driven the robbers' Saab to the same place. There the two perpetrators ... have forced open the outer door to the place where the valuables were stored. Then they have tried ... to gain access to the strong room of the vehicle but have ended the attempt before succeeding to complete the crime, as they believed that another vehicle was approaching and that there was a risk that they would be discovered. "

By a judgment of 17 April 2000, the District Court (*tingsrätten*) of Örebro convicted the applicants on all charges except car theft and attempted murder. With respect to the latter charge, however, the second applicant was instead convicted of aggravated assault, having shot at the money transport vehicle and wounded one of the security officers. The first applicant was sentenced to nine and a half years in prison and the second applicant to ten years' imprisonment. In regard to the charge of attempted aggravated robbery, the court reached the following conclusion:

> "To sum up, the District Court finds that it must be considered to be beyond every reasonable doubt that [the applicants] on the night between 24 and 25 November 1999 on E18/E20 ... began an attempt to rob the Securitas money transport vehicle... . The attempt thereafter continued on a smaller road ... by means of the applicants taking various measures to get access to the strong room of the vehicle. They ended the attempt, apparently because they got alarmed by lights from one or more cars, but there was a risk of the crime being completed. The crime is of an aggravated nature, mainly due to the fact that almost 10 million Swedish kronor [SEK] were stored in the vehicle and that firearms were used. ..."

Both the applicants and the public prosecutor appealed to the Göta Court of Appeal (*Göta hovrätt*).

The Court of Appeal heard the case on 30 and 31 May and on 5, 6, 7, 9, 13, 19 and 20 June 2000. Several witnesses gave evidence. On 19 June, when only the parties' closing statements remained, the president of the court invited the parties to consider whether the robbery charge could not be regarded as encompassing a charge of completed aggravated robbery. As a consequence, the public prosecutor, in his closing statement, adjusted the charge in question to concern, in the first place, aggravated robbery and, in the second place, attempted aggravated robbery. The description of the offence then read:

> "[The applicants] have ... on 25 November 1999 ... with threats and physical violence unlawfully taken, with the intention of appropriating it, a money transport vehicle containing in total SEK 9,905,000 in cash. The transport was operated by ... Securitas, on behalf of the Swedish Central Bank."

Counsel for the applicants objected that the adjustment was not permissible, as it introduced a new charge of intentional appropriation of the vehicle in question. Counsel for the second applicant stated that the charge of aggravated robbery could be considered as covered by the original indictment. Nevertheless, having regard to the factual circumstances, the applicants' actions could not be seen as constituting a completed aggravated robbery but only an attempt. Counsel for the first applicant maintained that the robbery offence had not been completed.

The Court of Appeal did not take a separate decision as to whether the public prosecutor's adjustment should be allowed. In its judgment of 4 July 2000, it stated that the applicants had objected to the adjusted description of the offence because it introduced an additional charge of theft of the vehicle. Finding that no such additional charge had been made but, instead, that the prosecutor, following the adjustment, had claimed that the robbery had been completed through the appropriation of the vehicle, the court decided to allow the adjustment.

On 4 July 2000 the Court of Appeal upheld the District Court's judgment, except that it found the applicants guilty of aggravated robbery and acquitted the first applicant of one charge of handling stolen goods and the second applicant of the charge of aggravated assault. In the latter respect, the court found that the use of violence was not a separate offence but had to be seen as an element of the robbery, leading to the latter being considered to be an aggravated offence. Finding that the robbery constituted a completed offence and not an attempt, the court stated the following:

> "Through the oral evidence combined with the telephone lists and other technical evidence, the Court of Appeal finds that it has been shown beyond reasonable doubt that [the applicants], in the manner claimed by the public prosecutor, have planned and prepared the robbery together and in mutual agreement, and that they have

> thereafter halted the money transport vehicle ... following which they have driven it to a secluded location two kilometres away from the place where it was halted.
>
> [The applicants] have not succeeded in getting access to the strong room of the vehicle and have therefore been forced to abandon the vehicle without getting hold of any part of its money contents. However, the very fact that [the applicants] have taken possession of the money transport vehicle with its money contents means that the robbery offence is completed, notwithstanding the fact that they thereafter have been unable to appropriate any of its load."

The Court of Appeal sentenced both applicants to eight years' imprisonment.

The applicants appealed to the Supreme Court (*Högsta domstolen*). The appeal included the same complaints as those made in the present application.

On 4 August 2000 the Supreme Court refused leave to appeal.

B. Relevant domestic law and practice

Domestic provisions of relevance to the present case are found in the Criminal Code (*Brottsbalken*) and the Code of Judicial Procedure (*Rättegångsbalken*).

A person who steals from another person by means of violence or by threat, implying or appearing to the threatened person to present an imminent danger, shall be sentenced for robbery to no less than one and no more than six years' imprisonment (chapter 8, section 5 of the Criminal Code). In order to convict a person of robbery, he or she must have unlawfully taken somebody's property with the intent to appropriate it. If the violence used endangers life or is very brutal, the crime is to be regarded as aggravated robbery, with a range of punishment from four to ten years' imprisonment (chapter 8, section 6).

If the commission of a crime has begun but is not brought to completion, the perpetrator is sentenced for an attempt to commit the crime if there was a danger that the crime would be completed or such danger was precluded only because of fortuitous circumstances, and provided that the act of attempt is criminalised by a specific provision (chapter 23, section 1). An attempt requires the same subjective condition as a completed crime, while some factual requisite may be missing on account of, for example, interference by the police. An attempt to commit robbery or aggravated robbery is punishable with terms of imprisonment corresponding to those applicable to a completed crime (chapter 8, section 12 and chapter 23, section 1).

A court's judgment may only relate to an act for which a prosecution has been properly instituted (chapter 30, section 3 of the Code of Judicial Procedure). A charge of criminal responsibility is conducted by the public prosecutor, who files with the court a bill of indictment against the person

or persons to be accused (chapter 45, section 1). The indictment must, *inter alia*, identify the criminal act and specify the time and place of its commission and the other circumstances required for its identification (chapter 45, section 4). These particulars of the offence provide the framework for the court's adjudication. The prosecutor should also state the applicable domestic law and the means of evidence invoked.

The particulars of the offence should include all the prerequisites of the act distinguishing it as criminal, that is, the actual facts as well as the subjective elements. The court must not judge on any other acts than those included in the particulars of the offence, or on any other extraneous elements. However, the court is not bound by the prosecutor's characterisation of the offence or reliance on a particular legal provision (chapter 30, section 3). It is for the court to know the law and apply the relevant provision to the act, as charged.

As a rule, once a prosecution has been instituted, it should not be altered. If the prosecutor wishes to prosecute another act, a new prosecution must be brought. However, the prosecutor may extend the prosecution against the same defendant to encompass another act if the court finds it appropriate, having regard to the investigation and other circumstances. In addition, the prosecutor may, with respect to the same act, without altering the indictment, adjust it by narrowing the action, or invoke a new circumstance or another legal provision in support of the prosecution (chapter 45, section 5).

Whether the prosecution is extended or merely adjusted depends on whether the new element amounts to a new act. The possibility to adjust the prosecution is closely connected to the principles of legal force, or *res judicata*. The criminal liability for those prerequisites which have already been determined in a judgment may not be taken up again for adjudication (chapter 30, section 9). Consequently, prerequisites which could be embraced by the legal force of a judgment may freely be added to the prosecution case, while prerequisites that could be prosecuted separately, even after the judgment, may not usually be added. However, the prosecutor may present another subjective requisite without being considered to have introduced a new act.

The court examining a case shall make certain that it is investigated appropriately and ensure that irrelevant matters are not presented. Through questions and observations, the court shall also attempt to remedy any unclear and incomplete statements which have been made (chapter 46, section 4 and chapter 51, section 17). Further, as the court is not bound by the prosecutor's characterisation of the offence or the legal provision on which reliance is placed, procedural guidance might be necessary in order to draw the parties' attention to any altered perceptions. In particular, a court of appeal must take into account that it should not alter the judgment of a district court without allowing the parties to comment on all the

circumstances of importance for such alterations. Moreover, the Supreme Court has stated that the defendant must be able to answer to everything which is held against him or her, and that no unexpected elements may influence the outcome (NJA 2003, p. 486).

COMPLAINTS

The applicants complained, under Article 6 § 3 (b) of the Convention, that they had not been given adequate time and facilities for the preparation of their defence, and that the request of the president of the Court of Appeal – that the parties consider whether there had not been a completed robbery offence – had constituted an improper involvement in the proceedings which had upset the principle of "equality of arms".

THE LAW

The applicants claimed that, as a consequence of the public prosecutor's adjustment of the robbery charge and the involvement of the president of the Court of Appeal in that process, they had not had adequate time and facilities for the preparation of their defence and the principle of "equality of arms" had been violated.

The Court finds that the complaint falls to be considered under Article 6 §§ 1 and 3 (a) and (b) of the Convention which, insofar as relevant, read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence; ..."

The respondent Government maintained that the complaint was manifestly ill-founded. They submitted that the prosecutor's adjustment and the Court of Appeal's judgment were based on the same elements appearing in the bill of indictment, and that the nature of the charge had not been changed. All relevant factors had therefore been well known to the applicants from the outset of the proceedings. The only new element had merely been a matter of deciding whether the criminal act in question had advanced to the point of completion. Counsel for the second applicant had acknowledged that the particulars of the offence in the indictment could also amount to a completed robbery, and that the prosecutor had given an

exhaustive account of the criminal act in the indictment. Thus, the applicants had been informed promptly of all the components of the charge and had been afforded adequate time and facilities to prepare their defence. Moreover, the defence had not asked for an adjournment of the proceedings when the prosecutor had presented the adjustment of the charge, but had stated their position on the same day. The hearing had continued the following day without any further arguments from the defence on the adjusted charge or a request for more time to consider the issue.

Furthermore, in inviting the parties to consider whether the original charge did not also encompass a completed robbery offence, the Court of Appeal had made the applicants aware that it might return a verdict of completed robbery and had afforded them the possibility of exercising their defence rights on this issue. The president's involvement could not therefore be considered unfair. In addition, there was no indication that the proceedings had otherwise been unfair or that the Court of Appeal had not satisfied the requirements of subjective and objective impartiality.

The Government further adduced that they had given the president of the Court of Appeal the opportunity to comment on his intervention. He had stated the following:

> "In the hearing of the case, the question arose among the members of the court whether the particulars of the offence did not encompass a completed robbery as well, since the money in question had come into the possession of the perpetrators through the seizure of the vehicle in which the money was transported. Following the case-law that has developed in this field, the Court of Appeal drew the parties' attention to this, in order for them to argue on this matter in their closing submissions. That this caused the prosecutor to adjust the charge, was nothing which the Court of Appeal could have prevented, as explained in the judgment, and apparently the Supreme Court did not consider this to be a mistake which should bring about a remittal of the case or some other ruling."

The applicants claimed that, through the prosecutor's adjustment of the robbery charge, a new element had been introduced – the intentional appropriation of the money transport vehicle. Consequently, they had been convicted by the appellate court of an offence which was different from the one described in the original indictment. Counsel for the defence had not made an express request for more time to answer the adjusted charge, as they had expected that the court, of its own motion, would adjourn the proceedings. In any event, a request for an adjournment, in their submission, would have been rejected by the court at such a late stage in the proceedings. The applicants further maintained that, without the adjustment, the Court of Appeal could not have convicted them of a completed offence. In drawing the parties' attention to this issue, a measure which had benefited nobody but the prosecutor, the court had not merely intervened to remedy unclear or incomplete statements or obscure particulars of the offence in the indictment. Instead, it had assisted the prosecutor by including the necessary prerequisites for a completed robbery, which

elements the prosecutor had failed to invoke due to human or professional shortcomings. This assistance had been contrary to the principle of "equality of arms".

Moreover, the applicants submitted that the Court of Appeal's president, while not holding any personal bias against the applicants, had acted partially in favour of the prosecutor. They stressed the importance of the courts not appearing to be an extension of the prosecution; they should give an unquestionably independent impression to the citizen.

The Court reiterates that the requirements of paragraph 3 of Article 6 represent particular aspects of the right to a fair trial guaranteed by paragraph 1. The Court will therefore examine the present case from the point of view of these two provisions taken together (see, among other authorities, *Mattocia v. Italy*, no. 23969/94, § 58, ECHR 2000-IX).

Paragraph 3 (a) of Article 6 points to the need for special attention to be paid to the notification of the "accusation" to the defendant; particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges laid. The accused must be made aware "promptly" and "in detail" of the cause of the accusation, i.e. the material facts alleged which form the basis of the accusation, and of the nature of the accusation, namely, the legal qualification of those material facts. The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair (see ibid., § 59, and *Pélissier and Sassi v. France* [GC], no. 25444/94, §§ 51-52, ECHR 1999-II).

While the extent of the detailed information referred to in this provision varies depending on the particular circumstances of each case, the accused must at least be provided with such information as is necessary to understand fully the extent of the charges, in order to prepare an adequate defence. In this respect, the adequacy of the information must be assessed in relation to sub-paragraph (b) of Article 6 § 3, which confers on everyone the right to have adequate time and facilities for the preparation of the defence, and in the light of the more general right to a fair hearing embodied in Article 6 § 1 (see the aforementioned *Mattoccia v. Italy* and *Pélissier and Sassi v. France* judgments, § 60 and § 54 respectively).

As concerns changes in the accusation, the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them and organise a defence on the basis of any new information or allegation (see *Mattoccia v. Italy*, § 61).

In the instant case, the Court notes that, by the prosecutor's bill of indictment of 11 February 2000, the applicants were, in so far as relevant for the present complaint, charged with attempted aggravated robbery. According to that indictment, they had, on 25 November 1999, attempted to steal from a money transport vehicle. The second applicant had forced his

way into the vehicle and had driven it to a secluded place, where they had unsuccessfully tried to gain access to the strong room of the vehicle in which the money was stored. The robbery had not been successful, but there had been a risk of it being completed. By the District Court's judgment of 17 April 2000, the applicants were convicted of the offence in question, the court having found that the evidence supported the prosecutor's description of events.

On 19 June 2000, towards the end of the hearing in the Court of Appeal and following the intervention of its president, the prosecutor adjusted the charge to concern a completed offence of aggravated robbery. In its judgment of 4 July 2000, the appellate court considered that the prosecutor had not introduced an additional charge of theft of the vehicle but that, following the adjustment, he had claimed that the robbery had been completed through the appropriation of the vehicle. In agreeing with this contention, the court found that the very fact that the applicants had taken possession of the vehicle with its money contents meant that the offence had been completed.

In the Court's view, it follows from these circumstances that the applicants were made aware of all the material facts of the offence ascribed to them already by way of the prosecutor's bill of indictment. The new element introduced on 19 June 2000 was whether their actions had progressed to the point where the offence could be considered to have been completed. It appears from chapter 30, section 3 of the Code of Judicial Procedure, and the statement of the president of the Court of Appeal to the Government, that the prosecutor's adjustment of the charge was not a prerequisite under Swedish law for convicting the applicants of the completed offence of robbery. Nevertheless, under Article 6 of the Convention, it must be determined whether they were promptly informed of the possibility that they might be convicted of the completed offence, and whether they were afforded an adequate opportunity to prepare their defence.

In this respect, the Court notes that the applicants were made aware of this possibility only on 19 June 2000, on the penultimate day of the appellate court hearing. While this short notice gives rise to some concern, the Court observes that all the facts underlying the adjusted charge were known to the applicants long before. Moreover, counsel for the second applicant was of the opinion that the charge of aggravated robbery could be considered as having been covered by the original indictment. Further, counsel for both applicants stated their position on the adjusted charge on the day when it was introduced. They did not submit any additional arguments on this issue the following day, the last day of the hearing, although they would have been free to do so. Nor did they request an adjournment of the proceedings in order to have more time to consider the issue. In this connection, the Court finds that there is nothing in the case

which supports the applicants' contention that a request for an adjournment would obviously have been refused by the Court of Appeal.

The Court considers that the intervention of the president of the Court of Appeal was made in order to make the parties aware that the acts with which the applicants were charged could constitute a completed robbery offence. The applicants were thus given an opportunity to present their arguments on this issue. Moreover, as the court was not bound by the prosecutor's characterisation of the offence and, accordingly, his adjustment of the charge was not a prerequisite for finding the applicants guilty of the completed offence, the president's intervention cannot be considered to have upset the principle of "equality of arms".

In these circumstances, the Court considers that, in reality, defence counsel had an adequate opportunity to state comprehensively the applicants' position on the adjusted charge before the Court of Appeal. Moreover, the appellate court could reasonably and justifiably conclude that this had indeed been the case.

Finally, the Court finds that the present case can be distinguished from the case of *Miraux v. France*, simultaneously examined by the Court (no. 73529/01, judgment of 26 September 2006), where a violation of Articles 6 §§ 1 and 3 was found. In that case, a new factual element – penetration – was introduced in the proceedings when the president of the court, after the parties' closing statements, asked the jury the supplementary question whether the accused was guilty of rape rather than attempted rape. In contrast, the facts which the applicants in the present case had to address remained the same throughout the proceedings; the prosecutor's adjustment of the robbery charge did not alter the description of events, but only changed the legal characterisation of the offence. Moreover, whereas the accused in the French case was not given an opportunity to present his arguments in relation to the new factual element, counsel for the present applicants were able – and did – state their position on the adjusted charge. It should further be noted that the French case involved a jury trial concerning a sexual offence, where special prudence is called for due to the sensitive nature of such offences and the possibility that jurors could be swayed by a proposition that the act charged might constitute an offence of a more aggravated nature. The present case did not give rise to any such special concerns.

Considering the proceedings in the instant case as a whole, the Court therefore finds that the information given to the applicants about the accusation against them was sufficiently prompt, and that they had adequate time and facilities for the preparation of their defence, within the meaning of Article 6 § 3 (a) and (b) of the Convention. Moreover, no other circumstances arise in the case to cast doubt on the appellate court's impartiality.

The Court concludes, therefore, that the present case does not disclose any appearance of a violation of the applicants' right to a fair hearing within the meaning of Article 6 § 1 of the Convention.

It follows that the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the remainder of the application inadmissible.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President