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

THIRD SECTION

DECISION

Application no. 25514/15
Abraham AHO
against Sweden

The European Court of Human Rights (Third Section), sitting on 13 December 2016 as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 20 May 2015,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Abraham Aho, is a Swedish national who was born in 1991 and lives in Södertälje. He was represented before the Court by Mr J. Karlsson, a lawyer practising in Stockholm.

A. The circumstances of the case

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

1. The pre-trial period

3. On 23 December 2009, a person was murdered at a nightclub in Södertälje, Sweden, by a lone gunman (hereafter "the December 2009

murder"). The applicant, who belonged to a well-known criminal network in Södertälje, was arrested the same day as a suspect. He was held in pre-trial detention until 1 April 2010, with restrictions. Although released from pre-trial detention on that date, he remained a suspect. On 14 December 2010 he was once again arrested and subsequently detained, with restrictions, on suspicion for the December 2009 murder as well as *inter alia* another murder. The prosecution against the applicant and several other defendants was brought on 16 November 2011.

4. With regard to the evidence against the applicant concerning the December 2009 murder, the prosecution, *inter alia,* relied on information provided by witness A., who was working at the nightclub on the night of the murder. A. told the first policeman to arrive at the crime scene that he wanted to tell another policeman, B., who the perpetrator was. On the same day, A. arrived at the police station. However, as B. was not present, he told policeman C. instead that the applicant was the perpetrator. A. had known the applicant since an early age. A. also made it clear to C. that he would not agree to be questioned formally by the police or be heard as a witness before a court. The reason was that he feared retribution from the criminal network to which the applicant belonged. C. took note of the information and a few days later A. repeated to policeman B. what he had seen on the night of the murder. During the period from 9 September 2011 to 19 April 2013, A. repeated this information to B., C. and a third policeman, D., on ten separate occasions.

2. The first trial

5. The trial at Södertälje District Court (*tingsrätt*) started at the end of 2011 and lasted for approximately six months. On 1 August 2012, the applicant was convicted of the December 2009 murder, aiding and abetting a second murder, abduction and extortion. He was sentenced to 12 years' imprisonment. Moreover, he was to remain in detention, with restrictions, until the judgment gained legal force.

6. The applicant appealed to Svea Court of Appeal (*hovrätt*), which found one of the lay judges at the District Court to be biased because he was also a member of a local police commission where, among other things, the criminal case against the applicant had been discussed. For that reason, on 5 October 2012 the Court of Appeal quashed the District Court's judgment and referred the case back to the lower court for renewed proceedings. The applicant was to remain in detention, with restrictions.

3. The second trial

7. The new proceedings started before a new composition of judges of the District Court at the beginning of 2013 and lasted for approximately six months.

8. Policemen B., C. and D. were heard as witnesses during the trial and they concordantly testified that A. had told them that the applicant was the perpetrator. However, despite numerous requests, A. refused to relay the information at a formal police hearing or at the trial. A. nevertheless appeared as a witness at the trial and was questioned by the prosecution and the defence. He denied that he had witnessed the murder.

9. On 29 August 2013, the applicant was once again convicted by the District Court of the December 2009 murder, aiding and abetting a second murder and abduction and extortion. This time, he was also convicted of aiding and abetting a third attempted murder. He was sentenced to 12 years' imprisonment. Moreover, he was to remain in detention, with restrictions, until the judgment gained legal force.

10. The District Court noted in its judgment that the applicant had claimed that A. blamed him for the murder for reasons of revenge or loyalty. The court, however, found no indication of such motives. A. was deemed credible, and his explanation to the policemen B., C. and D. that he refused to testify because of fear of retribution was seen as convincing. The court also reasoned that the strength of the hearsay evidence was reduced as A. had not provided the information during a trial where cross-examination was possible. A.'s identification of the perpetrator was therefore not seen as evidence decisive enough, taken by itself, to prove the guilt of the applicant. In addition to the identification, however, there was circumstantial evidence. A. had given information about the perpetrator to the victim in the extortion crime of which the applicant was also convicted. Furthermore, the applicant had no alibi and, according to connections to telecommunication masts, he was a few minutes away from the nightclub around the time of the murder. The applicant had called a person who stored guns 15 minutes before the murder, stating that he was in a hurry and wanted to meet outside the applicant's home. His mobile phone had thereafter been silent for the following 15 hours, which was very unusual for him. A few days earlier, the applicant had requested guns and ammunition, and he was able to handle guns. The District Court concluded that the circumstantial evidence, considered together with A.'s identification of the perpetrator, proved that the applicant was the murderer.

11. Upon appeal, the Court of Appeal held an oral hearing which lasted several months. The applicant's restrictions were lifted on 27 May 2014 by the court. On 1 September 2014, the court upheld the lower court's judgment as regards the applicant and he was ordered to remain in detention without restrictions until the judgment gained legal force.

12. The lower court's evidence evaluation and conclusion were shared by the Court of Appeal, where video recordings of the witness testimony were shown. The appellate court further noted that the applicant's mother had called his mobile phone at the time when the applicant had claimed he was sleeping in the apartment from which his mother was calling.

Moreover, the court noted that the applicant had handed over his cell phones to a friend after the murder but before he was arrested, indicating that he did not want the police to get hold of them. With regard to the case as a whole, the court remarked that several injured persons and witnesses had refused to be questioned by the police or had retracted previous statements given to the police at the trial. According to the court, it was obvious that this was because of loyalty or fear of retribution. Several witnesses were accused of perjury.

13. The applicant appealed against the Court of Appeal's judgment to the Supreme Court (*Högsta domstolen*) which, on 25 November 2014, refused leave to appeal.

14. The applicant appealed neither explicitly nor implicitly to the Supreme Court against the Court of Appeal's decision to keep him in detention until the judgment gained legal force.

B. Relevant domestic law

15. Chapter 35, section 1, of the Swedish Code of Judicial Procedure (*Rättegångsbalken*, 1942:740), reads as follows:

> "After conscientious assessment of everything that has occurred, the court shall determine what has been proved in the case.
>
> As to the effect of certain kinds of evidence, the specific provisions thereon shall apply."

16. This provision reflects the principle of free submission and evaluation of evidence (*principen om fri bevisföring och bevisvärdering*) which prevails in Swedish procedural law. It means that, as a main rule, there are no restrictions in law on the submission and evaluation of evidence. Thus, anything that may be of value as evidence in a case may, in principle, be presented during the main hearing. However, the circumstances under which evidence has been collected or given will have an influence on the way in which it is evaluated. The "principle of best evidence" (*principen om bästa bevismedlet*) is applied; consequently, witnesses and injured parties should normally give evidence during a court hearing, rather than the court reading the statements made during the preliminary investigation, to enable the parties to pose questions and scrutinise the statements more closely.

17. Moreover, according to Chapter 35, section 7, of the Code of Judicial Procedure, a court may dismiss evidence, *inter alia*, if the circumstance that a party wants to prove is without importance in the case, if the evidence is unnecessary or if it clearly would be to no effect.

COMPLAINTS

18. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that he did not have a fair trial because he was not able to question A., whose identification of the murderer was relied upon through the use of hearsay evidence, and furthermore, that sufficient measures were not taken to compensate him for this deficiency. He further complains that he was in pre-trial detention for a long time and thus he could not prepare his defence properly.

THE LAW

A. The applicant's complaint under Article 6 §§ 1 and 3 (d) of the Convention

19. The applicant complained that he was not able to question A. and of the use of hearsay evidence and that sufficient measures were not taken to compensate him for these flaws, which amounted to a violation of his right to a fair trial as provided by Article 6 §§ 1 and 3 (d) of the Convention which, in relevant parts, 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:
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

20. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that Article which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015 and *Taxquet v. Belgium* [GC], no. 926/05, § 84, 16 November 2010, with further references therein). In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 118, ECHR 2011).

21. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings (see *Sievert v. Germany*, no. 29881/07, § 58, 19 July 2012, with further references therein).

22. Turning to the circumstances of the present case, the Court takes note of the fact that it is not concerned with testimony that was given by a witness whose identity was concealed from the accused or who was absent at trial. In fact, A. was present and was heard as a witness. Thus, the domestic courts, the prosecution as well as the applicant and his defence counsel were in a position to observe A.'s demeanour under questioning and to form their own impression of his probity and credibility. As is evident from the District Court's judgment of 29 August 2013, the applicant used this opportunity and the court took this into account, but found no motive for A. to have lied to the police during his initial submissions. Furthermore, the applicant cross-examined policemen B., C. and D. during the trial. These are procedural safeguards capable of compensating for the fact that A. refused to be formally questioned during the preliminary investigation.

23. As to the admission of the hearsay evidence, the Court notes that Swedish criminal procedure adheres to the principle of free submission and evaluation of evidence (see paragraphs 15 and 16 above). It means that, as a main rule, there are no restrictions in law on the submission and evaluation of evidence. Thus, anything that may be of value as evidence in a case may, in principle, be presented during the main hearing. However, the circumstances under which evidence has been collected or given will have an influence on the way in which it is evaluated. The Court is satisfied that both the District Court and the Court of Appeal approached the evidence from the policemen B., C. and D. with caution and that it was considered to have reduced value because of its hearsay character. Also, the conviction of the applicant was not solely based on the hearsay evidence, as the domestic courts relied on substantial circumstantial evidence (see paragraphs 10 and 12 above).

24. In any event, the Court reiterates that, while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily

matters for regulation by national law and the national courts (see, for example, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

25. In the light of the above, the Court considers that, notwithstanding the fact that the domestic courts allowed the hearsay evidence, along with other evidence, the decisions of the courts were not arbitrary or unreasonable and therefore that the criminal proceedings against the applicant did not result in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

26. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. The applicant's other complaint

27. The applicant further complained that he was in pre-trial detention for a long time and therefore could not prepare his defence properly, amounting to a violation of the guarantees provided by Article 6 § 3 (b) of the Convention.

28. However, the Court notes that the applicant did not appeal to the Supreme Court against the Court of Appeal's decision to keep him in detention. Also, in his appeal to the Supreme Court he raised neither explicitly nor implicitly the issue that he could not prepare his defence properly. He therefore failed to exhaust available domestic remedies.

29. It follows that this complaint must be declared inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 19 January 2017.

Stephen Phillips
Registrar

Luis López Guerra
President