CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

PARTIAL 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 22 March 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

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

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 are represented before the Court by Mr B. Schultz, a lawyer practising in Askersund.

A. The circumstances of the case

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

By an 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. All the offences were related. 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."

By a judgment of 17 April 2000 the District Court (*tingsrätten*) of Örebro convicted the applicants of all but one charge of car theft and the charge of 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 assessing the evidence in the case, the District Court noted generally that the applicants had a right to remain silent and were not compelled to tell the truth. However, it reserved the right to disregard unverifiable statements made by the applicants, if those statements did not deserve credence having regard to the other information in the case. Noting that the applicants in general had provided very little information, the court found it difficult to understand why, for instance, the first applicant had refused to name the person at whose home he claimed to have spent the night when the robbery took place. According to the court, the first applicant had not given any reasonable explanation for his refusal to name the person. Having regard to various pieces of technical evidence, for instance the use of a car found after the robbery in storage rented by the second applicant, lists of mobile telephone communications made by the applicants and various items seized during a police search, as well as evidence given by witnesses, the court found that the applicants were the perpetrators. In regard to the charge of attempted aggravated robbery, it 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 place inside the vehicle where the valuables were stored. 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. ..."

In sentencing the applicants, the District Court noted that the first applicant had previously been convicted of 17 different charges. On 22 July 1998 he had been convicted of illegal threats, violent resistance, handling of stolen goods and a doping offence and had been sentenced to one and a half year's imprisonment. On 11 June 1999 he had been sentenced to two months in prison for car thefts. The first applicant had previously been convicted of 12 different charges, the latest one on 23 March 1998 when he had been sentenced to eight months' imprisonment for having handled stolen goods.

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

Following consultations with the public prosecutor and the police, the Court of Appeal decided, on 19 May 2000, that certain security measures should be applied at the public hearing in the case, including holding the hearing at Kumla prison.

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. The applicants claim that, 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. Still, having regard to the factual circumstances, the applicants' actions could not be seen as constituting a completed aggravated robbery but only an attempt. Also 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 made an objection on the ground that the adjusted description of the offence 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, claimed that the

robbery had been completed through the appropriation of the vehicle, the court decided to allow the adjustment.

Both in the District Court and the Court of Appeal, the public prosecutor invoked as evidence lists prepared by a telephone company of the calls that had been made to and from mobile telephones seized by the police from the applicants and of the telephone masts to which the phones had been connected during the period when the criminal offences were committed. The latter list aimed to show where the user of the respective telephone had been located at various points in time. In this regard, the technical director of the telephone company that had supplied the lists gave evidence before the courts. Whereas the applicants claimed that the lists contained flaws and that the information was thus not reliable, both the District Court and the Court of Appeal concluded that the information was not only reliable but also had considerable value as evidence.

During the oral hearings, the prosecutor's arguments and the evidence he invoked were, to a large extent, put before the courts through a multimedia presentation. The applicants claim that they were not given a copy of this presentation.

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 as 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 thereafter have 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 place inside the vehicle where the valuables were stored 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

Chapter 27, section 19 of the Code of Judicial Procedure (*Rättegångsbalken*) provides:

> "The term secret telephone surveillance implies the clandestine gathering of information about telephone communications which have been executed or requested to or from a particular telephone address or the interference with such communications.
>
> Secret telephone surveillance is permitted as part of a preliminary investigation concerning:
>
> 1. a crime for which is prescribed a punishment of imprisonment of no less than six months,
>
> ...
>
> 3. the attempt, preparation or conspiracy to commit a crime for which is prescribed a punishment of imprisonment of no less than two years, if such action is punishable."

COMPLAINTS

1. The applicants complain that, as the public prosecutor was allowed to adjust the robbery charge on the last day but one of the Court of Appeal hearing, they were not given adequate time and facilities for the preparation of their defence. By the introduction of a new element – intentional appropriation of the money transport vehicle – they were allegedly convicted by the appellate court of an offence different from the one described in the original indictment. Counsel for the defence expected that the court, by its own motion, would give them additional time to answer the adjusted charge, and they did not therefore make an express request for such an adjournment. Without the adjustment, the Court of Appeal could not have convicted the applicants for a completed robbery offence, and the court president's request that the parties consider whether the offence in question could not be regarded as a completed robbery – which led to the prosecutor's adjustment of the charge – constituted an improper involvement in the proceedings which violated the principle of "equality of arms". In these respects, the applicants rely on Article 6 § 3 (b) of the Convention.

2. The applicants further claim that the courts did not take proper account of certain evidence presented by the defence and that they drew improper adverse inferences from the applicants' choice to remain silent on certain points. As an example of the latter, they assert that the District Court, with which the Court of Appeal agreed, held it against the first applicant that he refused to name the person at whose home he claimed to have spent the night between 24 and 25 November 1999, the time of the

robbery. As a consequence, their right to be presumed innocent under Article 6 § 2 of the Convention was breached.

3. They also maintain that the various telephone lists constituted impermissible telephone surveillance which violated their rights under Article 8 of the Convention.

4. Moreover, the use as evidence of such a powerful investigation tool as the telephone lists allegedly upset the "equality of arms" in violation of Article 6 of the Convention. Also the public prosecutor's multimedia presentation of arguments and evidence, due to its elegant appearance and the fact that counsels for the defence were not given a copy of it, placed the defence at a disadvantage vis-à-vis the prosecution.

5. Finally, the applicants assert that there were no reasonable grounds for the Court of Appeal's decision to hold the oral hearing in the case at Kumla prison. The applicants, who had spent large parts of their lives in various closed institutions, had not made any known attempt to escape or otherwise acted violently in connection with arrests or court hearings. The choice of location for the hearing prejudiced the applicants' credibility by depicting them as dangerous and strengthened their impression that the court had a preconceived opinion of their guilt. It thus denied them a fair trial in accordance with Article 6 of the Convention.

THE LAW

The applicants have made various complaints under Article 6 of the Convention, the relevant parts of which provide the following:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by [a] ... tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 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; ..."

1. The applicants first claim 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 did not have adequate time and facilities for the preparation of their defence and the principle of "equality of arms" was violated. The Court finds that this complaint falls to be considered under Article 6 § 1 and § 3 (a) and (b) of the Convention.

The Court considers, however, that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The applicants further claim that the courts did not take proper account of certain evidence and drew improper adverse inferences from the applicants' choice to remain silent on certain points. They rely on Article 6 § 2 of the Convention.

The Court notes that the courts trying the applicants' case had regard to different types of evidence, both oral and written. Whereas the District Court and the Court of Appeal might not have addressed all evidence in detail in their judgments, a criminal court cannot, under the terms of Article 6, be required to give detailed reasons as to each piece of evidence. Overall, the judgments in the applicants' case contained extensive assessments of the evidence presented, and there is nothing to suggest that the courts did not take proper account of the evidence presented by the defence.

As regards the right to remain silent, there can be no doubt that this is a generally recognised international standard which lies at the heart of the notion of a fair procedure under Article 6. Still, the right to remain silent 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. 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 particular 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 (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 49-50, §§ 45-47).

In the present case, the Court takes note of the District Court's statement that, while the applicants had a right to remain silent and were not compelled to tell the truth, it reserved the right to disregard unverifiable statements made by them, if those statements did not deserve credence having regard to the other information in the case.

It is clear that the applicants were able to remain silent in the proceedings and that they in fact used that right extensively. The courts had regard to several pieces of evidence presented by the prosecution to prove that the applicants had been present at the scene of the crimes and that they had committed the robbery. Whereas it is not for the Court to determine whether the evidence presented was sufficient to convict the applicants – the assessment of evidence being a matter for the national courts – it cannot but conclude that, having regard to the weight of the evidence against the applicants, the drawing of inferences from their silence was not unfair or unreasonable in the circumstances. As to the particular example mentioned

by the applicants – the first applicant's claim that he had spent the night of the robbery at a friend's home – it should be noted that the first applicant's relationship or contacts with the unnamed friend was not part of the evidence presented by the prosecution. Instead, it was advanced by the first applicant in an attempt to show that he had an alibi for the relevant period. As he refused to name the person in question, the District Court could reasonably disregard this statement.

In conclusion, there is no indication that the manner in which the national courts assessed the evidence, including the inferences they drew from the applicants' silence, rendered the hearing unfair within the meaning of Article 6 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. The applicants maintain that the telephone lists violated their rights under Article 8 of the Convention. This provision reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, ..."

The Court reiterates that the lists in question detailed the calls that had been made to and from mobile telephones seized by the police from the applicants and the location of the telephone masts that had transmitted the calls, as registered by the relevant telephone company. There is no indication that the lists contained transcripts of actual telephone conversations or that they had been obtained through telephone tapping.

Leaving aside the question whether the gathering of such information could be considered to be an interference with the applicant's rights under Article 8, notably their right to respect for their "private life" and "correspondence", the Court considers that, in the circumstances, it was permissible under the second paragraph of that Article. More specifically, the Court finds that the surveillance measure, as such, had a basis in national law, notably chapter 27, section 19 of the Code of Judicial Procedure, and that it has not even been argued that the national authorities failed to obtain the relevant permission for the measure in question. Moreover, the information was gathered for the legitimate aim of combating crime. Finding that the means used remained within reasonable and justified limits, the Court concludes that the gathering of the information at issue must be considered to have been "necessary in a democratic society" for the aforesaid aim.

It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. The applicants also assert that the use of the telephone lists as evidence and the public prosecutor's multimedia presentation of arguments and evidence upset the principle of "equality of arms" and thus rendered the trial unfair under Article 6 of the Convention.

The Court reiterates that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Court is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, among other authorities, *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34, and *S.N. v. Sweden*, judgment of 2 July 2002, *Reports* 2002-V, p. 159, § 44).

As regards the use of the telephone lists as evidence, the Court first notes that the fact that they could be considered to be a powerful investigation tool cannot, as such, render the hearings unfair. It reiterates its above conclusions that the information in question was not unlawfully obtained and did not violate the applicants' rights under Article 8 of the Convention. Furthermore, the applicants were able to challenge the information contained in the telephone lists, and in fact did so, in the criminal proceedings. It should also be noted that the lists were not the only evidence on which the convictions were based. For these reasons, the Court cannot find that the use of the telephone lists as evidence involved a violation of Article 6 of the Convention.

With respect to the public prosecutor's multimedia presentation of arguments and evidence, the Court finds that, although the applicants were allegedly not given a copy of the computerised presentation as such, there is no indication that they were not given full access to the report of the preliminary investigation or any other material which the prosecutor invoked before the courts and displayed by means of the multimedia presentation. Again, the Court notes that the applicants were able to challenge all the arguments and evidence put forward by the prosecutor. The elegance with which that material was allegedly presented to the courts cannot, by itself, be considered to involve a violation of Article 6 of the Convention.

In general, the Court does not find any indication that the way in which evidence was taken and assessed by the courts examining the applicants' case was arbitrary or otherwise denied the applicants a fair hearing.

It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

5. The applicants finally claim that the Court of Appeal's decision to hold its oral hearing at Kumla prison prejudiced their credibility and strengthened their impression that the court had a preconceived opinion of their guilt. They rely, in this respect, on Article 6 of the Convention.

The Court notes that the decision to hold the hearing at the prison was taken for security reasons by the Court of Appeal following consultations with the public prosecutor and the police. It considers that, as a rule, it must be up to the relevant national authorities to determine when security measures are called for in criminal proceedings. The proceedings in the present case concerned charges of, *inter alia*, armed robbery and attempted murder. Moreover, the applicants had previously been convicted of criminal offences on several occasions. In these circumstances, it cannot be said that the appellate court acted arbitrarily or unreasonably when deciding on the location of its oral hearing. In this connection, it should further be noted that the hearing was open to the public (see, *mutatis mutandis*, *Riepan v. Austria*, judgment of 14 November 2000, *Reports* 2000-XII, pp. 12-14, §§ 25-31, with further references). Moreover, it has not been shown that the members of court, due to the location of the hearing or for other reasons, had a preconceived opinion of the applicants' guilt.

It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicants' complaint 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 did not have adequate time and facilities for the preparation of their defence, and that the principle of "equality of arms" was violated;

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President