

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

FIRST SECTION

CASE OF ROMANIUK v. POLAND

(Application no. 42179/14)

JUDGMENT

STRASBOURG

26 October 2023

This judgment is final but it may be subject to editorial revision.



In the case of Romaniuk v. Poland,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Ivana Jelić, *President*,
Krzysztof Wojtyczek,
Erik Wennerström*, judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 42179/14) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 7 May 2014 by a Polish national, Mr Tomasz Romaniuk, born in 1985 and detained in Sokołów Podlaski ("the applicant") who was represented by Mr P. Sieńko, a lawyer practising in Warsaw;

the decision to give notice of the application to the Polish Government ("the Government"), represented by their Agent, Mr. J. Sobczak of the Ministry of Foreign Affairs;

the parties' observations;

Having deliberated in private on 3 October 2023,

Delivers the following judgment, which was adopted on that date:

SUBJECT MATTER OF THE CASE

1. The issue in the case is whether the criminal proceedings against the applicant had been fair considering that he was not given an opportunity to examine or to have examined his co-defendant whose evidence was decisive for his conviction.

2. On 8 August 2008 two rival criminal gangs engaged in a riot over the informal protection of a restaurant in O.M. Many participants carried melee weapons and multiple shots were fired by several persons. Four persons sustained gunshot wounds and one died as a result.

3. The applicant was tried, alongside nineteen other defendants, for participating in a riot with the use of dangerous instruments (Article 159 of the Criminal Code). Based on the evidence given by one of his co-defendants (R.W., who was involved in the fight on the same side as the applicant), the applicant was also charged with illegal possession of a firearm (Article 263 § 2 of the Criminal Code), using that firearm during the events and shooting all four victims, including one fatally (Articles 148 § 1, 156 § 1, and 157 § 1 of the Criminal Code). The applicant was represented by defence lawyers throughout the domestic proceedings.

4. Within the investigation, R.W. was questioned nine times by a prosecutor, without the applicant or his lawyer being present. During the first interview he did not identify the gunman. During the second one he gave the gunman's criminal alias and later identified the applicant in a photograph.

R.W.'s testimony identifying the applicant was not completely coherent – it varied as regards the applicant's positioning, way of shooting and statements made after firing the shots. No audio or video recordings of R.W.'s testimony were made in the investigation.

5. Before the court, benefiting from his right not to incriminate himself, R.W. only indicated that he wished to maintain his testimony incriminating the applicant, explained that he had initially omitted the identity of the gunman as he had felt intimidated by another member of the group and refused to answer any questions, including those of the court. He was exempted from having to appear before the court after the first three hearings. His testimony was read out at the trial. The applicant gave his own version of the events but was only considered credible as regards his admission that he had been present at the crime scene.

6. On 2 December 2011, the Ostrołęka Regional Court acquitted the applicant of shooting two persons, including the one who died, and convicted him of the remaining charges, notably the attempted murder by shooting of Ł.W. and M.K. The applicant was sentenced to a cumulative penalty of 12 years' imprisonment. R.W. was convicted of participating in a riot and sentenced to a fine of 1,200 Polish zlotys (approximately 270 euros).

7. Based on testimony from multiple witnesses, the court established that there had been several gunmen at the scene but concluded that none other than the applicant could be identified. Based on the applicant's approximate position during the events (near the restaurant entrance, among other "defenders" of the building) his involvement in the shooting of two persons was ruled out, as their wounds could not have been inflicted from that position.

8. The court found that the gunman's identity could not be established from CCTV footage from the scene. The weapon itself was never recovered. Out of the 19 co-defendants and 101 witnesses, only R.W. claimed that the applicant had carried or used a firearm at the scene.

9. Noting the discrepancies in the testimony given by R.W. the court found one version, given during his second interview held on 18 February 2009, to be the sole credible version. The court accepted it as sufficient to establish that the applicant had carried a firearm, participated actively in the fight by firing the gun from near the restaurant entrance and had shot Ł.W. and M.K. In so far as some of the witnesses gave a description of the gunman which did not match the applicant or claimed that shots had been fired from a different direction than the applicant's position, the court found them unreliable. The court concluded that none of evidence which was considered reliable disproved the version presented by R.W.

10. The applicant appealed against the first-instance judgment. R.W did not.

11. During the appellate proceedings, the applicant requested that the court admit as evidence the testimony of R.W., with simultaneous playback

of the CCTV footage. On 25 October 2012 the Białystok Court of Appeal dismissed the request on the grounds that these two pieces of evidence had already been gathered at first instance and that the request had clearly been aimed at prolonging the proceedings.

12. On 31 October 2012 the appellate court slightly amended the impugned judgment. The relevant charges against the applicant and his sentence remained unchanged.

13. The appellate court explicitly stated that R.W.'s testimony had been the sole evidence linking the applicant to the injuries sustained by Ł.W. It concluded, however, that the fact that it was the only evidence did not mean that it was not sufficient.

14. As regards the shooting of M.K., the court similarly invoked R.W.'s testimony as the only evidence which identified the applicant as the gunman. It further cited evidence with which the impugned testimony was confronted – namely, that indicating the gunman's approximate position, but not his identity – and concluded that this had been sufficient to find the applicant guilty of that charge.

15. The applicant lodged a cassation appeal, complaining notably under Article 6 of the Convention about the dismissal of his request for R.W.'s questioning and indicating that, as R.W.'s sentence had already become final, the latter would have been obliged to testify before the appellate court.

16. On 8 November 2013 the Supreme Court dismissed the cassation appeal as manifestly ill-founded without giving written reasons.

17. The applicant complained, under Article 6 §§ 1 and 3 (d) of the Convention, that his conviction was based to a decisive extent on the statements of a witness whom he was unable to examine or have examined.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

18. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

19. The general principles concerning the examination of absent witnesses and use by the courts of the evidence given by those witnesses, laying down a tripartite test, have been summarised in *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 100-31, ECHR 2015), *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, §§ 118-47, ECHR 2011) and *Kuchta v. Poland* (no. 58683/08, §§ 44-49, 23 January 2018).

A. Whether there was a good reason for admitting pre-trial evidence from R.W., as absent witness, at the applicant's trial

20. Unlike in *Kuchta* (cited above), it was not disputed by either party that R.W., as a co-defendant, had the right not to testify until the end of the first-instance proceedings and that, as a result, there were solid grounds for his non-attendance at that stage.

21. The parties disagreed as to whether it was admissible and expedient to question R.W. in the appellate proceedings.

22. The applicant maintained his stance expressed in his cassation appeal (paragraph 15 above), submitting that R.W.'s testimony could have been tested before the appellate court.

23. The Government stated that, within the appellate proceedings, the first-instance judgment remained subject to being quashed in respect of all defendants, including R.W., even in the absence of their own appeals and that, as a result, the latter remained a co-defendant until the end of that stage of the proceedings. The Government concluded that questioning R.W. as a witness would have amounted to circumventing the law and confusing the role of defendant and witness which would, in turn, have resulted in the violation of his rights of defence.

24. The Court notes, however, that there appears to have been no general procedural obstacles for the appellate court to summon R.W. It was only the capacity in which he would have had to appear before that court (as a co-defendant or a witness) that was at stake. Thus, the Government's argument would only have become relevant if the appellate court had summoned R.W. and questioned him as a witness rather than as a defendant. Instead, the Białystok Court of Appeal dismissed the applicant's request solely on the grounds that the requested evidence had already been gathered and that its alleged sole aim was to prolong the proceedings.

25. In the light of that court's own findings as regards the importance of R.W.'s testimony for the applicant's conviction (paragraphs 13-14 above), the concern for the speed of the proceedings, cited for the purposes of dismissing the applicant's evidentiary request, does not appear convincing. Swiftness of proceedings cannot outweigh the difficulties which resulted for the defence from the refusal to hear a key witness.

26. Had the second-instance court summoned R.W., and assuming that the latter remained a co-defendant exercising his right to remain silent in the appellate proceedings (*mutatis mutandis Kuchta*, cited above, § 51), the respondent State could not have been criticised for allowing him to exercise his right not to answer any questions (*Vidgen v. the Netherlands*, no. 29353/06, § 42, 10 July 2012). However, as the Białystok Court of Appeal dismissed the applicant's evidentiary request *a limine* without any reference to R.W.'s status, the Court is not satisfied that all reasonable attempts were made by domestic authorities to allow the applicant to obtain answers from

R.W. at the stage of the appellate proceedings (compare and contrast *Vidgen*, cited above, §§ 14-16 and 47).

27. In any event, the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial. It remains, however, a very important factor to be weighed in the balance when assessing the overall fairness of a trial and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) (see *Schatschaschwili*, cited above, § 113).

B. Whether the applicant's conviction was based solely or mainly on R.W.'s testimony

28. It was not contested by the Government that R.W.'s testimony constituted the main evidence against the applicant. The reasons given by the domestic courts (summarised in paragraphs 7-9 and 13-14 above) point to the testimony as the sole evidence against the applicant on gun-related charges, either explicitly (as regards the shooting of Ł.W.) or implicitly (regarding the possession of a firearm and shooting of M.K.).

29. In view of the above, the evidence in question, if not the sole evidence, was clearly decisive for the applicant's conviction. Such untested evidence weighs heavily in the balance and requires sufficient counterbalancing factors to compensate for the consequential difficulties caused to the defence by its admission (see *Al-Khawaja and Tahery,* cited above, §§ 160-61).

C. Whether there were sufficient counterbalancing factors

30. Although, unlike in *Kuchta* (cited above), the first instance court came into direct, albeit brief, contact with R.W., the fact remains that the latter's testimony, given at the pre-trial stage and incriminating the applicant, was never tested through direct interrogation by the court or the defence.

31. Moreover, while the domestic courts indicated that they approached R.W.'s statements with caution, they failed to reason their rulings in accordance with the criteria laid down in *Al-Khawaja and Tahery*. They referred to the general formal admissibility of relying on statements given by a co-defendant (rather than by a witness *stricto sensu*) and assessed the credibility of R.W.'s statements as well as the contradictions within the gathered evidence.

32. The domestic courts cited R.W.'s statements as particularly important and where certain pieces of evidence collided with the version of R.W., the courts considered them unreliable (paragraph 9 above).

33. While it is true that R.W.'s testimony was read out at the trial, that the applicant had the opportunity to give his own version of the events and that he availed himself of that opportunity, it has not been shown that there have been sufficient counterbalancing factors to compensate for the handicap

under which the defence laboured (see *Kuchta*, cited above, § 66, and *Paić v. Croatia*, no. 47082/12, § 51, 29 March 2016).

D. Conclusion

34. Noting the particular circumstances of the present case, the Court considers that the applicant was not given a sufficient and adequate opportunity to challenge R.W.'s testimony, which constituted the decisive evidence for his conviction on gun-related charges. Having regard to the importance of respect for the rights of the defence in criminal proceedings the Court considers that, in the instant case, the applicant did not receive a fair trial in respect of the charges of shooting Ł.W. and M.K. as well as of illegal possession of a firearm.

35. There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 26 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt	Ivana Jelić
Deputy Registrar	President