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

FIRST SECTION

DECISION

Application no. 50170/14
Krzysztof Jan CZERSKI
against Poland

The European Court of Human Rights (First Section), sitting on 30 January 2024 as a Committee composed of:

Ivana Jelić*, President*,
Krzysztof Wojtyczek,
Erik Wennerström*, judges*,

and Attila Teplán, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 50170/14) 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 July 2014 by a Polish national, Mr Krzysztof Jan Czerski ("the applicant"), who was born in 1961, is detained in Włocławek and was represented by Mr J. Gutkowski, 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 Government's observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the question whether the criminal proceedings against the applicant were fair considering that, at the court stage of the proceedings, he was not given an opportunity to examine or to have examined his co-defendant whose evidence was decisive for his conviction. It raises issues under Article 6 §§ 1 and 3 of the Convention.

2. The applicant was charged with committing five drug-related offences consisting of: (i) leading an organised crime group aimed at producing and marketing drugs between 2003 and 2004, (ii) ordering other members of the

group to produce various drugs in 2004, and (iii) the possession of 1,693 g (1.693 kg) of cocaine found at his residence on the day of his arrest in 2010.

3. As regards the applicant's participation and leading role in the group, the charges were based on the testimony given by a co-suspect (G.C.), another member of the group who had turned himself in to the police and, in a series of detailed interrogations, described the group's criminal activities.

4. G.C. testified that the applicant had not participated in the production process himself but had a leadership role from the very beginning. No other witness or co-defendant incriminated the applicant in that respect.

5. During the investigation, between 26 November 2008 and 19 October 2010, G.C. was questioned at least 24 times by police officers and prosecutors. He gave testimony during individual questioning, and confrontations with other suspects and reconstruction experiments (*eksperyment procesowy*) consisting of pointing out the locations of drug production.

6. On 16 March 2010 the applicant was confronted with G.C. The applicant, who already had a lawyer at the time, explicitly stated that he had nothing against participating in the confrontation without legal assistance. G.C.'s earlier testimony was read out and confirmed by that suspect. Both suspects confirmed that they knew each other. The applicant did not make any comments and refused to answer any questions. The applicant did not ask G.C. any questions himself. The minutes of the confrontation do not indicate that G.C. refused to answer questions from the applicant.

7. The applicant's lawyer consulted the case file of the investigation and was authorised to transmit photocopies to the applicant.

8. During the trial, G.C. agreed to answer questions from the prosecutor, his defence lawyer and the court. He refused to answer questions from his co-defendants and their defence lawyers. His testimony was read out by the court and confirmed by the defendant at hearings on 21 July and 16 August 2011 during which G.C. gave no new testimony and no follow-up questions were put to him.

9. The applicant testified in court on 21 October 2011. He pleaded not guilty and denied all the allegations against him. He submitted that G.C. was an addict and a manipulative liar. In line with the allegations made against G.C. by the other defendants, the applicant deemed G.C.'s testimony to be slander aimed at improving his own situation.

10. On 5 December 2011 G.C. made statements before the court and addressed the above-mentioned allegations. He also stated that he did not wish to answer questions from his co-defendants' lawyers, citing previous negative experiences in other proceedings. No questions were put to him by the court.

11. Several expert opinions were obtained. Psychiatrists diagnosed G.C. with alcohol addiction, a history of amphetamine abuse and dissocial personality disorder. They concluded, however, that he was not psychotic and

that there was no need for further examinations aimed at establishing that he was telling the truth. Expert chemists confirmed that the substances found at locations indicated by G.C. (see paragraph 5 above) had been left behind by chemical reactions used for drug production as described by that defendant.

12. On 15 February 2012 the Warsaw-Praga Regional Court found the applicant guilty as charged and sentenced him to a cumulative penalty of 12 years' imprisonment and a fine of 100,000 Polish zlotys (PLN) (ca. 24,000 euros (EUR)). G.C. was convicted on seven drug-related charges, consisting of participating in the organised crime group as well as preparation and production of significant quantities of drugs. Benefitting from extraordinary leniency on account of his cooperation with the authorities (Article 60 §§ 3 and 5 of the Polish Criminal Code), he was sentenced to a cumulative penalty of 4 years and 6 months' imprisonment, suspended pending 8 years' probation and a fine of PLN 2,000 (EUR 480).

13. The court explicitly stated that the testimony of G.C. constituted "basic evidence" against all defendants. For that reason, the court decided to cite it *in extenso*, with a view to "demonstrating its credibility in the internal dimension, namely internal coherence, logic, consistency and decisiveness" (the summary of G.C.'s testimony takes up 67 pages and its assessment 11 out of the total 134 pages of the reasoning). The court addressed, in detail, the allegations regarding G.C.'s psychological state and, in the light of the gathered expert opinions, found that they had not undermined his credibility. The court noted that G.C.'s testimony, as regards the locations, chemical reactions and methods of drug production, was corroborated by the relevant expert opinions. Finally, the court considered that G.C. had clearly indicated whenever he did not remember something, and not only had he not minimised his role in the group but he had incriminated himself, while the other defendants simply denied his claims and gave testimony "detached from the logic and principles of life experience".

14. The applicant lodged an appeal. Citing Article 6 of the Convention, he complained that his conviction had been based solely on the testimony of G.C. whom he could not examine or have examined before the court. He further complained that the first-instance court had failed to admit as evidence some psychological opinions regarding G.C. sought in other sets of proceedings and allegedly undermining his credibility.

15. G.C. did not lodge an appeal.

16. The Warsaw Court of Appeal completed the evidence material *ex officio* with the opinions of expert psychologists referred to by the applicant. On 7 December 2012 it reduced the applicant's sentence to 10 years' imprisonment and PLN 80,000 (EUR 19,200) in fines.

17. The applicant lodged a cassation appeal, complaining notably of the appellate court's failure to summon one of his lawyers to the appellate hearings. The Supreme Court granted the cassation appeal and remitted the case.

18. On 16 December 2013 the Court of Appeal reduced the first-instance sentence in the same way as previously (see paragraph 16 above), having found that the quantity of drugs produced by the group had been smaller than established at first instance. The appellate court noted that G.C.'s testimony required thorough and careful assessment. Addressing the complaints regarding the impossibility for the applicant to examine or have examined G.C., the court noted that the applicant had been confronted with his accuser during the investigation. Having assessed the additional psychological opinions in detail, the court found that they did not put G.C.'s credibility into question.

19. On 7 May 2014 the Supreme Court dismissed the applicant's cassation appeal, raising, *inter alia,* Article 6 of the Convention, as manifestly ill-founded.

20. 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 violations of Article 6 §§ 1 and 3 (d) of the Convention

1. Conviction for being in possession of cocaine

21. The applicant's complaint covers his conviction on all charges. However, the charge of possession of cocaine (see paragraph 2 above) was based on material evidence found on his property rather than on testimony given by G.C. No other allegations regarding the conviction on that charge were raised by the applicant.

Thus, in so far as he complains of his conviction for being in possession of cocaine, that complaint is inadmissible under Article 35 § 3 (a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The remainder of the application

22. The Court recalls that 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 not allowing the applicant to question or have questioned G.C. before the court

23. In the present case, there were no doubts that G.C., as a defendant, had the right to remain silent to the extent of his choosing, including refusing to answer questions from his co-defendants and their lawyers (*Romaniuk v. Poland,* no. 42179/14, § 20, 26 October 2023).

24. The Court is thus satisfied that there were solid grounds for the impossibility for the applicant to examine G.C. or to have him examined before the court, as the State cannot be criticised for allowing a defendant to make use of rights which he enjoyed under Article 6 of the Convention (*Vidgen v. the Netherlands*, no. 29353/06, § 42, 10 July 2012).

(b) Whether the applicant's conviction was based solely or mainly on evidence from G.C.

25. It was not in dispute that G.C.'s testimony constituted the main evidence against the applicant. The Court notes that the relevant charges were not directly supported by other evidence, which renders G.C.'s testimony the sole evidence in that respect.

26. The evidence in question was thus 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

27. The Court is called upon to examine the proceedings as a whole (*Al-Khawaja and Tahery,* cited above, § 118), that is considering both the investigation and the trial stage.

28. As regards the investigation, the Court observes that: (i) the applicant was represented by a lawyer at that stage (compare and contrast with *Schatschaschwili*, cited above, § 71); (ii) the applicant was confronted with G.C. (see paragraph 6 above; *Palchik v. Ukraine*, no. 16980/06, § 10, 2 March 2017, compare and contrast with *Prăjină v. Romania*, no. 5592/05, § 46, 7 January 2014); (iii) the applicant's lawyer did not attend the confrontation and never contended that he had not been notified; (iv) the applicant explicitly stated that he did not object to the confrontation being conducted in his lawyer's absence; and (v) the applicant refrained from asking G.C. any questions himself during the confrontation.

29. In the light of the above, the Court finds that the applicant had an opportunity to examine and have examined a witness against him during the investigation (*Fąfrowicz v. Poland*, no. 43609/07, § 54, 17 April 2012, *Al-Khawaja and Tahery,* cited above, § 119) but failed to avail himself of that possibility. The ability to confront a witness for the prosecution at the investigation stage is an important procedural safeguard which can

compensate for the handicaps faced by the defence on account of the absence of such a witness from the trial (*Palchik*, cited above, § 50).

30. Moreover, the Court notes that, during the investigation, G.C. was questioned at least five times after the confrontation. The applicant did not contend that he or his lawyer asked to be allowed to participate in the questioning but were refused.

31. Moving on to the trial, the case should be distinguished from the scenario involving the testimony of an absent witness *stricto sensu* (for example, *Schatschaschwili*, cited above), as the first-instance court came into direct contact with G.C. who (i) was present when his statements from the investigation were read out, (ii) confirmed them in their entirety, (iii) made statements in response to the testimony of other defendants, and (iv) agreed to answer questions of certain persons, including those of the court (see paragraphs 8 and 10 above; compare and contrast with *Kuchta*, § 65 and *Prăjină*, § 56, both cited above). While the trial court did not put any questions to G.C., it is not this Court's role to question the reason thereof, given that the findings based on G.C.'s testimony do not appear arbitrary or manifestly unreasonable (*De Tommaso v. Italy* [GC], no. 43395/09, § 170, 23 February 2017).

32. The domestic courts made a particularly thorough and careful examination of the credibility of G.C. and of the reliability of his statements (see paragraphs 13 and 18 above), which is considered an important safeguard on its own (*Schatschaschwili*, cited above, § 126 and the case-law cited therein).

33. Even though the applicant was unable to cross-examine his accuser directly in court, he gave his own version of events with a view to casting doubt on the credibility of G.C. Moreover, the applicant – fully aware of the latter's identity and the importance of his testimony from the pre-trial stage of the proceedings (see paragraph 7 above) – was able to identify and investigate any motives G.C. might have had for lying, and was therefore able to contest effectively his credibility, albeit to a lesser extent than in a direct confrontation (*Schatschaschwili*, cited above, §131). In that respect, the Court notes that the domestic courts addressed, at length, the doubts cast by the applicant's allegations made against G.C. and, having agreed with the points raised in the applicant's appeal, completed evidence material in that respect *ex officio* (*a contrario Tseber v. the Czech Republic*, no. 46203/08, § 63 *in fine*, 22 November 2012).

34. Unlike in the case of *Vidgen* (cited above), the applicant, represented by two defence lawyers, did not make any attempt to have G.C. questioned before the appellate court.

(d) Conclusion

35. Viewing the fairness of the proceedings as a whole, the Court considers that notwithstanding the difficulties caused to the defence by

admitting the pre-trial statements of G.C. and the risks involved in doing so, the counterbalancing factors were sufficient to compensate for the admission in evidence of those statements.

36. It follows that this complaint is likewise inadmissible under Article 35 § 3 (a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 22 February 2024.

Attila Teplán	Ivana Jelić
Acting Deputy Registrar	President