CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39389/98
by Desmond KAVANAGH
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 28 August 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 23 July 1997 and registered on 16 January 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant as well as to the further observations of both parties,

Having deliberated, decides as follows:

THE FACTS

The applicant is a British national, born in 1961. He is currently serving a prison sentence in the United Kingdom. He is represented before the Court by Mr J. Wadham, a solicitor working with the Legal Department of Liberty, a non-governmental organisation based in London, England.

A. The circumstances of the case

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

At about 8.30 a.m. on 28 July 1995 an individual carrying a bunch of flowers forced his way through the front door of the home of a seventy-five year old woman as she was about to leave her house. He stole fifty pounds in cash from her as well as jewellery and ornaments valued at eight thousand pounds. During the robbery the victim sustained a broken finger and cuts and bruises to her head and body.

The victim provided a detailed description of the robber's physical appearance and attire. This description broadly matched that given by a postman who had spotted a man carrying a bunch of flowers in the vicinity on the morning in question. Although the victim and the postman noted some resemblance between two of the volunteers and the robber at a police identification parade organised on 2 October 1995, neither was able to make a positive identification.

At 4.19 p.m. on the day of the robbery the applicant surrendered to his bail at a London police station in respect of a separate offence. He was found to be in possession of three hundred and forty pounds and twenty-one pence. He had no other items of property on him. Some of his clothing matched the description of the clothes worn by the robber. On the same day he was granted bail in relation to the separate offence but was soon afterwards re-arrested on another matter and remanded in custody.

On 4 August 1995 police officers investigating the robbery searched the applicant's home and seized the clothes and shoes which he was wearing when he surrendered himself to the police on 28 July 1995. Nothing else relevant to the robbery was recovered.

On 9 August 1995 the applicant was twice interviewed under caution by the police in connection with the robbery. He had a private consultation with his solicitor before the first interview began. The police had informed the applicant's solicitor that finger and palm prints had been found inside the victim's house but refused to say where. The applicant was then interviewed for the first time under caution. He was told by police:

> "You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence".

The applicant declined to answer any of the questions put to him during interview. The interview was stopped in order to allow the applicant to have a further private consultation with his solicitor, as he had requested. The applicant gave samples of his finger and palm prints to the police. The police informed the applicant the same day that analysis had shown that his prints matched those found inside the victim's front door. The second interview then began. The applicant was again cautioned and was reminded that he was entitled to free legal advice at any time. The applicant confirmed that he understood what had been said to him. The applicant's solicitor then confirmed that his role was to protect the applicant's interests and legal rights and that the applicant could take legal advice at any stage during the interview. The solicitor added that if any questions were put to the applicant which he considered improper or if any questions concerned matters that had not been disclosed to the applicant in advance, he would indicate to the applicant the need to take advice. Finally, the solicitor added that the applicant intended to make no comment to any questions put to him by the police but that he wanted to participate in an identification parade.

The applicant was then asked a number of questions about his connection with the victim's house and his involvement in the robbery. It was specifically suggested to him that he had committed the robbery and that the finger and palm prints pointed to this. He was also asked about his alibi. The applicant continued to make no comment and was again warned of the risk of adverse inferences being drawn from his silence. The applicant stated that he had been advised by his solicitor to make no comment and would not make any comment.

The applicant was charged with the robbery shortly after the second interview. He then repeated his request to participate in an identification parade.

For six days from 10 May 1996 the applicant was tried before a jury at Kingston Crown Court, London, on charges of robbery and handling stolen goods.

At the trial the prosecution adduced forensic evidence in the form of a footprint found on the victim's carpet which matched the thread pattern of the shoes worn by the applicant on the day of the robbery, as well as fibres found on the applicant's shoes, seized at his home on 4 August 1995, which matched those on the victim's carpet. The prosecution conceded that neither element was conclusive of guilt. Of greater importance to the prosecution case was the fact that finger and palm prints found on the victim's front door were consistent with the applicant having been inside the house and having shut the door from the inside.

The applicant testified at the trial that he had not been anywhere near the area where the victim lived on the day in question. A defence witness testified that he was with the applicant at the time of the robbery in another part of London. The applicant stated in his defence that he had called at the

victim's house as well as other houses in her street in early July 1995 seeking help in connection with his car which had broken down. The victim's front door was ajar and he went into the hall and called out to see if anyone was in. There was no reply. The applicant submitted that he must have left his fingerprints on the front door on that occasion. The applicant called three witnesses in support of his account of having been in the street and having called at houses looking for jump leads for his car. The victim told the jury that she never left the front door open and that her cleaning lady wiped it regularly. The cleaning lady testified that she cleaned the inside of the front door every Monday.

In the course of the trial the applicant's counsel made an application in the absence of the jury that the trial judge hear evidence and submissions as to the admissibility of the fact that the applicant had, generally, made no comment when interviewed by the police, and had not disclosed the fact that he had an alibi and an explanation for the presence of the fingerprints, on the advice of his solicitor. It was also submitted on the applicant's behalf that, as a matter of law, there was no material on which the jury could be properly invited to draw inferences adverse to the applicant from his silence in interview. The trial judge gave an indication that adverse inferences might be drawn if the solicitor, who could give evidence as to the advice he gave to the applicant and the reasons for it, did not do so before the jury. The judge declined to hear evidence in the absence of the jury. He ruled:

> "In order to form a judgment as to whether silence when asked questions by the police was reasonable in the circumstances of the case, the jury will need to know not only the fact that the advice was given – and they will come to the conclusion by whatever evidence is called – but they will also need to know, I would have thought the reasons which the solicitor gave to the [applicant]... That seems to me will mean that the [applicant], if he wishes to assert that it was reasonable for him to keep his defence in reserve, would have to waive privilege and call his solicitor.
>
> The jury has to decide whether the [applicant] has good reason for making no comment, not to decide whether the solicitor had good reason for giving the advice that he gave."

The judge then assured counsel for the prosecution and the defence that he would later give them an opportunity to make submissions to him as to how he should direct the jury.

The applicant did not call his solicitor to testify. In the course of his evidence the applicant waived legal professional privilege and was cross-examined on his admitted failure to tell his solicitor on the day of his arrest about his alibi or his explanation for his fingerprints being found on the front door of the victim's house. As to why he had made no comment to the questions put to him during interview, the applicant said that this was because his solicitor had so advised him, and added that his solicitor had given him this advice as the police would not disclose to the defence where in the victim's house the finger and palm prints had been found.

As to the applicant's silence during the two police interviews, the trial judge directed the jury in the following terms:

> "The prosecution case is that in the circumstances when he was questioned or charged he could reasonably have been expected then to mention those facts. The law is that you may draw such inferences as appear proper from his failure to mention those facts when he was questioned or charged. You do not have to hold it against him, it is for you to decide whether it is proper to do so. Failure to mention such facts at the time cannot on its own prove guilt. But depending on the circumstances, you may hold that failure against him when deciding whether he is guilty. You must decide whether, in the circumstances which existed at the time, the earlier innocent visit and the alibi were facts that the [applicant] could reasonably have been expected to mention when he was questioned under caution before being charged with the offence or when he was charged with the offence.
>
> The applicant was not obliged to answer to questions, he was entitled to remain silent. That was his right and his choice. I remind you that the burden of proof remains on the prosecution throughout. The [applicant] has to prove nothing. Any inference from his failure to mention those facts when he was questioned under caution or charged or when he was charged cannot of its own prove guilt. You must be satisfied that the prosecution has established a case to answer before drawing any inferences from the failure to mention those facts. That means you must be satisfied that the [applicant's] finger and palm prints were on the inside of the [victim's] front door and that any physical description of the robber did not exclude the [applicant]. If, despite any evidence relied on to explain his failure to mention those facts when he was questioned under caution before being charged or when he was charged, you conclude that his failure to mention those facts can only sensibly be attributed to those facts not being true, you might draw an adverse inference."

Later the judge reminded the jury:

> "The [applicant] was interviewed on 9 August. Towards the end of the second interview he said that he was advised by his solicitor to make no comment, that is, to refuse to answer questions. The prosecution say that the [the applicant] could reasonably have been expected to mention certain facts."

Shortly afterwards the judge added:

> "[The applicant] tells you that he did not answer questions because he had been advised not to because he had not been told whereabouts his fingerprints had been found in [the victim's house]. Does that mean that he could not reasonably be expected to mention his whereabouts on 28 July? Does that mean that he could not reasonably have been expected to mention his innocent visit to [the victim's house]? The prosecution say this: until a man knows whereabouts in the house his prints have been found, he cannot even think about a story to explain them away. You have been told, you have heard the evidence, that the solicitor advised the [applicant] to make no comment."

Finally, the judge recited the applicant's evidence on the solicitor's advice:

> "I [the applicant] spoke to a solicitor before the interview. I was advised to make no comment in the interview from the outset. The police wouldn't say where my fingerprints had been found. I accepted that advice."

The jury returned a verdict of guilty by a majority of ten to two. On 21 May 1996 the applicant was sentenced to fourteen years' imprisonment for the robbery offence and twelve months' imprisonment concurrently for handling stolen goods.

The applicant appealed against his conviction and sentence to the Court of Appeal with the leave of the Single Judge. Before the Court of Appeal, the applicant contended *inter alia* that the trial judge had erred in law by permitting the police interviews to be admitted in evidence and by directing the jury that it was open to them to draw inferences from the failure of the applicant to mention during the interviews the matters which he later relied on in evidence at his trial.

On 7 February 1997 the Court of Appeal dismissed the applicant's appeal against conviction while reducing his prison sentence from fourteen to twelve years.

Delivering the judgment of the Court of Appeal, Lord Justice Rose stated that the court was not persuaded that the trial judge was wrong to decline to hear submissions in the absence of the jury on the exclusion of evidence. Lord Justice Rose considered that, even if evidence had been heard by the judge on the *voir dire*, it was inevitable that the judge would have ruled that the evidence sought to be excluded could be heard by the jury. The Court of Appeal concluded:

> "In our judgment, therefore, it follows that there can be no adverse impact upon the safety of this conviction by the course of events followed in relation to the submissions made in relation to section 34 [of the Police and Criminal Evidence Act 1994]."

As to the question whether the trial judge had given a proper direction to the jury on the drawing of inferences from the applicant's silence at the police interviews, Lord Justice Rose stated:

> "... the learned judge directed the jury impeccably, in accordance with the five points to which Lord Taylor C.J. drew attention in R. Cowan (1996) 1 Cr. App. R. 1, that is to say as to the correct approach by the jury before they could draw inferences adverse to the accused from his failure to mention material facts. ... In our judgment, when the whole of the summing up is read ... there is no sustainable argument that the judge's direction in relation to inferences were other than appropriate and adequate ... What is of significance, for consideration by the jury, is whether and when, in the sequence of events, as between arrest, charge and trial, the [applicant] mentions, if he does mention, matters relevant to his defence. It is for the judge to tailor his summing-up to the circumstances of the particular case, in order to deal with those matters. We see no ground for criticising the judge's summing up in this respect."

B. Relevant domestic law and practice

1. Criminal Justice and Public Order Act 1994

Section 34 of the Criminal Justice and Public Order Act 1994 provides that:

> "1. Where in any proceedings against a person for an offence, evidence is given that the accused –
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) ... being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> 2. Where this subsection applies ...
>
> (c) the court, in determining whether there is a case to answer; and
>
> (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.
>
> 3. Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention."

Section 35 (2) and (3) provides:

> "(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.
>
> (3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question."

Section 38 (3) adds that:

> "A person shall not ... be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2)..."

Guidance as to the direction which the judge should give the jury in respect of section 35 of the Criminal Justice and Public Order Act 1994 are provided by the Judicial Studies Board specimen directions and by the dicta

of Lord Taylor CJ in R. v. Cowan ([1996] 1 Criminal Appeal Reports 1). The relevance of these *dicta* to directions under section 34 of the same Act was confirmed by the Court of Appeal in R. v. Condron ([1997] 1 Criminal Appeal Reports 185).

The Judicial Studies Board guideline direction at the time of the Court of Appeal's consideration of the applicant's appeal provided that:

> "If he failed to mention [a fact] ... when he was questioned, decide whether in the circumstances which existed at the time, it was a fact which he could reasonably have been expected then to mention.
>
> The law is that you may draw such inferences as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention such a fact at that time cannot, on its own, prove guilt, but depending on the circumstances, you may hold that failure against him when deciding whether he is guilty, that is, take into account as some additional support for the prosecution's case. It is for you to decide whether it is fair to do so."

The dicta of Lord Taylor CJ are as follows:

> "We consider that the specimen direction is in general terms a sound guide. It may be necessary to adapt it to the particular circumstances of an individual case. But there are certain essentials which we would highlight:
>
> 1. The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the standard required is.
>
> 2. It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice.
>
> 3. An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act.
>
> 4. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence.
>
> 5. If despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

The current specimen direction for section 34, up-dated in May 1999 in the light of the judgments of the Court of Appeal in R. v. Argent ([1997] Criminal Appeal Reports 27) and in the instant case, provides:

> "[When arrested, and at the beginning of each interview] this defendant was cautioned, he was told that he need not say anything, but that it may harm his defence

if he did not mention something when questioned which he later relied on in court. Anything he did say may be given in evidence.

The defendant as part of his defence has relied upon [...] (*here specify precisely the fact(s) to which this direction applies*). But [the prosecution case is] [he admits] that he did not mention this [when he was questioned before being charged with the offence] [when he was charged with the offence] [when he was officially informed that he might be prosecuted for the offence].

The prosecution case is that in the circumstances, and having regard to the warning which he has been given, if this fact had been true, he could reasonably have been expected to mention it at that stage, and as he did not do so you may therefore conclude that [it has since been invented/tailored to fit the prosecution case/he believed that it would not then stand up to scrutiny].

If you are sure that he did fail to mention [...] when he was [charged] [questioned] [informed], it is for you decide whether in the circumstances it was something which he could reasonably have been expected to mention at that time. If it was, the law is that you may draw such inferences as appear proper from his failure to do so.

Failure to mention [...] cannot, on its own, prove guilt. But, if you are sure that quite regardless of this failure, there is a case for him to meet, it is something which you are entitled to take into account when deciding whether his evidence about this matter is true, i.e. you may take it into account as some additional support for the prosecution's case. You are not bound to do so. It is for you to decide whether it is fair to do so.

[There is evidence before you on the basis of which the defendant's advocate invites you not to hold it against him that he failed to mention this fact when he had the opportunity to do so. That evidence is [...]. If you think this amounts to a reason why you should not hold the defendant's failure against him, do not do so. On the other hand, if it does not in your judgment provide an adequate explanation, and you are sure that the real reason for his failure to mention this fact was that he then had no innocent explanation to offer in relation to this aspect of the case, you may hold it against him.]"

In R. v. Argent the Court of Appeal confirmed that legal advice is one circumstance to be taken into account by the jury. The Court of Appeal explained six conditions that had to be met before section 34 of the 1994 could allow inferences to be drawn. As regards the sixth condition, Lord Bingham CJ stated:

"The sixth condition is that the appellant failed to mention a fact which in the circumstances existing at the time the accused could be reasonably have been expected to mention when questioned. The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at the time. The courts should not construe the expression 'in the circumstances' restrictively: matters such as the time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant ...

Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common-sense, experience and understanding of human nature. Sometimes they may conclude that it was reasonable

> for the defendant to have held his peace for a host of reasons, such as he was ... worried at committing himself without legal advice, acting on legal advice, or some other reason accepted by the jury."

In R. v. Roble ([1997] Criminal Law Reports 449) the Court of Appeal stressed the defendant's right to reveal to the jury not only the fact that he remained silent on legal advice but also his right to adduce evidence before the jury (by way of oral evidence from the defendant himself and / or the solicitor who gave the advice) about the contents of the advice, that is the reasons why he was so advised.

The approach in R. v. Roble was confirmed in the later cases of R. v. Daniel ([1998] 2 Criminal Appeal Reports 373), R. v. Bowden ([1999] 1 Weekly Law Reports 823), and R. v. Fitzgerald (judgment of 6 March 1998, unreported).

In R. v. McGarry ([1999] 1 Criminal Appeal Report 377) the Court of Appeal held that where a trial judge decides, as a matter of law, that no jury could properly conclude that the requirements of section 34 of the 1994 have been satisfied and, therefore, it is not open to the jury to draw an adverse inference under section 34(2), he must specifically direct the jury not to draw any inference. In R. v. Doldur (judgment of 23 November 1999: "*The Times*", 7 December 1999) the Court of Appeal (per Lord Justice Auld) stated:

> "Acceptance of the truth and accuracy of all or part of the prosecution evidence may or may not amount to sureness of guilt. Something more may be required, which may be provided by an adverse inference from silence if they think it proper to draw one. What is plain is that it is not for the jury to repeat the threshold test of the Judge in ruling whether there is a case to answer on the prosecution evidence if accepted by them. The direction approved in Cowan has a different object. It is to remind the jury that they cannot convict on adverse inferences alone. It is to remind them that they must have evidence, which, in the sense of section 34 inferences, may include defence evidence where called and which, when considered together with any such adverse inference as they think proper to draw, enables them to be sure both of the truth and accuracy of that evidence and, in consequence, guilt."

The Government submitted in the Condron v. the United Kingdom case (judgment of 2 May 2000, no. 35718/97, to be published in ECHR 2000-V) that the case of R. v. Doldur is authority for the proposition that the jury must be satisfied that the prosecution have established a prima facie case of guilt before inferences may be drawn under section 34 of the 1994 Act.

In R. v. Bowden ([1999] 2 Criminal Appeal Reports 176) the Court of Appeal confirmed that if a defendant seeks to rely on reasons given in the course of an interview by a solicitor for advising his client to remain silent this would constitute a waiver of privilege even if the solicitor was not called to give evidence at the trial.

2. Criminal Appeal Act 1968 as amended by the Criminal Appeal Act 1995

Section 2(1) of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995, provides a single, composite ground of appeal against a criminal conviction. It states that the Court of Appeal:

> "shall allow an appeal against conviction if it thinks that the conviction is unsafe".

In R. v. Chalkey and Jeffries ([1998] 2 Criminal Appeal Reports 79) the Court of Appeal recognised that the omission of the word "unsatisfactory" which had been contained in the former section 2 of the 1968 Act had changed the law. A conviction will not be liable to be quashed on account only of procedural irregularity, or abuse of process or a failure of justice to be seen to be done. However in R. v. Mullen ([1999] 2 Criminal Appeal Reports 143), the Court of Appeal held that "unsafe" was to be given a broad meaning, favourable to defendants. The Court of Appeal stated that the terms was not limited to the safety of the conviction itself but encompasses the prior prosecution process. The Court of Appeal should look at all the circumstances of the case including questions of law, abuse of process and questions of evidence and procedure.

COMPLAINTS

The applicant complains that his right to a fair trial was breached on account of the fact that the trial judge erred in allowing the jury to draw adverse inferences from his silence.

The applicant states that the judge's direction violated Article 6 § 1 of the Convention, separately and in conjunction with Article 6 § 2, since the terms of the direction breached his right to a fair trial and undermined at the same time the presumption of innocence.

The applicant further relies on Article 6 § 1, in conjunction with Article 6 § 3 (b) and (c), in support of his complaint that the effect of the direction was to violate both his right to adequate facilities for the preparation of his defence and to a lawyer.

THE LAW

The applicant complains that his right to a fair trial was breached on account of the fact that the trial judge erred in allowing the jury to draw adverse inferences from his silence. He invokes Article 6 of the Convention which provides to the extent relevant:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ....

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: ...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ..."

In the applicant's submission he remained silent at the police interviews on the advice of his solicitor and he was unfairly penalised for relying on that advice since his decision to remain silent on the strength of that advice could not, as a matter of common sense, be probative of guilt. The applicant contends that the trial judge should have directed the jury accordingly. The applicant further maintains that it was impossible to identify the effect which the judge's direction had on the jury's determination of the case since it did not give reasons for its decision. He contends in this respect that the evidence adduced by the prosecution was not compelling and, in the absence of an adverse inference, was incapable of proving his guilt beyond a reasonable doubt.

The Government state with reference to the principles laid down in the Court's Condron v. the United Kingdom judgment of 2 May 2000 (application no. 35718/97, to be published in ECHR 2000-V) that the direction given to the jury in the instant case was much more specific than that given in the Condron case and limited much more directly the adverse inferences that could be drawn against the applicant. In short, the direction matched perfectly the requirements and safeguards identified by the Court in its Condron judgment and considerably curtailed the jury's discretion to draw an adverse inference from the applicant's silence during police interview.

In the Government's further submission, the fact that the applicant was cross-examined at the trial as to the content of his discussion with his solicitor before the police interview did not undermine the fairness of the trial. The applicant volunteered this information to the jury and the trial judge properly directed the jury as to the assessment of his explanation for his silence. For the Government, the jury plainly considered the relevance of the legal advice but concluded that it did not explain the applicant's silence. Contrary to the applicant's submission, the evidence against him was compelling and it was clear that the jury did not believe either his alibi defence or the reason he gave for his finger and palm prints being found on the inside of the victim's door.

The applicant disagrees with the Government's view of the safeguards contained in the judge's direction. The applicant submits with reference to the Court's Condron judgment (loc. cit.), that no mention was made in the direction that silence could not be the "main" as opposed to the "sole" basis for a conviction. This issue was not taken on appeal since the Court of Appeal could not have been invited to read section 38 (3) of the Criminal Justice and Public Order Act 1994 on a broader basis. Furthermore, appropriate weight was not given in the direction to the fact that the applicant was advised to remain silent by his solicitor. The direction in effect left the jury at liberty to draw an adverse inference notwithstanding that it may have been satisfied with the plausibility of the applicant's explanation.

The applicant also highlights that the Court of Appeal accepted that the judge was wrong to refuse an application for a *voir dire* to determine whether the jury should have been permitted to draw an adverse inference. In the event, the Court of Appeal was obliged to carry out an ex post facto review of this issue and upheld the terms of an imperfect direction with respect to the safety of the applicant's conviction to the neglect of the broader question concerning the fairness of his trial.

The Court notes that in its Condron judgment it confirmed in line with its earlier John Murray v. the United Kingdom judgment (*Reports of Judgments and Decisions* 1996-I) that the right to silence is not an absolute right. Accordingly, the fact that a trial judge leaves a jury with the option of drawing an adverse inference from an accused's silence either during police interview or during his trial cannot of itself be considered incompatible with the requirements of a fair trial.

The Court further stressed in its Condron judgment that since the right to silence, like the privilege against self-incrimination, lay at the heart of the notion of a fair procedure under Article 6, particular caution was required before a domestic court could invoke an accused's silence against him. Thus, it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. Nevertheless, it is obvious that the right cannot and 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.

For the Court, 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 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 (*ibid.* §§ 55-57).

The Court observes that the applicant was informed at the beginning of the first police interview that it was his right not to reply to the questions put

to him by the police as well as of the possible consequences attaching to the exercise of that right. The applicant has not disputed the clarity of the caution administered to him. He was accompanied by his solicitor during interview and relied on the latter's advice to remain silent in the face of police questioning about his whereabouts at the time of the robbery and the discovery of his finger and palm prints on the inside of the victim's front door. At his trial, the applicant relied on the defence of alibi, advanced an explanation for the presence of his prints in the victim's house and told the jury that he did not answer police questions during interview because his solicitor had advised him to remain silent.

The Court must have close regard to the manner in which the trial judge directed the jury on the issue of the applicant's silence, and in particular to the safeguards contained in his direction in order to ensure that it struck the appropriate balance between the exercise by the applicant of his right to silence and the circumstances in which an adverse inference may legitimately be drawn from silence.

It notes in the first place that under section 34 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") the trial judge was not obliged to leave this issue with the jury. He exercised his discretion to do so. The Court sees no reason to question the judge's decision from the standpoint of Article 6, nor his decision not to hear evidence on the *voir dire*.

Secondly, the trial judge warned the jury that the applicant was within his rights in refusing to answer police questions, that the burden lay on the prosecution to prove the applicant's guilt and that the applicant's silence "cannot of its own prove guilt." The trial judge further explained to the jury that it had to be satisfied that the prosecution has established a case to answer before drawing any inferences from the applicant's failure to mention to the police either his alibi or his explanation for the presence of his finger and palm prints in the victim's house. The Court would further add that, even if satisfied that there was a case to answer, the jury was not obliged to draw any inferences.

Thirdly, the trial judge carefully worded his direction so as to make clear to the jury that it had to be satisfied that the applicant's silence was consistent with guilt. The trial judge stated in this connection: "If, despite any evidence relied on to explain his failure to mention those facts when he was questioned under caution before being charged or when he was charged, you conclude that his failure to mention those facts can only sensibly be attributed to those facts not being true, you might draw an adverse inference." In the Court's opinion, this part of the direction as worded confined any use which the jury might make of the applicant's silence within limits which were consistent with the notion of fairness.

Fourthly, the jury was reminded that the applicant had testified that he did not mention the matters on which he relied on in his defence on account

of his solicitor's advice. Although it is the applicant's case that the trial judge failed to attach decisive weight to this issue, it is to be noted that the applicant did not in fact mention to his solicitor during any of their consultations at the police station that he could prove he was elsewhere at the time of the robbery or that he had paid an innocent visit to the victim's house on an earlier date. He admitted under cross-examination that he had failed to inform his solicitor of these matters. For the Court, what is important is the consideration that the jury was informed that the applicant sought to justify his silence with reference to his solicitor's advice and was apprised of the reasons for that advice once the applicant had decided to waive legal professional privilege. The fact that the trial judge did not go on to direct the jury that it could not draw an adverse inference from his silence cannot be impugned from the standpoint of fairness, bearing in mind the above-cited warning given by the trial judge to the jury on the circumstances which might justify the drawing of an adverse inference. Irrespective of whether or not the applicant remained silent on the advice of his solicitor, the crucial issue for the jury remained the same, namely could the applicants' silence at the police interview only sensibly be attributed to his having no answer to the incriminating matters put to him or none that would stand up to cross-examination.

The Court would also observe that, in view of the overall fairness of the direction and the strength of the prosecution case, the applicant cannot contend that the judge's omission of the word "mainly" is open to criticism from the standpoint of Article 6.

The Court notes that, in accordance with section 34 of the 1994 Act, it was the function of the jury to decide whether or not to draw an adverse inference from the applicant's silence. Having regard to the fact that it is impossible to ascertain the weight, if any, given by the jury to the applicant' silence, it was crucial that the jury was properly directed on this matter. It finds that in the instant case, and bearing in mind the safeguards in place, the jury's direction on this question was confined in a manner which was compatible with the exercise by the applicant of his right to silence at his trial.

There is accordingly no appearance of a breach of the fairness guarantees of Article 6 § 1 of the Convention and the applicant's reliance on Article 6 § 2 amounts in effect to a restatement of his case under the former provision.

Moreover, in so far as the applicant seeks to contest the fairness of the operation of section 34 from the standpoint of fairness and with reference to the fact that he was obliged to waive legal professional privilege in order to defend his decision to remain silent during police interview, the Court would observe that the fact that the applicant was subjected to cross-examination on the content of his solicitor's advice cannot be said to raise an issue of fairness under Article 6 § 1 of the Convention taken in

conjunction with Article 6 § 3(b) or (c). The applicant was under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for his silence remaining at the level of a bare explanation. The applicant chose to make the content of his solicitor's advice a live issue as part of his defence. For that reason he cannot complain that the scheme of section 34 of the 1994 Act is such as to override the confidentiality of his discussions with his solicitor (see the above-mentioned Condron judgment, § 60 *in fine*). It follows that the applicant's complaints under these heads are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

Having regard to the above considerations, the Court concludes that the application as a whole is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President