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. 37983/97
by Richard Charles OWEN
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 10 March 1997 and registered on 1 October 1997,

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 both parties' further observations,

Having deliberated, decides as follows:

THE FACTS

The applicant is a British national, born in 1951. He is currently serving a prison sentence in the United Kingdom. He is represented before the Court by Ms Nuala Mole, a lawyer attached to the London-based Aire Centre.

A. The circumstances of the case

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

Between 29 January 1996 and 20 February 1996 the applicant and two other co-defendants, B. and G., were tried before a jury at Bristol Crown Court on two counts of conspiracy to produce and possess with intent to supply cannabis. B. pleaded guilty to two fire-arms charges.

The charges against the applicant arose out of a police raid on a house of which he had previously been a tenant. The police found that cannabis was being cultivated on the premises using hydroponic equipment. According to the prosecution the applicant had used his scientific expertise to set up a cannabis-making factory in the house and had bought hydroponic equipment for this purpose between 1992 and 1994 while living in the house. He had then moved out in order to distance himself from the operation.

The applicant did not answer questions when interviewed by the police following his arrest.

At the close of the prosecution's arguments, the applicant's counsel advised him that he need not give evidence since he considered that there was no real evidence against him. The applicant did not testify.

In his summing up to the jury at the close of the trial, the trial judge, Judge Bursell QC, with reference to section 34 of the Criminal Justice and Public Order Act 1994, directed the jury on the manner in which they were to deal with the applicant's failure to give evidence. The judge's direction was based on the Judicial Studies Board specimen directions. Specifically, he said:

> "[The applicant], of course, has not given evidence, and that is, as [the applicant's] counsel] quite properly reminded you, [the applicant's] legal right. The burden of proving the case still remains on the Prosecution throughout, and [the applicant] is quite entitled to say, as he has through [his counsel], 'The Prosecution has failed to prove its case, and I stand on that'. Moreover, failure to give evidence on its own cannot prove guilt. On the other hand, if, and only if, you are satisfied that the evidence relied on by the Prosecution established that there is a case to answer, then in those circumstances you may consider [the applicant's] failure to give evidence. If, and only if, the sole sensible explanation for [the applicant's] decision not to give evidence is that he has no answer to the case against him, or none that could stand up to cross-examination, then it would be open to you, if you think fit, to hold against him his failure to give evidence. It is for you and you alone to decide whether it is fair to do in the circumstances of this case."

The jury retired to consider their verdict. A note was subsequently sent through to the judge from the jury stating that:

> "Regarding the evidence relating to [the applicant] we are unable to find definitive evidence to show guilt. However we do feel that there is a 'case to answer'. Are we able to infer that there is no defence because [the applicant] failed to give evidence?
>
> Ultimately we believe that [the applicant] was involved but we are experiencing difficulty in finding facts. Would your Honour please clarify his comments relating to the exercise of defendant's right not to give evidence."

In the absence of the jury, the trial judge addressed the applicant's counsel as follows:

> "I take the view, subject of course to anything that you say, that the correct course would be for me to remind the jury of that which I said firstly about circumstantial evidence, but then in relation to the failure to give evidence..."

The applicant's counsel agreed and also proposed that the jury be reminded again that the prosecution bore the burden of proving the applicant's guilt beyond reasonable doubt. The judge agreed.

The jury returned and announced a verdict of guilty against one co-defendant, B., and acquitted another, G. However, as regards the applicant, the jury informed the judge that they had not yet reached a verdict. The judge then gave the jury further directions in relation to the evidence against the applicant and his failure to give evidence. He stated:

> "May I first of all remind you of that which I have said about circumstantial evidence. It sometimes happens that a jury is asked to find some fact proved by considering direct evidence of it. Direct evidence may take many forms... On the other hand it is often the case that direct evidence of a crime is not available and the jury is required to decide the case on what I call 'circumstantial evidence'. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and to the defendant in order to demonstrate that some or all of the circumstances, when taken together, establish the defendant's guilt. Because the only conclusion to be drawn from that evidence is that it was the defendant who committed the crime ... the evidence must lead you to the sure conclusion that the charge that the defendant faces is proved against him. Circumstantial evidence can be powerful evidence, but it is clearly important that you do examine the evidence with care and consider whether the evidence upon which the Prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence, you should consider whether the evidence reveals any other circumstances which are or may be of sufficient reliability or strength to weaken or destroy the Prosecution case...
>
> But may I turn now to the failure of [the applicant] to give evidence, and may I remind you that that is his legal right not to give evidence. In spite of his not giving evidence, the burden of proving the case still remains on the Prosecution throughout. [The applicant] has to prove nothing... Moreover, failure to give evidence on its own cannot prove guilt. On the other hand, if and only if, you are satisfied that the evidence relied on by the Prosecution establishes that there is a case for him to answer, then in those circumstances you may go on to consider [the applicant's] failure to give evidence. If, and only if, the sole sensible explanation for his decision not to give

> evidence is that he has no answer to the case against him, or no answer that could have stood up to cross-examination, then it would be open to you, if you thought fit, to hold against him failure to give evidence. It is for you to decide whether it is fair to do in all the circumstances of this case."

The judge then allowed the jury to reach a majority verdict of ten to one. The jury retired at 3.02 p.m. to consider their verdict. At 3.52 p.m. they returned a verdict of guilty by a majority of ten to one.

On 3 April 1996 the applicant was sentenced to two concurrent terms of imprisonment of eight years.

The applicant sought to have his conviction overturned on the ground, *inter alia*, that the trial judge had erred in his second summing up to the jury by failing to mention that it was for the prosecution to prove beyond reasonable doubt that the applicant was guilty. The applicant was granted leave by the Single Judge to appeal to the Full Court of the Court of Appeal against conviction and sentence.

On 17 October 1996 the Court of Appeal dismissed the applicant's appeal against conviction but reduced his sentence. Lord Justice Brooke, delivering the judgment of the court, agreed with the argument put forward by counsel for the Crown that the trial judge was not obliged to repeat a direction on the burden of proof if he had already given one to that effect. Lord Justice Brooke stated:

> "The fact that the matter had to be proved to the criminal standard of proof was one on which the Judge had given the jury a very clear and correct direction at the beginning of the summing up and although it is a pity that he forgot to do what he had clearly intended to do, we do not consider that this late direction to the jury can be faulted on those grounds."

The applicant did not seek leave to appeal to the House of Lords.

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 *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."

Following the Court of Appeal's judgments in R. v. Cowan and R. v. Condron, the following specimen direction in respect of section 35 was drawn up by the Judicial Studies Board. It states:

"The defendant has not given evidence. That is his right. He is entitled to remain silent and require the prosecution to prove its case. You must not assume he is guilty just because he has not given evidence because, failure to give evidence cannot, on its own prove, prove guilt. However, as he has been told, depending on the circumstances, you may take into account his failure to give evidence when deciding on your verdict.

1. In the first place when considering the evidence as it now is you may bear in mind that there is no evidence from the defendant himself which in any way undermines or contradicts or explains the evidence put before you by the prosecution.

(...)

2. In the second place, if you think that in all the circumstances it is right to do so, you are entitled, when deciding whether the defendant is guilty of the offence(s) charged, to draw such inferences from his failure to given evidence as you think proper. In simple terms, this means that you may hold this failure against him.

[There is evidence before you on the basis of which the defendant's advocate invites you not to hold it against the defendant that he has not given evidence. That evidence is (here set out the evidence). If you think that this amounts to a reason why you should not hold it against the defendant that he has not given evidence, do not hold his silence against him. If, on the other hand, it does not in your judgment provide an adequate explanation for his absence from the witness box, then you may, if you think it right, hold his failure to give evidence against him.]

What inference can you properly draw from the defendant's decision not to given evidence before you? If you conclude that there is no case for him to meet, you may think that if he had an answer to it he would have gone into the witness box to tell you what it is.

If, in your judgment, the only sensible reason for his decision not to give evidence is that he has no explanation or answer to give, or none that could have stood up to cross-examination, then it would be open to you to hold against him his failure to give evidence, that is, 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."

In R. v. Birchall ([1999] Criminal Law Reports) Lord Bingham CJ stated, with reference to section 35 of the 1994 Act:

> "Inescapable logic demands that a jury should not start to consider whether they should draw inferences from a defendant's failure to give oral evidence at his trial until they have concluded that the Crown's case against him is sufficiently compelling to call for an answer by him. ... There is a clear risk of injustice if the requirements of logic and fairness are not observed (...)"

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 he was denied a fair trial in breach of Article 6 §§ 1 and 2 of the Convention. He maintains that the judge erred in law by allowing the jury to return a verdict of guilt on the strength of his silence alone.

THE LAW

The applicant maintains that he was denied a fair hearing on account of the trial judge's decision to leave the jury with the option of drawing an adverse inference from the exercise of his right to silence at his trial. The

applicant relies on Article 6 §§ 1 and 2 of the Convention, which provide and 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."

A. The Government's preliminary objection: non-exhaustion

The Government maintain that the applicant never sought leave to appeal on the issues which he raised in his application. They point out that, as regards the terms of the trial judge's direction, the applicant's counsel, and only as a subsidiary point, confined his grounds of appeal to the complaint that the trial judge failed to mention in his second summing up to the jury that it was for the prosecution to prove beyond reasonable doubt that the applicant was guilty. The Government submit that the applicant has failed to demonstrate that an appeal based on the substance of the complaints he now raises would have had no reasonable prospects of success.

The applicant states in reply that the Court of Appeal could not have provided an effective remedy in respect of his complaints. The applicant maintains that the Court of Appeal would only have had regard to the safety of his conviction and not the crucial and broader question of whether he had received a fair trial. Furthermore, his arguments in respect of the defects in the direction could not have been taken on appeal because the Criminal Justice and Public Order 1994 ("the 1994 Act") does not provide for the safeguards identified by the Court in its Condron v. the United Kingdom judgment (judgment of 2 May 2000, no. 35718/97, to be published in ECHR 2000-V) and arguably excludes them.

The Court considers that it does not have to rule on the Government's argument since the applicant's complaints are inadmissible in any event for the reasons set out below. However, it would stress in this connection that its approach to the Government's plea of non-exhaustion in the instant case should not be construed as exonerating an applicant from the requirement under Article 35 § 1 of the Convention to raise before the appeal courts, at least in substance, the various facets of his Convention complaints concerning the drawing of adverse inferences from his silence in court or during police interview. It observes in this connection that, at the material time, the relevant law (sections 34 and 35 of the 1994 Act) was undergoing development and new principles were emerging (see the above-mentioned Condron judgment, § 55).

B. Merits

In the applicant's submission, the jury note clearly indicated that the jury had taken the view that there was no *prima facie* case to answer. In his submission, the prosecution had not adduced any evidence that he had any association with his co-accused or that any of his purchases of hydroponic equipment had occurred after he had vacated the house and before the crime was discovered. Moreover, the prosecution had accepted that most of the equipment which he had purchased was of a different type to that found at the scene of the crime.

According to the applicant, the trial judge should have exercised his discretion not to allow the jury to draw an adverse inference from his silence in court since the prosecution case against him was of very little evidential value. In this connection, and with reference to the Court's Condron judgment (*loc. cit*.), the applicant asserts that the trial judge failed to stipulate in his direction that his conviction could not be based "solely" or "mainly" on his silence.

Furthermore, the trial judge erred in not reminding the jury in his second direction of the standard of proof required. It was no answer to say that the jury had already been informed of this in the earlier direction since the latter had been delivered twenty-fours hours previously and as part of a detailed and lengthy summing up.

In the applicant's further submission, the trial judge's direction was also deficient in that the jury was not informed that the reason why the applicant failed to give evidence was that he relied on his lawyer's advice.

The Government contend that the jury's note clearly indicated that the jury considered that there was a *prima facie* case against the applicant. Accordingly, the guilty verdict was not based solely or mainly on the applicant's silence.

The Government further contend that the direction given by the trial judge fully complied with the principles set out by the Court in its Condron judgment (loc. cit.). In contrast to the direction impugned in the Condron case, the direction given twice in the instant case was specific and limited very directly the adverse inferences that could be drawn against the applicant. The Government also assert that it is not open to the applicant to complain that there was no effective mechanism for advising the jury that the applicant had been advised by his solicitor not to give evidence at his trial. In the Government's submission, the applicant has not disputed that the trial judge asked the applicant's lawyer in open court at the close of the prosecution case whether the applicant had been apprised of the implications of not giving evidence. In any event, there was nothing to prevent his lawyer from informing the jury that he had advised the applicant not to testify as well as his reasons for this advice.

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, as in the instant case, 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).

With reference to the circumstances of the instant case, the Court observes at the outset that the applicant does not raise any complaint about the drawing of an adverse inference from his silence during police interview, in particular that the guarantees identified by the Court in the Condron judgment were not complied with (for which, see §§ 59 and 60). It would appear from the judge's direction that the applicant's silence during police interview was not adverted to by the prosecution and the jury was not invited to take his silence at that stage into consideration when deliberating on the question of guilt or innocence.

The Court will accordingly confine its examination to the issue of whether the fairness of the applicant's trial was undermined by the trial judge's decision to leave the jury with the option of drawing an adverse inference from the applicant's silence in court. To this end, the Court will consider carefully the terms of the judge's direction in order to determine whether it struck the right balance between the applicant's right to silence and the circumstances in which an adverse inference may be legitimately drawn from silence by the jury.

The Court observes that the applicant did not offer any explanation for his decision not to give evidence at his trial, other than his view that the prosecution had failed to prove its case. It was his right not to testify and he was clearly informed of that right and of the implications of exercising it by

the trial judge at the close of the prosecution case in application of section 35(2) of the 1994 Act. The Court does not consider that the terms of the trial judge's direction can be faulted on account of his failure to remind the jury that the applicant chose not to testify on the advice of his lawyer. This must have been plain to the jury given that the trial judge addressed, in the presence of the jury, the implications of any decision of the applicant not to give evidence. In any event, the Court doubts whether the applicant's reliance on legal advice as an explanation for his silence in court can be considered a plausible explanation which should have been specifically brought to the attention of the jury in the context of the direction, having regard to the fact that the advice was based on his lawyer's assessment of the strengths and weaknesses of the prosecution case. It was for the jury to determine whether the prosecution had made out a case to answer in the light of the evidence which it heard. Moreover, the Court finds no reason to question the trial judge's decision to allow the issue of the applicant's silence to be put to the jury. This was a decision which was taken in the light of the trial judge's own assessment of the prosecution case and in the exercise of the discretion conferred on him under section 35 of the 1994 Act. Moreover, it does not appear that the applicant's counsel sought to argue on the *voir dire* that the trial judge should omit any reference in his summing to the jury to the applicant's silence in court.

In the Court's opinion, the judge's direction cannot be said to have addressed the applicant's silence at the trial in terms which left the jury at liberty to convict the applicant solely or mainly on the strength of his silence. Safeguards were in place to obviate any such risk. In the first place, and as noted earlier, the trial judge was under no obligation to leave the jury with the option of drawing an adverse inference from the applicant's silence in court and the jury, left with that option, had a discretion whether or not to do so. Secondly, the Court must have particular regard to the fact that the trial judge emphasised that it was the applicant's statutory right not to testify, that it was for the prosecution to prove his guilt and that "failure to testify on its own cannot prove guilt." It is true that the judge did not direct the jury that it could not convict the applicant "mainly" on the strength of his silence. However, it was made clear to the jury that it had to be satisfied that there was a case to answer before it could begin to consider the probative value, if any, of the applicant's silence.

In this latter connection, the applicant disputes that the prosecution had made out a *prima facie* case of guilt and refers to the content of the note which the jury passed to the trial judge after retiring to consider its verdict. The Court does not accept that contention, having regard to the terms of the note and in particular to the jury's clear belief "that there is a case to answer." For the Court, the jury's enquiry related to the use which it could make of the various categories of evidence adduced by the prosecution in order to assess whether or not the facts alleged by the prosecution could be

accepted. It must be further observed that the jury was expressly warned that it could only draw an adverse inference "if, and only if, the sole explanation for the [applicant's] decision not to give evidence is that the [applicant] has no answer to the case against him, or no answer that could have stood up to cross-examination ...". Even if satisfied that there was a case to answer, the jury was not obliged to draw any inferences. It appears clear in the light of these considerations that the absence of any reference to "mainly" in the direction does not call into question the overall fairness of the direction.

Nor can the trial judge's failure to refer in his second direction to the standard of proof be impugned from the standpoint of the overall fairness of the direction. This matter had been clearly mentioned by the trial judge at an earlier stage. For the Court, what is important is that the trial judge warned the jury in his second direction that the burden of proving the applicant's guilt lay with the prosecution. The words used plainly conveyed that that burden was a rigorous one. The judge than proceeded to define, fairly, the conditions which should be satisfied before the jury could draw an adverse inference.

The Court notes that, in accordance with section 35 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.

It follows that the application 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