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

FOURTH SECTION

DECISION

Application no. 32605/11
Paweł ROZUMECKI
against Poland

The European Court of Human Rights (Fourth Section), sitting on 1 September 2015 as a Chamber composed of:
Guido Raimondi, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Krzysztof Wojtyczek,
Faris Vehabović,
Yonko Grozev, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*
Having regard to the above application lodged on 16 May 2011,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Paweł Rozumecki, is a Polish national, who was born in 1980 and is detained in Łomża. He was represented before the Court by Mr J. Brydak, a lawyer practising in Warsaw.

A. The circumstances of the case

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

3. On 18 June 1997 two people were shot dead in Komorów, in a forest area situated near allotment gardens. The victims were later identified as cell phone dealers who were at the same time robbed of several cell phones. Their bodies were buried in the ground after the shooting.

4. The events were witnessed by three people (hereafter: the anonymous witnesses nos. 2, 5 and 6) from a distance of approximately 125 metres, who at that time were in the nearby forest. Whereas the anonymous witness no. 2 started paying attention to a suspicious group of people even before the shots were fired, the other persons only witnessed the aftermath of the shooting.

5. On the same day the anonymous witness no. 2 notified the Police by phone of the alleged offences and indicated the scene of the crime.

6. At the crime scene the police secured material evidence, in particular the bodies of the victims. The victims' car was found at a distance of approximately 700 metres from the crime scene. In the subsequent analyses the fingerprints of the applicant's sister M.R. and of a certain M.T. were found on the car. M.T.'s and the applicant's individual scents and a certain K.M.'s scent were detected in the car. The analysis of telephone connections of the victims and the applicant's sister allowed the prosecution authorities to establish the identity of another person involved: a certain A.B., who was seen by several witnesses waiting in his car in the allotment gardens near the forest. Eventually, the buyers of the stolen cell phones were established and recognised M.R., M.T. and A.B. as their sellers. The stolen cell-phones were secured by the police.

7. On 9 September 1997 the anonymous witness no. 2 was heard by the prosecution authorities. A decision on keeping his personal data confidential was issued by the Warsaw Regional Prosecutor (*Prokurator Okręgowy*) on 23 October 1997.

8. The prosecution authorities arrested four people on suspicion of participation in the commission of the double murder and aggravated robbery. The applicant's sister M.R. was arrested on 19 June, A.B. was arrested on 20 June, K.M. - on 14 October and M.T. – on 9 December 1997.

9. On 22 October 1997, the applicant, who was at that time seventeen, left for Mexico with his mother.

10. On 12 December 1997 the Warsaw Regional Prosecutor decided to press charges against the applicant and issued an international wanted notice (*list gończy*) on suspicion of double murder and aggravated robbery.

11. On 18 March 1998 the Warsaw Regional Prosecutor severed the determination of the charges against the applicant to a separate set of proceedings. The investigation against the applicant was suspended because he remained in hiding.

12. Meanwhile, the proceedings against the applicant's sister, M.R., and three other persons A.B., K.M. and M.T. were continued. Initially, the applicant's sister and M.T. testified that K.M. had shot the victims. Subsequently, M.T. withdrew his testimony claiming that it was "suggested" to him by the police and that K.M. did not take part in the events. Also M.R. withdrew her statements against K.M. eventually claiming that a third unknown person shot the victims.

13. The anonymous witness no. 5, a person whom the anonymous witness no. 2 revealed in his subsequent testimony as having accompanied him on the day of the events in question, testified for the first time in March 1999.

14. On 6 August 1999 the Warsaw Regional Court (*Sąd Okręgowy*) convicted M.R., and K.M. of double murder and aggravated robbery, M.T. of aggravated robbery and A.B. of handling stolen goods.

15. On 24 January 2001 the Warsaw Court of Appeal (*Sąd Apelacyjny*) upheld the convictions of M.R., M.T. and A.B. but remitted the case for re-examination as regards the charges against K.M.

16. On 18 July 2002 the Warsaw Regional Court acquitted K.M. The judgment became final.

17. On 30 August 2006 the applicant was deported from the United States of America and the investigation against him was resumed.

18. On 5 September 2006 the Warsaw District Court decided to remand the applicant in custody relying on the reasonable suspicion that he had committed double murder and robbery.

19. On 14 May 2007 the Warsaw Regional Prosecutor lodged a bill of indictment against the applicant with the Warsaw Regional Court.

20. The Warsaw Regional Court heard the anonymous witnesses nos. 2 and 5 on 5 February 2008. The presiding judge conducted the hearing, the prosecutor, the applicant's lawyer and another professional judge from amongst the members of the bench sitting in the applicant's case participated in the hearing via video-link. They could ask the witnesses questions. For unspecified reasons the applicant was not allowed to participate in the hearing.

21. On 15 July 2008 the Warsaw Regional Court convicted the applicant of double murder and aggravated robbery and sentenced him to a cumulative penalty of twenty-five years' imprisonment.

22. The court established that the applicant had been fully aware of his sister's plans to kill and rob the victims. On the day before the planned crime, a hole was dug in the ground. On 18 June 1997 the applicant and M.T. awaited at the agreed place. M.R. travelled with the victims in their car and asked them to stop there on the pretext of searching for an address of a client. It was the applicant who shot the victims and immediately drove off in their car to a place near the allotment gardens where A.B. awaited in another car. They reloaded the cell phones and the victims' personal things into that car. Meanwhile, M.R. and M.T. buried the bodies in the ground and disappeared in the forest. The applicant drove back to the crime scene but, as no one was there, he drove off again and abandoned the victim's car 700 metres away. The perpetrators drove off together in A.B.'s car towards Pruszków and proceeded to sell the cell phones.

23. The court found the applicant's testimony that he had arrived at the crime scene only after the shots incredible and unsupported by any other

evidence apart from his sister's statement. The applicant claimed to have been unaware of his sister's plans and stated that he had waited for his sister with A.B. Only after hearing the shots he had arrived at the crime scene and then drove off in the victims' car in an attempt to "help" his sister. M.R. testified that the applicant had not been at the crime scene during the shooting and had only arrived after the shots. It was another person, whom she refused to identify, who shot the victims.

24. The court noted that A.B. did not confirm that the applicant had been with him. M.T. testified that he did not remember the events. However, it was the testimony of the anonymous witness no. 2 which was crucial to contradict the version of the applicant and his sister. This witness testified that his attention had been drawn by a loud argument of a group of five people. The witness heard four shots altogether, at that moment he saw silhouettes of three people, one of them a woman. Whereas he did not see a gun, on the basis of characteristic movements he stated that a man who was standing the closest to him was the shooter. After the shooting the perpetrators started to drag something and then a car drove off, which came back shortly afterwards and left again. During that time a woman and a man, after having buried something in the ground, left the crime scene.

25. The court considered that the testimony of the anonymous witness no. 2 was logical and consistent and that on its basis it was possible to establish who shot the victims. This witness was a third person, with no personal relations to any of the perpetrators. It followed from that testimony that it was the applicant who shot the victims. The anonymous witness no. 5 confirmed this testimony as regards several circumstances but could not give a clear chronological account of the events.

26. The applicant appealed against the first-instance judgment. He challenged the assessment of evidence by the first-instance court. He argued, in particular, that the evidence of the anonymous witness no. 2 did not confirm that the applicant had been the shooter. He further argued that, in violation of the provisions of the Code of Criminal Procedure his requests for evidence had been refused.

27. On 13 November 2008 the Warsaw Court of Appeal quashed the impugned judgment and remitted the case for re-examination. It considered the applicant's complaint about the assessment of evidence well-founded. It found that the first-instance court had failed to analyse the evidence in its entirety and that it had established certain facts without a sufficient basis in evidence. Moreover, despite the applicant's lawyer's request in this regard, the first-instance court had failed to hear as a witness a person who at the time of the events in issue had been with the anonymous witnesses nos. 2 and 5.

28. The appellate court also considered that, when re-examining the applicant's case, the first-instance court should carefully establish the extent of the applicant's criminal responsibility. Whereas the applicant had

confirmed that on 18 June 1997 he had been present at the crime scene, the court should establish whether he had shot the victims and, if not, if it had been his intention that the victims be shot, or whether it had been only his intention to commit a robbery.

29. During the retrial the Warsaw Regional Court heard the anonymous witnesses no. 2 and 5 on 30 April and 4 September 2009, respectively. All the members of the bench were present at those hearings. The applicant and his lawyer participated in the hearings via audio link and could ask the witnesses questions.

30. On 8 September 2009 the trial court inspected the crime scene (*oględziny miejsca zdarzenia*) and the place from which the anonymous witnesses had observed the events. The prosecutor and the applicant's lawyer were present.

31. As regards the third person accompanying on 18 June 1997 the anonymous witnesses nos. 2 and 5, on 25 May 2009 the trial court decided that the circumstances which could reveal the identity of this witness should be also kept confidential due to the character of the case and the witness' fear of reprisals. The witness was to be referred to hereafter as "the anonymous witness no. 6" and was summoned to appear before the court.

32. The anonymous witness no. 6 failed to attend the hearings scheduled for 4 September and 13 October 2009.

33. On 18 November 2009 the Warsaw Regional Court decided not to hear the anonymous witness no. 6 as the attempts to summon this witness had been futile.

34. On 19 November 2009 the Warsaw Regional Court gave a judgment and convicted the applicant of double murder and aggravated robbery and sentenced him to a cumulative penalty of fifteen years' imprisonment.

35. The court found that the applicant's role in the offences could be established mainly on the basis of the evidence given by the anonymous witness no. 2 assessed in the light of the results of the inspection of the crime scene carried out by the court. According to the first and the most precise testimony given shortly after the events, which this witness confirmed during subsequent questioning, after the shots he had seen a woman and three men at the crime scene. Immediately afterwards, the woman and one man started dragging something on the ground and the two other men drove off in a white car. The anonymous witness no. 5 also stated that he had heard several people speaking and that immediately after the shots a white car drove off. Whereas the applicant claimed that he had arrived at the crime scene only after having heard the shots from the place where he had awaited with A.B., the court considered that it would have been impossible to cover this distance within merely few seconds. Accordingly, he was present at the crime scene during the shooting.

36. The court further found that, while on the basis of the available evidence it could not be established whether it had been the applicant who

shot the victims, his intent of murder was evident due to the earlier preparations undertaken, namely the grave-like hole which had been dug in the ground. The court found that the applicant acted in complicity with M.R. and an unidentified person in committing the murders.

37. Finally, the court considered that there were no reasons to question the credibility of the anonymous witnesses, having regard to the fact that they had immediately notified the police about the crime. Moreover, they had testified in a careful and moderate manner, taking into account the considerable distance from which they had witnessed the events.

38. The applicant appealed against the first-instance judgment. He challenged the assessment of evidence by the trial court arguing that the testimony of the anonymous witnesses could not constitute a basis for establishing a number of people present during the shooting at the crime scene. The anonymous witness no. 2 stated that before the shooting he had seen a group of five people, but - after two people had been shot – he was to have seen four people. The anonymous witness no. 5 did not add anything substantial. He further referred to Article 6 §§ 1 and 3 (d) of the Convention arguing that in accordance with the Court's case-law a conviction should not be based solely or to a decisive extent on the evidence of anonymous witnesses. He also challenged the first-instance court's decision not to hear the anonymous witness no. 6 and requested the appellate court to rectify this shortcoming.

39. In the course of the criminal proceedings the applicant's detention on remand was continually prolonged by the domestic courts. The last decision was issued in this regard on 23 September 2010, the Warsaw Court of Appeal dismissed the applicant's appeal against an extension of his detention.

40. On 12 November 2010 the Warsaw Court of Appeal heard the anonymous witness no. 6. All of the members of the bench were present at the hearing. The applicant and his defence lawyer participated in the hearing via video link. They were allowed to ask questions. The witness confirmed in his testimony that he had been with the anonymous witnesses nos. 2 and 5 on that day, that he heard the shots and saw a woman with some men there. He could not give any details as regards the number of people present.

41. On 19 November 2010 the Warsaw Court of Appeal altered the first-instance judgment and convicted the applicant of aggravated robbery. It sentenced him to a cumulative penalty of fourteen years' imprisonment.

42. The appellate court agreed with the first-instance court's finding as regards the applicant's presence at the crime scene during the shooting. It observed that the applicant's version that at the time of the shooting he had been with A.B. at a distance of approximately 200-250 metres from the crime scene was not corroborated by any other evidence apart from his sister's testimony which she had moreover withdrawn during the retrial. Not

only was his version inconsistent but also contradicted by other evidence obtained in the proceedings.

43. The appellate court agreed with the first-instance court's finding that it was the evidence of the anonymous witness no. 2 which allowed it to establish the role of the applicant in the commission of the offences. It noted that this witness consistently testified that immediately after the shots he had seen a woman and three men at the crime scene and that two of those men had immediately driven off in a white car. It further observed that also the anonymous witness no. 5 confirmed this extremely prompt departure of the car after the shots. Having regard to the fact that all of the perpetrators, including the applicant, submitted that the applicant himself had started the car and driven off towards A.B., his presence at the crime scene during the shooting was certain.

44. However, taking into account that the anonymous witness saw three men at the crime scene, namely the applicant, M.T. and an unidentified individual, the applicant could not be found to be the shooter. Moreover, contrary to the first-instance court's findings, the criminal intent of murder could not be inferred solely from the applicant's presence at the crime scene. On the other hand, having regard to his prompt actions as regards the stolen property, the appellate court found that the intent of committing the robbery was clearly established.

45. It further agreed with the first-instance court's finding that the testimony of the anonymous witness no. 2 was fully credible. It added in this regard, that not only this witness did not know the applicant personally, but also the witness had never identified the applicant as the perpetrator. What is more, the first testimony was given by this witness when the applicant had not been a suspect in the investigation. Some minor inconsistencies in the statements given by this witness at different stages of the proceedings were natural given the passage of time. Moreover, the differences in the number of people before and after the shooting in the account of this witness could be explained by the nearness of the forest, in which some of the perpetrators could have hidden. They thus could not be held against the witness. Both the evidence of the anonymous witness no. 5 and of the anonymous witness no. 6 generally confirmed the account of events as given by this witness.

46. As regards the applicant's argument challenging the conviction as based solely or to a decisive extent on the evidence of anonymous witnesses, the Court of Appeal found as follows:

> "It should be recalled that this witness does not directly, or even indirectly, state that [the applicant] was present at the crime scene, or – for that matter – that he was the perpetrator. The [anonymous] witness no. 2 had not previously known [the applicant] and did not identify him in the proceedings. He also did not describe any features which could indicate his identity. Accordingly, the conviction in the present case is not, as suggested by the applicant, solely based on the evidence of the anonymous witness. The facts as established by the appellate court result from the analysis of the

entirety of evidence gathered which cumulatively constitutes a basis for finding the accused guilty of the offence [of robbery].

In this connection it should, however, be acknowledged that the evidence in question is circumstantial evidence.

The testimony of the anonymous witness no. 2 thus constitutes a basis for establishing a "circumstantial fact"(*"poszlaka*") that, immediately after the two victims had been shot, two of the four people present at the crime scene moved towards the car of the victims and drove off from there. Only after linking this fact with other [facts] clearly established in the present case, in particular such as: that it was [the applicant] (as the first one) who after the shots started the victims' car and drove off in it from the crime scene (which [the applicant] confirms), the fact that [the applicant] reloaded the stolen cell phones to another car, and that he abandoned the victims' car at a park place, and the fact that he participated in selling the stolen phones ... this enables [the court] to establish the chain of facts from which the categorical conclusion as to the existence of the "main fact" is drawn, namely that [the applicant] is guilty of [robbery].

The certainty of the conclusion as regards [the applicant's] guilt derives from linking logically the above facts into the chain of facts, entirely excluding a possibility of a different interpretation of the events in issue."

47. On 19 October 2011 the Supreme Court (*Sąd Najwyższy*) dismissed the applicant's cassation appeal as manifestly ill-founded (*oczywiście bezzasadna*). No reasons were given for this ruling.

B. Relevant domestic law

48. Article 184 of the Code of Criminal Procedure as in force at the relevant time provided, in so far as relevant, as follows:

"1. In case of a justified fear of danger to life, health, freedom or significant property of a witness or of a person close to the witness, the court, and in the preparatory proceedings the prosecutor, may decide to keep confidential the circumstances which could reveal the identity of the witness, in particular the personal data of the witness, if they are of no relevance to the outcome of the case.(...)

2. If a decision referred to in paragraph 1 is issued, the circumstances referred to in this provision should be known only to the court and the prosecutor (,,,). The records of the testimony of the witness shall be made accessible to the accused and the defence in a manner preventing the disclosure of the circumstances referred to in paragraph 1.

3. The witness shall be heard by the prosecutor, and by the court – which may designate one judge from amongst the members of the bench to carry out this task – in a place and in a manner preventing the disclosure of the circumstances referred to in paragraph 1. The prosecutor, the accused and the defence have a right to participate in the hearing of the witness. (...)

...

5. The witness and the accused, and in the proceedings before the court also the prosecutor, may appeal against the decision on keeping confidential the circumstances referred to in paragraph 1 with a time-limit of three days. (...)"

COMPLAINTS

49. The applicant complained invoking Article 6 § 3 (d) of the Convention that his criminal conviction had been based to a decisive degree on statements given by anonymous witnesses whom he could not properly examine during the hearing. He submitted in this context that during the first trial against him he could not be present during the examination of the witnesses, only his lawyer being allowed to take part in those hearing. Moreover, both during those proceedings and in the retrial proceedings the defence was only allowed to participate in the questioning of witnesses via sound-link and could not observe their reactions. Without knowing the identity of the witnesses, the defence could not effectively challenge their credibility.

50. He further complained under Article 5 § 3 of the Convention about the length of his pre-trial detention.

51. He also complained that his appeals against the decisions prolonging his detention had not been examined speedily, invoking Article 5 § 4 of the Convention.

52. Finally, he complained under Article 6 § 1 that the length of the criminal proceedings against him was excessive.

THE LAW

A. Alleged violation of Article 6 §§ 1 and 3 (d) of the Convention

53. Article 6 §§ 1 and 3 (d) read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

54. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that Article which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Taxquet v. Belgium* [GC], no. 926/05, § 84, 16 November 2010, with further references therein). It is also notable in this context that

the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010, and the references therein).

55. The Court clarified the principles to be applied when a witness does not attend a public trial in the judgment in the case *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, §§ 119‑147, 15 December 2011). As to the content of Article 6 § 3 (d), the Court explained that it enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. (see *Al-Khawaja and Tahery*, cited above, § 118, and *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 51, *Reports of Judgments and Decisions* 1997-III). In the context of absent witnesses, the Court set out two considerations in determining whether the admission of statements was compatible with the right to a fair trial. First, it had to be established that there was a good reason for the non‑attendance of the witness. Second, even where there was a good reason, where a conviction was based solely or to a decisive extent on statements made by a person whom the accused had had no opportunity to examine, the rights of the defence might be restricted to an extent incompatible with the guarantees of Article 6. Accordingly, when the evidence of an absent witness was the sole or decisive basis for a conviction, sufficient counterbalancing factors were required, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, §§ 119 and 147).

56. As the Court indicated in *Al-Khawaja and Tahery*, the problems posed by absent witnesses, at issue in that case, and anonymous witnesses, as in the present case, are not different in principle (see *Al‑Khawaja and Tahery*, cited above, § 127 and *Ellis, Simms and Martin against the United Kingdom* (dec.), nos. 46099/06 and 46699/06, § 74, 10 April 2012). Accordingly, in assessing the fairness of a trial involving anonymous witnesses called to give oral evidence before the court, the Court must examine, first, whether there are good reasons to keep secret the identity of the witness. Second, the Court must consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction. Third, where a conviction is based solely or decisively on the evidence of anonymous witnesses, the Court must subject the proceedings to the most searching scrutiny. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. In view of this, the Court must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place

(see *Al-Khawaja and Tahery*, cited above, § 147, and *Ellis, Simms and Martin*, cited above, §§ 76-78 and *Pesukic v. Switzerland*, no. 25088/07, § 45, 6 December 2012).

57. As to the reasons for admitting the anonymous evidence in the present case, the Court observes that the proceedings concerned a violent crime, an intentional killing of two victims. Whereas no organised criminal gang background to the offences in issue was eventually established, it should be noted that several individuals were involved in the commission of those offences and that they were apprehended by the domestic authorities at different moments in time (see paragraphs 8 and 17 above). Even though the Court does not have at its disposal all of the decisions on keeping confidential the personal data of the witnesses, from the wording of the decision of 25 May 2009 concerning the anonymous witness no. 6 it transpires that the domestic authorities based themselves on the character of the case and the witnesses' fear of reprisals (see paragraph 31 above). The Court is prepared to accept this argument in the present case, having regard to the fact that, even after almost eighteen years from the date of the events in question, some of the perpetrators still remain unknown (see paragraphs 36 and 44 above). It therefore accepts that there were relevant reasons to keep the witnesses' identities undisclosed.

58. Turning to examine whether the statements of the anonymous witnesses were the sole or decisive evidence against the applicant, the Court observes that the relevance of the statements of different anonymous witnesses for the applicant's conviction should be considered separately. Whereas the evidence of the anonymous witness no. 2 was clearly relied on by the domestic courts in finding the applicant guilty of aggravated robberies, the evidence of the anonymous witness no. 5 was referred to by them as supporting, likewise the statements of the anonymous witness no. 6 (see paragraphs 35 and 45 above). On the other hand, the statements of the remaining anonymous witnesses were not referred to by the domestic courts as of any relevance for the applicant's conviction. This assessment of the domestic courts was not challenged by the applicant before the Court (see paragraph 49 above).

59. As regards the evidence of the anonymous witness no. 2, the Court observes that both the first-instance and the appellate court relied on the testimony of this witness, which they considered credible and convincing. The Warsaw Regional Court stated that this evidence constituted the basis for the establishment of the applicant's role in the offences in issue. The Warsaw Court of Appeal agreed with this assessment. However, both courts relied also on other evidence in finding the applicant guilty of robbery, such as the applicant's own statements, the statements of the other perpetrators and the witnesses (see paragraphs 35-36 and 43-46 above). Moreover, in reply to the applicant's challenge of his conviction as based solely or to a decisive extent on the evidence of anonymous witnesses, the appellate court

stressed that the relevant facts had been established on the basis of the entirety of the evidence considered cumulatively (see paragraph 46 above). The Court is accordingly satisfied that the evidence of the anonymous witness no. 2 was not the "sole" evidence in the case.

60. However, on the question of the decisive nature of the evidence, the Court is mindful of the particular character of the present case, in which all the evidence against the applicant was of circumstantial nature. It reiterates that the word "decisive" should be understood in accordance with its case-law as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case (see *Al-Khawaja and Tahery*, cited above, § 131). In this context, the Court notes that, as explained by the Court of Appeal, the testimony of the anonymous witness no. 2 constituted the basis for establishing one of the circumstantial facts from which the final conclusion as to the applicant's guilt was drawn. On the basis of the evidence of this witness it was established that, immediately after the shooting, two of the four people present at the crime scene drove off in the victims' car. The Court of Appeal further referred to the following facts established on the basis of other evidence: that it had been the applicant who had first started the car after the shooting and drove off in it from the crime scene, that the applicant had reloaded the stolen cell phones to another car and had abandoned the victims' car several hundred meters away, and that he had participated in selling the stolen phones. It considered that on the basis of this "chain of facts" a categorical conclusion as to the existence of the "main fact" could be drawn, namely that the applicant was guilty of aggravated robbery, and any other interpretation of the events in question could be excluded (see paragraph 46 above). On the basis of this assessment of the domestic court, the Court finds that the evidence of the anonymous witness no. 2 did carry considerable weight in the establishment of the applicant's guilt. Moreover, there is a possibility that the evidence of the anonymous witness no. 2 may have been decisive for the applicant's conviction in the sense that in its absence a different interpretation of the events could not have been excluded.

61. It is accordingly necessary to examine whether there were adequate counterbalancing factors in place. In this respect, the Court observes at the outset that the assessment of the statements of the anonymous witness no. 2 was the principal issue throughout the domestic proceedings. The Court of Appeal quashed the first instance judgment of the trial court convicting the applicant of double murder due to the deficiencies in the assessment of the evidence in issue and for failure to obtain evidence from the third person who had witnessed the events, subsequently referred to as anonymous witness no. 6 (see paragraphs 27-28 above). The reasoning of the second judgment of the trial court, again convicting the applicant of double murder but without identifying him as the shooter, contained an extensive and careful assessment of the statements of the anonymous witnesses (see

paragraphs 34-37 above). Finally, following the applicant's appeal, the Court of Appeal rectified the procedural error of the trial court by hearing the anonymous witness no. 6 and amended the first-instance judgment by convicting the applicant of aggravated robbery. It also carried out an in-depth review of the evidence before it in the light of the applicant's arguments put forward in his appeal (see paragraphs 40-46 above).

62. The Court attaches significant weight to the Court of Appeal's detailed analysis of the role of the evidence of the anonymous witness no. 2 in establishing the applicant's guilt. As emphasised by that court, this witness did not incriminate the applicant either directly or indirectly. He did not state that the applicant had been present at the crime scene or that he had been the perpetrator of the alleged offences. Nor did this witness identify the applicant - he did not even describe any features or circumstances which could indicate the applicant's identity (see paragraph 46 above). As noted above, eventually the evidence of this witness served the domestic courts only to establish a "circumstantial fact" that four people were present at the crime scene right after the shooting and that two of them drove off in a car. The final conclusion as to the applicant's guilt was a result of linking this fact with other facts established in the case. Accordingly, the Court agrees with the assessment of the domestic court that in the present case the dangers inherent in anonymous evidence were significantly reduced. It considers that the difficulty for the defence of being unable to put to the witness, and ultimately to the court, any personal reasons the witness may have for lying was effectively counterbalanced by the limited nature of the witness' account of the events, regardless of the significance of the findings made on its basis by the domestic court for the applicant's conviction (compare and contrast *Van Mechelen and Others,* cited above, § 63; *Ellis, Simms and Martin*, cited above, §§ 76 -78 and *Pesukic*, cited above, §§ 36-37, where the impugned anonymous evidence was identification evidence).

63. Moreover, the Court is satisfied in the present case that the domestic courts scrutinised the testimony of the anonymous witness rigorously. They noted that the anonymous witness no. 2 had immediately notified the police about the crime and had testified in a reasonably consistent manner throughout the proceedings, taking into account the passage of time (see paragraphs 37 and 45 above). The Court further observes that eventually the domestic courts heard all the three people who had witnessed the events in question and the statements of the other two anonymous witnesses were found to be generally supporting and coherent with the account of the anonymous witness no. 2 (see paragraphs 35, 40 and 45 above). Furthermore, when examining the applicant's case for the second time, the trial court inspected the crime scene and the place from which the anonymous witnesses had observed the events. In the light of this inspection it considered the statements of those witnesses as careful and moderate

given their distance from the crime scene and the conditions under which they had made their observations (see paragraphs 30 and 36-37 above). The defence was also present during that inspection which enabled them to challenge the strength of the anonymous evidence on this basis. Finally, the Court of Appeal meticulously analysed the statements of witness no. 2 in the light of the applicant's arguments raised on appeal (see paragraph 45 above).

64. With regard to the procedural safeguards available in the present case, the Court further notes that during the retrial the anonymous witnesses were heard before the complete court and that all persons participating in the decision-making process could gain a personal impression of the witnesses and of their reactions to the questions put to them. Both the applicant and his defence lawyer were allowed to participate in the hearing via audio-link. Although the defence was prevented from observing the witness' demeanour under direct questioning, they were thus able to put questions to the witness via a sound link, which the witness answered as long as he did not risk betraying his identity (see also *Pesukic*, cited above, § 51).

65. Having regard to the above considerations and, in particular, to the careful examination by the domestic courts, the Court concludes that there were sufficient counterbalancing factors to ensure that the rights of the defence were not restricted to an extent incompatible with the guarantees of Article 6 §§ 1 and 3 (d) of the Convention. Consequently, there is no appearance of a violation of these provisions of the Convention and the present complaint must accordingly be dismissed as manifestly ill-founded and therefore inadmissible under Article 35 §§ 3 and 4 of the Convention.

B. Other alleged violations of the Convention

66. As regards the applicant's complaint under Article 5 § 3 of the Convention, the Court notes that the second first-instance judgment convicting the applicant was given by the Warsaw Regional Court on 19 November 2009. The applicant was sentenced to fifteen years' imprisonment (see paragraph 34 above). The first-instance conviction was upheld in essence by the Warsaw Court of Appeal on 19 November 2010 (see paragraph 41 above). Accordingly, the Court finds that the period to be taken into consideration for the purposes of Article 5 § 3 ended on 19 November 2009 (see *Kudła v. Poland* [GC], no. 30210/96, § 104 et seq, ECHR 2000-XI). As the present application was lodged with the Court on 16 May 2011, the complaint has been introduced out of time (see *Kawiecki v. Poland* (dec.), no. 15593/07, §§ 108-109, 23 October 2012) and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

67. Likewise, having regard to the fact that the last decision concerning the applicant's detention on remand was given by the Warsaw Court of

Appeal on 23 September 2010 (see paragraph 39 above), also the applicant's complaint under Article 5 § 4 of the Convention that his appeals against the decisions prolonging his detention had not been examined speedily is to be rejected under Article 35 §§ 1 and 4 of the Convention as lodged out of time.

68. As regards the complaint under Article 6 § 1 of the Convention about the length of the criminal proceedings, the Court notes the applicant failed to avail himself of the domestic remedies available under the Law of 17 June 2004 on a complaint about a breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay (*ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*). The Court notes that it recently examined the effectiveness of a complaint under the 2004 Act in the pilot judgment in the case of *Rutkowski and Others v. Poland* (nos. 72287/10, 13927/11 and 46187/11, §§ 161-186, 7 July 2015) and it found a violation of Article 13 on account of the lack of effectiveness of this remedy only in its compensatory aspect (ibid., §§ 179-186). Accordingly, the Court considers that the applicant in the present case was required by Article 35 § 1 of the Convention to complain to a domestic court under the 2004 Act about the alleged breach of the right to a trial within a reasonable time (see *Charzyński v. Poland* (dec.), no. 15212/03, §§ 39-42 1 March 2005).

69. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 24 September 2015.

Fatoş Aracı
Deputy Registrar

Guido Raimondi
President