



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

SECOND SECTION

CASE OF ŠKARO v. CROATIA

(Application no. 6962/13)

JUDGMENT

STRASBOURG

6 December 2016

FINAL

06/03/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Škaro v. Croatia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Işıl Karakaş, *President*,
Julia Laffranque,
Paul Lemmens,
Valeriu Griţco,
Ksenija Turković,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 15 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 6962/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Dean Škaro (“the applicant”), on 3 January 2013.

2. The applicant was represented by Mr Č. Prodanović, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged, in particular, that the principle of immediacy had not been complied with in the criminal proceedings against him.

4. On 8 October 2015 the complaint was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1979 and lives in Šibenik.

6. On an unspecified date an investigation was opened in respect of the applicant and four other persons, A.B., D.D., G.A. and E.R., in connection with the killing in Split of S.I.T.J, a British national. During the investigation A.B. gave oral evidence twice.

7. On 28 May 1997 the applicant was indicted before the Split County Court on charges of murder, while A.B., D.D., G.A. and E.R. were charged under the same indictment with participating in a fight which resulted in the death of one person. During the proceedings before the trial court A.B. did not testify and the oral evidence he had given during the investigation was read out. The applicant denied the veracity of his evidence.

8. On 19 July 2000 the Split County Court, composed of a panel of two professional judges and three lay judges, acquitted the applicant and found the other accused guilty as charged. Upon an appeal by the Split County State Attorney's Office, on 5 December 2002 the Supreme Court quashed the judgment in respect of the applicant and dismissed the charges against the other accused on account of the statutory prescription period. The Supreme Court also ordered that fresh proceedings against the applicant be conducted by a trial panel composed of different judges.

9. In the fresh proceedings a panel of two different professional judges and three different lay judges of the Split County Court heard evidence from A.B. in the presence of the applicant and his defence lawyer on 18 February 2004. However, since one of the lay judges changed during the proceedings, the trial had to start afresh. At a hearing held on 10 July 2007 the applicant agreed that A.B.'s statement could be read out and on the same day the Split County Court again acquitted the applicant. That judgment was also quashed by the Supreme Court, on 22 January 2008, which again ordered a fresh trial with different judges.

10. A third round of proceedings was held before a panel of two different professional judges (I.R. and Ar.B.) and three different lay judges (B.S., G.M. and S.B.) of the Split County Court. At a hearing held on 23 February 2010 A.B. gave oral evidence in the presence of the applicant and his defence counsel. On 24 March 2010 Judge Ar.B. was replaced by Judge M.Š. and the lay judge B.S. was replaced by another lay judge, J.B. At a hearing held on 8 July 2010 that panel heard evidence from A.B., in the presence of the applicant and his defence counsel. On 17 February 2011 Judge M.Š. was replaced by Judge M.M. and the trial had to start afresh. During the renewed proceedings the trial panel heard evidence from various witnesses, save for the witness A.B. whose prior statement was read out at a hearing held on 7 June 2011 because he was in a psychiatric institution. A.B. was the only witness who said that he had seen the applicant attacking the victim. A request by the applicant for the trial panel to hear the witness in person was denied on the grounds that the witness was undergoing treatment for alcoholism in a psychiatric institution and that any absence from the institution would have a negative effect on his treatment.

11. On 16 June 2011 the Split County Court found the applicant guilty of murder and sentenced him to eleven months' imprisonment, suspended for five years.

12. In an appeal of 5 August 2011, the applicant, *inter alia*, challenged the veracity of the evidence given by A.B. and objected to the trial court's decision not to hear evidence from that witness in person. The applicant countered the reason given by the trial court for not requesting A.B. to come to the hearing by submitting that the witness's psychiatric treatment was scheduled to be completed in about two months and that such a delay would not affect the applicant's trial.

13. On 27 March 2012 the Supreme Court upheld the judgment of 16 June 2011. The relevant part of the Supreme Court's judgment reads:

"The accused is not right in [alleging] that the first-instance court committed a serious breach of the rules of criminal procedure when it, without the [defence's] consent, read out the statements of witnesses A.B. and G.A. The [first-instance] court was correct in deciding to read out the statement of witness A.B. (page 967 of the case file), who was questioned several times in these criminal proceedings, because a letter from the Rab Psychiatric Hospital shows that he was undergoing medical treatment, namely that '... the medical treatment is ongoing and possible absence would not contribute to the overall therapeutic procedure ...' (page 965 of the case file)."

14. A subsequent constitutional complaint by the applicant was dismissed by the Constitutional Court on 12 July 2012.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (d) OF THE CONVENTION

15. The applicant complained that A.B. did not give oral evidence before the trial panel which ultimately convicted him. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant part of which reads as follows:

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

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;

..."

A. Admissibility

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

17. The applicant argued that his right to a fair trial in the criminal proceedings against him had been violated because the principle of immediacy had not been respected since the witness A.B., whose statement had been decisive for the applicant's conviction, had not been heard by the panel which had convicted him. There had been no good reason for A.B.'s absence because his psychiatric treatment had been about to end, in two months. Such a short delay would not have had a significant effect on the conduct of the proceedings, which had already lasted for about fifteen years.

18. The Government asserted that the criminal proceedings against the applicant had been fair. A.B. had initially been a co-accused in the proceedings at issue and had given his evidence in that capacity. However, after the charges against him had been dismissed, his previous oral evidence had not been used in the proceedings against the applicant. Instead, A.B. had given fresh oral evidence at the applicant's trial on 18 February 2004. The applicant and his defence lawyer had been present at both hearings and had been able to ask him questions. The judgment given by that trial panel had been quashed on appeal on the grounds of an incorrect and incomplete assessment of the facts.

19. During the fresh proceedings, the trial court heard A.B. on 23 February 2010 and, following a change in the composition of the panel, again on 18 July 2010. Following the replacement of judge M.S. by judge M.M., the trial court had done all it could to secure the attendance of A.B. The oral evidence previously given by him had been read out, which had been in compliance with the Code of Criminal Procedure which allowed for such evidence to be read out where a witness's attendance was impossible, or where there was a serious impediment due to age, illness or other reasons. The trial court had concluded that there had been a serious impediment to A.B. attending the trial owing to his medical treatment. The letter from Rab Psychiatric Hospital had indicated that treatment for alcoholism usually lasted two months, but had not given any concrete information about the possible duration of A.B.'s treatment. If the trial court had adjourned the hearing for two months or possibly longer, the trial would have had to start anew and all the witnesses would have had to be heard again. The applicant would have again had the possibility to disagree with the reading out of other witnesses' statements and thus cause further delays in the proceedings, which had already lasted for some fifteen years.

20. The Government also stressed that of the five trial panel members four had heard A.B.'s oral evidence at least once. Only one of the trial panel judges had not heard it. However, that had been a professional judge and not a lay judge and his experience had enabled him to assess the importance of the fact that he had not heard A.B.'s statement in person.

21. As to the importance of A.B.'s statement for the applicant's conviction, the Government maintained that it had been linked with the evidence given by other witnesses, including experts. Even though A.B. had been the only one who had seen the applicant attacking the victim, the evidence given by other witnesses had supported the version of events established in the judgment on the applicant's guilt.

2. *The Court's assessment*

22. The Court notes that the essence of the applicant's complaint in the present case lies in the fact that even though the trial court judges had been changed, the statement of one of the crucial witnesses, which had been given before a different panel of judges, was read out.

23. The Court reiterates that an important aspect of fair criminal proceedings is the ability for the accused to be confronted with the witnesses in the presence of the judge who ultimately decides the case. The principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused (see *Beraru v. Romania*, no. 40107/04, § 64, 18 March 2014; and *Cutean v. Romania*, no. 53150/12, § 60, 2 December 2014).

24. The Court notes that according to the principle of immediacy, a decision in a criminal case should be reached by judges who have been present throughout the proceedings and the evidence-gathering process (see *Cutean*, cited above, § 61). However, this cannot be deemed to constitute a prohibition of any change in the composition of a court during the course of a case (see *P.K. v. Finland* ((dec.)), no. 37442/97, 9 July 2002). Very clear administrative or procedural factors may arise rendering a judge's continued participation in a case impossible. The Court has indicated that measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available, where the credibility of the witness concerned is not in issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court (see *Cutean*, cited above, § 61).

25. As to whether the accused was deprived of his right to challenge or question a witness, the Court notes that that was not the case since the applicant was able to put questions to A.B. when he gave his evidence at hearings held on 18 February 2004, 23 February 2010 and 8 July 2010 (see paragraphs 9 and 10 above).

26. As to the reasons for not summoning A.B. to the hearing of 7 June 2011, the Court notes the applicant's argument that A.B. was to have completed his psychiatric treatment after two months and that such a short delay would not have affected the trial against him (compare to *Reiner and Others v. Romania*, no. 1505/02, § 74, 27 September 2007). The national courts gave no answer to that argument.

27. A further issue to be dealt with is whether the replacement of judge M.S. by judge M.M. should have led to the rehearing of A.B.

28. The Court notes that, unlike in *P.K. v. Finland* (cited above), the applicant in this case consistently challenged the credibility of the witness A.B. Furthermore, A.B.'s evidence could be said to have been decisive for the applicant's conviction because A.B. was the only witness who said that he had seen the applicant attacking the victim.

29. However, the Court considers that in the present case there are particular circumstances which justify an exception to the principle of immediacy. The Court notes that the trial panel which convicted the applicant had heard him as well as all the witnesses in person, save for A.B. (contrast to *Cutean*, cited above). As to the composition of the trial panel which heard evidence given by A.B. and the trial panel which convicted the applicant, the Court notes that only one judge, namely Judge M.M., had not heard the evidence given by A.B. (compare to *Graviano v. Italy*, no. 10075/02, § 39, 10 February 2005 and contrast to *Cutean*, cited above, § 63).

30. Even though one of the judges who had heard A.B. was later replaced, the four others had been present when A.B. had given his evidence. In those circumstances the fact that the new judge, Judge M.M., had the possibility to read the statement given by A.B. compensated for that judge's absence from the hearing where A.B. had testified (compare to *P.K. v. Finland*, cited above, and *Graviano*, cited above, § 39).

31. In the light of the above considerations, the Court concludes that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 6 December 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Işıl Karakaş
President