



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

FIRST SECTION

CASE OF ODDONE AND PECCI v. SAN MARINO

(Applications nos. 26581/17 and 31024/17)

JUDGMENT

STRASBOURG

17 October 2019

FINAL

17/01/2020

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

In the case of Oddone and Pecci v. San Marino,

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

Ksenija Turković, *President*,

Krzysztof Wojtyczek,

Aleš Pejchal,

Armen Harutyunyan,

Pauliine Koskelo,

Tim Eicke, *judges*,

Kristina Pardalos, *ad hoc judge*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 3 September 2019,

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

PROCEDURE

1. The case originated in two applications (nos. 26581/17 and 31024/17) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Italian nationals, Mr David Oddone and Mr Alessandro Pecci (“the applicants”), on 31 March 2017 and 11 April 2017, respectively.

2. The first applicant was represented by Mr S. Pagliai, a lawyer practising in Firenze, and the second applicant was represented by Mr F. Cocco, a lawyer practising in Rimini. The Government of San Marino (“the Government”) were represented by their Agent, Mr L. Daniele and their Co-Agent Ms M. Bovi.

3. The applicants complained, under Article 6 §§ 1 and 3 (d) of the Convention, that they had been denied the possibility to cross-examine two co-accused “as witnesses” who had given incriminating statements against them.

4. On 23 January 2018 the Chamber to which the case was allocated decided to join the applications and to communicate the above-mentioned complaint to the respondent Government.

5. The Italian Government did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

6. In February 2019, the President of the Section gave leave, pursuant to Rule 38 § 1 of the Rules of Court, for further factual information and observations from the parties to be included in the case file for the consideration of the Court.

7. Mr Gilberto Felici, the judge elected in respect of San Marino, withdrew from sitting in the Chamber (Rule 28). The President accordingly appointed Ms K. Pardalos to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were both born in 1979 and live in Rimini. At the time of the facts of the present case, the first applicant was a journalist and the second applicant a lawyer.

A. Police investigation

9. On an unspecified date the Civil Police (*Polizia Civile*) instituted an investigation concerning some suspicious car accidents which had taken place in San Marino. It had emerged from an information technology check that the first applicant and his parents had been involved in three car accidents in three and a half years, on 26 May 2008, 18 October 2009 and 28 September 2011. The first applicant was always the driver and one or both of the parents were with him. The first applicant was always driving a different car and the insurance companies involved were different each time. However, the kind of accident and the injuries caused to the persons involved was always the same. All three car accidents happened in the same town and two of them in the same street.

10. On 6 July 2012 the police questioned G. (the driver of the truck which was involved in the third accident) and on 12 July 2012, the police questioned L. (the driver of the other car which was involved in the second accident) as witnesses and therefore without the assistance of counsel. At the beginning of the respective questioning, both G. and L. tried to characterise the relevant facts as ordinary car accidents, providing some details of the accidents to the police. Later on, however, in the course of the same questioning, they retracted their statements and admitted that the first applicant had arranged the accidents and they had all together simulated them in order to claim compensation from their insurance companies.

11. In particular, G. told the police that he and the first applicant were friends and had simulated the car accident on 28 September 2011. He stated that the first applicant had planned the fraud and had decided to simulate the accident in San Marino, thinking that it would be simpler to obtain compensation there. G. admitted that he had accepted to take part in the criminal plan since he needed money to repay some debts. He stated that he knew that the first applicant's parents (who on that day were travelling in the first applicant's car) were also aware of the fraud, since the first applicant himself had told him so.

12. L. told the police that the second applicant (her boyfriend at the time, who had been travelling in her car on the day of the second accident) and the first applicant were old friends and that they had attended the same high school. In her opinion, the first applicant was "an arrogant guy, full of

himself, a so-called know-it-all”. She further stated that on an unspecified date the second applicant had informed her that he and the first applicant had planned to simulate a car accident and the former had asked her whether she wished to take part in the fraud. She said that at the beginning she had tried to refuse but after a while the second applicant had managed to convince her. Finally, she had consented to participate in the plan since she had needed money in order to repay some debts. She later added that she also needed it to pay for medical treatment in connection with the multiple sclerosis from which she suffered. She admitted that on 18 October 2009, while accompanied by the second applicant, she had intentionally “rear-ended” the first applicant’s car. She recalled that the first applicant had been accompanied by his mother and that after the accident he had pretended to be upset and had called the police in order to make the accident appear more credible. She told the police that in the afternoon or the day after, the second applicant had gone to the hospital and that almost one year later, the first applicant had given her approximately 5,000 euros (EUR). L. specified that she had deposited the sum of money in her current account.

13. On 13 July 2012 G. appeared voluntarily before the police. He added to his statement that a few days after the accident of 28 September 2011 the first applicant had given him EUR 2,000 in cash, as previously agreed.

B. Criminal investigation no. 564/RNR/2012

14. By a report of 31 July 2012, signed by a police officer, P., the police informed the investigating judge (*Commissario della Legge Inquirente*) about the results of the police investigation and on an unspecified date the judge opened a criminal investigation (*istruttoria*) for fraud.

15. On 6 August 2012 the investigating judge classified the case file (i.e. it could not be disclosed). No reasons were provided.

16. By a letter of request of 22 August 2012 the investigating judge asked the Italian judicial authorities to supply the phone records (*tabulati telefonici*) showing the list of phone numbers called by the persons involved in the investigation, for the period of a month prior to each of the car accidents.

17. On 31 August 2012 the investigating judge questioned both G. and L., with the assistance of their counsel but without the presence of the other accused persons. The judge, in person, informed G. and L. of the charges against them. G. and L. confirmed their previous statements and added some other details. In particular, G. added that when he had been summoned for questioning by the police, he had sent an email to the first applicant asking him what was going on and that on that same day the first applicant had called him saying that it was a matter of little importance and that he could even not show up at the questioning, but that in any case he [G.] had to deny any connection with the first applicant and had to confirm

that the accident had been real. L. added to her previous statement that approximately two weeks previously [mid-August], the second applicant had shown up at her work place in Italy. He had told her that he had been informed by the first applicant about the ongoing investigation in San Marino and asked her to withdraw her previous statements and to claim that the accidents had been real (*confermare la dinamica del sinistro*). L. stated that she had replied that changing her version of the facts would have made her nervous and she had therefore cut him short.

18. On 20 November 2012 C., S. and F., three persons involved in the first car accident, testified before the investigating judge that it had been a real accident and that they did not know the first and second applicants.

19. In consequence, on an unspecified date the charge in connection with the first car accident was dropped.

20. On 17 July 2013, in response to the above-mentioned letter of request, the Italian judicial authorities sent the requested phone records (list of phone calls).

21. On 29 November 2013 the investigating judge declassified the case file.

22. By a decision of 2 December 2013 the judge informed the applicants, in writing, of the charges against them and summoned them to appear for questioning on 20 February 2014.

23. By a joint written submission of 20 February 2014, counsel for the first and second applicants requested that the investigation be reopened in order for their clients to cross-examine the witnesses already heard, including L. and G. As to the questioning scheduled for that day, counsel stated that the first and second applicants had availed themselves of their right to remain silent but that they were willing to be questioned once the above-mentioned investigative activities had been repeated.

24. In addition, counsel for the first applicant informed the judge that the police investigation had been directed by a police officer, J.B., who held a grudge against the first applicant and could not be considered impartial. In particular, at the time of the police investigation, criminal proceedings on the basis of a complaint by the first applicant for defamation had been ongoing in Italy against J.B. and three other named officers of the Civil Police, for acts allegedly committed to the detriment of the first applicant. Furthermore, the second applicant had been legal counsel for the first applicant in those proceedings.

25. By a decision of 26 February 2014 the investigating judge rejected the request to reopen the investigation. The judge, *inter alia*, specified that (i) G. and L. had made their statements incriminating the applicants not only to the police but also before her, and that only the statements before her had been used; (ii) as to the alleged animosity of J.B., the first applicant had not complained about any specific shortcomings in the investigation able to show that it had been carried out irregularly; (iii) accused persons

(*prevenuti*) were not allowed to take part in the questioning of [other] co-accused (*coimputati*); (iv) it was not necessary to re-examine C., S. and F., since they had testified about the car accident of 26 May 2008, and that charge had been dropped; (v) the accused persons had been repeatedly summoned for questioning during the investigation but they [the applicants] had never shown up; (vi) the accused persons [the applicants] had just applied for a generic repetition of the whole investigation, without submitting any specific request; and (vii) the investigation had been sufficient in order to establish the relevant facts and behaviours.

26. On the same day the investigating judge issued an indictment against, *inter alia*, the applicants as well as G. and L. on a charge of fraud to the detriment of insurance companies, under Articles 73 and 204 § 3 (2) of the Criminal Code. In particular, the first applicant was charged in respect of the last two car accidents; L. and the second applicant were charged in respect of the accident which had taken place on 18 October 2009; and G. was charged in respect of the one that had taken place on 28 September 2011. The list of the prosecution witnesses to be heard at the trial included solely police officer P. On 28 February 2014 the indictment was notified to the Attorney General (*Procuratore del Fisco*), who would undertake the prosecution of the case, and to the first-instance judge (*Commissario della Legge Decidente*).

C. Trial

27. On an unspecified date, by a decree, the first-instance judge summoned, *inter alia*, the applicants as well as G. and L. (all in their capacity of accused persons) to the first hearing of the trial, on the basis of the above-mentioned indictment. The investigation file was automatically admitted as evidence.

28. At the beginning of a hearing on 17 November 2014, the judge acknowledged the presence of the first applicant as well as G. and L., assisted by counsel. The second applicant was not present in person but was represented by counsel. Counsel made submissions on their preliminary issues (*questioni preliminari*). Counsel for the first applicant reiterated that the police investigation had been irregular, given that some named police officers (including the above-mentioned J.B.) held a grudge against the first applicant. Moreover, the first and second applicants' counsel insisted that there had been a violation of the applicants' right of defence in so far as they had not been able to question L. and G. Further, among other things, the secrecy/classification regime had been applied by means of an unreasoned decision and had been prolonged beyond the maximum time-limit provided for by law. Thus, they requested that the investigation be reopened.

29. By an interim decision of 28 November 2014 the first-instance judge considered that even if the alleged animosity between the first applicant and the named police officers (including J.B.) were true, all the reports made by the police in the course of their investigation had been signed by another officer, P., and not by any of the officers indicated by the first applicant. It was true that J.B. had taken part in G.'s questioning but he had done so in the presence of another named officer. In any case, G. had been heard also by the investigating judge, thus the applicant's request was unfounded and a delaying tactic.

30. As to the argument that the decision to classify the case file had been unreasoned and that the secrecy/classification regime had lasted for a longer period than the maximum time-limit provided for by law, the judge stated that he could share the disappointment of the defence. Nevertheless, in any case, the law did not provide for any consequence arising from the violation of such rules by an investigating judge. Moreover, in practice, there had been no violation of the right of defence. The judge referred to the investigating judge's decision of 26 February 2014 (see paragraph 25 above) and the judgment of the Judge of Criminal Appeals of 7 October 2014 in criminal proceedings no. 1456/09, which stated:

"The procedural system in force does not provide for any rules concerning the collection of evidence and its admission (*utilizzabilità*). Thus, the principle, which is typical of adversarial systems, according to which a judge can base his decision only on evidence which had been collected in adversarial proceedings is not established (*rigorosamente affermato*) to the extent that the judge is obliged to exclude evidence that does not meet the above-mentioned requirement."

31. On the same day, the first applicant's counsel requested that sixteen witnesses (including J.B.) be heard.

32. On 13 February 2015 Officer P. testified that it had been him who had instructed the officers (who had carried out the investigation) to question L. and G. but not the applicants, since the former were the only persons involved in the case who had not had repeated car accidents (*recidiva amministrativa*).

33. On 11 March 2015 S.P. (the other police officer who had questioned G. during the police investigation) testified that J.B. had also taken part (with her) in the questioning of G. and he had also put some questions to him, although he had not been on duty that day. S.P. added that it had been her who had convinced G. to confess.

34. At the same hearing Officer P.G. testified that he had tasked J.B. with the questioning of L., since he (P.G.) had had some urgent tasks to carry out on that day. However, while J.B. had been carrying out the questioning, P.G. had been present in a connecting room.

35. On the same day counsel reiterated their request to cross-examine J.B. The judge rejected their request, considering it irrelevant to the proceedings.

36. At a hearing of 6 May 2015 the first applicant released “spontaneous declarations” (*dichiarazione spontanea*) and stated that he had never defrauded anybody in his life and had never committed any offence. Counsel for the second applicant asked the judge to declare inadmissible any evidence collected in violation of the law and to reopen the investigation before the investigating judge. Furthermore, L. and G.’s counsel, on the basis that they had given a “useful and spontaneous confession”, which had not been withdrawn during the trial, requested that the judge apply a reduced penalty. In the light of the applicable reduced penalty, counsel requested that the offence be declared time-barred with regard to L.

37. By a judgment filed in the relevant registry on 19 August 2015, the first-instance judge found all the accused persons guilty of the offences as charged. The judge sentenced the first applicant to two years and five months’ imprisonment and imposed a prohibition on holding public office and exercising political rights for one year and five months. The second applicant as well as L. and G. were sentenced to two years’ imprisonment and prohibited from holding public office and exercising political rights for one year.

38. The judge did not apply (to L. and G.) the domestic-law provision whereby, if an accused person had made a “useful and spontaneous confession”, this could serve as a mitigating circumstance (see relevant domestic law, paragraph 57 below), notwithstanding the fact that G. and L.’s confessions had had some usefulness (*una qualche utilità*) for the investigation. In the judge’s view, the application of such a provision to the position of L. and G. would have caused a substantial injustice to the detriment of the other accused persons. According to the judge, the reduced penalty deriving from the mitigating circumstance would have been determined not by a personal initiative on the part of L. and G., but by the decision of the police to summon for questioning only some of the accused persons (L. and G.), but not the applicants. Thus the persons who had not been summoned had been denied the same opportunity to deliver a useful confession.

39. As to the alleged violation of the applicants’ right of defence, the judge reiterated the considerations that he had set out in his decision of 28 November 2014 (see paragraph 29 above). In particular, he considered that the examination of L. and G. before the investigating judge had consisted of questioning (*interrogatori*), and that the applicants did not therefore have the right to be informed thereof. In the judge’s opinion, questioning could not be considered as an act aimed at “collecting and establishing evidence” (*raccolta e formazione della prova*), given that it was primarily aimed at protecting the accused’s right to defend himself (*strumento di difesa e garanzia*). An accused person did not have an

obligation to make self-incriminatory statements or give supporting evidence (*elementi di riscontro*) against his or her interests.

40. The judge held that the finding of criminal responsibility on the part of the applicants had not derived solely from G. and L.'s statements. In the judge's opinion such statements may have helped the investigation but had certainly not represented the only element. In particular, the police had already found the evident and conspicuous anomaly of two car accidents which had occurred in the same street and involved the same driver (the first applicant). Moreover, the phone records had shown that some of the accused persons had had contacts before one of the accidents.

D. Appeal proceedings

41. The first and second applicants, as well as G. and L., appealed.

42. The first and second applicants complained that the investigating judge had not provided any reasons for her decision to classify the case file, thus contravening the relevant law. Moreover, the maximum duration of the classification regime had been exceeded, since the file had not been disclosed to the applicants for eighteen months. According to the first and second applicants, the secrecy of the investigation had breached their right of defence, in particular in the light of the fact that they had been unable to participate in the examination of witnesses before the investigating judge. In addition, they complained that the investigating judge had discriminated against them since, unlike L. and G., they had been unable to take part in the investigation and to have access to the case file, which had been classified. Moreover, at the trial the judge had rejected their request to cross-examine L. and G., which had been essential since their statements were the only evidence against the applicants. For all those reasons they requested that the investigation (in particular the part which had been carried out under the classification regime) be declared null and void and that the evidence collected at the investigation stage be excluded, in the light of a breach of Article 15 of the Constitution (*Dichiarazione dei Diritti*) and Article 6 of the Convention.

43. The first and second applicants also claimed that the acquisition of the records concerning their mobile phones had been illegitimate given that the European Court of Justice, by a judgment of 8 April 2014, had declared Directive No. 2006/24/EC on the retention of data, invalid. In their opinion, the acquisition of their personal data had also been in breach of Article 8 of the Convention. In particular, the second applicant emphasised that the data collected from the Italian authorities regarded phone calls between him and the first applicant in 2011, during a period in which the former had been legal counsel for the latter in the above-mentioned criminal proceedings against J.B. and in other proceedings. Those phone calls were made two years after the car accident of which the second applicant had been charged

(which dated back to 2009), and for this reason they were not relevant to his case.

44. Lastly, the first and second applicants reiterated their request that J.B. be heard for the reasons mentioned previously.

45. L., via counsel, requested the application of the provision of domestic law whereby a “useful and spontaneous confession” could serve as a mitigating circumstance and, consequently, in the light of the applicable reduced penalty, that the offence be declared time-barred. She specified that her statements before the police had been made exclusively for the purpose of obtaining a reduced sentence, an opportunity which had been proposed to her by the police.

46. On an unspecified date G. withdrew his appeal.

47. By a judgment of 10 October 2016, published on 12 October 2016, the Judge of Criminal Appeals upheld the first-instance judgment concerning all the applicants, but modified it in respect of L. The judge dismissed L.’s case given that it had become time-barred due to the application of the mitigating circumstance of a “useful and spontaneous confession”. The judge further declared G.’s appeal inadmissible given that after having submitted it, he had expressly withdrawn it.

48. The Judge of Criminal Appeals acknowledged that the fact that the investigating judge had not given any reasons justifying her decision to classify the case file had breached the relevant law, but explained that the law did not provide that such a violation leads to the nullity of the ensuing acts. In addition, the decision to declassify the investigation only for some of the accused persons and not for the applicants had to be considered fully legitimate, since reasons for a classification regime could exist for some of the accused persons and not for others. Moreover, the relevant law expressly afforded the investigating judge the power to classify only some specific acts of the proceedings (partial classification).

49. As to the fact that neither the applicants nor their defence had taken part in the questioning of L. and G. during the investigation and that the latter had not been cross-examined at the trial, the appeal judge considered that (i) the investigating judge had legitimately questioned L. and G. without the presence of the applicants, since for the latter the investigation had been classified at that time; and (ii) the statements of G. and L. before the investigating judge by which they had accused the applicants had been correctly admitted as evidence and used in the judgment, given that the Code of Criminal Procedure did not contain any rule on the admissibility of the evidence to be used. In the domestic system the admissibility of evidence depended solely on the free opinion (*libero convincimento*) of the judge as to its reliability. In order to assess the reliability of evidence, a judge had solely to take into account the ways in which the evidence in question had been acquired (*modalità di formazione della prova*); however, he was not obliged to disregard it, irrespective of how it had been obtained.

50. As to the admissibility as evidence of the phone records sent by the Italian judicial authorities, the appeal judge considered that the judgment cited by the applicants, even though of great interest, did not have any influence on the rules of admissibility of evidence in San Marino, since the domestic system did not provide for any restrictions or regulations on the point. A direct application of that judgment in the domestic system of each State – in the sense of prohibiting the acquisition of data concerning phone calls – was neither evident (*concesso*) nor obligatory. Thus, the plea was manifestly ill-founded.

51. Examining the case on the merits, the judge considered that it was not true that the only evidence against the applicants had been the incriminating statements of L. and G. On the contrary, those statements had just confirmed a series of unequivocal elements which had been listed in the indictment and which would have been sufficient on their own to consider the commission of the fraud plausible on a logical level. The phone calls between the first applicant and G. on the days prior to the car accident of 28 September 2011 had not only confirmed, beyond reasonable doubt, G.'s statement incriminating the first applicant, but had also shown that the car accident that had occurred two years earlier (on 18 October 2009) between the first and second applicants had not been a matter of pure chance. This was so, *a fortiori* in light of the fact that an alternative explanation (which not even the first applicant had attempted to provide) would have been completely implausible. It was not credible that the first applicant had been involved in two car accidents with people with whom he was already acquainted, involving his relatives and causing the same injuries, and in the same street in San Marino. Moreover, the numerous phone calls between the first and second applicants had confirmed the existence of a well-established relationship, albeit also a professional one, between the two accused. Therefore, the incriminating statements of G. and L. had not represented unexpected and decisive revelations but had just confirmed that the first applicant could not be considered so unlucky as to have had two such peculiar car accidents.

52. In the judge's view, even accepting the existence of animosity between the first applicant and the police officer, J.B., that factor did not undermine the credibility of the accusing witnesses, G. and L. In particular, it was not credible that J.B. had made up the facts of the offence, since the car accidents (with all their above-mentioned particularities) had really happened and the insurance companies had actually paid compensation. Nor was it credible that L. and G., who did not hold any personal resentment against the first applicant, would have confessed to an offence for the sole purpose of backing officer J.B. in his alleged "revenge".

53. As to the position of the second applicant (who had been involved in the accident of 18 October 2009 while travelling in the car which had caused it), irrespective of the extent of his material contribution to the

fictitious accident, he had acted as an intermediary between L. and the first applicant. He had dragged L. into the criminal plan to avoid directly taking part in it, given his friendship with the first applicant and his parents. Despite those strong indications, the second applicant had not even bothered to attend trial to offer a different version of the facts.

54. In accepting L.'s "useful and spontaneous confession" as a mitigating circumstance, the judge considered that L.'s change of mind (*ripensamento*) and her decision to confess had been determined by the favourable consequences which had been proposed to her – namely, the possibility to obtain a reduced sentence – and not by the objective existence of evidentiary elements against her. Moreover, her contribution had been precise and detailed, and the fact that she had not participated in the trial had not affected the admissibility of her earlier statements made before the investigating judge.

E. Extraordinary Proceedings

55. In 2018, pending proceedings before this Court, the first applicant instituted revision proceedings before the Judge of Extraordinary Remedies in Criminal Matters asking the court to review the judgment of the Judge of Criminal Appeals of 10 October 2016, published on 12 October 2016. He raised, two main substantive issues, firstly concerning the competence of the Judge of Extraordinary Remedies in Criminal Matters under Article 13 in connection with his complaints of an unfair trial and secondly the existence of new evidence, in his view decisive for the outcome of his criminal case.

56. By a judgment of 8 January 2019 the Judge of Extraordinary Remedies in Criminal Matters rejected his request. Relying on judgment No. 6 of the constitutional jurisdiction (namely, *il Collegio Garante della Costituzionalità delle Norme*) of 1 August 2007 the judge considered that it had the competence to examine Convention complaints. It also noted that the first applicant had already brought proceedings before the ECtHR who had communicated the case to the respondent Government. However, even assuming the case was not inadmissible on the basis of the principle that the applicant having chosen one remedy he cannot have recourse to another (*electa una via non datur recursus ad alteram*), further considerations applied. The judge held that to enable consideration of such a request based on the extraordinary competence of the Judge of Extraordinary Remedies in Criminal Matters despite revision proceedings having originally been limited to the exhaustive list of grounds arising from Article 200 of the Code, such request would nevertheless have to comply with the same six months' rule applicable before the ECtHR. It followed that the applicant's Convention complaints were inadmissible as being out of time, them having been lodged more than six months after the appeal judgment in the

proceedings complained of. He considered the remaining complaints inadmissible as manifestly ill-founded.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code

57. Article 90 § 2 and Article 204 of the Criminal Code read, in so far as relevant, as follows:

Article 90 (mitigating and aggravating circumstances)

“(2) The judge may apply a penalty reduced by one degree (*la pena di grado inferiore*) ... if a useful and spontaneous confession has been given (*quando la confessione sia stata spontaneamente ed utilmente resa*).”

Article 204 (fraud)

“Whosoever secures an unfair profit for themselves or for others, by misleading another through deception or misrepresentation, shall be punished by imprisonment of the second degree as well as by a daily fine or prohibition of the second degree ...

The above-mentioned penalty is increased by one degree:

...

if the offence was committed in order to obtain compensation from an insurance company ...”

58. In a judgment of 9 September 2010 (in criminal proceedings no. 350/2007) the Judge of Criminal Appeals stated that the usefulness of a confession had to be assessed in the light of its evidentiary value (*capacità probatoria*) as to the constitutive elements of the offence. The usefulness of the confession had to be substantial, in the sense that through the confession the judge had to be able to obtain evidence of a fact that otherwise would have been impossible or difficult to prove.

B. Code of Criminal Procedure

59. Article 200 of the Code of Criminal Procedure, concerning revision proceedings, in so far as relevant reads as follows:

“A revision of a judgment finding guilt or acquittal, with the application of security measures or confiscation, ... which have become *res judicata*, is permissible:

(a) If new evidence comes to light which alone or in conjunction with the evidence already adduced, show that the applicant must be acquitted...;

(b) If the finding is based on a falsehood or other crime;

(c) If the facts established for the purposes of that finding are not reconcilable with the facts established in another criminal judgment which is final.

(d) If the European Court of Human Rights has found that the criminal proceedings had been in violation of the Convention, and the ensuing serious negative consequences can only be remedied by means of the revision of the judgment.

... [concerning who may lodge such a request]”

60. According to Article 202 of the Code of Criminal Procedure, a revision request has to be submitted within one year from the relevant facts leading to the reasons mentioned in the respective sub-articles of Article 220.

C. Law No. 93 of 17 June 2008

61. Law No. 93 of 17 June 2008 concerning criminal procedure rules and the confidentiality of criminal investigations reads, in so far as relevant, as follows:

Section 3 (Right to defence)

“(1) Except in the cases set out in section 5 below, the investigating judge carries out all the investigative activity in general, including that related to the collection of evidence, particularly its acquisition (*formazione*), while safeguarding the rights of the accused, the prerogatives of the Attorney General and the rights of private parties as protected by criminal law.

(2) The accused, assisted by a legal representative, and the Attorney General have the right to present their own defence, submissions and applications. They may also examine and make copies of all the acts in the proceedings, including the report of the crime. The investigating judge must ensure that the parties can participate or be represented at each stage of the investigation.

(5) The judicial police are tasked with searching for elements useful to the investigation, on their own motion, in compliance with the guarantees provided by law, unless a judge has given different and specific orders (*salvo diverse e specifiche indicazioni impartite dal giudice*). In any case, the offence notice and all the elements useful to the ongoing investigation must be communicated to a judge within the shortest possible time.”

Section 5 (Investigation and investigative acts under temporary classification or as an urgent matter)

“(1) Where there are specific reasons of an exceptional nature which lead to a consideration that the investigation as a whole can only be carried out successfully if classified, the investigating judge may, by means of a reasoned decision, order classification on a temporary basis, thus derogating from the provisions of sections 3 and 4.

(2) The same procedure applies when only some of the acts should be subject to temporary classification, or when the necessity for such an order emerges subsequently.

(3) The application of temporary classification to an investigation and investigative acts ... may last only as long as is strictly necessary for the performance of the

relevant acts; it may not in any event exceed six months from the registration of the report of the crime and may be extended only once, for a maximum period of another three months, if there exist serious reasons for so doing.

...”

62. In a decision of 3 February 2014, in criminal proceedings no. 751/RNR/2013, following revocation of the secrecy/classification regime, the investigating judge, relying on Section 3 (2) of Law No. 93 of 17 June 2008, assigned a term of ten days to the only defendant in the case in order to be able to request a repetition of the witnesses’ (victims’) testimony in the presence of the accused’s lawyers and the Attorney General.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

63. The applicants complained that they had been unable to cross-examine L. and G. at the trial, contrary to the guarantees provided in Article 6 §§ 1 and 3 (d) of the Convention, which reads, in so far as relevant, 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.”

64. The Government contested that argument.

A. Admissibility

1. The Government’s objection of non-exhaustion of domestic remedies in respect of the first applicant

65. By a letter of 5 February 2019, after the exchange of observations phase in the present case came to an end, the Government informed the Court of the decision of 7 January 2019 in the revision proceedings pursued by the first applicant. The Government for the first time raised the issue that, at the time when the application was lodged, the first applicant had not yet exhausted domestic remedies.

66. The first applicant submitted that the remedy relied on by the Government was an extraordinary remedy which according to the Court’s case-law did not need to be exhausted. Indeed none of the cases brought before the Court against San Marino had ever been rejected on the basis of non-exhaustion for failure to seek a remedy before the Judge of

Extraordinary Remedies. It was true that by a judgment of 16 August 2016 the Judge of Extraordinary Remedies established his competence to examine human rights issues. However, that competence went beyond that provided in Article 200 of the Code of Criminal Procedure concerning revision proceedings (see paragraph 59 above), and thus such competence had no basis in law (contrary, for example, to the new constitutional remedy in Turkey examined in *Hasan Uzun v. Turkey* (dec.), no. 10755/13, §§ 68-71, 30 April 2013). Moreover, the 2016 judgment was not accessible since San Marino did not have a system of published judgments (except for constitutional cases), thus making it difficult for individuals to learn about a new remedy created by case-law as opposed to codified law. Similarly, the decision of the Judge of Extraordinary Remedies, in the first applicant's case, to apply a six months' time-limit also had no legal basis. Indeed that judge had only chosen to apply the same time-limit used by the Court, but he could also have applied that relevant to revision proceedings namely a year (see paragraph 60 above) or that of any other human rights organ. Thus, even the rules regulating the remedy were uncertain. In this connection the first applicant referred to *Williams v. the United Kingdom* ((dec.), no. 32567/06, 17 February 2009). The first applicant pointed out that pursuing an uncertain remedy could lead to having a case rejected by the Court for failure to abide by the six-month limit. He relied on *Rezgui v. France* ((dec.), no. 49859/99, 7 November 2000) and *Prystavska v. Ukraine* ((dec.), no. 21287/02, 17 December 2002).

67. Without prejudice to the above, the first applicant submitted that the Court had regularly accepted that the last stage of the exhaustion of domestic remedies may be reached shortly after the lodging of the application but before the Court determines the issue of admissibility, as for example in the recent judgment of *Knox v. Italy* (no. 76577/13, §§ 111-113, 24 January 2019). Thus, even assuming the remedy relied on by the Government could be considered effective and that it had to be exhausted, the first applicant had in fact exhausted it, before the Court decided the admissibility of the application.

68. Even assuming the Government are not estopped from raising this objection (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 52-53, 15 December 2016), the Court reiterates that an applicant is not normally required to avail himself of an extraordinary remedy for the purposes of the exhaustion rule under Article 35 § 1 (see *Coniac v. Romania*, no. 4941/07, § 36, 6 October 2015; *Kiiskinen v. Finland* (dec.) no. 26323/95, ECHR 1999-V; and contrast *Zima v. Poland*, (dec.). § 47, no. 19186/10, 25 August 2015). The Court notes that the applicants' case became *res judicata* on the strength of the judgment of the Judge of Criminal Appeals of 10 October 2016, published on 12 October 2016. The Court further notes that in previous cases against San Marino the Court has already held that revision proceedings under Article 200 of the Code of Criminal Procedure amounted

to an extraordinary remedy which need not be exhausted, see, for example, the admissibility decision in *Ercolani v. San Marino* ((dec.), no. 35430/97, 28 May 2002) and the cases cited therein.

69. In the absence of any explanation or arguments by the Government as to why the revision proceedings in the present case should not be considered as an extraordinary remedy, whether by reference to any new competence attributed to it, or any other detail, the Court finds no reason to come to a different conclusion (compare, *Prystavskya*, cited above, and *Toziczka v. Poland*, no. 29995/08, § 27, 24 July 2012). Indeed the fact that the Government did not raise this objection in respect of the second applicant, who did not undertake proceedings before the Judge of Extraordinary Remedies, lends support to this conclusion. It follows that the first applicant was not required to pursue such remedy. The fact that the first applicant pursued it after he lodged his application with the Court has no bearing on this finding.

70. The Government's objection is therefore dismissed.

2. Conclusion

71. The Court notes that this complaint in respect of both applicants 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' submissions

(a) The first applicant

72. The first applicant complained that he had been prevented from cross-examining G. and L. during the investigation and at the trial. Relying on *Lüdi v. Switzerland* (15 June 1992, § 47, Series A no. 238) he observed that, pursuant to Article 6 § 3 (d), an accused person must enjoy an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage. According to the first applicant, the fairness of the proceedings had been further undermined by the fact that, in the domestic system, unlike in adversarial legal systems, statements made by witnesses during an investigation were added to the case file of the trial judge, who could make unfettered use of such evidence, irrespective of the way in which it had been collected.

73. The first applicant considered that the fact that G. and L. had been co-accuseds in the same criminal proceedings had no importance. Relying on *Lucà v. Italy* (no. 33354/96, § 41, ECHR 2001 II), he noted that the Court had held that an accused person tried in connected proceedings

undertook the role of “witness” in the light of the autonomous meaning of that term for the purposes of the Convention.

74. Relying on Section 3 of Law No. 93/2008 (see paragraph 61 above), the first applicant challenged the Government’s argument that the domestic law prohibited a co-accused from cross-examining another co-accused. On the contrary, given that the investigating judge had heard G. and L. when the case file had been classified (see paragraphs 15 and 17 above), the judge should have accepted the first applicant’s request to cross-examine them once the secrecy/classification regime had been lifted. The first applicant noted that, in a similar situation in other criminal proceedings, the investigating judge had decided to have the relevant testimony repeated in adversarial proceedings (see paragraph 62 above).

75. As to the Government’s argument that G. and L. had not been cross-examined in order to protect their own right of defence in light of the privilege against self-incrimination, the first applicant argued that G. and L. had no obligation to incriminate themselves or to provide evidence in support of the charges against them. Nevertheless, without prejudice to their right to remain silent concerning their own culpability, they should have been cross-examined by the first applicant on the incriminating statements that they had given against him. Moreover, G. and L.’s right to remain silent could be considered devalued in the instant case, in light of the fact that both of them had confessed in full (see paragraphs 10 and 12).

76. According to the first applicant, G. and L.’s testimony had been decisive for his conviction. Without their statements, no account of the alleged fraud in respect of the car accidents would have existed. Moreover, those incriminating statements had represented the starting point of the investigation and, in their absence, the investigating authorities would not have collected other evidentiary elements, including the phone records (see paragraph 20 above). In this connection, the first applicant pointed out that the phone records (showing contacts between him and G. in the days prior to the car accident of 28 September 2011) had corroborated only the latter car accident. It followed that, at least for the car accident of 18 October 2009, the incriminating statement of L. and G. had been the only evidentiary element. It had thus been essential for the purposes of the first applicant’s conviction.

77. The first applicant also noted that, in *Bracci v. Italy* (no. 36822/02, 13 October 2005), the Court had found that, in the presence of charges concerning multiple factual episodes (see paragraph 26 above), it was sufficient that the finding of guilt for even just one of them had been based on testimony not heard in adversarial proceedings in order to find a violation of Article 6 § 3 (d), provided that such testimony had been the only relevant evidence for that specific charge and conviction.

78. As to the counterbalancing factors that, according to the Government, had justified the derogation of his right to cross-examine G.

and L., the first applicant argued that, contrary to the Government's allegation, evidence had shown that the incriminating statements made by L. against the first applicant could have reasonably been the result of pressure by officer J.B. (who held a grudge against the first applicant, see paragraph 24 above) as well as of L.'s own animosity towards him (see paragraph 12 above). Moreover, not only had L. and G. made their statements before the police without the assistance of their lawyers, but they had done so in the presence of the hostile police officer J.B. and with the promise of a reduction of the penalty in the event that they decided to confess, all elements which had influenced their statements (see paragraphs 10 and 12 above). Relying on *Cornelis v. the Netherlands* ((dec.), no. 994/03, ECHR 2004–V (extracts)), the first applicant concluded that the above-mentioned circumstances made L. and G.'s account of the facts extremely unreliable. Indeed, their testimony could be characterised as biased and unspontaneous. Moreover, it had aggravated, and certainly not counterbalanced, the disadvantages for the applicant's defence deriving from the fact that it had been impossible for him to cross-examine G. and L. at the trial.

(b) The second applicant

79. The second applicant shared the first applicant's opinion that G. and L. had to be considered witnesses for the purposes of the Convention.

80. The second applicant argued that the violation of his right of defence had been aggravated by the fact that the investigation had been carried out under a secrecy/classification regime and that the investigating judge had heard L. without informing him. That regime had been applied without a reasoned decision (see paragraph 15 above), contrary to that provided by law (see paragraph 61 above) and in a discriminatory manner, since it had been applied only to him and the first applicant and not to L. and G. Moreover, the regime had been extended for a considerably longer period than the maximum time-limit of six months provided for by law.

81. As to whether the statement of L. had been the sole or decisive evidence, relying on *Brzuszczynski v. Poland* (no. 23789/09, § 83, 17 September 2013), the second applicant argued that L.'s statements had been given great weight and without them, the chances of his conviction would have been significantly slighter, also because L. had been the only eyewitness to the car accident in respect of which he had been charged. Indeed, according to the second applicant, no further evidence had corroborated the charges against him, given that the above-mentioned phone records did not refer to the car accident of 18 October 2009 in respect of which he had been charged, but exclusively to the one of 28 September 2011. Moreover, L.'s statements had not even been verified. For example, she had alleged that in exchange for her participation in the car accidents, she had received a sum of money which she had deposited in her bank

account. This was an easily verifiable allegation which the police had nevertheless failed to investigate.

82. In any case, in order to show the importance which had been attributed to L.'s statements by the domestic courts, it was sufficient to take account of the fact that the Court of Appeal had applied to her the mitigating circumstance provided for by the domestic law in the event of a useful confession (see paragraphs 54 and 57 above). It followed that, in the applicant's view, apart from L.'s incriminating statement, only conjectures against him remained.

(c) The Government

83. Relying on *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011) and *Sofri and Others v. Italy* ((dec.), no. 37235/97, ECHR 2003 VIII), the Government argued that, in order to decide whether the lack of cross-examination of G. and L. had determined a violation of Article 6 it was necessary to evaluate the overall fairness of the proceedings. In their opinion, there had been a good reason for the first-instance judge's decision not to cross-examine G. and L. at the trial and, consequently, for the fact that the domestic courts had relied on the statements that they had made during the investigation (not in adversarial proceedings), namely, the necessity to safeguard G. and L.'s own right of defence. In this connection, the Government noted that G. and L. had been co-accused in the same proceedings, had confessed to the crime and had given evidence against the first and second applicants (see paragraph 17 above). Therefore, they had a personal interest in the outcome of the proceedings and, in accordance with the privilege against self-incrimination they were not obliged to make statements that might be detrimental to their personal position, nor were they obliged to participate in the trial. Thus, in the Government's opinion, the lack of cross-examination of G. and L. had not been due to a lack of "reasonable efforts" on the part of the domestic court. The trial judge did not have the power to compel G. and L. to participate in the trial, given their right to be absent and to remain silent. Even assuming that the judge had summoned them for cross-examination, they could have refused, since they were not compellable witnesses.

84. The Government observed that the investigating judge had rejected the applicants' request to reopen the investigation (and, in particular, to hear G. and L. in adversarial proceedings, see paragraph 25 above) in light of the fact that, under domestic law, an accused person could not participate in the questioning of a co-accused. Thus, even assuming that G. and L. had been heard in adversarial proceedings, as requested by the applicants, the latter could not in any case take part in their questioning nor could they put questions to them through their counsel.

85. The Government denied that G. and L.'s statements had represented the sole or decisive evidence for the applicants' conviction. On the contrary, they pointed out that the domestic courts had taken into account further corroborating evidence, namely the phone records showing contacts between the accused persons prior to the car accidents and the odd fact that all the car accidents had occurred in the same street and had involved the same driver and the same passengers (see paragraphs 40 and 51 above). Relying, in particular, on *Frančiška Štefančič v. Slovenia* (no. 58349/09, 24 October 2017) and *Horncastle and Others v. the United Kingdom* (no. 4184/10, 16 December 2014), the Government pointed out that the Court had attached great importance to the existence of further corroborating evidence.

86. The Government added that, in the context of the proceedings at hand, there had been strong procedural safeguards aimed at counterbalancing the disadvantages that the applicants' defence had faced. The domestic courts had adopted a cautious and prudent approach with respect to the statements made by G. and L. and had attentively examined their reliability and consistency with the overall evidentiary framework of the case. The courts had also assessed the existing personal relationship between the witnesses and the applicants and had concluded that no evidence had shown that there had been any animosity. Nor was it credible that G. and L. had accused the applicants (and incriminated themselves) in order to support officer J.B.'s revenge (see paragraph 52 above). Therefore, in the Government's opinion, it could be considered that the proceedings as a whole had been fair.

87. Lastly, the Government argued that in *Schatschaschwili v. Germany* ([GC], no. 9154/10, § 131, ECHR 2015) the Court had held that where a defendant had been given an opportunity to provide an alternative version of the facts, this had to be considered as a counterbalancing element in order to ensure the overall fairness of the trial. They observed that only the first applicant had taken advantage of the possibility to release statements in his defence at the trial but, on that occasion, he had failed to provide an alternative version of the facts. Also the latter element had been taken into account by the domestic courts in declaring the applicants' guilt (see paragraph 51 above).

2. *The Court's assessment*

(a) **General principles**

88. At the outset the Court reiterates that the guarantees in paragraph 3 (d) of Article 6 of the Convention are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision (see *Al-Khawaja and Tahery*, cited above, § 118); it will therefore consider the

applicants' complaint under both provisions taken together (see *Schatschaschwili*, cited above, § 100).

89. The Court's primary concern under Article 6 § 1 of the Convention is to evaluate the overall fairness of the criminal proceedings. In making this assessment, the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted and, where necessary, to the rights of witnesses (see *Al-Khawaja and Tahery*, cited above, § 118, with further references and *Schatschaschwili*, cited above, § 101).

90. The Court reiterates that Article 6 § 3 (d) of the Convention 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. However, the use as evidence of statements obtained at the stage of a police investigation and judicial investigation is not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided that the rights of the defence have been respected (see *Al-Khawaja and Tahery*, cited above, § 118, and *Schatschaschwili*, cited above, §§ 103-05).

91. According to the principles developed in *Al-Khawaja and Tahery* (cited above, § 152), it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence. The Court must examine whether:

(i) there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements in evidence (*ibid.*, §§ 119-25);

(ii) the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (*ibid.*, §§ 119 and 126-47); and

(iii) there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (*ibid.*, § 147).

92. In *Schatschaschwili*, the Grand Chamber clarified that all three steps of the test were interrelated and, taken together, served to establish whether the criminal proceedings at issue had, as a whole, been fair (cited above, § 118). At the same time, it noted in respect of the first step that while the absence of good reason for the non-attendance of the witness cannot of itself be conclusive of the unfairness of the applicant's trial, it is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) of the Convention (*ibid.*, § 113). Expounding on the interplay of the second and third steps, the Grand Chamber highlighted the

importance of sufficient counterbalancing factors not only in cases in which the absent witness's testimony was the sole or the decisive basis for the conviction, but also in those cases where, in the domestic courts' assessment, that evidence, without clearly reaching the threshold of "sole or decisive", carried significant weight and its admission may have handicapped the defence (*ibid.*, § 116, and *Seton v. the United Kingdom*, no. 55287/10, § 59, 31 March 2016).

93. The Court reiterates that the term "witness" has an "autonomous" meaning in the Convention system. Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see *Lucà*, cited above, § 41, and *Rudnichenko v. Ukraine*, no. 2775/07, § 102, 11 July 2013). Alleged accomplices in an offence (convicted in prior proceedings) are also to be regarded as witnesses, for the purposes of Article 6 § 3 (d), when their statements are brought before the court who takes account of them in deciding the case against the applicants (see *Mild and Virtanen v. Finland*, nos. 39481/98 and 40227/98, § 43, 26 July 2005).

94. In that light, the Court has applied the *Al-Khawaja* test, by analogy, in cases where the absent witnesses were, at the same time, co-defendants in the case (see, for example, *Kuchta v. Poland*, no. 58683/08, § 44, 23 January 2018, and, by implication, *Dimović v. Serbia*, no. 24463/11, 28 June 2016) as well as in cases where a witness's privilege against self-incrimination was at play (see *Seton*, § 60, cited above, concerning an available but reluctant witness who could be accused of related crimes and *Cabral v. the Netherlands*, no. 37617/10, § 33, 28 August 2018, where the witness, an accomplice, was presented for cross-examination but remained silent).

(b) Application to the present case

95. It follows from the above-mentioned principles that the fact that the incriminating statement had been made, as in the present case, by a co-accused rather than by an ordinary witness, is of no relevance and the principles established in such cases apply *mutatis mutandis* to the facts of the present case (see *Kuchta*, cited above, § 44, and compare *Seton*, cited above, § 60).

96. In this connection, the Court observes that the wording of Article 6 § 3 (d) provides "for an accused to examine or have examined witnesses against him". In the Court's view once a co-accused or other accomplice makes statements incriminating another person (i.e. the accused), the former inevitably becomes "a witness against him" and should expect to be confronted by the accused as well as to be compelled to appear at trial for such purpose. Indeed, the absence under national legislation of

any means to ensure the attendance of the accusers (charged with the same crime), for the purposes of examination, can be considered inadequate and can contribute to a finding of a violation of the rights of the accused (see, for example, *Mild and Virtanen*, cited above, §§ 46-48). However, the Court emphasises that the status of “witness” given to a co-accused or an alleged accomplice (tried separately) does not detract from their own rights as accused persons or criminal suspects, including that of the privilege against self-incrimination (see, by implication, *Cabral*, cited above § 34). Indeed such witnesses may be compelled to appear for the purposes of cross-examination but they cannot be compelled to give evidence.

(i) Whether there was good reason for not securing the attendance of the witnesses at the trial

97. The Court refers to its general principles on the matter as set out in *Schatschaschwili* (cited above, §§ 119-22).

98. Turning to the present case, the Court notes that G. and L. were summoned to the trial in their capacity as accused persons (see paragraph 27 above), and they attended the first hearing, which was exclusively devoted to preliminary issues (see paragraph 28 above). They failed to attend any other hearing thereafter, and although represented by counsel, they did not withdraw their statements, which had been admitted to the file. No further steps were taken by the domestic authorities to have G. and L. cross-examined as witnesses. The applicants’ request to reopen the investigation in order to cross-examine them was refused (see paragraph 39 above). Thus, the Court is of the view that the domestic courts did not make any significant efforts to hear G. and L. in adversarial proceedings. While it is true that there is no suggestion that L. and G. were absent witnesses in the sense that they were dead, sick, or unreachable (see *Schatschaschwili*, cited above, § 119), they were absent witnesses in so far as they did not attend the trial in person while their untested evidence was admitted for use by the trial courts.

99. The justification put forward by the Government for the lack of cross-examination of G. and L. was the need to protect the right of G. and L. to remain silent and their privilege against self-incrimination. According to the Government, since G. and L. were co-accused in the same proceedings, they had the right not to take part in the trial and were not compellable witnesses. Indeed, the investigating judge (see paragraph 25 above) and the first-instance judge (see paragraph 39 above) held that under domestic law, an accused person could not cross-examine a co-accused witness. The first applicant contested this (see paragraph 74 above). The Judge of Criminal Appeals confirmed that the investigating judge had legitimately questioned L. and G. without the presence of the applicants’ defence and that their statements had been correctly admitted as evidence and used in the

first-instance judgment, given that the Code of Criminal Procedure did not contain any rules on the admissibility of evidence (see paragraph 49 above).

100. The Court notes that irrespective of whether or not domestic law allowed the trial court to compel the co-accused to attend the trial for the purposes of cross-examination (a matter disputed by the parties), it could not have compelled them to give evidence. Indeed, the Court has previously found that a respondent Party could not be criticized for allowing criminal suspects to make use of their Article 6 rights, i.e. where a witness, once called, remained silent, invoking his privilege against self-incrimination (see *Cabral*, cited above, § 34, and *Vidgen v. the Netherlands*, no. 29353/06, § 42, 10 July 2012). The Court considers that had L. and G. been called for the purposes of cross-examination, even if they could not have been compelled to give evidence, the court would still have been able to see them in the witness box and assess their demeanour in response to cross-examination (compare *Seton*, cited above, § 62, and *Pichugin v. Russia*, no. 38623/03, § 199, 23 October 2012).

101. The Court considers that, even if under domestic law the domestic courts could admit evidence not collected at the trial, and an accused person was prevented from cross-examining a co-accused, this could not deprive the applicants of the right which Article 6 § 3 (d) afforded them, to examine or have examined in adversarial proceedings any evidence against them. This is even more so where the co-accused, whose statements were being used, had admitted to the charges and not retracted their testimony via counsel present at the hearing, and thus had no apparent reason to remain silent at trial. Indeed, in the present case, precisely on the basis of their confession, the two witnesses had asked the court to take account of mitigating circumstances in sentencing them (see paragraph 36 above). It follows, that in the circumstances of the present case there was no good reason for not securing the attendance of the witnesses at the trial. As noted in the general principles (see paragraph 92 above), while this cannot of itself be conclusive of the unfairness of a trial, it is a very important factor to be weighed in the balance when assessing the overall fairness of a trial and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) (see *Schatschaschwili*, cited above, § 113).

(ii) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicants' conviction

102. The Court refers to its general principles on the matter as set out in *Schatschaschwili* (cited above, §§ 123-24). In determining the weight of the evidence given by the absent witnesses and, in particular, whether that evidence was the sole or decisive basis for the applicant's conviction, the Court has regard, in the first place, to the domestic courts' assessment (*ibid.*, § 141). The Court notes that both the first-instance judge (see paragraph 40 above) and the Judge of Criminal Appeals (see paragraph 51 above) held

that, in addition to G. and L.'s statements, further corroborating evidence existed, namely, phone records showing contacts between the first applicant and G. prior to the car accident of 28 September 2011 and the odd circumstance that both accidents had occurred in the same street and had involved the same driver and the same passengers. The first-instance judge noted that G. and L.'s confessions had had some usefulness and that they could have helped the investigation, but certainly had not represented the only element thereof (see paragraphs 38 and 40 above). The Judge of Criminal Appeals unambiguously found that their statements had not contained "unexpected and decisive revelations" (see paragraph 51 above).

103. The Court reiterates that where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (*ibid.*, § 123). As to the strength of the additional incriminating evidence available in the present case, the Court will first take into account the evidence in relation to the first accident. Apart from the statements of L. and G., the corroborating factors consisted of the general circumstances of the accidents (see paragraph 9 above) which led to the matter being investigated, and the phone records (namely a list of phone calls, but not their content) between the first applicant and the second applicant, which happened after the first accident and for which the applicants provided an explanation (see paragraph 43 above). As to the second accident, the corroborating factors consisted again of the general circumstances of the accidents (see paragraph 9 above) and the phone records (namely a list of phone calls, but not their content) between the first applicant and G., before the accident. The Court considers that the available corroborative evidence could not be considered conclusive as to the fact that the accidents had been fictitious and as to the fraud with which the applicants were charged. It follows that since L. and G. were the only eyewitnesses to the offence in question, their testimony could be considered decisive. However, even if the evaluation of the weight of the evidence by the domestic courts was not unacceptable or arbitrary, for the purposes of the present case, it suffices for the Court to consider that even if not "decisive", L. and G.'s statements carried significant weight and their admission in evidence clearly undermined the defence.

(iii) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

104. The Court must further determine whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission in evidence of the statements made by G. and L. The following elements are relevant in this context: the trial court's approach to the untested evidence, the availability and strength

of further incriminating evidence, and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial (see *Schatschaschwili*, cited above, §§ 125-31 and 145).

105. The Government submitted that the domestic courts had adopted a cautious and prudent approach with respect to the statements and that the applicants had had the possibility of providing an alternative version of the facts (see paragraphs 86 and 87 above).

106. The Court notes that the use of statements made by witnesses in exchange for immunity or other advantages is an important tool in the domestic authorities' fight against serious crime. However, the use of such statements may put in question the fairness of the proceedings against the accused and is capable of raising delicate issues as, by their very nature, such statements are open to manipulation and may be made purely in order to obtain the advantages offered in exchange, or for personal revenge. The sometimes ambiguous nature of such statements and the risk that a person might be accused and tried on the basis of unverified allegations that are not necessarily disinterested must not, therefore, be underestimated (see *Habran and Dalem v. Belgium*, nos. 43000/11 and 49380/11, § 100, 17 January 2017, and *Shiman v. Romania* (dec.), no. 12512/07, § 33, 2 June 2015). However, the use of these kinds of statements does not in itself suffice to render the proceedings unfair. This depends on the particular circumstances in each case (ibid. § 34, and *Cornelis*, cited above, and the cases cited therein).

107. As regards the domestic courts' treatment of the evidence provided by G. and L., the Court observes that the first-instance judge did not examine in any detail the credibility of the witnesses and the reliability of their statements. The Court of Appeal, replying to the applicants' arguments, assessed whether there had been any personal resentment against the first applicant and considered that L. and G. could not have confessed to an offence for the sole purpose of backing someone else who allegedly wanted "revenge" (see paragraph 52 above). In assessing whether there had been mitigating circumstances, the Court of Appeal also considered that L.'s decision to confess had been determined by the favourable consequences which had been proposed to her and that her contribution had been precise and detailed (see paragraph 54 above).

108. The Court notes firstly that the Court of Appeal's assessment of L.'s confession was not made in the context of establishing the guilt of the applicants. It was made exclusively in the context of the application of mitigating circumstances to L. (see paragraph 54 above). It follows that it is entirely irrelevant to the assessment of counterbalancing factors in the present case because that assessment was not carried out in order to evaluate the credibility, weight or veracity of the witness testimony (which could not be challenged by the applicants) for the purposes of establishing their guilt

but for other reasons related to L. As to the only statement made by the domestic courts, namely the Court of Appeal, concerning the reliability of the statements in the light of any animosity or undue pressure by others, the Court cannot but note that this limited assessment was not made by the court of its own motion, but solely in reply to the applicants' contestations (compare and contrast, *İshak Sağlam v. Turkey*, no. 22963/08, § 52, 10 July 2018). Indeed the domestic judgments do not contain any indication that those courts were aware of the reduced evidentiary value of the untested witness statements and it cannot therefore be said that they examined the reliability of the absent witnesses' statements in a careful manner (compare *Avetisyan v. Armenia*, no. 13479/11, § 63, 10 November 2016).

109. The Court has previously found that a higher degree of scrutiny should be applied to assessment of statements by co-defendants, because the position in which co-defendants find themselves when testifying is different from that of ordinary witnesses (see *Pichugin*, cited above, § 199). However, in the present case, nowhere do the domestic judgments state that the court had been obliged to exercise particular diligence in assessing the witnesses' credibility given that neither the defence nor the court had been able to question and observe the demeanour of the witnesses at the trial (see, *a contrario*, *Schatschaschwili*, cited above, § 146). The Court of Appeal limited itself to holding that, in order to assess the reliability of evidence, a judge had solely to take into account the way in which the evidence in question had been acquired (see paragraph 49 above), a principle applicable to the assessment of evidence in general. Nor did the courts, anywhere in their judgment as regards G.'s testimony or in the appropriate context as regards L.'s testimony, (i) take any account of the fact that G. and L.'s statements had not been consistent, namely that they had first denied all the charges against them and then later admitted to them (see *Dimović*, cited above, § 46); (ii) make any observation as to whether the witnesses had given detailed and coherent descriptions of the circumstances of the offence; (iii) take into consideration the fact that the witnesses had, without good reason, not made themselves available for cross-examination (see, *a contrario* and *mutatis mutandis*, *Schatschaschwili*, cited above, §§ 148-49); or (iv) assess the reliability of L.'s testimony in the light of the fact that it had been given to obtain the advantages offered to her in exchange. Thus, the Court considers that the manner in which the domestic courts examined L. and G.'s credibility, and the reliability of their statements, was insufficient.

110. The Court has already observed that the domestic courts had before them some additional circumstantial evidence supporting L. and G.'s incriminating statements (see paragraph 102 above) which in part had been challenged by the applicants, and it found that such evidence could not be considered conclusive (see paragraph 103 above) (see, *a contrario*, *Seton*, cited above, § 68).

111. As to any procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial, the Court notes that although the applicants did have the possibility to give their own version of the events, they had no chance to put questions to L. and G. indirectly, for instance in writing, nor were the applicants' or their counsel given an opportunity to question those witnesses during the investigation (see paragraph 17 above) (compare *Paić v. Croatia*, no. 47082/12, §§ 46-47, 29 March 2016).

112. In this connection, the Court reiterates that while Article 6 § 3 (d) of the Convention concerns the cross-examination of prosecution witnesses at the trial itself, the way in which the prosecution witnesses' questioning at the investigation stage was conducted attains considerable importance for, and may well prejudice, the fairness of the trial itself where key witnesses cannot be heard by the trial court and the evidence as obtained at the investigation stage is introduced directly into the trial. It is vital for the determination of the fairness of the trial as a whole to ascertain whether the authorities, at the time of the witness hearing at the investigation stage, proceeded on the assumption that the witness would not be heard at the trial. Where the investigating authorities took the reasonable view that the witness concerned would not be examined at the hearing of the trial court, it is essential for the defence to have been given an opportunity to put questions to the witness at the investigation stage (see *Schatschaschwili*, cited above, §§ 156-57).

113. It is not the Court's role, nor is it necessary in the present case, to examine whether or not the law provided for the possibility of questioning the co-accused witnesses at the investigation stage. The Court observes that in the present case, the investigating judge was of the view that an accused person did not have the right to cross-examine a co-accused witness (see paragraph 25 above). She thus refused the applicants' request to cross-examine G. and L. at the investigation stage and did not include G. and L. in the list of witnesses to be heard at the trial (see paragraph 26 above). She was thus aware that G. and L. would not be heard at the trial and by denying the applicants the opportunity to cross-examine them during the investigation, she took the foreseeable risk, which subsequently materialised, that neither the applicants nor their counsel would be able to question G. and L. at any stage of the proceedings.

114. It follows that, in view of the importance of the statements of the only eyewitnesses to the offence, the counterbalancing measures taken were insufficient to permit a fair and proper assessment of the reliability of the untested evidence.

(iv) Conclusion

115. In assessing the overall fairness of the proceedings and having regard to any counterbalancing factors, in the light of its finding to the effect

that the evidence given by G. and L. carried significant weight for the applicants' conviction (see paragraph 103 above), the Court considers that the trial court had before it scarce additional incriminating evidence regarding the offence of which the applicants were found guilty. However, insufficient procedural measures were taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial.

116. In those circumstances, the Court is of the view that the absence of an opportunity for the applicants to examine or have examined witnesses G. and L. at any stage of the proceedings rendered the trial as a whole unfair. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

117. Relying on Article 6 §§ 1 and 3 (a) and (b), the applicants further complained that the proceedings against them had not been fair, for various reasons. The second applicant also complained under Article 8 of the Convention of a violation of his private life. In his opinion, the acquisition of his phone records had been illegitimate, since those records corresponded to a period of time subsequent to that of the impugned events, and therefore they did not concern the facts of which he had been accused. In addition, the acquisition of his phone records was invalid in the light of a Court of Justice of the European Union (CJEU) judgment of 8 April 2014, which had invalidated Directive No. 2006/24/EC.

118. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

120. The second applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Damage

121. The first applicant claimed 100,000 euros (EUR) in respect of damage suffered on account of the unfairness of the proceedings and having regard to the ancillary penalty which prevented him from continuing his professional activity. He also claimed EUR 25,000 on account of the loss of profit as a result of his conviction, due to his suspension from the San Marino association of journalists.

122. The Government argued that there was no causal relationship between the damages claimed by the first applicant and the alleged violation, since his claim was based on the assumption that the questioning of G. and L. in new adversarial proceedings would have determined a favourable outcome of the proceedings for him. Moreover, the claim for EUR 100,000 seemed exorbitant and was not supported by adequate justification, given that the first applicant had not even specified the criteria that he had used to calculate such an amount. As to the claim for EUR 25,000, the Government noted that it appeared to be a duplication of the claim for damages, since the first applicant had already requested EUR 100,000 on that same account. Moreover, he had submitted two of his pay slips but had failed to provide an adequate explanation for the calculation of such sum.

123. The Court cannot speculate about the outcome of the proceedings had they been in conformity with Article 6 and therefore an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of that Article (see *Carmel Saliba v. Malta*, no. 24221/13, § 84, 29 November 2016). Thus, the Court rejects the first applicant's claim for pecuniary damage. On the other hand, the Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation, and that compensation has thus to be awarded. Making its assessment on an equitable basis, the Court awards the applicant the sum of EUR 8,000 under this head.

D. Costs and expenses

124. The first applicant claimed EUR 12,688 for the costs and expenses incurred before the Court.

125. The Government pointed out that the first applicant had submitted a mere draft note of expenses. Thus he had not provided evidence that he had actually paid that sum, nor that he was obliged to pay it on the basis of a legal or contractual obligation.

126. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as

to quantum. In the present case, bearing in mind that the Court has found a violation of only one of the applicant's many complaints, and regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the first applicant the sum of EUR 4,000 for the proceedings before the Court.

E. Default interest

127. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 §§ 1 and 3 (d) admissible, and the remainder of the applications inadmissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the first applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
4. *Dismisses* the remainder of the first applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Ksenija Turković
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

A.C.
K.T.U.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I agree with my colleagues that there has been a violation of Article 6 in the instant case. Nevertheless, I consider it necessary to introduce certain nuances to the reasoning.

2. The application concerns a criminal case with several co-accused who all have the same right to defend themselves. This right encompasses in particular the right for accused persons to determine their own line of defence, to decide whether to appear in person before the court at each and every hearing or to allow the court to proceed without their being present, to remain silent or present explanations, and to tell the truth or to lie. It also encompasses, *inter alia*, the protection against self-incrimination. Moreover, defence is a right, not an obligation, and accused persons may waive their right to defend themselves.

In a trial against two or more persons, the co-accused usually have conflicting interests. In order to secure a fair trial it is of fundamental importance to guarantee equal defence rights to all the co-accused and to manage the conflict of interests throughout the trial in a way which preserves the rights of all of them. Similarly, the examination by the Court of an application alleging a violation of Article 6 under its criminal limb requires a fair balancing of the rights and interests of all the co-accused.

3. I fully agree with the general assumption that an accused has the right to request the examination of one of his co-accused at the trial before the court. It is always preferable for a judgment to be based on the explanations of the accused presented directly before the court at the trial. The right in question stems directly from the right to a fair criminal trial guaranteed in Article 6 § 1 of the Convention. Whereas I agree that the term “witness” has an autonomous meaning under the Convention, I am not sure that it was really necessary to extend its scope to the co-accused.

4. The status of witness is different from that of co-accused. The mandatory presence of a co-accused does not guarantee that the latter will speak, let alone provide any truthful information relevant for deciding the case. It depends entirely on his free choice. A witness is required to appear before the court if summoned and to give truthful, accurate and comprehensive testimony about the relevant facts. He may invoke the privilege against self-incrimination, but this is an exception to the general obligation to testify. He may be punished for refusing to testify and is criminally liable for false testimony. In many jurisdictions one cannot be at the same time an accused and a witness in the same criminal trial because of the fundamental difference in factual and legal status between the two. It is therefore of fundamental importance to distinguish between the roles of

witness and accused in assessing compliance with the requirements of a fair trial.

5. The reasoning seeks to establish and maintain the distinction between co-accused and witness, but is not wholly consistent in this regard. In particular, using the term “witness” in respect of a co-accused may be a source of confusion and may blur the distinction between a co-accused and a witness in the strict sense. I also note in this context that the judgment criticises the domestic courts for not taking into account “the fact that the witnesses had, without good reason, not made themselves available for cross-examination” (see paragraph 109 of the judgment). The problem with this argument is that a co-accused does not have to make him or herself available for cross-examination without being previously summoned for that purpose. The majority should instead criticise the domestic courts for not summoning the co-accused and for not expressly taking into consideration in the reasoning of the judgments the fact that the co-accused had not been questioned directly by the domestic courts.

6. The instant judgment, following the court’s case-law, tries to apply *per analogiam* the three-stage test devised for assessing the reliance on the testimonies of absent witnesses: (i) whether there was good reason for not securing the attendance of the witnesses at the trial; (ii) whether the evidence of the absent witnesses was the sole or decisive basis for the applicants’ conviction; and (iii) whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured.

I am not sure that the test devised for absent witnesses (even if applied *per analogiam*) is the most appropriate for the purpose of assessing the fairness of a trial in which the domestic court based factual findings on the explanations provided by a co-accused at the investigation stage, without hearing evidence from him during the trial.

7. The judgment addresses the question “[w]hether there was good reason for not securing the attendance of the witnesses at the trial” (see paragraph 97 of the judgment). In my view, this is not the best way of approaching the problem. The initial assumption is the freedom of the accused in conducting his defence. The decision of an accused not to appear in person does not require any justification and deserves protection. However, this protection is not absolute because the right of the accused not to appear may be outweighed by the interests of the co-accused or other parties to the proceedings. The right of one accused to have a co-accused summoned and questioned directly at the trial usually prevails over the interest of this co-accused in not being present in person at the whole trial or at a specific hearing.

In this context, the question to be asked is rather whether there was a real need to secure the attendance of the co-accused for the purpose of direct examination before the court. Such need arises in particular if the statements

of one co-accused who would prefer not to appear constitute important evidence against another co-accused. The question whether there was a good reason for not summoning and seeking to examine another co-accused at the trial arises only if an accused requests the court to summon for the purpose of direct examination a co-accused whose statements may be relevant for deciding the criminal case. Such good reason may lie in the fact that a co-accused who previously made certain statements at the pre-trial stage has asserted at the beginning of the trial his right to remain silent throughout the subsequent proceedings.

8. The next question is whether the evidence of the absent co-accused was the sole or decisive basis for the applicants' conviction. The Judge of Criminal Appeals established that the statements of the applicants' co-accused "had just confirmed a series of unequivocal elements which had been listed in the indictment and which would have been sufficient on their own to consider the commission of the fraud plausible on a logical level" (see paragraph 51 of the judgment). The possibility of an alternative explanation of the car accidents was implausible. I note in this context that the European Court of Human Rights, applying the second criterion in non-straightforward cases, is forced to act as an additional instance which reassesses the available evidence.

9. The judgment seeks further to establish whether there *were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair*. The existing case-law (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 126-31, ECHR 2015) has identified the following possible counterbalancing factors:

- (i) whether the domestic court approached the untested evidence with caution;
- (ii) whether there is a video recording of the questioning at the investigation stage;
- (iii) the availability of corroborative evidence;
- (iv) the possibility of putting questions in writing to the absent witness;
- (v) the possibility for counsel to question the witness at the investigation stage;
- (vi) the opportunity for the accused to give his or her own version of events and cast doubt on the credibility of the witness.

I note that some of these possible counterbalancing factors belong to the sphere of free assessment of evidence (points (i) and (iii)). Factor (iii) overlaps, moreover, with the second stage of the test to be applied, namely *whether the evidence of the absent witnesses was the sole or decisive basis for the applicants' conviction*. Some of the factors listed above go to the core of the right to defend oneself and at the same time to the minimum guarantees of a fair trial ((vi)). Some enhance the credibility of the absent

co-accused's testimony ((ii) and (v)). The transposal of some of these solutions ((ii) and (v)) to the accused is not always easy. The applicable domestic rules may require that – at the investigation stage – each accused is questioned without the presence of his or her co-accused and their counsel.

I am not sure that, at least in criminal justice systems with strong non-adversarial (inquisitorial) elements, the problem should be framed in terms of the existence of “counterbalancing factors compensating for the handicaps caused to the defence”. Firstly, it is problematic whether the handicaps stemming from the absence of a co-accused whose statements are decisive for the outcome of the case can really be “compensated for”. Secondly, the absence of a co-accused before a court which approaches indirect evidence with caution may also create a handicap for the prosecution. Thirdly, in a legal system complying with the requirements of a fair trial the defence will have at its disposal a broad set of procedural rights (for instance, the right to submit new evidence and to contest the credibility of the evidence presented by the prosecution) and can always call into question the evidentiary value of statements made by other co-accused at the investigation stage and highlight their untested nature, thus further lowering their value. The inquisitorial principle coupled with the free assessment of evidence (or rather, more appropriately, the rational assessment of evidence) and the obligation to give reasons for the judgment require the domestic tribunal to establish the “material” truth and to justify rationally the factual findings on which the judgment is based. These principles, if correctly adhered to, should ensure that the proceedings are fair and that the final judgment is just, in spite of the fact that one of the co-accused was not directly questioned by the court.

10. When considering the question whether there were sufficient counterbalancing factors to compensate for the handicaps caused to the defence the Court examines very carefully the reasoning of the judgments rendered by domestic courts. In the present case, the Court's reasoning rightly points to a certain number of deficiencies in the reasons given by the domestic courts. The implicit assumption is that handicaps to the defence may later be compensated for by the quality of the judgments' reasoning. This possibility does not exist in legal systems where the factual findings of a jury are not accompanied by reasons.

It thus appears that the issue of an absent co-accused is closely linked to the requirement for the criminal judgment to be properly reasoned. The Court has held on numerous occasions that judgments of courts and tribunals should adequately state the reasons on which they are based (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 84, 11 July 2017, and *Papon v. France (dec.)*, no. 344/04, ECHR 2005-XI (extracts)). A failure to provide adequate reasons may be a ground for finding a violation of Article 6. In the instant case, the Court rightly established deficiencies in

the reasoning of the domestic courts which justify the conclusion that the domestic judgments' reasoning did not meet the requirements of a fair trial. It was possible to find a violation of Article 6 also on this basis.

11. The judgment asserts the following in paragraph 108 *in fine*:

“Indeed the domestic judgments do not contain any indication that those courts were aware of the reduced evidentiary value of the untested witness statements and it cannot therefore be said that they examined the reliability of the absent witnesses' statements in a careful manner (compare *Avetisyan v. Armenia*, no. 13479/11, § 63, 10 November 2016).”

I find this assertion somewhat problematic. Any professional judge is certainly well aware of the reduced evidentiary value of any statements by an accused, be they tested or untested. I have no doubt that the domestic courts, as they saw it, examined the reliability of the absent co-accused's statements in a careful manner. The problem lies elsewhere: this examination does not find its expression in a proper reasoning of the judgments.

12. Here, I would also like to note the following difficulty for the applicants' defence in this case. The trial court, acting in accordance with domestic law, did not seek to clarify from the very beginning the position of each accused and, in particular, whether they were pleading guilty or not guilty, whether they wished to assert their right to remain silent or to provide their version of events, and whether they agreed or disagreed with the statements of their co-accused. Without knowing from the beginning of the trial the position of their co-accused, it was more difficult for the applicants to prepare their own defence. This does not mean, however, that any changes in domestic law are necessary in this regard.

13. I note that the approach of the Court once again brings certain elements of the legal assessment of evidence to legal systems based on the free assessment of evidence, thereby interfering to some extent with their very intricate construction. It may be preferable to develop a new approach towards the untested statements of co-accused and the testimonies of absent witnesses, one which would better fit the pattern of criminal proceedings in these legal systems.