



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

FIRST SECTION

CASE OF DODOJA v. CROATIA

(Application no. 53587/17)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Fair hearing • Applicant convicted of a more serious criminal offence and sentenced more severely on the basis of untested incriminating witness evidence of significant weight • Insufficient counterbalancing factors to compensate for the handicap caused to the defence • General principles on admission of untested incriminating witness evidence in criminal proceedings applicable in cases where outcome of proceedings complaint focuses on factual circumstances relevant for ultimate severity of sentence

STRASBOURG

24 June 2021

FINAL

24/09/2021

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

In the case of Dodoja v. Croatia,

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

Péter Paczolay, *President*,

Ksenija Turković,

Krzysztof Wojtyczek,

Alena Poláčková,

Gilberto Felici,

Erik Wennerström,

Ioannis Ktistakis, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 53587/17) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Siniša Dodoja (“the applicant”), on 14 July 2017;

the decision to give notice to the Croatian Government (“the Government”) of the complaint concerning the applicant’s right to question witnesses and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 1 June 2021,

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

INTRODUCTION

1. The case concerns the applicant’s complaint that he was sentenced to a higher penalty on account of a police statement of his co-accused, who had meanwhile absconded and was being tried *in absentia*.

THE FACTS

2. The applicant was born in 1963 and lives in Split. He was represented by Mr Lj. Pavasović Visković, a lawyer practising in Zagreb.

3. The Government were represented by their Agent, Mrs Š. Stažnik.

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

5. In 2004 and 2005 the police conducted a criminal investigation involving several persons on suspicion of engaging in the purchase and sale of heroin. They employed secret surveillance measures against some of the suspects, including monitoring their telephone conversations and using undercover investigators.

6. After the police detained a certain S.B., in the presence of his attorney, on 18 October 2005 he confessed to participating in the organisation of the drug sale. He told the police that during 2004 and 2005,

about once or twice a month, he was buying heroin from a certain V.N. in Serbia, transferring it to Croatia and selling it to the applicant, who then resold it in the Split area.

7. On 18 October 2005 the police filed a criminal report with the Office for the Suppression of Corruption and Organised Crime (*Ured za suzbijanje korupcije i organiziranog kriminaliteta*; hereinafter “the State Attorney’s Office”) against sixteen persons, including the applicant, V.N. and S.B., on account of the criminal offence of narcotic drug abuse.

8. On the same day, the State Attorney’s Office requested the Zagreb County Court (*Županijski sud u Zagrebu*) to carry out an investigation against those persons. The investigating judge interrogated S.B., who refused to present his defence and stated that he maintained his statement previously given to the police in the presence of his attorney.

9. On 19 October 2005 the investigating judge interrogated the applicant who refused to present his defence.

10. On the same day the investigating judge rendered a decision on the conduct of an investigation and on pre-trial detention against the applicant, S.B. and twelve other persons.

11. On 12 April 2006 the State Attorney’s Office lodged an indictment against S.B., V.N., the applicant and twelve other persons on account of a reasonable suspicion that they had committed a criminal offence of narcotic drug abuse.

12. At a hearing held on 18 April 2008, when invited by the trial court to state their plea, S.B. pleaded not guilty to the charges against him. S.B.’s lawyer also objected to the reading of his police statement, claiming that it was inadmissible.

13. On 16 October 2008 S.B. was released from pre-trial detention as the maximum term of his detention had expired. He eventually left the country. Two days later, the applicant was also released from pre-trial detention for the same reason.

14. On 16 March 2010 the trial court concluded that S.B. had fled and that he would be tried *in absentia*.

15. The applicant presented his defence at a hearing of 26 October 2010. He admitted that in September 2005 he had been contacted by S.B. for the purpose of heroin sale on the illegal narcotic market. He helped S.B. sell three kilograms of heroin to a friend, guaranteeing for the payment to S.B. Subsequently, the court read out the testimony of S.B. provided to the police.

16. By a judgment of the Zagreb County Court of 2 November 2010, the applicant was found guilty of narcotic drug abuse under Article 173 § 2 and 3 of the Criminal Code and sentenced to eight years’ imprisonment. The relevant parts of the judgement read as follows:

DODOJA v. CROATIA JUDGMENT

“... At the end of presentation of evidence, ... [the applicant and V.N.] were examined ... while the defence of the first defendant, S.B., was read out from the minutes of 18 and 19 October 2005...

... [the court] dismissed as irrelevant proposals of [the applicant's defence counsel] to obtain from the police recordings of telephone conversations between S.B. and [the applicant], to supplement the telecommunications expert report so as to establish S.B.'s location during his phone conversations between 15 September and 15 October 2005 and whether he had contacted [the applicant] before that period. This is so because the court deemed the facts sufficiently established without the evidence requested, so that obtaining such evidence would have unjustifiably prolonged the criminal proceedings. ...

[The applicant] stated that he did not know V.N. and that he did not have his mobile phone number....

During the arrests of S.B. and [the applicant], their mobile phones were seized and inspected by telecommunications expert witnesses ... By examining the incoming calls to ... [the applicant], it was established that on 4 October 2005 at 4.49 pm he received a call by V.N. ... Therefore, the defence of V.N., in which he stated that he had never called [the applicant], is not true. Furthermore, by examining the mobile phone ... of S.B., it was established that in the period from 14 September to 6 October 2005, he frequently communicated with [the applicant] and V.N., with a total of 27 conversations being registered between S.B. and [the applicant] ... Analysing the testimonies of S.B., [the applicant] and V.N. and, relating to that, what the defendants told each other during their telephone contact, arising from the content of recorded telephone conversations which were reproduced at the main hearing, the court considered S.B.'s statement in relation to the criminal offence reliable.

This is primarily because [the applicant] and V.N. confirmed one essential fact stated by S.B.; they both indicated that they had contacted him regarding the purchase of heroin. However, as it transpires from the defence of [the applicant] and V.N., their activity was limited in terms of time, since they stated that only one delivery had taken place, and in terms of their role in that process, which they argued had merely included connecting S.B. to the person who had purchased the drug in Serbia (according to the defence of V.N.) and ... the person to whom he sold the drugs in Split (according to [the applicant]). Such defences of [the applicant] and V.N. are completely unconvincing because they are contrary to general experience and logic....

So [the applicant] states that in September 2005 he was called by S.B. who told him that he would come to Split to convey a message from an Albanian friend.... The question here is why anybody would come to Split to convey a message after contacting the person concerned via mobile phone. In addition, the question arises why the alleged friend did not contact [the applicant] directly and why he would even hire S.B., whom [the applicant] allegedly did not know. Furthermore, [the applicant's] defence, in which he claims that he is only guilty of putting S.B. in contact with the person who bought the drugs from him, indicates that he was far more involved, since after his 'friend' found that S.B. had sold him paracetamol instead of heroin, [the applicant] called S.B. and asked him to bring the real heroin, which he did, and after that 'friend' refused to pay S.B. the rest of the money for the heroin bought, the latter asked him to pay that amount, as he had guaranteed that the drugs would be paid, but [the applicant] does not cite a single reason why he needed to guarantee the payment of these drugs. Finally, [the applicant] stated that he had given the remaining EUR 20,000, the amount his friend had owed to S.B. ..., which is also completely illogical in the context of what [the applicant] had stated ...

In the light of all of the foregoing, it is obvious that [the applicant] and V.N. had sought to minimize their roles in the event for which they are charged [with a criminal offence], excluding their direct involvement in the purchase of heroin, in order to exonerate themselves ... On the other hand, what makes the testimony of S.B. particularly convincing is that he acknowledged his own involvement in the smuggling of the ... heroin, describing the circumstances in which he purchased heroin in Serbia and transported it to Croatia, to Split, stating the names of the persons involved, the quantities of the drugs he was transporting, as well as the period during which the drug was delivered ... The court did not find that, while incriminating himself, S.B. had any reason to wrongly incriminate [the applicant] and V.N., and neither did these defendants indicate any such particular reason.

The credibility of the testimony of S.B. also follows from the contents of his telephone conversations with V.N. during the period from 15 September to 4 October 2005 ... What is essential is the conversation between these defendants of 24 September 2005, during which V.N., speaking of the drug, told S.B. ... 'where we took the previous goods'. Therefore, the delivery of heroin was obviously not a one-time event, as could be concluded from the defence of [the applicant] and V.N., it was rather a part of continuous, repeated drug purchase, as stated by S.B. ...

Based on all of the above-mentioned evidence, it is undisputed that S.B., the applicant and V.N. ..., on the basis of a previous agreement and in order to obtain undue pecuniary gain, smuggled the ... heroin from Serbia to Croatia in such a manner that S.B. took over the heroin from V.N. ... at the agreed place in Serbia, placed it in his car and carried it to ... Klis near Split, while being followed by V.N. ... in another car. Upon arrival to Klis, S.B. contacted [the applicant] by telephone and arranged the time and place of the delivery of heroin, while the latter subsequently transferred this drug from the car of S.B. to his own car, and paid for the drug purchased to V.N. ... and then proceeded to sell it on the illegal drug market in Split. In this manner, the defendants carried out the transport of the ... heroin once or twice a month, transporting two to three kilograms of this drug, whereby V.N. ... paid to S.B. EUR 500 per kilogram of heroin transported for each trip completed.

Given the number of persons involved in the smuggling of narcotic drugs and the period during which they did so, S.B., [the applicant] and V.N. purchased, sold and transported for sale a substance that was proclaimed as a narcotic drug by regulations, even though they did not have the authority to engage in the trafficking of these substances, and since the offence was committed by a number of persons associating for that purpose, their acts correspond to the objective features of the criminal offence of narcotic drug abuse referred to in Article 173 §§ 2 and 3 of the Criminal Code ...

The fact that [the applicant] took part in the purchase of ... heroin for a prolonged period of time was taken as an aggravating circumstance, and so was the fact that he had multiple previous convictions, among other things, for the same criminal offence ..."

17. On appeal, on 3 April 2013 the Supreme Court (*Vrhovni sud Republike Hrvatske*) amended the legal characterisation of the offence in view of the entry into force of the new Criminal Code, which had been more favourable for the applicant. He was again sentenced to eight years' imprisonment, along with mandatory addiction treatment. The relevant part of that judgment reads as follows:

"... [T]he first-instance court carefully analysed and correctly assessed the testimony given by the S.B. during the first [police] interrogation, which he reiterated during the

questioning before the investigating judge, as well as the defences of [the applicant and V.N.] in which they only confess to a limited mediation in the sale of drugs ... When assessing these testimonies, the first-instance court took into consideration and evaluated other evidence – primarily the contents of recorded telephone conversations between S.B. and V.N., as well as the information on the identified telephone contacts of S.B. and [the applicant], which the court has correctly found to confirm the testimony of S.B. in the part relating to the actions of these defendants described in point 7 of the operative part of the first-instance judgment – but also other evidence consistent with the testimony of S.B. in the remaining parts. While it is undisputed that in his testimony S.B. primarily described his own actions that obviously constitute honest confession of multiple serious criminal offences, he also described the activities of other co-perpetrators in some of these actions, without undermining his own criminal liability. Contrary to the allegations of [the applicant], his testimony is detailed, consistent and logical, and its essential elements are only contradicted by the defences of individual co-defendants, which are, however, contradictory and unconvincing.

Thus, parts of the defence of [the applicant] in which he claims that he called S.B. after a friend of his, who had allegedly bought drugs from S.B., told him that S.B. had sold him paracetamol instead of heroin and that he asked S.B. to bring the heroin, are unsustainable and illogical, and so is the part in which he alleges that S.B. requested from [the applicant] to pay the remaining price for the heroin, although he only acted as an intermediary in the sale, according to his allegations. In addition, the allegation of [the applicant] that he gave the remaining EUR 20,000.00 to his friend rather than to S.B. is completely unclear, taking into account that [the applicant] denied that he would buy heroin from S.B. ...

The part of the defence of S.B. in which he stated that during the transport of heroin he had been followed by V.N. and another Albanian, was confirmed by a part of the testimony of [the applicant], who stated that two persons of Albanian nationality had accompanied S.B. on arrival to Split with the heroin, and the telephone contact between V.N. and [the applicant] is evidenced by ... [the finding of the telecommunications expert] ..., thus denying the defence of [the applicant and V.N.] according to which they did not know each other and there was no telephone contact between them.

Finally, the time period in which the offences described in point 7 of the first instance judgment were committed is evident from the testimony of S.B., who stated that V.N. ... visited him and offered him a job of transporting heroin ... after ... 8 July 2004. It is therefore apparent that the designation of October 2004 as the commencement of the criminal offence under point 7 of the operative part of the contested judgment does not in any case constitute an extension of the incriminated period to the detriment of the defendant.

[The applicant] also alleges that the telecommunications expert witness report contradicts certain allegations of S.B. and that the first-instance court unjustifiably rejected the motion of defence to supplement the telecommunications expert witness report, since it would provide for a more detailed examination of the testimony of S.B. He points out that the data on the base stations to which S.B.'s mobile phone was connected in the incriminated period indicate that over a period of twenty days, S.B. spent ... a total of seven days in Split during which he contacted [the applicant] every day and concludes that S.B. lied in his testimony and that there had been far more interactions between him and [the applicant] during those days than he admitted ...

However the data to be obtained and subjected to telecommunications expert witness evaluation would not, as [the applicant] erroneously claims in the appeal, contribute to a better assessment of S.B.'s testimony in the part in which he contradicts the defence of [the applicant]. It is already indisputable from the evidence so far presented, and from the defence of [the applicant] that S.B. occasionally came to Split, where he communicated via mobile phone and was meeting with [the applicant], whose description of the content of their conversations relating to buying and selling heroin differs from the one provided by S.B., as he denies that he would buy that drug and claims to have only been an intermediary in its sale to a third person. More detailed information on the movement of S.B. (and only in the periods when he used the mobile phone, establishing contact through individual base stations) would in no way result in a different assessment of the defence of ... [the applicant] in parts referring to the content of their agreements relating to heroin, so the first-instance court correctly dismissed such an evidentiary motion of [the applicant] ..."

18. On 6 July 2016 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicant's subsequent constitutional complaint. The relevant parts of the decision read as follows:

"The Constitutional Court finds that the courts assessed that the testimony [of S.B.] given to the police, which was used in relation to the applicant as a 'witness' testimony does not constitute the only piece of evidence for the finding that the applicant committed the criminal offence [charged with] in the incriminating period from October 2004 to October 2005. The Constitutional Court finds that the reasoning provided by the first- and the second instance [courts] had been relevant and sufficient in that regard."

RELEVANT LEGAL FRAMEWORK

19. Article 173 of the Criminal Code (*Kazneni zakon*, Official Gazette, no. 110/97, with subsequent amendments), in so far as relevant, read as follows:

Abuse of Narcotic Drugs Article 173

"(2) Whoever, without authorisation, manufactures, processes, sells or offers for sale or buys for the purpose of reselling, keeps, distributes or brokers the sale and purchase of or in some other way and without authorisation puts into circulation substances or preparations that are by regulation proclaimed to be narcotic drugs shall be punished by imprisonment for at least three years.

(3) If a criminal offence referred to in paragraph 2 of this Article has been committed by multiple persons who have joined to commit these offences, or the perpetrator of that criminal offence has organised a network of resellers or mediators, the perpetrator shall be punished by imprisonment for a term of at least five years or by long-term imprisonment."

20. Other relevant domestic law provisions have been cited in *Paić v. Croatia*, no. 47082/12, §§ 16, 18 and 19, 29 March 2016.

THE LAW

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

21. The applicant complained that he had not had a fair trial in that he had not been given the opportunity to examine a witness against him. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, reads as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...”

A. Admissibility

22. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

23. The applicant maintained that he had been unable to examine S.B. at any stage of the proceeding, whereas his statement weighed heavily in his conviction. After his statement before the police, before the trial court S.B. had pleaded not guilty and his defence attorney had unsuccessfully objected to the transcript of his statement to the police being read out.

24. He also stressed that S.B.'s statement had been the sole and certainly the key piece of evidence for his conviction in respect of the entirety of the incriminating period. While it was true that he had confessed to acting as an intermediary in the sale of heroin on one occasion, he had not admitted to the offence for which he had ultimately been convicted, and his confession could thus not have been deemed decisive. His confession related to a significantly smaller quantity of drugs and a narrower timeframe, so had that been decisive as claimed by the Government, he would have been sentenced to a less severe sentence than the one he had received.

25. The applicant further argued that the trial court had failed to thoroughly or carefully consider S.B.'s police statement, which had remained unsupported by any other evidence presented during the trial. Namely, according to the prosecution's main witness, S.B.'s role had been very different than the one he had described in his police statement, in which he had sought to significantly understate his role in the drug trafficking chain. Also, that crown witness had not even known the applicant. The analysis of phone interactions between S.B. and the applicant clearly corresponded to the timeframe the applicant had stated in his defence and the applicant's requests to obtain further evidence in that respect had been rejected.

26. In the applicant's submission, the transcript of a co-defendant's questioning necessarily had to be given lower evidentiary value, due to the right of that defendant not to incriminate himself and a possible conflict of interest with other co-defendants. Such a statement, especially one containing a confession and incriminating another co-defendant, must be subjected to a special verification of authenticity, with observance of strict procedural defence rights. This was particularly true in the applicant's case, considering that S.B. had himself subsequently pleaded not guilty and objected to the reading of the transcript of his questioning by the police before the trial court, because he had considered the said transcript inadmissible.

(b) The Government

27. The Government argued that the criminal proceedings against the applicant had been lawful and compliant with the applicable Convention standards. The trial court had made every effort to ensure S.B.'s presence at the trial, but he eventually had to be tried *in absentia*. There was thus a justified reason why S.B. had not been heard in court and why the applicant had been unable to question him.

28. They stressed that S.B.'s police statement had not been the sole or the decisive evidence against the applicant. Even before that statement had been read out, the applicant had confessed to having committed the criminal offence of abuse of narcotic drugs. S.B.'s testimony had thus not been decisive for the establishment of the applicant's guilt, but only for the sentence ultimately imposed on him.

29. They further emphasised that the trial court had not passively accepted S.B.'s testimony as accurate, but had thoroughly and cautiously considered S.B.'s and the applicant's statements, presenting evidence in order to test S.B.'s testimony and only after such an analysis had decided which of the two partially opposing statements to accept. His testimony had been corroborated by other evidence produced during the proceedings, such as frequent mobile phone contacts between the applicant and S.B., but also other members of the criminal association such as V.N. On the other hand,

the applicant's testimony had remained unsustainable and illogical, and unsupported by any other evidence.

30. Lastly, there was nothing to suggest that the applicant had been in a less favourable position in relation to the prosecution or that the court had failed to take account of his procedural handicap. It could not be argued that the rights of the defence had been restricted because of the inability to examine S.B. What was disputed was the extent of their criminal cooperation and the domestic court gave clear and precise reasons for rejecting the applicant's defence and accepting S.B.'s testimony.

2. *The Court's assessment*

(a) General principles

31. General principles regarding the admission of untested incriminating witness evidence in criminal proceedings have been summarised in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011), and *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 100-31, ECHR 2015). The Court reiterated in those judgments that Article 6 § 3 (d) enshrined the principle that, before an accused could be convicted, all evidence against him normally had to be produced in his presence at a public hearing with a view to adversarial argument (see *Al-Khawaja and Tahery*, cited above, § 118).

32. According to the principles developed in *Al-Khawaja and Tahery*, and confirmed in *Schatschaschwili*, 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 (*ibid.*, § 152). The Court must examine

- (i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence (see *Al-Khawaja and Tahery*, cited above, §§ 119-25);
- (ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction or carried significant weight and its admission might have handicapped the defence (*ibid.*, §§ 119 and 126-47); and
- (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps under which the defence laboured as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (*ibid.*, § 147).

(b) Application of the general principles to the present case

33. Unlike many previous cases of absent witnesses, in the present case the applicant does not contest his criminal liability as such, but instead complains that he had been charged and sentenced more severely on account of S.B.'s untested police statement. In other words, he does not contest his involvement in illegal drug trafficking, but he disagrees with the scope of the criminal activities that he had been convicted of and, consequently, the severity of the punishment imposed on him. The Court therefore has to examine whether the principles established in its case-law concerning the admission of untested incriminating witness evidence in criminal proceedings (see paragraph 31 above) equally apply in the circumstances of the present case, where the outcome of the proceedings complained of does not comprise guilt or innocence, but focuses on the factual circumstances relevant for the ultimate severity of sentence.

34. In this connection, the Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that provision (see *Al-Khawaja and Tahery*, cited above, § 118) and that its task in such cases is to consider the applicant's complaint under both provisions taken together (see *Schatschaschwili*, cited above, § 100). Moreover, when examining a complaint under Article 6 § 1, the Court must essentially ascertain whether the proceedings as a whole were fair, having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses (see, among other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010; *Schatschaschwili*, cited above, § 101; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 250, ECHR 2016).

35. The Court further reiterates that, although the issues concerning appropriate sentencing normally fall outside the scope of the Convention (see, for instance, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 55, 24 January 2017; see also *Canj v. Albania*, no. 11006/06, § 55, 6 March 2012), as a matter of fairness, the sentence imposed should reflect the offence which the defendant actually committed (see, *mutatis mutandis*, *Grba v. Croatia*, no. 47074/12, § 103, 23 November 2017).

36. In view of the above, the Court considers that the general principles of fairness necessarily encompass the punishment to which an accused has been sentenced in criminal proceedings, since it would be unfair to punish a person for a part of criminal activity which was the result of improper conduct of the proceedings on the part of the State authorities (see, *mutatis mutandis*, *Grba*, cited above, § 103).

37. Given that in the present case S.B.'s testimony could have influenced the outcome of the applicant's case (contrast, for example, *Kapustyak v. Ukraine*, no. 26230/11, §§ 94-95, 3 March 2016), the Court will proceed to examine whether the impossibility to question that witness

at any stage of the proceedings handicapped the applicant's defence to the point of rendering the trial against him as a whole unfair.

(i) *Whether there was a good reason for not hearing S.B. in the presence of the applicant and his lawyer*

38. The Court accepts that there had been a valid reason for not hearing S.B. at the main hearing. He was considered a fugitive and was being tried *in absentia* (see paragraph 14 above; see also *Lobarev and Others v. Russia*, nos. 10355/09 and 5 others, §§ 33, 34 and 40, 28 January 2020).

(ii) *Whether the evidence given by S.B. was the sole or decisive basis for the applicant's conviction*

39. The parties disagreed as to whether S.B.'s testimony had been the sole and decisive evidence for the applicant's conviction. In that connection, the Court notes that the applicant confessed to having been involved in illegal drug trafficking as an intermediary on one occasion, whereas S.B. had claimed that the drug transactions with the applicant had taken place once or twice per month over a period of one year.

40. The Court observes that the domestic courts held that there had been a number of other incriminating evidence against the applicant (see paragraphs 16 and 17 above). In particular, the trial court relied on a telecommunications expert opinion which established that, between 14 September and 6 October 2005, there had been numerous phone calls between S.B. and the applicant. It also relied on transcripts of recorded phone conversations between S.B. and V.N. from which it transpired that those two accused had had more than one transaction. In the Court's view, the foregoing evidence was rather circumstantial and indirect, as none of it actually proved that the applicant had been in contact with S.B. for an entire year, as claimed by the latter.

41. Consequently, although S.B.'s statement might not have been the sole or decisive evidence for the applicant's conviction of the impugned offence, the Court considers that it carried significant weight and that its admission may have handicapped the defence to an important degree (see *Van Wesenbeeck v. Belgium*, nos. 67496/10 and 52936/12, § 105, 23 May 2017).

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

42. The Court notes that in the domestic courts' decisions there is no indication that they approached the statements of S.B. with any specific caution, or that the fact that he was heard in the absence of the defence prompted the national courts to attach less weight to his statement (compare, for instance, *Al-Khawaja and Tahery*, cited above, § 157, and *Bobes*

v. Romania, no. 29752/05, § 46, 9 July 2013). On the contrary, the trial court conducted a detailed assessment of the applicant's and V.N.'s statements on equal footing as S.B.'s partially differing testimony, ultimately accepting the latter's untested evidence as credible.

43. In doing so, the trial court seems to have disregarded the fact that, when asked for his plea at the main hearing, S.B. had pleaded not guilty and his attorney requested that his police statement be excluded from the file (see paragraph 12 above). The court also seemed to not attach any particular weight to the fact that, although a "witness" for the purposes of the Convention (see *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001-II), S.B. had at the same time remained the applicant's co-defendant, who could have plausibly had his own interest in the outcome of the case and who, by virtue of his procedural status as a co-defendant, would be shielded from eventual prosecution for perjury if he made untrue statements (see *Trofimov v. Russia*, no. 1111/02, § 37, 4 December 2008, and *Kuchta v. Poland*, no. 58683/08, § 68, 23 January 2018).

44. The Court further observes that S.B.'s untested evidence carried significant weight in the assessment of the applicant's guilt for the entire period, as there was little or no direct evidence to incriminate the applicant for the entire period he had been convicted of (see paragraph 41 above). It thus required sufficient counterbalancing factors to compensate for the consequential difficulties caused to the defence by its admission (see *Al-Khawaja and Tahery*, cited above, § 161).

45. In this connection, the Court cannot but observe that, when the applicant's lawyer requested obtaining further evidence capable to prove or disprove the applicant's contacts with S.B. before 14 September 2005 or the content of their actual phone conversations, the trial court rejected such a proposal as unnecessary (see paragraph 16 above).

46. Finally, while it is true that the applicant had the opportunity to give his own version of the events during the trial, and that he availed himself of that opportunity, that fact alone could not in any event be regarded as a sufficient counterbalancing factor to compensate for the handicap under which the defence laboured (see *Paić v. Croatia*, no. 47082/12, § 51, 29 March 2016). Moreover, the Government's argument that the applicant would have been found guilty on the basis of his confession alone is irrelevant given that what is at stake in the present case is the scope of the applicant's established criminal guilt and the severity of the penalty for the offence of which he was ultimately convicted of (see paragraphs 33-37 above).

47. For the above reasons, the Court considers that the counterbalancing measures taken, if any, were insufficient to permit a fair and proper assessment of the reliability of the untested evidence in the applicant's case.

(iv) Conclusion

48. In the light of the foregoing, and examining the fairness of the proceedings as a whole, the Court notes that, in convicting the applicant the trial court relied heavily on a police statement of a co-defendant who had been absent from the trial, who himself would appear to have sought to recant that police statement and whom the applicant was never able to confront or question, despite the fact that it was the decisive evidence against him (see *Al-Khawaja and Tahery*, cited above, §§ 162 and 165). As a consequence, he was convicted of a more serious form of the criminal offence and sentenced to a more severe penalty on the basis of evidence in respect of which his defence rights had been appreciably restricted.

49. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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.”

A. Damage

51. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

52. The Government contested that claim as excessive.

53. The Court firstly notes that the applicant has the possibility of seeking a fresh trial under Article 502 of the Code of Criminal Procedure (see paragraph 20 above). However, the Court takes the view that the applicant has suffered some non-pecuniary damage as a result of the violation found which cannot be made good by the Court’s mere finding of a violation. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

54. The applicant also claimed 13,750 Croatian kuna (HRK; approximately EUR 1,870) for the costs and expenses incurred before the domestic courts and HRK 12,500 (approximately EUR 1,630) for those incurred before the Court.

55. The Government argued that the applicant had not proved that he had incurred any costs and that the sums claimed were excessive.

56. 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, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

57. 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 application admissible;
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 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, to be converted into Croatian kunas at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the 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 amounts 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 applicant's claim for just satisfaction.

DODOJA v. CROATIA JUDGMENT

Done in English, and notified in writing on 24 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Liv Tigerstedt
Deputy Registrar

Péter Paczolay
President