



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

FIRST SECTION

CASE OF DRAČA v. CROATIA

(Application no. 55724/19)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Applicant not invited to provide defence in person before appellate court when contesting his conviction and sentence on both factual and legal grounds

STRASBOURG

20 January 2022

FINAL

20/04/2022

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

In the case of Drača 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,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 55724/19) 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 Milan Drača (“the applicant”), on 16 October 2019;

the decision to give notice to the Croatian Government (“the Government”) of the complaint under Article 6 §§ 1 and 3 (c) of the Convention and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 7 December 2021,

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

INTRODUCTION

1. The case concerns the applicant’s complaint, under Article 6 §§ 1 and 3 (c) of the Convention, that in the criminal proceedings against him he was not invited to be present at the session of the appeal panel.

THE FACTS

2. The applicant was born in 1975 and lives in Zadar. In the proceedings before the Court he represented himself.

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

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

5. On 16 May 2014 the Zadar Municipal State Attorney’s Office (*Općinsko državno odvjetništvo u Zadru*) indicted the applicant in the Zadar Municipal Court (*Općinski sud u Zadru*) for the criminal offence of threatening a public official under section 139(2) and (3) of the Criminal Code (see paragraph 16 below). In particular, the applicant was charged with sending a text message to S.Z., the prefect of a county, threatening to gravely injure him, with the aim of getting back the job that he had previously had at a museum owned by the county.

6. In the course of the proceedings, in which the applicant was self-represented, the trial court heard S.Z. and the applicant in person, inspected material evidence (such as the applicant's medical documentation, and reports on examinations of S.Z.'s and the applicant's mobile telephones) and obtained a psychiatric expert report on the applicant's mental state at the time of perpetrating the offence (see paragraphs 7-9 below).

7. In an oral statement, S.Z. submitted that on 17 January 2014 at 1 a.m. the applicant had sent two text messages to his work mobile telephone, stating that he wished to be reinstated in the position that he had held at the museum. The messages had distressed S.Z., so in the morning he had reported them to the police. Later the same day he had received a further text message from the applicant, expressing anger at having had to undergo police questioning (which had taken place after the applicant had sent the first two text messages). The following day, on 18 January 2014 at 11:30 p.m., the applicant had sent him two further text messages. The one for which the applicant had been charged had read as follows:

“... don't [bulls**t] – if I had [really] threatened you, I would not have done so publicly. Leave me [in peace]. For the sake of my mother, my family [and] the [political party] I won't ... I won't. I am capable of making your life hell – even of mercifully and quickly breaking your neck, C3 vertebra – and now you go and report me again.”

S.Z. submitted to the trial court that the messages had scared him so that after several days he had gone to the police again. Lastly, he submitted that he had not wished to punish anyone, but only to protect himself.

8. According to the above-mentioned expert psychiatric report, at the moment of committing the offence the applicant had not been under the acute influence of alcohol; however, his capability to understand and control his actions had been reduced by a personality disorder and by an alcohol-related illness.

9. At the end of the trial the court heard the applicant. The applicant submitted that he had sent the text message for which he had been charged not as a threat in order to regain his old job at the museum, but rather as an ironic and cynical response to S.Z. having unjustifiably reported him to the police one day earlier. Hence, he had sent the text message to S.Z. in a private capacity, and not in the light of S.Z.'s official status. Furthermore, in the applicant's view, S.Z. could not have felt intimidated by that text message, as he had never taken measures to protect himself against any perceived threat from the applicant. The applicant then apologised to S.Z.

10. On 13 April 2017 the Zadar Municipal Court found the applicant guilty as charged and sentenced him to six months' imprisonment, suspended for two years. It concluded, in particular, that the applicant had clearly sent the text message to S.Z. in the latter's official capacity, that the text message had been objectively capable of causing S.Z. to feel fear, and that the applicant's assertions that he had not meant to threaten S.Z. had been legally irrelevant.

In determining an appropriate sanction, the trial court took into account the applicant's reduced criminal liability at the moment of his committing the offence, as well as the fact that he had no previous convictions and that he had several times apologised to S.Z. It considered that the sanction matched the gravity of the criminal offence and its consequences and met the aim of setting a general and individual deterrent.

11. On 1 June 2017 the applicant lodged an appeal with the Split County Court (*Županijski sud u Splitu*). He argued that he had not committed the criminal offence in question and that the trial court had incorrectly established the facts and applied the relevant law.

In particular, he submitted that he had sent the text message to S.Z. in a private capacity and not in the light of S.Z.'s position as prefect. This had been evident from the content of the text message. His action could therefore not have constituted a criminal offence under section 139(3) of the Criminal Code (see paragraph 16 below). Furthermore, the statement that S.Z. had given at the trial – namely, that he had not wished to punish anyone – cast doubt on the standing of the public prosecutor to prosecute the case.

The applicant further submitted that S.Z. had not felt intimidated by his text message; indeed, S.Z. had only reported him to the police nineteen days later by way of revenge, after learning that the applicant had called for an official inspection to be conducted at the museum, which had resulted in the head of the museum being found guilty of an offence.

Lastly, according to the applicant, the sentence imposed had been too severe, given that his sending one text message, for which he had apologised, had led to his undergoing three years of criminal proceedings and two years on probation, followed by a three-year official rehabilitation period. After sending the text message he had not committed any further offences and he had stopped consuming alcohol. The consequences of his actions and the resultant criminal proceedings had influenced him to such an extent that there had been no need for the imposition of any formal sanction.

In his appeal the applicant did not ask to be invited to the session of the appeal panel.

12. On 7 June 2017 the Zadar Municipal State Attorney's Office replied to the applicant's appeal, calling for its dismissal.

In particular, the prosecutor submitted that the decision to prosecute had not depended on the victim's disposition. Moreover, precisely because S.Z. had known the applicant personally, he had tolerated the applicant's messages of 17 January 2014 and had asked the police to only give a warning to the applicant. However, the threatening message sent the following day had shown that the applicant had conscientiously and persistently disrespected S.Z.'s official status.

The prosecutor furthermore submitted that the expert psychiatric report had confirmed that the applicant had not been under severe influence of

alcohol when he had sent the text message. Even if he had been, that would have been his own fault.

It was furthermore irrelevant that S.Z. had not asked for protection after receiving the threatening text message, as in any event there had been no legal possibility of taking any kind of security measure against the applicant, given that he had had no prior convictions.

Lastly, it had not been possible to forgo imposing any criminal sanction against the applicant, as the law did not provide for such a possibility in respect of the criminal offence of threat. In the prosecutor's view, the sanction imposed on the applicant had been mild.

13. On 16 January 2018 the Split County Court (sitting as an appellate court) held a session without inviting the parties to attend it. On the same day it gave a judgment by which it upheld the applicant's conviction and sentence.

In particular, it found that in his appeal the applicant had challenged the facts as established by the trial court, whereas the trial court had correctly established the facts and had correctly concluded that the applicant had committed the criminal offence in question.

It also held that the six-month prison sentence, suspended for two years, had amounted to an appropriate sanction. It noted that six months' imprisonment was the legal minimum for the criminal offence in question and that the trial court had taken into account all mitigating circumstances and the fact that there had been no aggravating circumstances. It held that the sanction had matched the gravity of the criminal offence, had been appropriate for the applicant individually, and had been capable of achieving the purpose of setting both a general and individual deterrent.

The appellate court's judgment did not provide any reasons for the fact that the applicant had not been invited to attend the session.

14. On 13 March 2018 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), arguing, *inter alia*, that the appellate court had failed to properly examine and address his arguments. He furthermore argued that the appellate court should have invited him to attend the session in order that he might be able to reply to the allegations made by the prosecution in its reply to his appeal.

15. On 3 April 2019 the Constitutional Court declared the applicant's constitutional complaint inadmissible as manifestly ill-founded. In particular, the court noted that the applicant had not asked to be invited to the session of the appeal panel, and that under the relevant law the appeal panel could have invited him of its own motion if it had deemed that his presence would be useful for the clarification of the case.

The Constitutional Court's decision was served on the applicant on 17 April 2019.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

16. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 125/2011, 144/2012 and 56/2015) read as follows:

Section 139

“(1) Whoever makes a serious threat with harm against another person so as to intimidate or disturb that person shall be sentenced to imprisonment for a term of up to one year.

(2) Whoever makes a serious threat to kill or to inflict serious bodily injury on another ... shall be sentenced to imprisonment for a term of up to three years.

(3) If the criminal offence referred to in paragraphs (1) and (2) of this section was committed against a public official in his or her performing a public authority or in connection with that person’s work or position ... the perpetrator shall be sentenced to imprisonment for a term of between six months and five years.

(4) The criminal offence referred to in paragraph (1) of this section shall be prosecuted by means of a private action [brought by the victim], whereas the offence referred to in paragraph (2) of this section shall be prosecuted [by a public prosecutor] following [the victim’s] motion...”

17. Article 475 of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 152/2008, 76/2009, 80/2011, 121/2011, 143/2012 and 56/2013), as in force until 15 December 2013, provided:

“1. The second-instance court renders a decision during the session of the appeal panel.

2. The defendant and his defence counsel and any subsidiary prosecutor or private prosecutor who, within the time-limit for appealing or in his or her reply to an appeal, have requested to be notified, shall be notified of the session of the appeal panel. The president of the panel, or the panel, may decide that the parties should be notified of the session, even if they have not so requested, if their presence would be useful for the clarification of the case.

3. If the defendant is in pre-trial detention or is serving a sentence [of imprisonment] and has a defence counsel, his presence shall be ensured only if the president of the panel, or the panel, considers it expedient.

...”

18. Amendments to the Code of Criminal Procedure were introduced on 15 December 2013 (Official Gazette no. 145/2013). In so far as relevant for the case at issue, the amended Article 475 provided as follows:

“1. The second-instance court renders a decision during the session of the appeal panel.

2. The parties shall be notified of the session of the appeal panel if, within the time-limit for appealing or in their reply to an appeal, they have requested to be notified. The president of the panel, or the panel, may decide that the parties should be notified of the session, even if they have not so requested, if their presence would be useful for the clarification of the case.

3. As an exception to paragraph (2) of this Article, if the second-instance court decides on an appeal against the first-instance judgment rendered for an offence punishable by a fine or up to five years' imprisonment, the parties shall be notified of the session of the appeal panel if the first-instance court pronounced a prison sentence and if the parties have requested to be notified, or if the president of the panel, or the panel, deemed that the parties' presence would be useful for the clarification of the case.

..."

19. Further amendments to the Code of Criminal Procedure were introduced on 27 July 2017 (Official Gazette no. 70/2017). In so far as relevant for the case at issue, Article 475(3), as set out above, was deleted, so that now Article 475 reads as follows:

"1. The second-instance court renders a decision during the session of the appeal panel.

2. The parties shall be notified of the session of the appeal panel if, within the time-limit for appealing or in their reply to an appeal, they have requested to be notified. The president of the panel, or the panel, may decide that the parties should be notified of the session, even if they have not so requested, if their presence would be useful for the clarification of the case.

..."

THE LAW

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

20. The applicant complained that he had not had a fair trial. In particular, he alleged that the session of the appeal panel had been held in his absence. He relied on Article 6 §§ 1 and 3 (c) 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 an ... impartial tribunal established by law. ...

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

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

A. Admissibility

21. The Court notes that the application 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' arguments

(a) The applicant

22. The applicant submitted that at the moment of lodging his appeal against the first-instance judgment he could not have known that the prosecutor would submit a reply warranting his reply in return, and that by the time he had received the prosecutor's reply he could no longer ask to be invited to attend the session of the appeal panel.

23. The applicant argued that the mere fact that the prosecutor had submitted such an extensive reply had indicated that his conviction by the trial court had not been convincing. Furthermore, the prosecutor had advanced arguments casting doubt on the veracity of the victim's statement, and consequently on the legal categorisation of his actions and the standing of the public prosecutor to prosecute the case. Given such circumstances, and in accordance with the principle that an accused should always have the "final say" in the trial, the appellate court ought to have invited the applicant to attend the appeal panel session and to state his position.

24. Lastly, the applicant contended that the fact that he had been able to submit his arguments against the prosecutor's allegations to the Constitutional Court had been irrelevant, as that court had not had competence to assess his guilt or innocence.

(b) The Government

25. The Government contended that the application did not reveal any violation of the Convention. They argued that under the legal provisions in force, the applicant had had an indisputable right to attend the session of the appeal panel, provided that he had made a request in that regard in his appeal. However, he had not availed himself of his legal right, and the appeal panel had not invited him of its own motion, deeming his presence to be unnecessary. The Government further stressed that if the applicant had considered his presence at the session of the appeal panel to be necessary for the clarification of the case, in his appeal he should have asked to be invited, regardless of whether or not the prosecutor would submit a reply.

26. The Government submitted that the appeal panel had correctly held that the applicant's presence at its session had not been necessary. The prosecutor's reply to the applicant's appeal had not contained any new allegations warranting a comment by the applicant. Thus, the fact that the applicant had not been invited to attend the session of the appeal panel in order to comment on the prosecutor's reply had not caused him any prejudice.

27. Lastly, the Government submitted that the applicant had attended all the hearings held before the trial court and had been able to put forward all his arguments and receive a reasoned reply from that court. Furthermore,

unlike in the case of *Zahirović v. Croatia* (no. 58590/11, 25 April 2013), the prosecution in the present case had not appealed against the first-instance judgment, and there had been no danger of *reformatio in peius* for the applicant. Moreover, since the prosecutor had also not been invited to attend the appeal panel session, the applicant had not been placed in a disadvantageous position *vis-à-vis* the prosecution.

2. The Court's assessment

28. The Court notes that the fact that violations of Article 6 §§ 1 and 3 (c) have repeatedly been found in cases against Croatia originated in a situation where, under the relevant domestic law and practice at the time, the appellate courts did not notify defendants about a forthcoming session of the appeal panel if they were in detention and had a lawyer, or if in summary proceedings they had received a fine or a suspended sentence (see, among others, *Zahirović*, cited above, §§ 58-64, 25 April 2013; *Lonić v. Croatia*, no. 8067/12, §§ 94-102, 4 December 2014; *Arps v. Croatia*, no. 23444/12, §§ 24-29, 25 October 2016; *Bosak and Others v. Croatia*, nos. 40429/14 and 3 others, §§ 105-09, 6 June 2019; and *Romić and Others v. Croatia*, nos. 22238/13 and 6 others, § 102, 14 May 2020).

29. The Court notes that after the amendments made to the relevant domestic law in the wake of the judgments in the cases of *Zahirović* and *Arps* (both cited above), the parties who request to be present at the session of the appeal panel will always be invited to attend (see paragraph 19 above). The origin of the issue that arose in cases cited in paragraph 28 above was thereby removed.

30. The Government argued that in the criminal proceedings against the applicant the Code of Criminal Procedure, as amended in July 2017, had been applicable and that therefore the appeal panel would have been obliged to invite the applicant to its session, had he made a request to that account (see paragraph 25 above). In other words, they argued that, by failing to ask in his appeal to be invited, the applicant had waived his right to attend the session of the appeal panel.

31. In that connection the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial, if such waiver is established in an unequivocal manner and attended by minimum safeguards commensurate with its importance (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII; *Kashlev v. Estonia*, no. 22574/08, § 45, 26 April 2016; and *Murtazaliyeva v. Russia* [GC], no. 36658/05, §§ 117-118, 18 December 2018). A waiver need not be explicit, but it must be voluntary and constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his

conduct would be. Moreover, the waiver must not run counter to any important public interest (*ibid.*).

32. However, the Court notes that, contrary to the Government's assertion, in the proceedings complained of by the applicant the legislation and practice applicable was that in place prior to July 2017.

33. In particular, the Court firstly notes that, regrettably, the appellate court did not give any reasons as to why it had not invited the applicant to attend the session, as this would have removed any doubts as to the applicable procedural law (see paragraph 13 above and compare, for factual circumstances, *Šaponja and Karaula v. Croatia* (Committee), nos. 72962/16 and 28751/17, §§ 18 and 30, 18 March 2021).

34. However, the Court notes that at the moment the applicant lodged his appeal against the first-instance judgment (1 June 2017, see paragraph 11 above), the relevant provision of the Code of Criminal Procedure provided that if the appellate court was deciding on an appeal against the first-instance judgment rendered for an offence punishable by a fine or up to five years' imprisonment, the parties would be notified of the session of the appeal panel if they so requested, but only if the trial court pronounced a prison sentence (see paragraph 18 above). This provision was deleted from the Code of Criminal Procedure on 27 July 2017 (see paragraph 19 above), hence almost two months after the applicant had lodged his appeal against the first-instance judgment.

35. Accordingly, having regard that the applicant received a suspended sentence for an offence punishable by up to five years' imprisonment (see paragraphs 10 and 16 above), the fact that in his appeal he had not asked to be invited to the session of the appeal panel could not be held against him (compare *Bosak and Others*, cited above, §§ 107-08).

36. It follows that the present case concerns a historic situation, in which the previous legislation and practice were applicable (see paragraph 28 above), and which were meanwhile changed (see paragraph 29 above).

37. The Court further notes that under the legislation in force at the time the applicant lodged his appeal and at the time the appellate court was deciding the case, the appeal panel could have in any event invited the applicant to attend the session, if it considered his presence useful for the clarification of the case (see paragraphs 18 and 19 above).

38. In that connection the Court observes that, under the Croatian legal system, the appeal court had competence to examine points of both fact and law and to conduct a full review of the assessment of the accused's guilt or innocence. It could uphold, quash or reverse the first-instance judgment and increase or decrease the sentence imposed by the trial court (see *Mirčetić v. Croatia*, no. 30669/15, § 25, 22 April 2021). The Court refers in that regard to its case-law cited in *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, § 33, 16 July 2019.

39. The Court notes that in his appeal the applicant contested his conviction and sentence on both factual and legal grounds (see paragraph 11 above). The prosecutor submitted a reasoned reply to the issues raised by the applicant and asked to uphold his conviction (see paragraph 12 above).

40. Accordingly, the appellate court was called upon to make a full assessment of the applicant's guilt or innocence in respect of the charges against him, in the light of not only the arguments that he had raised before the trial court, but also of those concerning the alleged failures of that court to establish all the relevant facts and to apply the relevant law correctly (see *Bosak and Others*, cited above, § 106; compare *Abdulgadirov v. Azerbaijan*, no. 24510/06, § 42, 20 June 2013, and *Kozliti v. Russia*, no. 17092/04, § 63, 14 November 2013). However, contrary to the requirements of this case-law by the Court, the appellate court held the session without the applicant being present (see paragraph 13 above).

41. Furthermore, the applicant also complained in his appeal that the trial court had imposed an overly severe sentence on him (see paragraph 11 above). The Court notes that the victim stated at the trial that he had not wished to punish anyone (see paragraph 7 above), yet this circumstance does not seem to have been taken into account by the domestic courts when setting the applicant's sanction (see paragraphs 10 and 13 above). Moreover, the appellate court upheld the sentence imposed by the trial court, holding that it was appropriate for the applicant individually (see paragraph 13 above). However, the appellate court did not have the benefit of gaining a personal impression of the applicant before reaching that conclusion (compare *Zahirović*, cited above, § 62).

42. In the case of *Lonić* (cited above, § 100), the Court considered it irrelevant that the appeal against the first-instance judgment had been lodged only by the applicant. In the Court's view, that did not affect the principal question brought before the appellate court – namely whether the applicant was guilty or innocent, an issue which, in order for the trial to be fair, had required the applicant's presence at the session of the appeal panel. For the same reason the Court dismisses the Government's arguments put forward in paragraph 27 above.

43. In view of these findings, and having regard to its case-law as set out in the cases of *Zahirović*, *Lonić* and *Bosak and Others* (cited above), the Court finds that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 3,100 euros (EUR) in respect of non-pecuniary damage.

46. The Government considered the applicant’s claim to be unfounded and unsubstantiated.

47. Having regard to the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage that cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

48. The applicant did not claim any costs and expenses. Accordingly, there is no call to award him any sum on that account.

C. Default interest

49. 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 (c) 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, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Croatian kunas at the rate applicable at the date of settlement;
 - (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;

DRAČA v. CROATIA JUDGMENT

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Péter Paczolay
President