



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

AFFAIRE BERNARD c. FRANCE

CASE OF BERNARD v. FRANCE

(159/1996/778/979)

ARRÊT/JUDGMENT

STRASBOURG

23 avril/April 1998

Cet arrêt peut subir des retouches de forme avant la parution de sa version définitive dans le *Recueil des arrêts et décisions* 1998, édité par Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Cologne) qui se charge aussi de le diffuser, en collaboration, pour certains pays, avec les agents de vente dont la liste figure au verso.

The present judgment is subject to editorial revision before its reproduction in final form in *Reports of Judgments and Decisions* 1998. These reports are obtainable from the publisher Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Köln), who will also arrange for their distribution in association with the agents for certain countries as listed overleaf.

Liste des agents de vente/List of Agents

Belgique/Belgium: Etablissements Emile Bruylant (rue de la Régence 67,
B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher
(place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

Pays-Bas/The Netherlands: B.V. Juridische Boekhandel & Antiquariaat
A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC
La Haye/'s-Gravenhage)

SUMMARY¹

Judgment delivered by a Chamber

France – statements by two psychiatric experts at a trial in an assize court

I. GOVERNMENT’S PRELIMINARY OBJECTION (non-exhaustion of domestic remedies)

Submitted that applicant had neglected to ask investigating judge to order independent expert report.

Submission referred to expert reports filed during investigation stage, whereas applicant had challenged remarks made by two experts at his trial in the Assize Court. Applicant had raised complaint in question before Assize Court and later before Court of Cassation.

Conclusion: objection dismissed (unanimously).

II. ARTICLE 6 OF THE CONVENTION

Reference to Court’s case-law.

Purpose of psychiatric examinations: to determine whether applicant was suffering from some mental or psychological disorder, if so whether there was a link between disorders found and offences he stood accused of, and whether he was dangerous. Two experts logically had to start from working hypothesis that he had committed the crimes in question. Their conclusions had been filed during the investigation and contained comments complained of.

Before Indictment Division applicant had had opportunity to challenge expert reports and ask for them to be declared null and void – no attempt to do so by his lawyers.

Before Assize Court applicant had lodged an interlocutory application, but court refused to declare experts’ evidence inadmissible, on ground that phrases challenged did not prove that they had prejudged merits of case or expressed their opinion as to defendant’s guilt. Record of hearings showed that all witnesses called by applicant had been heard and that defence had had opportunity to make observations after each witness had given evidence. Court of Cassation dismissed applicant’s argument that presumption of innocence had been infringed, on ground that comments complained of had not revealed any breach of oath sworn by experts to assist court on their honour and according to their conscience.

Applicant’s conviction based on all charges preferred and evidence obtained during investigation and discussed at trial hearings – Court could not regard statements in issue, which formed only one part of evidence submitted to jury, as contrary to requirements of fair trial and presumption of innocence.

Conclusion: no violation (eight votes to one).

1. This summary by the registry does not bind the Court.

COURT'S CASE-LAW REFERRED TO

27.2.1980, *Deweert v. Belgium*; 25.3.1983, *Minelli v. Switzerland*; 16.12.1992, *Edwards v. the United Kingdom*; 10.2.1995, *Allenet de Ribemont v. France*; 18.3.1997, *Mantovanelli v. France*

In the case of Bernard v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mrs E. PALM,

Mr R. PEKKANEN,

Mr G. MIFSUD BONNICI,

Mr P. JAMBREK,

Mr U. LÖHMUS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 31 January and 25 March 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 5 December 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22885/93) against the French Republic lodged with the Commission under Article 25 by a French national, Mr Jean-Paul Bernard, on 29 May 1993.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 §§ 1 and 2 of the Convention.

Notes by the Registrar

1. The case is numbered 159/1996/778/979. The first number is the case’s position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case’s position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 20 January 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr R. Macdonald, Mrs E. Palm, Mr G. Mifsud Bonnici, Mr P. Jambrek and Mr U. Lohmus (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 28 and 31 October 1997 respectively.

5. On 10 December 1997 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. On 7 January 1998 Mr R. Bernhardt, the Vice-President of the Court, replaced as President of the Chamber Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 § 6).

7. On 26 January 1998 the applicant's counsel filed documents at the registry.

8. In accordance with Mr Ryssdal's decision of 15 May 1997, the hearing took place in public in the Human Rights Building, Strasbourg, on 28 January 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr J.-F. DOBELLE, Deputy Director of Legal Affairs, Ministry of Foreign Affairs,	<i>Agent,</i>
Mrs M. DUBROCARD, <i>magistrat</i> , on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	
Mr A. BUCHET, Head of the Human Rights Office, European and International Affairs Department, Ministry of Justice,	
Mr B. DALLES, <i>magistrat</i> , Criminal Justice and Individual Freedoms Office, Criminal Cases and Pardons Department, Ministry of Justice,	<i>Advisers;</i>

(b) *for the Commission*

Mr J.-C. SOYER,

Delegate;

(c) *for the applicant*

Ms C. BRUN-SCHIAPPA, of the Marseilles Bar,

Counsel.

The Court heard addresses by Mr Soyer, Ms Brun-Schiappa and Mr Dobelle.

9. As Mr Macdonald was unable to take part in the deliberations on 25 March 1998, he was replaced by Mr R. Pekkanen, substitute judge, (Rules 22 § 1 and 24 § 1).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. In the course of a judicial investigation into a charge brought against Mr Bernard on a number of counts of armed robbery, an investigating judge at Nevers ordered two expert opinions on him: a psychiatric report from a Dr Guggiari and a medical and psychological report from a Dr Debitus.

11. On 13 July 1988 Dr Guggiari submitted his report, in which he concluded:

“As the subject does not accept that he is either ill or guilty, he cannot be regarded as curable. From what illness should he be cured?”

His social and affective environment will play a far greater role in his rehabilitation than any medical or psychiatric treatment, which he refuses.

All things considered, his chances of rehabilitation appear to be considerably compromised by both his criminal record and his personality.”

12. The applicant requested a second opinion, which the investigating judge commissioned on 19 May 1989 from a Dr Dumoulin.

13. On 24 June 1989 Dr Dumoulin filed his report, which contained the following passage:

“Mr Bernard is a gangster (from the English word ‘gang’, which denotes the members of a criminal conspiracy). The conduct of the operation shows (see the case file)

(a) that it was very well planned:

- customers unaware that staff were being threatened (raiders not masked),
- ‘remarkable calm’ of the raiders, who wore gloves and were armed,
- booby-trapped bundles not stolen,
- cash dispenser loaded for the weekend,
- raiders checked that security camera was a dummy.

(b) that it was the work of an experienced team:

- numerous bank robberies committed according to the same pattern by the same men,
- Mr Bernard is practically a weapons expert and has the advantage of the commando training he received when he did his national service in the marines.

All Mr Bernard’s major offences (both past and present) fall into the category of organised crime, sharing the following features:

- formation of a criminal organisation,
- aggravated robberies committed by armed criminals,
- targets chosen to bring immediate, large gains.

Mr Bernard is not a casual offender, but a real professional. In addition to hold-ups, it seems that his criminal activities have spread into new fields (see the other charges). The back-up provided by his accomplices (the gang) is essential, as they provide both material support, in the form of vehicles, safe houses, alibis etc., and moral support, since the recklessness of each member makes the group bolder and incites the others to repeat their crimes while controlling the risks better.

Mr Bernard’s responsibility is aggravated by many factors, for example:

- he is a habitual reoffender,
- he employs violence, threatening people with weapons,
- he acts in association with accomplices...

At no time did Article 64 of the Criminal Code apply to him.

Mr Bernard is always highly dangerous because of his sang-froid and his criminal determination. He showed his astuteness throughout the investigation – as he did when committing the offences – and during our interview, constantly denying that he took part in them. He cannot be intimidated by the judiciary. His dangerousness even seems to be directed towards the judges investigating his cases. He claims that Mr Roussel and Miss C. Enfoux were appointed to persecute him and makes alarmingly virulent verbal attacks on them. This dangerousness is intensified by his habitual use of firearms.

Mr Bernard's extreme dangerousness makes the following special measures essential:

- he must be permanently banned from carrying weapons of any kind, including those whose sale is not controlled,
- he must be placed on permanent probation after his release from prison,
 - imprisonment in an open prison is unthinkable,
 - inside prison he must be kept under special surveillance, in view of the likelihood that he will attempt to escape (high-security wing or similar).

Mr Bernard is liable to a criminal penalty, which must be directly proportionate to his extreme dangerousness.

Mr Bernard is not curable by criminal treatment (he is not in any case a suitable case for medical treatment). A number of sentences have not been sufficient to attenuate his delinquent behaviour. On the contrary, he adopts an omnipotent and defiant attitude which is reinforced still further by his imprisonment. His sthenia (aggressive attitude) is unbounded. He feels invincible.

Treatment by means of a criminal penalty is only a social-protection measure aimed at preventing the certain repetition of serious offences.

Mr Bernard can never be rehabilitated. His allegiance to the world of organised crime seems irreversible. No sentence can be heavy enough to break his spirit; he will always try to escape from prison or strengthen his links with other criminals there. He is certain to reoffend, as is proved by his criminal record."

This report was served on the applicant on 18 July 1989. He requested a third opinion, but on 25 July 1989 the investigating judge refused this request.

14. In the course of a separate investigation concerning an attempted escape the same judge ordered a psychiatric report and once again appointed Dr Dumoulin.

After this report had been filed Mr Bernard requested a second opinion, but this request was refused by the investigating judge on 15 September 1989. The applicant appealed on 25 September 1989 but, in an order of 3 October 1989, the President of the Indictment Division of the Bourges Court of Appeal refused him leave to appeal to that Division.

15. The applicant was committed for trial before the Rhône Assize Court in a judgment delivered by the Indictment Division of the Lyons Court of Appeal on 11 October 1991. The Indictment Division observed that Mr Bernard had initially admitted his involvement in an armed robbery in which 430,350 French francs (FRF) had been stolen on 5 June 1987 from a branch of Crédit Agricole in Nevers. It further noted that the applicant had been picked out by witnesses from a five-man identity parade as the person who had stood guard at the door during the robbery. The Indictment Division also found that the investigation had yielded sufficient evidence tending to establish that the applicant had robbed a branch of Crédit

Agricole in Le Mans of FRF 190,000 on 26 November 1986, with the aggravating circumstance that the offence had been committed with the assistance or threatened use of a weapon.

16. At the trial on 9 June 1992, after the experts had given evidence, Mr Bernard's lawyer requested in his submissions that a formal note be entered in the record to the effect that the experts had stated an opinion on the question of the applicant's guilt.

17. In an interlocutory decision of 12 June 1992 the Assize Court dismissed the applicant's lawyer's request for the evidence of two experts examined during the trial to be ruled inadmissible, on the following grounds:

“Whereas one of the lawyers of the defendant Bernard Jean-Paul requested in his submissions that a formal note be entered in the record to the effect that the expert Dumoulin had stated: ‘The facts themselves prove that he is dangerous’ and that the expert Guggiari had stated: ‘As he does not accept that he is either ill or guilty, he cannot be regarded as curable’

and that those experts had therefore stated an opinion at the trial on the question of Bernard Jean-Paul's guilt;

And whereas it was submitted that the evidence given by those experts should be ruled inadmissible;

Whereas, while the experts were giving evidence, Bernard Jean-Paul's lawyer noted down certain statements or isolated phrases which they are alleged to have made and which, it is submitted, prove that they stated an opinion on the question of Bernard Jean-Paul's guilt;

But whereas these statements or isolated phrases, even if they were spoken, have been taken out of context and do not establish that the experts prejudged the merits of the case or expressed their opinion as to the defendant's guilt, especially as, while giving their evidence, they were always careful to specify that they were stating their conclusions concerning offences which Bernard Jean-Paul denied committing;

...”

18. On 12 June 1992 the Assize Court sentenced the applicant to ten years' imprisonment for armed robbery.

19. Mr Bernard appealed on points of law. He submitted in his appeal, among other arguments, that the experts' comments had infringed the principle of the presumption of innocence, according to which they were under a duty not to express their opinion as to a defendant's guilt.

20. On 31 March 1993 the Court of Cassation dismissed the appeal, holding that the comments referred to in that ground of appeal did not constitute a breach of the oath sworn by the experts to assist the court on their honour and according to their conscience, as provided for in Article 168 of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW

A. Appointment of experts

21. The appointment of experts is governed by the following provisions of the Code of Criminal Procedure:

Article 156

“Where a technical question arises, any investigating judicial authority or court of trial may, at the request of the prosecuting authorities, or of its own motion, or at the request of any party, order an expert report.

Where an investigating judge decides not to grant a request for an expert report, he shall make an order stating his reasons.

Experts shall undertake their assignment under the supervision of the investigating judge or other judge duly appointed by the court ordering the expert report.”

Article 157

“Experts shall be chosen from the natural or legal persons appearing either in a national list drawn up by the Council of the Court of Cassation or in one of the lists drawn up by the Courts of Appeal, with the advice of the principal state prosecutor. The terms and conditions of inclusion in and removal from these lists shall be determined by a regulation of the Prime Minister. In exceptional circumstances the courts may, by means of a decision stating reasons, choose an expert who does not appear in any of these lists.”

Article 160

“Upon their inclusion in one of the lists referred to in Article 157, experts shall take an oath, before the Court of Appeal for the district in which they reside or have their registered office, to assist the courts on their honour and according to their conscience. They are not required to renew that oath before each assignment.”

Article 168

“Experts shall, if necessary, give evidence in court on the results of their technical investigations, after swearing to assist the court on their honour and according to their conscience...”

B. Preparation of expert reports

22. The preparation of expert reports is governed by the following provisions of the same code:

Article 158

“The terms of an expert’s assignment, which is confined to examining technical matters, shall be specified in the decision ordering the expert report.”

Article 161

“... In carrying out their assignment, experts shall liaise with the investigating judge or other judge; they must keep him informed of the progress of their assignment so that at any time he can take any measures that may be necessary.”

Article 165

“During the course of the expert’s assignment, any party may ask the court which has ordered the report to instruct the experts to make particular enquiries or to interview any named person who is likely to be able to provide them with technical information.”

Article 167

“The investigating judge shall inform the parties and their counsel of the experts’ conclusions ... In all cases, the investigating judge shall stipulate a period within which the parties must submit any observations or requests, particularly for a supplementary report or second opinion. During that period the case file shall be made available to the parties’ counsel. Where the investigating judge refuses a request, he shall do so in a decision stating reasons which must be made within one month of receipt of the request...”

Article 186-1

“The accused or a civil party may also appeal against the orders provided for in ... the fourth paragraph of Article 167.”

C. Psychiatric reports

23. Psychiatric reports are the subject of the following provisions:

Article 164

“... Where they [the experts] consider it necessary to question the accused ... the interview shall be conducted in their presence by the investigating judge or judge appointed by the court and shall in all cases comply with the formalities and conditions provided for in Articles 118 and 119.”

Article 81, paragraph 7

“An investigating judge may prescribe a medical examination, instruct a doctor to carry out a medical and psychological examination or order any other necessary measures. If the investigating judge decides to refuse a request for such an examination by the accused or his counsel, he must do so by means of an order stating his reasons.”

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Bernard applied to the Commission on 29 May 1993. He complained of an infringement of his right to a fair trial and of the principle of the presumption of innocence, and relied on Article 6 §§ 1 and 2 of the Convention.

25. The Commission (Second Chamber) declared the application (no. 22885/93) admissible on 18 October 1995. In its report of 22 October 1996 (Article 31), it expressed the opinion, by seven votes to seven with the President's casting vote, that there had been a violation of Article 6 § 1 and that it was not necessary to consider the complaint relating to Article 6 § 2. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

26. The Government asked the Court to hold that there had been no breach of Article 6 §§ 1 and 2 of the Convention.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

27. The applicant's counsel asked the Court to hold that there had been a breach of Article 6 § 1 and to award his client just satisfaction.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

28. The Government pleaded, as they had done before the Commission, that the applicant had failed to exhaust domestic remedies, in that he had neglected to ask the investigating judge to order an independent expert report after the second expert filed his report. The appeal of 25 September 1989, mentioned in the Commission's report, against the investigating judge's refusal of his request for a third expert opinion concerned a decision taken by a different investigating judge in the course of proceedings against the applicant for attempted escape with violence.

According to the Government the appointment of a third psychiatric expert would incontestably have provided a remedy for the complaint relating to Article 6 § 1 of the Convention.

29. Like the Delegate of the Commission, the Court observes in the first place that the Government's submission refers to the expert reports filed during the investigation conducted by the Nevers investigating judge, whereas Mr Bernard challenged the comments made by the experts Guggiari and Dumoulin at his trial on 9 June 1992 in the Rhône Assize Court.

Secondly – and the Commission rightly recognised this in its decision on the admissibility of the application – the applicant raised the complaint in question before the Assize Court, by means of an interlocutory application, and later by appealing to the Court of Cassation. Domestic remedies were therefore exhausted.

30. In any event, the Nevers investigating judge was at the relevant time conducting two investigations concerning the applicant, one of which was for armed robbery and the other for attempted escape. If the appeal of 25 September 1989 (see paragraph 14 above) concerned the psychiatric report filed by Dr Dumoulin in the context of the second investigation – and Mr Bernard admitted as much – it can reasonably be presumed that any further request for an independent opinion made after Dr Dumoulin had filed his report on 24 June 1989 (see paragraph 13 above) would have been bound to fail.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

31. The applicant submitted that the comments made by the two psychiatric experts at his trial on 9 June 1992 in the Rhône Assize Court had infringed his right to a fair trial and the principle of the presumption of innocence. He argued that this had breached Article 6 §§ 1 and 2 of the Convention, which provide:

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

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

32. The Government contended that the way the psychiatrists gave evidence at the trial, regard being had to the content of the reports they had filed during the investigation, had not infringed the applicant's right to a fair trial and the presumption of innocence.

They observed that experts were not members of the court called upon to determine whether a defendant was guilty, nor was it their role to take part in establishing whether he had committed the acts he stood accused of. The sole purpose of their contribution was to assess the defendant's personality, in order to determine in particular to what extent he was responsible for his actions at the time of the offence, supposing that it had been proved that an offence had been committed. In other words, the opinions expressed by the psychiatric experts in carrying out their assignment did not have any bearing on either the investigations conducted by the investigating judge about the facts which had given rise to the prosecution or the way the defendant's guilt was determined.

33. The Government submitted that the questions raised in the present case had to be determined in the light of the general context of the proceedings as a whole, which necessarily meant, according to French law, that the pre-trial investigation stage had to be included in the overall consideration of the Assize Court proceedings.

The fresh consideration of all the charges against a defendant followed extensive proceedings during which all the offences of which he stood accused had been looked into, first by the investigating judge and then by the Indictment Division of the Court of Appeal.

In the present case Mr Bernard had been committed for trial in the Rhône Assize Court pursuant to a decision taken on 11 October 1991 by the Indictment Division of the Lyons Court of Appeal after hearing his lawyers. That hearing had given them a perfect opportunity to raise the complaints

relating to the content of the psychiatric experts' reports and ask for these to be ruled inadmissible on the ground that they infringed the principle of the presumption of innocence. Moreover, if the Indictment Division had refused such a request, they could also have appealed to the Court of Cassation against the decision to commit their client for trial. However, no challenge was made.

Lastly, before the Assize Court the applicant had made an interlocutory application for a formal note to be entered in the record, but, after considering the allegations, the Assize Court had refused this request and the Court of Cassation had upheld that decision.

In any event, even supposing that the two psychiatric experts' statements had been capable of persuading the jurors that Mr Bernard was guilty, his conviction was based on an extensive body of factual evidence, including the fact that he had been identified by several witnesses.

34. The Commission considered that the question whether the psychiatric reports had infringed the applicant's right to a fair trial had to be determined by examining them in the light of the trial as a whole. It acknowledged, however, that this was no easy task given the specific features of assize court procedure, in which evidence was taken orally at the hearing, no reasons were given in the judgment declaring the defendant guilty and no official transcript of the trial was provided for by the Code of Criminal Procedure.

In the present case the members of the jury had heard the experts for the first time at the hearing in the Assize Court. The fact that experts were officially appointed and were required to swear a special oath, different from the one sworn by ordinary witnesses, together with their prestige as specialists, might give particular importance to the opinions they expressed in the minds of lay judges, which was what jurors were. The Commission accordingly took the view that the President of the Assize Court should have reminded the experts what their task was, namely to assist the court on their honour and according to their conscience, thus enabling the applicant, by means of an interlocutory application, to remedy if necessary a situation contrary to the requirements of the Convention.

The only possibility which remained open to the defence, namely of asking the court to enter a formal note of the comments concerned in the record and rule them inadmissible, was not sufficient to protect the applicant's right to a fair hearing within the meaning of Article 6 § 1, given the importance of what was at stake, the severity of the penalty to which he was liable and, above all, the special nature of assize court procedure.

35. As to the alleged infringement of the presumption of innocence, the Commission did not consider it necessary to examine that complaint, in view of the fact that it had found a violation of paragraph 1 of Article 6.

36. The applicant argued that, because of the special nature of a psychiatric report, experts' objectivity and impartiality had to be irreproachable.

A psychiatric expert, who was both an officer of the court and a doctor, acted outside the normal principles governing the conduct of criminal proceedings and the rules of medical ethics.

When being examined, a defendant could not be assisted by counsel or by another medical expert and could not submit observations. The only remedy available to him was to request a second opinion.

On the other hand, the psychiatrist was sometimes privy to highly personal confidences but nevertheless reported these to the investigating judge and later to a court at a public hearing. Because of these special features, experts had a duty to be particularly cautious and provide a scientific or medical justification for any answers they gave to the questions they were asked.

In the present case the comments in issue had not had any medical or scientific basis but had, on the contrary, demonstrated the partiality of those who had made them.

According to Mr Bernard, these comments had heavily influenced the jurors, who, from the very first hearing, had decided he was guilty.

37. The Court reiterates in the first place that "the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1" (see, among other authorities, the *Deweert v. Belgium* judgment of 27 February 1980, Series A no. 35, p. 30, § 56, the *Minelli v. Switzerland* judgment of 25 March 1983, Series A no. 62, p. 15, § 27, and the *Allenet de Ribemont v. France* judgment of 10 February 1995, Series A no. 308, p. 16, § 35). It will accordingly consider the applicant's complaints from the standpoint of these two provisions taken together. In so doing, it must consider the criminal proceedings as a whole. It is admittedly not the Court's task to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (see, *mutatis mutandis*, the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B, pp. 34 and 35, § 34, and the *Mantovanelli v. France* judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 436–37, § 34).

38. The purpose of the psychiatric examinations Mr Bernard underwent was to obtain, *inter alia*, an answer to the question whether he was suffering from some mental or psychological disorder and, if so, whether there was a

link between the disorders found and the offences he stood accused of. They were also intended to assess how dangerous he was. The two specialists appointed by the investigating judge logically had to start from the working hypothesis that the applicant had committed the crimes which had given rise to the prosecution. Their conclusions were filed on 13 July 1988 and 24 June 1989, during the investigation stage (see paragraphs 11 and 13 above), and contained the comments complained of. Mr Bernard himself had moreover requested the second expert opinion and his request for a third had been refused.

At the hearing before the Indictment Division of the Lyons Court of Appeal on 11 October 1991 the applicant had the opportunity to challenge the expert reports and ask for them to be declared null and void, but the judgment of that date committing him for trial did not mention any attempt to do so by his lawyers.

39. At Mr Bernard's trial in the Rhône Assize Court on 9 June 1992 his counsel lodged an interlocutory application after Dr Guggiari and Dr Dumoulin had given evidence, but the court refused to declare their evidence inadmissible, on the ground that the phrases challenged did not prove that they had prejudged the merits of the case or expressed their opinion as to the defendant's guilt. In its interlocutory decision of 12 June 1992 the court noted that the experts had always taken care to specify that they were stating their conclusions concerning offences which the applicant denied committing (see paragraph 17 above). In addition, the record of the hearings shows that all the witnesses called by Mr Bernard were heard and that his counsel had the opportunity to make observations after each witness had given evidence.

On 31 March 1993 the Court of Cassation dismissed the applicant's argument that the statements in issue had infringed the principle of the presumption of innocence, on the ground that the comments referred to did not reveal any breach of the oath sworn by the experts to assist the court on their honour and according to their conscience, as provided for in Article 168 of the Code of Criminal Procedure (see paragraph 20 above).

40. The file shows that the applicant's conviction was based on all the charges preferred and on the evidence obtained during the investigation and discussed at the hearings in the Assize Court. That being so, the Court cannot regard the statements in issue, which formed only one part of the evidence submitted to the jury, as contrary to the requirements of a fair trial and the presumption of innocence.

41. In conclusion, there has been no breach of Article 6 §§ 1 and 2.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* by eight votes to one that there has been no breach of Article 6 §§ 1 and 2 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Bernhardt;
- (b) dissenting opinion of Mr Lõhmus.

Initialled: R.B.
Initialled: H.P.

CONCURRING OPINION OF JUDGE BERNHARDT

I voted with the majority in finding no violation of Article 6 of the Convention. However, I would have preferred the judgment to express misgivings on the part of the Court about the way in which the experts in the present case performed their duties. The excerpts from the expert opinions quoted in paragraphs 11 and 13 of the present judgment contain statements which are in my view unacceptable and hardly compatible with the task of a neutral and objective expert.

Nevertheless, when considering all the elements of the case, I have come to the conclusion that these statements did not make the trial as a whole unfair. The defence had the opportunity to respond to and to comment on the experts' opinions. It must also be assumed that all members of the Assize Court knew the specific role of experts in criminal proceedings and took their own decision in accordance with their own conviction and conscience.

DISSENTING OPINION OF JUDGE LÖHMUS

In paragraph 37 the Court recalls that “the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1”. I entirely agree with this principle, as expressed in this judgment and in other judgments of the Court.

Contrary to the majority of the Court, I have reached the conclusion that there has been an infringement of the applicant’s rights under Article 6 §§ 1 and 2.

According to my understanding, the majority based their reasoning on the fact that the psychiatric reports formed only one part of the evidence submitted to the jury and that the applicant’s conviction was based on the evidence obtained during the investigation and discussed at the hearing in the Assize Court (see paragraph 40).

I am of the opinion that this reasoning, leading to the finding that there was no breach of Article 6 §§ 1 and 2, is in some respects in contradiction with the principle set forth in paragraph 37. It is not the Court’s task to substitute its own assessment of the facts and the evidence for that of the domestic courts. The Court’s task is to ascertain whether the proceedings in their entirety were fair.

The expressions that were used in the reports by the experts went beyond medical or psychiatric terminology. The experts overstepped the limits of their competence by expressing their opinion as to the applicant’s guilt. Both experts were appointed by an investigating judge, that is, by the judicial authority. As no reasons are given in the Assize Court’s judgment it cannot be known to what extent the jurors, in declaring the applicant guilty, took the psychiatric reports into account. Jurors are very sensitive to opinions expressed by qualified experts. By using such expressions in the reports, the experts reinforced the opinion that the applicant was guilty and so created a situation in which the principles of presumption of innocence and fair trial were not observed.