



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

THIRD SECTION

CASE OF POBORNIKOFF v. AUSTRIA

(Application no. 28501/95)

JUDGMENT

STRASBOURG

3 October 2000

In the case of Pobornikoff v. Austria,

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

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr P. KÜRIS,

Mr K. JUNGWIERT,

Mrs H.S. GREVE,

Mr K. TRAJA,

Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 September 2000,

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), by the Austrian Government (“the Government”) on 5 July 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention). It originated in an application (no. 28501/95) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention by the applicant, a German national, Dimiter Pobornikoff (“the applicant”), on 21 July 1994. The applicant was represented by Mr H. Baumgärtl, a lawyer practising in Munich (Germany). The Government were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs. The Agent of the Government of the Federal Republic of Germany, having been informed by the Registrar of their right to intervene (former Article 48 (b) of the Convention and former Rule 35 § 3 (b)), indicated that they did not intend to do so.

2. The Government’s application referred to former Articles 44 and 48 and to the declaration whereby Austria had recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach of Article 6 §§ 1 and 3 (c).

3. On 20 September 1999 the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the applications would be examined by one of the Sections. It was, thereupon, assigned to the Third

Section. Within that Section, the Chamber was constituted in accordance with Rule 26 § 1 of the Rules of Court.

4. In accordance with Rule 59 § 3 of the Rules of Court, the President of the Chamber invited the parties to submit a memorial on the issues in the case. The Registrar received the Government's memorial on 9 December 1999 and the applicant's memorial on 7 April 2000.

5. After consulting the Agent of the Government and the applicant, the Chamber decided not to hold a hearing in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 8 March 1993 the Public Prosecutor's Office at the Feldkirch Regional Court (*Landesgericht*) filed an indictment charging the applicant with murder. It was alleged that the applicant, in December 1991, had killed his wife and had then buried her decapitated corpse in a field where it had been discovered in May 1992. It was further alleged that he had had a mistress, and had run into financial difficulties as he had rented and furnished an apartment for her and had maintained her, whereas his wife, who had opposed a divorce, had owned the spouses' house and a collection of jewellery of considerable value. In these and the trial proceedings the applicant was represented by official counsel, Mr. A.

7. On 1 October 1993 the Feldkirch Regional Court, sitting as a Court of Assizes (*Geschworenengericht*), gave judgment. The jury found the applicant guilty of murder. The court, sitting with the jury, sentenced him to life imprisonment. It considered as aggravating circumstances that the applicant had acted for particularly base motives and had acted cruelly. It found that there were no mitigating circumstances.

8. On 2 November 1993 the applicant, still represented by Mr. A., filed a plea of nullity (*Nichtigkeitsbeschwerde*) and an appeal (*Berufung*). In his plea of nullity he complained about the composition of the court, the court's failure to put alternative questions to the jury and about the lack of reasons for the jury's verdict. He also submitted that there was no factual basis for finding him guilty. In his appeal he complained in particular that the Regional Court's judgment did not give sufficient reasons for the sentence. As to the aggravating circumstances, it was not clear which motives had been established and deemed particularly base. Nor did the judgment mention any facts which would allow the conclusion that he had acted in a cruel manner. As to possible mitigating circumstances, the applicant complained that the Regional Court had failed to take his advanced age and

lack of prior convictions into account. The applicant did not request to attend the hearing before the Supreme Court.

9. On 21 December 1993 the Supreme Court (*Oberster Gerichtshof*) fixed the hearing date for the applicant's plea of nullity and his appeal for 27 January 1994. The applicant received a notification, which stated that his counsel would be summoned to the hearing. As to the hearing of the plea of nullity, the notification informed him that he, being detained, could only appear through his counsel. As to the hearing of the appeal, he would not be brought to the court as the conditions of S. 296 § 3 of the Code of Criminal Procedure (*Strafprozeßordnung*) were not fulfilled. At an unspecified date in the middle of January 1994, the applicant was informed by the Vienna Bar Association that for the purpose of his representation at the hearing before the Supreme Court a new official defence counsel, Mr K., had been appointed as Mr A. would be unable to attend.

10. On 27 January 1994 the Supreme Court, after having held a hearing in the absence of the applicant but in the presence of his new official defence counsel, Mr K., rejected his plea of nullity as well as his appeal. As regards the appeal, the Court found that the applicant had rightly claimed as a mitigating circumstance that he had no prior convictions. Furthermore, cruelty had not been factually established as an aggravating circumstance. However, there was evidential support for the conclusion that the applicant had acted for particularly base motives. Attaching particular weight to this aggravating circumstance, the Supreme Court found that - notwithstanding the aforementioned deficiencies - the sentence of life imprisonment was commensurate with the applicant's guilt.

II. RELEVANT DOMESTIC LAW

A. Plea of nullity

11. The first-instance judgment of an assize court may be challenged by a plea of nullity to the Supreme Court on the specific grounds enumerated in section 345 § 1 of the Code of Criminal Procedure. The Supreme Court's task is mainly to control the acts of the bench and the presiding judge of the assize court. Its examination includes whether the trial has been conducted in a manner which complies with fundamental procedural principles, whether the right questions have been put and the correct directions given to the jury. The Supreme Court may only verify whether the jury has provided unclear, incomplete or contradictory answers to the questions put to it. The Supreme Court supervises the correct application of the criminal law, but in so doing is bound by the jury's findings of fact.

11. In certain cases the Supreme Court may reject a plea of nullity without a public hearing (section 285 (c) of the Code of Criminal

Procedure). In all other cases - such as the present - there will be a public hearing which may also be combined with a public hearing on an appeal against sentence.

12. As regards the hearing on a plea of nullity, section 286 of the Code of Criminal Procedure provides:

“1. When the date of the public hearing is being fixed, the accused ... shall be summoned ...

2. If the accused is under arrest, the notice of the hearing given to him shall mention that he may only appear through counsel. ...”

13. Section 344 of the Code of Criminal Procedure extends these rules to nullity pleas arising out of jury trials.

However, if the hearing is a combined one on a plea of nullity and an appeal against sentence, an accused who is present for the latter purpose may also exercise his rights concerning the nullity plea.

B. Appeal against sentence

14. The sentence as such may be challenged by way of an appeal against sentence. It may concern both points of law (in particular whether mitigating or aggravating circumstances have been correctly taken into account) and factors relating to the assessment of the sentence. Where the substance of an appeal is examined, a public hearing must normally be held.

15. As regards the personal appearance of the accused at a public appeal hearing, section 296 § 3, second sentence, of the Code of Criminal Procedure provides:

“An accused who is detained shall always be summoned and an accused who is detained shall also be brought before the court if he has made a request to this effect in his appeal or counter-statement or otherwise if his personal presence appears necessary in the interests of justice.”

THE LAW

I. SCOPE OF THE CASE

16. In his memorial, the applicant alleged that the Austrian police had failed to conduct the preliminary investigations with the necessary diligence, that the Court of Appeal had not correctly assessed the evidence before it, that the court appointed expert had not been a qualified physician and that defence counsel, Mr A., had failed to defend him properly.

17. The Court recalls that the scope of the case before it is determined by the Commission's decision on admissibility (see for instance, the *Fusco v. Italy* judgment of 2 September 1997, *Reports of Judgments and Decisions* 1997-V, p. 1731, § 16). In his application to the Commission the applicant only complained that, in criminal proceedings against him, he was not present at the hearing before the Supreme Court and this complaint was declared admissible by the Commission. It follows that the scope of the case is limited to that complaint.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

18. The Government claimed, as they had before the Commission, that the applicant's complaint under Article 6 §§ 1 and 3 (c) of the Convention was inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

19. The Government, referring to section 296 § 3 of the Code of Criminal Procedure, pointed out that the applicant, represented by official defence counsel, could have ensured his presence at the hearing of the appeal and the plea of nullity by making a request to this effect in his appeal or counter-statement. However, neither his official defence counsel nor the applicant himself made any such request. Further, the Government argue that, in the circumstances of the case, section 296 § 3 of the Code of Criminal Procedure did not impose a positive duty on the Supreme Court to summon the applicant of its own motion.

20. The Court observes that the Government's arguments are closely linked to the well-foundedness of the applicant's complaint under Article 6 §§ 1 and 3 (c). The plea should therefore be joined to the merits (see the *Kremzow v. Austria* judgment of 21 September 1993, Series A no. 268-B, p. 40-41, §§ 41-42; *Josef Prinz v. Austria*, no. 23867/94, 8.2.2000, § 30; *Michael Edward Cooke v. Austria*, no. 25878/94, 8.2.2000, § 31).

III. ALLEGED VIOLATION OF ARTICLE 6

21. The applicant complained about the failure to allow his presence at the hearing of his plea of nullity and his appeal before the Supreme Court. He relies on Article 6 §§ 1 and 3 (c) which, so far as relevant, provide:

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

...

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; ...”

22. The applicant submitted that a new defence counsel had been appointed, with whom he had no communication, shortly before the hearing in the Supreme Court. He maintained that his presence at the hearing before the Supreme Court was indispensable for a fair procedure.

23. The Government reiterated that in his appeal the applicant failed to request his attendance at the hearing, in accordance with section 296 § 3 of the Code of Criminal Procedure, or at a later stage in the proceedings. They argued that a positive duty on the State to bring a detained defendant before the appellate court irrespective of his wishes cannot be inferred from Article 6. They also contended that the Supreme Court did not have to determine any new aspects which had not been considered by the trial court.

24. The Court recalls that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance hearing. However, the personal attendance of the defendant does not necessarily take on the same significance for an appeal or nullity hearing as it does for the trial. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided and their importance for the applicant (*Belziuk v. Poland* judgment of 25 March 1998, Reports 1998-II, p. 570, § 37, and the aforementioned judgments of *Josef Prinz v. Austria*, op. cit. § 34, and *Michael Edward Cooke v. Austria*, op. cit. § 35).

25. In the instant case, the hearing before the Supreme Court involved both a plea of nullity and an appeal against sentence. The Court will examine the issue in respect of each of these proceedings in turn.

A. Attendance at the hearing of the plea of nullity

26. The Court observes that under Austrian law the Supreme Court in dealing with nullity proceedings is primarily concerned with questions of law that arise in regard to the conduct of the trial and other matters. The presence of the accused, who is legally represented, is not generally required either by paragraph 1 or 3 (c) of Article 6 (see the aforementioned *Michael Edward Cooke v. Austria* judgment, § 37).

27. In the present case, the applicant's plea of nullity related to procedural and legal matters, such as the composition of the court, the questions put to the jury as well as the conclusiveness of the findings of the jury. The applicant was represented by official defence counsel. It is true that this lawyer was appointed only shortly before the date of the Supreme Court hearing. However, the Court notes that this was done in co-ordination with Mr. A., the defence counsel who had assisted the applicant at the trial, and that the applicant had been informed accordingly. In these

circumstances, the applicant's general apprehensions are not sufficient to cast doubt on the effectiveness of his representation at the hearing of the plea of nullity before the Supreme Court. Accordingly, there were no special circumstances warranting the applicant's personal presence (see the *Stanford v. United Kingdom* judgment of 23 February 1994, Series A no. 282-A, p. 11, §§ 27-28).

Accordingly, as far as the plea of nullity was concerned, the applicant's absence from the Supreme Court hearing was not in breach of Article 6.

28. In the light of this conclusion, it is not necessary to deal with the question whether the applicant ought formally to have requested leave to attend the hearing of his appeal, and thereby ensure his presence at the hearing of his plea of nullity.

B. Attendance at the hearing of the appeal against sentence

29. The Court notes that in this procedure the Supreme Court was called upon to examine whether the applicant's sentence of life imprisonment was to be reduced or not. In his appeal the applicant had made reference to mitigating circumstances, such as his previous good conduct and his advanced age, and challenged the findings of the assize court as regards the aggravating circumstances.

30. The Supreme Court found that the applicant had rightly claimed as a mitigating circumstance that he had had no prior convictions and that the aggravating circumstance of cruelty had had no factual basis. It found, however, that the applicant had acted for particularly base motives and that this aggravating circumstance justified the sentence of life imprisonment.

31. The Court notes that, unlike the above mentioned applicants *Kremzow* and *Cooke*, the present applicant had already been sentenced to life imprisonment at first instance. Thus, the appeal proceedings before the Supreme Court could not possibly have resulted in an increased sentence. However, the Supreme Court looked at the applicant's motives for the offence, which it considered particularly base, and thus carried out an assessment of the applicant's personality and character. Moreover, what was at stake for the applicant was a possible reduction in sentence. Having regard to the nature of these issues before the Supreme Court, the Court does not consider that the case could have been properly examined without gaining a personal impression of the applicant. It was, therefore, essential to the fairness of the proceedings that he be present at the hearing of the appeal and afforded the opportunity to participate, together with his defence counsel.

32. It is true that the applicant's official defence counsel had not requested that the applicant be summoned to the appeal hearing, as required by section 296 § 3 of the Code of Criminal Procedure. However, in the *Kremzow* case, which moreover concerned a former judge familiar with the

relevant legal provisions, the failure to make such a request was not considered decisive, as section 296 § 3 also provides that, in the absence a request, the court should nevertheless have the appellant brought before it “if his personal presence appears necessary in the interest of justice” (Kremzow judgment, p. 45, § 68).

In short, the Court finds that the respondent State was under a positive duty to ensure the applicant’s presence in order to enable him “to defend himself in person” as required by Article 6 § 3 (c).

33. It follows that there has not been a failure to exhaust domestic remedies in this regard (see paragraph 20 above).

In conclusion, the Court finds a breach of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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.”

35. The applicant has not filed a claim for just satisfaction. Accordingly, the Court cannot make any award under this provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government’s preliminary objection in respect of the applicant’s complaint that he was not present at the hearing of his appeal;
2. *Holds* that there has been no violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) of the Convention as regards the applicant’s absence at the hearing of the plea of nullity;
3. *Holds* that there has been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) of the Convention as regards the applicant’s absence at the hearing of the appeal.

Done in English, and notified in writing on 3 October 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President