



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

THIRD SECTION

CASE OF KUCERA v. AUSTRIA

(Application no. 40072/98)

JUDGMENT

STRASBOURG

3 October 2002

FINAL

03/01/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kucera v. Austria,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEK,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mrs E. STEINER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 14 March and 12 September 2002,

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

PROCEDURE

1. The case originated in an application (no. 40072/98) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Helmut Kucera (“the applicant”), on 5 August 1997.

2. Initially, the applicant was represented by Mr K. Muzik, a lawyer practising in Vienna (Austria). The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department of the Federal Ministry of Foreign Affairs.

3. The applicant complains under Article 6 § 3 (c) of the Convention that he had not been able to attend the oral hearing on his appeal against sentence before the Vienna Court of Appeal.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 20 March 2001 the Court declared the application partly inadmissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed

Third Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

8. By a decision of 14 March 2002 the Court declared the applicant's remaining complaint admissible.

9. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1957 and is presently detained at the Krems Stein prison.

11. On 20 January 1994 the Vienna Public Prosecutor filed a bill of indictment against the applicant charging him with two counts of rape under aggravated circumstances, i.e. having caused serious injuries. The Public Prosecutor submitted that on 16 June 1993 the applicant had raped A.H., had beaten and strangled her, had forced her to swallow drugs and had threatened her with death. On 5 September 1993 he had raped E.P., had beaten and strangled her, had forced her to swallow drugs, had burned her skin with cigarettes and had cut her vagina with a knife causing a deep laceration as well as opening the abdominal cavity.

12. On 12 April 1994 the Court of Assizes (*Geschworenengericht*) of the Vienna Regional Court (*Landesgericht*) convicted the applicant of both offences of aggravated rape and sentenced him to 14 years' imprisonment. In assessing the penalty, the court considered as mitigating circumstances the applicant's partial confession regarding the rape of E.P. and, to some extent, that he had acted under the influence of alcohol and drugs. As aggravating circumstances, the court considered the applicant's criminal record, the fact that he had committed two rapes and the extreme brutality which the applicant had shown when committing the offences.

13. On 27 June 1994 the applicant filed a plea of nullity (*Nichtigkeitsbeschwerde*) and an appeal against sentence (*Berufung*). In his plea of nullity the applicant complained, *inter alia*, that the Court of Assizes had failed to hear the requested witnesses from Poland.

14. On 18 August 1994 the Supreme Court (*Oberster Gerichtshof*) confirmed the Court of Assize's judgment as regards the rape of E.P. and quashed the judgment as regards the other charge of rape and the sentence. It found that there had been sufficient information to identify the witnesses from Poland and that the Court of Assizes should have attempted to take this evidence. It remitted the case to that court.

15. On 19 September 1995 the new trial commenced before the Court of Assizes sitting with another jury and on 14 June 1996 the Court of Assizes convicted the applicant of raping A.H. and sentenced him to 14 years' imprisonment. When fixing the sentence the court considered as mitigating circumstances the applicant's confession regarding some of the facts concerning the charge of having raped E.P. and, to a certain extent, his intoxication. As aggravating circumstances it considered the applicant's criminal record, that he had committed two rapes and his extreme brutality when committing the offences.

16. On 29 August 1996 the applicant filed a plea of nullity and an appeal against sentence. In his appeal against sentence the applicant submitted that the Court of Assizes had failed to give sufficient weight to the mitigating circumstances, namely his neglected education, his difficult childhood and his intoxication. The applicant did not request to attend the hearings before the Supreme Court or the Vienna Court of Appeal (*Oberlandesgericht*).

17. On 8 October 1996 the Supreme Court, sitting in private, rejected as inadmissible the applicant's plea of nullity.

18. On 4 December 1996 the Vienna Court of Appeal fixed the hearing date for the applicant's appeal against the sentence for 18 December 1996. The applicant received a notification which stated that he, being detained, could only appear through his counsel and would not be brought to the court as the conditions of Section 296 § 3 [Section 294 § 5] of the Code of Criminal Procedure (*Strafprozeßordnung*) were not fulfilled.

19. On 18 December 1996 the Vienna Court of Appeal, after having held a hearing in the absence of the applicant but in the presence of his defence counsel, dismissed the appeal against the sentence. As regards the weighing of mitigating and aggravating circumstances by the Court of Assizes, the Court of Appeal found that the applicant's partial confession was merely a contribution to the establishment of the truth (*Beitrag zur Wahrheitsfindung*) and did not qualify as a mitigating circumstance. Further, there were additional aggravating circumstances such as the particular cruelty which the applicant had used when committing the offences, as well as their concurrent nature (*Zusammentreffen strafbarer Handlungen*). As regards the circumstances invoked by the applicant, the

Court of Appeal found that they could not be taken into consideration as mitigating circumstances. A neglected education and difficult childhood could not be considered as the applicant was now an adult and it could not explain his excessive use of brutality. Also no weight could be given to his intoxication because he should have known about the effects of alcohol on his person, and the experts had stated that it had no bearing on him committing the offences. Furthermore, the applicant's offences were not a consequence of a mental defect but of frustration and increased aggression and he had not shown any consciousness of his guilt. Thus, there was no reason to reduce the sentence.

II. RELEVANT DOMESTIC LAW

20. A 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 sentence as such may be challenged by way of an appeal against sentence to the Court of Appeal. 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. Unless an appeal against sentence is filed together with a plea of nullity and the Supreme Court decides on both remedies, such a hearing is held before the Court of Appeal.

21. As regards the personal appearance of the accused at a public appeal hearing, section 294 § 5, 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

ALLEGED VIOLATION OF ARTICLE 6 § 3 (c) OF THE CONVENTION

22. The applicant complains that the Vienna Court of Appeal heard his appeal against sentence in his absence. He relies on Article 6 § 3 (c) of the Convention which reads as follows:

“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;”

23. The applicant submits that the Court of Appeal should have heard him because for reviewing the correctness of a sentence a court must gain a personal impression of the accused. The arguments submitted in his appeal, that the court should have given more weight to circumstances such as his intoxication, his difficult childhood and his neglected education necessitated that the Court of Appeal decide on his appeal after having seen him. Thus, his presence at the hearing had clearly been necessary in the interest of justice and he had never expressly waived this right.

24. The Government submit that the present case must be distinguished from previous cases by the Court concerning the same issue, in particular the case of *Cooke v. Austria* (no. 25878/94, 8.2.2000). Unlike Mr Cooke the applicant had been represented by the same defence counsel throughout the proceedings and, again unlike Mr Cooke, he had at no time expressed his wish to participate in the Court of Appeal’s hearing. Thus, the Court of Appeal was not obliged to display particular diligence either but could assume that the applicant had waived his right to attend in person the oral hearing.

25. 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, *Michael Edward Cooke v. Austria*, no. 25878/94, § 35, 8.2.2000).

26. In the *Kremzow v. Austria* case the Court found that the accused’s absence at the Supreme Court’s hearing on his appeal was in breach of Article 6 §§ 1 and 3 (c) of the Convention. Having regard to the gravity of what was at stake for the accused in the circumstances of the case, the Court considered that he ought to have been able to “defend himself in person” and that the State was under a positive duty, notwithstanding his failure to make a request, to ensure his presence in court (*Kremzow v. Austria* judgment of 21 September 1993, Series A no. 268-B, p. 45 § 68).

27. In the present case the Vienna Regional Court convicted the applicant of two counts of rape under aggravating circumstances, i.e. having caused serious injuries, and sentenced him to 14 years' imprisonment. The applicant filed a plea of nullity and an appeal against sentence. In his appeal he submitted, *inter alia*, that the Regional Court had not taken into consideration as mitigating circumstances his neglected education and difficult childhood and the fact that he had committed the offences under the influence of medicine and alcohol. The applicant did not request to attend the hearing on the plea of nullity or the appeal. The Vienna Court of Appeal dismissed the appeal in the absence of the applicant, finding, *inter alia*, that the elements relied on by the applicant had already been taken into consideration by the Regional Court and that he had not submitted any new mitigating circumstances.

28. It is the Court's constant case-law that a court of second instance should order that an accused be brought before it "if his personal presence appears necessary in the interest of justice" (Kremzow judgment, op. cit., § 68; *Cooke v. Austria*, op. cit., § 43; *Pobornikoff v. Austria*, no. 28501/95, § 32, 3.10.2000). This is in particular the case where the examination of the appeal not only involves an assessment of the accused's character and state of mind at the time of the offence but also of his motive for the offence and evaluations of this kind were to play a significant role for the outcome of these proceedings (Kremzow judgment, op. cit., § 67).

29. In the circumstances of the present case the Court finds that the applicant's presence at the hearing on his appeal against sentence was not necessary in the interests of justice. The points raised by the applicant in his appeal could have been dealt with adequately by the Court of Appeal on the basis of the submissions made by the applicant's lawyer at the hearing and the case file before that court. The state of intoxication of the applicant at the time when he had committed the offence had been the object of an expert's report dealing with the effects of alcohol and medicines and it cannot be seen how the applicant's personal presence in addition to that of his lawyer would be necessary in duly considering this element. As regards the applicant's further argument – his neglected education and difficult childhood – the Court finds that this is essentially historical information and it cannot be seen how the applicant's presence would be of use. There is nothing to show that in the proceedings at issue the Court of Appeal had to evaluate the applicant's personality, his character, his motives for committing the offence, or his dangerousness. The Court therefore finds that Article 6 § 3 (c) has been respected in the proceedings before the Vienna Court of Appeal.

30. Accordingly, there has been no violation of Article 6 § 3 (c) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 § 3 (c) of the Convention.

Done in English, and notified in writing on 3 October 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President