



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

SECOND SECTION

CASE OF KORELLIS v. CYPRUS

(Application no. 54528/00)

JUDGMENT

STRASBOURG

7 January 2003

FINAL

21/05/2003

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 Korellis v. Cyprus,

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

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

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 April and 3 December 2002,

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

PROCEDURE

1. The case originated in an application (no. 54528/00) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Cypriot national, Mr Achilleas Korellis (“the applicant”), on 18 January 2000.

2. The applicant, who had been granted legal aid, was represented by Mr M.G. Pikis, a lawyer practising in Nicosia. The Cypriot Government (“the Government”) were represented by their Agent, Mr A. Markides, Attorney-General of the Republic.

3. Relying on Article 6 § 1 of the Convention, the applicant alleged that he had not received a hearing before an impartial tribunal in the criminal proceedings taken against him.

4. 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.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 23 April 2002, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

8. The applicant was born in 1953 and lives in Nicosia.

9. He was accused of rape and committed for trial before an Assize Court.

10. At the commencement of the hearing of the case before the Assize Court, the defence requested discovery of a number of relevant documents in the prosecution's possession. The defence further requested that a forensic examination of the complainant's knickers be carried out and that swabs taken from her vagina be analysed. The prosecution objected. After hearing argument from both sides, the Assize Court granted the requests on 19 March 1998. This order was made pursuant to the provisions of Articles 12(5)(b), and 30.2 of the Cyprus Constitution, Articles 6 §§ 1 and 3 b) of the Convention and the notion of a fair trial as developed in the recent case-law of the English courts. The Assize Court also relied on Article 7(1) of the Cyprus Law of Criminal Procedure, Cap. 155, as amended.

11. The Attorney General immediately applied for judicial review of the order by means of a writ of certiorari. The grounds invoked were lack of jurisdiction and error of law on the face of the record. The application was made *ex parte* and it came before Justice Artemides, a member of the Supreme Court. He granted leave and suspended the enforcement of the order. Thereafter, on 15 May 1998, after hearing the parties, Justice Artemides granted the application and quashed the Assize Court's order for excess of jurisdiction.

12. The applicant's appeal (no. 10227) against this decision was heard by the plenary of the Supreme Court consisting of nine judges. The judges included Justice Gavrielides who, as it transpired towards the end of the subsequent trial, had been actively involved in the investigation that preceded the filing of the indictment against the applicant, in his capacity as senior attorney attached to the Legal Service of the Republic, i.e. the prosecution. However, at the time of the hearing of the certiorari appeal, the defence had been unaware of this fact and, therefore, no objection was taken to his participation in the proceedings. Neither the prosecution nor Justice Gavrielides referred to the matter.

13. On 24 September 1998 the appeal was dismissed by a majority of 7 to 2. Justice Gavrielides was part of the majority.

14. In the course of the subsequent proceedings before the Assize Court, the prosecution provided several of the documents which the defence had previously requested. However, it objected to the defence having an opportunity to carry out forensic tests. The applicant claims that the latter was of the utmost importance for his defence since Vaseline was found on the knickers which the prosecution and the Assize Court treated as strong corroborative evidence of his guilt.

15. The applicant was found guilty by the Assize Court on 10 March 1999 and sentenced to three years' imprisonment. He appealed against his conviction to the Supreme Court. The appeal (no. 53/99) was referred to a division of the Supreme Court consisting of three judges. The first ground of appeal concerned Justice Gavrielides' participation in the *certiorari* proceedings, in violation of the applicant's right to a fair trial by an independent and impartial tribunal. The appeal was accompanied by a plea, followed by a petition, that the *certiorari* judgment of the Supreme Court of 24 September 1998 be vacated having regard to the principles enunciated in a recent decision of the House of Lords in the case of *R. v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No 2)* (1999). Vacation of the said judgment was a precondition for the determination of the applicant's first ground of appeal.

16. At the beginning of the appeal hearing, it was pointed out to the defence that the court could not review the validity of a previous judgment of the Supreme Court in the context of an appeal. The defence then filed a separate petition to the plenary of the Supreme Court to vacate its previous judgment. The hearing of the appeal was accordingly adjourned pending the determination of the petition.

17. The petition was examined by the plenary of the Supreme Court consisting of nine judges, including the three judges before whom the applicant's appeal was pending. The court was presided over by Justice Artemides. An objection to the participation of Justice Artemides was taken by the defence given his previous involvement in the case. It was claimed that his participation at this stage would render him a judge in his own cause and offend against the rule of impartiality. However, the objection was rejected.

18. The application to vacate was dismissed on 19 July 1999 by a majority decision delivered by Justice Artemides, on the ground that the Supreme Court lacked jurisdiction to re-open the proceedings and examine the validity of its previous judgment.

19. Following dismissal of the petition, the hearing of the appeal was resumed. The appellate division of the Supreme Court indicated to the defence that, in view of the dismissal of the application to vacate, the first ground of appeal was left in a vacuum. The defence was then left with no option but to withdraw this ground of appeal as it could no longer be determined.

20. A hearing of the remaining grounds of appeal which the applicant had made then followed. The hearing was completed on 2 November 1999, and judgment was reserved. The Supreme Court dismissed the appeal on 18 January 2000, thereby re-affirming the applicant's conviction.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

21. The Government reiterate the objection which they had raised at the admissibility stage, namely that Article 6 does not apply in the present case. They recall that in its admissibility decision the Court rejected the objection on the ground that “the knickers were considered by the defence to be an important piece of evidence in the case against the applicant ... and the question of their examination by the defence was crucial for the outcome of the trial ...”. However, the Government stress that these allegations, which were put forward by the defence, are directly related to the issues raised in the context of the applicant's second application (no. 60804/00) which was pending before the Court. The Government reiterate that the examination of the knickers was not crucial to the outcome of the trial. If, in the context of application no. 60804/00, the Court were to find that there had been no violation of the fair trial requirement, the present application is without object. The questions raised in the present application become merely theoretical, purely academic and without any substantive effect to the real issue, which is the ultimate fairness or unfairness of the criminal trial.

22. The applicant alleges that the Government seem to lose sight of the fact that the two applications concern violations of two separate rights of the applicant and that the two rights form different aspects of the right to a fair trial. He recalls that the issue of an impartial tribunal emerged by reason of the participation of Justice Gavrielides in the Supreme Court, even though he had been actively involved in the police investigation against the applicant. A finding of a violation of the applicant's right to the disclosure of material in the hands of the prosecution is in no circumstances a pre-condition to finding a violation of the right to an impartial tribunal.

23. Furthermore, the applicant alleges that the knickers were crucial for the outcome of the trial and, for this reason, the certiorari proceedings in which Justices Artemides and Gavrielides participated became decisive in the determination of the criminal charge against the applicant. In its decision of 10 March 1999, the Assize Court recognised the paramount importance of the knickers. In particular the Assize Court stated that, in view of the presence of traces of Vaseline on the knickers, the absence of the applicant's DNA from swabs taken from the complainant's vagina and the absence of Vaseline on the gauze with which her vagina was wiped by a medical practitioner, did not have the far-reaching implications which the absence of such evidence would have had.

24. The Court notes that the Government reassert their compatibility objection raised at the admissibility stage. However, it recalls that in its admissibility decision it had stressed that the certiorari proceedings,

although not determining a criminal charge against the applicant, were closely interwoven with the proceedings before the Assize Court. In this connection, the Court considers that it cannot decide the issue without referring to the trial proceedings as a whole and, consequently, decides to join this objection to the merits.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

25. The applicant alleges a violation of Article 6 § 1 of the Convention, which in so far as relevant, reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

26. The Government stress that the applicant did not allege at any stage of the proceedings that Judges Gavrielides and Artemides had acted with personal bias.

27. As regards the participation of Judge Gavrielides in the examination of appeal no. 10227, the Government submit that there was no legitimate reason to fear that he lacked impartiality. These were certiorari proceedings and the question involved was purely legal and not related to the facts of the case. In view of the nature of the proceedings he did not, and could not, make any decision concerning the merits of the charge against the applicant.

28. As regards the participation of Judge Artemides in the context of application no. 53/99, the Government stress that the issue to be determined in these proceedings was solely whether the Supreme Court had jurisdiction to vacate a judgment adopted within the framework of its appellate jurisdiction. In this respect, it is difficult to see how Judge Artemides can be said to have become “a judge in his own cause”. In the context of these proceedings, the applicant did not seek review of the judgment of 24 September 1998, nor the rehearing of appeal no. 10227.

29. Finally, the Government contend that, in the circumstances of the application, the alleged violation cannot be related to any actual prejudice to the applicant’s defence.

30. The applicant maintains that the proceedings in which Judge Gavrielides participated involved the determination of his right to have evidence disclosed prior to the hearing in order to prepare his defence. As regards the proceedings in the context of application no. 53/99, Judge Artemides could not participate since he was the judge who gave the first instance judgment of the Supreme Court of 15 May 1998. He participated and presided over the Supreme Court in the proceedings relating to the vacation of a judgment issued on appeal from his own decision. The participation of a judge in appeal proceedings from his own decision must be considered to render him a judge in his own cause.

31. Furthermore, the applicant claims that vacation of the judgment did involve a re-opening of the appeal proceedings. The Supreme Court was and remained the ultimate court of appeal. Therefore, it could not review the validity of its prior decision unless re-opening took place. The applicant admits that he did not seek a re-hearing. He states that this was because his rights had already been affected by the judgment of 24 September 1998 that was the subject-matter of application no. 53/99. Upon vacation of that judgment, the first ground of appeal could have been considered in the context of that appeal and the applicant acquitted accordingly.

32. The Court notes that the present application refers to interlocutory proceedings which preceded the trial in respect of the charge against the applicant, which was finally determined by a judgment of the Assize Court of 10 March 1999, upheld on appeal by the Supreme Court in its judgment of 18 January 2000. The applicant filed the present application against these interlocutory proceedings on 21 January 2000. There followed another application by the applicant lodged with the Court on 17 May 2000 (no. 60804/00), whereby he complained that his trial was in breach of his right under Article 6 § 1 to a fair hearing.

33. In the latter application he alleged, *inter alia*, in support of his complaint that he had been deprived of the opportunity, before his trial, to have his own scientific experts examine an important piece of evidence, i.e. the complainant's knickers, which were in the possession of the prosecution. It was this allegation which led the Court to declare the present application admissible, given the possibility that the results of the interlocutory proceedings, which prevented the scientific examination in question and which are the subject matter of the application, "were decisive for the determination of a criminal charge within the meaning of Article 6 § 1". In this respect the Court recalls its reasoning in its admissibility decision which was as follows:

"The Court considers that the certiorari proceedings decided by Judge Artemides and then by the plenary of the Supreme Court, although they did not determine a criminal charge against the applicant, were closely interwoven with the proceedings before the Assize Court. In effect, the Court notes that the knickers were considered by the defence to be an importance piece of evidence in the case against the applicant. Independently of the moment at which the knickers became an exhibit at the trial in accordance with the domestic procedural rules on the matter, the question of their examination by the defence was crucial for the outcome of the trial. Any evidence which a forensic examination might have disclosed could have had a important bearing on the applicant's guilt or innocence of the charges.

It follows that the Court considers that the results of these proceedings were decisive for the determination of a criminal charge within the meaning of Article 6 § 1."

34. It is clear from that reasoning that the admissibility decision was founded on the pre-trial assessment by the applicant of the importance of the

evidence regarding the examination of the knickers in the light of the parties' arguments which were before the Court at that stage.

35. However, after the examination by the Court of the second application, no. 60804/00, which dealt with the fairness as a whole of the main proceedings against the applicant before the Assize Court and the Court of Appeal, the Court came to the conclusion that the evidence of the knickers and the related interlocutory proceedings, did not ultimately play a decisive role in the determination of the criminal charge against the applicant (decision 3 December 2002). In this respect the Court repeats its findings in the decision which declared that application inadmissible as follows:

“The order of the Assize Court for the delivery of the complainant's knickers to the applicant was issued before the commencement of the trial. At that time there was no concrete evidence before the Cyprus courts as to the relevance to the case of an independent examination of the knickers by the defence.

The Court notes that, even if the applicant does not have to show actual prejudice to the defence due to the non-examination of the knickers, he still has to show the relevance of such an examination to the case against him (see *mutatis mutandis* *Jespers v. Belgium* 27 DR p. 61). However the applicant has failed to do so. He has also failed to substantiate his argument that such an examination was of potential relevance to his defence because of a possibility that there was a substance in the material out of which the knickers were made which was of the same or similar composition to Vaseline, or for any other reason specifically invoked by the applicant.

The Court has reviewed the evidence which was relied on by the Assize Court in convicting the applicant and which was produced in court. According to the case-file, by the time the applicant sought discovery of the complainant's knickers for a scientific expertise as to the presence or not of Vaseline, the pants had already been “washed” by the prosecution expert in certain chemical liquids, with the result that all the Vaseline had been removed from them. The Vaseline so extracted was separately preserved by that expert in a tube which was produced as an exhibit before the Court. Consequently such an expertise would have been ineffective. Therefore there was no possibility of contradicting, through an examination of the knickers, the evidence of the prosecution expert as to the presence of Vaseline on them.

The Court also takes into account the following elements: that the applicant was interrogated by the police on the day of the offence for which he was convicted, i.e. 22 August 1996; that he was then acting on legal advice; that the knickers were taken by the police that same day and were delivered on 29 August 1996 to the Government forensic expert but, for more than a year thereafter, no request for an examination by a defence expert of any object in the hands of the police was made.

The Court notes that the prosecution supplied the defence before the trial with the written report of the forensic expert. This expert gave oral testimony on behalf of the prosecution and was cross-examined by the applicant's counsel. In this respect the Court observes that the sole argument put by the defence was that the knickers examined by the prosecution expert were not those of the complainant. In any event, the possibility of there being a substance similar to Vaseline in the material out of

which the knickers were made was excluded by this expert and no evidence to the contrary was relied on by the applicant.

The Court also notes that the applicant did not complain of unfairness before the Assize Court on this particular discovery point.

Finally, the Court gives special weight to the fact that the conviction of the applicant was mainly based on the oral testimony of the complainant, who was described by the Assize Court as “completely credible”. The presence of Vaseline on the complainant’s knickers was only one of three subsidiary elements of evidence corroborating the complainant’s testimony. The other elements consisted of the evidence of two witnesses to whom the complainant made her first complaint soon after the incident of rape for which the applicant was found guilty. The Assize Court also accepted the evidence of these witnesses as credible. (According to Cyprus legislation, the first complaint is evidence of the truth of the matters stated therein.)”

36. As already pointed out above (paragraph 33), the interlocutory proceedings, which are the subject matter of the present application, “were closely interwoven with the proceedings before the Assize Court”. However, their ultimate impact depended on the conduct of the Assize Court proceedings, viewed as a whole. Therefore, given that the detailed examination of the Assize proceedings in application no. 60804/00 has led to the conclusion that the outcome of the interlocutory proceedings did not in fact play a decisive role in the determination of the criminal charge against the applicant, the Court also finds in the present case that the complaint relating to the interlocutory proceedings does not give rise to a violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government’s preliminary objection;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 7 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President