



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

SECOND SECTION

CASE OF D.P. v. FRANCE

(Application no. 53971/00)

JUDGMENT

STRASBOURG

10 February 2004

FINAL

10/05/2004

In the case of D.P. v. France,

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

Mr A.B. BAKA, *President*,

Mr J.-P. COSTA,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 6 May and 2 December 2003 and on 20 January 2004,

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

PROCEDURE

1. The case originated in an application (no. 53971/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr D.P. (“the applicant”), on 12 November 1999.

2. The applicant, who was granted legal aid, was represented by Ms M.-A. Canu Bernard, of the Paris Bar. The French Government (“the Government”) were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the Court of Cassation had not been impartial.

4. The application was allocated to the Second 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. By a decision of 6 May 2003, the Court declared the application partly admissible.

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

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 December 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	R. ABRAHAM, Director of Legal Affairs, Ministry of Foreign Affairs,	<i>Agent,</i>
Ms	L. DELAHAYE, Drafting Secretary, Human Rights Section, Legal Affairs Department, Ministry of Foreign Affairs,	
Ms	J. VAILHE, European and International Affairs Department, Ministry of Justice,	
Ms	R. KOERING-JOULIN, judge, Criminal Division, Court of Cassation,	<i>Counsel;</i>

(b) *for the applicant*

Ms	M.-A. CANU BERNARD, of the Paris Bar,	<i>Counsel,</i>
Ms	A. PERRY,	<i>Trainee.</i>

The Court heard addresses by Ms Canu Bernard and Mr Abraham.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1951 and is currently detained in Eysses Prison, Villeneuve-sur-Lot.

9. He was held in police custody from 25 to 27 September 1994, on suspicion of having sexually assaulted his stepdaughters. He made a full confession and, at the end of the period in police custody, he was charged with rape and aggravated sexual assault. He was detained on remand.

10. On 21 April 1995, under questioning by the investigating judge, the applicant retracted his confession; on 5 May 1995 he denied all the accusations made against him. He said that he had taken valium while in police custody and claimed that this drug could have impaired his mental faculties.

11. On 7 September 1995 the investigating judge extended the detention order. By an order of 22 December 1995, he rejected an application by the applicant for release. In a judgment of 9 January 1996, the Indictment Division of the Bordeaux Court of Appeal upheld the order. On 30 April 1996 the Court of Cassation dismissed an appeal on points of law lodged by the applicant. The Criminal Division of the Court of Cassation which ruled in that judgment was composed of Mr Le Gunehec, President, a reporting judge and six other judges, including Mr Guilloux and Mr Le Gall.

12. On 9 February 1996 the parties were informed that the investigation was complete. By a judgment of 2 July 1996 the Indictment Division committed the applicant to stand trial at the Gironde Assize Court.

13. The applicant appealed on points of law and put forward two grounds in support of his appeal: the first alleged that the Indictment Division had failed to comply with the procedural rules necessary for the effective exercise of the rights of the defence, as set out in Article 197 of the Code of Criminal Procedure, concerning the parties' access to the case file before the hearing; the second concerned a lack of sufficient reasoning in the order committing him for trial, and noted that it did not set out the facts on which the charges were based or explain why the alleged offences were classified as they were.

14. The Criminal Division of the Court of Cassation delivered a judgment dismissing the appeal on 12 February 1997. The Division which ruled on the appeal was composed of Mr Guilloux, acting as president in the absence of the incumbent president who was unable to attend, Mr Le Gall as reporting judge, and six other judges.

15. In a judgment of 3 April 1998, the Gironde Assize Court convicted the applicant and sentenced him to nineteen years' imprisonment and suspended his civic, civil and family rights for ten years.

16. On that same date the applicant lodged an appeal with the Court of Cassation, in which he raised six points of law. The first alleged a violation of Article 362 of the Code of Criminal Procedure, on the ground that the Assize Court had not stated by what majority of votes the sentence had been imposed; the second concerned a failure to comply with the principle that hearings must be oral and, in particular, with Article 347 of the Code of Criminal Procedure, which in principle prevented the court proper and the jury from deliberating with the case file before them; in his third point, the applicant complained of a violation of Article 379 of the Code of Criminal Procedure, which prohibited the content of statements being mentioned in the official record, unless the presiding judge decided otherwise; the fourth and fifth points concerned the wording of the questions put to the jury; the final point alleged a breach of the rights of the defence, on the ground that the accused had not spoken last on the question of the withdrawal of parental responsibility.

17. The applicant was provisionally granted legal aid but, in a decision of 8 April 1999, the Legal Aid Office refused his request on the ground that "no arguable ground" of appeal on points of law could be made out against the judgment of 3 April 1998.

18. In a judgment of 9 June 1999, the Criminal Division of the Court of Cassation dismissed the applicant's appeal on points of law. The Division was composed of Mr Gomez, President, Mr Guilloux, reporting judge, and Mr Le Gall, judge.

19. On 7 July 1999 the President of the Court of Cassation dismissed an appeal on points of law lodged by the applicant against the Legal Aid Office's decision.

II. RELEVANT DOMESTIC LAW

20. The relevant provisions of the Code of Criminal Procedure applicable at the material time are the following:

Article 370

“Where appropriate, after delivering the judgment the president [of the assize court] shall, if applicable, inform the accused of his or her right to lodge an appeal on points of law, and inform him or her of the time-limit for such an appeal.”

Article 567

“In the event of a breach of the law, judgments of indictment divisions and judgments of the criminal courts against which no ordinary appeal lies may be set aside on an appeal on points of law to the Court of Cassation lodged by the public prosecutor or by the party adversely affected, according to the distinctions made hereafter.

Such appeals shall be lodged with the Criminal Division of the Court of Cassation.”

Article 591

“Judgments of indictment divisions and judgments of trial and appellate courts against which no ordinary appeal lies and which comply with the formal requirements laid down by statute may be quashed only on grounds of a breach of the law.”

Article 592

“Such judgments shall be declared null and void if they are not delivered by the prescribed number of judges or have been delivered by judges who have not attended all the hearings in the case. Where several hearings have been held in one and the same case, the judges who have taken part in the decision shall be presumed to have attended all of them.

Such judgments shall also be declared null and void if they have been delivered without submissions having been heard from the public prosecutor.

Subject to the exceptions laid down by law, judgments which have not been delivered, or in respect of which the proceedings have not been conducted in open court, shall also be declared null and void.”

Article 593

“Judgments of indictment divisions and judgments against which no ordinary appeal lies shall be declared null and void if they contain no reasons or if the reasons are insufficient and do not enable the Court of Cassation to exercise its power of review and to ascertain that the law has been complied with in the operative provisions.

The same rule shall apply in the event of a failure or refusal to rule either on one or more applications by the parties or on one or more applications by the public prosecutor.”

Article 594

“In criminal matters, the judgment by the indictment division committing the accused for trial shall, when it has become final, determine the jurisdiction of the assize court and cover all procedural defects, should any exist, arising from the previous proceedings.”

THE LAW**ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION**

21. The applicant complained about the composition of the Court of Cassation which examined his appeal against the Assize Court's judgment, contending that it was not impartial. He alleged that there had been a violation of Article 6 § 1 of the Convention, which provides:

“In the determination ... of any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal ...”

A. The parties' submissions*1. The applicant*

22. The applicant pointed out that Mr Guilloux, the reporting judge in the restricted composition which dismissed his appeal on 9 June 1999, had presided over the Criminal Division when it dismissed his appeal against the committal order on 12 February 1997 and that Mr Le Gall, who sat as a judge in the Criminal Division on 9 June 1999, had been the reporting judge when the Criminal Division had dismissed his previous appeal on points of law on 30 April 1996. Although those appeals had examined only procedural issues, the applicant emphasised that it seemed unlikely that judges who had endorsed the judgment committing him for trial before the

Assize Court would subsequently go back on themselves by quashing that court's judgment. At the hearing, his counsel also referred for the first time to the composition of the Criminal Division of the Court of Cassation which on 30 April 1996 had dismissed the applicant's appeal against the judgment extending his pre-trial detention.

23. The applicant explained that what he contested was the functional impartiality of the Criminal Division of the Court of Cassation which had given judgment on 9 June 1999 and pointed out that, in this connection, even appearances could be of some importance. He considered that, at the time of its judgments of 30 April 1996 and 12 February 1997, the Court of Cassation had already formed an opinion on the probability of his guilt and assessed the facts. He said that the Court of Cassation was obliged to assess the facts in order to decide the appeal. Following his conviction by the Assize Court, the Court of Cassation had been the second level of jurisdiction with regard to the criminal charges. Finally, he stressed the importance of the positions occupied by Mr Guillou and Mr Le Gall in the composition of the Court of Cassation which delivered the judgment of 12 February 1997.

24. Applying the objective test and the principle of outward appearances, the applicant submitted that the Court of Cassation had not appeared impartial when it gave its judgment on 9 June 1999.

2. The Government

25. The Government observed at the outset that an appeal to the Court of Cassation on points of law was a special form of appeal and that the Court of Cassation's supervisory role was limited to reviewing whether the law had been correctly applied. Its only role was to examine whether the decisions given by the trial and appellate courts complied with the applicable law, whatever its source. They also emphasised that the Court of Cassation's role differed depending on whether it was examining an appeal lodged against a judgment committing a suspect for trial or whether it was considering an appeal against a conviction by an assize court, since the two decisions were different in nature and came at different stages of the proceedings. Thus, in the first type of case, the court's supervisory role focused on the proceedings before the indictment division and the reasons stated in the judgment, and was confined to ascertaining whether the legal classification given to the matters described in the judgment justified a committal to an assize court. In the second type of case, the court's supervisory role shifted to reflect the special nature of the proceedings before the assize court, and concerned those proceedings as a whole: on the basis of the court record, the Court of Cassation verified compliance with the procedural rules and the formal propriety of the questions put and replies given, with a view to ensuring that the questions were worded in a clear, factual and unambiguous manner and that the replies given were coherent. It

then checked that the rules concerning majority decisions had been complied with.

26. Thus, the issues dealt with in the two forms of appeal were very different in nature, as could be ascertained in this case. The Government therefore considered that the fact that two judges had ruled on the first appeal could not justify an allegation of bias on their part when they came to examine the second, since, in this scenario, they had at no time been required to examine the merits of the case.

27. They further submitted that the Court of Cassation's task would be made impossible if the fact that its decisions concerned a single criminal case were enough to oblige it to sit on each occasion in an entirely different composition.

28. Finally, they noted that the applicant's counsel had not alluded to the judgment of 30 April 1996 until the hearing before the Court, and submitted that that argument was in fact a new complaint that had been raised belatedly. In the alternative, they said that, even on that occasion, the Court of Cassation had not ruled on the merits of the case, and the applicant's doubts could not be said to have been objectively justified.

B. The Court's assessment

29. In the instant case, the Court notes that the applicant contends that the Criminal Division of the Court of Cassation was biased on account of the presence of two judges in the two compositions which ruled on the appeals he had lodged at two different stages of the proceedings.

30. It notes at the outset that the applicant's counsel also referred at the hearing before the Court to the inclusion of those two judges in the composition of the Criminal Division which ruled on an appeal on points of law against a judgment rejecting an application for release. However, it considers that this new argument was submitted out of time and cannot be taken into consideration.

31. The Court reiterates that there are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1 of the Convention: the first consists in seeking to determine the personal conviction of a particular judge in a given case; the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Gautrin and Others v. France*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1030-31, § 58).

32. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 26). In the instant case, the applicant does not contest the judges' subjective impartiality.

33. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that, when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of the person claiming that it is not impartial is important but not decisive. What is decisive is whether his or her doubts can be held to be objectively justified (see *Gautrin and Others*, cited above, *ibid.*).

34. In the instant case, the fear of a lack of impartiality was due to the fact that two of the judges who ruled on 9 June 1999 on the applicant's appeal against conviction had previously sat in the Division which ruled on 12 February 1997 on the appeal against the judgment committing the applicant for trial in the Assize Court. The Court accepts that that situation could raise doubts in the applicant's mind concerning the Court of Cassation's impartiality. However, it has to consider whether those doubts were objectively justified (see *Morel v. France*, no. 34130/96, § 44, ECHR 2000-VI).

35. The Court reiterates that the answer to that question depends on the circumstances of the case. The mere fact that a judge has also made pre-trial decisions cannot in itself be taken as justifying doubts regarding his or her impartiality. What matters is the extent and nature of the pre-trial measures taken by the judge. Likewise, the fact that a judge has detailed knowledge of the case file does not entail any prejudice on his or her part that would prevent his or her being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged. What is important is for that analysis to be carried out when judgment is delivered and to be based on the evidence produced and argument heard at the hearing (see, among other authorities, *mutatis mutandis*, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 22, § 50; *Nortier v. the Netherlands*, judgment of 24 August 1993, Series A no. 267, p. 15, § 33; *Saraiva de Carvalho v. Portugal*, judgment of 22 April 1994, Series A no. 286-B, p. 38, § 35; and *Morel*, cited above, § 45).

36. The Court is therefore called upon to decide whether, having regard to the nature and extent of the judicial review required of those judges in the appeal lodged against the judgment committing the applicant for trial, they displayed or could legitimately be considered to have displayed bias with regard to the decision to be taken by the Court of Cassation when examining the appeal against conviction. Such would be the case if the issues that they had had to deal with in the first appeal were analogous to those on which they had ruled within the Criminal Division when it examined the appeal

against conviction (see *Saraiva de Carvalho*, cited above, p. 39, § 38, and *Morel*, cited above, § 47).

37. The Court reiterates that an appeal on points of law to the Court of Cassation is a remedy whose purpose is different from that of an ordinary appeal (see *Civet v. France* [GC], no. 29340/95, § 43, ECHR 1999-VI) and that the Court of Cassation's role and supervisory activity are particular to it. As the possibilities of appealing to the Court of Cassation are limited by Article 591 of the Code of Criminal Procedure to breaches of the law, the Court of Cassation, unlike a court of appeal, does not have jurisdiction to reassess matters of pure fact. The review carried out by the Court of Cassation is of questions of law, which may in certain respects be mixed with questions of fact where it is reviewing the effect in law of the assessment of the facts. The Court of Cassation “nonetheless has the task of checking that the facts found by the tribunals of fact support the conclusions reached by them on the basis of those findings” (see *Civet*, cited above, § 43). As well as examining whether a judgment referred to it complies with the formal requirements, it ascertains that the decision is justified and that adequate reasons have been given.

38. Thus, in the instant case, the Court of Cassation did not take the decision to commit the applicant for trial before the Assize Court. In its judgment of 12 February 1997, it merely reviewed the propriety of the investigation and the lawfulness of the committal order by the Indictment Division, as well as the reasons given for that decision. The Court notes in particular that the Court of Cassation had to check whether the Indictment Division had provided sufficient reasons for holding that there was in this case “sufficient evidence” against the applicant to provide a legal basis for the decision to commit him for trial in the Assize Court, which was empowered, at the end of the trial, either to find him guilty or to acquit him. The fact that the accusations were sufficient to justify a committal order did not, of course, imply that the applicant, who, like any defendant, was entitled to benefit from the presumption of innocence, had been “presumed guilty” by the Indictment Division when it reached its decision.

39. Equally and *a fortiori*, the Court of Cassation clearly did not itself find the applicant guilty, or sentence him to nineteen years' imprisonment. In its judgment of 9 June 1999 on the appeal against the conviction by the Assize Court, the Court of Cassation dealt only with the issue of the lawfulness of the trial proceedings and the formal propriety of the questions put and replies given. Furthermore, the applicant's grounds of appeal were confined to alleged formal defects, and the only questions the Court of Cassation was required to assess were questions of pure law.

40. The Court considers that, in reaching its decision, it must take account of the special features of the role and nature of the judicial review exercised by the Court of Cassation. While it is true that the Court of Cassation judges who sat on two separate appeals in the proceedings ruled

on each occasion on the lawfulness of and reasons for the decisions given by the lower courts, the questions raised by the first appeal concerned the lawfulness of the investigation while those raised in the second concerned the lawfulness of the judgment. Thus, the judges concerned were never required to assess the merits of the charges against the applicant and were obliged to consider different questions of law in each of the appeals.

41. In other words, the issues they were called upon to consider in the second appeal were not analogous to those they had been required to deal with in the first appeal.

42. Accordingly, the Court accepts that the applicant may have harboured suspicions regarding the Court of Cassation's impartiality. However, on account of the difference in the questions submitted to the Criminal Division in the two appeals, it considers that he did not have objective reasons to fear that it would display bias or prejudice with regard to the decision that it was required to reach in the appeal against conviction.

43. Consequently, there has been no violation of Article 6 § 1 of the Convention in the instant case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 § 1 of the Convention.

Done in French, and notified in writing on 10 February 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President