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

FIFTH SECTION

CASE OF BONEV v. BULGARIA

(Application no. 60018/00)

JUDGMENT

STRASBOURG

8 June 2006

FINAL

08/09/2006

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 Bonev v. Bulgaria,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 15 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 60018/00) against the Republic of Bulgaria, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Stefan Ganev Bonev, a Bulgarian national who was born in 1960 and lives in Bourgas ("the applicant"), on 5 May 2000.

2. The applicant was represented by Ms Y. Vandova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs M. Karadjova, of the Ministry of Justice.

3. On 14 December 2004 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine its merits at the same time as its admissibility.

4. On 1 April 2006 this case was assigned to the newly constituted Fifth Section (Rule 25 § 5 and Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. At the material time the applicant was a vagrant, without a permanent place of abode. It seems that he had several convictions for various offences and had served jail time.

A. The preliminary investigation

6. On an unknown date in the end of September or in early October 1998 criminal proceedings were instituted against the applicant for having heavily beaten up an acquaintance of his, Mr S.K. (“the victim”) at a construction site on 26 September 1998, and thus having caused his death on one of the following days.

7. On an unspecified later date the investigator in charge of the case questioned Mr L.A., an eyewitness to the incident. The applicant was not present. Mr L.A. died a few days later, in early October 1998.

8. On 6 October 1998 the applicant was arrested.

9. On 10 October 1998 the investigator interviewed Mr I.Y., a witness. The applicant was not present.

10. On 21 October 1998 the applicant was charged with intentionally murdering the victim in an especially cruel manner and with extreme ferocity, while being a dangerous repeat offender, contrary to Article 116 § 1 (6) and (11) of the Criminal Code of 1968, as in force at that time, and placed in pre-trial detention.

11. On 28 October 1998 the investigator questioned Mr Z.T., another eyewitness to the incident. The applicant was not present.

12. On 16 November 1998 the applicant was questioned in the presence of an *ex officio* counsel. It seems that he admitted to having beaten the victim with a wooden board.

13. On 26 November 1998 the charges were diminished. The applicant was accused of intentionally causing severe bodily injury to the victim and thus negligently bringing about his death, while being a dangerous repeat offender, contrary to Article 124 §§ 1 and 3 of the Criminal Code of 1968. His pre-trial detention was continued.

14. The Bourgas Regional Prosecutor’s Office subsequently filed an indictment against the applicant with the Bourgas Regional Court.

B. The trial

15. The trial took place in the morning of 2 February 1999 at the Bourgas Regional Court. The applicant did not have counsel and was acting *pro se*.

16. The court first heard the applicant, who admitted to having beaten the victim with a wooden board, but stated that the next day he had seen him in good health. He had learned that the victim had died only on 6 October 1998, when arrested by the police.

17. The court then questioned two expert witnesses and admitted their reports in evidence. The first expert, a psychiatrist, gave an opinion on the applicant’s mental state at the time of the commission of the alleged offence and on his fitness to stand trial, on the basis of documents in the

investigation case file and an examination of the applicant on 12 November 1998. The second expert, a forensic medical doctor, who had carried out an autopsy on the victim's body on 30 September 1998, gave an opinion on the cause of the death, the extent of the injuries found on the body, the possible timing of their inflicting and the causal link between the injuries and the death.

18. After that the court heard the victim's sons, who testified about their father's character.

19. As Mr I.Y. and Mr Z.T. had not been found at the addresses which they had indicated during the preliminary investigation and had thus not been called at the trial, and as Mr S.V. did not appear despite being subpoenaed, the prosecution requested that their statements made during the preliminary investigation be read out before the court. The applicant agreed. The court, acting in pursuance of Article 279 § 1 (4) of the Code of Criminal Procedure of 1974 (see paragraph 31 below), observing that the first two witnesses had not been found at the addresses which they had indicated and were permanently changing their places of abode, and noting that the applicant agreed to the reading out of their statements, decided to admit these statements in evidence. The court also read out the statement of Mr S.V. on the basis of Article 279 § 1 (5) of the Code (see paragraph 32 below).

20. The court then questioned Mr S.V., who showed up later that morning. He testified that he had heard from Mr Z.T. and Mr L.A. that the applicant had beaten up the victim and that on the day after the incident he had seen the victim who could not stand up.

21. At the end of the trial the court heard the parties' closing statements. The applicant said that he considered himself guilty, expressed his regrets for his act, and pleaded for a minimal sentence.

22. In a judgment of the same day the Bourgas Regional Court found the applicant guilty as charged. It sentenced him to ten years' imprisonment. On the basis of the statements of Mr L.A. and Mr Z.T., the eyewitnesses, the testimony of Mr S.V., who had learned about the incident from them, and the statements of the applicant made during the preliminary investigation and at the trial, the court found that during the early hours of 26 September 1998 the applicant had heavily beaten up the victim with a wooden board at a construction site, after consuming a considerable amount of alcohol and having had a quarrel and a fight with him and the eyewitnesses several hours earlier. The court went on to find, on the basis of the statements of Mr L.A. and Mr Z.T. and the testimony of Mr S.V., that the victim had been in a very bad state of health the following day, when the three had visited him at the construction site. The court relied on the opinion of the forensic expert to determine that the death had occurred in all probability on 28 September 1998 and could be the result of a beating as the one described by the applicant and the eyewitnesses. It relied on the other expert's opinion

to conclude that the applicant had not been as heavily intoxicated by alcohol as to be unable to control his actions.

23. After delivering its judgment, the court ordered that the applicant be maintained in custody pending any appeals against it.

C. The appeal proceedings

24. The applicant appealed to the Bourgas Court of Appeals. He complained, *inter alia*, that the Bourgas Regional Court had convicted him on the basis of the statements of persons who had not been present during the trial. He specifically requested the court to call Mr I.Y. and Mr Z.T. as witnesses.

25. In a decision of 16 April 1999 the Bourgas Court of Appeals rejected the applicant's request to call Mr I.Y. and Mr Z.T. It held that both were vagrants and had no permanent place of abode where to be subpoenaed. The subpoenas sent out before the trial to the addresses which they had indicated during the preliminary investigation had been returned with a mention that neither of them lived at the respective address. The court went on to state that it was impossible for it to locate and subpoena Mr I.Y. and Mr Z.T.

26. After holding a hearing on 18 May 1999, in a judgment of the same day the Bourgas Court of Appeals upheld the lower court's judgment. It fully confirmed its findings of fact and went on to state that it had not erred by reading out the statements of Mr Z.T. and Mr L.A. made during the preliminary investigation and admitting them in evidence. These two witnesses were vagrants, did not have a permanent place of abode and could not be found in order to be subpoenaed. Moreover, the applicant had acquiesced to the reading of their statements and did not dispute that he had beaten up the victim and had said that he was guilty. The court held that the applicant's guilt had been established beyond doubt on the basis of the statements of the witnesses, the admissions of the applicant and the findings made during the victim's autopsy.

D. The proceedings before the Supreme Court of Cassation

27. The applicant appealed on points of law to the Supreme Court of Cassation. The counsel representing him argued, *inter alia*, that he had been convicted on the basis of the statements of persons whom the court had not heard personally and whom the applicant had not been able to cross-examine. The courts below had not made any effective efforts to locate Mr Z.T. and Mr I.Y. and there was no indication that Mr L.A. had indeed deceased. He relied on Article 6 § 3 (d) of the Convention.

28. The Supreme Court of Cassation held a hearing on 17 September 1999.

29. In a final judgment of 8 November 1999 the Supreme Court of Cassation upheld the lower court's judgment, fully confirming its findings of fact. It held that the applicant's complaint that Mr L.A. had not been called by the lower courts was unfounded, because the applicant had not requested that. In any event, it had been established that Mr L.A. had died before the trial. As regards the reading of the statements of Mr Z.T. and Mr I.Y., the court found they could not have been called at the trial because they did not have permanent places of abode and were vagrants. The subpoenas sent to the address indicated by them during the preliminary investigation had been returned with the notes that one of them was unknown at that address and the other had left that address and his current address was likewise unknown. In these circumstances, their statements had been properly read out, to which the applicant had agreed. The court further noted that the lower courts' findings of fact rested also on the applicant's statements made during the preliminary investigation and at the trial.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Criminal Code of 1968

30. At his trial the applicant stood accused of an offence under Article 124 §§ 1 and 3 of that Code, which, as in force at the relevant time, provided that whoever negligently caused the death of another by intentionally inflicting him bodily injury while being a dangerous repeat offender was punishable by a term of imprisonment ranging from five to fifteen years in the case of serious bodily injury, from three to ten years in the case of intermediate bodily injury, and up to five years in the case of light bodily injury.

B. The Code of Criminal Procedure of 1974

31. Article 279 § 1 (4) of that Code, as in force at the relevant time, provided that the statement of a witness given at the preliminary investigation could be read out at the trial if the witness could not be found in order to be called or had died. The Supreme Court has said that statements made by a witness during the preliminary investigation may be read out at the trial and admitted in evidence only if the court expressly finds that, after a thorough effort to locate the witness, it is impossible to find him or her (реш. № 301 от 19 юни 1981 г. по н.д. № 292/1981 г., ВС, II н.о.; реш. № 674 от 16 януари 1991 г. по н.д. 765/1990 г., ВС, II н.о.).

32. By Article 279 § 1 (5) of the Code, as in force at the material time, a witness' statement made during the preliminary investigation could also be read out at the trial if the witness, despite being duly subpoenaed, did not appear and the parties agreed to this. The same provision, amended effective 1 January 2000 (after the proceedings in issue), added the requirement that the court had to explain to an accused acting *pro se* that the statements thus read out will be used in reaching the verdict.

33. Article 95 § 1 of the Code provided that a recalcitrant witness could be fined and brought for questioning by force. By Article 157 § 2 of the Code, a witness could be brought by force even without being previously subpoenaed if he or she did not have a permanent place of abode. The authority responsible for bringing a witness by force was the Ministry of Internal Affairs (Article 157 § 4 of the Code).

34. Article 91 § 1 of the Code provided that the conviction could not rest solely on the admission of the accused.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

35. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that his trial had been unfair in that he had been unable to cross-examine the witnesses whose statements had served as the main basis for his conviction.

36. The relevant parts of Article 6 §§ 1 and 3 (d) provide as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. The parties' submissions

37. The Government pointed out that alongside Mr Z.T.'s and Mr I.Y.'s statements made during the preliminary investigation and read out at the trial, the trial court had heard the testimony of three other witnesses, one of which, Mr S.V., had provided as much information as Mr I.Y. The court had also admitted in evidence two expert opinions and heard the applicant himself. It could not therefore be deemed that the applicant's conviction had rested solely on witness' statements made during the preliminary investigation. The applicant's grievance relating to the lack of efforts to locate the absent witness was unfounded, as it was clear that he was a vagrant. Moreover, the applicant had acquiesced to the reading of the statements made during the preliminary investigation and had not asked that the witnesses who had made these statements be re-questioned. He had therefore had an opportunity to question the witnesses against him, which he had foregone. On the other hand, the conviction had rested on numerous other pieces of evidence, such as the testimony of the other witnesses and the two expert opinions. This was the conclusion of the appellate instances as well.

38. The applicant submitted that the domestic courts had not questioned the only eyewitnesses to the incident. The other witnesses, save one, who had also been absent at the trial, and the experts, had not provided information on the authorship of the alleged offence, which was a crucial element leading to his conviction. The applicant's own statements that he had hit the victim did not amount to an admission that the latter's death had resulted from that. The conviction had therefore rested to a decisive extent on the statements of persons who had not been called at the trial. The applicant's acquiescence to the reading of the statements out at trial had been immaterial, as under the relevant rules of domestic criminal procedure that was not a prerequisite for such reading; its precondition had been a thorough effort to locate the missing witnesses, which had been lacking. The applicant had, moreover, requested that the missing witnesses be called by the appellate court, which also had full jurisdiction in respect of the facts, but his request had been denied.

B. The Court's assessment

1. *Admissibility*

39. The Court finds that the application raises serious issues of fact and law. It does not therefore consider that it is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

40. As the guarantees of Article 6 § 3 (d) are specific aspects of the right to a fair trial set forth in the first paragraph of that Article, the complaint must be examined under the two provisions taken together (see, among many other authorities, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 19 *in limine*).

41. The first question to be decided is whether by agreeing to the reading out of the statements of Mr Z.T. and Mr L.A. – who were undoubtedly "witnesses against him" for the purposes of Article 6 § 3 (d) (see *Artner*, cited above, p. 10, § 19 *in fine*) – at the trial the applicant waived his right to have them examined. On this point, the Court reiterates that the waiver of a right guaranteed by the Convention, insofar as permissible, must be established in an unequivocal manner (see *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 65, 10 November 2005). In the instant case, the Court notes that the applicant, who was apparently not well versed in the law, was not represented at his trial, when he consented to the reading of the statements (see paragraphs 15 and 19 above). It does not seem that he was cautioned or was aware of the consequences of this acquiescence (see paragraph 32 above). Later, in his appeal to the Bourgas Regional Court, he expressly requested that Mr Z.T. be called to testify. In the proceedings before the Supreme Court of Cassation, when he was represented by counsel, he maintained that the latter's absence had infringed his rights under Article 6 § 3 (d) (see paragraphs 24 and 27 above). Thus, the Court cannot find that the applicant may be regarded as having waived his rights under Article 6 as to the opportunity to examine the witnesses against him (ibid., § 66).

42. The Court must thus establish whether the use of their statements made during the preliminary investigation, coupled with the impossibility to examine them or have them examined in court, amounted to a violation of the applicant's right to a fair trial.

43. According to the Court's case-law, this right normally presupposes that the evidence be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to take into account such statements obtained at the pre-trial stage is not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided the rights of the defence have been respected. As a rule, these rights entail an adequate and proper opportunity for the accused to challenge and question the witnesses against him, either when they make their statements or at a later stage of the proceedings (see *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, p. 16, § 36; and, more recently, *Mild and Virtanen v. Finland*, no. 39481/98 and 40227/98, § 42, 26 July 2005). In the event the impossibility to examine the witnesses or have them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (see *Artner*, p. 10,

§ 21 *in fine*; *Delta*, p. 16, § 37, both cited above; and *Rachdad v. France*, no. 71846/01, § 25, 13 November 2003). Finally, the conviction must not rest solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *Artner*, p. 10, § 22; *Delta*, p. 16, § 37, both cited above; *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 13, § 35 *in fine*; *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57 *in fine*, ECHR 2001-X; and *Rachdad*, cited above, § 23 *in fine*).

44. The trial and the appellate courts in the case at hand based the applicant's conviction on the testimony of Mr Z.T., Mr L.A. and Mr S.V., as well as on the applicant's admissions. They did not rely on Mr I.Y.'s depositions (see paragraphs 22 and 26 above). However, it was only Mr Z.T. and Mr L.A. who had been direct eyewitnesses of the act alleged against the applicant and who could thus conclusively establish the authorship of the offence, Mr S.V.'s testimony being only hearsay. It is true that the applicant also admitted to having beaten the victim and that the courts relied on that admission, but under Bulgarian law a conviction cannot rest solely on the admission of the accused (see paragraph 34 above). It is also unclear whether the applicant's avowal that he had beaten the victim amounted to an admission that he had caused his death (see paragraphs 12 and 16 above). Mr Z.T.'s and Mr L.A.'s statements appear to have been therefore decisive for the applicant's conviction. Mr L.A. could not be called at the trial, because he had died shortly after the opening of the preliminary investigation (see paragraph 7 above); the authorities cannot therefore be blamed for failing to ensure his presence. Mr Z.T., on the other hand, was not called at the trial or during the appeal proceedings because the courts held that it was impossible to subpoena him as he did not have a permanent place of abode (see paragraphs 19 and 25 above). However, it does not seem that any efforts were made to establish his whereabouts after it was found that he was not present at the address which he had provided during the preliminary investigation (see, *mutatis mutandis*, *Delta*, p. 16, § 37; and *Rachdad*, § 25, both cited above). While the Court is not unmindful of the difficulties encountered by the authorities in terms of resources, it does not consider that Mr Z.T.'s tracking down for the purpose of calling him at the trial, in which the applicant stood accused of a very serious offence and was risking up to fifteen years' imprisonment (see paragraph 30 above), would have constituted an insuperable obstacle (see *Artner*, cited above, p. 10, § 21, where the Austrian police was instructed by the trial court to make every effort to find a missing witness; *Berisha v. the Netherlands* (dec.), no. 42965/98, 4 May 2000, where the Dutch authorities tried to call a witness residing in the Slovak Republic through the Slovak authorities; and *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005, where the German authorities made considerable efforts to secure the

attendance of a witness serving a prison sentence in Lebanon). By Article 157 § 2 of the Code of Criminal Procedure of 1974, a witness could be brought for questioning by force even without being previously subpoenaed if he or she did not have a permanent place of abode, as in the case at hand (see paragraph 33 above). However, the authorities chose to eschew this. As a result, Mr Z.T. never appeared to testify before a court in the presence of the applicant. On the other hand, it does not appear from the materials in the case file – nor has it been argued by the Government, who were specifically asked about this – that the applicant had the opportunity to cross-examine him, or, for that matter, Mr L.A. – who had died before the applicant's arrest –, at another time.

45. Having regard the foregoing, the Court concludes that there has been a violation of Article 6 §§ 1 and 3 (d) and of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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."

A. Damage

47. The applicant claimed to have suffered non-pecuniary damage on account of the violation found in the present case, and sought 30,000 euros (EUR). He submitted that he had experienced anguish and frustration flowing from the unfairness of the trial, in which he had not been represented by counsel, and the resulting sentence of ten years' imprisonment in harsh conditions.

48. The Government were of the view that the claim was excessive, regard being had to the Court's case-law in Article 6 cases against Bulgaria. They pointed out that the lack of counsel and the allegedly poor conditions of imprisonment had not been raised in complaints before the Court and should therefore not be taken into account for the purposes of awarding just satisfaction.

49. The Court notes that it found a violation of the applicant's right to a fair trial solely on account of the use by the courts of witness' statements which he was not allowed to properly challenge (see paragraphs 41-44 above). This is therefore the only basis for the award of just satisfaction (see *Rachdad*, cited above, § 29 *in limine*). Having regard to this and ruling on an equitable basis, the Court awards the applicant EUR 1,500.

B. Costs and expenses

50. The applicant also sought the reimbursement of 9,000 United States dollars in lawyers' fees for the proceedings before the Court, plus EUR 1,210 for postage, translation of documents and other technical expenses.

51. The Government submitted that the lawyers' fees were excessive and arbitrarily set. The claim was also not fully supported by relevant documents, as required by Rule 60 § 2 of the Rules of Court.

52. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500, plus any tax that may be chargeable.

C. Default interest

53. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable on the date of settlement:
      (i) EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage;
      (ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK Registrar	Peer LORENZEN President