



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

FIFTH SECTION

CASE OF PELLO v. ESTONIA

(Application no. 11423/03)

JUDGMENT

STRASBOURG

12 April 2007

FINAL

10/12/2007

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 Pello v. Estonia,

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

Mr P. LORENZEN, *President*,

Mrs S. BOTOUCHAROVA,

Mr V. BUTKEVYCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr R. MARUSTE,

Mr J. BORREGO BORREGO,

Mrs R. JAEGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 20 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 11423/03) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Mr Ain Pello (“the applicant”), on 7 March 2003.

2. The applicant, who had been granted legal aid, was represented by Ms M. Lust, a lawyer practising in Tallinn. The Estonian Government (“the Government”) were represented by their Agent, Ms M. Hion, Director of the Human Rights Division of the Legal Department of the Ministry of Foreign Affairs.

3. The applicant alleged that his rights under Article 6 §§ 1 and 3 (d) were violated as he had had no opportunity to examine two of the witnesses in the criminal proceedings against him.

4. By a decision of 5 January 2006 the Court declared the application admissible.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1981 and lives in Estonia.

6. In the evening of 1 October 2000, next to a shop in Saue, a man who had been beaten died on the spot as a result of head injuries. On 2 October

2000 the Harju police initiated criminal proceedings. Charges were brought against the applicant and M.K.

7. Following the conclusion of the preliminary investigation the criminal case-file was sent to the Harju County Court (*maakohus*). According to the bill of indictment, the applicant and M.K. had been consuming alcohol in a train from Tallinn to Saue. In Saue they had walked to a shop in front of which they met T.N. They had entered the shop. After having bought beer the applicant and M.K. left the shop together. Outside the shop they had met O.U. and the victim. The former had entered the shop, the latter stayed outside. The victim, being under the influence of alcohol, had had an argument with the applicant and M.K. They had attacked the victim and beaten him, as a result of which he died. When O.U. left the shop and saw his friend on the ground, he approached the applicant and M.K. for clarification. After a brief scuffle O.U. had run away from the applicant and M.K. and again had entered the shop. Witness R.L., the shop assistant, had locked the door of the shop.

8. The bill of indictment relied on the statements of U.T., the father of the victim; O.U., the man together with whom the victim had come to the shop; R.L., the shop assistant; T.N., a man who had stayed in the shop during the offence; K.K., a man who had passed by the scene of the offence in a car and had seen two men beating a third one; and K.E., a nearby inhabitant who had heard voices while at home in the evening of the offence. In addition, reliance was placed, *inter alia*, on the plan and report concerning the scene of the offence, photos, a forensic expert's opinion with annexes, a report on the comparison of K.K.'s statements with the circumstances and a report concerning the confrontation of K.K. and the applicant.

9. In August 2001 the criminal case was joined with another case in which the applicant was also accused. Altogether there were five defendants in the criminal case.

10. On 19 September 2001 the hearing was adjourned by the County Court.

11. At the hearing of 6 November 2001 the prosecutor presented amended charges in the part not relating to the present case. The applicant's lawyer requested that the hearing be adjourned and that all the witnesses and the forensic expert be summoned. She also requested that additional questions be put to the forensic expert. The prosecutor informed the court that witness K.K. had died. The court adjourned the hearing.

12. The County Court heard the case on 29 November 2001 and on 4 April 2002.

13. At the hearing of 29 November 2001 the applicant's lawyer found that the participation of witnesses O.U., T.N., R.L. and K.E. was necessary. She noted that she had made a request to the effect that the forensic expert be called to the hearing. The court heard the applicant, M.K. and U.T. In

addition, the court disclosed the written records of statements made by witnesses K.K. and R.L. during the preliminary investigation, the record concerning the interrogation of M.K., the report concerning the confrontation of the applicant and K.K. and the report on the comparison of K.K.'s statements with the circumstances. The County Court granted the request to call witnesses O.U., T.N. and R.L. and ordered that an additional opinion from the forensic expert be obtained. The expert submitted an additional opinion on 29 January 2002.

14. On 4 April 2002 the County Court held the next hearing. Witness R.L. was heard and the written record of his statements given during the preliminary investigation was read out. Witnesses O.U. and T.N. failed to appear. The court had summoned them but the letters had been returned to the County Court by the postal service due to the expiry of the term for which mail was held. In addition, the court disclosed the written records of statements made by witness K.K., the report concerning the confrontation of the applicant and K.K. and several other materials. The applicant's lawyer insisted that the personal attendance of witnesses O.U. and T.N. at the hearing was necessary. The County Court dismissed the request and closed the hearing on the same day.

15. The Harju County Court delivered its judgment on 10 April 2002. Under Article 107 § 2 (1) and (2) of the Criminal Code the applicant was convicted of intentionally causing an extremely serious bodily injury which had been life-threatening and which due to negligence had caused the death of the victim and which had been committed in a manner motivated by hooliganism. The court sentenced him to three years' imprisonment. It relied on the forensic expert opinion together with annexes, the statements of witnesses K.K. and K.E., given during the preliminary investigation, and the statements of witness R.L. It further relied on the report concerning the scene of the offence together with a sketch plan and photos appended to it, the report concerning the examination of the material evidence together with photos and the victim's death certificate. The court established, *inter alia*, that the applicant and M.K. had attacked the victim and that they had been ready to attack K.K. and O.U. who had intervened.

16. The applicant's lawyer appealed against the County Court's judgment. She challenged the County Court's refusal to summon witnesses O.U. and T.N., finding that their statements could have been in favour of the applicant. She also complained that the findings of the County Court had been incompatible with the factual circumstances, pointing out, *inter alia*, that the statements of those witnesses on which the court had relied had been contradictory. She requested that witnesses O.U. and T.N. be summoned to the court and that the applicant be acquitted in respect of the charge concerned.

17. On 12 June 2002 a hearing at the Tallinn Court of Appeal (*ringkonnakohus*) took place. T.N. was present in the courtroom. However,

the court dismissed the applicant's lawyer's request that he be heard as a witness.

18. On the same date the Court of Appeal delivered its judgment. It established that the County Court had repeatedly sent summonses to the witnesses O.U. and T.N. Since the letters had been returned to the County Court by the postal service, the Court of Appeal concluded that the whereabouts of these witnesses had been unknown to the County Court. It had been lawful for the County Court to disclose their statements made during the preliminary investigation. As the County Court had disclosed the statements and examined them at its hearing, it had used these statements as evidence in compliance with the law. The Court of Appeal noted that the applicant's lawyer had failed to specify, either before the County Court or in her appeal, what information she would have wished to obtain from these witnesses. The Court of Appeal rejected the appeal in respect of the alleged lack of evidence and incompatibility of the County Court's conclusions with the factual circumstances, relying on the statements of witness K.K., given during the preliminary investigation and disclosed at the County Court's hearing, and the statements of witness R.L., given prior to the trial and confirmed by him at the hearing. The Court of Appeal noted that the County Court had rightly disregarded the statements of the accused. It also referred to the statements of U.T., given at the County Court's hearing, and to the forensic expert opinion. The court upheld the County Court's judgment in its relevant part in substance omitting, however, the element of hooliganism in the behaviour of the applicant and M.K. (Article 107 § 2 (2) of the Criminal Code). The prosecutor's appeal concerning the sentence was upheld in part and the applicant was sentenced to five years' imprisonment under Article 107 § 2 (1) of the Criminal Code.

19. The applicant's lawyer lodged an appeal with the Supreme Court (*Riigikohus*). She again challenged the County Court's refusal to summon witnesses O.U. and T.N., finding that the mere fact that the witnesses had not picked up the letters sent to them from the post office did not permit the conclusion that their place of residence had changed and that their whereabouts had been unknown to the court. She noted that the County Court had not ordered the police to secure the attendance of the witnesses at the hearing.

20. The Supreme Court rejected the appeal on 16 October 2002. It held that the County Court had failed to employ all possible means to guarantee the applicant a fair trial in accordance with Article 6 § 1 of the Convention, in that the County Court had failed to secure the witnesses' attendance by ordering the police to compel them to appear in court (*sundtoomine*). By disclosing the statements given by O.U. and T.N. during the preliminary investigation, without the applicant having had an opportunity to put questions to them, the County Court had also failed to observe the requirements of Article 6 § 3 (d). However, after having analysed at length

the case-law of the European Court of Human Rights, the Supreme Court found that there was no ground for quashing the judgments of the County Court and the Court of Appeal, since the conviction of the applicant had not been based entirely or to a decisive extent on the statements of witnesses O.U. and T.N.

THE LAW

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

21. The applicant complained that he had not received a fair trial and that his defence rights had been violated. He had had no opportunity to examine witnesses O.U. and T.N. Questioning of those witnesses would have led to his acquittal. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, provide:

“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

22. The Government were of the opinion that the applicant essentially wished to contest his conviction by the domestic courts. They noted that the Supreme Court had dealt with all the applicant's complaints, analysing also the relevant case-law of the European Court of Human Rights. It had found that the applicant's conviction had not been based solely or to a decisive extent on the statements of witnesses O.U. and T.N. Furthermore, the Government recalled that it was not the Court's task to substitute its own assessment of the facts for that of the domestic courts. They also argued that Article 6 § 3 (d) did not grant the accused an unlimited right to secure the appearance of witnesses in court. The Government found that in the present case the criminal proceedings as a whole had been fair and compatible with the requirements of Article 6 § 1.

23. The applicant did not comment on the Government's observations.

B. The Court's assessment

24. The Court notes at the outset that, since the guarantees of paragraph 3 (d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of this Article, it will consider the complaint about the lack of a possibility to examine the two witnesses at issue under the two provisions taken together (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 40, ECHR 2002-VII).

25. According to the Court's case-law, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 51). A conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (see, among others, *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX, and *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II, and, more recently, *Mild and Virtanen v. Finland*, no. 39481/98 and 40227/98, § 42, 26 July 2005).

26. The Court recalls that the admissibility of evidence is primarily a matter for regulation by national law. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendant seeks to adduce. It is not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (see *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V, with further references). Article 6 § 3 (d) does not require the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words “under the same conditions”, is a full “equality of arms” in the matter (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 38-39, § 91).

27. Therefore, even though it is normally for the national courts to decide whether it is necessary or advisable to call a witness, there might be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6 (see *Popov v. Russia*, no. 26853/04, § 179, 13 July 2006, *Destrehem v. France*, no. 56651/00, § 41, 18 May 2004, and *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

28. In the present case, the applicant argued that he had been unable to question O.U. and T.N. – witnesses whose statements would have led to his acquittal.

29. The Court observes that the prosecution had relied in the bill of indictment, among others, on the statements of these witnesses, given during the preliminary investigation, considering those statements as inculpatory evidence. However, these statements of witnesses O.U. and T.N. were not mentioned in the County Court's judgment. Nevertheless, the Court takes note of the observation made by the Court of Appeal in its judgment as to the use as evidence of the witness statements made by O.U. and T.N. by the County Court. The Court of Appeal considered that this had been lawful, as the whereabouts of these witnesses had been unknown. The Supreme Court found that, although the disclosure of the statements of O.U. and T.N. by the County Court gave rise to certain misgivings, the applicant's conviction had not been based solely or to a decisive degree on the statements of these witnesses.

30. It transpires from the reasoning of the Court of Appeal and the Supreme Court that they considered O.U. and T.N. primarily as prosecution witnesses. Having concluded that their statements were not the only or decisive evidence on which the applicant's conviction had been based, the Supreme Court found that there was no ground for quashing the judgments of the lower courts.

31. The Court notes, however, that the applicant's lawyer insisted on several occasions at the hearing before the County Court that it was necessary to examine the witnesses concerned. In her appeal to the Court of Appeal, she challenged the County Court's refusal to summon O.U. and T.N., arguing that they could have given statements in the applicant's favour. Moreover, she requested at the hearing before the Court of Appeal that T.N., who was present in the courtroom, be examined. She reiterated the argument concerning the County Court's refusal to summon the witnesses in her appeal to the Supreme Court. Accordingly, the defence considered O.U. and T.N. as witnesses on their behalf rather than as prosecution witnesses.

32. The applicant's appeals concerned the fact that O.U. and T.N. were not heard in court rather than that the courts unduly relied on their statements. The Supreme Court did not address this issue, but dismissed the appeal on the ground that the lower courts had not decisively relied on their statements.

33. As to the question whether the applicant has explained why it was important for the witnesses concerned to be heard, the Court takes note of the Court of Appeal's finding that the applicant's lawyer had failed to specify what information she would have wished to obtain from them. The Court notes that O.U. and T.N. had been in the immediate vicinity of the scene of the offence at the material time. The Court considers that the

relevance of the evidence concerned for the establishment of the truth had been recognised by the prosecution, since the bill of indictment had also relied on it, and by the County Court, which granted on several occasions the applicant's request to summon O.U. and T.N. Moreover, although the County Court, in its judgment, did not refer to the statements of O.U., it mentioned that the applicant and M.K. had been ready to attack him after his intervention.

34. Yet, the Court finds that the County Court did not make every reasonable effort to obtain the attendance of O.U. and T.N. in the court. In particular, it drew its conclusion that their whereabouts were unknown merely on the basis of the fact that the summonses sent to them had been returned by the postal service. It did not order the police to compel the witnesses to appear in court. Moreover, it appears that the Court of Appeal not only made no effort to obtain these witnesses' attendance, but it also refused to question T.N. who was present in the courtroom.

35. Taking into account that the domestic courts failed to make every reasonable effort to obtain the attendance and examination of the witnesses initially named by the prosecution and then called by the defence and that they failed to examine adequately the applicant's requests to that effect, the Court finds that the applicant's defence rights were limited to an extent incompatible with the guarantees of fair trial. There has accordingly been a violation of paragraphs 1 and 3 (d) of Article 6, taken together.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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.”

37. After the decision on admissibility the applicant's lawyer did not submit any claim for just satisfaction within the time allowed, although in the letter sent to her on 12 January 2006 her attention had been drawn to Rule 60 of the Rules of Court, which provides that an applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect. Accordingly, since the Court received no reply within the time prescribed in the letter accompanying the decision on admissibility, it considers that there is no reason to award any sum under Article 41 of the Convention (see *Capeau v. Belgium*, no. 42914/98, § 32, ECHR 2005-I).

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

Done in English, and notified in writing on 12 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President