



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

FIRST SECTION

CASE OF LISICA v. CROATIA

(Application no. 20100/06)

JUDGMENT

STRASBOURG

25 February 2010

FINAL

25/05/2010

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Lisica v. Croatia,

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

Anatoly Kovler, *President*,
Nina Vajić,
Elisabeth Steiner,
Khanlar Hajiyeu,
Dean Spielmann,
Sverre Erik Jebens,
George Nicolaou, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 4 February 2010,

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

PROCEDURE

1. The case originated in an application (no. 20100/06) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Croatian nationals, Mr Zlatko Lisica and Mrs Meri Lisica (“the applicants”), on 15 April 2006.

2. The applicants were represented by Mr A. Korljan, a lawyer practising in Zadar. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. On 3 September 2008 the President of the First Section decided to communicate the complaint under Article 6 § 1 of the Convention concerning the applicants' right to a fair trial to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were both born in 1978 and live in Zadar.

1. Background to the case

5. On 24 May 2000 at about 8.00 a.m., on a road in Zadar, three persons, dressed in black and wearing black masks, used a VW Golf II vehicle to block a vehicle belonging to a bank in Zadar which was carrying money.

The perpetrators, who were armed, forced the driver of the bank vehicle to abandon it, took the money and drove away from the scene in the bank's vehicle. After they had reached the nearby coast, they abandoned the vehicle and continued in a motorboat in the direction of the small coastal village of Bibinje. They abandoned the motorboat a couple of metres from the shore of Bibinje.

6. Meanwhile, the police had been alerted and a police vehicle on its way to the Bibinje marina passed a black BMW vehicle driven by the second applicant, driving from the seashore in the direction of the centre of Bibinje. The registration number of the vehicle was noted by the police. Later on it turned out that the vehicle belonged to the first applicant. The police found the abandoned boat floating along the shore.

7. Soon afterwards the police stopped the first and the second applicants, who were riding a motorbike. It was noted by the police that the motorbike seat was wet.

2. Investigation

8. On 24 May 2000 at 8.55 a.m. both applicants were arrested by the police and taken to the Zadar Police Department. At 3 p.m. on the same day the applicants were brought before an investigating judge of the Zadar County Court who immediately ordered their further detention for twenty-four hours.

9. The applicants' defence counsel lodged an appeal complaining that the applicants' detention had been illegal since under the relevant domestic law initial detention could not exceed twenty-four hours. They argued that the applicants had been detained from 8.55 a.m. on 24 May 2000 and their detention had been ordered until 3 p.m. on 25 May 2000, and had therefore exceeded twenty-four hours.

10. During the preliminary investigation by the police a VW Golf II vehicle, stolen from its owner at the time of the robbery in question and subsequently found by the police, was searched by the police without the presence of the applicants or their representatives. The search was carried out on 24 May 2000 from 8.15 a.m. to 11.30 a.m. and the written record of the search established that the plastic mould of one of the locks was missing. Samples of traces were taken and sent for examination.

11. A BMW vehicle belonging to the first applicant was seized as evidence on 24 May 2000 and kept by the police. On the same day the vehicle was searched by police officers K.B., T.J. and T.Z. on the basis of a search warrant issued by the investigating judge in the presence of the applicants' defence counsel. The official record of the search shows that it lasted from 4.10 p.m. to 7 p.m. A number of photographs of the inside of the vehicle were taken but they were not included in the case file. Several items of evidence were found and collected for further examination, including a wet towel, a car carpet, a black sweater, samples from the back seat cover and the cover of the front passenger seat, traces of earth and of all

four tyres. The vehicle was taken to the car park of the Zadar Police Department and kept there. The keys of the vehicle were left in the possession of the police.

12. On 26 May 2000 police officers of the Zadar Police Department, where the vehicle was being kept, entered it without a search warrant and without the knowledge of the applicants or their defence counsel and collected material evidence (see below §§ 17, 19, 26 and 27).

13. On 26 May 2000 the Zadar County Court dismissed the applicants' appeal against their detention on the grounds that, although the applicants had been taken by police officers to the premises of the Zadar Police Department on 24 May 2000 at 9 a.m., a decision on their arrest had been served on them at 3 p.m. and that therefore the statutory time-limit of twenty-four hours was to be counted from that time.

14. A criminal investigation was opened against the applicants on 26 May 2000 on suspicion that they had committed a bank robbery. Further pre-trial detention of both applicants was ordered and they remained in detention until 14 February 2001.

15. On 26 May 2000 an investigating judge of the Zadar County Court heard the applicants, who denied having committed the bank robbery in question and otherwise remained silent.

16. On 27 May 2000 another search of both vehicles was carried out. The search of the VW Golf II vehicle was carried out from 5.20 p.m. to 7.15 p.m., again without the presence of the applicants or their counsel. The door of the vehicle from which the plastic mould was missing was collected for further examination. The search of the BMW vehicle was carried out on the basis of a search warrant issued by the investigating judge and in the presence of the applicants' defence counsel. The record of the search indicates, *inter alia*, that an item, a plastic mould of a car lock was found on that occasion lying in the inside of the vehicle.

17. On 28 May 2000 the applicants' counsel reported to the investigating judge that during the search carried out on 27 May 2000 they had learned in an informal conversation with a police technician that the vehicle had been entered the day before, namely on 26 May 2000. They also alleged that after the search of 27 May 2000 had been carried out, the defence counsel had gone for a drink at the same bar as the policemen and the counsel overheard one of the policemen, officer Z.B., confirming that he had entered the vehicle the day before.

18. On 1 June 2000 police officer T.J. was also arrested on suspicion of having taken part in the planning of the robbery.

19. On 5 June 2000 the applicants' counsel lodged an objection with the investigating judge questioning the authenticity of the results of the search of the first applicant's vehicle of 27 May 2000. On 6 June 2000 the investigating judge submitted a report to the president of the Zadar County Court stating that he would take the allegations of the applicants' counsel into account. On the same day officer Z.B. made a report to the Zadar Police

Department stating that on 26 May 2000 he had entered the BMW vehicle, owned by the first applicant, in order to collect a sample of the seat cover. After entering the vehicle he had used scissors to cut a sample of the back-seat cover measuring 5 by 5 centimetres. He had then exited the vehicle and locked it. On 27 May at about 1 p.m. he had been ordered to deposit the key of the vehicle, placed in a yellow envelope, at the police station, which he had done. In a separate report of the same day, submitted to the Zadar Police Department, a forensic expert, I.R., stated that on 26 May 2000 at about 2.30 p.m. he had attempted to open the door of the BMW vehicle in order to collect a sample of the seat cover for further examination. Since he could not open the door, he had informed the police workshop about it. Around 3 p.m. a mechanic, A.Š., had arrived and succeeded in opening the door next to the driver's seat. I.R. had then asked officer Z.B. to join him, telling him that A.Š. had succeeded in opening the vehicle and asking him to bring scissors. They had then approached the vehicle together and officer Z.B. had entered it and cut a piece of the back-seat cover measuring 5 by 5 centimetres. He had then exited and locked the vehicle.

20. Between 6 and 19 July 2000 the investigating judge heard evidence from twenty-five witnesses, including three witnesses called on behalf of the defence.

21. On 7 June 2000 the investigation against the applicants and two other suspects was extended to the criminal offence of theft of the VW Golf II vehicle, used for the bank robbery.

22. A report on the tests carried out by a Ministry of the Interior Centre for Forensic Expertise, drawn up on 10 June 2000, concluded that the plastic mould of the car lock found in the first applicant's vehicle on 27 May 2000 belonged to a vehicle type VW Golf II.

23. In an appeal of 19 July 2000 against a decision extending his detention, one of the defendants objected, *inter alia*, to the illegal search of the first applicant's vehicle.

24. A report drawn up on 20 July 2000 by E.R., the Chief of the Zadar Police Department, Division of Forensic Police, and submitted to the Zadar County State Attorney's Office, stated that the keys of the first applicant's vehicle had been kept in a metal safe at that Division from 24 to 27 May 2000.

3. Criminal trial against the applicants

25. On 12 September 2000 the Zadar State Attorney's Office lodged a bill of indictment against the applicants and four other persons, including T.J., one of the officers who carried out the search of the first applicant's vehicle on 24 May 2000, in the Zadar County Court, charging them, *inter alia*, with bank robbery and theft of the VW Golf II vehicle. The indictment did not rely in any manner on the item of evidence found in the first applicant's vehicle during the search of 27 May 2000, namely, the plastic mould of the car lock.

26. At a hearing held on 2 November 2000 one of the defence counsel objected that the entry and further search of the first applicant's vehicle on 26 May 2000 had been illegal and that therefore the results of the further search carried out on 27 May 2000 had also been illegal. The court then decided to hear evidence from the police officers and other police employees involved.

27. A.Š., a mechanic, stated that he was employed in the Zadar Police Department and that one day his superior had told him to help officers open a BMW vehicle which had been parked in the police station car park, since there were some problems with the lock. He had managed to open the vehicle. He had seen officer I.N. standing next to the vehicle as well as some other persons. He had not seen what the officers had done in the vehicle because after opening the vehicle, he had left the scene. In answer to a specific question, he stated that the key had not been taken out of a yellow envelope.

28. Officer Z.B. stated that he had entered the BMW vehicle because he had been ordered by his superior, I.N., to collect a sample of seat cover from the vehicle. He had obtained the key from I.R. who had also told him how to open the vehicle. He had understood that I.R. had known that someone else had previously also opened the vehicle. There had been a problem with locking the vehicle because the batteries of the central lock had expired and the only door which could be opened was the one next to the driver's seat. He had opened that door and then, from the inside of the vehicle, opened the rear left door and cut off a sample from the back-seat cover measuring 5 by 5 centimetres. He had then exited the vehicle and handed the key to I.R. All this had been carried out without the presence of any of the defendants or their defence counsel. When specifically asked, he answered that he had not put anything in the vehicle.

29. I.R. stated that he was employed as a forensic technician at the Zadar Police Department. On 26 May 2000 his superior, I.N., had told him that the Centre for Forensic Expertise had told him in a telephone conversation that the police had omitted to enclose a sample of the seat cover from the vehicle of the defendant Zlatko Lisica, and asked for such a sample. He himself had not entered the vehicle; officer Z.B. had done so. After officer Z.B. had collected the required sample, he had locked the vehicle and they had placed the key in an envelope and then in a safe.

30. On 23 November 2000 a three-judge panel of the Zadar County Court dismissed the applicants' request that the transcript of the search of the first applicant's vehicle carried out on 27 May 2000 be excluded from the case-file. The relevant part of the decision reads:

“The search of the BMW vehicle, owned by the first defendant Zlatko Lisica, was carried out in Bibinje, on 24 May 2000 from 4.10 p.m. to 5.30 p.m. The vehicle was driven into the yard of the Zadar Police Department and the tyres were taken off for the purposes of further tests. The search was carried out by authorised persons K.B., T.J. (the fifth defendant) and T.Z. and the minutes were taken by K.B. During the search forensic technicians T.O. and I.R. collected from [...] inside the vehicle traces

of earth from the space for passengers, a rug in front of the driver's seat, traces from the gear stick and micro traces from the front passenger seat and from the rear right and left seats, all for the purposes of further examination.

On that occasion no neutral comparative samples were collected from the seat covers ...

...

The evidence given by witnesses, employees of the Zadar Police Department, Z.B., I.R. and A.Š., show that the BMW vehicle had been opened on 26 May 2000 at around 3 p.m. when Z.B., a forensic technician, at the order of his superior ... I.N., in the presence of his colleague I.R. had cut a sample of the seat cover, which had then been, according to the evidence given by E.R., urgently forwarded to the Zagreb Centre for Forensic Expertise.

According to the written report a new search of the BMW vehicle had been carried out afterwards, on 27 May 2000, when certificates on the seizure of certain items had been issued, which items had been forwarded for tests on 28 May 2000 ...

The defence argues that the search of the BMW vehicle of 27 May 2000 was unlawful because the police had entered the vehicle beforehand, and that therefore what was found during that search is unlawfully obtained evidence, as are the results of [examination of] such evidence ...

It is not disputed that forensic technicians B. and R., with the aid of vehicle-electrician, Š., opened the BMW vehicle which had been temporarily seized and took from it a sample of fabric for testing. It is disputed whether that search was carried out without informing the defence counsel and the investigating judge or not.

This court concludes that the police officers, [and] forensic technicians, were in fact performing an act of inquiry under Article 177(1) of the Code of Criminal Procedure because they were preserving traces necessary for examination; since beforehand they had found and secured a trace in the BMW vehicle, it was then necessary to take a neutral comparative sample in order for urgent tests to be carried out [...]. Therefore, it was an act of inquiry which had to be carried out by the police before investigation (as in the instant case); [the police] had been obliged to [take a comparative sample] during the search of 24 May 2000, but had omitted to do so, and therefore did so later, on 26 May 2000.

As regards the taking of a sample of fabric from the BMW vehicle on 26 May 2000, the police had made an omission in that they failed to make an official written record of the act taken, which would have noted that the act [was provided for by] Article 177(2) of the Code of Criminal procedure. However, such an omission did not infringe the defence rights and all has now been remedied by the questioning of the forensic technician as a witness. Therefore, although the procedures followed by the police were deficient, the nature of these deficiencies did not render the evidence [thus obtained] unlawful, as argued by the defence on the ground that the search had been carried out without the presence of the defence counsel and that therefore the further search of 27 May 2000, irrespective of counsel's presence, had been unlawful because someone had entered the vehicle beforehand and [the authenticity of] the evidence found on 27 May 2000 was open to question

[This court] finds that on 26 May 2000 the police carried out an act of inquiry about which it was not obliged to inform the defence counsel, and therefore the procedures followed [by the police] were not unlawful but acceptable. This court will assess the importance of the evidence – [obtained in] the search carried out on 27 May 2000 – when assessing all the evidence together in view of the fact that a search of the same vehicle had been carried out three days before by a policeman who was later on a defendant [in the same criminal proceedings].

For the above reasons the request of the defence for the exclusion of evidence, [namely] a written record on the search of the BMW vehicle of 27 May 2000, has been dismissed, as well as the request for the exclusion of the evidence relating to the transcript of the search, namely certificates on seized items, photo documentation of the search and [the results of] mechanical examinations, on the ground that they had been obtained unlawfully.”

No separate appeal was allowed, but only an appeal against the judgment, which was yet to be adopted.

31. On 14 February 2001 the Zadar County Court found the applicants guilty of bank robbery and sentenced the first applicant to four years and five months' imprisonment and the second applicant to three years' imprisonment. The relevant operative part of the judgment reads:

“The first defendant, Zlatko Lisica, the second defendant, Meri Lisica, the third defendant, D.P., the fourth defendant, T.J., the sixth defendant, R.N. and the seventh defendant, R.P.

are guilty

because

1. ... on 24 May 2000 at about 8 a.m. in Zadar, with the aim of taking money transported by a VW Golf vehicle ... of the “Dalmatian Bank” in Zadar, the third defendant D.P. together with two unidentified persons, all masked with caps drawn over their heads and wearing gloves, with a stolen vehicle type VW Golf II with licence plates ZD 597 AG ... blocked the [passage of] the transport vehicle and forced the bank employees U.S., D.Š. and I.M. to exit the vehicle, using automatic guns resembling guns type UZI, ordered them to lie down in the road at gun point, and then entered the transport vehicle of the “Dalmatian Bank” in which seven bags of money were lying and went towards the part of Zadar known as Arbanasi – Karma to the Fontana pier ... , where the first defendant Zlatko Lisica was waiting in a motorboat “Nina”, type Bayliner 4504 A, after which they all boarded the motorboat and drove to the “Golden Heaven” sea port in the Punta area of Bibinje where the second defendant Meri Lisica was waiting in a vehicle type BMW 525 with licence plates ZD 974 CA, owned by the first defendant Zlatko Lisica, into which they transferred the money and drove all together to a nearby forest, save for the first defendant Zlatko Lisica, who went to Bibinje on a motorbike ...

...

The fourth defendant, T.J.

2. acting as accessory to the criminal offence of robbery [described] under 1., collaborated with the other defendants immediately after the offence had been committed, informing them, via frequent telephone calls to the third defendant D.P.,

about police activity in the investigation of the criminal offence under 1., which was known to him because he was an officer of the First Police Station of the Zadar Police Department. He thus aided the perpetrators of the criminal offence [at issue], and in particular D.P., to successfully avoid police investigation.

...”

32. The relevant reasoning of the judgment reads:

“In connection with the criminal offence encompassed by indictment no. DO-K-36/00, this court heard evidence from [the following] witnesses:

- U.S, D.Š. I.M. and E.S. – employees of the Dalmatian Bank;
- M.B., T.Š., S.J., E.B. and T.I. – pupils who were present in Foša at the crime scene on the morning in question;
- D.K – an eyewitness of some of the events at the pier;
- T.K., M.K., A.Z., D.Š. and M.K. – eyewitnesses of the events at Kolovare, Fontana;
- Đ.Ž. and T.R. – eyewitnesses of the route of the motorboat on the morning in question;
- S.F. – an eyewitness of the arrival of the motorboat at Punta, Bibinje;
- N.Š., V.B. and J.L – eyewitnesses of the route followed by the BMW owned by the first defendant;
- A.B. – the chief of the criminal police and police officers E.R. and R.L. – eyewitnesses to some of the events in Foša and Bibinje on the morning in question;
- Ž.L., K.L., B.S., A.Š., V.B., A.T. and B.Ć – alibi witnesses; and
- N.P., R.B., V.C. and F. Š.

In connection with the finding of objects after the event, [this court] heard evidence from witnesses E.P. and B.Š.

In connection with the checking of telephone numbers and lists of telephone calls, [this court] heard evidence from witnesses I.M., M.Š. and T.Š.

In connection with the vehicles used ..., [this court] heard evidence from witnesses J.B., A.F. and F.F.

[The court] also heard evidence from police officers K.B., T.O., A.Š., Ž.M., Z.B., B.K., and A.Š., and from other witnesses R.B., N.P., V.C., F.Š., J.Š. and D.B.

Written records of the on-site visits and searches were read out as well as certificates of temporary seizures of objects and lists of telephone calls. With the parties' consent the expert reports were read out ...

The defence sought exclusion of the following allegedly illegally obtained evidence:

...

- written record of the search of the BMW vehicle of 27 May 2000

...

The court concludes that the above-mentioned evidence was not obtained in breach of the provisions of the criminal procedure or in violation of the right to respect for private and family life. In this connection the court draws attention to its reasoning in a decision by the trial bench of 23 November 2000 ...

As regards the search of the BMW vehicle of 27 May 2000, which the defence claims to be illegal on account of the police having entered the BMW vehicle and thus having allegedly 'staged the search' and 'possibly planted an item of evidence', namely the plastic mould of a door handle of a Golf II vehicle, this court finds that it is not unusual that another search of the BMW vehicle was carried out on 27 May 2000 and that it was not a staged search. The evidence given by witnesses B. and O., who carried out the first search of 24 May 2000, together with the fourth defendant T.J., shows that that search had not been detailed. The witnesses stated that they had not opened the glove compartment in the BMW vehicle at all and that the aim of that search had been to find money, arms and evidence of a crime. Since the search was conducted under the supervision of the fourth defendant, it is to be presumed that he 'neglected details'. Furthermore, even the defence, in submissions of 28 May 2000, stressed that the search of 24 May 2000 had only 'concerned a superficial examination of the inside of the vehicle, which meant that the search was to be continued'.

In connection with the above request by the defence, the court has heard evidence from the following police officers: Z.B., I.R., A.Š. Ž.M., B.K., K.B., T.O. and E.R.

...

It has been established that all the defendants know each other and communicate regularly. The first and the second defendants are boyfriend and girlfriend and live in the same village. The first defendant is a good and loyal friend of the third defendant, which follows from the evidence given by witnesses B.S. ..., B.M. ... and J.Š.

...

The second defendant Meri Lisica drove the vehicle owned by the first defendant Zlatko Lisica in the vicinity of the crime scene (evidence given by witnesses B.S., N.Š., J.L. and supported by the expert report on tyre tracks). In the final phase of the event [at issue] she was also spotted by witnesses E.R. and L.

...

Circumstantial evidence after the crime had been committed comprises the fact that the motorboat was left in Punta, Bibinje, the village where the first and the second defendants live and which is not unknown to the third defendant, who had frequently stayed in the summer house owned by his uncle R.P. situated in Punta ...

Immediately after the event tyre tracks of the same tyre type as those on the BMW vehicle owned by the first defendant Zlatko Lisica were found sixteen metres away from the sea front in Punta, where the motorboat had been abandoned. The first defendant's vehicle [was also found] in front of the second defendant, Meri Lisica's,

house with wet seats and covers and with the left fog light switched on. Finally, the third defendant and other perpetrators who have not yet been identified, sought shelter in a nearby forest in Bibinje (evidence given by witness Š. and the report on the on-site inspection of 28 May 2000, and in that connection also the report on chemical tests of 29 January 2001).

During the search of a BMW vehicle owned by the first defendant Lisica [carried out] on 27 May 2000 a plastic mould of the lock of the left-hand door of a vehicle type Golf II was found. The same type of Golf vehicle was used in order to block the bank's vehicle.

The evidence given by witnesses E.R. and R.L. is lawful. They referred to what they had seen on the morning of the events at 8.32 a.m. when they had followed the route of the motorboat. Since the criminal offence at issue was discovered ... immediately after its first phase had been completed and the search for the perpetrators began right after the phone call of witness T.I., the evidence given by witnesses E.R. and R.L. is to be taken as credible in that they said that at 8.32 a.m. they had been on the county road and had seen what they later described ... That they actually saw the vehicle owned by the first defendant, which had been familiar to them, and the second defendant (Meri Lisica) [driving] it correlates with the subsequent events. At the same time a [police] order was issued to find the vehicle owned by the first defendant, which was successfully completed, [the vehicle being] found in about twenty minutes. [Witnesses] R. and L. saw the second defendant M.L. when she arrived at the police station and recognised her as the woman they had seen shortly before at the wheel of the vehicle owned by the first defendant ...

During the proceedings the defence made an objection to the effect that witness E.R. had an interest in the outcome of these proceedings on account of the nature of his job as chief of the Criminal Police of the Zadar Police department ... and that therefore his evidence should not have been taken as credible (the closing arguments of the defence). It is to be noted that the court warned witness E.R. of his duty to tell the truth as well as of the consequences of perjury under the provisions of the Code of Criminal Procedure and that his evidence was assessed [by this court] as any other evidence and the court has concluded that the witness told the truth and did not lie out of the motives imputed to him.

...

On the morning in question witness D.K. ... was at the sea front in Foša ... He saw a motorboat ...

In the motorboat he saw a driver who was seated, and had a female hairstyle, curly upright hair like the singer Jimmy Hendrix, and was wearing dark glasses as if he wished to hide his face ...

He also stated that he had known the first defendant Zlatko Lisica from before and that they used to go for a drink together, and that the police had shown him his photograph. He commented that the driver of the motorboat had reminded him of the first defendant Zlatko Lisica and that he had considered telling the police that. At the hearing he explained that he had been hesitant as to whether to tell the police or not because testifying in court would be painful for him.

The Court concludes that witness K. knows the first defendant Zlatko Lisica and that even if he had recognised him as the driver of the motorboat, he would not have

admitted it, as he had actually said himself. Only at the hearing did he explain his reluctance to tell the police and, later on, the court, that the driver of the motorboat had reminded him of the first defendant Zlatko Lisica, because being a witness was difficult for him. It is true that it is not a pleasant duty to testify before a trial bench at a public hearing. However, there was no such atmosphere at the hearing during the investigation and the witness did not know then whether he would be called to the hearing and whether the first defendant would be indicted at all, and even then he pondered over whether or not he should reveal who the driver of the motorboat had reminded him of, using the words 'I might have told'. For that reason this court concludes that the driver of the motorboat was the first defendant Zlatko Lisica, whom witness K. described by his hairstyle, because it is true that the first defendant Zlatko Lisica has long curly hair like the singer Jimmy Hendrix.

Other witnesses from Karma – Fontana also stated that the driver of the motorboat had long hair and witness K. said that [he had thought] it was a woman, obviously on account of his shoulder-length hair (as the first defendant actually had and which is visible from the photographs in the case file).

...

On the morning in question witnesses A.Z., M.K. and T.K. were digging canals ... at Fontana – Karma ...

Witness [A.]Z. stated that ... he had seen a motorboat coming from the direction of Foša ... and three men who jumped into it carrying two bags ... The driver of the motorboat was a tall person, bigger than himself and had longer, untidy dark hair.

...

On the morning in question witnesses D.Š. and M.K. were in a cafe-bar near Fontana ... [D.]Š. said that ... she had seen a motorboat coming from the direction of Zadar and heading east, towards Bibinje, and that ... the driver of the motorboat had black curly hair and she had thought it was a woman ...

Although witness [A.]Z. stated at the hearing that he was sure that the driver of the motorboat had not been the first defendant Zlatko Lisica, the court does not accept that part of his statement as credible and concludes that it owes to the need not to make enemies. All the witnesses from Karma – Fontana saw that the driver of the motorboat had dark, shoulder-length, curly hair which was sticking out from under a cap and that the driver was a tall person. It is to be noted that the first defendant Zlatko Lisica is 1.91 metres tall.

...

On the morning in question at about 8 a.m., as she was entering a laundry where she worked, witness N.Š. ... saw a dark-coloured vehicle type Audi, BMW or Mercedes parked near a house in construction belonging to Roko Lisica, situated about a hundred metres from the sea and about forty to fifty metres from where she stood. At about 8.25, when she exited the laundry, she no longer saw the vehicle.

...

On the morning in question at about 8.30 a.m. witness A.B. ... was driving on a county road near Bibinje ... and saw a black BMW parked on a dirt road on the right

... he saw two or three young men in the vehicle. He continued driving on the county road in the direction of Sukošan and saw in his rear-view mirror that the BMW was driving behind him. When he later looked again the BMW was gone. He concluded that it either turned left into a forest ... or did a U-turn on the county road and returned.

...

After being informed [about the robbery] by their colleague T.I., witnesses E.R. and R.L. [policemen] drove on the county road towards Bibinje, in the direction taken by the motorboat. ... In Bibinje, at about 8.32 a.m. they encountered, coming from the opposite direction, a black BMW vehicle with licence plates ZD 974 CA, known to E.R. as the vehicle owned by the first defendant Lisica. ... A woman between 20 and 25 years of age, with brown hair tied in a pony tail, was sitting at the steering wheel and driving at a speed of about 80 kilometres per hour. R. Immediately ordered that they go to the house of the first defendant Zlatko Lisica to seek both him and the vehicle. He knows that the BMW vehicle had been found parked near the house of the second defendant and that the first and the second defendants had been found at the railway crossing, driving on a motorbike towards Zadar.

...

When the witnesses returned to the Zadar Police Station between 11 a.m. and noon they saw in the corridor the driver of the BMW, who was in fact the second defendant Meri Lisica, girlfriend of the first defendant Zlatko Lisica.

The above shows that by 8.20 a.m. the perpetrators of the robbery had abandoned the motorboat, jumped into the shallow water ... and taken the money, which must have taken a couple of minutes, which means that by 8.10 a.m. and at the latest at 8.15 a.m. they had already arrived in Punta, Bibinje. For that reason the persons who were sitting in the BMW were wet from the sea, and especially the driver of the BMW who drove it from Punta to Čukovica [a nearby forest] who was entirely wet because the driver's seat, break and accelerator pedals were wet from the sea, as recorded in the record of the search of that vehicle. ...

...

On the morning in question at about 7.45 a.m. witness B.S. was returning with his brother from a gas station ... and drove on the road through Punta and then through the village of Bibinje. When passing a house in construction he saw a dark-coloured vehicle and a girl sitting inside and he thought that it was Meri Lisica, but his brother told him that it was not her.

...

During the on-site inspection carried out on 24 May 2000 at 11.45 a.m. in Punta in Bibinje four car tyre tracks were found and their cast was taken.

The report relating to the search of the BMW vehicle owned by the first defendant carried out on 24 May 2000 at 4.10 p.m. shows that it was found parked in front of the house of the second defendant Meri Lisica, locked and with the right fog light switched on. A wet greyish-black beach towel was thrown over the driver's seat. The carpet [from the floor] below the accelerator and break pedals was wet as well as a

part of the carpet [from the floor] in front of the right-side back seat. The tyres of the vehicle were type 'Michelin energy' radial XSE dimensions 195/65 R 15 no. 91 XT2.

The carpets [on the floor] in front of the driver's, front passenger's and back right-side seats were taken for the purposes of examination, as it follows from the statements of witnesses B. and the order for examination. The towel, traces of earth found at the break pedal and all four tyres with wheels, taken from the vehicle by an employee of the car-mechanic workshop of the Zadar police Department, J.Š., were also sent for examination.

The cast of the tyre tracks collected in Punta in Bibinje, found sixteen metres from the sea ..., according to the technical expert ... belongs to a tyre type 'Michelin energy' dimensions 195/65 R 15, the same as those found on the BMW vehicle owned by the first defendant.

...

The report relating to the search of the BMW vehicle of 27 May shows that a plastic mould of a lock of an unknown vehicle, a screw-driver, a rasp and other items were found on the floor of the vehicle in front of the front passenger seat ...

According to the report of a chemical expert ... various types of ions characteristic of sea water were found on the carpets from the BMW vehicle ... the towel and break pedal.

...

On the basis of the expert reports, record of the on-site visit and search the court has concluded as follows: The second defendant Meri Lisica drove over the BMW vehicle sixteen metres from the sea front in Punta at the moment when she expected the motorboat to arrive, which had most likely been communicated to her by telephone. There were three persons in the BMW vehicle, wet from the sea. One of them drove the vehicle towards Čukovica for which reason the break pedal was wet from the sea. This is in conformity with the evidence given by witness B. who saw two or three young men in the BMW vehicle when it was parked on a dirt road [off the county road] ... The towel was put on the driver's seat by Meri Lisica before she drove the vehicle from Čukovica in order not to get wet. On the way from Punta to Čukovica she obviously sat in the only dry place in the BMW – the back left-side seat, behind the driver, for which reason witness B. did not see her because she is 169,5 metres tall, and the three perpetrators are between 1.78 and 1.93 metres tall ... This is in conformity with the evidence given by witnesses E.R. and R.L. that they saw a woman driving the BMW vehicle from the direction of Sukošan towards Bibinje, which means that they saw the second defendant when she was returning in the vehicle from Čukovica to Bibinje in order to park it in front of her house and meet the first defendant Zlatko Lisica, who came to pick her up on a motorbike.

...

Witness K.B., who carried out the search of the BMW on 24 May 2000, said that it was possible that during the [first] search he had not seen the plastic [mould of the lock] because the search of 24 May 2000 carried out by him and his colleagues had been superficial.

The photographs [taken during] the search of 24 May 2000 show the same hand tools near the front passenger seat in the BMW as the ones shown in the photographs taken during the search of 27 May 2000 when the carpet from [the floor in front of] the co-driver's seat had already been removed and sent for examination on 25 May 2000 ... Therefore, it cannot be evidence planted by the police but [it shows that] the search of the vehicle BMW [carried out] on 24 May 2000 was superficial.

A report drawn up by a mechanical expert shows that the inspection of the Golf II vehicle owned by J.B. revealed that a door-handle and lock were missing from its left door. The plastic mould found in the BMW was a part of the door handle of a vehicle type Golf II. Since the plastic mould did not bear an inscription of the year of its manufacture it could not be established with certainty that it had been manufactured in 1989, the year when the vehicle of J.B. [the owner of the Golf in question] had been manufactured.

However, it has been established that a part of the lock of the left door of a vehicle type Golf II was found in the BMW vehicle owned by the first defendant. Exactly the same type of Golf, stolen from J.B. and missing its left-hand door handle ... had been used to block the bank's delivery vehicle. J.B. said that before his vehicle had been stolen during the night of 22 to 23 May 2000 there had been no damage to the lock of the left door.

Although the mechanical expert could not conclusively establish that the plastic mould found in the BMW belonged to the vehicle owned by J.B., nevertheless the overall evidence leads to the conclusion that it was not a coincidence that a part of a lock of a vehicle type Golf II was found in the BMW vehicle owned by the first defendant and that a vehicle type Golf II had been used to block the bank's vehicle. In view of all the other evidence, namely the statements of the witnesses I.Š. and E.R., findings of the chemical and materials experts and the lists of telephone numbers, it is to be concluded that the lock mould found in the BMW vehicle owned by the first defendant Lisica belonged to the Golf II vehicle owned by J.B.

...

Witness J.Š. ... stated during the investigation ... that she had known the third defendant D.P. since July 1998 and ...that on Tuesday 23 May 2000 ... he had warned her not to go into the city on 24 May 2000 because there might be some shooting ...

Seven or eight days later ... they had met again and ... when she had asked if he had something to do with the bank robbery he had told her that their plan had worked out and ... that there had been between two and two and a half million Croatian kuna and that they had thrown some of it into the sea ... The money had been placed in a safe and would not be touched until the situation had calmed down ...

... through a conversation with D. she had learned that he was good friends with Zlatko Lisica ... and his girlfriend Meri Lisica.

At the hearing [before the trial court] she stated that the third defendant D.P. had never told her anything about any robbery ...

...

As regards the statement she had made during the investigation, she explained that ... she had mentioned the names of the first and the second defendants because the

police had put some photographs in front of her and under that impression and out of fear of the police she had mentioned their names as an answer to the question by the investigating judge whether she had known Zlatko and Meri Lisica.

D.P. had never mentioned any motorboat ... or the amount of money stolen from the Dalmatian Bank. She had mentioned that to the investigating judge only because the police had told her so.

The police in Zadar had not been fair to her; they threatened her with losing the flat where she lived, which is the subject of court proceedings before the Zadar Municipal Court. Her father, who had worked in Gospić, had lost his employment when it had become known that she was going to change her deposition. ...

...

It is true that the Zadar Municipality brought proceedings to evict the family of witness Š. ..., but the first-instance judgment [ordering their eviction] was quashed by the Zadar County Court ... on 28 June 2000 ... It is dubious how much is known to the criminal police about these proceedings, and even more so whether it would be a suitable method of putting pressure on a witness. The fact is that the father of the witness lost his employment long after her deposition [had been made], and it surely could not have served the police to put pressure on her to make the statement she had made in the investigation on 16 June 2000.

The court concludes that the deposition of the witness given in investigation is objective and not a result of police instructions and pressure. Her statement is so lengthy, detailed and personal that it is impossible that it had been told to her by the police and that she then repeated it in such detail before the investigating judge.

...”

33. A detailed analysis of the lists of telephone calls made from the cellular phones and land lines of the defendants and some unidentified persons follows, showing that in the period before the robbery and after it had been completed those persons communicated frequently.

34. The court further analysed the results of a chemical examination showing that the work overalls found at a rubbish dump in Čukovica (a forest near Bibinje) were wet from the sea and were the same ones whose traces had been found in the VW Golf II vehicle which had been used to block the way of the Dalmatian Bank's transportation vehicle, also a Golf.. The same traces were also found in the latter vehicle.

35. The relevant further reasoning reads:

“... when all the evidence is put together, [this court] concludes that the force of evidence in this case comes from a large number of small facts and concurrences, each in itself seemingly insignificant, but when they are seen as a whole and in their mutual correlation, they amount to firm proof that the first defendant Zlatko Lisica, the second defendant Meri Lisica and the third defendant D.P. had committed the criminal offence of robbery ... together with at least two unidentified persons ... The third defendant D.P. was one of the three masked men who, carrying arms, forced the employees of the bank to exit the transport vehicle ... after which they drove away at high speed in the same vehicle, carrying with them the bags full of money ... which they transferred to the motorboat in Fontana and then [took in] the BMW vehicle

owned by the first defendant to a forest and then [deposited in a] safe ... The first defendant Lisica drove the motorboat, and the second defendant Lisica waited for him, the third defendant and two unidentified persons in Punta. After arriving in Punta, the first defendant Lisica drove to Bibinje, and the second defendant and the others, carrying the money, drove to the forest, [The second defendant] then returned, parked the vehicle in front of her house, and the first defendant picked her up on a motorbike and they drove towards Zadar.”

36. On 6 April 2001 the applicants lodged an appeal complaining, *inter alia*, that the reliance of the first-instance judgment on the evidence obtained during the search of 27 May 2000 violated their right to a fair trial because on 26 May 2000 the police had already entered the BMW vehicle without the presence of the defence or neutral witnesses, which made it possible for the police to plant evidence in the vehicle. They also argued that the entry of the police into the BMW vehicle on 26 May 2000 had been unlawful and that therefore any evidence obtained during the search of 27 May 2000 had also been unlawfully obtained.

37. The State Attorney also lodged an appeal asking that the sentence be increased.

38. On 2 May 2002 the Supreme Court (*Vrhovni sud Republike Hrvatske*) dismissed the applicants' appeal and also increased the first applicant's sentence to six years and six months' imprisonment and the second applicant's sentence to four years and ten months' imprisonment. The relevant part of the judgment reads:

“As regards the defendants' arguments stated in their appeal that the impugned judgment is based on unlawfully obtained evidence which they had already sought to be excluded during the trial, it is to be stressed that, as regards the search of the vehicle of the defendant Zlatko Lisica carried out on 27 May 2000, that search was carried out in conformity with the provisions of the Code of Criminal Procedure and in the presence of the defence counsel. It is true that on that occasion they had learned that the vehicle of the defendant Zlatko Lisica had meanwhile been opened by the police in order to collect a fabric sample for the purposes of having it tested for contact traces, [a fact] of which neither defence nor the investigating judge had been informed. However, since neither the samples of seat cover collected from the vehicle of Zlatko Lisica, which was subject to testing for contact traces, nor the [results of] the tests themselves were evidence relied on in the [first-instance] judgment, the above-mentioned omission of the police does not amount to a grave procedural breach within the meaning of Article 367(2) of the Code of Criminal Procedure.

As regards the search of the vehicle of 27 May 2000 and the written record of it, as stated above that search was carried out in accordance with the provisions of the Code of Criminal Procedure. As regards the evidence found and secured during that search, a court is obliged under Article 351(2) of the Code of Criminal Procedure to duly assess each item of evidence separately and in connection with other evidence, and on the basis of such an assessment reach a conclusion as to whether a certain fact has been sufficiently proven. In this regard, when assessing the evidence found during the search [of 27 May 2000], the first-instance court gave valid and convincing reasons, which this court accepts.”

39. The applicants' subsequent constitutional complaint of 26 June 2002 was dismissed by the Constitutional Court (*Ustavni sud Republike Hrvatske*) on 12 October 2005.

II. RELEVANT DOMESTIC LAW

40. The relevant part of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002 and 62/2003) provides as follows:

Article 177

“(1) If there are grounds for suspicion that a criminal offence subject to public prosecution has been committed, the police shall be bound to take necessary measures aimed at discovering the perpetrator, preventing the perpetrator or accomplice from fleeing or going into hiding, discovering and securing traces of the offences and objects of evidentiary value as well as gathering all information which could be useful for conducting criminal proceedings. The police authorities shall inform the State Attorney about any measures taken within the period of 24 hours from the moment the first measure was taken ...

(2) In order to fulfil the duties referred to in paragraph 1 of this Article, the police authorities may seek information from citizens, apply polygraph tests, voice analysis, carry out the necessary inspection of the means of transportation, passengers and luggage, ... undertake necessary measures regarding the identification of persons and objects ... An official record shall be made on facts and circumstances determined in the course of the inquiry, which might be of interest for the criminal proceedings.

...”

41. Pursuant to Article 430 of the Code of Criminal Procedure, where the defendant requests an amendment of a final judgment following a finding by the European Court of Human Rights of a violation of, *inter alia*, the right to a fair trial, the rules governing a retrial shall apply.

THE LAW

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

42. The applicants complained that the criminal proceedings against them had been unfair, contrary to the requirements of Article 6 § 1 of the Convention, which reads as follows:

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

43. The Government contested that argument.

A. Admissibility

44. The Court notes that this complaint is not 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.

B. Merits

The parties' submissions

45. The applicants argued that the manner in which the evidence was obtained in the criminal proceedings against them fell foul of the requirements of a fair trial under Article 6 § 1 of the Convention. They explained that the national courts, in establishing that the applicants had committed a bank robbery, relied to a significant degree on the fact that a plastic mould of a car lock belonging to a vehicle type VW Golf II which was found in the first applicant's vehicle had belonged to the Golf vehicle used in the commission of the bank robbery at issue. The fact that the plastic mould in question had been missing from the Golf vehicle was established during the search of that vehicle carried out by the police on 24 May 2000, without the applicants or their counsel being either informed of or present at that search. Furthermore, during the first search of the BMW vehicle belonging to the first applicant, also carried out on 24 May 2000, the plastic mould in question had not been found; it had only been found during the second search on 27 May 2000. However, it turned out that the police had, without authorisation and without the applicants or their counsel being informed or present, entered the BMW vehicle on 26 May 2000. The applicants argued that the circumstances surrounding the finding of the plastic mould in question in the first applicant's vehicle had cast serious doubts on the authenticity of these findings and indicated a possibility that the evidence in question had been planted by the police.

46. The Government maintained that the proceedings had been fair and that the national courts had heard evidence from a number of witnesses concerning the entry into the first applicant's vehicle on 26 May 2000 and had given adequate reasons in respect of the applicants' objections to the manner in which the evidence was obtained. They also stressed that during the investigation the applicants had failed to object to the second search of the first applicant's vehicle. Furthermore, the applicants' conviction had not been solely based on the disputed evidence but had been corroborated by other relevant and sufficient evidence.

The Court's assessment

47. The Court reiterates that, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (*Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275, and *Salduz v. Turkey* [GC], no. 36391/02, § 50, 27 November 2008).

48. The Court reiterates further that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question ... (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V).

49. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009).

50. The Court notes that the first applicant's vehicle was searched by the police on 24 May 2000 pursuant to a search warrant issued by the competent investigating judge. Another search of the same vehicle was carried out on 27 May 2000, again by the police and pursuant to a search warrant issued by the competent investigating judge, and during that second search an item, a plastic mould of a lock belonging to a vehicle type Golf II, was found. This item was subsequently used as evidence in the criminal case against the applicants. However, it also turned out that between the searches carried out on 24 and 27 May 2000, the police officers of the Zadar Police Department where the vehicle was being kept had entered the vehicle for a further search, without any search warrant and without the knowledge

or presence of the applicants or their legal representatives. The applicants do not argue that the search carried out on 27 May 2000 when the disputed item of evidence was found in the vehicle was unlawful as such but that the evidence found had been planted by the police when they had entered the vehicle between 24 and 27 May 2000 and that therefore it should have been excluded from the criminal case file and could not serve as a basis for their conviction.

51. In view of the above-mentioned principles established in *Bykov v. Russia* (see above, § 49), the Court has examined firstly whether the applicants were given the opportunity of challenging the authenticity of the evidence and of opposing its use. In this connection the Court observes that the applicants were able, through their chosen counsel, to lodge an objection as to the authenticity of the item of evidence in question and that they did so at the beginning of the trial proceedings, in the adversarial proceedings before the first-instance court and later on in their grounds of appeal.

52. The Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The role of the Court is limited to verifying whether the effects of such interpretation are compatible with the Convention (see, *Miragall Escolano and Others v. Spain*, no. 38366/97, §§ 33-39, ECHR 2000-I).

53. The national courts established that it was true that the vehicle in question, which was kept by the police, was entered by the police officers on 26 May 2000, without a search warrant and without the knowledge or presence of the applicants or their counsel. The officers involved explained that they had entered the vehicle only to take a sample of the seat cover in the vehicle in order to send it for an expert examination. The national courts accepted that explanation and the police officers' statements that they had not planted the disputed item of evidence. They further held that there had been no procedural requirement under the relevant national law to inform the applicants or their counsel about the search of 26 May 2000.

54. The Court will now examine whether the second test from *Bykov* was satisfied in the specific circumstances of the present case by assessing the quality of the evidence in question, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see § 49 above). In this connection the Court places decisive importance on the following factors.

55. The BMW vehicle owned by the first applicant was seized by the police as evidence in the criminal proceedings against him and was kept by the police. While some of the police officers stated that the key had been kept in a metal safe, the others said that it had been kept in a yellow envelope. Whichever is the case, the facts of the case show that the police officers had free access to the key. It is undisputed that the police officers entered the vehicle without any authorisation, such as a search warrant. The applicants or their counsel were not informed of the further search of the

vehicle which took place between 24 and 27 May 2000. During the search carried out on 24 May 2000 the contested item of evidence was not found. The explanation given by the national courts that the first search, carried out according to the procedures prescribed by law, had been superficial is not sufficient in view of the guarantees of a fair trial. In this connection the Court also notes a discrepancy between the duration of the first search of the BMW vehicle carried out on 24 May 2000, as indicated in the official record of the search and as established by the Zadar County Court. The official record shows that the search of 24 May 2000 lasted from 4.10 p.m. to 7 p.m. (see § 11 above), while the Zadar County Court stated that it lasted from 4.10 p.m. to 5.30 p.m. (see § 29 above).

56. While it goes without saying that carrying out several searches of the same premises is in no way contrary to the principles of a fair trial, each of these searches has to comply with the minimum requirement that the defendant in the criminal proceedings is given an adequate opportunity to be present during the search. The applicants in the present case, however, were not informed of the search carried out between 24 and 27 May 2000 and thus were not given an opportunity to be present. Apart from the police officers who carried out the search and other employees of the police, there were no other witnesses present during the search. In this connection the Court stresses that the police force is a part of the State apparatus and acts in the criminal proceedings as an ally of the prosecution. The Court attaches significant importance to appearances in matters of criminal justice, since justice must not just be done but must be seen to be done. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Borgers v. Belgium*, 30 October 1991, § 24, Series A no. 214-B, and *Mirilashvili v. Russia*, no. 6293/04, § 228, 11 December 2008).

57. Thus, in the Court's view the circumstances of the searches of BMW vehicle cannot eliminate all doubt as to the reliability of the findings of the search carried out on 27 May 2000. That doubt is reinforced by the following. The search of the VW Golf II vehicle in the morning of 24 May 2000 was carried out without the presence of the applicants or their counsel and it appears that they had not been informed of it. The record of this search established that the plastic mould of one of the locks was missing. This element carried weight in the criminal proceedings against the applicant since the trial court concluded that it was exactly the same plastic mould which was subsequently found in the first applicant's vehicle (see paragraph 22 above).

58. The Court stresses that it might be that in certain circumstances, such as where the identity of perpetrators is unknown or where any delay in securing the evidence might cause it to perish, the police or other competent authorities will have to carry out searches or other acts aimed at securing evidence without the presence of the defendants. However in the present case the defendants had been identified as potential perpetrators and arrested as early as 24 May 2000 at 8.55 a.m. (see paragraph 8 above), that is to say

before the search of the BMW vehicle was carried out. Furthermore, nothing in the case-file suggests that the evidence in question was of a perishable nature. Therefore, there was no good reason to carry out the searches in question without the presence, or even knowledge, of the applicants or their counsel or at least in the presence of some neutral witnesses.

59. The Court shall now proceed with assessing the importance of the disputed item of evidence for the criminal conviction of the applicants. While it is true that the evidence obtained by the search carried out on 27 May 2000 was not the only evidence on which the conviction was based, it was nevertheless given significant weight by the national courts. In this connection the Court stresses the Zadar County Court's finding that the plastic mould found in the first applicant's vehicle had belonged to the VW Golf vehicle used for the bank robbery at issue. Of particular significance in this connection is the following passage:

“However, it has been established that a part of the lock of the left door of a vehicle type Golf II was found in the BMW vehicle owned by the first defendant. Exactly the same type of Golf, stolen from J.B. and missing its left-hand door handle ... had been used to block the bank's delivery vehicle. J.B. said that before his vehicle had been stolen during the night of 22 to 23 May 2000 there had been no damage to the lock of the left door.

Although the mechanical expert could not conclusively establish that the plastic mould found in the BMW belonged to the vehicle owned by J.B., nevertheless the overall evidence leads to the conclusion that it was not a coincidence that a part of the lock of a vehicle type Golf II was found in the BMW vehicle owned by the first defendant and that a vehicle type Golf II had been used to block the bank's vehicle. In view of all the other evidence, namely the statements of the witnesses I.Š. and E.R., findings of the chemical and materials experts and the lists of telephone numbers, it is to be concluded that the lock mould found in the BMW vehicle owned by the first defendant Lisica belonged to the Golf II vehicle owned by J.B.”

It emerges clearly from this passage that the criminal court, in concluding that the applicants committed the bank robbery in question, relied on the evidence found in the first applicant's vehicle on 27 May 2000. This shows that the item of evidence in question was relevant and important. What is more, it was the sole direct evidence, connecting the first applicant's vehicle and the vehicle driven by the robbers. The Court's task is not to assess whether the applicants' conviction would have been secured if the contested item had been excluded. Answering the question whether the circumstantial evidence in the specific circumstances of the present case sufficed for the conviction would be the prerogative of the domestic courts. Nor does the Court have to speculate on what the outcome of the trial would have been had that evidence not been used. Its task is to rule on the fairness issue; whether the use of the disputed item of evidence satisfied the requirement of the fairness of the trial.

60. Having regard to the purpose of the Convention, which is to protect rights that are practical and effective, and to the prominent place the right to

a fair administration of justice holds in a democratic society within the meaning of the Convention, the Court considers that any restrictive interpretation of Article 6 would not correspond to the aim and the purpose of that provision (see, *mutatis mutandis*, *Delcourt v. Belgium*, 17 January 1970, Series A no. 11, § 25, and *Ryakib Biryukov v. Russia*, no. 14810/02, § 37, ECHR 2008-...). In the present case the search of the VW Golf vehicle carried out by the police on 24 May 2000 as well as the entry of the police into the first applicant's vehicle on 26 May 2000, both without the applicants or their counsel being present or even informed of these acts and without a search warrant for the search of the BMW on 26 May 2000, produced an important piece of evidence. The Court stresses that it was the only evidence which established direct links with the first applicant's vehicle and the Golf II vehicle driven by the robbers, while all other evidence had circumstantial quality. However, the circumstances in which it was obtained cannot eliminate all doubt as to its reliability and affected the quality of the evidence in question.

61. Viewed in light of all the above-mentioned principles, the foregoing considerations are sufficient to enable the Court to conclude that the manner in which this evidence was used in the proceedings against the applicant had an effect on the proceedings as a whole and caused them to fall short of the requirements of a fair trial.

62. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

63. The applicants complained that their detention on 25 May 2000 from 8.55 a.m. to 3 p.m. had been unlawful. They relied on Article 5 of the Convention.

64. The Court notes that the final decision concerning the applicants' detention on 25 May 2000 was given on 26 May 2000 (see paragraph 10 above), while the application was lodged with the Court on 15 April 2006. Therefore, this complaint has been lodged outside the six month time-limit.

65. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicants claimed 200,000 euros (EUR) each in respect of non-pecuniary damage.

68. The Government deemed the sum claimed excessive.

69. The Court firstly notes that the applicants have a possibility to seek a fresh trial (under Article 430 of the Croatian Code of Criminal Procedure). However, the Court takes the view that the applicants have suffered some non-pecuniary damage as a result of the violation found which cannot be made good by the Court's mere finding of a violation. Nevertheless, the particular amount claimed is excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicants jointly the sum of EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicants.

B. Costs and expenses

70. The applicants also claimed costs for their legal representation, leaving it to the Court to assess those costs in accordance with its practice.

71. The Government stressed that the applicants had failed to specify their claim for costs and expenses and that therefore it had to be rejected.

72. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are 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 2,000 for the proceedings before it, plus any tax that may be chargeable to the applicants on this amount.

C. Default interest

73. 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 complaint concerning the applicants' right to a fair trial admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

- (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, which are to be converted into Croatian kunas at the rate applicable at the date of settlement:
- (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicants;
 - (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicants;
- (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Spielmann is annexed to this judgment.

A.K.
S.N.

CONCURRING OPINION OF JUDGE SPIELMANN

1. I agree in all respects with the Court's conclusions as to the violation of Article 6 § 1 of the Convention.

2. However, given its importance, I would have liked the content of paragraph 69 to have been included in the operative part of the judgment as well, for reasons I have explained in detail in the joint concurring opinion (with Judge Malinverni) in the case of *Vladimir Romanov v. Russia* (no. 41461/02, 24 July 2008) and, *mutatis mutandis*, in the partly dissenting opinion (also with Judge Malinverni) in the case of *Prežec v. Croatia* (no. 48185/07, 15 October 2009).

3. Firstly, it is common knowledge that while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court reached a finding of a violation or no violation of the Convention, and is of decisive importance on that account for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention. It is therefore a matter of some significance, from a legal standpoint, for part of the Court's reasoning to appear also in the operative provisions.

4. And indeed, what the Court says in paragraph 69 of the judgment is in my view of the utmost importance. It reiterates that the most appropriate form of redress in cases where it finds that the applicant has not had access to a court, in breach of Article 6 § 1 of the Convention, would, as a rule, be to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair hearing (the principle of *restitutio in integrum*).

5. The reason why I wish to stress this point is that it must not be overlooked that the amounts which the Court orders to be paid to victims of a violation of the Convention are, according to the terms and the spirit of Article 41, of a subsidiary nature. Wherever possible, the Court should therefore seek to restore the *status quo ante* for the victim. It should even, in cases such as the present one, reserve its decision on just satisfaction and examine this issue, where necessary, only at a later stage, should the parties fail to settle their dispute satisfactorily.

6. Admittedly, States are not required by the Convention to introduce procedures in their domestic legal systems whereby judgments of their Supreme Courts constituting *res judicata* may be reviewed. However, they are strongly encouraged to do so. I believe that where, as in the present case, the respondent State has equipped itself with such a procedure (Article 430 of the Croatian Code of Criminal Procedure), it is the Court's duty not only to note the existence of the procedure, as paragraph 69 of the judgment does, but also to urge the authorities to make use of it, provided, of course, that the applicant so wishes. However, this is not legally possible unless such an exhortation appears in the operative provisions of the judgment.

7. By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court's judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers' task in discharging these functions.

8. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also, in the operative provisions, indicate to the State concerned the measures it considers most appropriate to redress the violation.