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

FIRST SECTION

DECISION

Application no. 14541/15
Charles Bernard O'NEILL
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 8 January 2019 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Gilberto Felici, *judges,*
and Abel Campos, *Section Registrar,*

Having regard to the above application lodged on 13 March 2015,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Charles Bernard O'Neill, is a British national who was born in 1962 and is currently serving a prison sentence at HMP Saughton, Edinburgh. He was represented before the Court by Mr J. Rhodes, a lawyer practising in Glasgow, Scotland, with McClure Collins Solicitors.

2. The United Kingdom Government ("the Government") were represented by their Agent, Mr Paul McKell of the Foreign and Commonwealth Office.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Indictment and criminal trial

4. In September 2008 the applicant was indicted in the High Court along with a co-accused ("WL") on a number of serious charges. These included the murder of AG, attempting to defeat the ends of justice by disposing of her body, and a series of sexual offences against children. The trial took place in two parts, before different juries. The charges in the first part of the trial related to the sexual offences, and the charges in the second part of the trial related to the murder of AG. The present complaint is solely concerned with the first part of the trial, which took place from 26 April to 12 May 2010. The second part of the trial has already been considered by the Court in *O'Neill and Lauchlan v. the United Kingdom*, (no. 41516/10 and 75702/13, 28 June 2016).

5. The sexual offences on the indictment included the following:

- charge 5 (against the applicant only): assaulting IY (a fourteen year old with learning difficulties), drugging him, taking hold of him by the body, tickling him, rubbing him on the body, pulling him down onto a bed, removing his lower clothing and penetrating his hinder parts to his injury;
- charge 7 (against the applicant and WL) detaining a fourteen year old (DW) against his will, struggling with him, repeatedly attempting to kiss him, attempting to induce him to consume controlled drugs, concealing him within a locked wardrobe, urinating on him, holding him down, and attempting to have unnatural carnal connection with him;
- charge 8 (against the applicant and WL): assaulting a seventeen year old (JG, who was described by the courts as being a "person of very limited intelligence"), sharing a bed with him, handling and sucking his private member and inducing him to do the same, inducing him to consume controlled drugs and alcohol, inducing him to masturbate himself, penetrating his hinder parts and having unlawful carnal connection with him; and
- charge 10 (against the applicant and WL): intentionally meeting a six year old (SA) with the intention of engaging in unlawful sexual activity involving him or in his presence.

6. Charge 8 related to conduct which allegedly occurred in both Scotland and England. However, on the witness stand JG only gave evidence of conduct which had taken place in England. Consequently, at the conclusion of the prosecution case, the defence submitted that there was no case to answer on charge 8 as there was no evidence of a crime having been

committed in Scotland. The prosecution conceded that this was the case and, pursuant to section 97 of the Criminal Procedure (Scotland) Act 1995 (see paragraph 21 below) the trial judge acquitted the applicant and WL of charge 8.

7. At the relevant time, the Crown had no right to appeal an acquittal in solemn proceedings.

8. According to Scottish criminal law, there must be at least two sources of evidence to prove every element of the charge which is essential to the definition of the crime. Thus, no-one can be convicted of a criminal offence upon the unsupported evidence of a single witness, however credible or reliable that witness might be. Notwithstanding the acquittal on charge 8, the trial judge allowed the prosecution to rely on the evidence it had led in respect of charge 8 as corroboration for charges 5 and 7.

9. In the course of his summing up to the jury, the trial judge gave the jury the following direction on the presumption of innocence:

> "The first general direction I wish to give, ladies and gentlemen is to make it clear that an accused person is presumed to be innocent of any charge against him. This presumption of innocence which any accused enjoys is one that exists throughout the case unless and until the accused is proved to be guilty. In a criminal court in Scotland no one is required to prove that he is innocent and I'm sure none of us would wish the position to be any different."

10. Then, having taken the jury through the indictment, the trial judge emphasised that they were concerned only with charges 5, 7 and 10, and it was only in respect of those charges that they were required to return verdicts.

11. In respect of corroboration, he directed them:

> "... in Scotland no one can be convicted of a criminal offence upon the unsupported evidence of a single witness no matter how credible and reliable that single witness may be. Scots law insists that there must be corroboration, that is to say separate evidence from some other independent credible and reliable source which confirms or supports the principal source of evidence. The separate sources of evidence may be of a different character to each other. ... however, whether the evidence upon which the Crown relies is direct evidence or circumstantial evidence or a combination of the two, at least two separate sources of evidence are needed to prove what I have referred to as the essential facts in the case, that is whether the crimes charged in the indictment were committed and if they were whether the accused committed them."

12. He later expanded on that direction, stating:

> "Now ladies and gentlemen you'll recall that, at an earlier stage, I gave you general directions about the need for corroboration ....
>
> Sometimes, as counsel explained, and for various reasons, there is little or no eyewitness evidence and this can happen, as you can readily understand, especially in the case of sexual offences. In such cases a special rule can apply. This is the rule of mutual corroboration and it is necessary in the circumstances of this case that I should explain it to you.

It is, as was mentioned in the speeches, also known by this rather mysterious name of the *Moorov* doctrine after the case in which it was first developed by the court. Now this rule can apply where (a) the accused is charged with a series of similar crimes, (b) there is a different victim of each crime, (c) the commission of each crime is spoken to by one credible and reliable witness, and (d) the accused is identified as the person who committed each crime. The rule is this, if you are satisfied that the crimes charged are so closely linked by (1) their character, (2) the circumstances of their commission, and (3) time as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused, then the evidence of one witness about the commission of one crime is sufficiently corroborated by the evidence of one witness about the commission of each of the other crimes.

... ...

Now you will have noted straight away ladies and gentlemen that I've referred here to charge 8 and you will of course recall that the accused have been acquitted of that charge but this does not mean that the evidence which you heard in relation to charge 8 cannot be considered by you to the extent that it may be relevant to proof of charges which remain live. So the Crown is entitled to rely upon the evidence given by [JG] for the purpose of the rule of mutual corroboration which I have explained to you.

From what I have just explained ladies and gentlemen it will be evident to you that the rule of mutual corroboration does not apply, and I so direct you, in respect of charge 10. This is because charge 10 is not, I consider, sufficiently similar to charges 5, 7 and 8. So you cannot rely upon the evidence of any of the alleged victims of charge 5, 7 or 8 as sources of mutual corroboration in regard to charge 10, nor can you use the evidence of any of the alleged victims of charges 5, 7 or 8 as support for any of the witnesses who spoke to charge 10. That last charge, number 10, stands on its own in the sense that the rule of mutual corroboration does not apply to it for the purposes of the present case and I trust that's clear.

... ...

Now, if you believe any two complainers from charges 5, 7 and 8 ... [y]ou then have to decide if by reason of the character, circumstance and time of each alleged offence the crimes are so closely linked that you can infer that the accused was pursuing a single course of criminal conduct. It is not enough if all that is shown is that the accused had a general disposition to commit this kind of offence and I wish to stress to you ladies and gentlemen that you must apply this rule of mutual corroboration, the so-called *Moorov* doctrine with caution.

... ...

So far as the second accused [the applicant] is concerned the position is as follows: you would be entitled to use the evidence of [JG] to corroborate the evidence of [IY] and the evidence of [DW], and you would be entitled to use the evidence of [IY] and [DW] as mutually corroborative.

... ...

Now I direct you ladies and gentlemen that, in this case, there is enough evidence in law that the crimes alleged in each of the charges 5, 7 and 8 are sufficiently closed in time, character and circumstance for the rule to apply but it is for you to decide if the evidence of the respective complainers is reliable and credible, secondly if, the necessary link in time character and circumstances has been established and thirdly, if this special rule should be applied."

13. The jury convicted the applicant of charge 5 and both the applicant and WL of charges 7 and 10.

14. In his sentencing remarks, the trial judge observed that the applicant was "a relentless and murderous paedophile" and that he and WL represented a "high risk of safety to the public, particularly young men and boys, especially those suffering from some form of vulnerability". Having already imposed a life sentence in respect of the murder charge, of which the applicant would have to serve a minimum of thirty years, he imposed a further three ten-year sentences in respect of charges 5, 7 and 10, all of which were to run concurrently with the life sentence.

2. Appeal

15. The applicant and WL appealed against their convictions. Permission was refused following the first sift, but on second sift the applicant was granted permission for leave to appeal in relation to his submission that the trial judge had erred in directing the jury that they could use the evidence of JG (which formed the basis of charge 8, of which the applicant had been acquitted) to corroborate the evidence on charges 5 and 7.

16. The Appeal Court dismissed the appeal on 19 June 2014. At the outset, it noted that the acquittal on charge 8 had been an error. According to the court, if an accused person maintained that a court had no jurisdiction to try a charge, he should render a plea to that effect and, if the point was sound, the correct remedy would be for the court to "desert the *diet pro loco et tempore*" as regards that charge (that is, stop the charge being determined during that particular trial). That did not happen in the present case; instead, the defence had made a submission of no case to answer in respect of charge 8, and the trial judge had acquitted the applicant of that charge pursuant to section 97 of the 1995 Act (see paragraph 21 below). However, as section 97 was purely concerned about whether there was sufficient evidence to support a charge, it was not a vehicle within which to raise a "no jurisdiction" point; and it was not competent for the court to acquit a defendant of a charge over which it had no jurisdiction.

17. The Appeal Court's observations on this point had no effect on the acquittal on charge 8, which still stood. Nevertheless, the Appeal Court found that the evidence of indecent assault and sodomy in England, which could properly have been libelled in any event, either as a charge or otherwise, remained available to provide corroboration for the other charges in the indictment.

18. In respect of Article 6 § 2, the Appeal Court found:

> "[35] There is no breach of Article 6(2) by reason of the evidence on charge 8 being advanced by the Crown in the one single criminal process as proof of charge 7. ... [A]t the point of seeking a conviction on charge 7, all that the Crown were asserting was that the appellants had committed what the appellants had had notice of in charge 8,

albeit that, by the time the Crown addressed the jury, a conviction could not follow upon that charge for technical reasons. The Crown contention had been consistent throughout the proceedings and no party could reasonably have thought that the section 97 acquittal ... could have had the effect of barring the Crown from relying on the evidence on charge 8 as mutual corroboration of a charge awaiting judicial determination.

[36] As the European Court said in *Sekanina v. Austria* (1993) 17 EHRR 221 (at paras 28 and 30), there is a distinction to be drawn between cases where there has been a decision on the merits of an allegation and one where there has not. In the former, it is not open to the state to assert the guilt of a person whose innocence has been established. That is not what, in reality, occurred in this case. The appellants were not acquitted of the Blackpool element in charge 8 as a result of a decision on its merits but because the court considered that it had no jurisdiction to try the matter. The situation (*Sekanina v. Austria* (supra); *Asan Rushiti v. Austria* (2011) 33 EHRR 56; *Lamanna v. Austria*, 10 July 2001 (no 28923195); *Allenet de Ribermont v. France* (1995) 20 EHRR 557; *Geerings v. Netherlands* (2008) 46 EHRR 49) where there is an assertion of guilt in a separate process in circumstances in which that guilt has not been properly established, or has even been rejected, in a criminal court is not in any event analogous. This separate argument advanced by Mr O'Neill must be rejected.

[37] The trial judge's directions on charge 8 cannot be faulted. ... What the judge did do was direct the jury clearly on the need to believe a particular complainer before they could use his evidence as mutually corroborative of the testimony of another complainer in respect of the actings of the same accused. He directed the jury with equal clarity on the need for them to find the necessary similarities in, as he put it, the character, circumstances and time of offence."

19. The applicant sought leave from the Appeal Court to appeal to the Supreme Court of the United Kingdom, submitting, *inter alia*, that the Appeal Court had erred in its interpretation of *Sekanina v. Austria*, 25 August 1993, Series A no. 266-A. The Appeal Court refused leave to appeal on 21 August 2014. It found that no issue arose as to the compatibility of its earlier judgment with the Convention and, in any case, that the matter was not one of general public importance. It observed:

"On the central point about the interpretation of *Sekanina v. Austria*, the court is unaware of any European Convention jurisprudence to the effect that an acquittal of a charge by a court, which was not competent to do so, is in some way binding and that it precludes the use of evidence of that charge being used by a court for the purposes of determining a charge which is competently before it. Questions of the jurisdiction to try a criminal charge and the use of evidence of crimes allegedly committed in other jurisdictions, are matters for the domestic law and do not engage the Convention."

20. On 25 September 2014 and again on 6 October 2014, the Scottish Legal Aid Board refused the applicant legal aid for the purpose of seeking special leave to appeal directly to the Supreme Court.

B. Relevant domestic law and practice

1. A submission of no case to answer

21. Pursuant to section 97(1) of the Criminal Procedure (Scotland) Act 1995, immediately after the close of the evidence for the prosecution, the accused may intimate to the court his desire to make a submission that he has no case to answer, both (a) on an offence charged in the indictment; and (b) on any other offence of which he could be convicted under the indictment. Subsections 97(2)-(4) provide:

> "(2) If, after hearing both parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged in respect of which the submission has been made or of such other offence as is mentioned, in relation to that offence, in paragraph (b) of subsection (1) above, he shall acquit him of the offence charged in respect of which the submission has been made and the trial shall proceed only in respect of any other offence charged in the indictment.
>
> (3) If, after hearing both parties, the judge is not satisfied as is mentioned in subsection (2) above, he shall reject the submission and the trial shall proceed, with the accused entitled to give evidence and call witnesses, as if such submission had not been made.
>
> (4) A submission under subsection (1) above shall be heard by the judge in the absence of the jury."

2. Corroboration

22. Before someone can be convicted of an offence in Scotland, the law requires corroboration: that is, there must be at least two sources of evidence to prove every element of the charge which is essential to the definition of the crime. Thus, no accused person can be convicted on the evidence of one witness alone, however credible. The two sources of evidence required need not be of equal weight, and corroboration can take the form of direct or circumstantial evidence.

23. The law in Scotland also recognises the doctrine of mutual corroboration. This means that the credible but uncorroborated evidence of a single witness to an offence may corroborate, and be corroborated by, the credible but uncorroborated evidence of a single witness to another offence. In the leading case on mutual corroboration, *Moorov v. HM Advocate* [1930] JC 68, the accused was a shopkeeper who was convicted of a number of assaults or indecent assaults on a series of female shop assistants. His appeal against conviction centred on those charges where the only direct evidence against him was that of the shop assistant in question. The Appeal Court found that the shop assistants' evidence could provide mutual corroboration for each other. However, the Appeal Court made clear that the rule only applied when the similar charges were sufficiently connected with, or related to, each other in time, character and circumstance.

3. The admissibility of evidence in a criminal trial following an acquittal

24. The evidence that may be introduced by the prosecution to prove a crime charged in an indictment can include evidence which, in itself, could constitute a separate crime (*Griffen v. HM Advocate* [1940] JC 1). This remains the case even if the prosecution would be unable to seek a conviction in respect of that separate crime or decide to withdraw the charge relating to that separate crime (*McIntosh v. HM Advocate* [1986] SCCR 496; and *Danskin v. HM Advocate* [2002] SLT 889). Furthermore, the evidence remains available to prove the remaining charges even if there has been an acquittal (*HM Advocate v. Mair* [2013] HCJAC 89 and *Cannell v. HM Advocate* [2009] SCCR 207). In *Mair* the Court explained the position as follows:

> "The practice of the court is that generally the Crown cannot lead evidence of a crime not charged. If a particular passage of evidence is indicative of the commission of a crime in Scotland, fair notice dictates that the crime is libelled in the indictment. If it is not, an objection to the evidence may be sustained. In due course, an accused may be acquitted of the particular charge either because of lack of evidence or because the charge was libelled only for these evidential purposes and the Crown elect not to proceed with it for reasons of practical utility. However, evidence available to prove one charge may be relevant only to another charge on an indictment. The evidence remains available to prove the remaining charges, even if there has been an acquittal on the other, possibly 'evidential', one. That much is commonplace and it applies, in particular, to the evidence of the disposal of telephones or text messages in this case. The use of the evidence in this way does not contravene the principle that, once someone is acquitted of a crime, the Crown should not thereafter suggest that he is nevertheless guilty of that crime. All that the Crown seek to do is use evidence to prove a charge of which they have consistently maintained the respondent is guilty and where that guilt remains to be judicially determined."

25. Evidence should therefore only be available for mutual corroboration where it has been led in respect of a charge which has not been "judicially determined". Indeed, the courts have expressly recognised that it would be "inconsistent" for a jury to acquit of a charge, having rejected the evidence on it as incredible and unreliable, while at the same time returning a verdict of "guilty" in respect of another charge which depends for sufficiency on the evidence of the first being held to be credible and reliable (*Ogg v HM Advocate* 1938 JC 152).

4. Using evidence in a Scottish court from a foreign jurisdiction

26. Evidence of a crime committed outside Scotland is also capable of corroborating a crime committed in Scotland (see, for instance, *HM Advocate v. Joseph* [1929] JC 55). However, in Scotland it is incompetent to charge, and to lead evidence about a criminal offence committed in a foreign jurisdiction, except where statute has provided for a particular offence to have extraterritorial effect in the jurisdiction. In order

for the Crown to be permitted to lead evidence of a crime committed in a foreign jurisdiction, it must show (a) that the criminal offence forms an integral part of the crime which is libelled as having taken place in Scotland, or (b) that the connection between the offence abroad and the offence in Scotland is sufficiently close as to make it relevant to prove the offence abroad in the course of proving the crime in Scotland.

COMPLAINTS

27. Relying on Article 6 § 2 of the Convention, the applicant complains that the presumption of innocence was not respected in his case. First of all, despite his acquittal on charge 8, the prosecution was allowed to continue to rely on the criminal conduct alleged in that charge for the purposes of providing the necessary corroboration for charges 5 and 7 on the indictment. Secondly, the Appeal Court further violated Article 6 § 2 by unilaterally declaring that the decision to acquit the applicant on charge 8 was erroneous.

THE LAW

28. Article 6 § 2 of the Convention provides as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Reliance on criminal conduct alleged in charge 8

1. The parties' submissions

(a) The Government

29. The Government submitted that the applicant's Article 6 § 2 complaints should be rejected as manifestly ill-founded as the trial judge's decision to allow the jury to use evidence led in respect of charge 8 as corroboration for charges 5 and 7 on the indictment did not offend against his entitlement to the presumption of innocence.

30. The applicant was acquitted of charge 8 because the court considered that it did not have jurisdiction to try the matter. As such, neither the judge nor the jury had evaluated the evidence on that charge. Following the applicant's acquittal he was no longer charged with the offence set out in charge 8, although the evidence given by JG remained available to the jury when determining his guilt on charges 5 and 7. Before the applicant gave

evidence at his trial, both he and his legal representatives were fully aware that the Crown intended to rely on the charge 8 evidence in order to seek a conviction on charges 5 and 7. The trial judge directed the jury that the applicant was to be presumed innocent in respect of these charges; that the Crown were required to prove his guilt on those charges beyond a reasonable doubt and on corroborated evidence; and that it was for them to decide whether the evidence that they had heard in relation to charge 8 was credible and reliable, and whether it provided the necessary corroborations for verdicts of guilty to be returned on charges 5 and 7.

31. The Government further asserted that the Appeal Court had been quite right to describe the decision to acquit the applicant as "erroneous". It is clear from the Appeal Court's decision that in doing so it was not voicing any suspicions as to the applicant's guilt, but simply describing a procedural error that took place.

32. Finally, the Government contended that *Sekanina v. Austria*, 25 August 1993, Series A no. 266-A had no relevance to the applicant's case, as it was solely concerned with the second aspect of Article 6 § 2 of the Convention.

(b) The applicant

33. The applicant argued that at the beginning of his trial charge 8 had been competently before a court with jurisdiction to try it. However, following his acquittal he had offered no real defence to that charge, a fact likely noted by the jury.

34. In the applicant's opinion, for a court to rely upon the doctrine of mutual corroboration in order to convict a person, it must consider and evaluate the evidence and form the view that the accused had committed the offences. In other words, the jury could only use evidence under the doctrine if it concluded that conduct was criminal in its own right. The jury was therefore being invited to find the applicant *de facto* guilty of a crime he had been acquitted of.

35. Alternatively, if the Court were to accept that the High Court had no jurisdiction to try charge 8, there would still be a violation of Article 6 § 2 as a declaration of guilt was effectively being sought where the jury had no power to make a formal finding of guilt. If the court had no power to acquit the applicant, it should not have had the power to find him *de facto* guilty.

2. *The Court's assessment*

(a) General principles

36. Article 6 § 2 safeguards the right to be "presumed innocent until proved guilty according to law". Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof, legal

presumptions of fact and law, the privilege against self-incrimination, pre‑trial publicity and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013).

37. However, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair‑trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory (see *Allen*, cited above, § 94).

38. Whenever the question of the applicability of Article 6 § 2 in this second aspect arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt (see *Allen*, cited above, § 104).

39. In defining the requirements for compliance with the presumption of innocence in the context of this second aspect, the Court has drawn a distinction between cases where a final acquittal judgment has been handed down and those where criminal proceedings have been discontinued. In cases concerning statements made after an acquittal has become final, it has considered that the voicing of suspicions regarding an accused's innocence is no longer admissible (see *Sekanina v. Austria*, 25 August 1993, § 30, Series A no. 266‑A for the standards in that regard, and *Allen*, cited above, § 122 with further references). In contrast, the presumption of innocence will only be violated in cases concerning statements after the discontinuation of criminal proceedings if, without the accused's having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence, a judicial decision concerning him reflects an opinion that he is guilty (see, *inter alia*, *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62, and *Englert v. Germany*, 25 August 1987, § 37, Series A no. 123).

40. There is no single approach to ascertaining the circumstances in which Article 6 § 2 will be violated in the context of proceedings which follow the conclusion of criminal proceedings. However, much will depend on the nature and context of the proceedings in which the impugned decision was adopted, and the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 (see *Allen*, cited above, §§ 125-126).

(b) Application of those principles to the case at hand

41. The facts of the present case are somewhat unusual and do not, at first glance, sit neatly in either of the two distinct aspects of Article 6 § 2 of the Convention. The applicant was originally charged with a number of sexual offences, including charges 5, 7, 8 and 10, and at the beginning of the criminal trial evidence was led in respect of all four charges. However, following the conclusion of the prosecution's case, the defence made a submission of "no case to answer" in respect of charge 8 and the applicant was "acquitted" of that offence. The acquittal was final, as the Crown had no right to appeal an acquittal in solemn proceedings (see paragraph 7 above). Nevertheless, the trial continued in respect of charges 5, 7 and 10 and the applicant's conviction for these three offences only became final when his appeal rights were exhausted.

42. In the Court's view, therefore, a distinction must be drawn between charge 8, on the one hand, and charges 5, 7 and 10, on the other. In respect of the latter three charges the presumption of innocence applied, in its first aspect, from the moment the applicant was charged, within the autonomous Convention meaning of that term, until his conviction became final. In respect of charge 8, however, the first aspect of the presumption of innocence ceased to be applicable when the applicant was finally acquitted. Therefore, insofar as the applicant is complaining about the use of evidence led in respect of charge 8 as a source of corroboration for charges 5 and 7, Article 6 § 2 could only be applicable in its second aspect.

43. In order for Article 6 § 2 to apply in its second aspect, there must be a link between the two sets of proceedings. Although the parties made no submissions on this point, the Court would accept that such a link clearly exists since, in determining the applicant's guilt in respect of charges 5 and 7, both the trial judge and the jury were called upon to evaluate the evidence and assess the applicant's participation in the offences set out in charge 8.

44. That being said, in determining whether the presumption of innocence was respected, the Court considers it relevant that while the applicant was technically "acquitted" of the offence in charge 8, this was clearly in error and, although the erroneous acquittal was not overturned by the Appeal Court's judgment, it is nevertheless clear that it was not an acquittal "on the merits" (compare and contrast *Sekanina*, cited above, where the acquittal was based on the principle that any reasonable doubt

should be considered in favour of the accused). The applicant in *Allen* was in a similar position, and in that case the Court found that the termination of the criminal proceedings shared more of the features present in cases where criminal proceedings have been discontinued (see *Allen*, cited above, § 127). As such, it applied a higher threshold in determining whether there had been a breach of Article 6 § 2; while, following an acquittal "on the merits", the voicing of suspicions regarding a person's innocence will not be acceptable, where there has been a discontinuation there will only be a violation of that Article if a judicial decision reflects an opinion that he is guilty (see *Allen*, cited above, § 122).

45. In any event, the language used by the trial judge in the present case neither reflected an opinion of guilt nor described a state of remaining suspicion regarding charge 8 on the indictment. Although the trial judge permitted the jury to use the evidence led in respect of this charge as a source of corroboration for charges 5 and 7, in directing the jury he made it very clear that an accused person is presumed to be innocent of any charge against him (see paragraph 9) and, in deciding what evidence could be used to corroborate the offences charged, it was for them to decide first, if the evidence of the respective complainers was reliable and credible (see paragraph 12 above); and secondly, whether the crimes alleged in each of charges 5, 7 and 8 were sufficiently closed in time, character and circumstance for the rule of mutual corroboration to apply (see paragraph 12 above). Moreover, the fact that the jury convicted the applicant of charges 5 and 7 provides no indication as to whether they considered the evidence led in respect of charge 8 to be reliable and credible, since they could have considered the evidence led in respect of the other two charges to be mutually corroborative. In other words, the jury could have entirely rejected the evidence in respect of charge 8 and still convicted the applicant of charges 5 and 7.

46. Finally, having regard to the nature and context of the proceedings, the Court observes that the applicant's complaint challenges, in essence, the admissibility of evidence in a criminal trial. The Court has repeatedly held that this is ordinarily a matter for regulation by national law and that its only concern is to examine whether the proceedings have been conducted fairly (see for example, *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010 and *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). It has already found that the language used by the trial judge did not undermine the applicant's acquittal. It is, however, also important to note that all of the applicant's defence rights were observed throughout the trial. Furthermore, although the "acquittal" took place following the close of the prosecution's case, before the applicant gave evidence both he and his legal representatives were fully aware that the Crown intended to rely on the charge 8 evidence in order to seek a conviction on charges 5 and 7 (see paragraph 30 above). In this

regard, domestic law was clear that even after an acquittal the evidence remained available to prove the remaining charges (*HM Advocate v. Mair* [2013] HCJAC 89 and *Cannell v. HM Advocate* [2009] SCCR 207), provided that the charge in question had not been "judicially determined" (see paragraphs 24 and 25 above).

47. In light of the foregoing, the Court considers this aspect of the applicant's Article 6 § 2 complaint to be manifestly ill-founded. It must therefore be rejected as inadmissible in accordance with Article 35 § 3(a) of the Convention.

B. Statements made by the Appeal Court regarding the applicant's acquittal

48. The Court would also reject as manifestly ill-founded the applicant's complaint that the Appeal Court breached his presumption of innocence by describing his "acquittal" as erroneous.

49. As already noted, the applicant was "acquitted" after the defence made a submission of no case to answer in respect of charge 8. The submission was made because the complainer only gave evidence of sexual offences which occurred in England; that is, outside the court's jurisdiction. Therefore, the "acquittal" was not an acquittal "on the merits". Rather, it was a recognition that, on the basis of the evidence given by the complainer, the court did not have jurisdiction to try the offence.

50. On appeal, the Appeal Court simply pointed out that there had been a procedural error at the applicant's trial: instead of making a submission of "no case to answer", the defence should have rendered a plea that the court had no jurisdiction to try charge 8; and, had that been done, the court could have "deserted the *diet pro loco et tempore*" instead of "acquitting" the applicant of a charge over which it had no jurisdiction – something which it had not been competent to do (see paragraph 16 above). In pointing out the existence of a procedural error, the court neither suggested that the applicant was guilty of the crimes alleged in charge 8, nor voiced any suspicions in this regard.

51. Moreover, the Appeal Court's observations on this point had no effect either on the acquittal on charge 8 (see paragraph 17 above) or on the reason for the acquittal. The applicant remains "acquitted" of charge 8, and it continues to be the case that his "acquittal" was based on a lack of jurisdiction, as opposed to being a true acquittal "on the merits"

52. In light of the foregoing, the Court also considers this aspect of the applicant's Article 6 § 2 complaint to be manifestly ill-founded. It must therefore be rejected as inadmissible in accordance with Article 35 § 3(a) of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 31 January 2019.

Abel Campos Registrar	Linos-Alexandre Sicilianos President