[TRANSLATION-EXTRACTS]

...

THE FACTS

The applicant, Mario Borghi, is an Italian national who was born in 1964 and lives in Ozieri.

A. The circumstances of the case

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

1. The criminal proceedings against the applicant

In 1996 four prostitutes, X, Y, V and Z, lodged a criminal complaint, alleging armed robbery, and gave the police information which they claimed would enable them to identify those responsible. After a police investigation proceedings were instituted against the applicant and two other persons, A and B. Among other offences, the applicant, a *carabinieri* officer, was charged with trafficking in soft drugs (hashish) and hard drugs (heroin), fraud, forgery, receiving and a number of counts of armed robbery and abuse of a public office.

During the preliminary inquiries A and B made confessions, stating that the applicant was the person who had committed the armed robberies with them. W, a client of the prostitutes, identified the applicant as one of their assailants.

In a decision of 27 December 1996 the Sassari judge responsible for preliminary investigations committed A, B and the applicant for trial in the Sassari District Court.

A hearing at which W was due to give evidence was fixed for 24 April 1997. Having received a number of threats by telephone, W had installed a system for recording calls onto audio cassettes. In the evening of 23 April 1997 the applicant rang W. A detective sergeant friend of W who was at his home at the time of the incoming call, suspecting that it might contain threats to the witness, switched on the recording apparatus.

The hearing scheduled for 24 April 1997 did not take place because one of the two parties did not appear. W at first kept the cassette at his home and then, a few days later, decided to give it to the police, who seized it. W gave evidence at a public hearing on 22 May 1997 and a transcript of the conversation of 23 April 1997 was added to the judge's file. The applicant challenged the production of the transcript, asserting that it was the result of illegal and unauthorised telephone tapping. However, his arguments were rejected on the ground that the cassette had never been listened to by the

detective sergeant, who had done no more than switch on the recording apparatus. W, who enjoyed the right to keep his communications secret, had then freely decided to give the cassette to the police. Accordingly, there had been no "telephone tapping" within the meaning of Articles 267 to 271 of the Code of Criminal Procedure ("the CCP"); the transcript was a document created by a private individual who had authorised it and produced it legitimately during the trial.

In the course of the proceedings it was established that X, Y, V and Z were now untraceable. Accordingly, on 22 May 1997, the District Court, having taken formal note of the parties' agreement on the point, ordered the statements the witnesses concerned had made to the police to be added to the judge's file (Article 512 of the CCP). A and B declared that they wished to exercise their right under Article 210 of the CCP to remain silent. Pursuant to Article 513 § 1 of the CCP, the statements they had made before the trial were also added to the file and used when the court determined the merits of the charges against the applicant.

At a later hearing the applicant challenged the production of the records of the statements made by three of the prostitutes, X, Y and Z, observing that it had been entirely foreseeable that they would be tempted to make themselves scarce. The court dismissed the applicant's objection, noting that the prostitutes had given addresses in Italy where they could be contacted and that there was nothing to suggest that they would become untraceable. Moreover, the applicant had not immediately objected to the inclusion in the file of the statements he now sought to challenge, so that he was estopped from objecting to their use.

In a judgment of 5 December 1997 the Sassari District Court sentenced the applicant for armed robbery, trafficking in soft drugs (hashish), fraud, forgery and abuse of a public office to six years' imprisonment and a fine of 4 million Italian lire (approximately 2,065 euros). It acquitted him of trafficking in hard drugs (heroin) and receiving, and of one count of abusing a public office.

The judgment was based on the statements by A and B, which were held to be precise, credible and corroborated by other evidence. In particular, the applicant, A and B had been recognised by some of the victims, and the version of events given by the women matched the evidence of the applicant's two co-defendants. In addition, W had identified the applicant and, as appeared from the transcript of the telephone conversation on 23 April 1997, the latter had unlawfully tried to bring pressure to bear on his accuser. Admittedly, the applicant had pleaded that W's evidence had been unlawfully admitted, since he should have been considered a co-defendant, not a witness, but the District Court held that it had not been established that W had been guilty of obscene behaviour in a public place. Lastly, a security guard had seen a car identical to the applicant's near the place where one of the armed robberies had been committed, and it had been established, on the

basis of evidence given at the trial and his own partial admissions, that the applicant had paid for certain goods with a cheque stolen from one of the victims.

The applicant appealed, contesting the credibility of the prosecution witnesses. He repeated his objections concerning the unlawfulness of admitting in evidence the conversation with W and the prostitutes' statements.

In a judgment of 21 October 1998 the Cagliari Court of Appeal upheld the first-instance judgment. It repeated, for the most part, the reasoning of the Sassari District Court and observed that at the hearing on 22 May 1997 the applicant had accepted the reading out of the prostitutes' statements and had thus implicitly waived any objection to their use.

The applicant appealed on points of law, arguing in particular that his co-defendants' statements had not been credible and that the recording of the conversation on 23 April 1997 had amounted to unauthorised and therefore illegal telephone tapping.

On 14 September 1999 the applicant, as he was entitled to do by virtue of Law no. 14 of 19 January 1999, requested application of a sentence negotiated with the Principal Public Prosecutor at the Court of Cassation. At the same time he withdrew all his grounds of appeal.

In a judgment of 29 September 1999, the text of which was deposited with the registry on 5 November 1999, the Court of Cassation reduced the applicant's sentence to four years and six months' imprisonment and a fine of 3 million lire. It observed that the applicant and the prosecuting authorities had reached an agreement about the appropriate sentence and that examination of the decisions at first and second instance had not revealed any circumstance warranting the applicant's acquittal.

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B. Relevant domestic law

1. Article 512 of the Code of Criminal Procedure ("the CCP")

In the version in force at the material time, Article 512 of the CCP provided:

> "At the request of one of the parties, the judge shall order to be read in court documents resulting from enquiries by the police [or] by the representative of the prosecuting authorities ... where, on account of unforeseeable events or circumstances, [those enquiries] can no longer be repeated."

Article 513 § 1 of the CCP, as amended by the Constitutional Court's judgment no. 60 of 24 February 1995, read as follows:

> "Where the defendant ... refuses to answer questions, the judge, at the request of one of the parties, shall order to be read in court records of the statements made by the

> defendant to the representative of the prosecuting authorities [or to the police acting on the instructions of the prosecuting authorities] ... during the preliminary investigation..."

As a consequence of being read out the documents and statements referred to in Articles 512 and 513 of the CCP are added to the judge's file and may be used for assessment of the merits of the charges.

By means of the Constitutional Amendment Act no. 2 of 23 November 1999 the Italian parliament added the principle of a fair trial to the Constitution itself. Paragraphs 3, 4 and 5 of Article 111 of the Constitution, as now worded, provide:

> "3. In criminal proceedings, the law shall guarantee that the person accused of an offence is informed promptly and in confidence of the nature and grounds of the charge against him; that he shall have adequate time and facilities for the preparation of his defence; that he shall be given an opportunity before the court to examine or to have examined anyone giving evidence against him, to obtain the attendance and examination of any defence witnesses on the same conditions as witnesses called by the prosecution and to obtain the production of any other evidence in his favour; and that he will have the assistance of an interpreter if he cannot understand or speak the language used at the trial.
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> 4. The principle of adversarial process shall be observed during criminal proceedings with regard to the examination of evidence. An accused's guilt cannot be established on the basis of statements made by a person who has freely and wilfully eluded examination by the accused or his lawyer.
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> 5. Rules shall be made governing the circumstances in which adversarial examination of the evidence is to be dispensed with, either because the accused has consented or because there is due evidence that such examination is objectively impossible or that there has been unlawful conduct."

2. Requests for application of sentence during cassation proceedings

Section 3 of Law no. 14 of 19 January 1999 provides that where an appeal on points of law is pending in criminal proceedings in which a Court of Appeal gave judgment before 31 January 1999 the Principal Public Prosecutor at the Court of Cassation and the defendant may agree on the acceptance, in whole or in part, of some of the grounds of appeal, provided that the other grounds are withdrawn. Where acceptance of the grounds of appeal which the defendant has not withdrawn has a bearing on the severity of the sentence, the parties are required to inform the Court of Cassation what sentence they have agreed upon.

COMPLAINTS

1. Relying on Article 6 §§ 1 and 3 (d) of the Convention, the applicant complained that the criminal proceedings against him had not been fair.

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THE LAW

1. The applicant submitted that the criminal proceedings against him had not been fair. He alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which provide:

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

The applicant submitted that the Italian courts had convicted him on the basis of the statements of prostitutes, X, Y, V and Z, whom he had not been able to question at his trial and those of his co-defendants, who had then availed themselves of the right to remain silent.

However, the Court is not required to determine whether the facts alleged by the applicant reveal the appearance of a violation of the Convention.

It reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system.

The rule is based on the assumption that there is an effective remedy available in respect of the alleged breach in the domestic system, whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48). For the requirements of Article 35 of the Convention to be satisfied, normal recourse must be had by an applicant to remedies which are available and

sufficient to afford redress in respect of the breaches alleged (see *Akdivar and Others v. Turkey,* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 65 and 66; *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, § 52; and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 85).

In the present case, the Court observes that the applicant withdrew all his grounds of appeal of his own accord and therefore did not give the highest Italian court the opportunity to determine the merits of his complaints. Admittedly, in deciding to request adoption of the procedure provided for in section 3 of Law no. 14 of 14 January 1999 he sought to obtain a reduction of his sentence, as agreed with the Principal Public Prosecutor at the Court of Cassation. However, the Court considers that the prospect of obtaining an advantage cannot be taken to affect a defendant's freedom to waive all grounds of appeal on the facts or on points of law (see, *mutatis mutandis*, *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). As the applicant's decision must be considered to have been free and voluntary, the Court concludes that he did not submit to all the competent national bodies the complaints he now seeks to raise in Strasbourg.

Moreover, the Court does not discern in the present case any particular circumstances capable of absolving the applicant from the obligation to exhaust domestic remedies.

It follows that this complaint must be rejected for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

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For these reasons, the Court unanimously

Declares the application inadmissible.