CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF GOSSA v. POLAND

(Application no. 47986/99)

JUDGMENT

STRASBOURG

9 January 2007

FINAL

09/04/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gossa v. Poland,

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

Sir Nicolas BRATZA, *President,*
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges,*
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 5 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 47986/99) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Jan Gossa ("the applicant"), on 5 January 1998.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that he had not received a fair trial in violation of Article 6 §§ 1 and 3 (d) of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. By a decision of 25 October 2005 the Court declared the application admissible.

6. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1953 and lives in Łódź.

8. On 4 April 1994, at 2.40 a.m. officers of the Polish Border Guards

(*Straż Graniczna*) arrested a certain A.I., a German national of Polish origin, on suspicion of having stolen a car "Mercedes 200E" in which he was travelling to Belarus. The arrest took place after a routine control of his documents on the Polish-Belarusian border. The officers, having learnt that the car had been hired from the company "Sixt-Budget" in Germany, and having found that, according to their records, A.I. had previously several times crossed the Polish-Belarusian border driving different cars, asked the Kołbaskowo Border Guards (a check-point at the Polish-German border) to inquire whether the car was being sought by the German police. It was soon confirmed that since 2 April 1994 the German police had been looking for that car, which had been reported as having disappeared. A.I. was later taken into police custody and brought to the Sokółka District Police Station (*Komenda Rejonowa Policji*).

9. On 5 April 1994, at 8 a.m., the applicant and a certain J.S.-T., a national of the United States of America, reported to the Sokółka District Police Headquarters. They presented a copy of the contract concluded by J.S.-T. with the "Sixt-Budget" company, from which it appeared that she had hired the car in question for the period from 2 to 10 April 1994.

10. On the same day the applicant was arrested. Subsequently, A.I., J.S.-T. and the applicant were questioned by the police as suspects. A.I. was charged with aiding and abetting an unknown person to sell a stolen car. The applicant was charged with aiding and abetting a car theft. J.S.-T. was charged with attempted car theft.

11. A.I. did not confess. He stated that he took odd jobs as a driver at the Świecko border station (on the Polish-German border). He admitted that he had intended to bring the car to Belarus but denied knowing anything about the theft of the car. He maintained that a woman, whose first name was "Elżbieta" and for whom he had already worked, had hired him to drive the car in question from Łódź to Belarus, i.e. to the Minsk airport. He had been paid 500 Deutsche marks (DM) for that service. On 3 April 1994, at about 5 p.m. he had met "Elżbieta" in Łódź. She had been accompanied by another woman resembling a Philippine national. She had handed over to him the car, its documents and the keys.

12. The applicant did not confess and stated that he had known J.S.–T. for some 8 years. He had met her in Łódź on 3 April 1994. She had come in a "Mercedes" that had been hired. They had decided that they would drive the applicant's car in Poland and she had left the "Mercedes" in a guarded car park. On the same day A.I. had asked him to lend him his car. The applicant, having first asked J.S.-T. for her permission, had lent him the "Mercedes" hired by her. He had handed the car documents and keys to A.I. Later, he had driven J.S.-T. to her friend, P.M. On 4 April 1994, at about 8 p.m., A.I.'s father had come to the applicant's home and had told him that A.I. had been arrested when crossing the border since it was suspected that the car in question had been stolen. The applicant had informed J.S.–T. and

P.M. of what had happened and the three of them had come to the Sokółka District Police Station to present the car documents and explain the situation.

13. J.S.-T. did not confess and stated that, together with P.M., she had flown to Frankfurt am Main from San Francisco on 2 April 1994. She had hired the car in question at Frankfurt airport. She had crossed the Polish border in Zgorzelec ("Goerlitz" in German) and had met the applicant there, as had been arranged previously. The applicant, P.M. and she had gone to Łódź. They had arrived there at about 10-11 a.m. The applicant had taken the car and the car documents from her in order to park it in a safe place. On 4 April 1994 at about 11 p.m. she had learnt from the applicant that the car had been seized by the police as having been stolen and that they had to go to Sokółka to explain the situation. J.S.-T. denied having given the applicant any permission to use or to lend the car. She maintained that she did not know either A.I. or a woman called "Elżbieta" and that she had not been at the Świecko border station.

14. A.I and the applicant were subsequently confronted with each other. A.I. maintained his version of events, refused to give any further evidence and asked the prosecution to hear evidence from the owners of the car. The applicant denied handing over the car to A.I. He explained that J.S.-T. had done it. She had been accompanied by an unknown woman and P.M. He stated that J.S.-T. had asked him to find her a driver who could deliver the car to Minsk or Vilnius. He had recommended A.I. to her and had helped her to contact him.

15. On 6 April 1994 the applicant was remanded in custody until 5 July 1994. On the same day he was heard by the prosecutor. He did not confess. In contrast to what he had originally stated, he maintained that he had not known J.S.-T. before the events in question. He had previously known only P.M, who had called him from the USA to tell him that he would be coming to Poland on a tourist tour. The next day P.M. had called him from Łódź and they had fixed a meeting. Only then had the applicant met J.S.-T. for the first time. P.M. and J.S.-T. had come in the "Mercedes". They had asked the applicant to deliver the car to Minsk or Vilnius. P.M had said that J.S.-T. had been the owner of the car. The applicant had told them that he could not deliver the car but promised to give them the name of a person who would do so. To this end, he had gone to A.I.'s home and told him of their proposal. A.I. had provisionally agreed. He had arranged a meeting. They had met at a car park. P.M. had come in company with J.S.-T. and a woman called "Elżbieta" or "Ewa". The applicant had introduced A.I. to them. A.I. and the latter woman had gone to the car. The applicant had not, however, been present when they had been talking and when the keys and documents had been handed over to A.I. Nor had he known anything about the payment for A.I. He had learnt from A.I.'s father that A.I. had been arrested. Subsequently, he had called P.M. and

complained to him of what had happened. He had reminded P.M. and J.S.-T. that they had claimed that the car had not been stolen and asked them to report to the Sokółka District Police Headquarters and explain the situation. They had gone to Sokółka on 5 April 1994. During the conversation with the police officers P.M. had left in the applicant's partner's car.

16. On 6 April 1994 the prosecutor ordered that J.S.-T. be detained on remand. She refused to testify.

17. On 6 April 1994 A.I. testified before the prosecutor. He did not confess. He stated that on 3 April 1994 the applicant had come to his father's home in Łódź and had offered him payment for driving a car, hired by the applicant's acquaintance, to Minsk. He had agreed. They had later met at the car park next to the railway station. The applicant had been in the company of two women: a woman with, in his words, a "foreigner's look" and "Elżbieta", the woman that he had some time earlier met at the Świecko border station. He had been given the car documents and keys. They had agreed to pay him DM 500. He had been assured by the applicant and J.S.-T. that the car had been lawfully in their possession. On the same day, after obtaining A.I.'s testimony, the prosecutor ordered that he be remanded in custody.

18. On 22 April 1994 the applicant was released on bail.

19. On 5 May 1994 J.S.-T. decided to testify in the presence of her lawyer and an interpreter. She confessed. She stated that she had flown to Frankfurt am Main from the USA together with her friend, P.M. She had hired the car in question for the period from 2 to 10 April 1994. P.M. had proposed a visit to Poland. She agreed. On 2 April 1994, at 8.30 p.m. they had arrived in Łódź. When they had been parking the car, they had met the applicant. She had not known him before. P.M. had introduced him as a friend of his. The applicant had come with them to P.M.'s home. He had proposed "doing business", that is to say, taking the car to a former Soviet Union country with the help of a "trustworthy person" in order to sell it and, afterwards, report a "theft" to the police. P.M. had protested but she had agreed. The applicant had gone to find such a "trustworthy person" and had later rung her to inform her of a meeting place. She had gone there with P.M. The applicant had waited with an unknown man. She had given the car, its documents and the keys to that man. On 4 April 1994 the applicant had informed her that the driver had been arrested. He had said that they should "save this man" and asked her to go with him to explain that what had happened had been a "mistake". P.M. had gone with them to Sokółka as an interpreter. J.S.-T. admitted that she had given false testimony on 5 April 1994. She stated that she regretted it.

20. On 6 May 1994 the Sokółka District Prosecutor released J.S.-T. on bail. The prosecutor had regard, *inter alia*, to J.S.-T.'s confession and the fact that all necessary evidence had already been obtained. On the same day

J.S.-T. left for the United States and, since then, her whereabouts have been unknown.

21. On 9 May 1994 the Sokółka District Prosecutor appointed two experts in psychiatry in order to establish whether the applicant could be held criminally responsible for his acts. On 16 June 1994 the Choroszcz Psychiatric Hospital informed the prosecutor that the applicant had failed to appear for his examination. By a letter of 22 June 1994 the applicant was informed by the prosecutor that his failure to undergo a psychiatric examination might be treated as an attempt to obstruct the proceedings. On an unspecified later date the applicant underwent the examination in the Choroszcz Psychiatric Hospital. On 8 August 1994 the psychiatric experts submitted their report to the prosecutor.

22. On 21 September 1994 the District Prosecutor laid additional charges against the applicant. On the following day the applicant and A.I. were summoned to give evidence. They refused to testify. On the same day the applicant was given access to the case file. On 23 September 1994 the prosecutor terminated the investigation against the applicant, A.I. and J.S.-T.

23. On 3 October 1994 the Sokółka District Prosecutor (*Prokurator Rejonowy*) filed a bill of indictment with the Łódź Regional Court (*Sąd Wojewódzki*). J.S.-T. was charged with attempted car theft. The charge was formulated in the following way:

> "... that on 3 April 1994 in Łódź, acting together with [the applicant] and A.I. and with intent to appropriate a "Mercedes- Benz 200E" car valued at 850,000,000 [old] Polish zlotys, which was entrusted to her under a rental agreement concluded with the company "Sixt-Budget" in Germany, instructed through [the applicant] A.I. to deliver [that car] to the C[ommonwealth of] I[ndependent] S[tates] with a view to selling it but she did not complete the offence because, on 4 April 1994, A.I. was arrested on ... the Polish border when driving the car in question..."

24. The applicant was charged with handling stolen goods of a significant value. The charge was formulated as follows:

> "... that on 3 April 1994 in Łódź, acting together and in agreement with A.I. assisted J.S.-T. to sell a "Mercedes-Benz 200E" car registered under number MUD 9552 and valued at 850,000,000 [old] Polish zlotys ...[and, in particular] knowing that the car had been obtained by crime, hired A.I. to deliver that car to the C[ommonwealth of] I[ndependent] S[tates] ..."

25. A.I. was charged with handling stolen goods of a significant value. The charge was phrased as follows:

> "... that on 3 April 1994 in Łódź, acting together and in agreement with [the applicant] assisted J.S.-T. to sell a "Mercedes-Benz 200E" car registered under number MUD 9552 and valued at 850,000,000 [old] Polish zlotys ... [and, in particular] knowing that the car had been obtained by crime, took it over from [the applicant] in order to deliver it to the C[ommonwealth of] I[ndependent] S[tates] ..."

26. On 10 January 1995 Łódź Regional Court severed the charge against

J.S.-T. from the case and stayed the proceedings against her.

A. The original trial

27. On 10 February 1995 the trial began. A.I. was heard first. He pleaded not guilty and refused to testify before the court. He confirmed the statements he had made in the investigation but explained that it had been the applicant who had contacted him with J.S.-T. He added that he had met J.S.-T. for the first time at the car park where she had given him the car, its documents and the keys. She had been in the company of "Elżbieta", for whom he had worked previously. A.I. further admitted that, when giving evidence for the first time, he had not revealed certain facts.

28. The applicant also pleaded not guilty and gave evidence. His testimony was consistent with that given on 6 April 1994. He confirmed the statements he had made during the confrontation with A.I. on 5 April 1994. However, he departed from the statements he had made during the first questioning on 5 April 1994.

29. On 19 May 1995 the Regional Court asked, apparently for the second time, the Embassy of the United States of America in Warsaw for information on whether J.S.-T. indeed lived at the address she had supplied to the prosecution. The Regional Court emphasised the urgent nature of its enquiry. In its reply of 2 June 1995, the Consular Department of the Embassy informed the Regional Court that, according to their knowledge, J.S.-T. was not at the time staying in Poland.

30. Later, the Regional Court heard evidence from A.I.'s father and M.A., the officer who had arrested A.I. on the border. The applicant's partner was also called as a witness but she refused to testify.

31. The Łódź Regional Court held hearings on 31 March, 16 May and 3 July 1995. On the latter date the Regional Court acquitted the applicant and A.I. The reasoning for the verdict read, in so far as relevant:

> "In the course of the trial it was established that J.S.-T. was not residing in the territory of Poland (see the letter of the Consular Department of the Embassy of the United States of America, p. 482). For that reason, the statements that she had made in the investigation were read out as witness testimony.
>
> Assessing the above-mentioned testimony as well as the remaining material before it, this court has found the following:
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> The whole structure of the bill of indictment was in principle based on J.S.-T.'s confession that she had made in the investigation. On account of mistakes committed already at the investigative stage and having regard to general guarantees [for a defendant] laid down in the Code of Criminal Procedure, it has to be considered that this evidence does not suffice to find the defendants guilty of the offences with which they were charged.
>
> Even without questioning the prosecutor's decision to release J.S.-T. ... which, in the context of the letter from the Consular Department of the American Embassy appears

to have a dubious basis, it is impossible not to question the statement made in the reasoning for that decision, namely that the evidence collected was [at that time] complete. In passing, it should be noted that the inquiries were still under way and the investigation itself was terminated on 23 September 1994. Having regard to the material gathered up to that stage, including evidence given by [J.S.-T.] it was simply necessary to confront [her] with her co-suspects, in particular with [the applicant].

That, however, was not done and, for all practical reasons, could not be done at the trial stage. Had it been done, it would have been possible to clarify a number of facts which, maybe even in J.S.-T.'s absence, would have enabled [the court] to determine properly the charges against the other defendants.

For procedural reasons, J.S.-T.'s statements are to be considered as witness testimony and as such are to be assessed. Yet when assessing [her statements], it must be taken into account that they do not have the quality of [witness] testimony given under pain [of being criminally liable for perjury] but are the statements of a suspect with all the consequences thereof, including the possibility that J.S.-T., for the reasons only known to herself, did not tell the truth or the whole truth.

Moreover, this part of the evidence was not heard directly by the court and this, for obvious reasons, made it impossible for it to verify and assess fully [her statements]. Assessing this evidence from the point of view of its credibility, it cannot be said to have the quality of consistency from the beginning of the proceedings.

In view of the foregoing, this court, finding it impossible for it to verify this evidence, cannot rely on it to conclude that the defendants' guilt has been proved beyond a reasonable doubt.

It must also be noted that this evidence concerns mainly [the applicant]. There is no direct indication that A.I., when crossing the border..., knew that the car had been obtained by crime. ...

The testimonies of both defendants cannot be considered credible because they [changed their statements], although in their final version presented at the trial they were closely consistent. ... However, the defendants' and, in particular, A.I.'s guilt is not obvious even on the basis of their testimonies. ...

Having regard to the foregoing and to the fact that there is no convincing and trustworthy evidence of the defendants' guilt, this court has acquitted them. ..."

32. The Sokółka District Prosecutor appealed on 11 October 1995, alleging in essence that the trial court had wrongly assessed the evidence of the defendants.

33. On 19 January 1996 the Łódź Court of Appeal (*Sąd Apelacyjny*) quashed the acquittal and remitted the case to the Sokółka District Prosecutor. It ordered that a further investigation be carried out.

34. On 30 April 1996 the applicant's defence counsel was notified that the applicant would be given access to the case file on 17 May 1996. On 16 May 1996 the applicant requested the Sokółka District Prosecutor to give him access to the case file in another part of the country. The applicant did not appear before the prosecutor when summoned. On 29 May 1996 the

prosecutor decided to stay the investigation. On 4 June 1996 the prosecutor ordered that the applicant be detained for a period of 7 days in view of his failure to appear before the investigating authority. The prosecutor also issued a wanted notice in respect of the applicant. On 11 June 1996 the applicant appealed against the detention order. On 9 September 1996 he was arrested. On 13 September 1996 the applicant was brought before the Sokółka District Prosecutor and was given access to the case file. He was released later on that same day.

35. In the meantime, the applicant, on his own, tried to establish the whereabouts of J.S.-T. through the Consulate General of the Republic of Poland in Los Angeles. On 7 October 1996 the Consul wrote to him a letter, which read, in its relevant part:

> "... we should inform you that we cannot help you because the supplied address of the person you search for does not exist in the San Francisco address directory (on 40th street there are no such low numbers and the postal code concerns another state). You are asked to check the address once again; perhaps the correct address is in the Sokółka District Court's possession. If the person that you search for has changed her address we will certainly not be able to find her because in the United States there are no registers of residents and no duty to register one's place of residence. ..."

36. The charge against A.I. had earlier been severed from the case and he had already been charged separately, although before the same court. On 16 October 1996 the Białystok Regional Court convicted A.I. of handling stolen goods and sentenced him to 1 year of imprisonment and a fine. That judgment became final on an unspecified later date.

B. The second trial

37. On 31 October 1996 the Sokółka District Prosecutor filed a new bill of indictment against the applicant with the Białystok Regional Court. The applicant was charged with handling stolen goods of a significant value. The charge was phrased as follows:

> "... that on 3 April 1994 in Łódź, acting together and in agreement with A.I. assisted J.S.-T. to sell a "Mercedes-Benz 200E" car registered under number MUD 9552 valued at 850,000,000 [old] Polish zlotys ...[and, in particular] knowing that the car had been obtained by crime, hired A.I. to take that car abroad..."

The prosecution called the following witnesses: A.I. (at that time detained on remand), J.I. (A.I.'s father who had already been heard at the original trial), B.P. (the applicant's partner who had already refused to testify at the original trial), M.A. (the officer of the Border Guards who had stopped A.I. on the border and who had already been heard at the original trial), P.P. (an officer of the Border Guards), and G.O, M.J., T.M. and Z.D. (police officers from the Sokółka District Police).

38. On 19 November 1996 the Białystok Regional Court transmitted the case for examination by the Łódź Regional Court. On 31 January 1997 that latter court requested the Łódź Court of Appeal that the case be transmitted

back to the Białystok Regional Court. On 11 February 1997 the Court of Appeal ruled that the case should be examined by the Łódź Regional Court.

39. The Łódź Regional Court held hearings on 23 April and 2 June 1997. On the latter date the Regional Court gave judgment. It convicted the applicant as charged and sentenced him to 18 months' imprisonment suspended on probation for 3 years and a fine of 2,000 new Polish zlotys (PLN).

The reasoning for the judgment read, in so far as relevant:

> "On 2 April 1994 J.S.-T., who had a permanent residence in San Francisco, hired a Mercedes 200 E from the Sixt-Budget company in Frankfurt. The car was hired for a period from 2 to 10 April 1994. The rental agreement included a ban on driving the car to the countries of Eastern Europe, Denmark [and] Italy (p. 13).
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> On 3 April 1994 J.S.-T. accompanied by a P.M. arrived at Łódź in the hired car. In Łódź they met the defendant Jan Gossa, an acquaintance of P.M. The defendant proposed to take the car abroad to former USRR, where it would be sold. He [the defendant] stated that he knew a person who was willing to drive the car. The amount received from the sale was to be shared.
>
> On the same day the defendant put J.S.-T. in contact with A.I. The meeting took place in the car park, where J.S.-T. handed the car documents to AI. AI left the car park in the "Mercedes" (statements of J.S.-T., pp.93-94).
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> On 4 April 1994 at 2.40 a.m. A.I. arrived at the Kuźnica Białostocka road border check-point and attempted to cross the Polish-Belarusian border in the Mercedes 200 E. During the border control the officers of the Border Guards decided to check if the car was being searched for in Germany. They were alerted by the fact that A.I. declared that he was travelling as a tourist to Moscow and Sochi, but did not have any luggage. In addition, after having verified internal records, it was established that he [A.I.] had previously crossed the border driving a different car.
>
> On 4 April 1994 at 1.40 p.m. information was received from the Kołbaskowo border check-point that the car was appropriated to the detriment of the Sixt-Budget rental company (p.7). The value of the Mercedes amounts to approximately PLN 85,000. It was returned to the company, which on 4 April 1994 had notified that the car was appropriated.
>
> By a final judgment of the Białystok Regional Court of 16 October 1996 ... A.I. was convicted of the offence specified in Article 215 § 2 of the Criminal Code, consisting in the fact that on 3 April 1994 in Łódź he had assisted J.S.-T. in selling a "Mercedes-Benz 200E" car registered under number MUD 9552 valued not less than 85,000 PLN to the detriment of the company Sixt-Budget GmbH, in that knowing that the car had been obtained by crime he took it with a view to driving it abroad and was sentenced to 12 months' imprisonment and a fine of PLN 5,000 (case file no. III K 132/96).
>
> The defendant Jan Gossa did not confess to the act with which he had been charged. He refused to give evidence before the court, and thus the court revealed his statements made during the investigation.
>
> ...

The court did not consider the applicant's statements credible. He was questioned on few occasions and [each time] he made differing statements. Those statements vary in essential respects: as to acquaintance with J.S.-T., as to contacts with her and as to reasons for handing the car to A.I. If the applicant's evidence given at the [original] trial that he had had nothing to do with the attempted taking of the "Mercedes" abroad was to be considered credible, then the defendant would have had no reasons to provide, directly after his arrest, false information, [which was] different from the version [of events] which he had eventually presented.

The court, when determining the facts of the case, considered credible the statements made by J.S.-T, questioned as a suspect, on 5 May 1994. In those statements, J.S.-T. had presented in detail her contacts with the defendant and A.I. Her statements are logical and convincing. She was questioned in the presence of an interpreter and her lawyer. She had unrestrained freedom to express herself. The facts stated by her do not only incriminate the defendant and A.I., but they also confirm her guilt.

Those statements do not lose their credibility on account of the fact that they differ from J.S.-T.'s statements made directly after her arrest, namely that the defendant without her consent had lent the car to his friend. He [the defendant] had the car keys because he had parked the car in the car park. That version of events, although similar with the defendant's first statement, is not credible.

A.I. saw the rental agreement when taking the car. A.I. has lived in Germany for 8 years and could not have any difficulties in understanding the clause in the agreement which forbade driving the car to the countries of Eastern Europe. J.S.-T. also knew the content of the rental agreement, and thus was aware of this ban. The next assertion of the defendant and A.I. that the latter was to drive the car to Minsk or Vilnius on her [J.S.-T.'s] instructions did not find any support in the evidence. A.I. at the time of his arrest on the border had stated that his destination was Moscow or Sochi, so completely different destinations [from those previously referred to].

In the light of the evidence obtained in the case the applicant's guilt does not raise any doubts. It was the defendant who was the mastermind of the sale of the car abroad. The amount received from the sale was to be shared.

The defendant was fully aware that J.S.-T. was not the owner of the car. She resided permanently in the United States. She drove to Łódź in the hired Mercedes which was registered in Germany. J.S.-T. was a party to the rental agreement and she gave her consent to the sale of the car. She also handed over the documents and the car keys to A.I. to whom she had been directed and put in contact with by the defendant. A.I. was to drive the car abroad. At the moment of the handing of the car to A.I. it was appropriated to the detriment of the Sixt-Budget company, the owner of the car.

The defendant's actions constituted [the offence specified in] Article 215 § 2 of the Criminal Code. The defendant, acting together and in agreement with A.I. assisted J.S.-T. in selling a "Mercedes-Benz 200E" car registered under number M-UD 9552 valued not less than 85.000 PLN ... [and, in particular] knowing that the car had been obtained by crime, hired A.I. to take that car abroad..."

40. The applicant and the prosecutor appealed. The applicant alleged a breach of his defence rights and of a number of procedural provisions. He stressed that he had been deprived of any opportunity to challenge the

statements of J.S.-T. made before the prosecutor and to cross-examine her. He also maintained that the authorities had made no real attempt to secure the attendance of that witness before the court.

41. On 13 November 1997 the Łódź Court of Appeal upheld the conviction but partly altered the sentence imposed. It raised the fine originally imposed to PLN 6,000. The reasoning for that judgment read, in so far as relevant:

> "... The alleged breach of [the applicant's] procedural rights cannot be upheld. The legal grounds for declining to hear J.S.-T. before the court are laid down in Article 337 §§ 1 and 2 of the Code of Criminal Procedure. Under that provision, the court may – even if the parties object – decline to take measures to summon a witness and confine itself to reading out the records of statements previously given by him or her as a defendant or suspect. The application of that provision is an exception to the rule of the direct examination of witnesses and does diminish the accused person's defence rights, in particular in situations where there has been no prior confrontation between him and a witness whose testimony is later read out. It must however be stressed that Article 337 of the Code of Criminal Procedure does not oblige the court to exhaust all possibilities of producing a witness from abroad at the trial, even if he or she resides in a neighbouring country. ... Of course, the trial court is empowered, apart from the application of the measure under Article 337..., to make efforts to ensure the direct examination of a witness from abroad. But those efforts make sense only if there are prospects of success. It is known – also to the author of the appeal – that the [previous] attempts made by the court in that respect were futile and that future ones would fail. As early as 1995 the Regional Court asked the Embassy of the United States of America for information as to whether J.S.-T. lived at the address that she had supplied. The reply was evasive and should be interpreted as a refusal to furnish any information on that matter. A further confirmation of the firmness of that position is found in the letter of the Polish diplomatic service (see the letter of the Consul General of the Republic of Poland in Los Angeles, p. 482).
>
> A pre-condition for securing an appearance of a witness from abroad is that the authority conducting the proceedings knows his or her address. Bearing in mind the obligation to observe all procedural rules attached to summoning a witness from a foreign country, a summons cannot be sent if his or her address is unknown or if it is clear that the address is false. It that context, it should be recalled that the applicant's "private" enquiries were to no avail (see ... the letter of 7 October 1996...).
>
> In conclusion and having regard to the grounds for the appeal, the [trial] court would not have been able to satisfy the requirement of the "proper and effective summoning of the witness J.S.-T. for the trial". Consequently, this argument is ill-founded and, indeed, this court could have stopped at this point because the appellant's further arguments do not concern the court's actions but the actions of the investigative authorities and, also, the appellant does not challenge the logic of the conclusion reached by the trial court. Yet there is a need to make the following remarks.
>
> First of all, J.S.-T. was released because she put up bail of PLN 10,000. Until that time, that is to say, for a month, she was in custody. The [applicant] was treated in the same way but on more favourable conditions: he was released after 17 days and the security in question was PLN 8,000.
>
> Secondly, evidence obtained under Article 337 must be assessed with a particular

thoroughness. The assessment of J.S.-T.'s testimony must be very careful, not least because she was charged with theft of the car in question and supplied a false address. The Regional Court, did, however, manage the task. The best proof is the fact that the [appellant] does not even try to challenge the arguments relating to J.S.-T.'s testimony, which are presented in the reasoning of the contested judgment. It can only be recalled that the trial court took notice of the circumstances surrounding the last questioning of J.S.-T. (by the prosecutor and in the presence of her lawyer) and of the importance of those statements for her criminal responsibility. The court of first instance did not overlook the fact that those statements differed from the previous ones. There is no material proof to conclude that her statements incriminating [the applicant] were made in consequence of her agreement with the investigating authority and, in particular, that they were the price for her release. If her release can be looked on from this angle, the price for her release – although lawful – was the security in question.

Apart from the above-mentioned arguments of the trial court, there is one more reason to believe J.S.-T. and not to believe [the applicant]. His subsequent statements differ in respect to a number of principal points, points that were enumerated by the trial court. That court rightly noted that [the applicant], when questioned for the first time, had no reason to present a version of events that differed from those later presented. That was decisive for the trial court when, in making a choice between [the applicant's] statements and the last version presented by J.S.-T., it rejected his testimony. She also changed her statements but she had an interest in concealing the truth. Yet, if [the applicant] was not in any criminal conspiracy with other persons involved in the case, he had no reason to conceal the true circumstances capable of showing that he was not involved in the activities of those persons.

The applicant's letter to the court dated 17 July 1997 reinforces the conclusions reached by the Regional Court rather than supporting his own credibility. A new circumstance emerges [from that letter], namely that the car in question was to return from Minsk (so, it was to return to Poland and then to Frankfurt am Main, where it had been hired) with medicines for P.M. So, there was no car theft, and therefore no assistance in selling property obtained by crime. Multiplying different versions results in none of them being considered credible.

Two further, significant elements should be added to the arguments of the trial court.

A.I., when heard by the prosecutor on 6 April 1994, said, among other things, that "... [the applicant] came and offered me to get paid – he asked whether I would drive a "Mercedes" to Minsk since his acquaintance was to deliver a hired car there." [That] witness both earlier and in the present case, in [the applicant's] presence, confirmed those statements and [the applicant] did not object. [The applicant] himself stated that he suggested A.I. as a driver because he had a German passport. Of course, [the applicant] knew of the arrival of the car on German licence plates. If one combines all these facts which, given [the applicant's] more than average intelligence and the fact that his decisions are well considered (see the psychologist's report, pp. 138-139) presented [him] with an exceptionally easy task, it must be concluded that [the applicant] had full knowledge and fulfilled all elements [i.e. had the necessary *actus reus* and *mens rea*] for the offence in question.

Since, for all the above reasons, the assessment made by the court of first instance was compatible with the [principles laid down in] Article 4 § 1 of the Code of

Criminal Procedure and consistent with the principles of logical thinking and common sense, no grounds for allowing the [applicant's] appeal have been found. ..."

42. On 9 December 1997 the applicant was served with the written grounds of the judgment of the Court of Appeal. On 6 January 1998 he filed a cassation appeal with the Supreme Court (*Sąd Najwyższy*), alleging a breach of Article 6 § 3 (d) of the Convention in that he had been deprived of an opportunity to examine, or have examined, the principal witness against him.

43. On 18 December 1998 the applicant wrote to the Supreme Court and asked for a hearing date to be fixed. On 23 December 1998 the Supreme Court replied as follows:

"... acting on the President of the Section's instruction, I should inform you that dates for hearings are fixed depending on the date on which a given cassation appeal has been lodged with the Supreme Court and that, at present, the [average] period between the date of the filing of a cassation appeal and the date of a hearing amounts to some 2 years and 6 months. Given that your ... cassation appeal was received at the Supreme Court's registry on 19 February 1998, it will be heard not earlier than in 2000."

44. The Supreme Court examined the cassation appeal on 1 December 2000 and dismissed it as being obviously groundless. It decided, pursuant to Article 535 § 2 of the Code of Criminal Procedure, not to provide written grounds for its decision.

II. RELEVANT DOMESTIC LAW

45. When the applicant was tried, the rules governing the assessment and admissibility of evidence were contained in the Code of Criminal Procedure of 1969 ("the 1969 Code") (*Kodeks postępowania karnego*). The Code is no longer in force. It was repealed and replaced by the Law of 6 June 1997 (commonly referred to as the "New Code of Criminal Procedure"), which entered into force on 1 September 1998.

Article 4 § 1 of the 1969 Code provided:

"Judges shall rule on the basis of their conviction deriving from evidence obtained and founded on their free assessment of evidence [and they shall] draw on knowledge and life experience."

Article 337 provided, in its relevant part:

"1. If a witness has groundlessly refused to testify, or has given testimony different from the previous one, or has stated that he does not remember certain details, or if he is abroad, or a summons cannot be served on him, or if he has not appeared on the ground of irremovable obstacles or if the president of the court has declined to summon him pursuant to Article 296 § 2 [i.e. because upon the lodging of the bill of indictment the prosecution has asked that the records of his testimony be read out at trial], the records of his previous statements may be read out, [regardless of whether they] have been made in the investigation or before the court in the case in question or in another case or in any other procedure provided for by the law.

2. In the circumstances referred to in paragraph 1, the records of evidence that a witness has given when heard as an accused may also be read out."

THE LAW

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

46. The applicant complained that his trial had been unfair in that he had been unable to examine a witness whose statements had served as the main basis for his conviction. The relevant parts of Article 6 §§ 1 and 3 (d) provide as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

A. The parties' submissions

47. The applicant maintained that his right to a fair trial had been violated. He argued that in the present case there had been no evidence other than the statements of J.S.-T. which had served as the basis for his conviction. He further submitted that the rights of the defence had been breached since at no stage of the proceedings had he had a possibility to put questions to that witness.

48. The Government admitted that during the entire course of the criminal proceedings against the applicant, he had not had an opportunity to examine J.S.-T., who had been a witness against him. They submitted that a testimony of that witness had been read out at the hearing held on 2 June 1997 and, undoubtedly, it had been taken into account by the Łódź Regional Court in its judgment of the same date. However, in the particular circumstances of the present case, the Government maintained that despite

the fact that the applicant could not examine J.S.-T. in the course of the impugned proceedings, his defence rights had not been infringed to such an extent as to amount to a breach of Article 6 §§ 1 and 3(d) of the Convention.

49. The Government underlined that J.S.-T. had been residing in the USA and, as it appeared after her release, she had supplied the prosecuting authorities with a false address. The Łódź Court of Appeal, in its judgment of 13 November 1997, had clearly stated that all "attempts made by the court [in order to secure the personal appearance of that witness at the hearing]" were futile and ... that future ones would fail". Furthermore, in the written grounds of its judgment of 13 November 1997, the Court of Appeal referred to the information obtained from the Embassy of the United States of America in Poland which "should be interpreted as a refusal to furnish any information on that matter". The Government emphasised that, despite the efforts made by the relevant authorities, it was impossible to secure the appearance of J.S.-T. at the hearing. They further maintained that in such a case "it was open to the national court, subject to the rights of the defence being respected, to have regard to the statements obtained by the police ... in particular if corroborated by other evidence before it" (cf. *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, § 22).

50. Furthermore, the Government contended that the testimony of J.S.-T. had not been the only evidence on which the national courts had based the applicant's conviction. They argued that the statements of J.S.-T. had been corroborated by other evidence. In particular, the Łódź Court of Appeal referred in this respect to the statements of A.I. The Government underlined that the applicant had been confronted with A.I. in the course of the investigation and that the applicant had examined him at the hearing. They also submitted that there had been other items of documentary evidence which had formed the basis of the applicant's conviction. The Government also stressed that the evidence obtained from J.S.-T. had been assessed by the courts with particular diligence.

B. The Court's assessment

1. Applicable principles

51. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaint under Article 6 §§ 1 and 3 (d) taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 49).

52. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under

the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others*, cited above, p. 711, § 50, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67).

53. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others*, cited above, p. 711, § 51, and *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

54. As the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*, no. 33354/96, § 40, 27 February 2001; *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

55. With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court recalls that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see, *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). However, *impossibilium nulla est obligatio*; provided that the authorities cannot be accused of a lack of diligence in their efforts to award the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see, in particular, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21; *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005; *Mayali v.*

France, no. 69116/01, § 32, 14 June 2005; *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005). Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should, however, be treated with extreme care (see *Visser v. the Netherlands*, no. 26668/95, § 44, 14 February 2002; *S.N. v. Sweden*, no. 34209/96, § 53, ECHR 2002-V). The defendant's conviction may, in any event, not solely be based on the statements of such a witness (see, in particular, *Mayali*, cited above, § 32).

56. In that regard, the fact that the statements were, as here, made by a co-accused rather than by a witness is of no relevance. In that connection, the Court reiterates that the term "witness" has an "autonomous" meaning in the Convention system (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). Thus, where a statement may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see, *mutatis mutandis*, *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 950-51, §§ 51-52).

2. Application of the above principles

57. The Court notes that in convicting the applicant, the domestic courts relied on the statements given by J.S.-T. at the investigative stage of the proceedings and A.I.'s statements given both before the prosecutor and the courts. They further relied on the applicant's statements at the investigative stage, having regard to the fact that the applicant refused to give evidence before the courts during his second trial. At no stage of the proceedings was a confrontation organised between the applicant or his counsel and J.S.-T.

58. The Court observes that the authorities made efforts to secure J.S.-T.'s attendance at the hearing, who had provided the prosecution service with a false address in the United States. It notes that as early as 19 May 1995 the Łódź Regional Court submitted its second request to the Embassy of the United States of America in Warsaw, asking for confirmation whether J.S.-T. had lived at the address provided to the prosecution service. In their reply, the Consular Department of the Embassy limited itself to stating that, according to their knowledge, J.S.-T. did not reside in Poland. Furthermore, it appears from the written reasoning of the Court of Appeal's judgment of 13 November 1997 that the authorities made an unsuccessful inquiry concerning J.S.-T.'s place of residence with the Consulate General of the Republic of Poland in Los Angeles. However, despite those efforts, the authorities were unable to determine the actual address of J.S.-T. which was a precondition for serving a summons on the witness residing abroad. Thus, the domestic courts could not secure the presence of J.S.-T. at the hearing.

59. The Court considers that it was not for the Polish authorities to make

inquiries to establish the whereabouts of a person residing on the territory of a foreign State. By requesting the Embassy of the United States of America on two occasions to confirm the address of J.S.-T. and making the inquiry with the Consulate of the Republic of Poland in Los Angeles, those authorities took steps to establish the address of that witness. Since their efforts were to no avail, the national courts were not in a position to serve a summons on J.S.-T. abroad or to request that she be heard as a witness by the authorities of a foreign State. Moreover, they had no alternative but to rely on the information which they could receive from sources such as the Embassy of the United States of America in Poland and the Consulate General of the Republic of Poland in the USA, since J.S.-T. was a national of the United States. Under these circumstances, the Polish authorities cannot be accused of a lack of diligence (see, *Calabro v. Italy and Germany* (dec.), no. 59895/00, ECHR 2002-V).

60. The Court readily agrees that it would have been preferable for J.S.-T. to have been heard in person, but her unavailability could not be allowed to block the prosecution, the appropriateness of which was, moreover, not for the European Court to determine (see *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 28). Similarly, the Court does not consider it appropriate to question the Sokółka District Prosecutor's decision of 6 May 1994 to release J.S.-T. on bail.

61. The Court finds that in view of the unsuccessful efforts to establish J.S.-T.'s address and the subsequent impossibility to summon her, it was open to the national courts, subject to the rights of the defence being respected, to have regard to J.S.-T.'s statements obtained by the prosecution, in particular in view of the fact that they could consider those statements to be corroborated by other evidence before them.

62. Furthermore, the Court observes that the applicant had ample opportunities to challenge J.S.-T.'s version of events and to put his own version to the courts during the re-trial, but he chose not to do so. Thus, the courts when determining the charges against him had to have recourse to his statements given at the investigative stage of the proceedings. However, since those statements significantly varied in respect of certain crucial details, the domestic courts considered that their credibility was undermined (see, *mutatis mutandis*, *Asch v. Austria*, cited above, § 29). In addition, the Court is satisfied that the domestic courts assessed J.S.-T.'s statements with the particular care required. They took into consideration different factors which were of relevance when it came to assessing the credibility of J.S.-T. and the veracity and the weight to be given to her statements (see, *mutatis mutandis*, *Solakov*, cited above, § 62).

63. In any event, the Court considers that the applicant's conviction was not based solely or to a decisive degree on J.S.-T.'s statements. Both the Regional Court and the Court of Appeal had regard to evidence given by A.I., the applicant's co-accused. The Regional Court in its judgment of

2 June 1997 found that the applicant's assertion that A.I. would drive the car to Vilnius or Minsk was contradicted by A.I.'s statements at the time of his arrest on the border check-point. Moreover, the Court of Appeal in its judgment of 13 November 1997 noted that A.I. had stated during questioning by the prosecutor on 6 April 1994 that the applicant had offered him payment and had asked whether he would drive a Mercedes, which had been hired by the applicant's friend, to Minsk. The Court of Appeal emphasised that A.I. had confirmed that testimony at the hearing before the Regional Court and that the applicant had not challenged that evidence, despite having all possibilities to do so.

64. Having regard to the proceedings as a whole, the Court considers that the lack of a possibility to examine J.S.-T. at the hearing did not, in the circumstances of the case, infringe the rights of the defence to such an extent that it constituted a breach of paragraphs 1 and 3 (d) of Article 6, taken together (*mutatis mutandis*, *Artner v. Austria*, cited above, pp. 10-11, §§ 22-24). The Court cannot, therefore, find that the applicant's trial as a whole was unfair.

65. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE LENGTH OF PROCEEDINGS

66. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

67. The Government contested that argument.

68. The period to be taken into consideration began on 5 April 1994 and ended on 1 December 2000. It thus lasted 6 years and nearly 8 months for three levels of jurisdiction.

69. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II)

70. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Pélissier and Sassi*, cited above).

71. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of

persuading it to reach a different conclusion in the present case. It observes, in particular, that there was a nearly 35-month period of inactivity in the proceedings before the Supreme Court between the date of lodging the applicant's cassation appeal and the date of delivery of the judgment. The Court can accept that some delays in the procedure before the Supreme Court could be explained by the fact that at the material time the Supreme Court had to deal with an increased workload (see, in respect of civil cases, *Kępa v. Poland* (dec.), no. 43978/98, 30 September 2003). Nevertheless, in the present case the applicant's cassation appeal lay dormant in the Supreme Court for nearly 35 months, which constitutes an unreasonable delay (see *Domańska v. Poland*, no. 74073/01, § 32, 25 May 2004). Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

72. There has accordingly been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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

74. By a letter of 26 June 2003 the applicant claimed 21,350 Polish zlotys (PLN) in respect of pecuniary damage and PLN 150,000 in respect of non-pecuniary damage, referring to the alleged violation of his right to a fair trial and to the alleged violation of the right to have his case examined within a reasonable time. He reiterated those claims in his letter of 20 May 2006.

75. The Government did not comment on the applicant's claims.

76. The Court has found no violation in respect of the applicant's complaint under Article 6 §§ 1 and 3 (d) and therefore no award in this respect can be made. On the other hand, the applicant has succeeded in respect of his second complaint, namely that his case was not heard within a reasonable time. However, the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. Nevertheless, it considers that the applicant certainly suffered non-pecuniary damage, such as distress and frustration, on account of the protracted length of the proceedings, which cannot be sufficiently compensated by the above finding of a violation. Taking into account the

circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 under that head.

B. Costs and expenses

77. The applicant made no claim for costs and expenses.

C. Default interest

78. 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

1. *Holds* by six votes to one that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of the length of the proceedings;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Casadevall is annexed to this judgment.

N.B.
F.E.-P.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

I did not vote with the majority on point 1 of the operative provisions because, in my opinion, the fact that the applicant was unable to examine or have examined the prosecution witness on whose statements his conviction was mainly based also amounted to a violation of Article 6 §§ 1 and 3 (d) of the Convention. To my mind the authorities' responsibility for that serious procedural shortcoming is obvious for the following reasons.

1. The main prosecution witness and co-defendant, J.S.-T., was arrested on 6 April 1994. For a month she refused to make a statement. She agreed to do so, in the presence of her lawyer, on 5 May 1994 and on the very next day (6 May) the District Prosecutor, taking the view that "all necessary evidence had been obtained" (see paragraph 20 of the judgment), ordered her release on payment of approximately 2,500 euros bail. She then left for the United States, after supplying a false address. It follows that the witness was under the judicial authorities' power and control for a month.

2. The above facts raise three questions:

(a) For what reason was no attempt made to confront the applicant with the witness who was his co-defendant during those thirty days?

(b) Why, after J.S.-T.'s statement on 5 May, did the authorities not give the applicant, as a person charged with a criminal offence, the opportunity to examine or have examined the witness against him?

(c) Why was J.S.-T. released immediately on the day after making her statement, thus frustrating one of the applicant's fundamental rights?

The Government did not provide any explanation, and the Court for its part did not give these anomalies, though they have serious implications for the rights of the defence, the attention they deserve.

3. The Regional Court acquitted the applicant at first instance for lack of evidence and precisely because of the doubts raised by J.S.-T.'s statement. In that connection the Regional Court pointed out in its judgment: "... when assessing [her statements], it must be taken into account that they do not have the quality of [witness] testimony given under pain [of being criminally liable for perjury] but are the statements of a suspect with all the consequences thereof, including the possibility that J.S.-T., for reasons only known to herself, did not tell the truth or the whole truth" (see paragraph 31 of the judgment). On that basis I consider that in the present case, notwithstanding the fact that the term "witness" has an autonomous meaning within the Convention system, the distinction between the statements of a witness, in the true sense of the word, and those of a

co–defendant (who had been released and had left the country leaving a false address) was not without importance.

4. I consider that the arguments which led the majority to find no violation do not stand up to the general principles applicable in the case, set out in paragraphs 51 to 56 of the judgment. The majority have attached particular importance (in paragraphs 58 and 59 of the judgment) to all the unsuccessful efforts made by the Polish judicial authorities to find out the witness's address in the United States so that she could be summoned. On the other hand, they do not appear to have been troubled by the fact that this witness was under the control of the same authorities for a month or by the fact that those authorities decided to release her immediately after she had made her statement, whereas – without any particular effort – they could have enabled the applicant to exercise the right to examine or have examined a key prosecution witness, as guaranteed by Article 6 of the Convention.