

APPLICATION/REQUÊTE N° 12013/86

Gerlando ALBERTI v/ITALY

Gerlando ALBERTI c/ITALIE

DECISION of 10 March 1989 on the admissibility of the application

DÉCISION du 10 mars 1989 sur la recevabilité de la requête

Article 6, paragraph 1 of the Convention: *This provision does not govern the admissibility and probative value of evidence as such, but it does not exclude the use of indirect evidence which is sufficient in the eyes of the law to establish the guilt of the accused and is debated in adversarial proceedings before the judge.*

Article 19 of the Convention: *The Commission is not competent to examine alleged errors of fact or law committed by national courts, except where it considers that such errors might have involved a possible violation of the rights and freedoms set forth in the Convention.*

Article 6, paragraphe 1, de la Convention : *Cette disposition ne régit pas, comme telles, l'admissibilité et la force probante des moyens de preuve mais elle n'exclut pas le recours à des moyens indirects de preuve suffisamment forts, aux yeux de la loi, pour établir la culpabilité de l'intéressé et discutés contradictoirement devant le juge.*

Article 19 de la Convention : *La Commission ne peut examiner de prétendues erreurs de fait ou de droit commises par le juge national que dans la mesure où ces erreurs pourraient impliquer une violation des droits et libertés garantis par la Convention.*

(TRANSLATION)

THE FACTS

The applicant, Gerlando Alberti, is an Italian national born in 1927 in Palermo. He is currently in detention in Volterra. Before the Commission, his is represented by Mr. Dean, a lawyer practising in Perugia.

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

On 25 August 1980, the applicant was arrested with four other people — three of whom were French nationals — as part of an investigation concerning international drug trafficking, conducted by the Palermo Public Prosecutor's Office.

The police operation which led to his arrest also led to the discovery of two drug-refining laboratories and was followed by further arrests, in particular in Paris and in Marseille.

This police operation had been prepared thanks to the collaboration of Mr. J., owner and manager of a hotel in which the three French nationals had stayed for around three weeks. Mr. J. had allowed two police officers to pose as members of his staff. In this way the police had been able to monitor the movements of the three French nationals and choose the best time to intervene.

On 28 August 1980, two men, who remain unidentified, entered Mr. J.'s hotel with their faces uncovered, and shot and killed him while he was on the telephone at reception, then fled in a car which was later found burnt out.

The results of the investigation conducted by the police following this murder were set out in a report dated 2 September 1980. The report showed that all the possible motives had been taken into consideration and carefully examined: the members of Mr. J.'s family and his collaborators had been questioned to ascertain whether they had professional motives or motives of enmity towards the victim; Mr. J.'s behaviour during the period preceding his death had also been taken into account.

According to the investigators, the crime could be explained only on account of the victim's collaboration in the operation that had led to the uncovering of the drugs ring of which the applicant appeared to be the leader.

Further to this report, the Palermo prosecuting authorities opened an investigation in respect of a person or persons unknown. Then, on 22 September 1980, the applicant and Mr. C. — who was regarded as his second in command — were charged with being the instigators of the murder.

During the investigation, several people who had taken part in the police operation or in the subsequent inquiries, as well as the witnesses to the murder, were heard. The applicant, Mr. C., the three French nationals and other accomplices who had been arrested were questioned. An inspection of Palermo prison revealed that prisoners in solitary confinement could contact not only other prisoners but also persons from outside carrying out work in the prison.

Documents relating to another investigation in progress in respect of the applicant, who was being prosecuted for infringements of drug legislation, and in particular a report dated 28 August 1980 by the criminal investigation police ("criminalpol") and the public prosecutor's submissions made in the context of those proceedings were included in the case-file.

At the end of the investigation, the public prosecutor asked the investigating judge to discontinue the proceedings since in his view there was not sufficient

evidence to establish that the order to kill Mr. J. had been given by the applicant or by Mr. C., given that accomplices who were not in prison could also have decided to take their revenge.

However, on 23 September 1982, the investigating judge ordered the committal for trial before the Palermo Criminal Court. He considered that the charges against the accused were well supported: in particular, the murder had been committed only shortly after the conclusion of the police operation in which Mr. J. had collaborated and the members of the criminal organisation still at large could therefore not have known of the part played by Mr. J. nor could they have acted without instructions from the applicant or from Mr. C.

The trial before the Palermo Criminal Court lasted from 27 January to 4 March 1983. The applicant declined to take part.

On 27 January 1983, having examined Mr. C. and having read out the statements made by the applicant during the investigation, the court heard the following witnesses: a captain of the carabinieri, the chief warden of Palermo prison and two other warders, a police superintendent and a police constable, Mr. J.'s wife, the fiancé of Mr. J.'s daughter, two members of the hotel staff, and the person at the other end of the telephone when Mr. J. was murdered.

On 28 and 31 January 1983, various documents were read out, including police reports and a report drawn up by the Public Prosecutor's Office on the shortcomings of Palermo prison.

On 1 March 1983, the Criminal Court heard four other witnesses: a captain of the fiscal police ("Guardia di Finanza"), an assistant to the Palermo chief police officer, the Palermo prison governor and a third warden.

Hearings on 2, 3 and 4 March 1983 were taken up by the public prosecutor's address and the address by the lawyers for the accused. After the last hearing, on 4 March 1983, the Palermo Criminal Court delivered its judgment sentencing the applicant to 24 years' imprisonment.

In its decision, it found that the only plausible motive for the murder of Mr. J. was revenge and that nobody, other than the applicant and his accomplices, had reason to seek such revenge.

Moreover, the manner in which the murder had been carried out — which bore the Mafia hallmark — and the fact that it had taken place very shortly after the applicant's arrest, led the Criminal Court to conclude that the order to kill Mr. J. had been given by the applicant. The fact was that the applicant was the only person among those arrested to have had the authority to give such an order, given his undoubted position as chief of the Sicilian branch of the criminal organisation broken up by the police operation.

With regard to the members of this criminal organisation who had not been arrested, the Criminal Court noted that they had undoubtedly not been directly aware of the role that Mr. J., by collaborating with the police, had played in the arrest of their "chief". This role could only have been known by the three French nationals since the police officers who had worked at the hotel, and whom the three French nationals knew well, had also participated in their arrest. However, the three French nationals could have communicated this fact only to the applicant and Mr. C., and only these two knew about the channels for conveying messages from the prison to the outside to give the order to kill Mr. J.

On the basis of all this circumstantial evidence, which it regarded as consistent with the only plausible motive for the murder, the Criminal Court decided that the applicant was guilty. However, it acquitted Mr. C., considering that there was no proof that the applicant had consulted him before taking his decision.

The applicant appealed, asserting that he had been convicted without any evidence. The public prosecutor also appealed against the decision, claiming that an adequate statement of reasons had not been given for Mr. C.'s acquittal.

The proceedings before the Palermo Criminal Court of Appeal took place, over five hearings, from 9 to 13 April 1984. The court examined Mr. C. and had reports read out concerning two examinations of the applicant, who had declined to appear. It ordered that a copy of the judgment of 19 April 1983 — by which the Palermo Court had sentenced the applicant to 18 years' imprisonment for heading a criminal organisation involved in drug trafficking — be placed in the file along with a copy of the operative provision of the judgment confirming this sentence on appeal.

After hearing the public prosecutor's address and the arguments of the accused's lawyers on 13 April 1984, the Palermo Criminal Court of Appeal, adopting the reasoning of the Criminal Court, rejected the public prosecutor's appeal and that of the applicant and confirmed the sentence imposed on the applicant.

On 13 March 1985, the Court of Cassation rejected the applicant's appeal.

In its judgment — the text of which was filed with the registry on 25 June 1985 — it noted first of all that the trial judges' finding as to the Mafia-style character of the murder had not been based on a general assessment ("apprezzamento di maniera") but on the specific methods used to commit the murder, which were similar to those used for most Mafia murders in Sicily.

According to the Court of Cassation, following a rigorous examination of the results of the investigation, the trial judges had succeeded in establishing the sole and exclusive motive for the crime. They had taken account not only of the chronological succession of events, but also of undoubted circumstances: namely the presence at the hotel, at the same time as the French nationals, of policemen acting as hotel staff, with the agreement of the hotel manager; the considerable damage, economic and otherwise, caused by the police operation — facilitated by the hotel manager's

collaboration — to the criminal organisation, which had in the process “lost” two laboratories and had many of its members arrested ; the considerable loss of prestige by the Sicilian members of the organisation who had been unable to provide adequate security for the criminal activity ; the confirmed absence of other motives, established on the basis of statements made by the victim’s relatives and the results of the police investigation.

In addition, the prosecution evidence was all based on facts established during the proceedings.

Thus, the position occupied by the applicant in the criminal organisation emerged from documents — duly acquired during the trial and placed in the file — relating to the proceedings concerning the drug-trafficking case. Those proceedings had ended on 11 February 1985 in a judgment by the Court of Cassation confirming the applicant’s conviction.

The fact that after a three-week stay at the hotel, the French nationals found themselves — at the time of their arrest — face to face with the policeman who had acted as hotel receptionist, justified the conclusion that the policeman had been recognised by them.

It was also established that the French nationals had had the possibility of contacting the applicant after their arrest and that the solitary confinement measure had not prevented one of them from contacting other prisoners and thereby having a lawyer recommended. In addition, the two public prosecutors responsible for the investigation had personally observed that it was not possible to ensure the solitary confinement of prisoners at Palermo prison. The trial judges had logically concluded that, first of all, the applicant had been informed by the French nationals of what they had seen and secondly, that he had had access to “channels” allowing him to convey messages to the outside.

Furthermore, the extreme speed with which revenge was taken — less than three days after the arrest of the applicant and his four accomplices — led the judges to rule out the possibility that other members of the criminal organisation could have known of Mr. J.’s role, which therefore allowed them to confine their search for the instigators of the murder to the five arrested persons.

The three French nationals had absolutely no influence over local criminals and Mr. C. was a mere executor (“gregario”). The applicant was therefore the only one of the five in a position to take the decision to kill Mr. J. and to give orders to this effect.

The Court of Cassation concluded that the Appeal Court’s decision could not be challenged and therefore confirmed the applicant’s conviction.

COMPLAINTS

Before the Commission, the applicant complains that he was convicted only on the basis of circumstantial evidence and presumptions. He asserts that it was impossible for him to clear himself of charges which were not based on any concrete evidence. He alleges a violation of Article 6 of the Convention.

THE LAW

The applicant claims that his conviction was based only on circumstantial evidence and presumptions and alleges a violation of Article 6 of the Convention.

The Commission will examine this complaint under Article 6 para. 1 of the Convention, which guarantees the right to a "fair trial".

The Commission recalls first of all that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (see, for example, No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31 and 61).

The Commission also stresses that the question of the admissibility of evidence and of its probative value falls essentially within the ambit of domestic law (see, for example, No. 7450/76, Dec. 28.2.77, D.R. 9 p. 108; No. 8876/80, Dec. 16.10.80, D.R. 23 p. 233). It is therefore not required to decide on the question of whether the domestic courts correctly assessed the evidence.

It recalls further that the use of indirect evidence is not ruled out in itself by Article 6 para. 1 of the Convention (see, No. 8945/80, Dec. 13.12.83, D.R. 39 p. 43), but that the judges, at the time of taking their decision, may convict only on the basis of direct or indirect evidence that suffices in the eyes of the law to establish the guilt of the accused (see, *Barberà, Messegué and Jabardo v. Spain*, Comm. Report 16.10.86, para. 104, Eur. Court H.R., Series A no. 146, p. 49). In addition, the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument (see, Eur. Court H.R., *Barberà, Messegué and Jabardo* judgment of 6 December 1988, Series A no. 146, p. 33, para. 78).

In this case, the Commission notes that in the absence of direct evidence, the trial judges established that the order to execute Mr. J. had been given by the applicant. To reach this conclusion, they relied on a whole body of indirect evidence, such as the existence of a single plausible motive, namely revenge; the absence of people with an interest in killing Mr. J. apart from members of the criminal organisation

he had helped to uncover; the fact that it was impossible for the applicant's accomplices who were not in prison to have known that Mr. J. had collaborated with the police; and the fact that the applicant was the only person, among those arrested, to have had the necessary authority to order the murder and the possibility of conveying his orders outside the prison.

The Commission also notes that the applicant does not deny that the charges against him were presented and debated adversarially before both the trial judges and the Court of Cassation. There is therefore nothing in the file that allows the Commission to conclude that the applicant did not enjoy a fair trial.

It therefore considers that the application is manifestly ill-founded and must be rejected under Article 27 para. 2 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.