

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

FIFTH SECTION

CASE OF SIEVERT v. GERMANY

(Application no. 29881/07)

JUDGMENT

STRASBOURG

19 July 2012

FINAL

19/10/2012

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



In the case of Sievert v. Germany,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 26 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 29881/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Lars Sievert ("the applicant"), on 9 July 2007.

2. The applicant was represented by Mr E. Wölke, a lawyer practising in Cologne (*Köln*). The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin,* of the Federal Ministry of Justice.

3. The applicant alleged that neither he nor his counsel had been able at any stage of the criminal proceedings instituted against him to question the main witnesses on whose testimonies his resulting conviction relied in breach of his right to a fair trial pursuant to Article 6 § 1 as well as §§ 3 (b) and (d) of the Convention.

4. On 22 September 2010 the application was communicated to the Government.

5. The applicant and the Government each filed observations on the admissibility and merits of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1974 and lives in Cologne. At the time of the events at issue he had been a police officer. He was subsequently dismissed when his conviction for inflicting bodily harm causing death while exercising a public office (*Körperverletzung im Amt mit Todesfolge*) as a consequence of the trial which forms the subject of the present application became final.

7. Prior to the proceedings at issue the applicant had already been the subject of preliminary investigations by the public prosecution authorities on eight separate occasions on suspicion of having caused bodily harm while on duty. At the time of the events at issue, seven of these preliminary proceedings had been discontinued in lack of sufficient evidence for the charges and one of the proceedings was still pending. In 2001 he had further been convicted of two counts of libel (*Beleidigung*) and compulsion (*Nötigung*) committed in the course of police operations.

A. The incidents at the Cologne Eigelstein Police Station on 11 May 2002

8. On 11 May 2002 the applicant was called to assist other police officers in arresting a man who was acting violently. The man ("the victim") was overpowered using force by the police officers, including the applicant, arrested and transferred to the Cologne Eigelstein Police Station. One police officer sustained minor injuries during the victim's arrest. The arrested person was subsequently transferred to a hospital where he fell into a coma and died without having regained consciousness.

9. Police officer G. and his female colleague H. belonged to an earlier shift but were still present at the police station when the victim was brought to the station. At the time of the events at issue G. and H. had an intimate relationship while G. was married to another woman. They witnessed the victim's ill-treatment by several police officers at the police station without helping the victim and later discussed the events and what, if any, further action was required in view of the incident.

10. On 12 May 2002 H. informed her former supervisor that G. and herself had witnessed several police officers surrounding the victim and repeatedly and jointly kicking him in the head, body, arms and legs as he had lain handcuffed on the floor of the "watergate", a tapered room whose width decreased from approximately 2.5 meters to 1.5 meters and which functioned as the police station's entry room. The victim had also been kicked and beaten later in a cell.

11. H.'s former supervisor immediately informed his hierarchical superiors who summoned G. and H. to the police station and questioned them later that day. G. and H. named several police officers, including the applicant, as participants in the victim's ill-treatment and identified several of them, including the applicant, during an identity parade.

12. All officers named by G. and H. were suspended from active duty. Criminal investigations were instituted against those officers as well as against G. and H. and conducted by a special team (*Sonderkommission*) established for this purpose. The head of the Cologne Eigelstein Police Station, who had not been involved in the events at issue, was posted to another police station with a view to enabling an impartial clarification of the circumstances of the case.

13. On 23 May 2002 counsel for the witnesses G. and H. submitted their written testimonies on the incident of 11 May 2002. As recommended by their respective counsel, G. and H. did not specify their own actions.

14. The criminal investigations against G. and H. on suspicion of having participated in the victim's ill-treatment, of not having rendered assistance to the victim and of having attempted to obstruct the prosecution of the police officers involved in the ill-treatment, were discontinued on 24 February 2003. The prosecution authorities specified that there was no evidence that G. and H. had actively participated in the ill-treatment. They further found that in view of the fact that the events had occurred within a short space of time it had been impossible for G. and H. to intervene and effectively prevent the ill-treatment. Furthermore, a psychiatric opinion obtained by G. and H.'s respective counsel from a professor at Munich university hospital expressed doubts as to whether G. and H. would have been personally capable of confronting their colleagues and helping the victim while having regard to the psychological pressure they had been exposed to at the time of the events at issue.

B. Proceedings before the Cologne Regional Court

15. On the same date, 24 February 2003, the applicant and five other police officers involved in the events were charged with jointly inflicting bodily harm causing death while exercising a public office (*gemeinschaftliche Körperverletzung im Amt mit Todesfolge*) before the Cologne Regional Court sitting in a jury formation (*Schwurgericht*) with three professional and two lay judges (*Schöffen*).

The subsequent trial was conducted in the period from 26 June to 25 July 2003.

1. The testimonies of witnesses G. and H.

16. On 8 July 2003, the fifth of in total eleven hearing days, witnesses G. and H., the only eye witnesses of the events in the "watergate" and the cell,

testified in court. In reply to the Regional Court's related question they denied having an intimate relationship.

17. G. gave an account of his recollection of previous statements made by him in the course of the preliminary proceedings and answered questions posed by the presiding judge, another judge and the public prosecutor. Then counsel assisting the witness declared that the latter would not answer questions by the accused, defence counsel or by the victim's relatives acting as joint plaintiffs to the prosecution (*Nebenkläger*). Counsel pointed out that the criminal investigations against the witness for participating in the victim's ill-treatment had been discontinued but could be reopened and there was thus a risk that the witness could incriminate himself. The Regional Court observed that two of the accused, including the applicant, had indeed declared in the course of the trial that G. had participated in the ill-treatment. He was therefore entitled not to reply to questions of the defence after having testified and having answered questions by members of the court and the prosecutor. Consequently, the court ordered that the witness be granted the right not to answer questions posed by defence counsel or the accused pursuant to section 55 of the Code of Criminal Procedure (see "Relevant domestic law" below). The court further ordered that G. not be put under oath.

18. Subsequently, witness H. testified, gave an account of her previous testimonies during the investigations, and answered questions by the court and an expert witness. She refused to answer questions by the defence counsel and counsel for the victim's relatives. Counsel for one of the applicant's co-accused formulated questions to be put to H. by the court. Counsel for H. then declared that H. would also not answer further questions by the court since there was a risk that the witness could incriminate herself. The Regional Court observed that criminal investigations had been pending against H. on suspicion of not having rendered assistance to the victim and of having attempted to obstruct the prosecution of the police officers involved in the ill-treatment. The court thus ordered that H. be granted the right not to testify pursuant to section 55 of the Code of Criminal Procedure (see "Relevant domestic law" below) and for this reason also refrained from submitting the questions formulated by counsel to the witness. The Court specified that once a witness had invoked his or her right to remain silent pursuant to the said provision any further questions were inadmissible. Furthermore, H. had explicitly stated that she would not answer any further questions even if put by the court.

19. On 13 July 2003 the applicant and another accused applied for two witnesses to be examined by the court with a view to demonstrating that G. and H. had lied to the court as regards their extramarital affair. They further alleged that G. had not told the truth concerning certain information provided on his past career as a police officer and regarding an intimate relationship with a further female colleague. The Regional Court, assuming

that these allegations were correct, considered that the hearing of the proposed witnesses could be dispensed with.

20. On 14 July 2003 the applicant requested that G. and H.'s statements be excluded as evidence from the trial.

2. The judgment of the Cologne Regional Court

21. In its judgment of 25 July 2003 the Regional Court held that the accused police officers by jointly and wilfully inflicting bodily harm on the victim had negligently caused the latter's death and found them guilty as charged. It sentenced the applicant to a suspended prison term of one year and four months.

(a) The facts established by the Cologne Regional Court

22. According to the facts as established by the Regional Court, the victim suffered from an acute boat of psychosis. He threatened two police officers with death who had arrived at the victim's flat following a neighbour's emergency call. The officers requested reinforcements, used pepper spray and subsequently subdued the victim using considerable force. The victim thereupon entered into a state of "excited delirium" and displayed extreme agitation, violent behavior, insensitivity to pain, and "superhuman" strength. The applicant and another police officer then arrived as further reinforcements, repeatedly hit the victim's legs and managed to shackle the victim who nonetheless continued to struggle. No police officer involved in the arrest was aware that the victim was suffering from a psychotic bout. One of the police officers involved, police officer A., sustained minor injuries.

23. The police officers transported the handcuffed and shackled victim to the Cologne Eigelstein Police Station. In the "watergate" the victim fell to the ground. The officers stood in a circle around the victim and jointly kicked and beat him while being aware that he did no longer present a serious danger. They were angry that the victim continued with his futile resistance which was perceived as particularly unruly. They also wanted to take revenge for their colleague A.'s injuries. As a consequence of his ill-treatment the applicant's nose started bleeding. One of the officers called an ambulance, a procedure generally observed in the event a person in police custody sustains, even minor, injuries.

24. The victim was then pulled from the "watergate" to a cell, leaving a clearly visible trail of blood on the floor. Some officers, including the applicant, continued to jointly beat and kick the victim who was no longer offering any resistance in the cell, leaving stains of the victim's blood on the wall.

25. The victim was then transferred to a hospital where the medical personnel at first did not recognise the psychotic bout and did not order that handcuffs and shackles be removed. The victim's pulse and breathing were

not checked continuously. Following the victim's apnoea and cardiac arrest, he was transferred to the intensive care unit where he was reanimated, possibly causing rib fractures. The victim sustained irreparable brain damage and died on 24 May 2002.

26. The coroner concluded on the basis of a post-mortem that the victim had collapsed because of psychic excitement that had resulted in an "excited delirium". The coroner could not decide whether the force used by the police officers or the medical maltreatment in the hospital had caused the victim's death.

(b) The assessment of the testimonies of witnesses G. and H.

27. The Regional Court declared that it had based its finding on the victim's ill-treatment in the "watergate" and in the cell on the statements of the witnesses G. and H. While the fact that the defendant had been deprived of the opportunity to examine the witnesses required the court to subject the credibility of their testimonies to particular scrutiny, it had nevertheless not been necessary to exclude them altogether.

28. In this context the Regional Court noted that there was no plausible reason why the witnesses should have wrongly accused their colleagues. They did not have any tangible benefits from their testimonies but, as also pointed out by the psychiatric expert who had examined the witnesses, risked on the contrary being branded as traitors by other police officers. They had further risked incriminating themselves for not having assisted the victim.

29. The court was further of the opinion that allegations indicating that G. had accused his colleagues with a view to concealing a possible own involvement in the victim's ill-treatment were not convincing. Even assuming such involvement, there had been no reasons for G. to expect that any of the police officers participating in the ill-treatment would disclose the underlying events at their own initiative. In fact such allegations were made for the first time by one of the accused after G. and H. had revealed the circumstances of the case.

30. The court further observed that the witnesses – from their point of view – had a plausible justification for their decision not to answer questions by the defence. G. and H. had an intimate relationship while G. was married to another woman. As it had had transpired already in the course of the preliminary proceedings, they had to expect questions concerning their intimate relationship in a highly publicised trial by the defence with a view to casting doubt on their credibility.

31. The court considered that the witnesses' testimonies were credible, consistent and that there was nothing to establish that they had coordinated their testimonies. The psychiatric expert who had examined the witnesses had also confirmed that their description of the events at issue was credible and their behaviour plausible while taking into account the strain G. and H.

were exposed to. In contrast, the account of the events given by the applicant and the co-accused and their denial of any involvement in the applicant's ill-treatment in the "watergate" were contradictory and not supported by the further available evidence.

32. The witnesses' descriptions of the events on their part were corroborated at least in part by the statements of some of the accused or other evidence. For instance, the applicant himself had conceded that in the cell he had kicked the victim once in the hip as a warning and with a view to preventing a possible attack by the latter. Another accused, D., had confessed that he had also beaten the victim one time in the cell, not because it was necessary to prevent an attack but rather because he could not control his anger at the victim. Police officer A. who had sustained minor injuries on the occasion of the victim's arrest and had been heard as a witness on the occasion of the trial had testified that when the victim had been taken to the ambulance one of the accused police officers had told him "We have taken revenge for you". In the court's view these additional testimonies constituted evidence that the police officers' treatment of the victim had not constituted an ordinary and appropriate reaction to the resistance of an arrested person. The Regional Court further referred to two medical expert opinions confirming that while the injuries sustained by the victim were not particularly serious and had not directly led to his death, they could nevertheless be aligned with the description given by G. and H. of his ill-treatment in police custody.

33. Having regard to the above considerations, the Regional Court concluded that there was nothing to cast doubt on the veracity of G. and H.'s testimonies to the extent they concerned the circumstances of the victim's ill-treatment. The court conceded that it could not be established whether the force used by the police officers or, alternatively, the medical maltreatment in the hospital had caused the victim's death and considered that this uncertainty had a mitigating effect on the sentences imposed. The Regional Court nevertheless maintained that the ill-treatment in the "watergate" had led to the victim's bleeding and consecutive transport to the hospital and that there had therefore been a causal connection between the physical abuse in police custody and the latter's death. Since the co-accused had acted jointly their respective participation in the ill-treatment was imputable to each of them.

C. Proceedings before the Federal Court of Justice

34. On 28 July 2003 the applicant lodged an appeal on points of law. In his appeal brief of 1 December 2003 he complained in particular that the testimonies of witnesses G. and H. had not been excluded despite the defence's inability to examine those witnesses in breach of Article 6 § 3 (d) of the Convention.

35. On 2 July 2004 the Federal Court of Justice dismissed the applicant's appeal on points of law.

D. Proceedings before the Federal Constitutional Court

36. On 16 August 2004 the applicant lodged a constitutional complaint. He argued that the Regional Court's reliance on the testimonies of witnesses G. and H. had violated his right to a fair trial pursuant to Article 6 §§ 1 and 3 (b) and (d) of the Convention because the Regional Court had failed to provide for a possibility for the defence to examine witnesses G. and H.

37. On 27 December 2006 the Federal Constitutional Court refused to admit the applicant's constitutional complaint for examination (no. 2 BvR 1657/04). The decision was served on the applicant on 11 January 2007.

38. The Federal Constitutional Court observed that the constitutional right to a fair trial was both affirmed and substantiated by Article 6 §§ 1 and 3 of the Convention; that it needed to be concretised on a case-by-case basis; that specific procedural requirements could only be deduced from it if basic requirements of the rule of law were at stake; that the accused had to have access to and a right of participation in the establishment of the facts and that illegally obtained evidence had not always to be excluded. It emphasised that the domestic courts were under a constitutional obligation to take Article 6 §§ 1 and 3 of Convention, as interpreted by this Court, into account and to duly consider the factors found to be relevant by this Court in balancing competing rights when deciding the case before them.

39. Turning to the circumstances of the case at hand, the Federal Constitutional Court held that there had been no violation of the applicant's constitutional right to a fair trial and Article 6 § 3 (d) of the Convention. Although the criminal courts had based their findings on the testimonies of witnesses G. and H. whom the defence had had no opportunity to question at any stage of the proceedings, the right to a fair trial did not require that these testimonies be excluded.

40. The witnesses' autonomous decision not to answer questions had been based on a sustainable ground, namely their right to remain silent. Public authorities had not caused the applicant's inability to examine or have examined witnesses G. and H. to such an extent as to warrant the exclusion of their testimonies. The applicant had not had a right to be present during the police interrogation of G. and H. who at that time had been co-suspects. There had been no need to allow for the presence of the applicant's counsel during the pre-trial examinations of G. and H. because it had not been foreseeable that the witnesses would refuse to answer questions of the defence in court. The witnesses had freely chosen not to answer questions of the defence. H. had declared that she would not answer

further questions by the court. The state authorities had thus not been responsible for the inability of the defence to confront the witnesses. Furthermore, the Regional Court had been aware of the reduced evidentiary value of the witnesses' testimonies. It had extensively questioned the witnesses in open court and, taking into account expert advice, had carefully assessed the testimonies as regards their content, development and possible adjustments. It had thus analysed the testimonies extensively, critically and thoroughly.

E. Subsequent Developments

41. Following expiry of the probation period (*Bewährungszeit*), the Regional Court by a decision of 17 July 2006 remitted the applicant's sentence.

II. RELEVANT DOMESTIC LAW

42. Under section 55 (1) of the Code of Criminal Procedure a witness may refuse to answer any questions the reply to which would subject him, or one of his close relatives, to the risk of being prosecuted for a criminal offence or a regulatory offence.

43. Pursuant to its section 69 (1) and (2) a witness shall be directed to state coherently all he knows about the subject of his examination and if necessary, further questions shall be asked in order to clarify and complete the witness statement and to explore what constitutes the basis of the witness' knowledge.

44. Section 238 (1) of the Code of Criminal Procedure states that the presiding judge shall conduct the hearing, examine the defendant and take the evidence. Section 240 (2) stipulates that the presiding judge shall, upon request, give permission to the public prosecution office, to the defendant, and to defence counsel, as well as to the lay judges to address questions to the defendant, witnesses and experts. According to section 244 (2) the court, in order to establish the truth, shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision. Paragraph (3) of the said provision stipulates that an application to take evidence shall be rejected if the taking of such evidence is inadmissible.

45. Section 257 of the Code of Criminal Procedure stipulates that after each co-defendant has been examined and after evidence has been taken in each individual case the defendant shall be asked whether he or she has anything to add. Upon request, the public prosecutor and defence counsel shall also be given the opportunity to make their statements after the examination of the defendant and after evidence has been taken in each individual case. According to section 258 of the said Code, the public prosecutor and subsequently the defendant shall further be given the

opportunity to present their arguments and to file applications after the taking of evidence has been concluded.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

46. The applicant complained that neither he nor counsel had been able at any stage of the proceedings to question the witnesses G. and H. who provided the sole evidence on his participation in the beating of the victim in police custody and on whose testimonies the Regional Court based its finding of his guilt and his conviction. He alleged that therefore his right to mount an effective defence had been unduly restricted.

The applicant further maintained that the Regional Court's conclusion that there had been a causal connection between the victim's ill-treatment and his subsequent death in hospital infringed the principle of "*in dubio pro reo*".

He relied on Article 6 § 1 as well as § 3 (b) and (d) of the Convention, which, as far a relevant, read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ...
>
> (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. Admissibility

47. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties submissions

(a) The applicant

48. The applicant argued that it was well established in the Court's case-law that an accused or his counsel had to be granted the opportunity to question witnesses against him at some stage of the criminal proceedings, either at the investigation stage or in the course of the ensuing trial. Where a cross-examination of a witness was not possible the prosecution authorities or the trial court had to compensate the resulting restrictions of the rights of the defence and had, for instance, to arrange for an opportunity for the defendant or counsel to prepare a list of questions to be submitted to the witness. Evidence obtained from witnesses whom the defence had not been able to question at any stage of the proceedings – like G. and H. in the instant case – was inadmissible and had to be excluded by the trial court, failing which the rights of the defence were unduly restricted thus rendering the trial unfair in breach of Article 6 §§ 1 and 3 (d) of the Convention.

49. This was even more evident where, as in the case at hand, the trial court's finding of guilt relied exclusively on statements of witnesses the defence had no opportunity to question. The Cologne Regional Court had indeed based its finding that the accused police officers, including the applicant, had jointly inflicted bodily harm on the victim, solely on the statements of G. and H. The additional means of evidence referred to by the Regional Court, such as, *inter alia*, the medical expert reports regarding the victim's injuries, the statements of the co-accused D. and the further witness A. as well as the applicant's own statement conceding that he had kicked the victim once in the cell, had in fact not directly concerned the applicant's involvement in the victim's previous ill-treatment in the "watergate" that had led to the injuries making the latter's transfer to hospital necessary. Such additional evidence had thus not corroborated the testimonies of G. and H. in this respect.

50. The applicant further submitted that it had been established that G. and H. when examined by the Regional Court had not told the truth as regards their intimate relationship and that witness G. had also been lying about other details of his past professional and private life, a behaviour that necessarily casted doubt on the credibility of the witnesses' testimonies as a whole.

51. In the applicant's view, the Regional Court had not compensated these deficiencies by a sufficiently careful assessment of G. and H.'s statements and their credibility in its decision-making. Furthermore, the Regional Court's conclusion that there had been a causal connection between the victim's ill-treatment and his subsequent death in hospital had –

in lack of sufficient admissible evidence supporting such finding – violated the "*in dubio pro reo*" principle.

(b) The Government

52. The Government conceded that the Regional Court's establishment of facts regarding the events in the "watergate" and the cell was based on the testimonies of G. and H. and that neither the applicant nor counsel had been able to question or have questioned either witness at any stage of the proceedings. However, there had been no violation of Article 6 § 1 and 3 (d) since the criminal proceedings against the applicant as a whole had been fair.

53. The Government contended that it had not been imputable to the domestic authorities that G. and H. could not be examined by the defence. At the stage of the investigation proceedings G. and H. had been co-suspects together with the applicant and other police officers and there had thus been nothing to indicate that the applicant's or his counsel's attendance at the police interrogations of G. and H. would be required. On the occasion of the applicant's ensuing trial the witnesses, after having answered questions of the court and the public prosecutor, had availed themselves of their right not to testify in accordance with section 55 (1) of the Code of Criminal Procedure. Their decision to remain silent only in relation to the accused, defence counsel and counsel for the victim's relatives had not been arbitrary. There had been grounds to assume that the latter would further build on the allegations of the applicant and another accused that G. had actively participated in the victim's ill-treatment and that they would attempt to cast doubt on the prosecution authorities' previous finding that G. and H. had not been in a position to assist the victim. G. and H. therefore had to fear that the public prosecution authorities would resume the discontinued preliminary proceedings in their respect.

54. The Government pointed out that the Regional Court was confronted with three conflicting interests. On the one hand, it had been under an obligation to observe G. and H.'s right not to testify and not to incriminate him or herself in line with the "*nemo tenetur se ipsum accusare*" principle enshrined in German constitutional law as well as the Convention. At the same time it had been required to conduct an effective investigation with a view to identifying and punishing those responsible for the victim's death following ill-treatment in police custody in accordance with Article 2 and 3 of the Convention. If the trial court had excluded the statements of G. and H., the police officers charged would have had to be acquitted and would have stayed in office thus entailing the risk that they would commit similar offences in the future. Finally, the Regional Court had to ensure that the applicant be able to mount an effective defence.

55. In the Government's view, the Regional Court had reconciled these conflicting interests in the only practicable way by carefully and critically

assessing G. and H.'s statements while taking into account further corroborating aspects in the evaluation of the available evidence. On the occasion of the trial the witnesses had been thoroughly examined by the court and the representatives of the public prosecutor's office. As opposed to the applicant's submissions, his conviction had not been solely based on the statements made by G. and H. but also on additional corroborating elements such as the description of the events at issue by the co-accused D. and witness A. The factual evidence secured at the crime scene, various expert opinions and the medical diagnosis specifying the injuries sustained by the victim had also supported G. and H.'s testimonies.

56. Furthermore, the applicant as well as counsel had had sufficient opportunity to comment on and to challenge the statements made by G. and H. as well as their credibility in the course of the trial, either directly after the examination of the witnesses by the court and the public prosecutor or once the taking of evidence as a whole had been concluded in accordance with sections 257 and 258 of the Code of Criminal Procedure. The applicant had in fact managed to disclose that part of G. and H.'s. testimonies had been untrue. In its evaluation of the witnesses' statements the Regional Court had taken into account all the circumstances that could have called into question the witnesses' credibility and had provided arguments why it nevertheless considered their testimonies to be convincing to the extent they related to the applicant's involvement in the events at issue.

57. The Government concluded that the restrictions of the applicant's right to examine the witnesses G. and H. had thus been compensated by the trial court and the admission of their testimonies had not rendered the trial as a whole unfair. There was further nothing to establish that the Regional Court's assessment of the available evidence had been arbitrary or had not observed the "*in dubio pro reo*" principle.

2. The Court's assessment

58. As the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1, the Court will examine the applicant's complaints under these provisions taken together (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 59, ECHR 2000-II).

The Court recalls that its primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, as a recent authority, *Taxquet v. Belgium* [GC], no. 926/05, § 84, 16 November 2010, with further references therein). In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses (see, as a recent authority, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 118, 15 December 2011).

Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II, § 39 and *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X).

59. The Court notes at the outset that in the present case, it is not concerned with testimony that was given by witnesses whose identity was concealed from the accused or who were absent at trial. G. and H. whose identity was known to the defence gave live evidence in open court in the presence of the applicant, his co-accused and the respective defence counsel. The witnesses gave an account of their recollection of previous statements made in the course of the preliminary proceedings and answered questions posed by the presiding judge, another judge and the public prosecutor. The Court observes in this context that pursuant to section 244 (2) of the German Code of Criminal Procedure the trial court was required to extend, *proprio motu*, the taking of evidence to all facts and means of proof relevant with a view to establishing the truth and actual circumstances of the case. There is nothing to establish that the trial court has not observed these requirements in the case at hand.

Thus, the court, the prosecution as well as the accused and their respective counsel were in a position to observe the witnesses' demeanour under questioning and to form their own impression of their probity and credibility (see, by contrast, *Kostovski v. the Netherlands*, 20 November 1989, §§ 42 and 43, Series A no. 166 and *Windisch v. Austria*, 27 September 1990, § 29, Series A no. 186).

60. While it would clearly have been preferable for the defence to directly confront the witnesses, in particular in view of the fact that it is common ground between the parties that their testimonies were significant for the applicant's subsequent conviction, the Court nevertheless observes that it was not imputable to the domestic authorities that G. and H. could not be questioned by the defence. The Court accepts the Government's argument that at the investigation stage there were no grounds for the domestic authorities to arrange for such possibility since G. and H. were interrogated by the police as co-suspects of the applicant. It further shares the Federal Constitutional Court's view, as reflected in its decision of

16 August 2004, that it had not been foreseeable for the domestic authorities that G. and H. would subsequently refuse to answer questions of the defence when examined in court in their capacity as witnesses.

61. The Court also accepts that in the course of the ensuing trial the domestic courts were under an obligation to respect the witnesses' decision to avail themselves of their statutory right not to testify and that in order not to circumvent such right the trial court refrained from submitting questions prepared by the defence to witness H. The latter had, in any event, explicitly refused to answer any further questions by the trial court itself. The Court recalls in this context that it has recognised that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (see *Saunders v. the United Kingdom*, 17 December 1996, § 68, *Reports of Judgments and Decisions* 1996-VI). The Court further finds it relevant to note that it had been in particular the allegations by the applicant and another accused in the course of the trial, indicating that the witnesses had been involved in the events at issue, that were at the origin of the court's decision to grant the latter the right not to answer questions of the applicant and defence counsel.

62. The Court observes that at the same time the domestic courts were expected to clarify the circumstances of the case with a view to identifying and punishing those responsible for the victim's death following ill-treatment in police custody in accordance with the requirements enshrined in Article 2 and 3 of the Convention (see *Gäfgen v. Germany* [GC], no. 22978/05, § 116, ECHR 2010). It therefore shares the Government's view that the interests of justice were obviously in favour of admitting G. and H.'s testimony since otherwise any further prosecution of the accused police officers would have *de facto* been blocked. It is also recalled in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly and in particular whether the defendant's rights have not been unacceptably restricted and that he or she remains able to participate effectively in the proceedings (see *T. v. the United Kingdom* [GC], no. 24724/94, § 83, 16 December 1999 and *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A).

63. In this connection the Court notes that the applicant and defence counsel who were able to observe the witnesses' demeanour under questioning (see § 59 above) had an opportunity to challenge the latter's credibility as well as the accuracy of their testimonies in the course of the trial (see *Isgrò v. Italy*, no. 11339/85, § 36, 19 February 1991). In accordance with sections 257 and 258 of the Code of Criminal Procedure they had the right to comment on and to challenge the statements made by

G. and H. directly after the examination of the witnesses by the court and the public prosecutor and once the taking of evidence as a whole had been concluded. The applicant, while not being able to question the witnesses directly, thus nevertheless had the possibility to cast doubt on their credibility and contradict their account of the circumstances of the case *(see Asch v. Austria*, 26 April 1991, § 29, Series A no. 203 and *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-II). He indeed availed himself of such opportunity by pointing out that G. and H. had lied about their intimate relationship and that G. had further given an incorrect account with respect to details of his past professional career.

64. The Regional Court did in fact accept the applicant's related allegations as true and conceded that they raised doubts as to the witnesses' reliability (see, by contrast, *Unterpertinger v. Austria*, 24 November 1986, § 32, Series A no. 110). In view of these inconsistencies in the witnesses' statements and given the defendant's inability to examine them, the court itself emphasised that it was required to subject the credibility and accuracy of their testimonies to particular scrutiny.

65. Consequently, the Regional Court took into account and assessed various aspects that could have put into question the witnesses' probity in its thoroughly reasoned judgment, including those invoked by the applicant. The court further referred to the opinion of the psychiatric expert who had thrown light on the motivation and psychological context in which the testimonies had been given. Having regard to the circumstances of the case, the Regional Court provided arguments why there were no grounds to assume that the witnesses had wrongly accused their colleagues or had concealed a possible own involvement in the victim's ill-treatment. The trial court further observed that the witnesses had plausible reasons for their decision not to answer questions by the defence. The Court considers that the arguments advanced by the domestic courts in this respect were not immaterial for their conclusion that the testimonies given by G. and H. were credible and consistent to the extent they concerned the circumstances of the victim's ill-treatment (see *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004). In these circumstances the Court is satisfied that the necessary care was applied in the evaluation of G. and H.'s statements.

66. The reliability of such evidence was further supported by the description of the events at issue by the co-accused D. and the further witness A. In addition, the applicant himself had conceded that he had at least in the cell participated in the victim's ill-treatment. While such elements of evidence taken separately may not have been conclusive for the charges the applicant was found guilty of, these items taken together and in combination with the further factual evidence secured at the crime scene as well as the expert opinions and medical diagnosis specifying the victim's injuries, nevertheless corroborated G. and H.'s testimonies. The Court recalls in this context that the witness statements submitted in the course of

a trial do not have to cover all the elements of the charges at issue but that some of them can be derived by means of logical reasoning or other material submitted to the acting judge (*ibid.).*

67. Having regard to the above considerations and the evidence in support of G. and H.'s statements, the Court considers that the Regional Court was able to conduct a fair and proper assessment of the latter's reliability. Against this background, and viewing the fairness of the proceedings as a whole, the Court considers that, notwithstanding the handicaps under which the defence laboured, there were sufficient counterbalancing factors to conclude that the admission in evidence of G. and H.'s testimonies did not result in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention. The Court further finds that there is nothing to demonstrate that the applicant, who had been represented by counsel throughout the proceedings, did not have adequate time and facilities for the preparation of his defence in breach of Article 6 § 1 read in conjunction with Article 6 § 3 (b).

68. Finally, as regards the evaluation of the admitted evidence by the trial court, the Court reiterates that Article 6 of the Convention does not lay down any rules on the way evidence should be assessed, which are therefore primarily matters for regulation by national law and national courts. It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). The Court finds that there is nothing to establish that the assessment of the evidence by the domestic courts in the case at hand was arbitrary or that the reasons advanced for their conclusion that there had been a causal connection between the victim's ill-treatment and his subsequent death in hospital, infringed the principle of *in dubio pro reo*.

69. In conclusion, the Court considers that, taken as a whole, the proceedings in issue were fair for the purposes of Article 6 § 1 read in conjunction with § 3 (b) and (d) of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by six votes to one that there has been no violation of Article 6 § 1 read in conjunction with § 3 (b) and (d) of the Convention.

Done in English, and notified in writing on 19 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

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

D.S.
C.W.

DISSENTING OPINION OF JUDGE ZUPANČIČ

1. I beg to disagree with the majority's finding that there has been no violation of the provisions of Article 6 (1) and (3)(d) – *Right to a fair trial.* For me, the relevant provisions are Article 6 (2) and (3)(d) which read as follows:

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

2. Prior to the applicant's trial and pursuant to section 170 (2) of the German Code of Criminal Procedure, the investigation proceedings against G. and H. were discontinued by decision of the Public Prosecution Office. Section 170 (2) of the German Code of Criminal Procedure provides:

> "(1) If the investigations offer sufficient reason for proffering public charges, the Public Prosecution Office shall proffer them by submitting a bill of indictment to the competent court.
>
> (2) In all other cases, the Public Prosecution Office shall *terminate the proceedings*. ..." [*Emphasis added*]

3. Apparently, pursuant to German law, a decision under the above section 170 (2) is reversible*, i.e.,* the proceedings may be resumed.

4. Germany has not ratified Article 4 of Protocol No. 7 to the Convention but the Court has rendered decisions with respect to other countries that have similar procedural provisions in their domestic Codes of Criminal Procedure in relation to the *ne bis in idem* (double jeopardy) procedural human right: in the cases of *Müller v. Austria* (dec. no. 28034/04, 18 September 2008) and *Sundqvist v. Finland* (dec. no. 75602/01, 22 November 2005).

5. As regards Germany, the Court had the opportunity to examine the provisional discontinuation of criminal proceedings under Article 6 (2) of the Convention in the cases of *Niedermeier v. Germany* (no. 37972/05, decision of 3 February 2009) and *Y v. Germany* (no. 40899/05, decision of 3 February 2009); however, these related to provisional discontinuation by a court decision and not by decision of the Public Prosecution Office, as in this case.

6. Here we have a slightly different situation, in which G. and H., the two co-defendants, were accorded, during the applicant's trial, the right to withhold their testimony on the basis of potential self-incrimination.

7. Since they had previously been subjected to prosecution – which prosecution had, however, been discontinued – they were in the instant case, namely the applicant's trial, entitled to abstain from testifying and from being subjected to cross-examination by the applicant's defence.

8. Where, to use the language of the German Code of Criminal Procedure, the Public Prosecution Office "terminates the proceedings", this, although reversible in German law, remains in any event an *ex parte decision.* It is taken by the prosecutorial authorities.

9. The logical implication here can be phrased as a question concerning the nature and the basis of that decision. Such a decision is made – where we are dealing with merits and *not* with procedural impediments such as immunity etc., to which double jeopardy in any event does not attach – essentially *on the basis of the presumption of innocence*.

10. Since it is merely a *lack of sufficient evidence* which is the only imaginable procedural institute capable of providing the procedural basis for the decision to stay the prosecution, this is a logically unavoidable conclusion.

11. The presumption of innocence is consubstantial with and thus inseparable from the banning of double jeopardy (*ne bis in idem*).

12. In the relatively recent cases of *Sundquist v. Finland* 75602/01 of 22 November 2005 and *Müller v. Austria,* decision no. 28034/04 of 18 December 2008, this confluence of presumption of innocence on the one hand and the proscription of double jeopardy on the other was in fact dealt with by this Court. Although Germany has not ratified Article 4 of Protocol No. 7 to the Convention, the Court has nevertheless rendered some decisions in respect of other countries having similar procedural provisions in their domestic codes of criminal procedure.

13. What is the real purpose of all presumptions in all procedures, i.e., not merely the presumption of innocence?

14. The function of presumptions in law is to enable the judge, and this goes back to Roman law, always to make a decision, i.e., even in cases where there is insufficient proof.

15. The reverse implication of any presumption is thus that the burden of proof is on the side that does not profit from the presumption. It also means that the risk of non-persuasion is on that same side.

16. In adversarial proceedings as intended by the Convention, this implies that throughout the criminal proceedings the prosecutor carries the complete burden of proof and must take the risk of non-persuasion (*in dubio pro reo*) as to every element of the definition of the crime (in German: *der Tatbestand*). If the prosecution does not satisfy the burden of proof as defined by the *Tatbestand* – which is its true purpose! – the prosecution will not obtain a conviction.

17. The function of the presumption of innocence is therefore not, as in the majority of our cases, simply the instruction as to how to treat as

innocent somebody who has not been finally convicted. The function is, on the contrary, a very specific procedural – indeed epistemological – device.

18. The presumption authorises final decisions in cases where there is otherwise insufficient evidence as to what the plaintiff or the prosecution is actually asserting. In civil procedure preponderance of evidence will suffice, whereas in criminal procedure, we require proof beyond reasonable doubt.

19. If we now turn to the question concerning the preliminary stages of criminal procedure and the question as to when double jeopardy will attach, the issue arises as to what is *the real nature of the decision* taken by the prosecutor to stay the prosecution.

20. In German criminal procedure, as pointed out above, this decision is wholly reversible. Historically, we are familiar with such reversibility. In the purely inquisitorial criminal procedure, straightforwardly incompatible with the spirit of the Convention, there existed a legal institute called *absolutio ab instantia;* it permitted the *inquirens* (akin to the investigating judge) if sufficient evidence, in his view, subsequently accumulated, to recommence the investigation against a particular defendant.

21. Since it is in violation of the defendant's procedural guarantees, *absolutio ab instantia* is largely considered as unacceptable, and in strong violation, I dare say, of the applicant's human rights, in the light also of Article 4 of Protocol No. 7.

22. Given the reversibility of a prosecutorial discontinuance decision and the possibility of further prosecution, *absolutio ab instantia* will hang almost indefinitely, like the sword of Damocles, over the head of the criminal suspect, barring the statute of limitations.

23. The conceptual link between the presumption of innocence on the one hand and the principle of *ne bis in idem* (double jeopardy) on the other depends on the underlying, more basic question, as to whether the decision to discontinue the proceedings on the part of the Public Prosecution Office under section 170 (2) of the German Criminal Procedure, is actually a *decision*.

24. The procedural norm may, of course, provide anything, and, *inter alia*, that re-starting of the prosecution is permitted if new evidence against somebody is thereafter gathered. However, the question is decidedly not a positivist one and especially not so before the European Court of Human Rights. The outstanding question is: *"Is this logical?"*

25. The decision to terminate the proceedings (this is the official language of section 170 (2)) is, after all, a decision. It follows inexorably that this *decision* to terminate the proceedings is inescapably based, as it must be, on the presumption of innocence! If it is a decision, albeit a temporary one, the decision to suspend the prosecution cannot logically be based on a simple lack of sufficient evidence. This is obvious for the simple reason that a lack of sufficient evidence cannot by definition be in itself a basis for any kind of decision.

26. If we go back to Roman law, we begin to understand that the judge *(praetor)* in any kind of procedure (mostly, of course, private-law procedures) was always obliged to arrive at a decision. Yet he may not have had sufficient available information (evidence) on the basis on which to be able to make the decision in the first place. Under the phrase of *non liquet*, the *praetores* were mostly forbidden to take the "*I don't know*" position, i.e., a decision had to be taken, one way or the other, - because decision making in the adversarial context is in fact *the* basic function of legal conflict resolution. The proof that this was even then understood as essential lies in the first rule of the Leges XII Tabularum: *Si in ius vocat ito...!*

27. Thus the law from its very beginning provided for the possibility that there would *not* be sufficient evidence and *not* enough truth available for the judge to make an informed decision.

28. It was here that the presumptions (*presumptiones juris)* helped and were intended precisely for this purpose, i.e., for situations in which the whole truth about the subject matter at stake in the procedure was simply not available. This was the original and authentic purpose of all presumptions, which in turn implies in every adversarial context, that the burden of proof is always on the plaintiff (*Ei incubit probatio, qui dicit, non qui negat...*).

29. It is therefore logical to assume – and this is the connection between the presumption of innocence on the one hand and the double jeopardy proscription on the other hand – that *any* decision based on *any* lack of evidence is always based on a presumption and is thus of necessity a *final* decision.

30. Here we have to include the understanding that *a decision is by its very nature something final*, i.e., a decision that can at anytime be reversed is not a decision. Even in strictly positivist and narrow terms, the quoted language of paragraph 2 of section 170 of the German Code of Criminal Procedure, which speaks of "*terminating the proceedings*," inexorably implies that there has been a (final?) *decision* made on the part of the Prosecutorial Office.

31. The moment, however, the decision based on the presumption of innocence is made, correspondingly by the Public Prosecution Office, the previously *refutable* presumption of innocence (*praesumptio juris*) of necessity metamorphoses into an *irrefutable* one (*praesumptio juris et de jure*).

32. In fact, many countries have been logically consistent and have taken the position that double jeopardy attaches in the preliminary phases of procedure; the decision to dismiss the prosecution – as for example in the recent case against Dominique Strauss-Khan in New York – cannot be reversed, which in turn implies that double jeopardy has definitely attached to the "*res judicata*" nature of the prosecutorial *ex parte decision*. In other words, the whole world would be quite surprised if the prosecutor in the

above-mentioned aborted case were subsequently to be permitted to re-initiate the proceedings.

33. The situation in the present case, however, is completely analogous. The majority, in turn, has implicitly ratified the German *absolutio ab instantia* "logic" and has, moreover, sacrificed to this very ratification the applicant's right to cross-examine.

34. Because of the problem we have described, the co-defendants in this particular case could have "taken the Fifth", i.e., could have invoked their privilege against self-incrimination because, obviously, there was a real possibility that the Public Prosecution Office would re-commence the proceedings.

35. Nevertheless, the eventual blocking of the applicant's right to cross-examine the hostile witnesses, and the resort to the Court's 'totality of circumstances' explanation in paragraphs 63-66 of the majority judgment, derives from a concealed double jeopardy problem, as described above.

36. If there is a fault in the *system* of criminal procedure of a particular country, it is in my opinion unacceptable to deny the defendant his explicit human right to have the witnesses against him submitted to cross-examination or to be able to cross-examine them himself or through his defence lawyer.

37. Here, the balancing of the essential human right to cross-examine one's witness as against the 'totality of circumstances' and the fairness of the trial as a whole turns out to be a false dilemma.