CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 27077/95
by Peter HEIDEGGER
against Austria

The European Court of Human Rights (Third Section) sitting on 5 October 1999 as a Chamber composed of

Mr J.-P. Costa, *President*,
Mr L. Loucaides,
Mr P. Kūris,
Mrs F. Tulkens
Mrs H.S. Greve
Mr K. Traja,
Mr M. Ugrekhelidze, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 9 March 1995 by Peter Heidegger against Austria and registered on 21 April 1995 under file no. 27077/95;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1973, and is presently detained in a prison in Salzburg. He is represented before the Court by Mr Hitzenbichler, a lawyer practising in Salzburg.

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

On 8 July 1993 the applicant was arrested under the suspicion of having robbed and killed the taxi driver Claudia D.

When questioned by the police at Gmunden the applicant first denied any connection with the crime, but then - on 9 July 1993 - he made a confession before the police at Salzburg. He stated that he had threatened the taxi driver with a firearm described as signalling device (*Signalstift*), whereby unintentionally a shot had gone off. On the same day he confirmed this confession before a judge on duty (*Journalrichter*) who had been called in immediately by the police officers.

On 11 July 1993 the investigating judge appointed an ex-officio defence counsel for the applicant and ordered for the next day an inspection of the scene of the crime (*Lokalaugenschein*).

On 12 July 1993 the inspection was conducted by the investigating judge in the presence of the applicant, his defence counsel, the public prosecutor, a court expert and several police officers. According to the minutes of the inspection, at the beginning the investigating judge asked the applicant whether he maintained his confession. The applicant again confirmed that he had robbed the taxi-driver, but denied having killed her intentionally. Then the applicant gave a detailed account of the course of the events and his flight until he had met a man at a pizzeria who had brought him to town. Thereafter the “course of the events” was reconstructed with the help of a police officer in the role of the victim, using the original car and the firearm the applicant had allegedly used. The applicant showed how he had threatened the victim by holding the fire arm against her neck, how he had got hold of the victim’s purse, how the victim had tried to get off the car and turned towards the applicant and how the shot had gone off. This reconstruction of the course of events was filmed with a video camera.

On 23 July 1993 the applicant withdrew his confession claiming that on 5 July 1993, the day of the crime, he had been at home in Gmunden with his mother.

On 16 and 17 May and 10 June 1994 the trial against the applicant took place before the Salzburg Regional Court (*Landesgericht*) sitting as an Assize Court (*Geschworenengericht*). When questioned about the events on 5 July 1993, the applicant maintained that on that day he and his girlfriend had been in several bars in Gmunden and that between 10.00 p.m. and 10.30 p.m. his girlfriend had brought him home where he stayed all night. It was therefore impossible that he had committed the crime close to Salzburg (approximately 70 km away) around 11.30 p.m. He claimed that the witnesses who allegedly had seen him had been mistaken. When confronted with his previous confessions he submitted that he had made the first confession because he had been forced to do so by the police and had maintained his confession before the judge on duty and the investigating judge because he had not dared to withdraw it in the presence of police officers.

Subsequently the court heard as witness the police officers who had carried out the investigations, the judge on duty and the investigating judge. They were questioned about the course of the investigations and the circumstances of the applicant's confession. The police offices denied having exerted pressure on the applicant and stated that the applicant had given details which at that time had been unknown to them such as the place where the victim's purse and documents had been thrown away. The judge on duty stated that he had also questioned the applicant alone, in the absence of the police officers, and the applicant had expressly stated that no pressure had been exercised on him.

The court then questioned the managing director of a pizzeria who had identified the applicant as being the person whom he had driven at the relevant time from a bar near to the scene of the crime to the centre of Salzburg, as well as his employee who also had identified the applicant.

Moreover, the court heard as witness the applicant's girlfriend, his mother and several other persons on the question whether it was possible that at the time of the crime the applicant had been in Salzburg. Several witnesses stated that they had seen the applicant in a bar in Gmunden and that he had left the bar with his girlfriend. His mother stated that he had been at home by 22.30 p.m. and had not left the house later.

On 10 June 1994 the video-film made in the course of the inspection of the scene of the crime was shown. Neither the applicant, nor his defence counsel raised any objections. When questioned the applicant stated that during the inspection he did have the possibility to consult with his defence counsel.

Thereafter the court heard a medical expert. He explained, inter alia, that the victim's final position did not correspond to the applicant's account in his confession, namely that the shot had gone off when he was sitting inside the car. According to the medical expert it was more likely that the taxi driver had been shot from the outside. The expert also excluded that an ordinary firearm had been used, a signalling device using ordinary bullets could have been a suitable weapon.

The court refused to read out a private expert opinion on the credibility of the applicant's confession or to hear that expert on this issue.

On 10 June 1994 the Assize Court convicted the applicant of aggravated robbery and murder and sentenced him to seventeen years imprisonment.

On 16 August 1994 the applicant, represented by a defence counsel of his own choice, filed a plea of nullity (*Nichtigkeitsbeschwerde*) with the Supreme Court (*Oberster Gerichtshof*). He complained, in particular, that the video-film made in the course of the inspection of the scene of the crime was shown at the trial. The applicant submitted that during this inspection he had been intimidated by the presence of a large number of taxi-drivers and that he did not have any contact with his ex-officio defence counsel before the inspection. The applicant further complained that the Assize Court had refused to admit a private expert opinion on the credibility of the applicant's confession. The applicant also claimed that in view of numerous inconsistencies and unresolved questions the Assize Court should have taken further evidence on its own motion or to advise the applicant's defence counsel to do so.

On 8 November 1994 the Supreme Court dismissed the applicant's plea of nullity and increased his sentence to twenty years' imprisonment. The Supreme Court considered that neither the showing nor the making of the video-film in the course of the inspection of the scene of the crime constituted *per se* a ground of nullity. Moreover, since the applicant had failed to oppose to the showing of the film at the trial by making a formal request to the court not to do so, he could not raise this matter in the proceedings on the plea of nullity. As regards the Assize Court's refusal to take accept as evidence the opinion of a private expert the Supreme Court found that the applicant had failed to ask the court to appoint an expert. Private expert opinions only served the purpose to enable an accused to make the relevant requests. As regards the applicant's complaint that the Assize Court had failed to take of its own motion further evidence or to advise his defence counsel to do so, the Supreme Court noted that the applicant has not filed any request for the taking of further evidence and that it had been up to him to do so. Besides, any inconsistencies between the applicant's confession made at the stage of the preliminary investigations and the findings of the court experts had been discussed in detail at the trial. The opinions of the experts had been conclusive and without contradictions; thus, there had been no necessity to obtain further expert reports. It had therefore been up to the jury to assess the evidence before it and to evaluate whether the applicant's initial confession or the statements he had made during the trial were more credible.

COMPLAINTS

1. The applicant complains under Article 6 §§ 1 and 3 of the Convention about his conviction and the alleged unfairness of the criminal proceedings leading thereto.

a. He submits that the jury in its evaluation of evidence had relied on the video film of the inspection of the scene of the crime which had been shown at the trial. At the inspection he had been intimidated by a large number of taxi-drivers present and had made his confession therefore under pressure.

b. He contends that the Assize Court failed to take additional evidence of his own motion. Moreover the Assize Court refused to admit as evidence a private expert opinion on the credibility of the applicant's confession.

c. He claims that he was not granted effective legal assistance as the Assize Court failed to advise his ex-officio defence counsel to request that additional evidence be taken. Moreover, this defence counsel was acquainted with the public prosecutor and therefore lacked impartiality. For this reason he failed make the necessary requests.

d. He submits further that he did not have adequate time to prepare his defence. He met his ex-officio defence counsel only 12 July 1993 when the inspection of the scene of the crime took place and had had no contact with him before that inspection.

2. The applicant complains under Article 6 § 2 of the Convention that the jury was influenced by a press campaign conducted against him. In particular the press did not sufficiently report when he withdrew his confession.

THE LAW

1. The applicant complains about the alleged unfairness of the above criminal proceedings in various respects. He relies on Articles 6 §§ 1, 2 and 3 of the Convention which, insofar as relevant read as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
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> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

The Court recalls that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties. In particular, it is not its 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. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (cf. the Garcia Ruiz v. Spain judgment of 21 January 1999, § 28, to be published in Reports of Judgments and Decisions 1999).

It seems, in the Court's view, appropriate to look at the applicant's complaints about the alleged unfairness of the criminal proceedings from the point of view of paragraphs 1 and 3 of Article 6 taken together, especially as the guarantees of paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1 (see the Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, § 29).

a. The applicant complains that the jury in its evaluation of evidence had relied on the video film of the inspection of the scene of the crime which had been shown at the trial.

The Court recalls that Article 6 of the Convention guarantees the right to a fair trial, it does, however, not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter of national law (see the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, § 46). The Court's task is to ascertain whether the

applicant's trial as a whole was fair (see the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, § 43).

The Court notes that the contested video-film was made in the course of an inspection of the scene of the crime in the presence of the investigating judge, the applicant accompanied by his ex-officio defence counsel, the public prosecutor and several police officers. The applicant, assisted by defence counsel, had the opportunity to exercise his defence rights both at the pre-trial stage and at the trial. He could have refused to repeat his confession on the occasion of the inspection of the scene of the crime. He also could have opposed to the showing of the video-film at the trial. The applicant did not do so. The Court also observes that at the trial the applicant had been given the opportunity to comment on the video-film and to explain why he had made the allegedly wrong confession.

The Court finds that the showing of the video-film at the trial did not render the criminal proceedings unfair.

b. The applicant complains further that the Assize Court failed to take additional evidence of its own motion.

However, the Court is not entitled to decide on the alleged violation of Article 6 in respect of the Assize Court's failure to obtain additional exonerating evidence as the applicant, assisted by counsel had not asked the court to obtain such evidence (see the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, § 88).

The applicant also submits that the Assize Court refused to admit as evidence a private expert opinion on the credibility of the applicant's confession.

In this respect the Court recalls that as a general rule, it is for the national courts to assess the evidence before them, as well as the relevance of the evidence which the defendant seeks to adduce. More specifically, Article 6 § 3 (d) leaves it to them, in principle, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system. It does not require the attendance and examination of every witness on the accused's behalf (see the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, § 89, and the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33).

The Court notes that as regards the Assize Court's refusal to take accept as evidence the opinion of a private expert the Supreme Court found that the applicant had failed to ask the court to appoint an expert. Private expert opinions only served the purpose to enable an accused to make the relevant requests. The Court therefore finds that the applicant did have the possibility to raise this issue at the trial by requesting the court to appoint an expert for drawing up a report on the issues mentioned the private expert opinion. However the applicant has not done so.

In the light of the above considerations, the Court finds no indication that the failure to take additional evidence was incompatible with Article 6, or that thereby the applicant's rights of the defence were unduly restricted or the proceedings unfair.

c. The applicant claims that he was not granted effective legal assistance as the Assize Court failed to advise his ex-officio defence counsel to request that additional evidence be

taken. Moreover, this defence counsel was acquainted with the public prosecutor and therefore lacked impartiality. For this reason he failed make the necessary requests.

The Court recalls that the Convention is designed to guarantee not rights which are theoretical or illusory but rights which are practical and effective, and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused. Nevertheless, a State cannot be held responsible for every shortcoming on the part of an appointed lawyer. It follows from the independence of the legal profession that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The competent national authorities are required under Article 6 § 3 (c) to intervene only if the failings of a lawyer are manifest or are sufficiently brought to their attention in some other way (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, § 65, and the Daud v. Portugal judgment of 21 April 1998, Reports 1998-II, p. 750, § 38).

The Court observes that the applicant neither raised this issue at the trial, nor brought it to the knowledge of the Austrian courts on another occasion. Moreover, the Court cannot find that the issue whether the defence counsel appointed for the applicant had been allegedly acquainted with the public was one which had been manifest to the Austrian courts. As regards the allegation that the defence counsel had failed to make certain requests for taking of evidence the Court observes that the Assize Court during three days heard numerous witnesses and obtained other evidence which, in part, was exonerating evidence. In such circumstances any alleged shortcomings of the defence cannot be considered as having been manifest to the Austrian courts.

The Court therefore finds that there is no indication that these courts failed to ensure that the applicant had an adequate defence.

d. The applicant complains that he was not granted adequate time to prepare his defence, since he had met his ex-officio defence counsel only on 12 July 1993 when the inspection of the scene of the crime took place and had had no contact with him before.

The Court recalls that Article 6 § 3 of the Convention might be of relevance even in the pre-trial stage, if the fairness of the proceedings is likely to be seriously prejudiced by an initial failure comply with requirements enshrined in this paragraph (see the Imbroscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13 § 36). The right for an accused to communicate with his lawyer has been recognised by the Court as a fundamental part of the preparation of his defence.

The Court notes that in the present case the applicant had been arrested on 8 July 1993, on 9 July 1993 he had been heard by the judge on duty and on 11 July 1993 an ex officio defence counsel had been appointed for him. On 12 July 1993 the inspection of the scene of the crime was carried out and on this occasion the applicant's newly appointed defence counsel was present. Although the applicant had not met him earlier the applicant was not prevented from contacting him before or during the inspection. Furthermore, neither the applicant nor his defence counsel asked the court for an adjournment of this procedural step in or to consult on the preparation of the defence. The trial itself started on 16 May 1994 and the applicant was assisted by his defence counsel.

The Court therefore finds that the applicant's submissions do not disclose any appearance of a violation of his right to prepare his defence which would prejudice the fairness of the proceedings taken as a whole.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

2. The applicant complains under Article 6 § 2 of the Convention that the jury had been influenced by a by a press campaign conducted against him. He submits, in particular, that the press did not sufficiently report when he withdrew his confession.

The Court recalls that in certain cases a cases a virulent press campaign can be prejudicial to the fairness of a trial and involve the State's responsibility (No. 10857/84, Dec. 15.7.86, D.R. 48, p. 144 with further references).

However, the Court finds that in the present case the applicant has failed to substantiate that the reporting in the media was more than the inevitable publicity connected with investigation and prosecution of this sort of crimes.

The applicant's submissions do not, therefore disclose any appearance of a violation of the presumption of innocence which could have had repercussions on his right to a fair trial.

It follows that also this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J.-P. Costa
President