CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 30389/03
by Rudolf NESTEROV
against Estonia

The European Court of Human Rights (Fourth Section), sitting on 25 October 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 22 August 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Rudolf Nesterov, is an Estonian national who was born in 1968 and lives in Puhja, Tartu County. He is represented before the Court by Mr M. Masso, a lawyer practising in Tallinn.

A. The circumstances of the case

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

1. First set of proceedings

a) The Tartu County Court's judgment of 12 April 2001

On 12 April 2001 the applicant was convicted, together with G. and S., of several offences by the Tartu County Court (*Tartu Maakohus*). According to the charges, at 2.45 a.m. on 22 August 1996 the applicant, after having had a debt dispute with the victim and being employed by G., had thrown an explosive device into a car parts shop owned by OÜ Arep, a private limited company. A charge of damaging property by use of explosives was brought under Article 144 § 1 of the Criminal Code. The applicant was also charged with extortion under Article 142 § 2 of the Criminal Code. According to the charges, in November or December 1996 he had demanded EEK 5,000 (EUR 319) from T. and P., the owners of OÜ Micro Autolammutus, a private limited company and competitor of OÜ Arep, and threatened to destroy the property in their office if they refused to give him the money. The applicant was further charged, under Article 207-3 § 1 of the Criminal Code, with unlawful possession of explosives. In 1989 or earlier he had acquired, without having the required licence, 113 grams of gunpowder and kept it unlawfully in his place of residence until 27 September 1998. Finally, the applicant was charged under Article 207-4 of the Criminal Code with unlawfully producing, acquiring, possessing, and transferring an explosive device. At the end of August 1998 or the beginning of September 1998 he had asked S. to produce an explosive device for him, which S. had done. The applicant had modified the device in order to increase its power of destruction. Thereafter he had kept the explosive device in his place of residence until 27 September 1998. On that date he had been arrested by the police just before he could hand the device over to I.S.

In respect of the charge under Article 144 § 1 of the Criminal Code, the County Court convicted the applicant and G., relying on the following evidence:

1) an inspection report of the scene of the offence;
2) a report of the Tartu Rescue Company together with a plan of the site of the explosion;
3) an expert's report no. KP-8-9 concerning the explosives;
4) statements of witness J.M.;
5) statements of A.P., representative of OÜ Arep;
6) statements of witness M.S.;
7) statements of victim P.;
8) statements of victim T.;
9) undercover recordings of G.'s conversations;
10) statements of anonymous witness "Aili";
11) statements of anonymous witness "Karl";

12) statements of anonymous witness “Tiiu”.

In addition to the statements given by the anonymous witnesses during the investigation, the County Court also questioned them on the request of the defence counsel. The defence put questions to them in writing.

The County Court held that the charge of extortion (under Article 142 § 2 of the Criminal Code) against the applicant had not been made out. He was acquitted of this charge.

With respect to the charge against the applicant of unlawful possession of explosives and the charge against him and S. of unlawfully producing, possessing, holding and transferring an explosive device, the County Court noted that S. had pleaded guilty. According to him, he had made the explosive device on instructions. The guilt of the applicant had also been proved by his own statements and those of the witnesses I.S. and B., several search and seizure reports, expert opinions and other items examined at the court hearing.

The County Court granted the civil claim for damages by OÜ Arep.

The applicant was sentenced to a total of seven years’ imprisonment, less the time he had spent in pre-trial detention.

b) The Tartu Court of Appeal’s judgment of 23 January 2002

Defence counsel for the applicant and G. appealed against the judgment of the County Court. The applicant’s counsel requested the Tartu Court of Appeal (*Tartu Ringkonnakohus*) to acquit the applicant in respect of the Article 144 § 1 charge, mitigate his sentence, put him on parole and dismiss the civil claim. Defence counsel was of the opinion that the applicant’s conviction had been based on assumptions, rather than on the facts established. He alleged that the County Court had wrongfully referred to the transcript of G.’s taped conversations. According to him, the parties to the proceedings had had no possibility of verifying that the transcript reflected the recording adequately. Counsel found that the statements of the anonymous witnesses did not accord with the rest of the evidence and that a conviction could not be based solely on the anonymous statements. He insisted that the doubts raised by the statements of the anonymous witnesses, which could not be eliminated by other evidence, had to be interpreted in favour of the accused at trial.

On 23 January 2002 the Court of Appeal allowed the appeal in so far as it concerned the civil claim but upheld the remainder of the County Court’s judgment. The Court of Appeal found that the court of first instance had given reasons for not relying on the statements of the witnesses on behalf of the accused at trial and considering the statements of P. and T. in respect of the explosion as reliable. The Court of Appeal noted, furthermore, that it had no reason to doubt the reliability and truthfulness of the statements of the anonymous witnesses Aili, Karl and Tiiu. It found that their statements tallied in many respects and accorded with the material evidence (the

inspection report of the scene of the offence and the expert's report concerning the explosive device). The Court of Appeal stressed that the reliability of the statements of the anonymous witnesses had been controlled by the County Court, where they had been heard at the request of the defence counsel. The anonymous witnesses had confirmed their statements given during the preliminary investigation.

The Court of Appeal noted that the fact that all parties to the proceedings had not comprehended the voice records concerning G. did not eliminate their value as an item of evidence proving the guilt of the accused at trial. Moreover, the case file had included a transcript of the recording. According to the record of the County Court's hearing, the recording had been heard in the courtroom. The Court of Appeal agreed with the applicant's counsel and the prosecutor that the amount of the damage caused to OÜ Arep was unclear and that the civil claim therefore had to be settled in separate civil court proceedings.

c) The Supreme Court's judgment of 19 June 2002

The applicant's counsel and G. appealed against the Court of Appeal's judgment, which was quashed in part by the Supreme Court on 19 June 2002. The Supreme Court quashed the judgment in so far as the Court of Appeal had upheld the County Court's judgment convicting and sentencing the applicant and G. under Article 144 § 1 of the Criminal Code. The judgment was also quashed in respect of the applicant's overall sentence and in so far as the referral of the civil claim of OÜ Arep to a civil court had been concerned.

The Supreme Court pointed out, *inter alia*, that, as provided by Article 48 § 2 of the Code of Criminal Procedure, a voice recording – but not a written transcript thereof – could be used as evidence in criminal proceedings. The Supreme Court noted that, according to the record of the Court of Appeal's hearing, the recording of G.'s conversation had not actually been heard at the hearing in the appeal court. The Court of Appeal had, at the same time, noted that the transcript had corresponded to the recording. The Supreme Court found that the Court of Appeal had failed to comply with the requirements of Article 19 § 1 and Article 206 of the Code of Criminal Procedure, which provided that a criminal case had to be examined thoroughly and objectively and the evidence examined directly.

As concerned the anonymous witnesses, the Supreme Court was satisfied that the County Court had directly examined the statements given by them.

Finally, the Supreme Court noted that the applicant's counsel had challenged, *inter alia*, the applicant's conviction under Article 207-3 § 1 of the Criminal Code. However, in his appeal to the Court of Appeal he had only challenged the applicant's conviction under Article 144 § 1 of the Criminal Code. In respect of the other offences only a more lenient punishment had been asked for. Accordingly, the Supreme Court found that

the applicant had no right of appeal in respect of his conviction under Article 207-3 § 1 of the Criminal Code.

The Supreme Court referred the case, in so far as it was quashed, back to the Court of Appeal.

2. Second set of proceedings

a) The Tartu Court of Appeal's judgment of 29 October 2002

On 29 October 2002 the Court of Appeal quashed the County Court's judgment in respect of OÜ Arep's civil claim. It also modified G.'s overall sentence and the date from which the serving of the sentence would be deemed to run.

The Court of Appeal found that since the statements of the witnesses P. and T. tallied and the involvement of G. and the applicant in the organisation of the explosion had been proved by other evidence, there was no reason to question their truthfulness. Furthermore, the Court of Appeal noted that also the statements of the anonymous witnesses tallied and the reliability of these statements was made even greater by the fact that they matched the factual circumstances concerning the explosion. These statements accorded with an additional expert opinion concerning the explosive device. The Court of Appeal was of the opinion that G.'s guilt had also been proved indirectly by the undercover voice recordings made from 10 February to 24 February 2000 and the transcripts thereof. The recordings from 7 December to 16 December 1998 and from 9 April 2000 could not be taken into account as evidence, since they were incomprehensible due to their poor quality.

The Court of Appeal concluded that the denial of guilt by G. and the applicant had been rebutted by all the evidence overall.

The Court of Appeal found that it was unnecessary to rule on the civil claim, since in the meantime, on 23 May 2002, the Tartu County Court had, in separate proceedings, granted a claim by OÜ Arep against G. and the applicant.

b) The Supreme Court's judgment of 14 March 2003

Defence counsel for the applicant and G. appealed against the judgment of the Court of Appeal. The applicant's counsel requested, *inter alia*, that the applicant be acquitted of the charge under Article 144 § 1 of the Criminal Code. He found that the courts had based the applicant's conviction decisively on the statements of the anonymous witnesses. This conflicted with the case-law of the Supreme Court and the European Court of Human Rights. It had been impossible to ascertain on which grounds the anonymity had been granted with respect to some of the witnesses. Neither the anonymous statements nor the statements by the named witnesses

proved that it had been the applicant who had committed the explosion. The applicant's counsel further requested that the applicant be put on parole in respect of the sentence imposed under Articles 207-3 § 1 and 207-4 of the Criminal Code.

On 14 March 2003 the Supreme Court quashed the County Court's judgment of 12 April 2001 and the Court of Appeal's judgment of 29 October 2002 in part. It held that the classification of the offence and the reference to the provision of the Criminal Code had to be modified, since the relevant provision had been changed between the time the offence had been committed and the time the courts had decided the case. The Supreme Court convicted the applicant under Article 144 and G. under Articles 17 § 4 [organiser of the offence] and 144 of the Criminal Code. Both of them were sentenced to six years' imprisonment.

With respect to the anonymous witnesses, the Supreme Court found no violation of the law of criminal procedure. It held that the County Court had directly verified their statements. The courts had evaluated all the evidence and given sufficient reasons for the conclusions made on the basis of the anonymous statements. The Supreme Court reiterated that it did not have power to establish the facts. The fact that the appellants had disagreed with the factual circumstances established by the lower courts was not a question of law which could be dealt with in the review proceedings in the Supreme Court.

The Supreme Court noted that by its judgment of 19 June 2002 the applicant's conviction under Articles 207-3 and 207-4 of the Criminal Code had been upheld. That judgment of the Supreme Court had become binding on the same date. Therefore, there were no grounds for analysing once again the well-foundedness of the sentence imposed on the applicant pursuant to those provisions.

B. Relevant domestic law

Under Article 79-1 § 1 of the Code of Criminal Procedure, as in force at the material time, in order to ensure the security of a victim or a witness or persons close to him or her, the person in question may be granted anonymity. Anonymity is granted in a reasoned order by a preliminary investigator at the request of a witness or a victim, or on the initiative of the preliminary investigator.

Pursuant to Articles 205 and 206 of the Code of Criminal Procedure, a judge must preside over court hearings so that all facts are examined thoroughly, from all perspectives and objectively, and the truth is ascertained. When hearing a criminal case a court of first instance must directly examine the evidence by hearing the accused, the victims, witnesses and experts, inspecting physical evidence and disclosing records and other documents. Article 262 § 2 of the Code provides that a court judgment must

be based only on evidence that has been heard at a court hearing. Article 274 of the Code provides that the statement of facts and reasons in a court judgment must set out, *inter alia*, the facts ascertained in the examination by the court and the evidence on the basis of which the court deems the facts to be established; the reasons why the court bases its judgment on such evidence and deems other evidence in the case to be unreliable; the charges on which the court convicts each of the defendants; and the evidence on which its conclusion is based.

Article 243 of the Code of Criminal Procedure provides that, after a witness has given testimony, he or she is examined by the participants in the proceedings, including the accused and his or her lawyer. Additional questions may be submitted to a witness to clarify and supplement the testimony previously given by him or her. If a court deems it necessary to hear evidence from a witness who has been granted anonymity, the witness is heard in the absence of the participants in the proceedings on the basis of the questions submitted by them. The content of the testimony has to be disclosed at a court hearing.

Under Article 246 of the Code of Criminal Procedure, testimony given by a witness during the pre-trial investigation may be disclosed if the witness fails to appear at a court hearing or if the whereabouts of the witness are unknown or if the witness has been granted anonymity.

COMPLAINTS

1. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that his conviction had mainly been based on the statements of the anonymous witnesses who had been questioned by the County Court without him or his lawyer being present.

2. The applicant alleged, under Article 6 § 2, that his right not to incriminate himself had not been respected.

3. Finally, the applicant complained, under Article 6 § 1, that the judgments contained insufficient reasons with regard to his conviction under Article 207-3 § 1 and Article 207-4 of the Criminal Code. Moreover, he had been induced by an *agent provocateur* to commit the offence.

THE LAW

1. The applicant complained, under Article 6 §§ 1 and 3 (d), that his conviction had mainly been based on the statements of the anonymous witnesses who had been questioned by the County Court without him or his lawyer being present. The investigator’s decisions had not provided reasons

as to why it had been necessary to grant three witnesses anonymity. The applicant pointed out that the case file did not contain information on any potential threat to the life, liberty or security of the witnesses or their family members. The judgments convicting him contained no reasons why at least the applicant's defence counsel had not been allowed to take part in the direct questioning of the anonymous witnesses, which had been arranged by the County Court. Not all the questions the defence had put to the witnesses in writing had been answered.

The relevant provisions of the Convention provide, in so far as relevant:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> 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;"

As the guarantees of paragraph 3 (d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of this Article, the Court will consider the complaint about the proceedings relating to the charges of the explosion under the two provisions taken together (see *Mefṭah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 40, ECHR 2002-VII).

The Court reiterates that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Court is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, among other authorities, *S.N. v. Sweden*, no. 34209/96, § 44, ECHR 2002-V).

According to the Court's case-law, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 51).

The use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 69, and *Van Mechelen and Others*, cited above, p. 711, § 52). However, a conviction should not be based either solely or to

a decisive extent on anonymous statements (see *Doorson*, cited above, p. 472, § 76, and *Van Mechelen and Others*, cited above, p. 712, § 55).

The Court has also had regard to its findings in a series of cases concerning reliance on witness testimony which was not adduced before the trial court that Article 6 § 3 (d) only required the possibility to cross-examine such witnesses in situations where this testimony played a main or decisive role in securing the conviction (see *Kok v. the Netherlands* (dec.), no. 43149/98, ECHR 2000-VI, with further references).

With regard to the present case, the Court notes that the applicant complained in his appeal against the County Court's judgment of 12 April 2001 that the statements of the anonymous witnesses had not accorded with the other evidence, that the courts unlawfully had based the conviction mainly on the anonymous statements and that these statements had been in any case insufficient to form a basis for the conviction. The applicant did not raise the issue that he or his lawyer could not question the anonymous witnesses directly or that not all questions put in writing to these witnesses were answered.

The Court is satisfied that the applicant's conviction was not based mainly or decisively on the statements of the anonymous witnesses. The domestic courts relied on numerous items of evidence, including several reports, statements of named witnesses and undercover recordings (see above). The Court also notes that the defence put questions to the anonymous witnesses through the County Court. Moreover, the Court finds that all the complaints concerning the reliability of the evidence were carefully studied and assessed by the domestic courts and reasoned answers were given to them.

Against this background the Court finds that the rights of the defence were sufficiently respected in the present case.

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

2. The applicant alleged that his right not to incriminate himself was not respected, since the courts had relied on undercover recordings of conversations between G. and his room mate in the detention cell concerning G.'s intended alibi.

The Court finds that the applicant was not directly affected by the alleged violation of the Convention. What might be at stake in this instance was not the applicant's but G.'s right not to incriminate himself. Therefore, the applicant cannot claim to be a victim of the violation.

It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

3. The applicant complained, under Article 6 § 1, that he had been induced by an *agent provocateur* – on no basis – to commit the offences punishable under Article 207-3 § 1 and Article 207-4 of the Criminal Code.

Despite his appeals to the Court of Appeal and to the Supreme Court, no reasoned judgment had been given in that respect. He further alleged that, due to a change made to the Criminal Code, a more lenient sanction should have been imposed retroactively.

The Court notes that this complaint was dealt with only in the first set of the proceedings. On 19 June 2002 the Supreme Court upheld the lower courts' judgments in so far as they related to this complaint. Accordingly, the Supreme Court's judgment was the final ruling made by the domestic authorities in respect of this complaint. However, the applicant lodged his application with the Court on 22 August 2003, that is, more than six months later.

It follows that this complaint has been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President