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. 40741/02
by Mario PEREIRA
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 8 April 2003 as a Chamber composed of

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs E. PALM,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 7 September 2001,

Having deliberated, decides as follows:

# THE FACTS

The applicant, Mr Mario Pereira, is a United Kingdom national, who was born in 1973 and is currently serving a sentence of life imprisonment in HM Prison Wakefield. He is represented before the Court by Saunders and Co, solicitors practising in London.

## A. The circumstances of the case

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

On 13 February 1997, Michael Menson died as a result of severe burns sustained during an incident in a street on the night of 27-28 January 1997, when he was sprayed with a form of accelerant and the back of his clothing set alight.

As a result of their investigation, the police arrested and charged in the United Kingdom three men, the applicant, Charalambous Constantinou and Husseyin Abdullah. A fourth man implicated in the incident, Ozzie Cevat, had gone to Cyprus. He was arrested and tried in Cyprus and convicted of manslaughter.

The trial in the United Kingdom took place in November-December 1999. The prosecution case was that the applicant and Cevat had set Menson on fire while Constantinou had assisted by acting, *inter alia*, as lookout and that Abdullah had committed subsequent acts intended to pervert the course of justice (namely, by covering up the evidence of the incident). In the case of the applicant, the prosecution relied on the evidence of witnesses who said that he confessed his involvement to them; on covert tape recordings of conversations between him and his co-accused; and on the lies which he had told the police. As regarded Constantinou, the prosecution relied on his own account that he had watched the applicant and Cevat carry out the attack, making no attempt to leave and doing nothing to prevent what happened. Afterwards he had taken Menson's personal stereo. In his case too, the prosecution relied on the covert recordings and the lies he told.

Before the trial, the applicant applied for severance of the trial so that he would not be tried with his two co-defendants. He considered that a joint trial would prejudice his defence such that a fair trial would not be possible. This was because both his co-defendants had made statements implicating him in the attack. In particular, Constantinou in his statement to the police had stated that the applicant and Cervat were not only present but had set fire to the victim. According to the rules of evidence, this statement was evidence against Constantinou but not the applicant. However although the judge would be bound to direct the jury to that effect, the jury would still hear Constantinou's version of events. It was also unlikely that

Constantinou, who had a history of mental disorder, would give evidence and be available to be cross-examined. At the same time, the applicant applied under section 78 of the Police and Criminal Evidence Act 1984 for the evidence from the covert tapes to be excluded as inadmissible and also relied on the prejudice to his defence from the taped conversations from Constantinou implicating him.

The judge rejected the applicant's application for severance. He took the firm view that this was a case which called strongly for a single trial. He recognised that there was a danger of prejudice in that ruling but pointed out that there was a joint charge of murder and that it would be difficult to have a fair trial of all the accusations if done separately.

> "In this case if tried separately, it is possible that Pereira could be acquitted of murder, and Constantinou, whose case is that Pereira had carried out the killing, could be convicted. It is also possible that there could be inconsistent verdicts on the individual counts of doing acts tending to and intended to pervert the course of justice.
>
> In the circumstances, although there is some prejudice to all three defendants if each is tried with the others, in my judgment, there are no exceptional circumstances which make it necessary for me to order severance. Balancing all the factors for and against severance, I conclude that the interests of justice are best served by a joint trial of the defendants..."

The judge also refused to exclude the covert tapes as evidence.

During the trial, neither of the applicant's co-defendants chose to give evidence. The applicant did go into the witness box.

On 21 December 1999, the applicant was convicted of murder and sentenced next day to life imprisonment. Constantinou was convicted of manslaughter and a count of perverting the course of justice and was sentenced to a total of 12 years' imprisonment for manslaughter.

The applicant applied for permission to appeal, on the grounds inter alia that the judge had wrongly refused to order a separate trial. Permission to appeal was refused by a single judge of the Court of Appeal. He renewed his application. At a hearing held on 9 April 2001, the Court of Appeal considered as regarded the judge's decision to try all the defendants together:

> "That was a judgment that was entirely open to the judge on the facts and the circumstances of the case. He was plainly well seized of the implications of the decision that he was being invited to make and he did not identify any exceptional circumstances that made it necessary to order severance.
>
> [Counsel for the applicant] said to us that the exceptional circumstances were the absence of significant evidence against his client, in terms of there being no eye witnesses, no forensic evidence and the dubious nature... of the persons to whom the confessions had actually been made.
>
> It was not, however, the case that there was no other evidence at all against his client, nor, in our judgment, is it right to say that the jury would necessarily have

concentrated on inadmissible evidence in order to understand the case. This was very much a matter for the judge's judgment. This Court will not interfere with his ruling in this case.

The judge was, of course, in making that ruling, acutely conscious of the need to direct the jury in the clearest possible terms as to what evidence was admissible and what was not in the case of each man. He said:

'...what Mr Constantinou may have said to Mr Abdullah and Mr Abdullah to Mr Constantinou in the absence of Mr Pereira is not evidence against Mr Pereira, and if there are other occasions vice versa as far as Mr Pereira is concerned.

The same applies to what Mr Constantinou may have said to Pereira about Mr Abdullah in Mr Abdullah's absence, or what Mr Abdullah may have said about Mr Pereira or Mr Constantinou in the absence of one or other of them.

It is desperately important that you bear that in mind at all times and of course it is important because you are going to be considering, as I have already told you, the cases entirely separately in relation to each.'

The judge was entitled to assume, and this Court will assume, that the jury understood and acted on a direction that was singled out by the judge as being 'desperately important' as part of their work. That safeguard is and was the proper safeguard for the various defendants. It is the appropriate safeguard in a case such as this."

The Court of Appeal went on to find that the judge had not erred in admitting the evidence of the covert tapes. They rejected the applicant's arguments that Constantinou's statement to the police should not have been admitted in evidence as it was entirely self-serving and that the jury's verdicts were inconsistent.

## COMPLAINTS

The applicant complained under Article 6 of the Convention that the judge was wrong to rule that the applicant was not entitled to a separate trial and that ruling resulted in highly prejudicial evidence being presented at the joint trial. As neither co-defendant gave evidence, the applicant was powerless to deal with the statement by Constantinou to the police, the evidence of conversations between Constantinou and Abdullah and the police interviews of Abdallah. The Court of Appeal were wrong in upholding the trial judge's ruling and in their assessment that there were adequate safeguards against prejudice. He further complained that as a co-defendant he had no possibility of arguing at the trial that statements of the other accused should not have been admitted due to their prejudice to him and that the trial judge's discretion to exclude such material was unduly restricted.

# THE LAW

The applicant complains that he did not receive a fair trial invoking Article 6 § 1 of the Convention which provides:

> " 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."

The applicant complains in essence about the refusal by the trial judge to order a separate trial due to the possible prejudicial effect on his defence of the evidence given by his co-defendants and the Court of Appeal's rejection of his application for appeal on that ground.

Matters of evidence are primarily for regulation by national law and for the domestic courts (*Windisch v. Austria,* judgment of 27 September 1990, Series A no. 186, § 25, and *Teixeira de Castro v. Portugal,* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 34). However, the Court may examine whether the requirements of fairness under Article 6 § 1 have been complied with in light of the proceedings as a whole and whether one party was placed at an unfair disadvantage by a decision regarding the admission of evidence (*Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274-A). The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained and used, were fair. Of particular relevance to the Court, is whether the issue which forms the subject of the complaint was subject to careful scrutiny by the appeal courts.

In this case, the Court observes that the applicant's objections to trial with his co-defendants were considered by the trial judge at a pre-trial hearing and rejected in a written judgment giving reasons. This ruling was reviewed on appeal by the Court of Appeal, following written and oral argument on behalf of the applicant and rejected, again, in a judgment setting out the reasons for so doing. The issue was therefore fully ventilated and examined.

Both the trial judge and the Court of Appeal took the view that the possible prejudicial effect of trying the defendants together had to be balanced against the possible injustice and unfairness which could arise from severing an indictment which concerned a very serious crime and trying the alleged participants separately. This could, for example, have led to perverse or contradictory verdicts by different juries. The Court notes the presumption applied by the domestic courts that the defendants involved in an offence should be tried together and considers that this is an unexceptionable approach, based on common sense principles attaching to the administration of justice. The phenomenon of "cut throat defences" where co-accused blame each other to some degree is common, even inevitable, and cannot be regarded *per se* as disclosing a procedural unfairness contrary to Article 6 § 1 of the Convention.

The applicant failed in the domestic proceedings to persuade the courts that special circumstances arose in his case rendering a separate trial necessary, his argument principally being that the statement made to the police by Constantinou would be before the jury although it could not be regarded as evidence against him under domestic law rules and he would have no opportunity to cross-examine Constantinou about that version of events if, as occurred, he declined to go into the witness box. The domestic courts found that any prejudice that arose could be met by a strong direction to the jury as to how to approach the evidence against each co-accused. While the applicant argues that was not an adequate safeguard, this Court agrees with the Court of Appeal that the emphatic guidance given by the judge to the jury may be regarded as having been understood and taken into account.

Finally, it may be noted that the evidence of Constantinou was not the only evidence against the applicant and the applicant had the opportunity of going into the witness box to give the jury his version of events. Taking the proceedings as a whole, the Court finds that the domestic rules of evidence and the way in which they were applied by the domestic courts did not operate to deprive the applicant of the opportunity to put forward an effective defence or to render his trial unfair within the meaning of Article 6 § 1 of the Convention.

The Court concludes that the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President