CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45441/99
by Lawrence PULLICINO
against Malta

The European Court of Human Rights (Second Section), sitting on 15 June 2000 as a Chamber composed of

Mr C.L. Rozakis, *President*,
Mr B. Conforti,
Mrs V. Strážnická,
Mr P. Lorenzen,
Mr M. Fischbach,
Mrs M. Tsatsa-Nikolovska,
Mr P. Vella, *ad hoc judge*,
and Mr E. Fribergh, *Section Registrar*,

Having regard to the above application introduced on 23 December 1998 and registered on 15 January 1999,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the oral submissions of the parties at the hearing on 15 June 2000,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Maltese national, born in 1944. He is currently serving a fifteen-year prison sentence in Malta.

He is represented before the Court by Professor Ian Refalo, Dr Marse-Ann Farrugia, Dr Joseph Galea Debono and Dr Edward Wood, all lawyers practising in Malta.

A. Particular circumstances of the case

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

At the time of the events giving rise to his prosecution and conviction, the applicant was a Commissioner of Police in Malta.

In 1987 the Government of the day ordered the re-opening of a criminal inquiry into the circumstances surrounding the death of a suspect at the police headquarters in 1981 which occurred when they were in opposition. In 1989, following the close of the inquiry, the applicant was charged with the following offences arising out of the incident: perjury; wilful homicide; giving false testimony under oath; and three separate charges of subornation of three police witnesses. On 7 February 1991 the Court of Criminal Appeal declared the three charges relating to witness subornation null and void.

Before the applicant's trial opened on 11 January 1993, the applicant, then on bail, appeared before a criminal court charged with having breached the conditions of his bail. On 7 January 1993 the court revoked the applicant's bail, being satisfied that there was sufficient evidence to prove that the applicant had approached a prosecution witness in circumstances which showed that the intention was to corrupt the latter's evidence at the forthcoming trial. The court ordered a ban on the publication of these proceedings.

According to the applicant the trial opened against the background of intense and sustained media coverage and political discussion. The applicant cites among other incidents the appearance in a newspaper before the jury was empanelled of a report alleging that he had been found guilty of violations of human rights. The editor of the newspaper was subsequently found guilty on 30 June 1993 of contempt of court. The court which convicted the editor considered that the report could have had a negative affect on the jury causing irreparable harm to the applicant. He also points to the fact that a witness who had failed to appear at the bail revocation proceedings was subsequently tried on a perjury charge a couple of days before his own trial with the result that the public learned in press reports dated 8 and 23 January 1993 that his bail had been revoked.

The trial commenced on 11 January 1993 and was presided over by the same judge who had earlier ordered the applicant's bail to be revoked. Following empanelment the judge instructed the jury to disregard anything which they may have heard or read about the case.

On 12 February 1993 the prosecution announced at the close of its case that it had no further evidence to present to the court. Among the witnesses called by the prosecution were three persons who had testified against him in the earlier proceedings in which his bail had been revoked. According to the applicant the result was to allow these witnesses to give evidence on the circumstances which led to the revocation of the applicant's bail thus

creating for him a new case to answer. Three police officers also gave evidence against the applicant. Two of these officers who had admitted to beating up the suspect had been granted a presidential pardon to secure their testimony against the applicant.

Throughout this phase of the trial the applicant took detailed notes of the case against him in order to facilitate the giving of his own evidence in rebuttal at the appropriate moment. The applicant began his testimony on 15 February 1993. When the morning sitting was adjourned at 1.15 p.m., the prosecution requested the court to disallow the applicant use of his notes. The court upheld the request and ordered the confiscation not only of the notes but also other documentation including legal materials which the applicant had assembled in his place of confinement for the purposes of preparing defence.

The afternoon sitting resumed at 3.30 p.m. on 15 February 1993. Before the jury were admitted to the courtroom, the applicant's counsel informed the presiding judge that the applicant was experiencing difficulty in testifying without the aid of his notes. Submissions were made on this matter by counsel for both sides. The applicant's counsel insisted that the materials in the case were so voluminous that it would be impossible for any witness to remember everything without the aid of reference materials. The presiding judge decided to postpone a decision on the issue. The applicant resumed his evidence. At 5.15 p.m. the prosecution commenced its cross-examination of the applicant. The cross-examination was later suspended, whereupon the applicant's counsel again raised the issue of his client's notes. Both counsel entered minutes in the record of the proceedings setting out their respective views on the matter. At a later stage the presiding judge ruled as follows:

> "Until such time as the accused concludes his testimony he is precluded from having access to any writing except that indicated in section 583 of the Code of Organisation and Civil Procedure."

The applicant concluded his evidence on 17 February 1993. The following days were taken up with matters such as the hearing of witnesses requested by the jury, the defence speech, the prosecution's reply, the addresses to the jury and the latter's deliberations and verdict.

In his summing up to the jury the judge gave directions on the relevant law and stressed that it was for the jury to reach its decision on the basis of the facts and without taking into account any extraneous matters. The judge advised the jury that the applicant was to be presumed innocent until proved guilty and it was for the prosecution to prove guilt to the criminal standard of beyond reasonable doubt. He further stressed the need to subject to scrutiny the evidence of those witnesses who had testified in return for a pardon and that the applicant could not be convicted on the sole evidence of an accomplice.

On 10 March 1993 the jury, after seven and a half days of deliberations, found the applicant not guilty of the charge of wilful homicide but guilty of being an accomplice to the crime of causing grievous bodily harm resulting in death. According to the applicant he was never charged with the latter offence but was nevertheless found guilty of it. He was found not guilty of the perjury charge but guilty of giving false evidence under oath. However, on the same day the court acquitted him of the perjury charge and declared the related charge to be time-barred.

The applicant was sentenced to a term of imprisonment of fifteen years on the charge of being an accomplice to the crime of causing grievous bodily harm resulting in death.

On 15 April 1994 the Court of Criminal Appeal confirmed the judgment and sentence of the trial court. Although the court held for the first time that the confiscation of a defendant's notes at his trial was illegal under Maltese law, it nonetheless found that no miscarriage of justice had taken place at the applicant's trial having regard to the strength of the evidence against him. As to the applicant's complaint that the fairness of the trial was impaired on account of the adverse media reporting of the case, the court held that the balance between the applicant's rights as an accused person and the freedom of the press had not been disturbed to the point where it could be said that the media coverage had a negative influence on the deliberations of the jury and the verdict reached. The court also ruled that the applicant had the opportunity to challenge the presence of the trial judge under domestic law. Since he had failed to do so it was no longer open to him to raise the issue of the judge's impartiality on appeal.

The applicant appealed to the First Hall of the Civil Court contending that he had been denied a fair trial in breach of the guarantees laid down in the Maltese Constitution and the European Convention on Human Rights. On 5 August 1997 his appeal was rejected, the court being of the opinion that the applicant's complaints whether taken individually or collectively did not substantiate that he had been denied a fair trial.

The applicant subsequently appealed to the Constitutional Court, which in its judgment of 18 August 1998 dismissed his appeal. The Constitutional Court acknowledged that the applicant's right to a fair trial had been breached since the confiscation of his reference materials had seriously disrupted his defence. It stated in this regard that:

> "... the confiscation of the notes and other books of the applicant and this after he has already started testifying and without a forewarning, certainly hindered the testimony given by him in defence, both from the factual aspect and from the psychological one and this particularly because those notes which were prepared by him to conduct the defence did not necessarily refer to evidence previously given ...
>
> ...The Court is therefore of the opinion that in this regard and limited to this grievance, the right of the [applicant] to a fair hearing before the first Court was violated ..."

However the Constitutional Court then proceeded to rule that the criminal proceedings, taken as a whole, had been fair. The court noted also that it was relevant that at no time before the Court of Criminal Appeal had the applicant asked to give evidence with the assistance of those materials.

In line with the rulings of the appellate courts, the Constitutional Court also found that the applicant had not adduced any concrete proof that the jury or the trial or appeal court judges had been influenced by press coverage of the proceedings or related political statements. It noted, *inter alia*, that the jury had taken a considerable length of time in reaching a verdict. Furthermore, the court rejected the applicant's challenge to the impartiality of the trial judge, *inter alia*, on the ground that he had not raised this matter at the appropriate moment in the trial and had not availed himself of domestic remedies for this purpose.

B. Relevant domestic law

Section 39 of the Constitution of Malta provides:

"…
(6) Every person who is charged with a criminal offence –
…
(b) shall be given adequate time and facilities for the preparation of his defence; …"

Sections 506-508 of the Criminal Code provide as relevant:

"506. The Court of Criminal Appeal may, if it thinks it necessary or expedient in the interest of justice –
…
(c) if it thinks fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such application, subject to the provisions of section 635.

507. Without prejudice to the generality of the last preceding section, where evidence is tendered to the court under that section, the court shall, unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise its power under that section of receiving it if –
(a) it appears to it that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and
(b) it is satisfied that it was not adduced at the trial but that there is a reasonable explanation for the failure so to adduce it.

508. (1) Where an appeal against conviction is allowed by reason only of evidence received or available to be received by the Court of Criminal Appeal under sections 506 and 507 or by reason of a point raised under paragraph (b) of subsection (1) of section 501 and in each case it appears to the court that the interests of justice so require, the court may, instead of directing the entry of a judgment and verdict of acquittal as provided by subsection (2) of section 501 or by paragraph (b) of subsection (4) of section 503, order the appellant to be retried."

Section 583 of the Code of Organisation and Civil Procedure reads as follows:

"A witness may refresh his memory by referring to any writing made by himself or by another person under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing; but in such case, the writing must be produced and may be seen by the opposite party.

THE LAW

The applicant complains that he was denied a fair trial in breach of Article 6 of the Convention, which provides as relevant**:**

> "1. In the determination 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 ...".

A. As to the confiscation of the applicant's notes at trial

In the applicant's submission the confiscation of his reference notes on the order of the trial judge caused irreparable harm to his defence and compelled him to present his case to the jury at a substantial disadvantage *vis à vis* the prosecution.

The Government's preliminary objections

1. Lack of victim status

The Government contended that that the Constitutional Court accepted that the confiscation of the applicant's materials at his trial amounted to a procedural irregularity which, taken in isolation, may have infringed Article 6 of the Convention. This in their view constituted sufficient redress in the circumstances for the alleged violation of Article 6. They further added that any breach of the applicant's right to a fair hearing that might have been committed at first instance was redressed in view of the comprehensive review of the evidence carried out by the Court of Criminal Appeal, then by the First Hall of the Civil Court and finally by the Constitutional Court. Significantly, the applicant has never disputed the fairness of the proceedings on appeal .

For the above reasons the Government maintained that the applicant can no longer claim to be a "victim".

The applicant stated in reply that the mere acknowledgement by the Constitutional Court that there had been breach of the Convention is not itself sufficient to redress his grievance and to cancel his victim status. The applicant stressed in this respect that he is still serving the prison sentence handed down by the trial court.

The Court does not accept the Government's contention. It is settled case-law that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 18, § 34; the Brumărescu v. Romania judgment of 28 October 1999, § 50, to be published in *Reports of Judgments and Decisions* 1999).

It is to be observed in this connection that, notwithstanding the fact that the Constitutional Court accepted the applicant's submission on this complaint, it found that in the circumstances the proceedings taken as a whole were fair. However, the applicant disputes that conclusion before the Court and he still harbours a strong sense of grievance given that his conviction and prison sentence remained unchanged. Although the

Government's arguments are of relevance to the merits of the applicant's complaint they cannot be invoked to deprive him of the status of a "victim" within the meaning of Article 34 of the Convention. On that account the Court rejects the Government's objection under this head.

2. Non-exhaustion of domestic remedies

In an alternative submission the Government stated that the applicant's counsel did not raise any objection to the prosecution's request at 1.15 p.m. on 15 February 1993 to disallow the applicant access to his notes. Although the applicant's defence counsel drew the presiding judge's attention to his concern that the applicant was experiencing difficulty in giving testimony in the absence of his notes, the applicant resumed his evidence-in-chief in the afternoon of the same day, and did not express the wish or the need to consult his notes; nor did he express any such wish or need during his cross-examination which began later on that same day. When the cross-examination was suspended the applicant's counsel again raised the matter of the applicant's notes and both sides' counsel submitted their views on the legal position governing this matter. The presiding judge subsequently ruled that until such time as the applicant has concluded his testimony he was precluded from having access to any writing except for that indicated in section 583 of the Code of Organisation and Civil Procedure. The Government stress that the expression used in section 583, namely any "writing" ("*kitba*"), covered the applicant's notes.

The Government submitted that the applicant and his counsel chose to remain passive after this ruling and did not make any request to allow the applicant to refer to his notes. This was despite the fact that the trial judge's ruling expressly reserved the applicant's right to have access to them. Furthermore, neither the applicant nor his counsel raised any further objection about being denied access to any writing covered by that section. No attempt was made to obtain a decision from the court as to whether the notes, papers and materials of which he was deprived fell within the terms of the court's decision. The point only came to the fore again after the jury had returned its verdict and as a ground of appeal.

The Government further maintained that the applicant never requested the Court of Criminal Appeal to give evidence before it with the aid of the said documents. In their submissions it would have been open to the applicant to do so in application of section 506(c) of the Criminal Code. His failure to make use of this remedy constitutes another ground on which to reject the complaint under Article 35 § 1 of the Convention.

For the above reasons, the Government submitted that the applicant's complaint should be declared inadmissible.

The applicant disputed the Government's reliance on section 583 of the Code of Organisation and Civil Procedure. He contended that the prosecution, immediately prior to the suspension of the morning sitting, requested the court not to allow him access during the adjournment to any materials which he might have at his place of confinement. The court ordered the removal of any materials found there. Following the resumption of the afternoon sitting the applicant's counsel referred the presiding judge to the right of a witness to refresh his memory, especially in a case like the instant one where the evidence was voluminous. However the prosecution insisted that the relevant legal provision did not apply to notes taken by the accused of the evidence of witnesses during the trial or documents and transcripts of the proceedings of the trial. When the sitting was suspended for the day prosecution counsel

persisted in his restrictive interpretation of section 583. In these circumstances the applicant could not be faulted for not referring again to the provisions of section 583. His counsel had already argued the point, had failed and to raise the issue again would have been futile.

The applicant drew attention in this connection to the fact that the prosecution maintained its position on this matter before the Court of Criminal Appeal. However, that court rejected the prosecution's view and held that the notes which the applicant had made at the trial did fall within the exception to the scope of section 583. Moreover, both the Court of Criminal Appeal and the Constitutional Court accepted as fact that every scrap of paper was removed from the applicant's possession with detrimental consequences for his defence rights.

As to the Government's reliance on section 506(c) of the Criminal Code, the applicant stated that this issue only arose at the very end of the Constitutional Court's judgment. The Government never alluded to this provision at any stage of the appeal proceedings and on that account they must be considered estopped from taking the point in the Convention proceedings. In any event, the decision to allow evidence to be tendered would have been at the discretion of the Court of Criminal Appeal. The provision at issue has never been used in proceedings before the Court of Criminal Appeal in the manner canvassed by the Constitutional Court and now by the Government. In the applicant's submission, section 506(c) cannot be applied by the Court of Criminal Appeal to hear afresh two and a half days' of evidence given by the applicant before a jury. He contended that the purport of the section is limited to situations where the Court of Criminal Appeal requires some minor clarification of the evidence, for example where the transcript of the trial is unclear on a particular issue.

For these reasons, the applicant requested that the Government's objection on grounds of non-exhaustion be rejected.

The Court recalls that the purpose of the rule on non-exhaustion contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it. Thus the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. Nevertheless, the only remedies that must be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (for a recent statement of the basic principles, see the Civet v. France judgment of 28 September 1999, § 41 and the authorities referred to therein, to be published in *Reports* 1999).

The Court observes that the parties dispute the scope and effectiveness of section 583 of the Code of Organisation and Civil Procedure and section 506(c) of the Criminal Code in the context of the applicant's complaint. However it considers that it does not have to pronounce on this matter having regard to the fact that all of the instances on appeal considered the merits of the applicant's complaint concerning the confiscation of his reference materials. None of the courts on appeal barred an examination on the merits merely

on account of the applicant's failure to rely on section 583 at first instance or on section 506(c) before the Court of Criminal Appeal.

Admittedly the Constitutional Court drew attention to the fact that it would have been open to the applicant to have invoked section 506(c) before the Court of Criminal Appeal. Notwithstanding that observation, the Constitutional Court examined the substance of the complaint and, like the Court of Criminal Appeal, concluded that the confiscation measure gave rise to a procedural irregularity in the proceedings at first instance. In these circumstances, and having regard to the fact that the substance of the applicant's complaint was a consistently central aspect of the applicant's various appeals and that the appeal courts had the option of ordering a re-trial had they been persuaded of the merits of his arguments, it must be concluded that the applicant's complaint cannot be defeated on grounds of non-exhaustion.

For the above reasons, the Court dismisses the Government's objection.

3. Merits

The Government contended that even supposing there had been a procedural irregularity resulting from the confiscation of the applicant's notes there was no consequential unfairness to the applicant's trial. They submitted that the same rule would have been applied to all witnesses including those called by the prosecution and that the applicant was unable to substantiate on appeal that he had been treated differently compared to other witnesses. It would have been open to the applicant's counsel to request the segregation of any prosecution witness whose evidence was suspended so as to prevent him or her from having access to reference materials. A request to that effect was never made.

Moreover, there was nothing to suggest from the applicant's performance in the witness box that he was in any way impaired in his recollection of the points made by prosecution witnesses or in his organisation of the sequence of his own evidence through not being able to consult his notes. In the Government's view, it was an exaggeration to claim that this had "an irreparable effect on the psychological frame of mind of the applicant." On the contrary, the applicant was never placed at a disadvantage and had every means at his disposal to defend himself on an equal adversarial footing with the prosecution at both the pre-trial stage and during the actual trial. The Government stress that at all stages the applicant's counsel could have access to the notes or any other materials which the applicant cared to pass to him without having to make a specific request to the court to that effect. Of equal importance was the fact that the decision only operated as long as the applicant was giving evidence in the witness box.

Furthermore, any defects in the original trial were remedied at the level of the Court of Criminal Appeal. Before the latter court the applicant had every opportunity to seek to persuade it that the conviction should not stand. The Court of Criminal Appeal made a detailed assessment of all the evidence before the first instance court and reached the conclusion that there had been no miscarriage of justice. Accordingly, considering the proceedings as a whole it cannot be maintained that they were unfair.

The applicant asserted that it was incorrect to state that he had full access to the record of the proceedings throughout the trial. He was in fact denied access to them after the decision to remove the first morning's transcripts from his possession. The applicant stated

that there was no substance to the argument that his defence counsel could have full access to the records or to the notes which the applicant himself had made. Such an argument is at variance with the right of an accused to participate effectively in a criminal trial, irrespective of whether he is assisted by a lawyer. The applicant stressed that he, a lawyer by training, had taken an active part in the organisation of his defence at the pre-trial stage, had assisted his lawyer to this end and to deny him use of his reference materials at a critical moment in his defence severely disrupted his and his counsel's conduct of the case. It was no answer to his complaint to state that he could simply have entrusted his materials to his counsel. In the first place, the reference materials were prepared in accordance with his perception of the events which had unfolded at the trial. Secondly, his counsel would have been placed under an undue burden to have to decipher his notes and at the same time to proceed with the examination-in-chief or follow his cross-examination.

The applicant concluded that the arbitrary removal of his reference materials amounted to a breach of the principle of equality of arms, forcing him to present his case to the jury at a substantial disadvantage as compared to the prosecution. He points to the fact that prosecution witnesses whose evidence was suspended did not have to labour under the same disadvantage since, unlike him, they were not kept segregated when their testimony was suspended.

The Court will have regard to the proceedings as a whole including the decisions of the appellate courts. Its task is to ascertain whether the proceedings in their entirety, as well as the way in which evidence was taken, were fair (see, *inter alia*, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34; the Stanford v. the United Kingdom judgment of 23 February 1994, Series A no. 282-A, p.10, § 24).

It observes that the parties dispute the extent of the difficulty which the applicant experienced in giving his evidence following the confiscation of his reference notes. In the Government's submission, the confiscation did not disturb the flow or coherency of his evidence at the trial. In the Court's opinion, even supposing that this perception of the applicant's performance in the witness box is correct, it cannot be taken to condone the measure which was applied to him. For the Court, Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 - "to defend himself in person", "to examine or have examined witnesses", and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court" (see, *inter alia*, the Colozza v. Italy judgment of 12 February 1985, Series A no. 89, p. 14, § 27; the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 33, § 78; and the above-mentioned Stanford judgment, pp. 10-11, § 26).

In the Court's opinion an accused's effective participation in his criminal trial must equally include the right to compile notes in order to facilitate the conduct of his defence, irrespective of whether or not he is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence. The dialogue between the lawyer and his client should not be impaired through divesting the latter of

materials which set out his own views on the strength and weaknesses of the evidence adduced by the prosecution.

This being said, the Court acknowledges that different considerations may apply to the actual use of notes by an accused during his examination-in-chief or cross-examination. The credibility of an accused may be best tested on how he reacts in the witness box to questioning. A domestic court might therefore be justified in preventing an accused's reliance on written recollections of events or the reading out of notes in a manner which suggest that that the evidence given has been rehearsed.

The Court notes in fact that the Court of Criminal Appeal roundly criticised the decision to confiscate the applicant's reference materials and further up the chain of appeals the Constitutional Court ruled that the applicant's right to a fair hearing before the trial court had been breached from the standpoint of both Maltese constitutional law and Convention law.

As to whether the defect in the original trial was rectified on appeal, the Court observes that the applicant's case was the subject of a painstaking review by the Court of Criminal Appeal. That court delivered a lengthy judgment in which it found that the irregularity did not result in a miscarriage of justice given that there was still a sufficiently strong case against him for a reasonable jury, properly directed, to return a verdict of guilt. In the Court's view the approach taken by the Court of Criminal Appeal, with its emphasis on the safety of the applicant's conviction, failed to address the element of "fairness", a notion which cannot be equated to "safety." This oversight was alluded to by the Constitutional Court in its implied admonishment of the Court of Criminal Appeal's reasoning on this issue. The Constitutional Court, in application of the correct Convention test and with reference to the Strasbourg Court's case-law, looked at the fairness of the proceedings as a whole before concluding that the irregularity at first instance had not prejudiced the applicant's right to a fair trial.

The Court agrees with the latter conclusion. It notes that any disadvantage which the applicant may have suffered was off-set by the fact that he was represented throughout by experienced counsel. It has not been suggested by the applicant that he was impeded in his contacts with his counsel during the suspension of his witness testimony. It has not been suggested either that the applicant's counsel could not have access to all of the materials at issue or sought a brief adjournment to enable him to speak privately to the applicant about a particular matter. Although the applicant maintains that the impugned measure was not applied to prosecution witnesses, the Court cannot speculate as to whether the latter category of witnesses had, like the applicant, compiled reference notes to assist them in their testimony. In any event, the testimony of prosecution witnesses could be probed fully by the applicant's counsel. The Court must also weigh in the balance the fact that the applicant never identified any particular difficulty which he experienced when giving his testimony. He formulated his complaint on appeal in general terms without adducing concrete instances of personal prejudice. He has not alluded either to any such instances in his pleadings before the Court.

For the above reasons, the Court finds that, taken in their entirety, the proceedings afforded the applicant a fair and effective opportunity to present his defence in an adversarial procedure and respected the principle of equality of arms. It therefore rejects his complaint

under this head as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. As to the applicant's complaint impugning the impartiality of the trial judge

The applicant complained that the fairness of his trial was impaired on account of the fact that the judge who presided at his trial had earlier revoked his bail on the grounds that the evidence of witness who testified that he had improperly contacted a prosecution witnesses was to be believed. The end result was to brand him a perjurer in the eyes of the judge.

In their further observations on the admissibility of this complaint the Government announced their intention to withdraw their objection based on grounds of non-exhaustion and to plead the matter on the merits.

The Government state that the Court of Criminal Appeal and the Constitutional Court addressed fully the applicant's complaint. With reference to the principles developed in the Convention case-law on the issue of a judge's objective impartiality, both these courts reached the conclusion that the presiding judge's impartiality could not be impugned on account of any pre-trial or trial decisions he had made. Neither his revocation of the applicant's bail nor his decision to admit as witnesses the three persons who had testified at the bail revocation proceedings called into question in any way the presiding judge's impartiality and the applicant has adduced no evidence in support of his allegation.

For the above reasons, the Government concluded that the applicant's complaint was manifestly ill-founded.

The applicant stated in reply that the presiding judge made a negative assessment of his credibility and honesty in deciding to revoke his bail. From that moment on he was considered a perjurer in the eyes of the presiding judge. In addition, notwithstanding the fact that the presiding judge had placed a ban on the reporting of the bail revocation proceedings, he subsequently allowed the prosecution to call persons who testified against him in the bail revocation proceedings to prove that the applicant had tried to corrupt a witness and thus disparage his own credibility as a witness.

The Court recalls that the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, § 28).

As to the subjective test, the applicant has not disputed the personal impartiality of the trial judge.

Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks

impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.

In this regard, the Court has previously held that the mere fact that a judge has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his impartiality. What matters is the extent and nature of the pre-trial measures taken by the judge (see the above-mentioned Fey judgment, p. 12, § 30; and the Sainte-Marie v. France judgment of 16 September 1992, Series A no. 253, p. 32, § 32).

The Court observes that the judge who presided at the applicant's trial revoked his bail in the days preceding the trial. The Court is not persuaded by the applicant's assertion that the nature of that decision shaped the judge's view about his credibility and honesty as a witness in the trial proceedings. It notes that the issue determined by the judge in the bail revocation proceedings was whether or not he had broken the conditions of his bail by approaching a prosecution witness. That issue was entirely distinct from the question of his guilt or innocence of the criminal charges brought against him. The determination of that question ultimately lay in the hands of the jurors.

With the exception of the judge's decision to admit the oral testimony of the prosecution witnesses who testified against the applicant at the bail revocation proceedings, the applicant has not impeached before the Court the judge's handling of evidentiary matters or his directions to the jury. Indeed the Court finds the judge's summing up to the jury balanced and in no way unfair to the case for the defence.

As to the decision to give leave to the prosecution to call the witnesses who testified at the bail revocation proceedings, the Court recalls that the assessment of the relevancy of evidence and the decision to admit evidence are essentially matters for the domestic judge (see the Teixeira De Castro v. Portugal judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34). The Court does not find that the trial judge's decision on this issue can be construed as a measure which was intentionally hostile to the defence. In the first place, the applicant has not impugned the judge's subjective impartiality in his conduct of the trial. Secondly, the defence had every opportunity to discredit the evidence of these witnesses before the jury.

The Court must also have regard to the fact that the applicant's lawyer at no stage of the trial sought to challenge the participation of the judge. He did so on appeal. Although, the courts on appeal placed emphasis on the applicant's silence on the issue at the trial they nevertheless reviewed the merits of the complaint and ruled that it was unfounded.

For the above reasons, the Court rejects his complaint under this head as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

C. As to the alleged prejudice to the applicant's trial on account of adverse media and other statements

The applicant insisted that the hostile reporting on his trial prejudiced the minds of the jurors and prevented him from receiving a fair trial.

The Government replied that no prejudice had been caused to the fairness of the applicant's trial at any stage as a result of any reports carried in the media. It was entirely incorrect to describe the publicity surrounding the trial as a virulent press campaign. The

verdict returned at the trial indicated that the jury had an open mind as to the applicant's guilt and were not in any way influenced by any adverse publicity. The Government highlight the fact that the Constitutional Court thoroughly reviewed this complaint, including from the standpoint of Convention law, and firmly concluded that the applicant's grievance could not be sustained with respect to either media reports or any other statements on his case.

Furthermore, the Government maintained that the defence did not raise any objection to the fact that the jury was being sent home at the weekend.

For these reasons the Government stressed that the applicant's complaint was manifestly ill-founded.

The applicant pointed out that his trial was a highly political event given that the Government of the day had an interest in securing his conviction on account of the fact that the charges against him related to events which occurred while they were in opposition. The applicant drew attention to various examples of negative reporting on his case which, he maintained, prejudiced the fairness of the proceedings, before, during and after the trial.

A few weeks before the trial began an incorrect report appeared in the "The Malta Independent" indicating that the applicant had already been found guilty of human rights abuses. Significantly, in the contempt of court proceedings of 30 June 1992 against the editor of the newspaper the Court of Magistrates considered that the publication could have given a wrong impression to jurors who had to sit in the case against the applicant and could have caused irreparable harm to his defence. Moreover, despite the ban imposed on the reporting of the revocation of the applicant's bail a local newspaper carried a story that the Attorney General had made an urgent application to the court. In the contempt proceedings brought against the editor the Court of Magistrates observed that the applicant could have been irreparably prejudiced by the report. Furthermore, the fact that there was no ban on the reporting of the case of the witness who perjured himself at the bail revocation proceedings meant that the content of those proceedings became common knowledge. Two reports dealing with the revocation of the applicant's bail were in fact carried in a local newspaper on 8 and 23 January 1993 when the jury was hearing evidence.

During the trial there was further partisan reporting in the local press including reports which could have been read by the jury at their hotel during the stage of deliberations.

Following the jury's verdict and pending the appeal to the Court of Criminal Appeal the applicant was repeatedly attacked in the press and vilified in sensationalist headlines.

The applicant maintains that he had no effective remedy with respect to this complaint. He contends that it was not open to him under Article 611(2) of the Criminal Code to put a question to jurors in order to establish whether there existed cause to challenge them in the light of the prejudicial pre-trial publicity on his case. Not even the presiding judge felt the need to question the jury in order to satisfy himself that none of them had been subjected to undue extraneous influence. Furthermore, the fact that the presiding judge has warned the jury to set aside everything they may have or read about the case cannot be considered a decisive safeguard.

The applicant further maintained that it was impossible to insulate the jury against the effects of the sustained campaign against him, especially since they were allowed to return to

their homes at weekends and have access to the press and broadcasting coverage of the trial. The applicant alluded in particular to a press report dated 13 January 1993 which described the contents of a letter read out to the court in the absence of the jury. That letter, simply signed "prisoners detained at Corradino Prison", alleged that the applicant had together with others been responsible for the killing and beating of prisoners.

The Court observes that there is general recognition of the fact that the courts cannot operate in a vacuum. Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large.

Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. This is all the more so where a public figure is involved, such as in the present case.

However, public figures like the applicant are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6, which in criminal proceedings include the right to an impartial tribunal, on the same basis as every other person. This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice (see the Worm v. Austria judgment of 29 August 1997, *Reports* 1997-V, pp. 1552-51, § 50).

The Court observes that the applicant's trial had its roots in events which were a matter of intense and divisive political debate and it could not be expected that the trial itself would be conducted with any degree of serenity. The applicant highlights several instances of negative reports in the press which he maintains caused irreparable harm to his defence. The Court notes that the domestic courts were attentive to the possible risks caused to the fairness of the trial by prejudicial comment in the media and took steps to ensure that a balance was struck between press freedom and the applicant's right to a fair trial. Contempt proceedings were in fact brought against editors. Although the applicant seeks to minimise the value of the direction which the trial judge gave to the jury, the direction must nevertheless be considered a safeguard against the possible intrusion of extraneous and biased reporting into the jury's own assessment of the issues raised by the trial.

In the Court's opinion, the applicant has not made out a case that a media campaign was waged against him of such virulence as to sway or was likely to sway the outcome of the jurors' deliberations. He has not adduced any concrete proof of such, including proof that the authorities had in any manner encouraged prejudicial reporting in the media. Indeed, the length of time taken by the jury to reach a verdict - seven and a half days - would strongly suggest that the jurors acted in accordance with their own conscience and the requirements of the oath which they had sworn. The applicant was in fact acquitted of the principal charge against him, wilful homicide.

The Court must also have regard to the fact that this complaint was taken and carefully reviewed on appeal. The appeal instances all concluded that any objectionable comments which appeared in the media either before or after the verdict had no influence either on the jury or on the judges sitting in the Court of Criminal Appeal.

For the above reasons, the Court rejects his complaint under this head as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Erik Fribergh
Registrar

Christos Rozakis
President