

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

THIRD SECTION

DECISION

Application no. 57687/09
Hrach SAHAKYAN against Armenia;
Application no. 63452/09
Zaven MKRTCHYAN against Armenia; and
Application no. 63455/09
Vladimir MKRTCHYAN against Armenia

The European Court of Human Rights (Third Section), sitting on 1 October 2013 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Corneliu Bîrsan,
Ján Šikuta,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the application no. 57687/09 lodged on 29 October 2009 and the applications nos. 63452/09 and 63455/09 lodged on 27 October 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicants in the present case, Mr Hrach Sahakyan (the first applicant), Mr Zaven Mkrtchyan (the second applicant) and Mr Vladimir Mkrtchyan (the third applicant) are Armenian nationals, who were born in 1981, 1985 and 1980 and lived, before their prosecution and imprisonment, in Yerevan. The first applicant is represented before the Court by his sister, Ms L. Sahakyan, the second and the third applicants, who are brothers, are represented by Mr V. Grigoryan, a lawyer practising in Yerevan.

A. The circumstances of the case

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

1. The applicants' prosecution and the conduct of the investigation into M.M.'s death

3. On 11 August 2005 criminal proceedings were instituted on account of the murder of M.M., a 19 year-old man who was stabbed to death early in the morning on the same date in a street in Yerevan.

4. On the same day the first and the second applicants were taken to the Shengavit District Police Station of Yerevan (hereafter, the police station) in connection with the murder.

5. On 18 August 2005 the first and the second applicants were formally arrested.

6. On 21 August 2005 the second applicant was charged with murder under Article 104 § 1 of the Criminal Code (hereinafter the CC) and the first applicant was charged with aiding the second applicant to commit the murder (Article 38-104 § 1 of the CC).

7. On 27 October 2005 the third applicant was arrested and, on 30 October 2005, charged with aiding the second applicant to commit the murder, and detained. The third applicant claims that he was arrested at the General Prosecutor's Office (hereafter, the GPO) which he had visited after a telephone call from an investigator asking him to appear as a witness.

8. On 23 November 2005 a new set of criminal proceedings was instituted on account of the first applicant having had sexual intercourse with juvenile A.M. against her will, and also carrying out acts of a sexual nature and indecent acts with her. It appears that the new criminal case was joined to the criminal proceedings instituted on account of the murder.

9. On 29 December 2005 the criminal charges in respect of the applicants were modified and new charges were brought. In particular, all the applicants were charged with three counts of aggravated murder (Article 104 § 2 (5, 7 and 10) of the CC) and one count of aggravated hooliganism (Article 258 § 3 (1) of the CC). In addition, the first applicant was charged with one count of aggravated rape (Article 138 § 2 (3) of the CC), coercion to acts of a sexual nature (Article 140 of the CC), commission of acts of a sexual nature with a person under 16 years of age (Article 141 of the CC) and commission of indecent acts with a person under 16 years of age (Article 142 § 1 of the CC).

10. On 24 February 2006 the investigation into the criminal case was concluded and the criminal case, together with the indictment, was referred to the Shengavit District Court of Yerevan for trial. According to the indictment, M.M. had been murdered by the applicants as a result of a street argument. It was also noted that, in the period from 2003 until 2004, the

first applicant had regularly had sexual intercourse with juvenile A.M. Furthermore, according to the indictment, on 4 or 5 July 2005 the first applicant had used violence to force A.M. to have sexual intercourse with him. It appears that the charge of rape was based on the victim statements of A.M. and witness statements of G.A., V.V., G.S. and V.Gh.

11. It further appears that none of the applicants confessed to the crimes or gave any statements.

2. Key witnesses to the charges of murder and hooliganism

12. It appears that more than 20 persons were involved as witnesses in the criminal proceedings. However, as far as the witness evidence is concerned, the charges against the applicants were largely based on the pre-trial witness statements of several key witnesses.

(a) Witness M.H.

13. M.H. made multiple witness statements before the investigating authorities, during which she often changed her testimony maintaining, however, that she had witnessed the murder. It appears that she reinstated her statements during the confrontation with the applicants. It appears that on 24 August 2005 M.H. lodged complaints with different public bodies and the mass media seeking protection against the illegal acts of the police against her and her family. In those complaints, she stated that she had been taken to the Shengavit District Police Station of Yerevan (hereafter, the police station) where she had been kept for about a week and forced to make incriminating witness statements, as guided by the investigators, under threats and intimidation.

14. On 9 September 2005, during questioning at the GPO, M.H. maintained her allegations of police intimidation and threats and retracted her previous witness statements. However, during her questioning in October and November 2005 she stated that she had actually witnessed the murder and described the circumstances of M.M.'s death. As to her complaints about the unlawfulness of police actions and the retraction of her previous witness statements. M.H. claimed that she had been under pressure from the first applicant's mother and sister who had continually harassed her and her family, seeking to make her retract her incriminating witness statements.

15. It appears from the case file that another witness, T.M., testified that M.H., who was her friend, told her that the first and the second applicants had committed a murder the day before in front of her house. M.H. gave the same account of events also to M.M's father, K.M., and his relatives, H.M. and G.M.

(b) Witness D.S.

16. D.S. was questioned several times as a witness by the investigating authorities and stated that during the night of 10 to 11 August 2005, as she was selling fruit in the street, she heard the noise of a scuffle and swearing in the street and went towards the disturbance. She then heard someone call M.H. by name and ordered her not to interfere and to leave. Shortly thereafter the noise had stopped and she had seen a thinly-built young man come out from alongside the building onto the street holding his chest, and fall to the ground. Then she noticed several men and a woman coming onto the street and running in different directions. Among those persons she recognised the applicants, whom she knew as they lived in the same block as she did. D.S. reinstated her statements during the confrontation with V.M.

17. D.S. also claimed before the investigating authorities that after she had testified about the murder, when she met the first applicant's sister by chance in the street, the latter started to verbally abuse her and called her an informer. A similar incident took place in the presence of M.H.

(c) Witness M.V.

18. M.V. was questioned for the first time on 3 November 2005, after M.H. had mentioned him in one of her later witness statements. It appears that during questioning M.V. stated that he had witnessed the murder of M.M., and gave an account of the events similar to that given by M.H. It appears that M.V. reinstated his statements during the confrontation with the applicants.

19. In April 2006, during the trial before Shengavit District Court, M.V. lodged complaints with various public bodies, including the GPO and the mass media, in which he sought protection from the illegal acts of the police and declared that he had made false witness statements against the applicants as a result of ill-treatment and intimidation by the police and the investigators, who had also threatened to change his status from witness to accomplice if he refused to make the witness statements they wanted.

20. It appears from the case file that on the day following the murder M.V. left for several days to his aunt's house, outside Yerevan. Later his cousin, Ar.M., testified that M.V. had told him that the first, second and third applicants had beaten up a young man. G.V., M.V.'s brother, gave similar testimony.

(d) Witness A.M.

21. A.M., to whose telephone calls were made by the first applicant from M.M.'s cell-phone not long before the murder, was questioned as a witness by the investigating authorities at the very outset of the investigation and gave incriminating statements against the applicants.

22. In September 2005 A.M. lodged complaints with the President, the GPO and the Chief of Police of Armenia, and also sent written statements to several newspapers in which she stated that on 11 August 2005, together with her mother and sister, she had been taken to the police station and then to the Shengavit District Prosecutor's Office where she had been kept unlawfully for several days. During the whole period the police officers and investigators forced her, under threats of prosecution for false testimony, intimidation and ill-treatment, to make incriminatory statements against the applicants stating that she had witnessed the murder of M.M., whom she had actually never met. In order to stop the police harassment, she had made the witness statements against the applicants, guided by the investigator.

23. In October 2005 A.M. was questioned several times at the GPO in relation to her complaints. Although she maintained her complaints of intimidation and ill-treatment, she never sought to have a criminal investigation instituted in this respect. At the same time, she talked about her former relationship with the first applicant and, in particular, about the first applicant forcing her to have sexual intercourse.

3. The applicants' alleged ill-treatment

24. According to the first and second applicants, they were subjected to ill-treatment by police officers during their detention at the police station from 11 until 18 August 2005. In turn, the third applicant claims that he was subjected to psychological pressure during the investigation and that he was beaten by prison officers during his detention at Kentron pre-trial detention facility.

(a) The first applicant

25. It appears from a letter from the Facility for Detention of Arrestees under the Yerevan Police Department (hereafter the Arrestees Detention Facility), sent on 27 September 2005 to the first applicant's defence lawyer, that bruises in the area of the right eye, nose and the back were discovered on the first applicant during his admission to the Facility for Detention of Arrestees under the Yerevan Police Department (hereafter the Arrestees Detention Facility) on 18 August 2005. It was also mentioned that, according to statements by the first applicant, he had sustained these bruises before being taken to the police station.

26. During the investigation, the first applicant lodged several complaints with the GPO claiming that he was innocent and seeking protection against his allegedly unlawful prosecution and detention. In addition the first applicant also alleged, without giving any details, that he had been subjected to beatings by police officers during the initial period of his arrest.

27. On 3 October 2005 the GPO informed the first applicant, in reply to his above complaints, that the veracity of his claims would be examined

during the investigation of the case and that the first applicant would subsequently be informed of its results.

28. On 7 November 2005 the first applicant lodged a written note with the GPO in which he stated that, in protest against his unlawful prosecution, he was declaring a hunger strike.

29. In the meantime, on 6 September 2005 the first applicant's defence lawyer lodged a request with investigator R.K. seeking a forensic medical examination in order to establish the origin of the first applicant's injuries. In this respect, the defence lawyer stated that when they had both visited the first applicant at the pre-trial detention centre the day before, the first applicant had shown them bruises on his back and claimed that he had been beaten by police officers.

30. On 9 September 2005 investigator R.K. decided to reject the defence lawyer's request, stating that no bodily injuries had been shown by the first applicant in his presence. Nor had the first applicant alleged ill-treatment during the conduct of the investigative measure in which he had been involved. Moreover, according to a letter received on the same day from the Nubarashen pre-trial detention facility, to which the applicant had been transferred on 23 August 2005 and where he was being detained, a medical check-up had been performed at the time of his admission, but no bodily injuries had been discovered.

31. The applicant alleges that he referred to his ill-treatment by the police officers many times during his trial. According to the only information available in the file, the Shengavit District Court, in its decision of 12 March 2007 to remit the case for additional investigation, noted that the first applicant had injuries on his admission to the Arrestees Detention Facility and that the investigating authority had rejected the defence lawyer's motion for a forensic medical examination of the first applicant in that respect. No further information was provided by the first applicant on the trial court's reaction to his allegations of ill-treatment.

(b) The second applicant

32. According to the second applicant, during his detention at the police station from 11 to 18 August 2005 he was subjected to beatings and intimidation by the police officers to force him to confess to the crime.

33. The second applicant, who was represented by a defence lawyer, lodged complaints with the GPO twice, claiming that he had been unlawfully prosecuted, since he was innocent, and that the witness statements had been obtained under duress and intimidation.

34. It appears that on an unspecified date during the investigation the second applicant declared a hunger strike in protest against his unlawful prosecution.

35. During the trial, on 24 November 2006 the second applicant lodged a written complaint with the trial court in which he stated, *inter alia*, that he

had been beaten on arrival at the police station. The second applicant claimed to have made similar statements throughout the trial. He did not specify, however, whether there was any reaction to those statements by the trial court.

(c) The third applicant

36. On 8 November 2005 the third applicant, who had a defence lawyer, lodged a request with the General Prosecutor's Office seeking to be released and to have his prosecution stopped. In the request he also stated that he had been subjected to different types of pressure during questioning.

37. On 10 November 2005 the General Prosecutor's Office dismissed the request, finding that there were no grounds to discontinue the third applicant's prosecution and release him from detention.

38. The third applicant claims that during the trial before the Shengavit District Court he had made many oral statements protesting against his ill-treatment and poor conditions of detention at the Kentron pre-trial detention facility. He did not specify, however, whether there was any reaction to those statements by the trial court.

(d) Complaints lodged by the applicants' mothers

39. It appears that during the investigation R.S., the first applicant's mother, and A.H., the mother of the second and third applicants, lodged multiple complaints with different public authorities, including the GPO, alleging that during the investigation the applicants had been subjected to ill-treatment by police officers and the investigators, and seeking appropriate measures against the police.

40. On 13 January 2006 the General Prosecutor's Office informed A.H. and R.S. by letter that their complaints had been examined and that the allegations made in those requests were fabricated and untrue and that the investigation into the criminal case was being conducted in the prescribed manner. The letter also indicated that, in order to check the veracity of the allegations, A.H. and R.S. had been invited to the General Prosecutor's Office on many occasions, but had intentionally avoided visiting. The GPO again invited the mothers to visit the investigation authority in order to present concrete facts underlying the allegation of unlawfulness during the investigations.

41. In April 2006 A.H. lodged requests with the chief of the penal institutions under the Ministry of Justice, with copies addressed to the Minister of Justice and the General Prosecutor of Armenia, seeking to transfer the second and third applicants from Kentron pre-trial detention centre to another detention facility and to safeguard their security. In this respect, she claimed that the third applicant had been subjected to beatings and other forms of ill-treatment by prison officers in the pre-trial detention facility.

42. On 18 April 2006 the Head of Penal Institutions informed A.H. in a letter that her allegations were unfounded and there was no need to transfer her two sons to another pre-trial detention facility.

43. It appears that later in the same year the second and third applicants were transferred from Yerevan to Nubarashen pre-trial detention facility.

4. The applicants' trial

44. On an unspecified date after 24 February 2006, Shengavit District Court of Yerevan started the examination of the criminal case.

45. It appears that witnesses M.H., M.V. and D.S. retracted their pre-trial witness statements during their questioning before the trial court as being false and obtained by trickery, intimidation or ill-treatment. Witness A.M. also retracted her pre-trial statements concerning M.M's murder, but maintained her incriminating statements against the first applicant for the part of rape and sexual intercourse.

46. On 12 March 2007 the Shengavit District Court decided to remit the case for additional investigation. The decision, *inter alia*, stated that no confrontation had been held during the investigation between the first applicant and witnesses G.A., V.V., V.Gh. and G.S. who had testified against him on the charge of A.M.'s rape. In addition, witnesses M.H. and M.V., when questioned before the trial court, had retracted their pre-trial statements as being made under intimidation and ill-treatment by police officers during their illegal detention at the police station. Moreover, according to the wiretapped conversation between witnesses A.M. and M.H., on 14 August 2005 an oral confrontation had been held between witness A.M. and the second applicant at the police station, during which the second applicant had been beaten in A.M.'s presence.

47. It appears that both the applicants, who sought to be acquitted, and the trial prosecutors, who sought the remittal of the case for a fresh court examination, lodged appeals against that decision.

48. On 8 May 2007 the Criminal Court of Appeal granted both appeals, quashed the decision of the Shengavit District Court and remitted the case for a fresh examination to the same District Court.

49. On 16 January 2008 the criminal case, in accordance with the new rules of jurisdiction, was transferred to the Yerevan Criminal Court.

50. It appears that neither witness M.H. nor witness M.V. appeared before the Yerevan Criminal Court during the trial as they had changed their residence and had not notified the trial court of their whereabouts. However, M.H.'s mother provided the trial court with video footage addressed to the Yerevan Criminal Court in which M.H. once again retracted her pre-trial statements as having been made under threats and intimidation.

51. On 4 February 2009 the Yerevan Criminal Court delivered its judgment, finding the applicants guilty as charged and sentencing the first and the second applicants to 15 years' imprisonment in total, and the third

applicant to 11 years' imprisonment in total. The trial court based its findings on multiple witness testimony including that given at the pre-trial stage by M.H., M.V. and D.S., as well as a number of forensic examinations, including a tissue examination of the victim and the offender's clothing. It appears that none of the applicants pleaded guilty.

52. At the same time as delivering the judgment, the Yerevan Criminal Court also adopted a supplementary decision drawing the attention of the investigating authorities to substantial violations of the law during the investigation of the criminal case.

53. On different dates the applicants lodged appeals against the judgment of the Yerevan Criminal Court claiming, *inter alia*, that during the investigation of the criminal case both they and the witnesses had been illegally deprived of their liberty and subjected to intimidation, trickery and ill-treatment. In this respect, the applicants indicated that the Yerevan Criminal Court, when finding them guilty, had not taken into account the witness statements given at the trial, but relied as evidence on their retracted pre-trial statements, which had been obtained under duress.

54. On 11 May 2009 the Criminal Court of Appeal dismissed the appeals. As to the issue of the witnesses retracting their pre-trial witness statements during the trial, the Court of Appeal found that this was the result of pressure exerted on the witnesses by relatives of the accused. In this respect, the Court of Appeal referred to the statements made by witness M.H. claiming that during the investigation the first applicant's sister and mother had regularly abused and threatened to harm her and her family. The Court of Appeal also indicated that similar statements concerning harassment by close friends and relatives of the accused had been made by both D.S. and M.V. In this respect, the Court of Appeal held that as a result of harassment by the relatives of the accused witnesses, M.H. and M.V. had had to leave their place of residence and settle elsewhere. The criminal Court of Appeal also mentioned in its decision that confrontations had been held by the investigating authorities between M.H. and the applicants and M.V. and the applicants, during which the witnesses had maintained their witness statements. Moreover, it assessed the reliability of the pre-trial statements of M.H. and M.V. relying on a vast body of evidence including the testimony of witnesses T.M., Ar.M., and G.V.

55. On different dates the applicants lodged appeals on points of law against the decision of the Criminal Court of Appeal of 11 May 2009, raising the same issues as those indicated in their appeals against the judgment of 4 February 2009.

56. On 16 July 2009 the Court of Cassation declared those appeals inadmissible for lack of merit.

B. Relevant domestic law

1. The Criminal Code (in force from 1 August 2003)

57. Article 38 envisages "organiser", "abettor" and "aider" as types of accomplice.

58. Article 104 § 1 describes murder as an unlawful, intentional deprivation of one's life by another person and prescribes punishment in the form of deprivation of liberty for a term of 8 to 10 years.

59. According to Article 104 § 2 (5, 7 and 10) murder, if committed with particular cruelty, by a group of persons or an organised group and prompted by hooliganism shall be punishable by deprivation of liberty for a term from 12 years to life.

60. According to Article 138 § 2 (3), rape of a juvenile female is punishable by deprivation of liberty for a term of 4 to 10 years.

61. Article 140 stipulates that coercion to perform acts of a sexual nature is punishable by a fine or deprivation of liberty for a term from 1 to 3 years.

62. Article 141 provides that coercion to perform acts of a sexual nature committed by a person aged over 18 in respect of a person under the age of 16 is punishable by a fine or deprivation of liberty for a term not exceeding 2 years.

63. According to Article 142 § 1, commission of indecent acts in respect of a person under the age of 16 is punishable by a fine or deprivation of liberty for a term not exceeding 2 years.

64. Article 258 § 3 (1) stipulates that hooliganism, if committed by a group of persons or an organised group, is punishable by a fine or deprivation of liberty for a term not exceeding 5 years.

2. The Code of Criminal Procedure (in force from 12 January 1999)

65. According to Article 11 § 7, in the course of criminal proceedings no one shall be subjected to torture and to unlawful physical or mental violence, including such treatment inflicted through the administration of medication, hunger, exhaustion, hypnosis, denial of medical assistance and other cruel treatment. It is prohibited to coerce testimony from a suspect, accused, defendant, victim, witness and other parties to the proceedings by means of violence, threat, trickery, violation of their rights, and through other unlawful actions.

66. According to Article 17 § 4, complaints alleging a violation of lawfulness in the course of criminal proceedings must be thoroughly examined by the authority dealing with the case.

67. According to Article 27, the body of inquiry, the investigator and the prosecutor are obliged, within the scope of their jurisdiction, to institute criminal proceedings in each case when elements of a crime are disclosed,

and to undertake all the measures prescribed by law in order to disclose the crimes and to identify the perpetrators.

68. According to Article 41 § 2(4), the court is entitled to request the prosecutor to institute criminal proceedings in cases prescribed by this Code.

69. Article 175 obliges the prosecutor, the investigator or the body of inquiry, within the scope of their jurisdiction, to institute criminal proceedings if there are grounds envisaged by this Code.

70. According to Article 176, the grounds for instituting criminal proceedings include, inter alia, information about crimes received from individuals and discovery of information about a crime or traces and consequences of a crime by the body of inquiry, the investigator, the prosecutor, the court or the judge while performing their functions.

71. According to Article 177, information about crimes received from individuals can be provided orally or in writing. An oral statement about a crime made during an investigative measure or court proceedings shall be entered respectively into the record of the investigative measure or of the court hearing.

72. According to Article 180, information about crimes must be examined and decided upon immediately, or in cases where it is necessary to check whether there are lawful and sufficient grounds to institute proceedings, within ten days following the receipt of such information. Within this period, additional documents, explanations or other materials may be requested, the scene of the incident inspected and examinations ordered.

73. According to Article 181, one of the following decisions must be taken in each case when information about a crime is received: (1) to institute criminal proceedings, (2) to reject the institution of criminal proceedings, or (3) to hand over the information to the authority competent to deal with it.

74. According to Article 182, if there are reasons and grounds to institute criminal proceedings, the prosecutor, the investigator or the body of inquiry shall adopt a decision to institute criminal proceedings.

75. According to Article 184 § 1, the body of inquiry, the investigator or the prosecutor, based on the materials of a criminal case dealt by them, shall adopt a decision to institute a new and separate set of criminal proceedings, while the court shall request the prosecutor to adopt such a decision, if a crime unrelated to the crimes imputed to the accused is disclosed, which has been committed by a third person without the involvement of the accused.

76. According to Article 185 §§ 1, 2, 3 and 5, in the absence of lawful grounds for institution of criminal proceedings, the prosecutor, the investigator or the body of inquiry shall adopt a decision to reject the institution of criminal proceedings. A copy of the decision shall be served

on the individual who has reported the crime. This decision may be contested before a higher prosecutor or the court of appeal. The court of appeal shall either quash the decision or uphold it. If the decision is quashed, the prosecutor shall be obliged to institute criminal proceedings.

77. Article 278, entitled "scope of judicial control", provides that a court, in cases and procedure prescribed by this Code, shall examine complaints about the lawfulness of decisions and actions of the body of inquiry, the investigator, the prosecutor and the bodies carrying out operative and reconnaissance measures.

78. According to Article 290, the suspect and the accused are entitled to lodge complaints with a court against the decisions and actions of the body of inquiry, the investigator, the prosecutor or the bodies carrying out operative and reconnaissance measures, including the refusals of such authorities to receive information about crimes or to institute criminal proceedings and their decisions to suspend or terminate criminal proceedings or to end criminal prosecution, in cases prescribed by this Code. If the complaint is found to be substantiated, the court shall adopt a decision ordering the authority dealing with the case to stop the violation of a person's rights and freedoms.

COMPLAINTS

79. The first and the second applicants complain under Article 3 and Article 5 of the Convention that on 11 August 2005 they were taken to the Shengavit District Police Station where they were kept without legal basis until 18 August 2005 and subjected to ill-treatment by police officers who sought to obtain self-incriminating or incriminating statements from them.

80. The third applicant complains under Article 3 and Article 5 of the Convention that he was arrested on 27 October 2005 at the GPO despite the fact that he had been called by telephone to appear there as a witness and, from that day onwards, had been subjected to threats and intimidation by law enforcement officials. While detained at the Kentron pre-trial detention centre he had also been subjected to beatings by prison officers.

81. The first applicant complains under Article 6 of the Convention that he was not confronted with witnesses G.A., V.V., G.S. and V.Gh. who testified against him in relation to the charge of rape.

82. The second and third applicants complain under Article 6 that the criminal proceedings against them were lengthy.

83. All the applicants complain under Article 6 of the Convention, in conjunction with Article 3, that during the investigation the law enforcement officials obtained incriminatory evidence against them by exerting pressure on the witnesses, namely by means of threats, intimidation

and beatings; the domestic courts did not evaluate the evidence properly, failed to give reasons for their conclusions, and used the pre-trial witness statements of witnesses M.H., M.V. and D.S. as evidence against them despite the fact that those witnesses retracted their pre-trial witness statements during the trial as being obtained by trickery, intimidation and ill-treatment.

84. The applicants also complain under Article 13 of the Convention that no proper investigation was carried out by the Armenian authorities despite multiple complaints of intimidation and beatings submitted to different public authorities by them, the witnesses and their close relatives.

THE LAW

A. Joinder of the applications

85. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

B. Complaint under Article 3 of the Convention

86. The first and the second applicants complained that they had been subjected to ill-treatment by police officers at the police station from 11 August to 18 August 2005 and the third applicant complained about psychological pressure during arrest and ill-treatment at the Kentron pre-trial detention facility. They referred to Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

87. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Kudła*

v. Poland [GC], no. 30210/09, § 152, ECHR 2000-XI, and *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24).

88. The Court reiterates that where the applicant's complaint stems not from a known structural problem, such as general conditions of detention, but from an alleged specific act or omission by the authorities, the applicant must be required, as a rule, to exhaust domestic remedies in respect of it (see *Vladimir Sokolov v. Russia*, no. 31242/05, § 70, 29 March 2011). The domestic remedies must be "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see *Kudła v. Poland* [GC], no. 30210/09, § 158, ECHR-XI).

89. In the present case, the Court observes that as far as the second and the third applicants are concerned, there is no evidence in the case files, which would indicate the presence of bodily injuries. The only indication in the case files about any physical injuries caused to the applicants is the report of the first applicant's medical examination upon his admission to the detention facility. The Court, however, notes that, according to the first applicant's statements, he had sustained these bruises before being taken to the police station (see paragraph 22). It is therefore doubtful whether the existence of bruises on the first applicant could objectively be considered as having been the result of ill-treatment or torture. Furthermore, the Court notes that at some point during the investigation, the first applicant's defence lawyer requested the investigating authority to assign a forensic medical examination seeking to establish the origin of his client's bruises, which was refused by an investigator on the ground that no bodily injuries had been shown by the first applicant in his presence. The first applicant's defence lawyer did not lodge a complaint against this refusal to the superior bodies, such as the Prosecutor's Office or the domestic courts.

90. Moreover, the Court notes that none of the applicants, all of whom had defence lawyers during the investigation, lodged a complaint with the senior law enforcement authorities raising in a proper and timely manner the issue of their alleged ill-treatment and seeking a corresponding investigation to be concluded. In this respect the Court points out that in their several complaints lodged with the General Prosecutor's office during the investigation, the applicants essentially claimed that they were innocent and sought to have their prosecution discontinued.

91. It is true that the first and the second applicants, in their claims, although in a vague manner, but raised the allegation of their ill-treatment. All their claims were dismissed by the GPO and none of the applicants took any action against it. In this respect the Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. Article 35 § 1 also requires that

complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance, and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey,* 18 December 1996, §§ 51-52, Reports of Judgments and Decisions 1996-VI, and *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, Reports 1996-IV).

92. The Court notes that Armenian law provides a remedy to the victims of alleged ill-treatment. In the Armenian legal system the power of a court to reverse a decision not to institute criminal proceedings, as well as its power to quash the decision or the action of the prosecutor, is a substantial safeguard against the arbitrary exercise of powers by the investigating authorities. An appeal under Articles 185 and 290 of the CCP to a court of general jurisdiction against a prosecutor's decision not to investigate complaints of ill-treatment constitutes therefore an effective domestic remedy which must be exhausted.

93. The applicants' allegations of ill-treatment were considered by the prosecutor, who did not find a prima-facie case of ill-treatment. The applicants did not, however, challenge those decisions in separate judicial proceedings under Articles 185 and 290 of the CCP.

94. Hence, it appears that, as far as the alleged ill-treatment is concerned, the applicants failed to exhaust the effective domestic remedy existing under Armenian law.

95. On the other hand it is true that they raised that issue many times during their trial. However, firstly it is doubtful whether raising that issue during the trial could be considered as effective as such, given their failure to complain properly to the prosecuting authorities about their alleged ill-treatment at the investigation stage. Secondly, there is no indication that the applicants raised a complaint in their appeals as to the Criminal Court's inaction in respect of their allegations of ill-treatment.

96. It is true that during the criminal proceedings the applicants' mothers lodged multiple complaints about their sons' alleged ill-treatment to different public authorities, including the General Prosecutor's Office. However, given the applicants' failure to complain to the law enforcement authorities about their alleged ill-treatment, the Court is of the opinion that the mere fact that the applicants' mothers did so is not sufficient to conclude that the applicants exhausted properly the available domestic remedies as far as their complaint of ill-treatment is concerned.

97. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Complaint under Article 6 of the Convention

98. The applicants complained that they had not had a fair hearing in that their conviction had been based mainly on the records of witness statements made during the pre-trial proceedings, the lawfulness of which they had rebutted at the trial. They relied on Article 6 § 1 of the Convention, which, in so far as relevant, provides as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

99. The applicants alleged, in particular, that during the investigation the law enforcement officials had obtained incriminatory evidence against them by exerting pressure on the witnesses, by means of threats, intimidation and beatings; the domestic courts did not evaluate the evidence properly, failed to give reasons for their conclusions, and used the pre-trial statements of witnesses M.H., M.V., A.M. and D.S., which were unreliable and contained many inconsistencies.

100. The Court reiterates that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140; *Teixeria de Castro v. Portugal*, 9 June 1998, § 34, Reports 1998-IV; and *Jalloh v. Germany* [GC], no 54810/00, §§ 94-96, ECHR 2006- IX).

101. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see, among other authorities, *Khan*, cited above, § 34; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Heglas v. the Czech Republic*, no. 5935/02, §§ 89-92, 1 March 2007; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

102. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, the Court must examine whether the applicants

were given an opportunity to challenge the authenticity of the evidence and to oppose its use (see, *Gäfgen v. Germany* [GC], no. 22978/05, § 164, ECHR 2010).

103. In the present case the Court has to examine whether the requirements of a fair trial have been satisfied as regards the admission as evidence of the incriminating statements made by the witnesses M.H., M.V., A.M. and D.S. during the investigation and then retracted before the trial court upon a serious allegation that these statements had been obtained against their will and under pressure from the police.

104. The Court has already held that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's statement in court than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pre-trial questioning is primarily a process by which the prosecution gathers information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a defendant's guilt following a fair assessment of all the evidence actually produced at the trial, based on the direct examination of evidence in the court. Although it is not the Court's task to verify whether the domestic courts made any substantive errors in that assessment, it is nevertheless required to review whether the courts gave reasons for their decisions in respect of any objections concerning the evidence produced (see *Huseyn and others v. Azerbaijan*, nos 35485/05, 45553/05, 35680/05 and 36085/05, § 211, 26 July 2011).

105. The Court reiterates that the use in evidence of statements obtained at the stage of the police enquiry and the judicial investigation is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 of the Convention. Under certain circumstances it may be necessary for the courts to have recourse to statements made during the criminal investigation stage. If the accused had sufficient and adequate opportunity to challenge such statements, at the time they were taken or at a later stage of the proceedings, their use does not run counter to the guarantees of Article 6 §§ 1 and 3 (d). The rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *Caka v. Albania*, no. 44023/02, § 102, 8 December 2009; *Vozhigov v. Russia*, no.5953/02, § 51, 26 April 2007; *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II; and *Solakov v. "the former Yugoslav Republic of Macedonia*", no. 47023/99, § 57, ECHR 2001-X)."

106. The Court notes that at the pre-trial stage of the proceedings witnesses witnesses M.H., M.V., D.S. and A.M. made statements to the police which incriminated the applicants in murdering M.M. However, the

applicants were confronted with these witnesses during the investigation and later examined them at the trial.

107. The Court notes that the applicants' counsels challenged the admissibility of the recordings and were able to put forward arguments to exclude the evidence as unreliable, unfair and obtained in an oppressive manner. The Criminal Court in a careful ruling, however, admitted the pre-trial statements, finding that these were of probative value and had not been shown to be so unreliable as to be excluded from the body of evidence. As to the pre-trial statements of the witness A.M., the Criminal Court did not rely on them in its judgment to substantiate the applicants' guilt. The judgment of the Criminal Court was reviewed on appeal by the Criminal Court of Appeal. Turning to the issue of the witnesses retracting their pre-trial statements during the trial, the Court of Appeal found that it was the result of pressure exerted on the witnesses by the family members, relatives and close friends of the applicants. The Criminal Court of Appeal also mentioned in its decision that confrontations had been held by the investigating authorities between M.H. and the applicants and M.V. and the applicants, during which the witnesses had reinstated their witness statements. Moreover, it assessed the reliability of the pre-trial statements of M.H. and M.V. relying on a vast body of evidence including the testimony of witnesses T.M., Ar.M., G.V., K.M., H.M. and G.M.

108. The Court for its part notes that M.H. had made multiple statements to the investigating authorities, during which she often changed her testimony, maintaining however that she had witnessed the murder. It is true that starting from April 2005 M.H. lodged several complaints claiming that her accusatory statements against the applicant had been extracted by means of ill-treatment and intimidation. However, in October and November 2005 she repeated her accusatory statements against the applicants.

109. As to the statements of witness D.S., the Court notes that there is nothing in the case file to suggest that she has ever complained that her pre-trial statements had been obtained unlawfully. On the contrary, during the investigation she claimed before the investigating authorities that she had been subjected to pressure by the relatives of the first applicant.

110. Regard being had to all the above, the Court finds that at each step of the procedure the applicants had an opportunity to challenge the reliability of the witness statements and that the domestic courts' conclusions that the applicants were guilty of the crimes imputed to them, based on their own assessment of the evidence before them, was not arbitrary. It cannot, therefore, find that the applicants' trial as a whole was unfair. Furthermore, the Court finds that the domestic courts gave reasons for their decisions in respect of any objections concerning the evidence produced.

111. It follows that this part of the applications must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

C. The remainder of the applications

112. The applicants also alleged violations of their rights under Articles 5, 6 and 13 of the Convention. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the applications is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President