



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

FIRST SECTION

Application no. 12913/07
Ayrat Pikovich CHEMOLTYNOV against Russia
lodged on 13 February 2007

STATEMENT OF FACTS

The applicant, Mr Ayrat Pikovich Chemoltynov, is a Russian national, who was born in 1971 and lives in Omsk. He is currently serving his sentence in prison hospital LPU OB-11 in Omsk.

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

A. Criminal proceedings concerning the drug-related crimes

On 4 February 2006 the applicant was arrested on charges of three episodes of drug selling and two episodes of attempted drug selling. His pre-trial detention was subsequently extended.

On 31 May 2006 the Oktyabrskiy District Court of Omsk found the applicant guilty as charged and sentenced him to nine years' imprisonment.

On 13 July 2006 the Omsk Regional Court partly modified the conviction of 31 May 2006 but left the sentence unaltered.

The applicant's subsequent requests for supervisory review were unsuccessful.

B. Criminal proceedings concerning the infliction of bodily injuries

1. Background events and the investigation against the applicant

Between 12 midnight and 4 a.m. on 24 June 2005 a group of men was involved in a fight with Mr S., E. and L. in a bar located near a boat station. As a result, Mr S. sustained numerous grave injuries and later died in the hospital. Mr L. sustained minor bodily injuries, while Mr E. received a few blows which were later qualified as an act of battery.

On 25 June 2005 a criminal case under Article 111 § 4 of the Russian Criminal Code (infliction of grave bodily injuries causing death by

negligence) was instituted. The applicant was one of the suspects, among Mr K. and P.

On 29 June 2005 a measure of restraint in the form of an obligation not to leave a place of residence was chosen in respect of the applicant.

On 24 October 2005 a criminal case against the applicant was severed from the case against the other suspects.

On 15 March 2006 the applicant was charged with infliction of grave bodily injuries causing death by negligence on Mr S., battery of Mr E. and infliction of minor bodily injuries on Mr L.

It appears that the applicant did not participate in pre-trial confrontations with Mr E. and L.

In the course of the investigation Mr L. was presented with the applicant's photo and identified him as one of the persons who had beaten him, as well as Mr S. and E., together with Mr P., K. and other unidentified men. Mr L. also submitted that the man on the photo was the one who had shouted that he had broken a rifle butt during the fight. Mr L. further stated that he had seen in the hands of the same person either a stick or a rifle.

On 28 March 2006 the applicant studied the bill of indictment against him on charges of inflicting grave bodily injuries on Mr S. (Article 111 § 4), battery of Mr E. (Article 116 § 1) and inflicting minor bodily injuries on Mr L. (Article 115 § 1 of the Russian Criminal Code).

On 14 April 2006 the Kirovskiy District Court of Omsk ("the district court") convicted Mr K. and P. of infliction of grave bodily injuries causing death by negligence on Mr S., battery of Mr E. and infliction of minor bodily injuries on Mr L.

On an unspecified date the criminal case against the applicant was transferred to the district court.

2. Evidence examined at the trial

(a) The applicant's statement

The applicant testified at the trial stating the following. On the night between 23 and 24 June 2005 he had been in the bar with Mr K. and P. Later he had gone to sleep but a boat station guard had awakened him and told him to take a rifle go to the bar where the fight had been taking place. On his way to the boat station the applicant had met Mr S., and from there they walked together. Then they had met Mr K. who claimed that Mr S. had participated in the fight along with another man who had run away. Mr K. had beaten Mr S. a few times. The applicant had gone searching for the other man who had participated in the fight with his friends. Then he had returned to the bar and seen Mr S. sitting at a table. At some point Mr L. had rushed inside the bar armed with a knife. The applicant had hit him with the rifle butt and broken it as a result of the impact at Mr L.'s body. Mr S. had offered him his own rifle. The applicant had not hit anyone else than Mr L. and left to get some sleep at the boat station. The following morning Mr K. had told him that he had put "the thieves"¹, who had been trying to steal a boat, in a cellar.

¹ Hereinafter the words and expressions presented with quotation marks represent a verbatim translation of the Russian text used in the domestic courts' judgments

(b) Mr E. and L.'s pre-trial statements

During the trial against the applicant the surviving victims, Mr E. and L., were absent from the hearings.

Mr E.'s pre-trial statement was read out, according to the text of the district court's judgment, "upon a motion of the prosecutor, taking into account the reason for the victim's failure to appear in the court room". No further reasons for Mr E.'s absence were given. According to the statement, Mr K. and P. and other unidentified persons had beaten him up and locked him in a basement. The applicant's name was not mentioned.

Mr L.'s pre-trial statement was read out, according to the text of the district court's judgment, "upon a motion of the prosecutor, taking into account the reason for the victim's failure to appear in the court room". No further reasons for Mr L.'s absence were given. According to the statement, Mr K., P. and the applicant had been in the bar before the conflict between Mr E. and K., who had been both in the state of alcoholic inebriation, had erupted. The fight had commenced, and Mr K., P. and the applicant had beaten Mr L. The applicant had a metal stick of about one metre in length. No further details concerning the applicant's actual involvement in the beatings were given. At some point Mr L. had lost consciousness, he had come back to his senses handcuffed to a tree. Mr K. and P. had occasionally delivered more blows on Mr S. and E. who had been lying on the ground.

(c) Statements by witnesses present at the trial

Mr M.S., Mr S.'s brother, was granted victim status as a surviving relative of a late person. He stated during the trial hearing that he had found out about the fight the following morning and later learned from Mr E. that his brother and his friends had had a quarrel with some men including Mr K. and P. sitting at a next table in the bar. Later more men had arrived, "some of them with a stick, some with a gun" and the beatings had ensued. Mr S., E. and L. had been beaten by Mr K. and P. together with a "non-Russian man with either a stick or a gun".

During the trial Mr K. stated in court that he had not seen in what way the applicant had been involved in the fight.

Mr P. stated in court that in the course of the fight the applicant and Mr K. had managed to "beat out" a knife of Mr L.'s hands. The applicant then had left the bar and returned with Mr P.'s broken rifle. Mr P. did not know who the applicant had hit with the rifle butt. Mr P. claimed that the applicant had participated in the fight among everyone else involved. Mr P. had seen the applicant hitting Mr L. but he had not seen him hitting Mr E. and S.

Mr B. was questioned as a witness. He had not seen the fight and only heard reports of it from Mr E. and L. after the incident. In Mr B.'s submission, Mr E. and L. had told him that Mr K., P. and the applicant had beaten them up, that the applicant had had either a stick or a rifle, and that he had broken the rifle butt.

Ms Z., a waitress at the bar, stated in court that she had witnessed the conflict between two groups of men and the ensuing fight. She submitted that the applicant "had not participated in the fight, asked her to make him some tea and left". She had no information about any rifle.

Mr M., a person present in the bar during the fight, was questioned as a witness. He stated during the hearing that in the evening of 23 June 2005 he had come to the bar and taken a seat at Mr K. and P.'s table. At the next table there had been four unknown men. The fight had started. The four men had run away but then Mr K. had brought two of them back to the bar. Mr K. had hit the two men three to four times while Mr P. had hit them once or twice. More men had got involved in the fight. The third unknown man had come back with a knife. At the same time the applicant had entered the bar with Mr P.'s disassembled rifle and hit "the guy" in the arm area with the rifle butt. Mr M. had not seen the applicant beating anyone else. Mr K. and P. had hit "the guy" a few more times and handcuffed him to a tree.

The prosecutor asked the district court to read out Mr M.'s pre-trial statement, which stated that Mr K. had come to the bar with "a fat guy" and two other men had brought in "a short guy". At that point in time the applicant had arrived with a disassembled rifle, left the rifle somewhere, hit "the fat guy" once or twice in the body with his hand and hit "the short guy" once or twice in the body with the fist. Mr M. did not contest his pre-trial statement before the district court.

(d) Other evidence considered by the district court

The district court examined the reports from confrontations between Mr E. and P., Mr L. and P., and Mr L. and K., respectively. None of the reports in question contained any mention of the applicant's name, however, in some of them "a person of a Tatar origin" and "a person of a Kazakh origin" were vaguely mentioned. It appears that the applicant has non-Slavic features.

The district court also examined the report of a confrontation between Mr M. and K. according to which Mr M. had seen the applicant beating "the fat and the dark-skinned guys". He had also claimed to have seen the applicant "hitting the third guy with a rifle butt". Mr M. had further stated that the rifle had been broken after the impact on the unnamed "third guy's" shoulder and that the applicant had inflicted a several blows with his hands on that person's face and body.

The district court further examined the report of Mr L. identifying the applicant by photo.

The district court examined as evidence clothing items belonging to Mr S., P. and K. and a metal stick.

The forensic experts' reports on the post-mortem examination of Mr S.'s body and on examinations of Mr E. and L. had listed the injuries observed attributing them to numerous blows with hands, feet and unidentified items.

The district court also heard a few witnesses and allowed reading out a number of pre-trial statements by police officers, who had arrived at the scene of the incident after the fight, and hearsay witnesses. The defence consented to reading those statements out. None of those testimonies shed any further light on the applicant's involvement in the fight.

3. The applicant's conviction

According to the applicant, the prosecutor was absent from the last trial hearing during which the applicant delivered his final plea.

On 2 August 2006 the Kirovskiy District Court of Omsk (“the district court”) delivered a judgment in the applicant’s case.

The applicant had denied his guilt in infliction of grave bodily injuries causing death by negligence on Mr S. and battery of Mr E. He partly admitted guilt in infliction of minor bodily injuries on Mr L.

The district court established, “upon assessing collected and examined evidence as a whole”, that the applicant together with Mr E., K. and other unidentified persons had hit Mr S. at least eight times in the head and at least thirty-two times in the other parts of the body, while the applicant himself had hit Mr S. at least once in the head and at least five times in the other body parts causing numerous injuries. It further found that the applicant and other persons had hit Mr E. at least twenty-two times and Mr L. at least fifty-seven times. The district court considered that the applicant himself had hit Mr E. and Mr L. at least two and five times, respectively.

The district court explained its findings as to the applicant’s guilt as follows:

“Regardless of the fact that other persons were involved in the conflict and infliction of bodily injuries upon the victims, the court considers the evidence presented sufficient to conclude that Chemoltynov is guilty of the actions he is charged with. The read-out statements by the victims, as well as the depositions by the witnesses questioned at the hearing and the results of the confrontations have allowed establishing that Chemoltynov together with other persons inflicted numerous blows to various body parts and heads of all victims. It also follows from the experts’ conclusions that each victim sustained numerous blows and that the trauma that caused [S.’s] death was a result of at least eight blows to the head. The court’s conclusions as to the applicant’s guilt are based, first and foremost, on the read-out statements by victims [E.] and [L.], which they confirmed in the course of the confrontations with [K.] and [P.]. The victims’ statements are coherent in part with the deposition by [M.], who explained that Chemoldynov had hit [S.] and [E.]. The victims’ statements are also confirmed by the deposition, which is derivative from their statements, by [B.], who explained that [K.], [P.] and Chemoltynov had beaten up the victims, put [S. and K.] in the cellar and used special equipment [handcuffs] on [L.]”

The district court further found no reasons to question the veracity of the victims’ statements because the forensics experts examining, in particular, Mr S.’s body had established that the victims had been in a mild state of alcoholic inebriation and therefore had been capable of “perceiving the events”.

The district court dismissed the applicant’s allegations that he had not inflicted any blows to Mr S. and E. for the reason that “they have been refuted by the statements by victim Mr L., witness Mr M. and derivative depositions by M.S. and B., according to which Chemoltynov inflicted blows on all victims”.

The district court found the applicant guilty on three counts and sentenced him to seven years and six months’ imprisonment under Article 111 § 4 (infliction of grave bodily injuries causing death by negligence), and to eight and four months’ correctional works under Articles 115 § 1 and 116 § 1 of the Russian Criminal Code, respectively. Cumulatively with the previous sentence of 31 May 2006, the applicant was sentenced to fourteen years’ imprisonment in a strict-regime penitentiary

facility. The applicant was also ordered to pay 50,000 Russian roubles as non-pecuniary damages to Mr M.S.

4. Appeal proceedings

The applicant and his counsel both filed statements of appeal. They argued, *inter alia*, as follows: the witnesses' statements had been contradictory; it followed from Mr M.'s deposition that the applicant had not beaten Mr S. and E.; Ms Z. had not confirmed the applicant's involvement in the fight; the applicant had not had pre-trial confrontations with Mr E. and L. so he had not had an opportunity to clarify certain contradictions in their statements; Mr E. and L. had been absent from the hearing for no good reason and their pre-trial statements had been read out despite the applicant's objections so that the applicant had been deprived of the right to confront the witnesses against him. The applicant also argued that the prosecutor had been absent from the court room during the last hearing and as a result the applicant had been deprived of an opportunity to put forward a motion to exclude certain evidence as inadmissible.

In the applicant's submission he was not served with a copy of the district court's judgment when preparing his statement of appeal. The applicant requested that the appeal hearing be conducted in his absence.

On 28 September 2006 the Omsk Regional Court upheld the district court's judgment on appeal in full. It stated that the applicant's guilt had been proven by statements by Mr E., L. and M. The applicant had admitted his guilt in striking the knife out of Mr L.'s hand with the rifle butt. Mr E. and L.'s pre-trial statements had been read out for a well-motivated reason. The prosecutor's absence from the last hearing during which the applicant had delivered his final plea and the sentence had been read out had not affected the applicant's rights.

The applicant further attempted at instituting supervisory review proceedings but to no avail.

COMPLAINTS

The applicant complains under Article 6 of the Convention that the witnesses of prosecution were absent from the court hearings in the course of the proceedings that ended on 28 September 2006.

QUESTIONS TO THE PARTIES

1. Were the criminal proceedings against the applicant that ended on 28 September 2006, taken as a whole, compatible with the applicant's right to a fair trial under Article 6 § 1 of the Convention?

2. In particular, was there a violation of Article 6 §§ 1 and 3 (d) on account of the applicant's inability to question in open court the victims in his case as witnesses for prosecution (see *Polufakin and Chernyshev v. Russia*, no. 30997/02, § 194, 25 September 2008), namely Mr Evstafyev and Mr Letyaga? Was there a good reason for the failure to allow the applicant an opportunity to examine the witnesses in question (see *Mesesnel v. Slovenia*, no. 22163/08, § 40, 28 February 2013, and *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 120, ECHR 2011)? Was the applicant's conviction based solely or decisively on the evidence of the absent witnesses (see *Al-Khawaja and Tahery*, cited above, § 147)?