APPLICATION N° 22420/93

Massimo CARLOTTO v/ITALY

DECISION of 20 May 1997 on the admissibility of the application

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Article 6, paragraph 1 of the Convention

a) Provision not applicable to proceedings concerning an application for a retrial in a criminal matter, but applicable to the retrial proceedings themselves

b) The guarantees contained in paragraph 3 of Article 6 are specific aspects of the general right to a fair trial set out in paragraph 1 of the same Article

c) The question whether a trial is in conformity with the requirements of Article 6 must be considered on the basis of an examination of the proceedings as a whole and not one isolated aspect

In the present case, the fact that some evidence was lost by the authorities cannot, in itself, cast doubt on the fairness of the criminal proceedings

d) Article 6 para 1 does not lay down rules on admissibility of evidence, which is primarily a matter for regulation under national law, but requires the Convention organs to ascertain whether the trial as a whole was fair

e) The waiver of a right, whether before national authorities or the Convention organs, must be established in a non-equivocal manner (reference to the Pfeifer and Plankl judgment)

Change in composition of a court following the stay sine die *of a retrial National law provided a right to request that lay and expert witnesses be re examined but by agreeing that the oral and other evidence submitted before the stay could be used thereafter the applicant unequivocally waived his rights*

Article 19 of the Convention *The Commission is not competent to examine alleged errors of fact or law committed by national courts except where it considers that such errors might have involved a violation of the rights and freedoms set out in the Convention*

THE FACTS

The applicant is an Italian citizen He was born in 1956 and lives in Padua

The applicant was represented before the Commission by Mr Alborghetti, a lawyer practising in Padua

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

A *Particular circumstances of the case*

a) Original criminal proceedings

On 20 January 1976, the applicant went to a police station and stated that, while walking down a street in Padua he had heard screams coming from the block of flats where his sister lived As the door was open, he had gone into the flat and found a young woman, naked, with fresh stab wounds She was still alive and, on recognising the applicant, had called him by his name and said that her mother would be coming to see her that evening She had then lost consciousness He had gone up to her touched her and noticed six or seven stab wounds on her body He had panicked and fled A few hours later he had decided to make his statement

The same day, the police took the applicant into custody, having found traces of blood on his coat The next day, Padua public prosecutor's office issued an arrest warrant for murder

Following a forensic examination ordered as part of the investigation, according to which the applicant s version of events was not credible (see below), he altered his story, saying that he had heard screams but when he had arrived at the scene of the crime, the young woman was already dead

Subsequently, he returned to his original version of events, explaining that he had altered it because the forensic report appeared to incriminate him

On 19 October 1976, the applicant was committed for trial before Padua Assize Court

On 20 January 1977, the trial opened

On 24 February 1977, Padua Assize Court ordered further investigative measures, namely a forensic report on the victim and a psychiatric report on the applicant

In August 1977, the applicant was transferred to Cuneo special prison

When the further investigative measures had been completed, Padua Assize Court undertook a thorough examination of all the evidence obtained in the course of the investigation and the trial It compared the findings of the two expert reports, the first of which had been ordered at the investigative stage and the second during the trial The reports agreed in so far as that

- there were sixty one knife wounds to the victim's body (whereas the applicant had mentioned only six or seven),

- the traces of blood found on the applicant's coat came from the victim,

  the applicant s right glove was cut in several places and its lining stained (possibly with blood), and

  a packet of washing-powder which had been found in the laundry room, near the victim, was stained with blood which was neither that of the victim nor the applicant

According to the first report (by experts B and F), the victim had died after receiving a rapid and continuous series of sixty-one knife wounds, one of which had been fatal Therefore the victim could not possibly have spoken to the applicant As regards the glove, it was clear that the cuts in it had been caused by the use of a knife similar to the murder weapon An unknown substance had penetrated to the inside of the glove

According to the second report (by experts P, M and P), the victim had died of loss of blood rather than from a fatal knife wound They considered it possible that the series of stabs might have been interrupted and that the victim could have spoken to the applicant As regards the cuts in the glove, these had not been caused by a knife similar to the murder weapon, since the lining was not broken although the knife used in the attack had been very sharp

The Assize Court agreed with the findings in the second report, finding as a fact that the applicant had found the young woman alive, since he could not have known, except from the victim herself, that her mother would be coming that evening The court held that there was no proof that the applicant was guilty but merely circumstantial evidence of insufficient weight to be probative

There was also a number of factors in the applicant's favour, such as the fact that he had gone to the police of his own accord, without even changing his clothes, and the presence of traces of blood belonging neither to the victim nor the applicant on the packet of washing-powder The latter discovery opened up the possibility that a third party, the probable murderer, had heard the applicant coming up the stairs and hidden somewhere - in fact, in the laundry room near the victim where the bloodstained packet had been found and waited for the applicant to leave before completing the crime

In a judgment of 5 May 1978, Padua Assize Court acquitted the applicant for lack of evidence and ordered him to be released immediately

The public prosecutor appealed against this judgment The applicant cross-appealed in the hope of being acquitted on more favourable grounds

In a judgment of 19 December 1979, Venice Assize Court of Appeal convicted the applicant and sentenced him to eighteen years' imprisonment The court based its findings on the conclusions in the first medical report, the one ordered at the investigative stage The court held that the applicant's version of events was not credible It considered that he had indeed found the young woman alive, that she had told him that her mother was about to arrive, and that he had then attacked her The court found that there was strong circumstantial evidence against the applicant and no evidence in his favour As for the motive, the court found that it had been a sexual attack Lastly, regarding the hypothesis of an unknown murderer hiding in the laundry room near the bloodstained packet, the court held that, if the culprit had in fact hidden there, there would have been other traces of his presence apart from the ones found on the packet

The applicant appealed to the Court of Cassation on a point of law, submitting that the Assize Court of Appeal judgment was based on inadequate and illogical grounds, particularly in the following respects head and body-hairs found near the victim's nails had not been examined and the traces of blood belonging to a third party found on the packet had not been taken into account

On an unspecified date, the applicant fled abroad, where he remained, eluding attempts to find him, for many years

In a judgment of 19 November 1982, deposited with the court registry on 18 April 1983, the Court of Cassation dismissed the applicant's appeal, holding that the appellate court had correctly assessed all the evidence In particular, the bloodstains on

the packet were of very little weight in the circumstances As regards the hairs found near the victim's nails, and which had not been examined, the court held that it would, in any event, have been difficult to give any weight to this evidence in the circum stances The court emphasised that the applicant had waited for almost two hours before making a statement to the police Lastly, the court held that the applicant's conviction was not based solely on circumstantial evidence, given that it had been established that the applicant was present at the time of death, that he had left the victim's flat in haste, that his clothes were bloodstained, that he had not attempted to help the victim and that he had not called the police

b) Application to have the case reopened and subsequent proceedings

In circumstances which are not clear from the file, the applicant was deported from Mexico on 2 February 1985 and arrested on arrival in Italy

On 22 January 1987, in an attempt to obtain evidence to support an application to have his case reopened, the applicant applied to Venice Court of Appeal for leave to arrange a forensic examination of some of the evidence gathered at the time of the investigation, including the bloodstained packet and the head and body hairs found on the victim

In an order of 27 May 1987, Venice Court of Appeal granted part of this application, ordering a forensic examination of the head and body-hairs found on the victim and of the gloves

In July 1987, Venice Court of Appeal informed the applicant that the head and body-hairs had been accidentally mislaid

In an order of 5 February 1988, Venice Court of Appeal noted that the bloodstained packet had been accidentally mislaid, without ruling on the issue of whether it could be considered as new evidence justifying reopening the case The court ordered the case-file to be transferred to the Court of Cassation

On 20 June 1988, the applicant applied to the Court of Cassation for his case to be reopened

His application was based on the following grounds

1 according to a forensic report on the stains on the gloves, it was impossible to affirm that they were blood, and equally impossible to establish whether the gloves had been washed and if so when The applicant emphasised that the gloves he had been wearing when making his original statement had been perfectly dry

2 the shoes which the applicant was wearing at the time of making his original statement did not match a shoe-print found on the victim's body, and

3 according to a haematology report, if the applicant had inflicted some sixty knife wounds on a victim struggling to defend herself, his clothes should have been splattered with blood rather than simply having a few bloodstains on them

The applicant emphasised, lastly, the seriousness of the disappearance of the bloodstained packet and head and body-hairs found on the victim, which deprived him of the opportunity of proving his innocence by means of DNA tests

In a judgment of 30 January 1989, the Court of Cassation ordered that the applicant's case be reopened on the basis that the three points of evidence adduced by the applicant were new and justified reopening the case The court noted that two of the tests requested by the applicant could not be carried out because the evidence had been accidentally lost

On 20 October 1989, the retrial opened before Venice Assize Court of Appeal The court ordered expert reports (from R , F , P , G , F and B) and proceeded to take oral evidence from these experts as well as from the experts involved in the original trial Evidence was also taken from six lay witnesses

At the end of the oral hearings, and after re examining all the evidence in its possession, Venice Assize Court of Appeal ordered a stay of proceedings on 22 December 1990 This order shows that the court considered that only one of the fresh items of evidence adduced by the applicant in support of his application for a retrial was capable of proving his innocence This was the shoe print found on the victim's body which, the court held, certainly did not belong to the applicant or to any of the persons who had had access to the crime scene after the murder (police officers and medical staff) As regards the forensic examinations carried out on the gloves and on the applicant's clothes, the court held that the results were not conclusive as to the applicant's guilt or innocence The court considered that this reasoning should, logically, lead to the applicant being acquitted on the grounds of reasonable doubt

However, the court also had to determine which law to apply to the case A new Code of Criminal Procedure had come into force during the retrial, and the verdict would not be the same under the new provisions as under the old According to the old Code, in a reopened case, lack of evidence led automatically to a conviction whereas under the new Code the accused should be acquitted

Therefore, Venice Assize Court of Appeal referred the case to the Constitutional Court to clarify the issue of the applicable law

In a judgment of 19 June 1991, the Constitutional Court held that, in relation to grounds of acquittal, the new Code should be applied Accordingly, in the applicant's case where there was a lack of evidence, the correct result was an acquittal

On 21 February 1992, the proceedings before Venice Assize Court of Appeal resumed

In the meantime, the composition of the court had changed: the President had retired and the six lay judges were new Only the reporting judge was the same

At the hearing, the court first heard an exposition of the facts of the case from the reporting judge. Then the applicant was asked whether he wished to make any statement in addition to those on the case-file. The applicant replied that he had nothing to add and that he was innocent. The court then proceeded to read the expert reports filed before the stay. Finally, the President adjourned the proceedings on 28 February 1992

It appears from the transcript of the hearing of 28 February that the parties (the public prosecutor, the applicant and the parties claiming civil damages) agreed that the evidence submitted prior to the stay in particular, expert reports drawn up for the court or the parties, as well as the testimony of the expert and lay witnesses - could be used It was also agreed that the expert reports drawn up for the court should be read out, as should any other document designated by the President All the lay witnesses, and some of the expert witnesses, were present at the hearing and confirmed the truth of the evidence they had given before the stay The parties agreed that the lay and expert testimony given on 21 July and 8 October 1990 could be taken as read and used by the court

In a judgment of 27 March 1992, Venice Assize Court of Appeal upheld the conviction of 19 December 1979

As regards the change in its composition, the court held that the proceedings were not void under section 185 of the Code of Criminal Procedure, given that they had been stayed *sine die* under section 432 of the same Code, in accordance with which a fresh summons had been issued and the parties had had the opportunity to reavail themselves of the rights arising at the opening stage of the retrial

On the merits, the court recalled that, where a case is reopened, the court may diverge from the assessment of the evidence made in the original trial only if the fresh evidence which justified the case being reopened can be held to constitute conclusive proof In the case before it, the court had to examine whether any of the three fresh points of evidence could be so considered - and they could not

The court referred to the haematology reports ordered before the stay to explain why the applicant's clothes were only slightly bloodstained despite the degree of violence used in the murder All the expert witnesses agreed that the fact that only a small amount of blood had been found on the applicant's clothes did not exclude the possibility of the applicant having committed the crime. On the contrary, the most likely explanation for the presence of a small quantity of blood on the applicant's clothes could only be that he had attacked someone. In other words, that expert evidence was more unfavourable than favourable to the applicant.

As regards the shoe-print found on the victim's body, the court noted that there were in fact two different shoe-prints and that it had proved impossible to establish with certainty that they did not belong to one or other of the persons who had had access to the murder scene. The court held that it was impossible to say that one of these prints belonged to a third party, that is, the presumed murderer. Therefore, this second piece of evidence was not at all conclusive as to the applicant's innocence

In relation to the gloves, the court noted that the expert witnesses had testified that it was impossible to be sure whether they were stained with blood or to establish whether, and when, the gloves had been washed. The court concluded that this last item of evidence did not prove the applicant's innocence either.

Subsequently, the applicant appealed to the Court of Cassation on a point of law against the judgment of Venice Assize Court of Appeal. He submitted that the proceedings were void due to the change in the composition of that court and that the judgment was also void given that the court, as newly composed, had held him guilty, whereas the "old court" had been in favour of acquitting him. According to the applicant, the "new court" should have considered itself bound by the conclusions reached by the "old court" before the retrial was stayed Lastly, the applicant challenged the manner in which the Assize Court of Appeal had assessed the evidence

In a judgment of 24 November 1992, deposited with the court registry on 22 January 1993, the Court of Cassation dismissed the applicant's appeal. It held that the change in the composition of the Assize Court of Appeal did not render the proceedings void, given that the retrial had been stayed *sine die* and that the newly-composed court had held a complete rehearing As regards the applicant's submission that the Assize Court of Appeal's judgment was void, the Court of Cassation held that the only thing which could have prevented the newly-composed court from reassessing the case was a final judicial decision, which had not been given, since the order referring the case to the Constitutional Court was not a final decision On the question of the assessment of evidence, the Court of Cassation held that the Assize Court of Appeal's reasoning was logical and well-founded

On 7 April 1993, the applicant was given a pardon

B *Relevant domestic law*

According to section 472 of the 1930 Code of Criminal Procedure, the deliberations must take place as soon as the hearing stage of a trial has closed and must be carried out by the judges who heard the case.

Under section 185, failure to comply with the legislative provisions concerning the appointment of judges and governing the judiciary generally (*altre condizione di capacità del giudice*) constitutes an irremediable flaw rendering the proceedings void. A motion to set the proceedings aside on these grounds may be raised at any time during their course.

According to case-law (see, e.g., Cass. pen. sez. II, 9.3.92, no 2502) and legal writings, a change in the composition of a court during a trial entails absolute nullity, which may be invoked at any time during the proceedings.

Under section 432, after a stay *sine die*, the resumed proceedings must commence with a summons. The court may use all the powers, and the public prosecutor and other parties all the subsisting rights, which were available to them at the opening stage of the trial. The steps provided for in sections 415 (lists of witnesses to be called), 416 (re-examination of documentary evidence and summoning of expert witnesses) and 417 (fresh expert reports) are considered as having been taken in the resumed trial if the parties do not renew them.

COMPLAINTS

The applicant complains that his retrial did not constitute a fair hearing

Invoking Article 6 para. 3 (b) of the Convention, the applicant complains, first, that certain items of evidence seized by the police at the time of the criminal investigation were accidentally lost by the State authorities. He submits that this deprived him of the opportunity to have tests which could have proved his innocence carried out

Invoking Article 6 paras. 1 and 3 (d), he complains further of the change in composition of Venice Assize Court of Appeal after the resumption of the retrial He submits that the newly-composed court re-examined his case but confined itself to reading the documents on the case-file instead of retaking evidence from the expert and lay witnesses, and found him guilty.

THE LAW

The applicant complains that he was not given a fair hearing before Venice Assize Court of Appeal, which was trying his case as a result of the Court of Cassation's decision to reopen it

Invoking Article 6 paras 1 and 3 (d) of the Convention the applicant points out that after the retrial was resumed, Venice Assize Court of Appeal was composed almost entirely differently that it confined itself to reading the documents on the case file from before the stay and that it found him guilty

Invoking Article 6 para 3 (b) of the Convention, the applicant also complains that certain items of evidence seized at the time of the criminal investigation by the police were not kept safely by the State authorities and, therefore, were not available to be examined as requested by the applicant

Article 6, in so far as relevant, provides

> 1 In the determination of his civil rights and obligations or 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
>
> 3 Everyone charged with a criminal offence has the following minimum rights
>
> b) to have adequate time and facilities for the preparation of his defence,
>
> d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

The Government submit, first, that the fact that it was impossible to carry out the tests requested by the applicant because the evidence in question had been accidentally lost, does not raise any problem under Article 6 of the Convention, since, carrying out those tests would have had no effect on the verdict The Government emphasise that the role of Venice Assize Court of Appeal, as a court retrying a case, was to assess the new evidence to decide whether it was capable of proving the applicant's innocence According to the Government, since the head and body hair referred to had been found on two fingers of one of the victim s hands rather than for example under her nails no test could have ruled out the possibility of their belonging to one of the persons who had had access to the scene of the crime after the murder As for the bloodstained packet, no test could have established the precise date on which the bloodstains had been made so as to support the hypothesis that they had

been made on the day of the crime. The Government conclude that neither of these items of evidence was capable of proving the applicant's innocence, and thus of overturning the *res judicata*.

The Government then submit that the change in the composition of Venice Assize Court of Appeal did not deprive the applicant of his right to a fair hearing The Government point out that, when the retrial was resumed, the court, acting in accordance with section 432 of the Code of Criminal Procedure, served summonses on the parties and on the lay and expert witnesses The witnesses attended the hearings and, with the agreement of the parties, confirmed the truth of their previous testimony. According to the Government, the applicant could have requested and obtained a re-examination of the witnesses, but failed to do so.

In conclusion, the Government request that the application be declared inadmissible as manifestly ill-founded.

The applicant opposes the Government's arguments.

First, he submits that if he had been able to have the lost evidence tested, he might have been able to prove that the head and body-hair and the blood on the packet all belonged to the same person - that is, the murderer. The applicant emphasises that the disappearance of the evidence occasioned a debate in the Italian Parliament and that the Minister of Justice had, at the time, planned to introduce *ad hoc* provisions concerning the preservation of evidence.

The applicant then points out that, when the retrial was resumed, it was a fresh hearing in name only, since the lay and expert witnesses were not re-examined The applicant points out that he never expressly waived his right to examine the witnesses, nor did he do so implicitly in the case of the expert witnesses, especially those responsible for the reports read out at the hearing of 21 February 1992, who did not attend the hearing of 28 February 1992. Lastly, the applicant emphasises the particular nature of the circumstances in which the resumed retrial took place before Venice Assize Court of Appeal, given that, before the stay, the issue was whether it was possible, as a matter of law, to acquit him

The Commission recalls that Article 6 of the Convention is not applicable to proceedings concerning an application for a retrial (Nos. 13601/88 and 13602/88, Dec 6 7 89, D R 62, p 284 at p 291)

The Commission notes that the proceedings in question in the present case are the retrial proceedings themselves Consequently, the Commission considers that there is no problem regarding the applicability of Article 6 (cf., *mutatis mutandis*, Eur Court HR, Poiss v. Austria judgment of 23 April 1987, Series A no. 117, p. 102, para. 48).

The Commission notes at the outset that the complaints raised by the applicant under paragraphs 3 (b) and 3 (d) of Article 6 of the Convention merely relate to particular aspects of the right to a fair trial as guaranteed in Article 6 para 1 In the present case, it will take account of them while examining the proceedings as a whole in the light of this general guarantee (Pelladoah v the Netherlands judgment of 22 September 1994, Series A no 297-B, p 33, para 33 and Poitrimol v France judgment of 23 November 1993, Series A no 277-A, p 13, para 29)

Therefore the question before the Commission is whether the proceedings in question, taken as a whole, were fair.

The Commission recalls, first, that it is not competent to deal with an application alleging that errors of fact or law have been committed by a domestic court, 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 (No 21283/93, Dec 5 4.94, D R 77-B, p. 81 at p 88).

It is true that Article 6 guarantees the right to a fair trial, but the Convention does not regulate, as such, the manner in which evidence should be taken, which is essentially a matter for domestic legislation, the task of the Convention organs being simply to ascertain whether, in the particular circumstances of the case, the proceedings in their entirety were fair (Eur Court HR, Edwards v the United Kingdom judgment of 16 December 1992, Series A no 247-B, pp 34 35, para 34)

As regards the applicant's complaint concerning the change in the composition of Venice Assize Court of Appeal, the Commission notes that the Court of Cassation judgment of 24 November 1992 shows that, under Italian law, this change of composition did not render the proceedings void and did not prevent the court from re-examining the facts of the case.

The Commission considers that the applicant could have applied for and obtained a re-examination of lay or expert witnesses under section 432 of the Code of Criminal Procedure

The question then arises whether the applicant waived his right to a fair hearing under Article 6 of the Convention by omitting to make such a request

According to the Court's case-law, the waiver of a right guaranteed by the Convention - in so far as it is permissible - must be established in an unequivocal manner (see Eur Court HR, Pfeifer and Plankl v Austria judgment of 25 February 1992, Series A no 227, pp 16-17, para. 37)

In the instant case, the Commission notes that, under section 432 of the Code of Criminal Procedure, where the parties do not make such an application for a lay or expert witness to be re examined, the documents previously placed on the case-file are deemed to have been admitted in evidence for the purposes of the resumed hearing

The Commission considers that the applicant, who was assisted by a barrister, could not have been unaware of this rule Moreover, it emerges from the Court of Cassation's judgment of 24 November 1992 that Venice Assize Court of Appeal followed the Code of Criminal Procedure Further, the Commission notes that there is no evidence to suggest that the applicant was pressurised into waiving his rights If he wished to avail himself of his rights it was for him to request to do so the mere fact that he hoped to be acquitted, in the light of the order made by the Assize Court of Appeal on 22 December 1990, could not exonerate him from this responsibility

In particular, the Commission notes that it is clear from the file that the applicant agreed that evidence submitted prior to the stay could be used and that the testimony given by lay and expert witnesses on 21 July and 8 October 1990 should be taken as read and deemed to have been admitted in evidence

In these circumstances, the Commission considers that the applicant can be deemed to have waived his rights in a non equivocal manner

In so far as the applicant complains that he was deprived of the ability to defend himself and to have tests carried out on evidence which had been accidentally lost, the Commission notes, first, that several years had elapsed between the end of the original proceedings and the application for the case to be reopened The Commission further recalls that the question whether a trial is in conformity with the requirements of the Convention must be considered on the basis of the proceedings as a whole and not one isolated aspect (see, for example No 12002/86, Dec 8 3 88 D R 55, p 218 at p 219)

Having examined the applicant's retrial as a whole, the Commission notes that the applicant was assisted by a barrister before each of the courts involved and that he had the opportunity of putting his arguments, and challenging those of the prosecution in detail at every stage of the proceedings The Commission finds that Venice Assize Court of Appeal carried out a minute examination of the facts of the case and the submissions made by the applicant to prove his innocence but found him guilty on the basis of the unanimous opinion of the expert witnesses, according to whom the only reasonable explanation for the presence of bloodstains on the applicant's clothes was that he had attacked someone, and that his other arguments were not capable of proving his innocence

In these circumstances, the Commission finds that the courts determining the criminal charge against the applicant respected his right to defend himself in accordance with Article 6 paras 1 and 3 (b) and (d) of the Convention

It follows that the application is manifestly ill-founded and must be rejected pursuant to Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority,

DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE