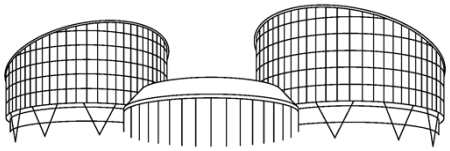

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF STEPHENS v. MALTA (No. 3)

(Application no. 35989/14)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Testimony given by accomplice in absence of lawyer and admitted as evidence against the applicant • Overall fairness not impaired

STRASBOURG

14 January 2020

FINAL

14/05/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Stephens v. Malta (no. 3),

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Alena Poláčková,
María Elósegui,
Gilberto Felici,
Lorraine Schembri Orland, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 3 December 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 35989/14) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Mark Charles Kenneth Stephens ("the applicant"), on 28 April 2014.

2. The applicant was represented by Mr D. Camilleri, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that the use at his trial of third party statements given to the police without legal assistance had rendered his own trial unfair. He relied on Article 6 §§ 1 and 3 (c) of the Convention.

4. On 9 June 2016 the Government were given notice of the above mentioned complaint and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The British Government did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

6. On 19 January 2017 the President of the Section to which the case was allocated, at the time, decided to accept the applicant's submissions submitted out of time (Rule 38 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1963 and is detained in Paola.

A. Background of the case

8. The police initiated their investigations in respect of the applicant on the basis of a statement made by a certain G.R.E, who had been, together with his partner S.M., stopped and searched at the Malta International Airport on their arrival on 11 August 2003. In one of their bags, the police found almost three kilograms of cocaine and 7,151 ecstasy pills.

9. On 11 or 12 August 2003 G.R.E. was questioned by the police without the assistance of a lawyer. In his statement, G.R.E. stated that he was afraid to name the person who had instructed him to carry the drugs to Malta. However, he indicated that such person was of Russian nationality.

10. On 12 August 2003 G.R.E. gave a second statement to the police, without the assistance of a lawyer, where he indicated that the drugs were delivered to him by a person who he knew as "Mark Stephens". He also stated that "Mark Stephens" was Maltese and had a mother and two brothers who lived in Malta; one of his brothers ran a private school. G.R.E. also said that, prior to August 2003, on the instructions of "Mark Stephens", he came to Malta to collect a substantial amount of money which he had to deliver to "Mark Stephens" in Spain. G.R.E. said that on that occasion he had met V.S., who told him that he had known "Mark Stephens" for a very long time and that, together, they were entering into a partnership to purchase a club in Spain.

11. On 13 August 2003 G.R.E. confirmed his second statement on oath before the inquiring magistrate (during the inquiry relating to the *in genere* as known in Maltese law). The applicant claimed that G.R.E. had not been assisted by a lawyer on that occasion, while the Government gave contradictory versions on this point.

12. On 30 November 2004, consequent to an arrest warrant issued by the Maltese authorities, the applicant was arrested and detained in Spain on suspicion of having conspired in the trafficking of cocaine, ecstasy and cannabis. On 9 September 2005 the applicant was extradited to Malta to stand trial on charges of drug trafficking.

B. Criminal proceedings against the applicant

13. On 10 September 2005 the applicant gave a statement to the police. No lawyer was present during the interrogation. A further statement was given on the following day. The applicant stated that he had a sister and a brother who ran a private school and that they, as well as his mother, lived in Malta. He confirmed that he knew G.R.E., who used to drink in his bar which he was leasing in Zaragoza, Spain, called "Mountain Side Inn". He also declared that it was A.W. who supplied G.R.E. with the drugs.

14. On the same day the applicant was charged before the Court of Magistrates as a Court of Criminal Inquiry with having conspired in dealing

in prohibited substances in breach of the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance, Chapters 101 and 31 of the Laws of Malta respectively.

15. During the committal proceedings before the Court of Magistrates, on 20 September 2005, G.R.E. testified that the "Mark Stephens" he knew, and who had given him instructions, owned a restaurant in Spain called "Mountain Side" but was not present in the courtroom. G.R.E. claimed that what he had told the police had been fabricated because the inspector told him that he was facing thirty years imprisonment if he did not cooperate.

16. On 23 September 2005, V.S. also gave evidence during the committal proceedings and confirmed that he had once been asked by his friend Mark Stephens – whom he identified as the person charged [the applicant] – to pick up G.R.E. from the airport and to take care of him. He also confirmed that he and the applicant were going to take a business together in Spain with another English person, and that he actually handed a sum of money to G.R.E. to pass on to the applicant.

17. On 17 April 2006, a bill of indictment was issued and the applicant was put on trial by jury before the Criminal Court.

1. First-instance

18. During the trial G.R.E. changed his version. He denied that the applicant was "Mark Stephens" and said that a certain A.W. used the name of "Mark Stephens". In this connection, in his summing up to the jury, the judge stated, *inter alia*, as follows: "The prosecution is asking you to consider that [the pre-trial] statement confirmed on oath as true. It is also asking you to find the accused's guilt on the basis of that statement confirmed on oath before Magistrate X. Legally he is perfectly entitled to do so, whether you do so or not that is a question of fact which is up to you to decide, but when the prosecution tells you irrespective of what he said here, irrespective of what he said before the magistrate in the compilation of evidence, if you decide to believe his first statement confirmed on oath before Magistrate X and you accept that as the truth then on the basis of that statement you can convict the accused. Legally he is correct, factually it depends on you whether you are prepared to accept that first statement on oath."

19. In his statement of defence the applicant raised the issue of the admissibility of the statements made by G.R.E. before the trial. The defence also maintained that G.R.E. was a liar and that his credibility was at issue.

20. On 28 June 2007 the Criminal Court observed that it was not in a position to address those pleas in a specific and concrete way, but that it could only limit itself to stating that it would be guided, in deciding whether or not to admit any such evidence, by the relevant provisions of law and principles accepted by the Maltese courts, such as ensuring that an accused was given a fair hearing and that due process, as interpreted by the

Constitutional Court and the European Court of Human Rights, was observed.

21. From the records of 3 November 2008 it appears that the applicant did not object to the distribution to the jurors of his own statement, nor did he object to the distribution to the jurors of the statement which G.R.E. gave on oath before the inquiring magistrate (see paragraph 11 above). G.R.E. also gave evidence on oath (see paragraph 18 above) and the applicant cross-examined him. V.S. and the inspector also gave evidence on oath and a confrontation between G.R.E. and both witnesses ensued. The applicant cross-examined V.S. who had stated that the applicant had introduced him to G.R.E. A number of other witnesses were also heard.

22. By a judgment of 5 November 2008 the Criminal Court found the applicant guilty of having conspired for the purpose of committing an offence in breach of the provisions of the Ordinances cited above, and specifically of dealing illegally in cocaine and ecstasy pills and of having promoted, constituted, organised and financed such conspiracy. It sentenced the applicant to twenty-five years' imprisonment and to a fine of 60,000 euros (EUR) and ordered him to pay costs.

2. Appeal

23. On 21 November 2008 the applicant appealed against that judgment before the Court of Criminal Appeal, requesting the latter to revoke the first-instance judgment. In so far as relevant, his grievances may be briefly summed up as follows: there was a wrong interpretation and application of the law regarding the difference between impeaching the witness and believing him in whole or in part, or not at all; the first court's direction to the jury "that the statement [of G.R.E.] could be used to convict was a misdirection to the absolute detriment of the appellant"; there was a procedural defect in the summing up which constituted a violation of the law and had a bearing on the verdict; and there was an irregularity in the proceedings regarding the law of evidence which was detrimental to the accused.

24. By a judgment of 24 June 2010 the Court of Criminal Appeal confirmed the applicant's guilt and sentence rejecting his grounds of appeal one by one.

25. In particular, the Court of Criminal Appeal took account of G.R.E.'s second statement to the police and his sworn statement before the inquiring magistrate. In both statements, he had indicated that the drugs were delivered to him by a person who he knew as "Mark Stephens". The court also noted that, subsequent to those statements, during the committal proceedings before the Court of Magistrates, and during the trial by jury, G.R.E. had stated and indicated that the applicant was not the "Mark Stephens" that the same G.R.E. had mentioned in his sworn statement previously.

26. The Court of Criminal Appeal also noted that although in his testimony of 20 September 2005 G.R.E. had stated that the "Mark Stephens" he knew was not in the courtroom, the applicant had indicated in his statement to the police of 11 September 2005 that he knew G.R.E. Further, in the same testimony of G.R.E of 20 September 2005, he had indicated that the "Mark Stephens" he knew owned a restaurant in Spain called "Mountain Side" and the applicant had, on 11 September 2005, stated that he was indeed leasing a bar in Zaragoza, Spain, called "Mountain Side Inn".

27. The Court of Criminal Appeal referred to other factors upon which the jurors could have relied to conclude beyond reasonable doubt that the applicant was the "Mark Stephens" to whom G.R.E. had referred to in his second statement, as well as to conclude that the applicant was guilty of the offence with which he was accused: Firstly, in his second statement G.R.E. stated that "Mark Stephens" was Maltese and had a mother and two brothers who lived in Malta, one of the brothers ran a private school. Indeed, albeit his other sibling was a female, the applicant had admitted that he had a brother who ran a private school and that they, as well as his mother, lived in Malta. Secondly, V.S., to whom G.R.E. had referred in his second statement, gave evidence on 23 September 2005 and confirmed that he had once been asked by his friend "Mark Stephens" – whom he identified as the applicant – to pick up G.R.E. from the airport and take care of him. V.S. had also confirmed that the applicant and himself were going to enter into business together, and with another person in Spain and that he had handed a sum of money to G.R.E. to deliver it to the applicant.

28. In the Court of Criminal Appeal's view the facts of the case were relatively simple: "On 11 August 2003 the police stopped and searched G.R.E. and S.M. on their arrival from London. In one of their luggage three packets containing a total of 2,988.2 grams of cocaine of around 70% purity were found, and two packets containing a total of 7,151 pills containing MDMA (ecstasy) were also found. G.R.E. made two statements to the police. In his first statement he said that he was afraid to mention the person who had instructed him to carry the drugs to Malta, saying that he was Russian. In his second statement he said that it was Mark Stephens who, it has been established, was the applicant. He confirmed his second statement on oath before the duty magistrate" and concluded that in terms of Section 30A of Chapter 101 of the Laws of Malta such statement was admissible provided that it was given voluntarily (see relevant domestic law).

29. In view of the above considerations, the Court of Criminal Appeal held that the existence of an agreement for the importation of drugs to Malta was beyond doubt. This was clearly evidenced from G.R.E.'s sworn statement and from the evidence subsequently given, namely that of V.S. The mode of action for the importation and delivery of drugs was also spelt

out and described by G.R.E. (in his second statement to the police on 12 August 2003 and the sworn statement on 13 August 2003), namely, that the drugs were delivered to him by a person he knew as "Mark Stephens". Consequently, the jury's verdict was both legal and reasonable.

C. The applicant's constitutional redress proceedings

1. First-instance

30. On 9 May 2012, the applicant filed an application before the Civil Court (First Hall) in its constitutional competence, alleging *inter alia*, violations of Article 6 §§ 1 and 3 (c) on account of (himself) not having been assisted by a lawyer prior to the police interrogation and on account of the use of statements during his trial, which had been made in the absence of a lawyer, by G.R.E. (while the latter was experiencing drug withdrawal symptoms). He also complained that the judge hearing the criminal trial was utterly biased when he failed to direct the jurors to treat the evidence tendered by G.R.E. with caution on the basis of Article 639(3) of the Criminal Code. In his view the same judge directed the jury into accepting G.R.E.'s statement, which was later confirmed on oath, rather than merely interpreting and directing the jury as to the relevant law on the admissibility of the statements of G.R.E.

31. On 20 September 2012 G.R.E. testified in these proceedings and claimed that when he gave his statement to the police he had been sick and needed drugs and alcohol. He wanted to get out of the depots at all costs.

32. His evidence was rebutted by that of two police officers. One of the police officers testified that G.R.E. appeared lucid and was not suffering from withdrawal symptoms, and that it was G.R.E. who had opened up telling the facts and that it had barely been necessary to put questions to him.

33. By a judgment of 29 April 2013 his claims were rejected.

34. The court noted that the applicant was questioned by the police on 10 September 2005. It had transpired that prior to his extradition to Malta the applicant had had the opportunity to consult a lawyer. He also consulted his lawyer in connection with constitutional redress proceedings which he undertook in 2004 in respect of his extradition. Moreover, the applicant spoke to his lawyer the day before he was questioned by the police. Thus, it was evident that while in police custody, the applicant had had access to his lawyer prior to questioning. The content of such exchanges was irrelevant, what mattered was the fact that the applicant had been given the opportunity to consult a lawyer and could therefore have sought legal advice. Although the applicant had been duly cautioned, he chose to reply to the questions put to him by the police. Furthermore, the applicant gave testimony during his trial and confirmed his statement to the police. Moreover, the applicant had not admitted to any wrongdoing during the interrogation.

35. On the applicant's second complaint, the court held that the applicant had no right to have G.R.E.'s (a third person) statements excluded from his own trial on the basis of the judgment in *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008). That right belonged to G.R.E. and not to the applicant. Moreover, there had been no allegation that G.R.E. had given the statements under duress or ill-treatment. G.R.E. himself had filed constitutional redress proceedings contesting his two statements solely on the basis that he did not have legal assistance prior to the police interrogation. However, by a judgment of 27 June 2012, (which became final in the absence of an appeal) the court had dismissed his complaint (see paragraph 48 below).

36. As to the applicant's allegation that G.R.E. had been experiencing drug withdrawal symptoms when he gave his statements to the police, thus shedding doubt on the veracity of G.R.E.'s statements, the court held that the applicant had ample opportunity to raise this grievance during the criminal proceedings. However, he had failed to do so. Moreover, there was no evidence that G.R.E. had not been mentally fit to participate in the police interrogation and to give evidence on oath before the duty magistrate. It was true that the forensic psychologist declared that inmates, who made use of drugs, experienced drug withdrawal symptoms which produced psychological problems and that under certain circumstances an inmate could become more vulnerable. However, the applicant had failed to submit information with regard to G.R.E.'s condition and as to whether the latter had been mentally fit, or not, to give evidence before the inquiring magistrate.

37. The court held that G.R.E. gave evidence during the trial by jury and that the applicant had ample opportunity to cross-examine him on the contents of the two statements since these were filed in the court file. Further, during the trial, a copy of G.R.E.'s statement released before the inquiring magistrate was distributed to the jurors and the applicant's defence counsel had not objected to this, despite being free to question G.R.E. about such statement.

38. Whilst it was true that after his declaration on oath before the inquiring magistrate, G.R.E. had sought to exculpate the applicant, this did not mean that the jurors had to believe the subsequent version of the facts. Having read G.R.E.'s testimony, the court found that the jurors were fully justified in not believing what he had said when he gave evidence during the subsequent committal proceedings, and eventually during the trial by jury, opting instead to believe G.R.E.'s previous versions.

39. As to his last complaint, it considered that it was not for the constitutional jurisdictions to decide on the application or not of Article 639 (3) of the Criminal Code. Having read the judge's address, the court considered the applicant's assertion to be untrue as the presiding judge had simply explained what the law provided.

2. Appeal

40. On an unspecified date the applicant appealed mainly in so far as the complaint related to the use of G.R.E.'s statements.

41. By a judgment of 9 December 2013, the Constitutional Court rejected the applicant's appeal and confirmed the first-instance judgment.

42. The Constitutional Court considered that it was not for it to re-assess the evidence and that the applicant had ample opportunity to cross-examine the witness – who was present and gave testimony also at trial – in front of the jurors, which he did. Further, he had not objected to the distribution to the jurors of the statements by G.R.E.

43. According to the Constitutional Court, the right to legal assistance during the pre-trial stage safeguarded the individual being questioned and not any third party subject to criminal proceedings.

44. Further, the fact that G.R.E. confirmed his second statement on oath before the inquiring magistrate weakened the applicant's claim that G.R.E. had released the statement under pressure or duress. The presence of a magistrate or a judicial officer – who was independent from the Police – sufficed for the statement to be considered as having been given freely and voluntarily and to show that it had not been extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour.

45. The above considerations also weakened the applicant's allegation concerning the effect of withdrawal symptoms. Moreover, the allegation concerning G.R.E.'s state was a question of fact that had to be decided upon in criminal proceedings and not in constitutional redress proceedings. The evidence tendered by the forensic psychologist was of a generic nature and did not specifically relate to G.R.E.'s mental state at the time of questioning. As to the police officer's evidence to the effect that G.R.E. had been hospitalised immediately after he had given the statements, the Constitutional Court considered that the evidence of this officer could have been brought before the Criminal Court as there was no legal impediment, yet the applicant had failed to do so. Moreover, no evidence was adduced about G.R.E.'s mental health on admission to hospital, thus there was no evidence that he had been suffering from withdrawal symptoms.

46. In relation to the applicant's argument that the jury had been misdirected by the judge in relation to the statements of G.R.E. the Constitutional Court considered that the trial judge had explained the law to the jurors and that he had stated in clear terms that the prosecution's request to find guilt on the basis of G.R.E.'s sworn statement was legally correct whilst factually it depended on whether the jurors accepted that statement as the truth. In its view the judge had been careful not to influence the jurors. In any event these were matters to be dealt with during the criminal appeal proceedings, and in fact the Court of Appeal had already rejected the applicant's grievance.

D. G.R.E.'s constitutional redress proceedings

47. On an unspecified date G.R.E. instituted constitutional redress proceedings complaining that he had not had legal assistance at pre-trial stage.

48. At first-instance, on 27 June 2012 the Civil Court (First Hall) in its constitutional competence held that G.R.E.'s guilt was not found solely by reference to his statements to the police. He was caught at the Malta International Airport with a substantial amount of drugs in his possession. Apart from his first and second statements to the police, G.R.E. had also made a sworn statement before the Court of Magistrates. G.R.E. persisted in his statement of admission of guilt notwithstanding the fact that the Criminal Court had warned him of the legal consequences of such statements and allowed him a short time to retract it. G.R.E. had also not appealed against the finding of guilt but had limited his appeal to other dispositions of the Criminal Court's judgment.

49. The judgment became final in the absence of an appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legal assistance during pre-trial detention

50. By Act III of 2002 the Maltese Parliament introduced the right to legal assistance at the pre-trial stage. However, the law only came into force in 2010 by means of Legal Notice 35 of 2010. Prior to this Legal Notice Maltese law did not provide for legal assistance during the pre-trial investigation and specifically during questioning, whether by the police or by a magistrate in his investigative role. Before questioning, however, suspects would be cautioned, that is, informed of their right to remain silent and that anything they said could be taken down and produced as evidence. At the time no inferences could be drawn by the trial courts from the silence of the accused at this stage.

51. Statements taken by the police could be confirmed on oath before the Court of Magistrates, in which case the person was entitled to be assisted by a lawyer.

B. The Criminal Code

52. Article 661 of the Criminal Code (Chapter 9 of the Laws of Malta) on confessions not to prejudice third parties provides that:

> "A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other evidence."

53. Article 639(3) of the Criminal Code reads as follows:

> "Where the only witness against the accused for any offence in any trial by jury is an accomplice, the Court shall give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused."

C. The Dangerous Drugs Ordinance

54. Section 30A of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), on statements that may be admitted as evidence provides that:

> "Notwithstanding the provisions of article 661 of the Criminal Code, where a person is involved in any offence against this Ordinance, any statement made by such person and confirmed on oath before a magistrate and any evidence given by such person before any court may be received in evidence against any other person charged with an offence against the said Ordinance, provided it appears that such statement or evidence was made or given voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

55. The applicant complained that the use at his trial of G.R.E.'s statements given to the police without legal assistance had rendered his own trial unfair. He relied on Article 6 §§ 1 and 3 (c) of the Convention.

56. The Court considers that the complaint concerning the admission of third party statements made in the absence of legal assistance is to be examined solely under Article 6 § 1 of the Convention which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ..."

57. The Government contested that argument.

A. Admissibility

58. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

59. The applicant submitted that his right to a fair trial was breached since the statements made by G.R.E., including the one which was confirmed on oath in front of the magistrate, were made without the former having had the right to speak to a lawyer prior to making such statements. Despite that situation, the statement had been used and had not been expunged from the acts of the proceedings. The applicant noted that while the domestic courts found that G.R.E. had not given the statements as a result of duress or ill-treatment the latter testified for the first time in front of the Court of Magistrates as a Court of Criminal Inquiry that what he had said had been suggested to him by the Inspector (H.) and that he had released such statements "because H. said that I was looking at thirty years imprisonment if I did not cooperate". In the applicant's view this was clear evidence that G.R.E. felt pressured into making the statements, which pressure drove him as far as to re-confirm the same on oath in front of the magistrate. He considered that taking those statements to be the truth and ignoring all other facts which weakened the veracity of those statements resulted in the applicant's trial being an unfair one.

60. According to the applicant, G.R.E.'s statements were crucial in finding for the applicant's guilt, as the only other evidence was the applicant's and that of an accomplice (V.S.) and according to domestic law, the latter's statements had to be approached with caution. In the applicant's view had there been no statements [by himself or G.R.E. without the assistance of a lawyer] V.S. statements would not have sufficed, thus "It is to this extent that it is being submitted that the guilty verdict was very much the result of the applicants' statements." In this connection the applicant relied on the Court's case-law, such as *Borg v. Malta* (no. 37537/13, 12 January 2016).

(b) The Government

61. Recapitulating the Court's case-law on the admissibility of evidence, the Government submitted that the statements of G.R.E. had been taken by lawful means in accordance with the relevant domestic law provisions. Furthermore, G.R.E. had not been successful domestically in claiming a breach of Article 6 §§ 1 and 3 (c) of the Convention.

62. The Government submitted that G.R.E.'s pre-trial statements were not the only evidence supporting the applicant's conviction. Indeed, G.R.E. had again made statements during trial, although contradicting his previous ones. V.S. had also been a key witness during the trial. Moreover, police officers and forensic scientists also gave evidence. It had been the

combination of elements which allowed the jury to find the applicant guilty, as also confirmed by the Court of Criminal Appeal.

63. Furthermore, the applicant had had the possibility to challenge G.R.E.'s statements and confront him and his rights of defence had been respected. They relied on the Court's conclusions in *Camilleri v. Malta* ((dec.) no. 51760/99, 16 March 2000, concerning a complaint under Article 6 § 3 (d) on account of the absence of the accused at the time when witness G.F. had given a statement before the investigating magistrate, while during trial G.F. had retracted his statement). Distinguishing the case from *Jalloh v. Germany* ([GC], no. 54810/00, ECHR 2006-IX), the Government submitted that in the present case the statements had been voluntarily given by both the applicant and G.R.E. Indeed G.R.E. had chosen to cooperate with the police to benefit from mitigation in punishment for a crime in which he had been caught red-handed. He had also repeated his statement before the inquiring magistrate at a point where he had consulted with and was assisted by his lawyer. The applicant had had the opportunity to cross-examine G.R.E. which he availed himself of, as well as V.S., and the applicant himself had also testified during the proceedings. He had further not objected when the prosecution had requested that G.R.E.'s testimony (made before the inquiring magistrate) be distributed to the jurors.

2. The Court's assessment

(a) General principles

64. The Court reiterates that under Article 6, it is not the Court's role to determine, as a matter of principle, whether particular types of evidence may be admissible. 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 the violation of another Convention right is concerned, the nature of the violation found (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *Jalloh*, cited above, § 95; *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009; and *López Ribalda and Others v. Spain*, nos. 1874/13 and 8567/13, § 83, 9 January 2018).

65. In determining whether the proceedings as a whole were fair, regard must nevertheless be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is

no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, among other authorities, *Bykov*, cited above, § 90; *Khan*, cited above, §§ 35 and 37; and more recently, *Perliński v. Poland* (dec.) no. 59131/11, 26 February 2019).

66. It follows that the use of evidence obtained as a result of a breach of Article 8, such as, for example, secretly taped material which was unlawfully obtained, does not necessarily conflict with the requirements of fairness guaranteed by Article 6 § 1 (see, for example, *Khan*, and *Bykov*, § 91, both cited above). The same can be said of the use of evidence obtained by conduct contrary to Article 6 § 1 (such as incitement) (see, for example, *Matanović v. Croatia*, no. 2742/12, 4 April 2017).

67. To the contrary, the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair, irrespective of the probative value of the statements and irrespective of whether their use is decisive in securing the defendant's conviction (see *Gäfgen v. Germany* [GC], no. 22978/05, §§ 165-166, ECHR 2010). This is so even if the person who suffered the breach of Article 3 is a third person and not the applicant for the purposes of Article 6 (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 263, ECHR 2012 (extracts) and *mutatis mutandis*, *Urazbayev v. Russia*, no. 13128/06, § 61, 8 October 2019).

(b) Application to the present case

68. The Court observes that the applicant made reference, for the first time, to his own statements given without legal assistance in his observations and no complaints to that effect were mentioned in his application form. However, despite any misleading submissions by the applicant (see paragraph 60 above), the Court notes that the scope of the case before it is limited to whether the admission of G.R.E.'s statements (made in the absence of legal assistance) impaired the fairness of the proceedings against the applicant.

69. The Court next notes that it is not entirely clear whether the applicant is complaining that he suffered a violation of Article 6 because G.R.E.'s statements, which were admitted as evidence against him, were made under circumstances amounting to a violation of Article 3 (see, *a contrario, Harutyunyan v. Armenia*, no. 36549/03, § 59, ECHR 2007-III, and *a contrario, mutatis mutandis*, *Othman (Abu Qatada)*, cited above, § 263). In any event, the Court notes that, while the applicant alleges that G.R.E. had been questioned while suffering from withdrawal symptoms and that a certain pressure was allegedly exerted on G.R.E., those claims were dismissed by the domestic court (see paragraphs 44-45 above). It follows, that it has not been established that the statements, which were also reiterated before the duty magistrate, were made in circumstances which

amounted to treatment contrary to Article 3. The Court further notes that while the absence of an Article 3 complaint does not preclude the Court from taking into consideration an applicant's allegations of ill-treatment for the purposes of deciding on compliance with the guarantees of Article 6 (see *Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006, and *Kolu v. Turkey*, no. 35811/97, § 54, 2 August 2005), in the present case the alleged ill-treatment by a third party was not made out, nor was it alleged by that same party.

70. That having been established, the only other Convention right concerned with the taking of G.R.E.'s statements (see general principles at paragraph 64 above) is Article 6 § 3 (c). However, the Court notes that the non-observance of one of the minimum rights guaranteed by Article 6 § 3 will not lead to an automatic violation of that provision (see, for example and by implication, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, and *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015). The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Beuze v. Belgium*, [GC], no. 71409/10, §§ 120, 9 November 2018 and the case-law cited therein).

71. In doing so the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1. Those minimum rights guaranteed by Article 6 § 3 – such as for example, the right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, which is one of the fundamental features of a fair trial – are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (ibid. §§ 122-123).

72. Particularly relevant to the present case, the Court observes that in the recent *Beuze* judgment, the Grand Chamber departed from the approach taken in previous cases that systematic restrictions on the right of access to a lawyer led, *ab initio*, to a violation of the Convention (see, in particular, *Dayanan v. Turkey*, no. 7377/03, § 33, 13 October 2009, *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010, and *Borg*, cited above, § 62). In *Beuze*, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as

well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them.

73. It follows from the above that, while there is no doubt that G.R.E.'s initial statements were made in the absence of a lawyer, it cannot be said that such circumstances automatically led to G.R.E having had an unfair trial. Indeed the domestic court found that it did not, and the Court is not called upon to re-examine the domestic court's findings in that case. Further, the Court notes that those statements were not taken in breach of domestic law, since at the time such circumstances were lawful. Therefore, the situation pertaining to the present case is one concerning solely the domestic courts' use, in the applicant's case, of statements made by a third party without the assistance of a lawyer. Thus, the Court is called on to assess whether the use in criminal proceedings of evidence obtained from third parties, in such circumstances, rendered the proceedings of another individual (in the present case the applicant) unfair.

74. Having already held in the preceding paragraph that the evidence obtained was not unlawful nor in breach of any Convention provision, in determining whether the proceedings as a whole were fair, regard must be had to other factors (see paragraph 65 above).

75. As to whether the rights of defence were respected, the Court notes that the applicant had all the opportunity to challenge G.R.E.'s statements in adversarial proceedings (see, *mutatis mutandis*, *Khan*, cited above, § 35), and he did cross-examine the witness in front of the jurors. Further, he did not object to the distribution to the jurors of the statements by G.R.E.

76. As to the quality of that evidence, as noted above, it has not been shown that G.R.E. had been pressured into giving his statement, therefore it has not been established that he had not given his statements "freely"(compare, *Perliński,* cited above, § 38 and *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, § 210, 26 July 2011). On the contrary, the Court notes that the statement given by G.R.E. to the police on 12 August 2003 corresponded to the statement given before the magistrate the day after, on 13 August 2003. Such circumstances lend some credence to their reliability or accuracy, despite the fact that such statements were later retracted. It is true that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's testimony given at the trial hearing than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise (ibid. § 211). When dealing with complaints concerning this issue, 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 (ibid.). However, the Convention does not require jurors to give reasons for their decisions (see *Moreira Ferreira v. Portugal (no. 2)* [GC],

no. 19867/12, § 84, 11 July 2017) and, in so far as relevant in the present case, as noted in the preceding paragraph the applicant's objections, if any, were limited.

77. Additionally, the statements made by G.R.E. before the trial, to which the jury decided to give a greater evidential value as opposed to his later statements, were supported by other material in favour of the applicant's conviction. In particular, in its judgment the Court of Criminal Appeal also relied on the testimony of V.S. given during the proceedings and that of the applicant himself. It also explained in detail how the testimony of each witness corroborated that of the other (see paragraphs 26-27 above). The Court reiterates that a higher degree of scrutiny should be applied to assessment of statements by co-defendants, because the position in which co-defendants find themselves when testifying is different from that of ordinary witnesses (see *Pichugin v. Russia,* no. 38623/03, § 199, 23 October 2012). The same can be said to apply to accomplices tried in different proceedings. Thus, while it is true that the testimony of G.R.E. and V.S. as accomplices had to be approached with caution, the Constitutional Court considered that the trial judge had explained the law to the jurors and he had stated in clear terms that the prosecution's request to find guilt on the basis of G.R.E.'s sworn statement was legally correct whilst factually it depended on whether the jurors accepted that statement as the truth. In the Constitutional Court's view the judge had been careful not to influence the jurors, and, the Court of Criminal Appeal had already rejected the applicant's grievance (see paragraph 46 above). As to V.S., the Court notes that the applicant had not taken issue with that testimony neither during the criminal proceedings nor during the constitutional redress proceedings, and there is nothing in the case-file which could lead the Court to consider that the testimony given by V.S. – the crux of which referred to the identification of the applicant as Mark Stephens – had not been considered with caution.

78. In view of all the above the Court is persuaded that the criminal proceedings against the applicant were "fair" as a whole and that, therefore, there has been no violation of Article 6 § 1 in the present case.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 14 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Paul Lemmens President