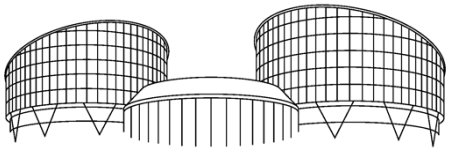

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MIRČETIĆ v. CROATIA

(Application no. 30669/15)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Defence in person • Applicant's absence from the session of the appeal panel in the criminal proceedings against him

STRASBOURG

22 April 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mirčetić v. Croatia,

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

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*

and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 30669/15) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Đorđe Mirčetić ("the applicant"), on 18 June 2015;

the decision to give notice to the Croatian Government ("the Government") of the complaint under Article 6 §§ 1 and 3 (c) of the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 16 March 2021,

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

INTRODUCTION

1. The case concerns the applicant's complaint, under Article 6 §§ 1 and 3 (c) of the Convention, that in the criminal proceedings against him he was not given an opportunity to be present at the session of the appeal panel.

THE FACTS

2. The applicant was born in 1948 and lives in Zagreb. He was represented by Mr Č. Prodanović, a lawyer practising in Zagreb.

3. The Government were represented by their Agent, Ms Š. Stažnik.

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

5. On 4 July 2011 the Zagreb County State Attorney's Office (*Županijsko državno odvjetništvo u Zagrebu*) indicted the applicant in the Zagreb County Court (*Županijski sud u Zagrebu*) on charges of rape.

6. On 29 November 2011 the Zagreb County Court found the applicant guilty as charged and sentenced him to four years' imprisonment. The court found the applicant's version of events unconvincing and based the conviction mainly on the victim's testimony.

7. On 19 December 2011 the applicant lodged an appeal against the judgment of the Zagreb County Court with the Supreme Court (*Vrhovni sud Republike Hrvatske*), challenging the factual and legal grounds for his conviction and sentence. He submitted that he had not committed the criminal offence for which he had been convicted, that the first-instance court had wrongfully assessed the evidence and that a wrong conclusion had been drawn from the established facts.

8. In particular, he argued that the victim's testimony, on which his conviction had been based, had been illogical, incoherent and unreliable. In that regard, the applicant pointed out to the fact that the victim's statement given during the pre-trial investigation differed from her statement given during the trial. He complained that the trial court had failed to call a defence witness he had asked to be called. Lastly, he noted that the first-instance court unduly took the inappropriate defamation and moral disqualification of the victim as aggravating circumstance given that his intention had not been to disqualify or degrade the injured party. Thus, according to him, the sentence imposed on him had been too severe. The applicant asked to be acquitted or that a less severe sentence be imposed on him in case the appeal court decided to uphold his conviction. Alternatively, the applicant asked the appeal court to quash the first-instance judgment and remit the case to the lower court. Subsequently, after the time-limit for lodging an appeal had expired, he asked for his lawyer to be invited to the session of the appeal panel.

9. During the appeal proceedings the case file was forwarded to the State Attorney's Office of the Republic of Croatia (*Državno odvjetništvo Republike Hrvatske*), which submitted a reasoned opinion to the Zagreb County Court, calling for the dismissal of the appeal.

10. On 24 June 2014 the Supreme Court held a session without informing the applicant or his lawyer of it. On the same day it adopted a judgment in which it upheld the applicant's conviction, but it did so under the new, more lenient Criminal Code, and sentenced him to two and a half years' imprisonment. The Supreme Court also discounted the period spent in police custody (between 28 November 2010 and 29 November 2010) from the custodial sentence imposed. It appears therefore that at the time the session of the appeal panel took place, the applicant was not either in pre-trial detention or serving a sentence. The Supreme Court did not provide any reasons as to why neither the applicant nor his lawyer had been invited to attend the session.

11. On 30 January 2015 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), arguing, *inter alia*, that he had not been given an opportunity to be present at the session of the appeal panel.

12. On 31 March 2015 the Constitutional Court declared the applicant's constitutional complaint inadmissible as manifestly ill-founded.

13. The decision of the Constitutional Court was served on the applicant's representative on 24 April 2015.

RELEVANT LEGAL FRAMEWORK

14. The relevant domestic law in force at the material time, concerning the presence of an applicant at a session of an appeal panel, is set out in *Romić and Others v. Croatia* (nos. 22238/13 and 6 others, §§ 65 and 66, 14 May 2020, with further references).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

15. The applicant complained that he had not had a fair trial. He alleged in particular that the session of the appeal panel had been held in his absence.

16. The applicant relied on Article 6 §§ 1 and 3 (c) of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ..."

A. Admissibility

17. The Court notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) and 4 of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

18. The applicant submitted that his presence at the session of the appeal panel had been necessary because his conviction had been based solely on evidence given by the victim, whose reliability had been questionable (see paragraphs 6 and 8 above). He should have been allowed to attend the session in order to be able to clarify the relevant facts.

19. The Government argued that the applicant had waived his right to attend the session of the appeal panel by failing to ask in his appeal to be invited to attend the session (see paragraph 8 above). However, the Government contended that even in the absence of a defendant's request in that regard, under the relevant domestic law and practice in situations such as that in the applicant's case, the appellate court would have the discretion to decide whether it was useful for the clarification of the case to invite a defendant to be present at the session. In this connection, the Government argued that the appellate court had correctly held that there had been no reason for the applicant to attend the session because he had been heard during the trial, and had been given the opportunity to participate effectively in the first-instance proceedings.

20. The Government also submitted that the applicant's absence from the session of the appeal panel had not affected the fairness of the criminal proceedings against him, given that the prosecution had also not been invited to attend the session. In addition, the prosecution had not appealed against the first-instance judgment and the hierarchically higher State Attorney's Office had not asked in its reasoned opinion for a more severe sentence to be imposed on him. Moreover, the applicant's sentence had been reduced on appeal.

21. Lastly, the Government argued that the present case should be distinguished from *Zahirović v. Croatia* (no. 58590/11, 25 April 2013), in that the appellate court in the present case had not been called upon to assess the applicant's personality or character, given that he had not raised such issues in his appeal. In this connection they also relied on *Kamasinski v. Austria* (19 December 1989, Series A no. 168).

2. The Court's assessment

22. The Court notes that the fact that violations of Article 6 §§ 1 and 3 (c) have repeatedly been found in cases against Croatia originated in a situation where, under the relevant domestic law and practice applicable at the time, the appellate courts did not notify defendants about a forthcoming session of the appeal panel if they were in detention and had a lawyer, or if in summary proceedings they had received a fine or a suspended sentence (see *Zahirović*, cited above, §§ 54-64, 25 April 2013; *Lonić v. Croatia,* no. 8067/12, §§ 90-102, 4 December 2014; *Arps v. Croatia*, no. 23444/12, §§ 24-29, 25 October 2016; *Bosak and Others v. Croatia*, nos. 40429/14 and 3 others, §§ 105-09, 6 June 2019; and *Romić and Others v. Croatia*, nos. 22238/13 and 6 others, § 102, 14 May 2020).

23. In the present case the applicant received a prison sentence but it appears that at the time that the session of the appeal panel took place he was not in pre-trial detention or serving a sentence (see paragraph 10 above). Accordingly, the present case does not fall within one of the situations in which the courts would not have ensured the applicant's

presence at the session regardless of whether the applicant had asked to be present (see paragraph 14 above, with reference to Article 374 § 2 of the 1997 Code of Criminal Procedure, and contrast *Zahirović*, cited above, § 61; *Lonić*, cited above, § 97; and *Bosak and Others,* cited above, § 108).

24. The Court observes that the applicant did not ask in his appeal to be invited to the session of the appeal panel and it was not until later that he asked that his lawyer be present (see paragraph 8 above). However, as the Government pointed out, under the domestic law in force at the material time, the appellate court could have invited the defendant to attend the session even in the absence of such a request if it considered that the defendant's presence would be useful for the clarification of the case (see paragraph 14 above, and Article 374 § 1 of the 1997 Code of Criminal Procedure). Furthermore, there is nothing in the case file to lead to the conclusion that the failure to invite the applicant to attend the session of the appeal panel was motivated by the fact that he had failed to submit a (timely) request (see paragraph 10 above). In these circumstances, the Court finds that the fact that the applicant did not ask to attend the session cannot be held against him (compare *Kremzow v. Austria*, 21 September 1993, § 68, Series A no. 268-B, and *Pobornikoff v. Austria*, no. 28501/95, § 32, 3 October 2000 and contrast *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII; *Murtazaliyeva v. Russia* [GC], no. 36658/05, §§ 117, 118 and 127, 18 December 2018; and *Lamatic v. Romania*, no. 55859/15, §§ 48 and 62, 1 December 2020).

25. The Court observes that, under the Croatian legal system, the appeal court had competence to examine points of both fact and law and to conduct a full review of the assessment of the accused's guilt or innocence. It could uphold, quash or reverse the first-instance judgment and increase or decrease the sentence imposed by the trial court (see paragraph 14 above). In this connection the Court refers to its case-law cited in *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, § 33, 16 July 2019. The Court further observes that the applicant was convicted of rape (see paragraph 6 above) and therefore the re-examination of the conviction on appeal was of particular importance for him (see *Sergey Timofeyev v. Russia*, no. 12111/04, § 80, 2 September 2010).

26. Moreover, in his appeal the applicant denied the commission of the impugned offence and contested his conviction and sentence on both factual and legal grounds (see paragraphs 7 and 8 above). He submitted, in particular, that the victim's testimony, on which the first-instance court based his conviction, had been illogical, incoherent and unreliable because the statement she had given during the pre-trial investigation differed from her statement given in the course of the trial. He also complained that the trial court had failed to call a defence witness he had asked to be called. The Court considers that these arguments indicate that the applicant wanted to

obtain a review of both the admissibility and reliability of the evidence obtained and of the facts established by the first-instance court.

27. Furthermore, the applicant also complained that the first-instance court had imposed a too severe sentence on him by wrongly holding that he had defamed and morally disqualified the victim, while according to him, that had not been his intention. The applicant asked the appeal court to reverse the first-instance judgment and acquit him or to reduce his sentence in case his conviction would be upheld. Alternatively, he asked the appeal court to quash his conviction; the prosecutor asked it to uphold the applicant's conviction. The appellate court was therefore called upon to make a full assessment of his guilt or innocence in respect of the charges against him, in the light of not only the arguments that he had raised before the first-instance court, but also of those concerning the alleged failures of that court to establish all the relevant facts and to apply the relevant substantive and procedural rules correctly (see *Bosak and Others*, cited above, § 106; compare *Abdulgadirov v. Azerbaijan*, no. 24510/06, § 42, 20 June 2013, and *Kozlitin v. Russia*, no. 17092/04, § 63, 14 November 2013; and contrast *Fejde v. Sweden*, 29 October 1991, § 33, Series A no. 212-C, and *Hermi*, cited above, § 85). However, contrary to the requirements of the above-mentioned case-law, the appellate court held the session without the applicant being present (see paragraph 10 above).

28. In the case of *Lonić* (cited above, § 100), the Court considered it irrelevant that the appeal against the first-instance judgment had been lodged only by the applicant, or that the appellate court amended the first-instance judgment in a manner and to an extent favourable to the applicant. In the Court's view, that had not affected the principal question brought before the second-instance court, namely whether the applicant was guilty or innocent, an issue which, in order for the trial to be fair, had required the applicant's presence at the session of the appeal panel. For the same reason the Court dismisses the Government's arguments put forward in paragraph 19 above.

29. Accordingly, having regard to the above considerations, the Court finds that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on the grounds of the applicant's absence from the session of the appeal panel in the criminal proceedings against him.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

31. The applicant claimed 12,800 euros (EUR) in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage.

32. The Government contested those claims, deeming them excessive, unfounded and unsubstantiated.

33. The Court does not discern any causal link between the violation found and the pecuniary damage alleged by the applicant; it therefore rejects this claim. On the other hand, the Court finds that the applicant must have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis and in view of the relative gravity of the violation, the Court awards him EUR 1,500, plus any tax that may be chargeable to him.

B. Costs and expenses

34. The applicant also claimed EUR 3,900 for the costs and expenses incurred before the domestic courts and before the Court.

35. The Government submitted that the claim for expenses was excessive and had been lodged without any supporting documents, and so should be rejected.

36. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the applicant EUR 845 in respect of the costs and expenses incurred before the domestic courts, and EUR 845 in respect of those incurred before the Court, plus any tax that may be chargeable to him.

C. Default interest

37. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the applicant's absence from the session of the appeal panel;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance

with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,690 (one thousand six hundred and ninety euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 April 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Krzysztof Wojtyczek
President