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

THIRD SECTION

CASE OF P.S. v. GERMANY

(Application no. 33900/96)

JUDGMENT

STRASBOURG

20 December 2001

FINAL

04/09/2002

This judgment will become final in the circumstances set out in Article 44 § 2.

In the case of P.S. v. Germany,

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

Mr I. CABRAL BARRETO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 29 November 2001,

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

PROCEDURE

1. The case originated in an application (no. 33900/96) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, P.S. ("the applicant"), on 9 July 1996.

2. The German Government ("the Government") were represented by their Agent, Mr Stoltenberg, *Ministerialdirigent*. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court). Moreover, the applicant was, exceptionally, granted leave to represent himself (Rule 36).

3. Relying on Article 6 § 3(d) of the Convention, the applicant alleged that he had been convicted on the basis of statements made by a witness whom he had never been given an opportunity to examine or to have examined.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 6 June 2000, the Chamber declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). The case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. In the late evening of 29 April 1993, the father of S., born in 1985, laid a criminal information against the applicant, alleging that the applicant, her private music teacher, had sexually abused S. during an individual music lesson that afternoon. S. and her mother were questioned at the local police office on the afternoon of 30 April 1993. S. was heard by a police officer and confirmed her father's statements. S.'s mother stated that S. had been very disturbed after her music lesson and that she had later confided in her mother.

9. On 10 January 1994 the Künzelsau District Court, sitting with a single judge, convicted the applicant of having committed the offence of sexual abuse of a child in concurrence with the offence of sexual abuse of a charge. He was sentenced to seven months' imprisonment on probation.

In establishing the relevant facts, the court relied on the statements made by the mother concerning her daughter's account of the relevant events, her behaviour after the music lesson on 29 April 1993 and her character in general, and also on the evidence given by the police officer who had questioned S. shortly after the offence in April 1993.

The court dismissed the applicant's request for a psychological expert opinion regarding the credibility of S.'s statements on the ground of the court's own professional experience, acquired as a judge in family matters, in evaluating statements made by children.

Moreover, the court observed that it had not been reasonable to hear S. herself, as, according to her mother, she had meanwhile repressed her recollection of the event in question and would seriously suffer if reminded thereof. If S. were to be examined, this would not contribute to a further clarification of the facts, but seriously impair her personal development.

10. The applicant appealed to the Heilbronn Regional Court, requesting his acquittal. In the appeal proceedings, he was assisted by counsel.

11. On 17 March 1995 the Heilbronn Regional Court dismissed the applicant's appeal against his conviction of sexual abuse of a child, but set aside the conviction of sexual abuse of a charge. The sentence to seven months' imprisonment on probation was upheld.

The Regional Court noted that the applicant had denied having sexually abused S. It found that his guilt could be established on the basis of the evidence before it, i.e. the statements made by S.'s mother and the police officer as well as a psychological expert opinion on the question of S.'s credibility, ordered in the context of the appeal proceedings. In her report of November 1994, the expert, who had questioned S. in October 1994, confirmed that S.'s statements were credible.

The Regional Court considered that the absence of S.'s testimony in court constituted a serious shortcoming in the taking of evidence. In this respect, it noted that the parents had refused to bring their daughter to court on account of the risk that her state of health would deteriorate as she suffered from neurodermatitis. According to the Regional Court, the parents' refusal was understandable. In this respect, the Regional Court had regard to a medical certificate confirming the parents' statements and the findings of the psychological expert that S.'s state of health would most likely deteriorate again if she were to be heard anew on the event in question. Taking into account that S.'s statements had been reported by her mother and by the police officer and that an expert opinion on her credibility had been prepared, the Regional Court, considering the rather trivial nature of the charge and the sentence at stake, reached the conclusion that S. was to be regarded as a witness out of reach.

12. On 2 August 1995 the Stuttgart Court of Appeal dismissed the applicant's appeal on points of law.

13. On 18 January 1996 the Federal Constitutional Court refused to entertain the applicant's constitutional complaint, leaving open the question whether the complaint had been lodged in time.

II. RELEVANT DOMESTIC LAW

14. The conduct of trial proceedings is governed by sections 226 to 275 of the Code of Criminal Procedure (*Strafprozessordnung*).

15. As regards the taking of evidence, section 244(2) provides that the court shall, *proprio motu*, extend the taking of evidence to all facts and evidence important for the decision in order to determine the truth.

A request for the taking of evidence may be refused under the statutory conditions of section 244(3) to (6). Pursuant to section 244(3), second sentence, an application may, *inter alia*, be refused if the evidence is unavailable.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained that he could not put questions to the child S., the main prosecution witness. He invoked Article 6 § 3 (d) of the Convention according to which

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (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;
>
> ..."

17. The applicant considered that questioning S. in court would have been important for establishing the truth.

18. The respondent Government maintained that in the overall circumstances the requirements of a fair hearing were met. In particular, the courts used statements, made by the mother and by the police officer conducting the criminal investigation, on the events of 29 April 1993, and also the mother's statements as a witness to the child's agitated state. The decision not to interrogate the child in court was based on the fear of damage to her health as a result of emotional stress, as indicated in a medical certificate. Moreover, the Regional Court had regard to an expert's opinion on her psychological examination of the child. The applicant had sufficient opportunity to comment on these statements and did not, in the appeal proceedings, request that the child be interrogated in court. According to the Government, the child did not have to be examined by a psychological expert at the earliest possible stage of the proceedings.

19. The Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and that as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling on whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see the Doorson v. the Netherlands judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67; and the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 50).

20. This being the basic issue, and also because the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 (see, amongst many other authorities, the Van

Mechelen and Others judgment cited above, p. 711, § 49), the Court will consider the applicant's complaints from the angle of paragraphs 3 (d) and 1 taken together.

21. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see the Van Mechelen and Others judgment cited above, p. 711, § 51; and the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

22. In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention (see the Doorson judgment cited above, p. 470, § 70).

23. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*ibid*., p. 471, § 72).

24. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see the van Mechelen and Others judgment cited above, p. 712, § 55; the Doorson judgment cited above, p. 472, § 76; and the Windisch v. Austria judgment of 27 September 1990, Series A no. 186, p. 11, § 31).

Accordingly, the Court has held in a previous case that there was a violation of Article 6 § 1, taken together with Article 6 § 3 (d), noting that "in convicting the applicant in the instant case [of a sexual offence on a minor] the domestic courts relied solely on the statements made in the United States before trial and that the applicant was at no stage in the proceedings confronted with his accusers" (see the A.M. v. Italy judgment, no. 37019/97, 14 December 1999, §§ 26, 28).

25. In the present case, the applicant was convicted of having sexually abused S., an eight-year-old girl.

26. The Court notes that at no stage of the proceedings has S. been questioned by a judge, nor did the applicant have any opportunity of observing the demeanour of this witness under direct questioning, and thus from testing her reliability (see the Kostovski v. the Netherlands judgment of 20 November 1989, Series A no. 166, p. 20, § 42 *in fine*; and the Windisch judgment cited above, p. 11, § 29).

27. At first instance, the District Court, in its decision of 10 January 1994, relied on the statements made by S.'s mother, who had given evidence concerning her daughter's account of the events and her behaviour on 29 April 1993 as well as her character in general, and of the police officer who had questioned the girl shortly after the offence in April 1993.

The District Court decided not to hear S. in order to protect her personal development as, according to her mother, she had meanwhile repressed her recollection of the event and would seriously suffer if reminded thereof.

28. Organising criminal proceedings in such a way as to protect the interests of juvenile witnesses, in particular in trial proceedings involving sexual offences, is a relevant consideration, to be taken into account for the purposes of Article 6. However, the reasons given by the District Court, in its judgment of 10 January 1994, for refusing to question S. and dismissing the applicant's request for an expert opinion are rather vague and speculative and do not, therefore, appear relevant.

29. The Regional Court, aware of the shortcomings in the taking of evidence, ordered a psychological expert opinion on S.'s credibility which was eventually prepared in October 1994, i.e. one and a half years after the relevant events. The girl was again not heard in court on account of her parents' refusal, which was motivated by the possible risk to her health. In addition to the evidence available at first instance, the Regional Court had at its disposal an expert opinion on S.'s credibility. However, considering the delay of about eighteen months between the event in question and the preparation of this opinion, the Court finds that in the present circumstances, the procedure followed by the judicial authorities cannot be considered as having enabled the defence to challenge the evidence of S., reported in court by third persons, one of them a close relative.

30. Finally, the information given by the girl was the only direct evidence of the offence in question and the domestic courts based their finding of the applicant's guilt to a decisive extent on S.'s statements.

In this respect, the present case is similar to the one of A.M. v. Italy referred to above and differs from previous decisions where the Court was satisfied that criminal proceedings concerning sexual offences, taken as a whole, were fair, as the convictions were either entirely based on evidence other than the statements of the victim (cf. no. 36686/97, Dec. 12 January 1999), or not solely based on the statements of the victims (no. 35253/97, Dec. 31 August 1999).

31. In these circumstances, the use of this evidence involved such limitations on the rights of the defence that the applicant cannot be said to have received a fair trial.

32. There has thus been a violation of paragraph 3 (d), taken in conjunction with paragraph 1, of Article 6 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Under Article 41 of the Convention,

> "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."

34. The applicant did not file any claims for just satisfaction under Article 41. The Court, for its part, sees no ground for examining this question of its own motion (see, *mutatis mutandis*, the Nasri v. France judgment of 13 July 1995, Series A no. 320-B, p. 26, § 49).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been a violation of paragraph 3 (d), taken in conjunction with paragraph 1, of Article 6 of the Convention.

Done in English, and notified in writing on 20 December 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President