**REPUBLIKA SLOVENIJA**
**USTAVNO SODIŠČE**

Case No.: Up-124/04-20
Date: 9 November 2006

# D E C I S I O N

At a session held on 9 November 2006 in proceedings to decide upon the constitutional complaint of A. A., of Ž., represented by law firm B., o. p., d. n. o., V., the Constitutional Court

d e c i d e d a s f o l l o w s:

the constitutional complaint against Supreme Court Judgment No. I Ips 64/2003 of 13 November 2003 in conjunction with Ljubljana Higher Court Judgment No. I Kp 736/2002 of 18 September 2002 and Ljubljana Local Court Judgment No. II K 723/2000 of 29 March 2002 is dismissed.

## R e a s o n i n g

### A.

1. The complainant was found guilty by the Local Court judgment of the criminal offence of fraud determined in the first paragraph of Article 217 of the Penal Code (Official Gazette RS, No. 63/94 et sub. – hereinafter referred to as KZ). The court sentenced him to seven months' imprisonment. The judgment was pronounced after the main hearing had been conducted, which the complainant failed to attend. He filed an appeal against the Local Court judgment, which the Higher Court dismissed. The Supreme Court dismissed a request for the protection of legality.
2. According to the complainant, his right to be present at trial determined in the second indent of Article 29 of the Constitution was violated due to the fact that the

main hearing was conducted in his absence. He is convinced that one of the conditions determined for trial *in absentia*, determined in Article 442 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 et sub. – hereinafter referred to as ZKP), was not fulfilled. He states that he was indeed duly summoned and did not appear at the hearing, however, the court allegedly erroneously concluded that he had already been examined and that his presence was not necessary. In addition, he states that he was examined in the investigation and not at the main hearing, which in his opinion is inconsistent with Article 442 of ZKP, which must be interpreted in a restrictive manner. In accordance with such interpretation, the exception from the right to be present at trial can allegedly only be applied in cases in which a defendant was examined after a charging instrument was served on him, thus after he was fully informed of a charge. With regard to the question of the right to be present at trial, i.e. the obligation to be examined at the main hearing, in the challenged judgment the Supreme Court allegedly adopted a standpoint according to which the rights guaranteed to defendants by the Constitution and ZKP in the part which determines the rules for a regular procedure do not need to be respected in a summary procedure, which entails an exception. By such standpoint the Supreme Court allegedly violated the complainant's right to the equal protection of rights determined in Article 22 of the Constitution, as in the complainant's opinion every limitation of the right to a defense is inadmissible and thus he must be guaranteed the right to be present at trail also in proceedings before a local court.

3. Moreover, the complainant alleges that his right to examine witnesses in the investigation, as he is guaranteed by the third paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, IT, No. 7/94 – hereinafter referred to as the Convention), was violated. The complainant was allegedly not informed of the examination of the witnesses during the investigation. In addition, he draws attention to the fact that the standpoint of the Supreme Court according to which the possible error of an investigating judge was remedied by summoning the complainant to the main hearing was erroneous.

4. On 31 August 2006, the Constitutional Court received the complainant's supplementation to the constitutional complaint in which he alleges that the court considered only the statements of the witnesses and the injured party and not also the evidence that he had produced. In this regard, he argues at great length against the individual items of incriminating evidence and challenges their credibility. By the aforementioned treatment his right to present all evidence to his benefit determined in the third indent of Article 29 of the Constitution, Article 29 of the Constitution, which guarantees a defendant absolute equality in criminal proceedings, and the principle of a state governed by the rule of law determined in Article 2 of the Constitution, were allegedly violated.

5. On 29 May 2006 the panel of the Constitutional Court accepted the constitutional complaint for consideration. In accordance with Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as ZUstS), the Constitutional Court sent the constitutional complaint to the Supreme Court, which did not reply thereto.

6. The Constitutional Court inspected the court file of the case in which the challenged decisions were issued.

B. – I.

7. The complainant alleges that his right to be present at trial determined in the second indent of Article 29 of the Constitution was violated, as one of the conditions required by Article 442 of ZKP for trial *in absentia* in the summary procedure was not fulfilled. In connection with this, the Constitutional Court points out that the Constitutional Court is not an instance which would review the correct application of procedural law as such. The possible violation of procedural law can be relevant to the decision on a constitutional complaint only inasmuch as it also entails the violation of a human right or fundamental freedom.

8. The second indent of Article 29 of the Constitution guarantees anyone charged with a criminal offence the right to be present at trial. Placing this right within the framework of Article 29 of the Constitution indicates the special meaning which the constitution framer intended for the discussed right as one of the fundamental legal guarantees of a defendant in criminal proceedings. This right is guaranteed to the defendant also by indent e) of the second paragraph of Article 14 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71 and Official Gazette RS, No. 14/92 – hereinafter referred to as the Covenant). In contrast to the Covenant, the Convention does not expressly mention the right to be present at trial, which nevertheless does not entail that the Convention does not recognize such. The European Court of Human Rights (hereinafter referred to as the Court) decided in the case Colozza v. Italy[1] that the object and purpose of Article 6 of the Convention show that a person charged with a criminal offence is entitled to take part in the hearing, as otherwise he could not exercise the rights provided by Article 6 of the Convention. Consequently, in accordance with the established case-law of the Court, the right to be present at trial must be understood as an integral part of the guarantees which are provided by Article 6 of the Convention.

9. The essence of the complainant's allegation is that he should have been examined also at the main hearing and not only in the investigation. In the complainant's opinion, the examination in the investigation stage cannot be sufficient grounds for him to be tried *in absentia*. In the investigation he was allegedly not informed of the charge, and as such could not answer it. In the complainant's opinion, the interpretation as adopted by the challenged judgments can lead to a situation in which a defendant is examined in the investigation on the suspicion that he committed a certain criminal offence, while subsequently a prosecutor files a charging instrument regarding a completely different criminal offence. If subsequently the defendant is tried *in absentia*, he does not have the possibility to defend himself.

[1] Judgment No. A 89 of 12 February 1985, paragraph 27 of the judgment.

10. In the challenged judgment regarding the above-mentioned issue, the Supreme Court adopted the standpoint according to which it is not important at which stage the defendant is examined, however, he must be examined in a manner as is determined by ZKP, and, in addition, the earlier examination must refer to the same charge. In the concrete case the Supreme Court determined that the offence due to which the investigation was initiated against the complainant was completely identical to the offence which is the subject of the charge. The complainant was thus informed of everything that incriminated him, he was served with the charging instrument, he was duly served a summons to the main hearing, whereby he was instructed that the main hearing may be conducted in his absence, and he did not excuse his absence. Moreover, the Supreme Court established that as regards the factual circumstances and the course of events at the main hearing, the order of the Local Court that the complainant's presence at the main hearing was not necessary, was correct.

11. The fundamental question in this constitutional complaint is thus focused on whether it is admissible from the viewpoint of the right to be present at trial, as determined in the second indent of Article 29 of the Constitution, that a defendant is tried *in absentia* even though he has not (yet) been examined at the main hearing but only in the investigation.

12. The fact that a court conducts a main hearing *in absentia* of a defendant is by itself not inconsistent with the right to be present at trial determined in Article 29 of the Constitution. In certain cases the absolute prohibition against holding a trial *in absentia* would make it impossible to conduct criminal proceedings and would lead to the disappearance of evidence as well as to the expiration of statutes of limitation.[2] However, a trial *in absentia* may only be allowed under strict conditions. One[3] such condition is that by conducting a trial *in absentia*, a defendant is not deprived of the right to answer the charge against him which follows from Article 22 of the Constitution in conjunction with the right to a defense determined in Article 29 of the Constitution. Therefore, a trial *in absentia* is not admissible if the defendant was not given the opportunity to be heard after he had been informed of the charge brought against him, such that he had the opportunity to answer such charge.

13. A defendant who is examined in the investigation is informed of the charge, as contained in the request for an investigation, prior to the examination. Such is enclosed with the summons to the examination. Prior to the examination, the defendant is informed of his rights. The examination of the defendant in the investigation, as regulated by Articles 227 and 228 of ZKP, is in terms of content

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[2] The same was the reasoning of the Court in the above-mentioned case Colozza V. Italy**.** A comparative overview shows that a majority of the regulations of criminal procedures do indeed recognize the central importance to the right to be present at trial, however, under certain conditions they simultaneously allow the trial of a defendant *in absentia*. Such trial is allowed according to the statutory regulation of Austrian, Belgian, Finnish, French, German, Dutch, Norwegian, and Swedish criminal procedure. A trial *in absentia* is exceptionally allowed also in the legal systems of England and Wales, which are traditionally unfavorable to such (Judgment of the House of Lords in the case Regina v. Jones of 20 February 2002, (2002) UKHL 5). The only comparative legal system which does not allow such trial under any circumstance is the Scottish.

[3] In the present decision the Constitutional Court does not discuss other conditions which follow from the right to be present at trial determined in the second indent of Article 29 of the Constitution, because the constitutional complaint does not address them directly.

completely identical to the examination of the defendant in the main hearing, as determined by Articles 323 and 324 of ZKP. After the investigation is completed a prosecutor may file a charging instrument against the defendant. In accordance with the right to a defense determined in Article 29 of the Constitution, the defendant must be given the opportunity to be examined regarding the charge at the main hearing also in cases in which the charge is exactly the same as contained in the request for an investigation. On the basis of the materials collected in the investigation and on the basis of other facts and evidence which he is informed of in the course of criminal proceedings, the defendant may decide to supplement his defense or otherwise adapt such to the collected procedural materials. However, if the charge in the charging instrument refers to a different offence, as described in the request for an investigation, the court must, prior to deciding on the charge, ensure that the defendant is present at the main hearing and examine him, except if the defendant decides not to defend himself. Otherwise, not only the right to be present at trial determined in the second indent of Article 29 of the Constitution, but also the right to answer the charge as follows from Article 22 of the Constitution in conjunction with the right to a defense determined in Article 29 of the Constitution, are violated.

14. After inspecting the case file, the Constitutional Court established that the request for an investigation, which was filed on 9 July 1999, as well as the indictment, which was filed on 4 February 2000, both refer to the same criminal offence. Regardless of some differences in the wording, both charge the complainant with misleading the injured party with the intent to acquire substantial illicit material gain by means of a deceitful presentation of factual circumstances in a manner such that she concluded a fictitious contract with him by which he indemnified her in the amount of 4,691,500 SIT. Both acts describe the complainant's conduct and the circumstances of the offence in a manner such that they are logically the same. In the request for an investigation the subject of the allegation was legally classified as a graded criminal offence of fraud as determined in the second paragraph of Article 217 of KZ, whereas in the indictment it was classified as an attempt at the aforementioned criminal offence. The complainant filed an objection against the indictment which was dismissed by the order of the pre-trial chamber of the District Court in Ljubljana on 7 July 2000. Simultaneously, the pre-trial chamber established that the offence contained in the charge was erroneously legally classified, as the alleged amount involved at the time of the offence minor and not substantial material gain, that the offence should be classified as the criminal offence of attempted fraud as determined in the first paragraph of Article 217 of KZ in conjunction with Article 22 of KZ, and that the court file, after the order becomes final, should be transferred to the Local Court in Ljubljana, which has subject-matter and territorial jurisdiction in the case. At the main hearing held on 29 March 2002 the District State Prosecutor modified the charging instrument, which until then had still been termed an indictment in a manner such that she termed it an information, reclassified the offence as the completed criminal offence of fraud (and not an attempt) determined in the first paragraph of Article 217 of KZ, and modified some wording in the factual description of the criminal offence. Despite such modifications, the charge against

the complainant remained the same in terms of content as regards his conduct and the circumstances in which the offence was allegedly committed.[4]

15. On the basis of such relation between the request for the investigation on the basis of which the complainant was examined, the indictment which was filed after the investigation was completed, and the final information which resulted from the modification of the indictment in the main hearing, it can be determined that all three procedural acts involved the same alleged offence. That a different criminal offence was the subject of the main hearing and the investigation is not alleged even by the complainant, who merely in general draws attention to the fact that a prosecutor may file a charging instrument for a completely different criminal offence after the investigation is completed. Due to the fact that the charge against the complainant had not been modified in terms of content in the course of the individual stages of the criminal proceedings, and due to the fact that he had already been examined in the investigation, as regards the circumstances of the concrete case the court was not obliged to ensure that the complainant was present at the main hearing and (once again) examine him with regard to the alleged offence. Notwithstanding the aforementioned, in accordance with what was said in paragraph 13 of this reasoning, the court had a duty to enable the complainant to attend the main hearing and exercise his procedural rights, inter alia also the right to be examined by the court.

16. As regards the aforementioned, it follows from the court file of the discussed case that the Local Court ordered that the complainant be served a summons via post and by a court courier at the address of his residence, as well as at his work address (which was the same as the address of his residence). The summonses sent via the court courier were served on him on 4 February 2002, and the summons sent via mail on 6 February 2002. Thus, the court duly summoned the complainant to the main hearing, which he admitted in the constitutional complaint, however, he did not come to the main hearing. On 28 March 2002, thus directly before the main hearing, he sent a message to the court instead in which he stated that “he objects to the main hearing”. He substantiated his objection by stating that he did not know what the matter of the case was and that he had received four summonses to the main hearing that were all the same, and in which it was allegedly only written that he had committed a criminal offence according to the second paragraph of Article 217 of KZ, and nothing else. In his application he did not motion for the adjournment of the main hearing, neither did he state a reason which would substantiate such adjournment. Thus, the court gave the complainant the opportunity to attend the main hearing and be (once again) examined, however, the complainant did not take this opportunity and did not state an appropriate reason for such.

17. As regards the circumstances of the discussed case, the standpoint of the Supreme Court according to which the disputable main hearing could be conducted in the absence of the defendant, as he had already been examined in

[4] If a factual description contained in a charge was modified at the main hearing in a manner such that a certain legally relevant fact was modified, such can no longer be considered a charge for the same offence. In such case the court should adjourn the main hearing, serve the modified charging instrument on a defendant, and ensure his presence at the main hearing, where the court should examine him with regard to the modified charge (except if he declares that he will not present his defense) – logically the same as in Horvat, Š.: The Criminal Procedure Act with Commentary, GV Založba, Ljubljana 2004, pp. 949-950.

the investigation, is not inconsistent with the right to be present at trial determined in the second indent of Article 29 of the Constitution, or with the right to answer a charge, as follows from Article 22 of the Constitution in conjunction with the right to a defense determined in Article 29 of the Constitution.

18. With regard to the complainant's absence at the main hearing, the constitutional complaint furthermore challenges the standpoint of the Supreme Court in the challenged judgment according to which the rights guaranteed to defendants by the Constitution do not need to be respected in a summary procedure, which entails an exception. Such standpoint of the Supreme Court allegedly violates the complainant's right determined in Article 22 of the Constitution. The challenged standpoint could not be found in the Supreme Court judgment and therefore the complainant's allegation of the violation of his right to the equal protection of rights determined in Article 22 of the Constitution is not substantiated.

B. – II.

19. Furthermore, the complainant alleges that he was not summoned to the examination of the incriminating witnesses in the investigation. Item d) of the third paragraph of Article 6 of the Convention guarantees a defendant the right to examine incriminating witnesses. In Decision No. Up-719/03 of 9 March 2006 (Official Gazette RS, No. 30/06, and OdlUS XV, 41), the Constitutional Court decided that the violation of that right entails the violation of the right to a defense determined in Article 29 of the Constitution.

20. As follows from the leading judgment of the Court in the case Kostovski v. The Netherlands,[5] a defendant should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings. The Constitutional Court inspected the case file and determined that it did not follow from the file that the complainant was summoned to the examination of the witnesses in the investigation, and thus he could not question the witnesses or challenge their statements at the time the witnesses were making such statements. However, the same witnesses were once again examined at the main hearing, which the complainant did not attend, although he had been duly summoned.[6] In the new examination the witnesses generally repeated the statements they had made in the investigation. The complainant was thus given an adequate opportunity to question the incriminating witnesses, however, he did not take such opportunity, as he did not come to the main hearing. Therefore, his right determined in indent d) of the third paragraph of Article 6 of the Convention,

[5] Judgment No. A 166 of 20 November 1989.

[6] As follows from the established case-law of the Court (e.g. the judgment in the case Poitrimol v. France, No. A 277-A of 23 November 1993), no other rights of a defendant can be violated due to his absence. However, such prohibition only entails the prohibition on sanctioning the defendant in a manner such that he is prevented from exercising some other right, e.g. prohibiting his legal representative who has appropriate authorisation and did come to the trial from representing him. Such sanctioning must be distinguished from the situations in which the defendant due to his absence in fact cannot exercise a certain right, e.g. to question witnesses in the concrete case.

and thereby also his right to a defense determined in Article 29 of the Constitution, were not violated.

B. – III.

21. As regards the statements which the complainant alleged in the supplementation to the constitutional complaint, the Constitutional Court established that the complainant filed such only on 31 August 2005, thus substantially after the expiry of the 60 day time-limit determined by the first paragraph of Article 52 of ZUstS. Therefore, the alleged violation could not be reviewed by the Constitutional Court.

C.

22. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 of ZUstS, composed of: Dr. Janez Čebulj, President, and Judges Dr. Zvonko Fišer, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr. Ciril Ribičič, Dr. Mirjam Škrk, Jože Tratnik, and Dr. Dragica Wedam Lukić. The decision was reached by eight votes against one. Judge Ribičič submitted a dissenting opinion.

Dr. Janez Čebulj

President