



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

THIRD SECTION

CASE OF POTCOVĂ¹ v. ROMANIA

(Application no. 27945/07)

JUDGMENT

*This version was rectified on 11 April 2014
under Rule 81 of the Rules of Court.*

STRASBOURG

17 December 2013

FINAL

17/03/2014

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

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¹ Rectified on 11 April 2014: the text was “POTCOAVĂ”.

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In the case of Potcovă² v. Romania,

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

Josep Casadevall, *President*,

Alvina Gyulumyan,

Corneliu Bîrsan,

Ján Šikuta,

Luis López Guerra,

Nona Tsotsoria,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 26 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 27945/07) against Romania, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Ioan-Nicolet Potcovă³ ("the applicant"), on 20 June 2007.

2. The applicant was represented by Ms E. Albert, a lawyer practising in Târgu-Mureş. The Romanian Government ("the Government") were represented by their co-Agent, Ms I. Cambrea, of the Ministry of Foreign Affairs.

3. On 3 November 2011 the application was declared partly inadmissible and the complaint concerning the fairness of the criminal proceedings against the applicant was communicated to the Government.

THE FACTS

4. The applicant was born in 1969 and lives in Ungheni.

5. In the evening of 4 July 2002, at approximately 11 p.m., the applicant was apprehended by two police officers. They were seeking the perpetrator of several rapes committed in that area over the previous few months. As the applicant fitted the description given by the victims, he was body-searched and arrested.

² Rectified on 11 April 2014: the text was "Potcoavă".

³ Rectified on 11 April 2014: the text was "Ioan Nicolet Potcoavă".

6. According to the applicant, he was beaten up both on the way to the police headquarters and then all through the night, and forced to confess to crimes he had not committed. His criminal complaint to that effect, lodged on 14 August 2002, was eventually dismissed as unsubstantiated on 30 January 2007 by the High Court of Cassation and Justice.

7. On 5 July 2002 the applicant made three handwritten statements at the police headquarters. He was not assisted by counsel.

In the first statement he denied having committed the crimes. In the second and third statements he confessed to having committed three rapes, on 8 November 2001 and in February and April 2002, and two attempted rapes in May and June 2002, and stated that he had been planning similar deeds for 4 July 2002. He gave details of how he had approached, immobilised and abused the victims on each occasion.

On the same day he was taken to the prosecutor's office attached to the Mureş County Court where, in the presence of counsel, he reiterated his confession. According to the applicant, the police officers who accompanied him to the prosecutor's office threatened him with violence if he changed his statements before the prosecutor. A police officer was present during the questioning of the applicant in the prosecutor's office.

8. The applicant was examined by a panel of psychiatrists and forensic doctors. They concluded that at the time of the offences the applicant was accused of, he had been aware that what he was doing was wrong. They also concluded that he had a personality disorder which led to antisocial behaviour, and he was unable to control his instinctual impulses. On 5 August 2002 they submitted their report to the prosecutor.

9. On 18 December 2002 the prosecutor lodged the indictment with the Târgu Mureş District Court. Before the court, the applicant was represented by counsel. He retracted his previous confessions and reiterated that he had been beaten and threatened by police during the early questioning sessions. On 11 August 2003 the court convicted the applicant.

10. However, in a final decision of 17 October 2003 the Târgu Mureş Court of Appeal quashed the applicant's conviction and sent the case back to the prosecutor's office for further investigation. The court found that the rights of the defence had been breached in that the applicant had not been assisted by counsel during the first questioning sessions and that the prosecutor had not ordered an expert examination of the material evidence.

11. Following the instructions set out in the final decision, the prosecutor again heard evidence from the applicant, in the presence of his counsel, and from witnesses and the victims. The applicant denied the commission of the rapes. The prosecutor also ordered an expert examination of the material evidence and assessed whether it would have been feasible for the applicant to leave his work place and commit the rapes within the relevant time frame.

12. On 16 March 2004 the prosecutor again indicted the applicant.

13. On 9 October 2006 the Târgu Mureş District Court acquitted the applicant, as it considered that the evidence in the file was not sufficient to allow a conclusion beyond doubt that he had committed the crimes of which he was accused. It noted that some of the material evidence gathered had turned out to be inconclusive and that the applicant had presented an alibi for the time when two of the rapes had occurred. The court did not examine the applicant's first statements, whereby he had incriminated himself.

14. In a final decision of 27 September 2007 the Mureş County Court reversed the judgment and convicted the applicant on three counts of rape and one of attempted rape, sentencing him to one year, six months and twenty-six days in prison. The court considered that the applicant's confessions were consistent with the evidence in the file, in particular the victims' statements, the expert medical report and the statements made by the witnesses who had attended the reconstruction of the events in the first set of investigations. The court attached weight to the fact that the confessions had been handwritten by the applicant himself and included a detailed description of his *modus operandi*; it also argued that more often than not the first declarations made in a case reflected the truth, as the person had not yet had the time to reflect and prepare a defence. The court also observed that the applicant had repeated his confession before the prosecutor in the presence of a lawyer, and that at that time he had made no mention of abuse by the investigators. It noted that the applicant had refused to provide biological samples for testing and that the polygraph test he had taken had showed "simulated behaviour". Lastly, the court noted that no similar rapes had been reported in the area after the applicant's arrest.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. The applicant complained under Article 6 of the Convention that the criminal proceedings against him had not been fair and that his defence rights had been breached. In particular, he complained that he had not been afforded access to a lawyer during the police questioning, that he had not been allowed time to prepare his defence but had been questioned immediately upon his arrest, and that he had undergone an expert forensic examination, as he and his family had requested.

16. The Court considers that this complaint falls to be examined under Article 6 §§ 1 and 3 (b) and (c) of the Convention, which reads as follows:

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

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(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 Government contended that the applicant had lost his victim status in so far as by the final decision of 17 October 2003 the Târgu Mureş Court of Appeal had expressly admitted that the applicant’s rights of defence had been breached in that he had been questioned without a lawyer, and implicitly admitted that he had not had adequate time and facilities to prepare his defence. They observed that in application of that decision the case had been sent back to the prosecutor, who had then taken a statement from the applicant in the presence of a lawyer.

18. The applicant disagreed with the Government on that point.

19. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a “victim” for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention. As to the redress which is “appropriate” and “sufficient” in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see, for instance, *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 186, ECHR 2006-V; *Gäfgen v. Germany* [GC], no. 22978/05, §§ 115-116, ECHR 2010; or *Kurić and Others v. Slovenia* [GC], no. 26828/06, §§ 259-261, ECHR 2012 (extracts)).

20. In the case at hand, the Court of Appeal expressly acknowledged that the applicant’s rights had been breached by the fact that he had been questioned without a lawyer. However, the unlawfully obtained statements remained in the file, making it possible for a later court, in the same proceedings, to rely on them (see paragraph 14 above). The domestic authorities thus failed to ensure effective reparation for the breach of defence rights that they themselves had found. The redress offered by the Court of Appeal was thus rendered devoid of meaning.

21. It follows that the applicant may still claim to be the “victim” of the alleged violation. The Government’s preliminary objection in this regard must accordingly be dismissed.

22. Lastly, the Court notes that the application 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' positions

23. The applicant averred that even though he had been able to fully exercise his defence rights after the case had been sent back to the prosecutor, that possibility had remained merely formal in so far as in its decision of 27 September 2007 the County Court had relied on his first statements, which had been obtained unlawfully on the night of his arrest.

24. The Government contended that the criminal proceedings against the applicant had been fair. The applicant had been defended by counsel before the courts, had participated fully in the proceedings, had been able to adduce evidence in his defence and had been present at all court hearings. They argued that in convicting the applicant the County Court had relied on an extensive body of evidence and that his initial statements given without a lawyer had been neither the sole nor the decisive basis for his conviction; they had been one element in the file which corroborated the remaining evidence. The Government averred that the court had attached significance to the applicant's complete change of position from full admission in the early stages to denial in the later stages, and had explained in great detail why it had relied on the former to the detriment of the latter. The Government pointed out that the applicant's allegations of police brutality had been found unsubstantiated by means of a final court decision.

2. The Court's assessment

(a) General principles

25. The Court makes reference to the principles established in *Salduz v. Turkey* ([GC], no. 36391/02, §§ 50-55, 27 November 2008), in particular to the finding that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction.

26. It is also reiterated that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings were conducted fairly (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

(b) Application of those principles to the present case

27. In the case under examination, the applicant confessed in police custody while not assisted by counsel, and reiterated his confession in the

prosecutor's office in the presence of a court-appointed lawyer. He later changed his statements before the courts.

28. The applicant was convicted based on the evidence in the file, including his first confessions, but those confessions were subsequently set aside by the Târgu Mureş Court of Appeal in its final decision of 17 October 2003 (see paragraphs 9 and 10 above).

29. Furthermore, when retrying the case, the District Court found that the evidence in the file was not sufficient to secure the applicant's conviction (see paragraph 13 above, *in fine*). The first confessions were not referred to in the District Court's reasoning. However, the County Court relied on that evidence in finding the applicant guilty (see paragraph 14 above). It made no claim that the remaining evidence would have been sufficient for convicting the applicant.

30. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody (see *Salduz*, cited above, § 58).

31. In sum, even though the applicant had the opportunity to challenge the evidence against him, the absence of a lawyer during his questioning in police custody irretrievably affected his defence rights in so far as the evidence thus obtained, although declared unlawful by a final court decision, was still used at the later stages of the proceedings for the applicant's conviction.

32. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention and there is no need for the Court to examine the remaining allegations.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed, in respect of pecuniary damage, 15,050 Romanian lei, representing loss of salary during his detention and until he found a new job. He also claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

35. The Government contended that there was no causal link between the alleged violation and the damages sought, that the claim in respect of non-pecuniary damage was excessive, and that a finding of a violation would represent in itself sufficient just satisfaction.

36. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 2,400 in respect of non-pecuniary damage.

37. Lastly, the Court reiterates that when a person, as in the instant case, has been convicted in domestic proceedings which failed to comply with the requirements of a fair trial, a new trial or the reopening of the domestic proceedings at the request of the interested person represents an appropriate way to redress the violation found. In this connection, it notes that Article 408¹ of the Code of Criminal Proceedings provides for the possibility of a retrial or the reopening of the domestic proceedings where the Court has found a violation of an applicant's fundamental rights and freedoms (see *Hanu v. Romania*, no. 10890/04, § 50, 4 June 2013).

B. Costs and expenses

38. The applicant also claimed RON 2,623.85 for costs and expenses incurred before the domestic courts and the Court.

39. The Government averred that the claims were unsubstantiated.

40. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 400, covering costs under all heads.

C. Default interest

41. 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

3. *Holds* there is no need to examine the complaint under Article 6 § 3 (b) of the Convention;
4. *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 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 400 (four hundred 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President