

ACTION REPORT

KOLOMPAR v. SERBIA

Application no. 34167/15

Judgment of 26 September 2023, final on 26 September 2023

I CASE DESCRIPTION

1. This case concerns a violation of the applicant's right to a fair trial as the only evidence for her conviction in 2012 was a flawed identification offered by the victim personally after she had already been shown photographs of the applicant, in the absence of the procedural guarantees contained in domestic law (violation of Article 6 § 1).

2. The Court further found that the discrepancies in the statements given by the witnesses were not addressed sufficiently by the national courts in their reasoning. The courts thus failed to observe two basic requirements of criminal justice: (i) that it is the prosecution that has to prove a defendant's guilt beyond a reasonable doubt; and (ii) the principle of *in dubio pro reo* which requires that the benefit of any doubt about the reliability of evidence should be given to the defendant and not the prosecution (§ 16).

II INDIVIDUAL MEASURES

3. The Serbian authorities have taken steps to ensure that the violations at hand have ceased and that the applicant has been redressed for the negative consequences of the violations found by the European Court. These measures are set out below.

A. The applicants' release

4. The applicant was granted release on 22 January 2016, after having served the entirety of their imposed prison sentence.

B. Re-examination of the impugned criminal proceedings

5. Based on the judgment of the European Court, the applicant, through his representative, submitted an appeal on points of law (zahtev za zaštitu zakonitosti) to the Supreme Court in order to obtain judicial review of the previous national courts decisions.

6. On 24 January 2024 the Supreme Court of Cassation upheld his request, quashed the impugned judgment which the European Court found to be in breach of the Convention and remanded the case for retrial. In doing so the Supreme Court of Cassation expressly relied on the European Court's indications in this judgment.

7. In the reopened proceedings, Pančevo Basic Court acquitted the applicant of the charges on 13 August 2024. This judgment became final on 13 September 2024.

C. The applicant's redress

8. The European Court awarded the applicant the amount of EUR 4,500 in respect of costs and expenses. The payments have been made on 15 January 2024.

9. In view of the above, the authorities consider that the applicant has been redressed for the damage sustained.

III GENERAL MEASURES

10. The authorities ensured that appropriate measures have been taken to prevent similar violations of the right to a fair trial. These measures are set down below.

A. Amendments to the Criminal Procedure Code

11. Bearing in mind that the Criminal Procedure Code which was applied in the mentioned case contained general formulations regarding the recognition of persons and objects in criminal proceedings, the legislator noticed the need to amend and specify the legal norm from the then Article 104. Therefore, in Article 90¹ of the current Code of Criminal Procedure, it is explicitly prescribed that recognition of persons and objects can also be done using photographs or voices, with respect to identity protection, which is achieved by displaying other photographs or voices of unknown persons with similar characteristics described by the person in question.

12. The authorities believe that the new legal solution has eliminated the perceived shortcomings and that recognition by a photograph is prescribed in a clear and detailed manner.

B. Development of Convention-compliant case-law

13. The government wishes to emphasize that the case in question is an isolated one. It is important to note that domestic courts have developed an adequate case law, particularly after the adoption of the amendments to the Code of Criminal Procedure, to prevent any further violations of the Convention.

14. We would like to draw your attention to the examples of case law of second-instance courts in criminal proceedings, which we have included in the annexes of this Action Report. These examples pertain to the appellate courts in Belgrade², Novi Sad³, Kragujevac⁴ and Niš⁵. They demonstrate the significance that courts attach to the principle of *in dubio pro reo* and conscientious evaluation of the evidence. Therefore, any

¹ <https://www.pravno-informacioni-sistem.rs/SIGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2011/72/1/reg>

² Annex 1 - Appellate Court in Belgrade relevant case-law

³ Annex 2 - Appellate Court in Novi Sad relevant case-law

⁴ Annex 3 - Appellate Court in Kragujevac relevant case-law

⁵ Annex 4 - Appellate Court in Niš relevant case-law

shortcomings of the first instance court in these matters lead to the reversal of the judgment and retrial or acquittal.

15. Thus, in its acquittal judgment KŽ1-Po1-17/2023, the Appellate Court in Belgrade stated:

"The conclusion of the first-instance court that it is indicative that JJ's insistence and request to see the accused AA immediately after he informed him about the payment of the subsidy to his bank account, followed by their meeting, and that this indicates that the convicted JJ asked that accused AA hand him over the money - a bribe for a priority settlement of his request as soon as possible, according to the findings of the Appellate Court in Belgrade, is not supported by any evidence found in the files, and such a conclusion was drawn by the first-instance court on the basis of indications and assumptions on the basis of which the court cannot base a conviction"⁶.

16. In the judgment KŽ1-148/2023, the Appellate Court in Novi Sad applied the findings of the European Court from the *Dimović v. Serbia*⁷ case (app.no. 7203/12) to the specific case and stated:

"When considering the allegations of the appeal of the defendant's counsel, this court also took into account the views of the European Court expressed in the judgment *Dimović v. Serbia*, considering that the same can be applied to this specific criminal matter, that is, that:

- Article 6 § 3 stipulates that, before the accused is convicted, all the evidence against him must be presented, in his presence at the public hearing, in order to give him the opportunity to present opposing arguments,
- it should be considered whether there was a sufficiently good reason to withhold the statement of the co-defendant against whom the proceedings were separated, bearing in mind that as a general rule, the co-defendant should present evidence during the trial and that all reasonable efforts should be made to ensure his presence...
- it is necessary to establish that the absence of the co-defendant was an excludable or decisive basis for the conviction of the accused. According to the "rule of exclusivity and decision-making", if the conviction of the accused is exclusively or mainly based on the evidence of witnesses that the accused cannot examine at some stage of the trial, his defense rights are unjustifiably limited,

⁶ see Annex 1, page 28

⁷ <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%5B%22document%22%5D,%22itemid%22:%5B%22001-188279%22%5D%7D>

- it must be determined whether there were sufficient counterbalancing factors, including strong procedural guarantees, to compensate for the difficulty caused to the defense by the admission of untested evidence and to ensure that the trial as a whole was fair. "⁸

17. Concerning the same criminal offence as the one in question (aggravated theft), the Appellate Court in Kragujevac stated in its judgment KŽ1-310/2022:

"The intention of the defendants to obtain unlawful material gain by alienating the Dacia Duster vehicle, which the defendants denied throughout the criminal proceedings, was not proven, while their claim that they used this vehicle to go to the rental car agency and take the spare keys from the car they rented, and whose original keys they lost, with which they consistently remained during the proceeding, was not denied by the evidence provided by the public prosecutor, who bears the burden of proof, so by applying the basic principle of the criminal procedure that in case of doubt, a decision shall be made in favor of the defendants, only acquittals can be made verdict because it was not proven that the defendants committed the criminal offense of aggravated theft at the time and in the manner in which they were charged."⁹

18. Regarding the same criminal offense, the Appellate Court in Niš in its judgment KŽ1-408/2020 pointed out the shortcomings of the first-instance court's conscientious assessment of the evidence and stated:

"In the context of the above, the first instance court, in the absence of the public prosecutor's evidentiary initiative, was authorized in the meaning of Article 15 point 4 of the CPC to determine the presentation of evidence in order to shed light on the fact in question or else to resolve doubts regarding the same in favour of the accused, which he failed to do.

In the repeated proceedings, the first-instance court is obliged to eliminate substantive violations of the provisions of criminal procedure and properly and comprehensively evaluate the evidence in terms of Article 419 paragraph 2 of the CPC, and not from the aspect of the presumed guilty of the accused, then to present clear and complete reasons for the factual and legal conclusions about proven or unproven facts that are the subject of proof, with reference to the evidentiary significance of certain pieces of evidence on which the factual basis of the judgment is based. "¹⁰

⁸ see Annex 2, pages 4 and 5

⁹ see Annex 3, Page 9

¹⁰ see Annex 4, Pages 11 and 12

19. The Appellate Court in Niš expressed the following arguments in its judgment KŽ1-832/2019 regarding the identification of the perpetrator of the crime:

"Although witness AA in the police pointed to BB as the perpetrator of the criminal act, while pointing to another person as "a person similar to the perpetrator", the said recognition was not confirmed by the testimony of this witness, who decisively stated at the hearing that the present defendant is not the person who is the perpetrator of the criminal act and that she would certainly recognize that person when she saw him, while the aggrieved party CC does not recognize the defendant as the perpetrator at all.

In view of the fact that even after the hearing held before the second-instance court there is still doubt regarding the decisive fact concerning the perpetrator of the criminal act, this court decided in favour of the defendant, reversed the first-instance judgment and acquitted the defendant because it was not proven that the defendant committed the act for which he was accused."¹¹

20. Having examined the presented examples, it can be inferred that the national courts have established an adequate level of jurisprudence and are taking effective measures to prevent any potential violations of the Convention in cases similar to that of the *Kolompar* case.

C. Trainings and awareness-raising measures

21. In 2022, the HELP course "Judicial Reasoning and Human Rights" was introduced as a mandatory part of the annual initial training program of the Judicial Academy. Young legal experts from Serbia are among the first participants of the improved version of the HELP course, which was published in February 2022. The development, and then the adaptation and implementation of the course at the domestic level, represent a continuation of project efforts to strengthen the capacity of lawyers to effectively apply the European Convention on Human Rights and standards arising from the case law of the European Court of Human Rights at the domestic level.

22. During the upcoming period, the course participants will have the chance to acquire a comprehensive understanding of the right to a fair trial. This will enable them to recognize their responsibility towards protecting human rights and ensuring the effective

¹¹ see Annex 4, page 19

implementation of the European Convention on Human Rights at a national level. Additionally, the course will help them enhance their knowledge of legal reasoning and improve the quality of justice standards in both criminal and non-criminal matters.

23. The course is conducted in cooperation with the Judicial Academy as part of the "HELP for the Western Balkans" and "Strengthening effective legal means for preventing human rights violations in Serbia" projects, which are carried out as part of the joint program of the European Union and the Council of Europe "Horizontal Facility for the Western Balkans and Turkey in 2019-2022".

D. Publication and dissemination measures

24. The authorities ensured that publication and dissemination of the present judgment were taken to draw the attention of the relevant domestic authorities on the European Court's findings in this case. To this end, the European Court's judgment was translated into Serbian and published in the Official Gazette and on the Government Agent's official web page. The European Court's findings have therefore been made easily accessible to judges and the legal community nationwide.

25. The above-mentioned measures ensured that all domestic courts and relevant bodies are now aware of the Court's findings and the need to comply with the Convention requirements in similar cases.

IV JUST SATISFACTION

25. The authorities ensured that just satisfaction awarded by the European Court has been disbursed to the applicant on 15 January 2024.

V CONCLUSIONS

26. The Serbian authorities consider that the individual measures taken have put an end to the violation of the Convention found by the European Court and provided redress to the applicant.

27. The authorities furthermore consider the general measures taken are capable of preventing similar violations.

28. Therefore, the authorities consider that Serbia has complied with its obligation under Article 46 § 1 of the Convention.