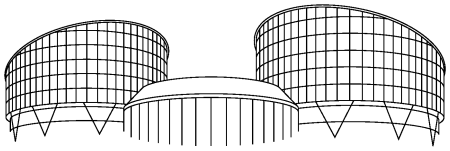

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KOLOMPAR v. SERBIA

(Application no. 34167/15)

JUDGMENT

STRASBOURG

26 September 2023

This judgment is final but it may be subject to editorial revision.

In the case of Kolompar v. Serbia,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Tim Eicke, *President*,
Branko Lubarda,
Ana Maria Guerra Martins, *judges*,
and Branimir Pleše, *Acting Deputy Section Registrar*,

Having regard to:

the application (no. 34167/15) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 20 June 2015 by a Serbian national, Ms Roža Kolompar ("the applicant"), who was born in 1974 and was represented by Mr V. Juhas Đurić, a lawyer practising in Subotica;

the decision to give notice of the complaint concerning the alleged unfairness of the criminal proceedings in question to the Serbian Government ("the Government"), represented by their Agent, Ms Z. Jadrijević Mladar, and to declare the remainder of the application inadmissible;

the parties' observations;

the Government not having objected to the examination of the application by a Committee;

Having deliberated in private on 5 September 2023,

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

SUBJECT MATTER OF THE CASE

1. The application concerns the fairness of criminal proceedings in which the applicant's guilt was allegedly determined solely on the basis of "a flawed identification offered by the victim personally".

2. On 26 July 2010 Ms K.K. complained to the Kovačica police station that two Romani women had stolen money from her house. From photographs shown to her, those being photographs of the applicant only, she identified the applicant as a person whom she saw at the exit gate coming out of the yard, before she had discovered the theft. The police prepared an official note (*službena beleška*) in this respect.

3. On 4 November 2010 the investigating judge issued a decision whereby this official note was excluded from the case file.

4. On 25 November 2010 the applicant was charged with aggravated theft.

5. On 12 January 2012 the first-instance court opened the trial. It heard the applicant, who maintained that she had never been in the village, contrary to the claims of Ms K.K. She could not explain how the victim had recognised her. The court questioned Ms K.K., who reiterated her previous statements regarding the incident and identified the applicant as the person she had seen at the exit gate coming out of her yard on the day when the money had been stolen from her. The court heard several other witnesses, all Ms K.K.'s

neighbours. Most of them had not seen anyone in front of her house. They could only testify that they had seen a "suspicious car" in their village on the day in question, but they could not agree on the colour of the car or the direction it had come from. Only one witness stated that he had seen two women in front of Ms K.K.'s house, but he did not identify the applicant as one of them.

6. On 24 September 2012 the court of first instance found the applicant guilty as charged and sentenced her to one year's imprisonment. The court stated that it had established the decisive facts concerning the time, place and manner of the commission of the offence on the basis of the statements given by Ms K.K. and the other witnesses, as well as the written documentation. The court found Ms K.K.'s statement credible, while dismissing the applicant's version of the events as an attempt to avoid criminal liability and contradictory to Ms K.K.'s statement.

7. On 8 October 2013 the Novi Sad Court of Appeal upheld the first-instance judgment and made a distinction between the identification procedure under Article 104 and a witness statement given at the main trial, stating that no identification procedure under Article 104 of the Code of Criminal Procedure had been carried out in the case at hand but that Ms K.K. had been able to see the applicant in the courtroom and to identify her as the person who had been in her yard on the day in question.

8. On 18 December 2013 the Supreme Court of Cassation rejected an appeal on points of law lodged by the applicant.

9. On 25 March 2015 the Constitutional Court dismissed the applicant's subsequent constitutional appeal.

10. The applicant complains under Article 6 of the Convention about the fairness of the criminal proceedings in which she was found guilty of aggravated theft and sentenced to one year's imprisonment based solely on evidence obtained through an identification which had itself been carried out in breach of the requirements of the Serbian Code of Criminal Procedure.

THE COURT'S ASSESSMENT

11. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

12. The general principles concerning the fairness of proceedings, including the admissibility of evidence have been summarised in *Schenk v. Switzerland* (12 July 1988, §§ 45-46, Series A no. 140), *Moreira Ferreira v. Portugal* (no. 2) ([GC] , no. 19867/12, § 83, 11 July 2017), *Khan v. the United Kingdom* (no. 35394/97, § 34, ECHR 2000-V), *Jalloh v. Germany* ([GC], no. 54810/00, § 95, ECHR 2006-IX), *Bykov v. Russia* ([GC], no. 4378/02, §§ 89 and 90, 10 March 2009), *Balliu v. Albania*

(no. 74727/01, § 42, 16 June 2005), and *Laska and Lika v. Albania* (nos. 12315/04 and 17605/04, § 57, 20 April 2010).

13. According to Article 104 of the Code of Criminal Procedure, in force at the relevant time, when it was necessary to establish whether a witness could recognise a certain person, whom he had already described, the witness would be shown the person in question together with other persons unknown to him. All of those persons had to have "basic characteristics" similar to the "basic characteristics" originally described by the witness and the witness would then be asked to declare whether he could identify the person concerned with certainty or a certain degree of probability and, if the answer was in the affirmative, to point out that person. In the course of preliminary criminal proceedings and the pre-trial phase of a case, an identification was to be performed in such a way so as to ensure that the person being identified cannot see the witness and that the witness personally also cannot see the person concerned before the commencement of the formal identification procedure.

14. It is furthermore understood that, in any event, an identification parade, together with the relevant procedural safeguards, should normally be conducted shortly after a criminal offence takes place so that an eyewitness who does not know the accused can both identify the person concerned and have his or her own credibility tested.

15. Turning to the present case, the Court notes that the only evidence for the applicant's conviction was her identification by the victim at the main trial after she had already been shown photographs of the applicant, and no others, by the police and after she had seen the applicant in the capacity of a defendant in the courtroom (see paragraphs 2 and 5 above). There was furthermore no forensic or other physical evidence related to the crime, and the "written documentation" referred to consisted of police reports exclusively (see paragraph 6 above). While the official note on the applicant's initial identification was excluded from the case file (see paragraph 3 above), the fact remains that the applicant's identification before the trial court had been carried out in the absence of the procedural guarantees contained in Article 104 of the Code of Criminal Procedure (see paragraphs 5, 7 and 13 above, including the appellate court's own admission to this effect). All this, in the Court's view, rendered the victim's statement dubious, particularly in view of the fact that other witnesses were themselves unable to identify the applicant as the perpetrator and one eyewitness in particular, while noting that there had indeed been two women in front of the victim's house, could not identify the applicant as one of them (see paragraph 5 above). In these circumstances, not even the adversarial nature of the ensuing proceedings could cure the procedural defects in question (see *Laska and Lika*, cited above, § 68).

16. In addition to the above, the Court finds that in the present case the existing discrepancies in the statements given by the witnesses (see

paragraph 7 above) were not addressed sufficiently by the national courts in their reasoning, in so far as they essentially merely repeated who had said what and decided to accept the victim's account despite it not being corroborated by any other evidence (see, *mutatis mutandis*, *Laska and Lika*, cited above, § 64). The national 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 (see, for example and *mutatis mutandis*, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, §§ 77 and 89, Series A no. 146; *Melich and Beck v. the Czech Republic*, no. 35450/04, §§ 49 and 55, 24 July 2008; *Fatullayev v. Azerbaijan (no. 2)*, no. 32734/11, § 99, 7 April 2022; and *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, § 232, 16 November 2017).

17. In view of the foregoing, the Court concludes that the criminal proceedings against the applicant did not satisfy the requirements of a fair trial. There has accordingly been a violation of Article 6 § 1 of the Convention in the present case.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

18. The applicant requested the reopening of the criminal proceedings. She also claimed 6,700 euros (EUR) in respect of the non-pecuniary damage suffered. Lastly, the applicant sought a total of EUR 8,210 for the costs and expenses incurred domestically and those incurred before the Court.

19. The Government contested the applicant's claim regarding the non-pecuniary damage in question. They also considered her claim for costs and expenses to be unsubstantiated.

20. The Court refers to its settled case-law to the effect that when an applicant has suffered an infringement of rights guaranteed by Article 6 of the Convention, he should, in so far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings if requested (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006). The Court notes in this connection that Article 485 paragraph 1(3) and Article 492 of the Serbian Code of Criminal Procedure, as currently in force, provide for, *inter alia*, a defendant's right to request a retrial domestically if the Court finds a violation of his or her rights as guaranteed by the Convention. The Court therefore considers that, in the specific circumstances of the present case, the finding of a violation of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (see, for example

and *mutatis mutandis*, *Matijašević v. Serbia*, no. 23037/04, §§ 55-57, ECHR 2006-X).

21. As to the applicant's claim for costs and expenses, the Court reiterates that an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and were also reasonable as to their quantum. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress. 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 4,500, covering costs and expenses under all heads, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, which is to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 26 September 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Branimir Pleše	Tim Eicke
Acting Deputy Registrar	President