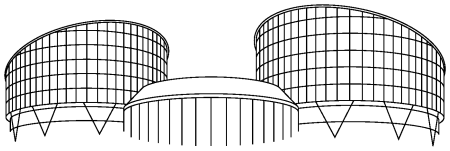

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF CABRAL v. THE NETHERLANDS

(Application no. 37617/10)

JUDGMENT

STRASBOURG

28 August 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Cabral v. the Netherlands,

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

Helena Jäderblom, *President,*
Branko Lubarda,
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 3 July 2018,

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

PROCEDURE

1. The case originated in an application (no. 37617/10) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Netherlands national, Mr Euclides Cabral ("the applicant"), on 25 June 2010.

2. The applicant was represented by Mr S.R. Bordewijk, a lawyer practising in Schiedam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and their Deputy Agent, Ms K. Adhin, both of the Ministry of Foreign Affairs.

3. The applicant alleged that his criminal conviction was based solely or to a decisive extent on the statements of a witness whom he had not been able to examine.

4. On 28 June 2016 the complaint concerning the applicant's conviction of the fourth of four charges was communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1987 and lives in Rotterdam.

A. Factual background

6. The applicant was charged with having, with an accomplice called V., robbed three supermarkets and with having, with two accomplices, mugged someone in the street outside a discotheque.

7. V. made statements to the police admitting his own participation in the supermarket robberies and implicating the applicant in all four crimes.

B. Proceedings before the Regional Court

8. The applicant was tried before the Rotterdam Regional Court (*rechtbank*). V. was summoned as a witness by the defence.

9. Not being suspected of having taken part in the street mugging, V. could not refuse to give evidence about it; he made a statement to the effect that he had not personally witnessed the robbery but had heard from bystanders that it had been committed by a group that did not include the applicant.

10. V.'s statement disculpating the applicant was not believed by the public prosecutor (*officier van justitie*) and the court. V. was subsequently charged with perjury (*meineed*).

11. On 30 August 2006 the Regional Court gave judgment convicting the applicant of all four crimes. It sentenced him to four years' imprisonment and ordered the execution of a suspended two-week sentence of juvenile detention (*jeugddetentie*) imposed on a previous occasion when the applicant was still a minor.

C. Proceedings before the Court of Appeal

12. The applicant lodged an appeal (*hoger beroep*) with the Court of Appeal (*gerechtshof*) of The Hague.

13. V. was again summoned as a witness by the defence. As relevant to the case before the Court, he kept silence on all four charges, including the street mugging in relation to which he was by this time being prosecuted for perjury.

14. The Court of Appeal gave judgment on 4 March 2008 convicting the applicant of all four charges. It sentenced the applicant to six years' imprisonment and, as the Regional Court had done, ordered the execution of the two-week suspended sentence of juvenile detention.

15. The evidence on which the conviction of the fourth charge was based may be summarised as follows:

(a) The supermarket manager's report to the police that his supermarket had been robbed;

(b) A statement made to the police by a cashier who had been forced at gunpoint to open her cash register, from which one of the robbers had snatched money and other goods;
(c) V.'s confession to the police, in which the applicant was named as co-perpetrator.

D. Proceedings before the Supreme Court

16. The applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*). As relevant to the case before the Court, he complained under Article 6 § 3 (d) of the Convention of the use made by the Court of Appeal of V.'s statements to the police to ground his convictions even though V. had refused to answer the questions of the defence under cross-examination.

17. The Advocate General (*advocaat-generaal*) submitted an advisory opinion (*conclusie*) analysing the case-law of the Court, in particular the Chamber judgment *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, 20 January 2009, and expressing the view that V.'s evidence was "sole and decisive" in respect of the fourth charge but not in respect of the first three charges, for which sufficient other evidence was available.

18. On 5 January 2010 the Supreme Court gave judgment dismissing the applicant's appeal on points of law. Referring to its own case-law (its judgment of 6 June 2006, ECLI:NL:HR:2006:AV1633, Netherlands Law Reports (*Nederlandse Jurisprudentie*, "NJ") 2006, no. 332, its judgment in the *Vidgen* case; see *Vidgen v. the Netherlands*, no. 29353/06, § 23, 10 July 2012), it found that the applicant had had sufficient opportunity to cross-examine V. or have him cross-examined. The mere fact that V. had refused to give evidence under cross-examination did not mean that use in evidence of his statement to the police was excluded by Article 6 § 3 (d) of the Convention.

II. RELEVANT DOMESTIC LAW

A. The Code of Criminal Procedure

19. Articles of the Code of Criminal Procedure (*Wetboek van Strafvordering*) relevant to the case are the following:

Article 219

"A witness shall be excused the duty to answer a question put to him if in so doing he would expose himself or one of his relatives in the ascending or the descending line *ex transverso* [i.e. siblings, uncles, aunts, nieces and nephews, etc.], whether connected by blood or by marriage, in the second or third degree of kinship, or his

spouse or former spouse, or registered partner or former registered partner, to the risk of criminal prosecution."

Article 339

"1. The following only shall be recognised as legal evidence:

1º. the court's own observation;

2º. statements made by the defendant;

3º. statements made by witnesses;

4º. statements made by experts;

5º. written documents.

2. No proof is required of generally known facts or circumstances."

B. Subsequent developments in domestic case-law

20. In its judgment of 29 January 2013, ECLI:NL:HR:2013:BX5539, the Supreme Court reversed its earlier case-law, holding that in view of the Court's *Vidgen* judgment it could no longer be accepted that a defendant had had sufficient opportunity to cross-examine or have cross-examined a witness summoned at the request of the defence if that witness refused to give evidence under cross-examination.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

21. The applicant complained that he had been convicted "solely or to a decisive extent" on the basis of statements made to the police by a witness who had been allowed to refuse to give evidence under cross-examination by the defence. He relied on Article 6 § 3 (d) of the Convention, which reads as follows:

"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; ..."

22. The Government disputed this.

A. Admissibility

23. The Court notes that although in the original application the applicant complained in relation to all four charges brought against him (see paragraph 6 above), but that it is now only concerned with the complaint related to the proceedings concerning the fourth charge (see paragraph 4 above).

24. The Court notes that this complaint 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. Argument before the Court

25. The Government submitted in the first place that the witness V. had been summoned to the hearing, both at first instance and on appeal, at the request of the defence. The applicant's counsel had been permitted to examine him, but had made only minimal use of this opportunity: he had been content simply to accept V.'s refusal to answer instead of attempting to put more specific questions to him. The lack of any cross-examination was therefore due to the passivity of the applicant's counsel himself. In the alternative, the Government submitted that V. was not a compellable witness and the privilege against self-incrimination was good reason for not requiring him to give answers.

26. In the second place, the Government argued that the statement made by V. to the police had not constituted the "sole or decisive evidence" on which the conviction had been grounded. The applicant had, after all, been convicted of other, related facts, namely the three supermarket robberies; the resulting pattern of crime was adequate supporting evidence.

27. In the third place, the Government expressed the view that sufficient counterbalancing factors had been in place. Already the first-instance and appellate courts' decision to summon V. as a witness, so that the defence could call his credibility into question, constituted such a counterbalancing factor. Special consideration had been given precisely to the question of V.'s reliability as a witness, since V. stood charged with perjury (see paragraph 10 above); in the event, the Court of Appeal had come to the conclusion that V.'s statement to the police was fit to be believed.

28. The applicant stated that the defence had called V. as a witness precisely to cross-examine him and call the reliability of his evidence into question. V.'s privilege against self-incrimination had however had to be respected. It could not be said that the defence had remained passive.

29. V.'s statement to the police had been the sole and decisive evidence of the applicant's involvement. The remaining evidence had tended to show

that a street mugging had taken place but had not directly implicated the applicant. The pattern of crime emerging from the supermarket robberies had been suggested by the Government as supplementary evidence for the first time in the proceedings before the Court; it had not been evidence relied on by the Court of Appeal.

30. Calling V. as a witness was not in itself a sufficient counterbalancing measure given that V. had refused to give evidence. His appearance in court did not alter the fact that the defence had been denied the possibility either to secure a retraction of his statement incriminating the applicant or to put his credibility to the test.

2. The Court's assessment

31. As the guarantees of Article 6 § 3 (d) are specific aspects of the right to a fair trial set forth in the first paragraph of that Article (see, among many other authorities, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011), the Court will follow its usual practice in cases of this nature and consider the present case under Article 6 §§ 1 and 3 (d) taken together.

32. The Court has stated the applicable principles as follows (see *Paić v. Croatia*, no. 47082/12, §§ 29-31, 29 March 2016, see also *Seton v. the United Kingdom* no. 55287/10, §§ 57-59, 31 March 2016; more recently, *Bátěk and Others v. the Czech Republic*, no. 54146/09, §§ 37-39, 12 January 2017):

> "29. The principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him or her were admitted as evidence have been summarised and refined in the Grand Chamber judgment of 15 December 2011 in *Al-Khawaja and Tahery* (*Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011). According to the principles developed in that judgment, it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who was not present and questioned at the trial are used as evidence (ibid., § 152). The Court must examine
>
> (i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statement as evidence (ibid., §§ 119-125);
>
> (ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (ibid., §§ 119 and 126-147); and
>
> (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (ibid., § 147).
>
> 30. Even where there were no good reasons for the non-attendance of a witness, the Court is still called upon to assess whether the witness statement was the sole or decisive evidence supporting the accused's conviction and whether there were sufficient counterbalancing factors to secure a fair and proper assessment of the

reliability of such evidence ([*Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 113 and 116, ECHR 2015]).

31. As to the order of the three steps of the *Al-Khawaja* test, the Court has held that, given that all three steps of the test are interrelated and, taken together, serve to establish whether or not the criminal proceedings at issue have, as a whole, been fair, it may be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or unfairness of the proceedings (ibid., § 118)."

33. The Court notes at the outset that V. was not an "absent" witness in the sense that he was not presented for cross-examination. Indeed, the defence was enabled to question him in open court, though to little effect. Rather, V. refused to give evidence, relying on his privilege against self-incrimination. In the circumstances of the present case, however, the Court will apply the principles set out above.

34. The starting point for the Court is the judgment of the Court of Appeal, which survived the appeal on points of law lodged by the applicant. The evidence on which the applicant was convicted included statements made by V. to the police (see paragraph 15 above). However, invoking his privilege against self-incrimination, V. refused to allow these statements to be tested or challenged by or on behalf of the applicant. The respondent Party cannot be criticised for allowing V. to make use of rights which, as a criminal suspect, he enjoyed under Article 6 of the Convention (see *Vidgen v. the Netherlands*, no. 29353/06, § 42, 10 July 2012).

35. The Court must next determine whether the statements made by V. constituted, for present purposes, the "sole and decisive" evidence on which the applicant's conviction was based.

36. Noting – as indeed the Advocate General did in his advisory opinion to the Supreme Court (see paragraph 17 above) – that the only evidence implicating the applicant in the robbery was the statement made by V. to the police in which he identified the applicant as co-perpetrator, all other evidence being capable merely of proving that the robbery had happened (see paragraph 15 above), the Court finds that it was.

37. Although, as the Government state, V. was summoned to the hearings of both the Regional Court and the Court of Appeal to allow the defence to cross-examine him, his persistence to remain silent made such questioning futile. In the absence of any other possibility to put the credibility of V.'s incriminating statement to the test, it must be found that the handicaps under which the defence laboured were not offset by effective counterbalancing procedural measures.

38. There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. Taking the view that one quarter of the prison sentence which he had to serve consequent on his conviction was attributable to the violation of the Convention here in issue and basing his calculations on domestic compensation rates for wrongful detention, the applicant claimed 27,520 euros (EUR) in respect of non-pecuniary damage.

41. The Government did not comment.

42. The Court has consistently held that where, as in the instant case, a person is convicted in domestic proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the most appropriate form of redress would, in principle, be a retrial or the reopening of the case, at the request of the interested person (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Sejdovic*, cited above, § 126; and *Cudak v. Lithuania* [GC], no. 15869/02, § 79, ECHR 2010). In this connection, it notes that Article 457 § 1 (b) of the Netherlands Code of Criminal Procedure provides for the possibility of revision (*herziening*) by the Supreme Court of a conviction where it has been determined in a ruling of the Court that there has been a violation of the Convention or one of its Protocols, as the case may be, in proceedings that have led to the conviction, or a conviction of the same crime, if revision is necessary with a view to reparation within the meaning of Article 41 of the Convention.

43. The Court furthermore notes that it has previously concluded that a finding of a violation of Article 6 of the Convention constitutes sufficient just satisfaction for the purposes of Article 41 of the Convention when such procedural arrangements were in place under the domestic law (see, among recent authorities, *Hokkeling v. the Netherlands*, no. 30749/12, §§ 67-68, 14 February 2017; *Zadumov v. Russia*, no. 2257/12, §§ 80-81, 12 December 2017). It reiterates that the payment of monetary awards under Article 41 is designed to make reparation only for such consequences of a violation that cannot be remedied otherwise (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 250, ECHR 2000-VIII). The Court concludes that reopening of the proceedings is the most appropriate form of redress for the established violation of the applicant's rights, should he request it, given that it is capable of providing *restitutio in integrum* as

required under Article 41 of the Convention. Therefore, the finding of a violation constitutes sufficient just satisfaction in the present case.

B. Costs and expenses

44. The applicant also claimed EUR 94 for the costs and expenses incurred before the Court. Although legal aid had been granted by the domestic authorities, this amount was left for him to pay as his own contribution to the cost of legal assistance.

45. The Government did not comment.

46. The Court awards the applicant the sum claimed. It notes, however, that the documents submitted give no indication that any tax is chargeable to the applicant on that amount, or for that matter included in it, and accordingly will not make any award in that respect.

C. Default interest

47. 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 application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *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, EUR 94 (ninety-four euros) 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 August 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Helena Jäderblom President