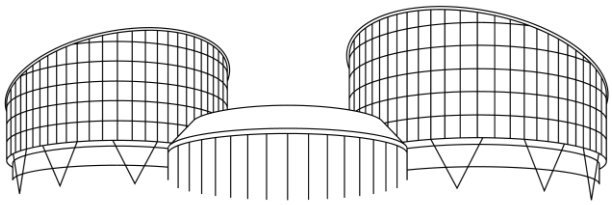

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ERKAPIĆ v. CROATIA

(Application no. 51198/08)

JUDGMENT

STRASBOURG

25 April 2013

FINAL

25/07/2013

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

In the case of Erkapić v. Croatia,

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

Isabelle Berro-Lefèvre, *President,*
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 19 March and 2 April 2013,

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

PROCEDURE

1. The case originated in an application (no. 51198/08) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Mario Erkapić ("the applicant"), on 17 October 2008

2. The applicant was represented by Ms J. Novak, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Mr Š. Stažnik.

3. On 10 November 2010 complaints by the applicant of lack of fairness of the criminal proceedings against him were communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1967 and lives in Zagreb.

A. Investigation

5. On 19 October 2000 a Zagreb County Court (*Županijski sud u Zagrebu*) investigating judge questioned a witness, M.S., about alleged heroin trafficking in Zagreb. M.S. testified, *inter alia*, that in April 2000 he

had transported one kilogram of heroin from B.S. to another person, known to him as "Mario".

6. As part of a further police investigation of the organised supply of heroin in Zagreb, on 27 April 2001 the Drug Suppression Unit of the Zagreb Police Department (*Policijska uprava Zagrebačka, Sektor kriminalističke policije, Odjel kriminaliteta droga*; hereinafter "the police") questioned a suspect, I.G.H., who stated that he had bought heroin from the applicant. During the questioning he was assisted by lawyer H.B. The questioning of I.G.H. commenced at 11.15 p.m., after a defence lawyer appeared at the police station at 11.10 p.m., and ended on 28 April 2001 at 1 a.m.

7. On 31 May 2001 the police questioned another suspect, V.Š., who stated that he was a heroin addict and that he had bought heroin from the applicant. During the questioning he was assisted by lawyer N.D. His questioning commenced at 4.26 p.m., after a defence lawyer appeared at the police station at 3.55 p.m., and finished at 5.43 p.m. on the same day.

8. On 6 June 2001 the applicant was arrested on suspicion of supplying heroin. The applicant was questioned by the police but chose to remain silent.

9. The next day the applicant was brought before an investigating judge at the Zagreb County Court. He denied all the charges against him but decided to remain silent and not to give any evidence. The applicant was again questioned by the investigating judge on 11 June 2001, but gave no evidence.

10. On 11 June 2001 an investigation was opened in respect of the applicant and eight other individuals, including I.G.H. and V.Š., in the Zagreb County Court in connection with a suspicion of conspiracy to supply heroin in Zagreb in the period between 1998 and 2001.

11. On 17 and 19 June 2001 the investigating judge sought to hear I.G.H., who chose to remain silent and not to give any evidence. When questioned by the investigating judge I.G.H. was not assisted by a lawyer.

12. On 21 June 2001 the investigation was extended to another defendant, I.S., who also chose to remain silent but denied all the charges against him.

13. On 25 June 2001 the police questioned another suspect, N.S. He stated that he had been a heroin addict for years and that he had been buying heroin from the applicant. During the questioning he was assisted by lawyer Ž.S. His questioning commenced at 5.50 p.m., after a defence lawyer appeared at the police station at 5.30 p.m., and finished at 6.55 p.m. on the same day.

14. On 16 July 2001 the investigating judge heard evidence from V.Š., who chose to remain silent. During the questioning V.Š. was not assisted by a lawyer, but he stated that his lawyer was I.K.

15. On 23 July 2001 the investigating judge heard evidence from witness M.S., who retracted his statement of 19 October 2000, stating that it had

been given under coercion by the investigating judge and the police. He stated that it was not true that he had transported one kilogram of heroin to "Mario". He also stated that he did not know the applicant.

16. On 26 July 2001 the investigating judge questioned the applicant in connection with the allegations made by N.S. The applicant denied the charges and refused to make any further statement.

17. On 31 July 2001 the investigating judge heard N.S., who complained that he had given his statement to the police under duress and that during his questioning he had been represented by a lawyer who was not of his choosing. Before the investigating judge N.S. was represented by lawyer D.G. On the same day the investigating judge extended the investigation to N.S. and two other individuals.

B. Proceedings on indictment

18. On 4 December 2001 the Zagreb County State Attorney's Office (*Županijsko državno odvjetništvo u Zagrebu*) indicted the applicant and twelve other defendants in the Zagreb County Court. The applicant was charged with conspiracy to supply heroin in the period between mid-1998 and June 2001, whereas some of the co-accused were charged with supplying and possession of heroin.

19. The applicant lodged objections to the indictment on 14 and 21 December 2001, arguing that it had numerous substantive and procedural flaws. He requested, *inter alia*, that all official notes of the police interviews be excluded from the case file, as well as the record of I.G.H.'s oral statement given to the police. He contended that I.G.H. had been a heroin addict and that he had given his statement while at an advanced stage of withdrawal.

20. A three-judge panel of the Zagreb County Court dismissed the applicant's objections against the indictment and remitted the case for trial on 11 April 2002. It excluded the official notes of the police interviews from the case file but not the record of I.G.H's oral statement.

21. On 2 May 2002 the applicant lodged an appeal with the Supreme Court (*Vrhovni sud Republike Hrvatske*) against that decision, and on 21 May 2002 the Supreme Court dismissed his appeal as ill-founded.

22. On 11 July 2002 the president of the trial panel of the Zagreb County Court commissioned a psychiatric report on the applicant's mental capacity. The psychiatric report was drawn up on 27 July 2002. It confirmed that the applicant had full mental capacity and was intellectually able to participate in the proceedings.

23. After he had received some further documentation from the defence concerning the applicant's psychiatric treatment, on 8 November 2002 the president of the trial panel commissioned another psychiatric report. The medical expert reiterated all his previous findings.

24. At a hearing held on 25 November 2002 the applicant pleaded not guilty.

25. Further hearings were held on 28 November 2002 and 21 February 2003, at which the trial court heard evidence from six witnesses and an expert witness in toxicology. A police officer, D.Z., gave oral evidence concerning a police trap they had set for one of the accused, D.L., and also concerning his questioning of another accused, Z.E.

26. On 8 April 2003 the president of the trial panel commissioned a psychiatric report on the mental capacity of N.S. at the time the alleged offence was committed.

27. At a hearing on 29 May 2003 a psychiatric expert testified that N.S., in the period concerning the charges held against him, had had diminished mental capacity but that he had been able to understand the nature of his acts. In that period he had been addicted and a user of illegal drugs. This meant that he did not have significant withdrawal crises. The parties made no objections to these findings.

28. At the same hearing the trial panel commissioned a psychiatric report in respect of the other accused, including V.Š. and I.G.H.

29. On 9 June 2003 the president of the trial panel informed the defence lawyers that he had received information from the Italian authorities that one of the witnesses, D.M., could be heard in Italy since he was serving his prison sentence there. The president of the trial panel asked the defence lawyers to inform him whether they wished to be present during the questioning of that witness in Italy.

30. On 18 June 2003 the psychiatric expert submitted his report commissioned at the hearing on 29 May 2003. He found that, in the period concerning the charges, V.Š. and I.G.H. had been heroin addicts. Their mental capacity had therefore been diminished but they were able to understand the nature of their acts at the time. In addition, I.G.H. had a personality disorder.

31. On 23 October 2003 the applicant's defence lawyer informed the Zagreb County Court that he would not travel to Italy for the questioning of witness D.M. On 25 October 2003 witness D.M. was questioned by an investigating judge in court in Vasto, Italy. He did not provide any evidence concerning the applicant. The record of his statement was forwarded to the Zagreb County Court.

32. A further hearing was held on 8 March 2004, at which witness M.S. reiterated that he had made his first statement, on 19 October 2000, to the investigating judge under coercion and fear of ill-treatment by the police. He claimed that he had never transported any drugs as he had described in his statement.

33. At a hearing on 19 April 2004 the psychiatric expert confirmed his findings in respect of V.Š. and I.G.H. The defence lawyers raised objections concerning the methods used and the expert's findings.

34. Another hearing was held on 23 March 2005, at which the defence lawyers asked for witness D.M., who had been heard by the Italian authorities, to be heard at the trial. The trial panel dismissed their request, on the grounds that there were significant impediments to securing his presence at the hearing, and that he had already been questioned by the Italian judicial authorities.

35. At a hearing on 24 March 2005 the applicant, V.Š. and I.G.H. all gave evidence. The applicant again denied all the charges against him and complained that he had been ill-treated by the police.

36. V.Š. testified that he did not know the other co-accused. As to the statement he had made to the police, he stated:

> "I have been a [heroin] addict for years and when I was in the police [station] nobody asked me anything but [a police officer] K.A., whose face I will never forget, drafted a record in another room. I asked for my lawyer, K. but the police told me that K. was a mafia lawyer and that he could not come ... I would like to add that when I was arrested the police told me that they needed me to give a statement. They knew I was soft and that I would sign everything they asked just to get out. That is how I signed this record, which was, as I said, drafted in another room ...
>
> I can answer the questions of the president of the trial panel by saying that I had a number of interviews with [the police officer] K.A. but he told me that this would never become part of a case file and he told me the same thing for this [statement]. However, since [K.A.] did not want to call my lawyer K., he called this other lawyer who never gave me any advice. He just told me that he had signed the record and that I could do whatever I wanted. I have to say that [this lawyer] was a woman. Nothing I said in that statement is true ... except the part in which I said that I was an addict. ... The only true information [in that statement] is my personal details and the fact that I was an addict but [the police officer] already knew that. The part where I said that I was not in withdrawal was absolutely not true ...
>
> I have known K.A. for six years, he has arrested me on a number of occasions and he once lodged a criminal complaint against me. Once he also threatened me that if I did not tell him something, he would lodge a criminal complaint, which he had previously prepared against me, but that never happened. He tolerated my [heroin] addiction but asked me to tell him from whom I was buying drugs, and sometimes would tell him. Sometimes I would tell him the truth but mostly not, I was trying to gain time. ... I trusted [K.A.] when he brought me that record and told me to sign it and that everything would be all right, that I could go. Therefore I signed it.
>
> As to the questions put by [the accused] I can answer that when I was in the police [station] the only thing that was important for me was to get out and to get myself a heroin fix, or methadone, which I was just going to pick up when the police arrested me."

37. I.G.H. also testified that he had been ill-treated by police and that his statement was the result of ill-treatment. He stated:

> " ... In [the police station] the ill-treatment started immediately. Two or three police officers, whom I did not know, told me to spread my legs and put my hands behind my back with my head pressed against the wall. Whenever somebody passed by me I was kicked, and when I fell they kicked me on the ground. They were jumping all over me. This lasted for some time and then they started to negotiate, asking me to

give a statement. I asked for lawyers J.N. or S.B. but they told me as regards [lawyer J.N.] 'why do you need that bitch' and also that [lawyer S.B.] would not come. The ill-treatment ... started again and then [police officers] [K.]A. and [D.]Z. came. They told me that they were good policemen and asked me to give a statement. They also told me that [V.Š.] had already made a statement and that they had two to three other statements and that I should also make a statement, sign it and I could go. Then I signed that statement but I did not see what was in it. I remember that there was some police lawyer who told me 'you just sign here kid'. The policeman also blackmailed me with an arrest warrant against me which had been issued previously, saying that they would withdraw it if I signed.

... I would like to confront policemen Z. and A. concerning everything I have just said. ...

The policeman also did not provide me with any medical assistance from a doctor and when I asked for heptaton they told me that there was no chance I could get it before I signed.

... I used to buy drugs all over the place, but never from anybody who is present in this courtroom. ...

Nothing [in the statement] is true except my personal details. ...

I know [police officers] Z. and A. ... They did not physically ill-treat me but they were asking me to work for them. It is not true what was written, that I was not in withdrawal. I was, and the policeman waved the heptaton in front of my eyes. They were showing me the drugs. The defence lawyer did not see anything, but he was only there for about ten minutes, he signed [the statement] and left."

38. Another hearing was held on 25 March 2005, at which N.S. gave evidence. As to his statement given to the police, he stated:

" ... [In the police station] I was held for four or five hours. I was asked about Erkapić and [the policeman] told me that if I confirmed what they said they would let me go. So I did that, I signed the record and left. I did it because I was having a severe physical crisis.

... I never asked for the defence lawyer Ž.S. He was just there at one moment and the policeman told me that he was my defence lawyer. I don't remember but I don't think I ever signed a power of attorney for him.

The record was written previously, and not while the lawyer was there. In the presence of the lawyer I was just confirming what was written in the record and then I signed it. I signed it without reading it, because I could not wait to get out and take drugs ...

During my police questioning I was never offered medical assistance, although I was in withdrawal.

... the policemen saw that I was in withdrawal ... because I told them so, and I asked for a doctor and heptaton, but they said no.

39. At the same hearing another co-accused, D.L., testified that while he had been in police custody he had heard police officers beating and interrogating N.S. for three hours.

40. After the accused had given evidence the applicant's defence lawyer asked for the records of the oral statements given to the police by V.Š.,

I.G.H. and N.S. to be excluded from the case file as evidence obtained unlawfully. The defence lawyers of the other co-accused made the same request.

41. At a hearing on 14 April 2005 the trial court dismissed their requests, on the grounds that the records of the statements given to the police did not reveal any reason to exclude them from the case file.

42. At the same hearing I.G.H. added that he had been told by policeman K.A. that they wanted to put the applicant in prison for fifteen years or kill him. V.Š. and I.G.H. reiterated that their statements given to the police had been a result of withdrawal symptoms and crisis.

43. In their closing argument, the applicant's defence lawyers argued that the only evidence against the applicant was the statements of his co-accused, which had been made to the police under duress and pressure. They asked for the applicant to be acquitted.

44. On 14 April 2005 the Zagreb County Court found the applicant guilty as charged and sentenced him to eight years' imprisonment, and imposed a confiscation order on him in the amount of 690,134.4 Croatian kunas (HRK).

45. The Zagreb County Court based the applicant's conviction solely on the statements V.Š., I.G.H. and N.S. had made to the police. In addition it considered that witness M.S. had also testified that he had transported one kilogram of heroin to the applicant.

46. As to the lawfulness and probative value of the records of oral statements given to the police by V.Š., I.G.H. and N.S., that court noted:

> "The request to exclude the record of the statement made by the fourth accused, I.G.H., to the police on 27 April 2001, made by the defence lawyer of the fourth accused I.G.H., on the ground that when giving the statement [I.G.H.] had been undergoing withdrawal from heroin, was dismissed. [The record of his statement] does not reveal any suspicion that [I.G.H.] was in withdrawal. Moreover, there was a defence lawyer present during his questioning who did not have any objection as to the manner of the questioning. This record does not reveal any circumstances which could raise the suspicion that the questioning of the fourth accused I.G.H. by the police on 27 April 2001 had been unlawful ...
>
> It was also requested that the records of the statements given to the police by the third accused V.Š., the fourth accused, I.G.H., and the eleventh accused, N.S., be excluded from the case file on the ground that these statements were made under duress and that as such they could not be used in the proceedings. The records referred to do not reveal any circumstances which could raise the suspicion that the statements had been made under coercion or pressure. The defence lawyers were present during the questioning and they did not have any objections. ... There is nothing credible to support the suspicion that the records referred to were obtained unlawfully, and therefore the request for their exclusion was dismissed ...
>
> Statements by the third accused, V.Š., the fourth accused, I.G.H., and the eleventh accused, N.S., made to the police in the presence of their defence lawyers, are accepted by this court as they are clear, specific and precise. These statements support each other, they have a number of details which could obviously be known only from personal experience (particularly the details of how they contacted the first accused,

> Mario Erkapić, and how the drugs were distributed and hidden) ... The statements these accused made during the trial, where they tried to show that their previous statements were a result of unlawful treatment by the police (threats, ploys, ill-treatment), are not accepted by this court, as their aim is to avoid criminal responsibility.
>
> Moreover, the records of the police interviews do not contain any element capable of placing their lawfulness in question. This court is not persuaded that various unlawful aspects [of the police questioning] alleged by I.G.H. did not provoke any reaction by the accused, who argued that [any reaction] would have been futile. These allegations were made almost four years after the events concerned had taken place and are therefore not credible and are an obvious fabrication aimed at avoiding criminal responsibility."

47. On 3 October 2005 the applicant lodged appeals with the Supreme Court against the first-instance judgment. He argued, *inter alia*, that his conviction had been based solely on the statements made to police by his co-accused, although that had been evidence obtained unlawfully, as his co-accused had been ill-treated by police during the questioning. Moreover, they had been heroin addicts and at the time of the questioning were going through withdrawal.

48. He further complained that the first-instance court had failed to hear the defence lawyers who had allegedly been present during the police questioning, and the police officers who had questioned his co-accused. In a situation in which his co-accused had raised the issue of coercion and ill-treatment during the police questioning, and in view of the fact that they had incriminated not only themselves but also him, the trial court had been obliged to check their testimony. As to the statement of witnesses M.S., the applicant pointed out that this witness had never said that the person he knew as "Mario" was the applicant.

49. On 22 February 2006 the Supreme Court dismissed the applicant's appeal. It upheld the findings of the Zagreb County Court that there was no evidence in the case file to suggest anything unlawful in the records of interviews with the police by the applicant's co-accused. The Supreme Court pointed out that they had been questioned in the presence of the defence lawyers and that there was nothing to indicate any withdrawal symptoms, coercion or oppression. The Supreme Court also added:

> "The psychiatric expert D.M. found that in April 2001 [I.G.H.], as an addict, had a high tolerance of heroin, but [the expert] did not say that he was experiencing a withdrawal crisis, which [the expert] reiterated at the hearing. The defence had no questions ...
>
> There was not a single piece of evidence, including the report drawn up by psychiatric expert D.M., to suggest that [I.G.H.] had been unable to understand the consequence of his actions, and particularly that he was unable to testify before the relevant authorities, regardless of his heroin addiction and diminished mental capacity at the time the offence was committed. Equally, there is not a single piece of evidence that the accused V.Š., and N.S. ..., on account of their heroin addiction, were unable to understand the nature of their actions or to testify before the authorities. ..."

50. The applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) against the above judgment on 4 April 2006, reiterating his previous arguments.

51. On 17 September 2008 the Constitutional Court dismissed the applicant's constitutional complaint, endorsing the reasoning of the Supreme Court. The decision of the Constitutional Court was served on the applicant on 26 September 2008.

II. RELEVANT DOMESTIC LAW

52. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010) read as follows:

Article 29

"In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law."

53. The relevant part of Section 62 of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette nos. 99/1999, 29/2002 and 49/2002) reads:

"1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that a particular action on the part of a state body, a body of local and regional self-government, or a legal person with public authority, affecting his or her rights and obligations, or placing him under suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms, or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: "constitutional right") ...

2. If another legal remedy exists against the violation of the constitutional right [complained of], a constitutional complaint may be lodged only after that remedy has been used.

3. In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law, is allowed, remedies are exhausted only after the decision on these legal remedies has been given."

54. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, 27/1998, 129/2000, 51/2001) provide:

Abuse of Narcotic Drugs
Article 173

"... (2) Whoever, without authorisation, manufactures, processes, sells or offers for sale or buys for the purpose of reselling, keeps, distributes or brokers the sale and purchase of, or, in some other way and without authorisation, puts into circulation, substances or preparations which are designated by regulation as narcotic drugs shall be punished by imprisonment for one to ten years, or by long-term imprisonment.

(3) If the criminal offence referred to in paragraph 2 of this Article is committed while the perpetrator is part of a group or a criminal organisation, or has organised a network to sell drugs, he shall be punished by imprisonment for not less than three years or by long-term imprisonment."

55. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 62/2003, and 115/2006) are as follows:

Article 9

"(1) The courts' decisions in criminal proceedings cannot be based on unlawfully obtained evidence (unlawful evidence).

(2) Unlawfully obtained evidence is evidence obtained by means of a breach of the fundamental rights of defence, the right to dignity, reputation, honour and respect for private and family life guaranteed under the Constitution, law and the international law, and evidence obtained in breach of the rules of criminal procedure in so far as set out in this Act, as well as any other evidence obtained unlawfully. "

Article 78

"(1) Where this Act provides that the judicial decision cannot be based on certain evidence, the investigating judge shall, at the motion of the parties or ex officio, exclude such evidence from the file before the conclusion of the investigation or before he gives consent for the indictment to be preferred without investigation (Article 191 paragraph 2). The decision of the investigating judge is subject to appellate review.

...

(3) After the investigation and after the consent is given to prefer the indictment without the investigation (Article 191 paragraph 2), the investigating judge shall also proceed according to the provisions of paragraph 1 and 2 of this Article in respect of all information which according to Article 174 paragraph 4 and Article 173 paragraph 3 of this Act is given to the State Attorney or to police officers by citizens or by a suspect who has been interrogated contrary to the provisions of Article 177 paragraph 5 of this Act."

Article 177

" ... (5) In the course of the investigation the police authorities shall inform the suspect pursuant to Article 237 paragraph 2 of this Code. At the request of the suspect the police authorities shall allow him to appoint a lawyer, and for that purpose they shall stop interviewing the suspect until the lawyer appears or at the latest three hours from the moment the suspect requested to appoint a lawyer. ... If the circumstances show that the chosen lawyer will not be able to appear within this period of time, the police authorities shall allow the suspect to appoint a lawyer from the list of lawyers on duty provided to the competent police administrations by the Croatian Bar Association for the territory of a county ... If the suspect does not appoint a lawyer or if the requested lawyer fails to appear within the time period provided, the police authorities may resume their interview with the suspect ... The State Attorney has the right to be present during the interview. The record of any statement made by the defendant to the police authorities in the presence of a lawyer may be used as evidence in the criminal proceedings ... "

Article 355

"(1) If an accused, while being questioned at a trial, contradicts a previous statement he has made, the president of the trial panel shall draw his attention to these contradictory statements and ask him why he is testifying differently. If necessary, his previous statement or part of that statement shall be read out.

(2) If an accused refuses to testify at a hearing or refuses to answer a question, his previous statement or part of that statement shall be read out."

Article 413

"The provisions of this chapter concerning the reopening of the criminal proceedings shall also be applicable ..., on the basis of a decision of the European Court for Human Rights which refers to some ground for the reopening of criminal proceedings or for an extraordinary review of the final judgement."

Article 427

"A request for the extraordinary review of a final judgment may be lodged [in respect of]:

...

3. an infringement of the defence rights at the trial or of the procedural rules at the appellate stage, if it may have influenced the judgment."

56. The relevant provisions of the amended Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012) provide:

Article 502

"...

(2) The relevant provisions concerning the reopening of the criminal proceedings shall be applicable in the case of a request for revision of any final courts' decision in connection with the final judgment of the European Court of Human Rights by which, in respect of the defendant, a violation of the rights and freedom under the Convention for the Protection of Human Rights and Fundamental Freedoms has been found.

(3) The request for reopening of the proceedings in connection with the final judgment of the European Court of Human Rights can be lodged within a thirty-day time limit starting from the moment of the finality of the judgment of the European Court of Human Rights."

Article 574

"...

(2) If prior to the entry into force of this Code a decision was adopted against which a legal remedy is allowed pursuant to the provisions of the legislation relevant to the proceedings [in which the decision was adopted], ..., the provisions of that legislation shall be applicable [to the proceedings concerning the remedy], unless otherwise provided under this Code.

(3) Articles 497-508 of this Code shall be accordingly applicable to the requests for the reopening of the criminal proceedings made under the Code of Criminal Procedure

(Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 62/2003, and 115/2006)."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

57. The applicant complained that he had not had a fair trial as provided for in Article 6 § 1, which, in so far as relevant, reads as follows:

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

A. Admissibility

1. The parties' arguments

58. The Government submitted that the applicant had failed to exhaust all available and effective domestic remedies. In the Government's view the applicant should have lodged a complaint concerning the alleged ill-treatment of his co-accused by the police through the police chain of command. That would have resulted in the investigation of all the circumstances of the case, which the applicant could have used when making his request for evidence to be excluded. Furthermore, the applicant had failed to lodge a criminal complaint against the police officers and the lawyers who had participated in the questioning of his co-accused. This would have allowed him to use the result of the proceedings concerning his criminal complaint as evidence in his criminal proceedings or as a ground on which he could have asked for his case to be reopened. The Government also pointed out that the applicant had failed to lodge a complaint with the Bar Association against the lawyers who had participated in the questioning of his co-accused; that association would have investigated the complaint and the result of the investigation could have been used as evidence in the applicant's criminal proceedings.

59. The applicant argued that the fact that the Constitutional Court had examined his constitutional complaint on the merits suggested that he had exhausted all available domestic remedies. As to the Government's assertion that he should have lodged criminal and disciplinary complaints against the police officers and lawyers who had participated in the questioning of his co-accused, the applicant argued that these had not been effective remedies concerning his complaints brought before the Court, and that he had not been obliged to pursue all possible remedies since he had been entitled to chose a remedy which had addressed his essential grievances. In his view the Government had failed to substantiate their

arguments that these were effective remedies within the meaning of Article 35 § 1 of the Convention.

2. The Court's assessment

60. The Court reiterates that, in accordance with Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, 22 September 1994, § 33, Series A no. 296-A, and *Remli v. France*, 23 April 1996, § 33, *Reports* 1996-II).

61. Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *John Sammut and Visa Investments Limited v. Malta* (dec.), no. 27023/03, 28 June 2005). The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness.

62. Therefore, Article 35 § 1 does not require that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI, and *Barta v. Hungary*, no. 26137/04, § 45, 10 April 2007). Remedies available to a litigant at the domestic level are considered effective if they prevent the alleged violation or prevent it from continuing, or if they provide adequate redress for any violation that has already occurred (see *Mifsud v. France* (dec.) [GC], no. 57220/00, § 17, ECHR 2002-VIII).

63. The Court notes that in the course of the criminal proceedings against him in the Zagreb County Court the applicant requested that the records of the oral statements his co-accused made to the police be excluded as evidence obtained unlawfully. Furthermore, in his appeal to the Supreme Court and his constitutional complaint lodged with the Constitutional Court, the applicant complained that his conviction had been based on evidence obtained unlawfully, namely the statements his co-accused had made to the police. These complaints were examined on the merits before both the Supreme Court and the Constitutional Court. It follows that in the course of the criminal proceedings against him the applicant afforded the domestic authorities sufficient opportunity to address his Convention grievances.

64. As to the Government's argument that the applicant had failed to lodge criminal and disciplinary complaints against the police officers and lawyers who had participated in the questioning of his co-accused, the Court notes that the applicant's complaint concerns only the alleged lack of fairness of the criminal proceedings at issue. In the Court's view, such

issues should be considered in the context and course of those proceedings and not in pursuing a number of other proceedings.

65. Therefore, the Court considers that the applicant properly exhausted the relevant domestic remedies and that the Government's objection must be rejected.

66. The Court also considers that this part of 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' arguments

67. The applicant contended that he had not had a fair hearing in that his conviction had been based solely on the record of the oral statements made during the pre-trial proceedings to the police by his co-accused, the lawfulness of which they had denied at the trial, i.e. before the investigating judge. He pointed out that he had not been able to participate in the questioning of his co-accused by the police, and that their oral evidence given to the police had been used to convict him. The applicant pointed out that the domestic courts, when relying on the statements made by the co-accused, had to take them with a higher degree of circumspection. This is because the accused, unlike the witnesses, is free to chose whether to give oral evidence or not or even to lie if necessary in support of his or her case.

68. In the applicant's view the problem in his case was the fact that he had not had an opportunity to question his co-accused when they had given their statements incriminating him. Furthermore, the applicant pointed out that his co-accused had testified before the trial court that they had been ill-treated by the police during the questioning, but the records of their statements had been later used to convict him. These allegations had never been examined by the domestic courts, which had rendered his trial unfair.

69. The Government argued that the applicant's complaints concerning the alleged unlawfulness of evidence had been examined by the domestic courts on more levels and at various stages of the proceedings. The applicant's assertion that his co-accused had made their statements while undergoing withdrawal had been rebutted by the psychiatric reports commissioned by the trial court, which found that the applicant's co-accused had been capable of making statements to the police. On the basis of these findings the trial court had duly examined the other evidence from the case file and found the applicant guilty. Moreover, the Supreme Court had examined the applicant's complaints in detail and had found that there was not one piece of evidence to suggest there was anything unlawful in the way the statements of his co-accused had been obtained by the police. In

sum, the Government considered that the applicant had had a fair hearing in which he had duly and effectively participated.

2. The Court's assessment

(a) General principles

70. The Court has held on many occasions that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV; and *Heglas v. the Czech Republic*, no. 5935/02, § 84, 1 March 2007).

71. The Court reiterates that, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Article 6 may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275, and *Salduz v. Turkey* [GC], no. 36391/02, § 50, 27 November 2008).

72. In determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see, amongst many others, *Sevinç and others v. Turkey* (dec.), no. 8074/02, 8 January 2008; *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009; and *Lisica v. Croatia*, no. 20100/06, § 49, 25 February 2010).

73. In this context the Court reiterates that, under Article 6 § 1 of the Convention, its task is to establish whether the evidence produced for or against the accused was presented in such a way as to ensure a fair trial (see *Barım v. Turkey* (dec.), no. 34536/97, 12 January 1999), irrespective of the type or gravity of the charges held against an accused since the public interest in investigation and punishment of a particular offence cannot justify measures which extinguish the very essence of an applicant's

defence rights (*Jalloh v. Germany* [GC], no. 54810/00, § 97, ECHR 2006-IX). As the Court has already indicated above, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce. The Court must however determine whether the proceedings considered as a whole, including the way in which evidence was taken, were fair as required by Article 6 § 1 of the Convention (see *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 57, 20 April 2010).

(b) Application of these principles to the present case

74. In the present case the Court has to examine whether the requirements of a fair trial have been satisfied as regards the admission into evidence of the incriminating statements made by the applicant's co-accused to the police and then retracted before the trial court with the serious allegation that these statements had been obtained against their will and under pressure from the police.

75. The Court has already held that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's statement in court than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pre-trial questioning is primarily a process by which the prosecution gather information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a defendant's guilt following a fair assessment of all the evidence actually produced at the trial, based on the direct examination of evidence in court. Although it is not the Court's task to verify whether the domestic courts made any substantive errors in that assessment, it is nevertheless required to review whether the courts gave reasons for their decisions in respect of any objections concerning the evidence produced (see *Huseyn and Others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 211, 26 July 2011).

76. The Court notes that I.G.H., V.Š. and N.S., at the pre-trial stage of the proceedings, made statements to the police which were incriminating to the applicant in the offence of drug trafficking, without the applicant being present during the questioning. However, the applicant was given an opportunity to confront his co-accused at the trial. At that stage of the proceedings the co-accused retracted their statements and made numerous allegations that the police had put pressure on them to make such statements.

77. The Court notes that V.Š., when examined at the trial, claimed that the police had provided him with a previously prepared statement incriminating the applicant and had asked him just to sign it; they had allegedly refused his request to be represented by a lawyer of his own choosing and had ignored the fact that he had been in the process of heroin

withdrawal (see paragraph 36). The same allegations were made by I.G.H. who asked to be confronted with the police officers (see paragraph 37), and by N.S. who first complained to the investigating judge that he had been put under pressure by the police to make a statement incriminating the applicant (see paragraph 17) and then reiterated his allegations during his testimony at the trial (see paragraph 38).

78. Following these statements given by I.G.H., V.Š. and N.S. at the trial, the applicant requested that the records of their oral statements given to the police be excluded from the case file as evidence obtained unlawfully. However, his request was dismissed without any action being taken by the trial court to examine the allegations, such as questioning the defence lawyers who, according to the applicant's co-accused, had not been present during their whole police questioning; questioning the police officers who had conducted the interviews; or requesting a detailed report from the police on the matter (see, by contrast, *Sevinç*, cited above); or commissioning a medical report concerning the mental state of I.G.H., V.Š. and N.S. and their alleged withdrawal crisis at the time they were making their statements. All these shortcomings were pointed out in the closing arguments of the defence lawyer representing the applicant. Under these circumstances, having regard to the purpose of the Convention, which is to protect rights that are practical and effective (see *Lisica*, cited above, § 60), the Court is not convinced that the applicant had an effective opportunity to challenge the authenticity of the evidence given by his co-accused to the police and to oppose its use.

79. As to the manner and circumstances in which the evidence was obtained, the Court notes that there is no dispute between the parties that I.G.H., V.Š. and N.S. were heroin addicts in the period when they gave their statements to the police. In addition, I.G.H. had a personality disorder, which was also not disputed by the parties (see paragraphs 27 and 30). All of them claimed that during the police questioning they had suffered from withdrawal, and I.G.H. and N.S. alleged that they were denied medical assistance during their police custody (see paragraphs 37 and 38). The Court observes, however, that the trial court never took any actions to ascertain the circumstances surrounding these complaints.

80. Furthermore, the Court notes that I.G.H. and V.Š. complained before the trial court that their legal representation during the police questioning had fallen short of the requirements of effective defence, since they had not been given an opportunity to be represented by lawyers of their own choosing (see paragraphs 36 and 37). The same complaints were also raised by N.S., who had already complained to the investigating judge that during the police questioning he had been represented by a lawyer not of his choosing (see paragraphs 17 and 38). They also claimed that the lawyers imposed on them by the police had not in fact been present during the questioning but had only come to sign the ready-prepared statements.

81. On the other hand the record of the questioning of I.G.H. by the police indicates that his questioning commenced at 11.15 p.m. and ended on 28 April 2001 at 1 a.m., and that he was assisted by a lawyer with whom he had a five-minute opportunity for consultation (see paragraph 6).

82. The Court further notes that I.G.H., V.Š. and N.S. were not represented by the same lawyers during the police questioning and before the investigating judge (see paragraphs 6 and 11 concerning I.G.H.; paragraphs 7 and 14 concerning V.Š.; and paragraphs 13 and 17 concerning N.S.). In view of their complaints, this can be observed against the fact that I.G.H., V.Š. and N.S. all provided statements to the police incriminating the applicant. However, when they were brought before the investigating judge I.G.H. and V.Š. remained silent (see paragraph 11 and 14) and N.S. complained that he had given his statement to the police under pressure (see paragraph 17) while represented by a lawyer not of his own choosing.

83. The domestic courts, however, merely limited themselves to the finding that the records of the statements did not provide any indication of unlawfulness, without any further assessment of the circumstances surrounding the police questioning. This appears particularly insufficient in view of the concordant objections raised by the applicant's co-accused and supported by the statements of other witnesses; namely M.S., who also complained about the alleged pressure by the police (see paragraphs 15 and 32). Therefore, the Court considers that the national courts did not conduct the proper examination of the submissions by the applicant and his co-accused without prejudice.

84. Consequently, in the absence of an adequate explanation by the domestic authorities, the Court has serious doubts about the reliability and accuracy of the statements given to the police by I.G.H., V.Š. and N.S. as well as about the quality of such evidence.

85. As to the extent to which the domestic courts relied on such evidence when convicting the applicant, the Court notes that the Zagreb County Court relied on the statements I.G.H., V.Š. and N.S. had made to the police when it convicted the applicant (see paragraph 45) and that it had no other concrete and direct corroborative evidence concerning the applicant's guilt (see *Vaquero Hernández and Others v. Spain*, nos. 1883/03, 2723/03 and 4058/03, § 130, 2 November 2010; see also, by contrast, *Bostancioglu v. Turkey* (dec.), no. 36927/04, 7 June 2011; and *Sevinç*, cited above).

86. It is true that the Zagreb County Court referred also to the statement given by witness M.S., however that statement cannot be held as sufficient, let alone relevant and specific, evidence with which to convict the applicant. Namely, when questioned by the investigating judge on 19 October 2000, that witness stated that in 2000 he had transported heroin to a person he knew as "Mario" (see paragraph 5). In his statement of 23 July 2001, which he made to the investigating judge in the applicant's case, M.S. retracted his previous statement and expressly stated that he did not know the applicant

(see paragraph 15). He reiterated this statement at the trial on 8 March 2004 (see paragraph 32).

87. Therefore the Court considers that the statements I.G.H., V.Š. and N.S. had made to the police were, if not the sole, at least the decisive evidence against the applicant, without which securing a conviction of the applicant would either not be possible or the possibility would have receded very far into the distance.

88. In sum, the Court considers that the foregoing considerations taken together are sufficient to enable it to conclude that the national courts failed to properly examine all relevant circumstances surrounding the police questioning of the applicant's co-accused, and in relying thereon for his conviction, did not secure the applicant a fair trial.

89. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

90. The applicant also cited Articles 3, 13 and 14 of the Convention and Article 1 of Protocol No. 1, without any proper substantiation.

91. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

94. The Government considered the applicant's claims excessive, unfounded and unsubstantiated.

95. Having regard to all the circumstances of the present case, the Court accepts that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 in respect of

non-pecuniary damage, plus any tax that may be chargeable to him. Furthermore, the Court notes that under the relevant domestic law (see paragraph 56) it is opened for the applicant to request the reopening of the criminal proceedings in connection with the Court's finding of the violation of his right to a fair trial under Article 6 of the Convention.

B. Costs and expenses

96. The applicant also claimed EUR 4,025.83 for costs and expenses incurred before the Court.

97. The Government considered the applicant's claims unfounded.

98. 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 applicant the sum of EUR 2,500 for costs and expenses before the Court, plus any tax that may be chargeable to him on that amount.

C. Default interest rate

99. 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 complaint under Article 6 § 1 of the Convention concerning the alleged lack of fairness of the criminal proceedings admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
      (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,500 (two thousand five 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction and costs and expenses.

Done in English, and notified in writing on 25 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President