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

THIRD SECTION

CASE OF G.B. v. FRANCE

(Application no. 44069/98)

JUDGMENT

STRASBOURG

2 October 2001

FINAL

02/01/2002

In the case of G.B. v. France,

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

Mr W. FUHRMANN, *President*,
Mr J.-P. COSTA,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 16 May 2000 and 11 September 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44069/98) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr G.B. ("the applicant"), on 30 July 1998.

2. The applicant was represented by Mrs C. Waquet, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs. The President of the Chamber acceded to the applicant's request not to have his identity disclosed (Rule 47 § 3 of the Rules of Court).

3. Relying in particular on Article 6 §§ 1 and 3 (b) of the Convention, the applicant complained of an infringement of the principle of equality of arms and the rights of the defence, firstly, in that, at the beginning of his trial at the Assize Court, the prosecution had filed documents that had never been brought to his notice and, secondly, in that the Assize Court had refused to order a further expert opinion when the expert contradicted his written report in the course of his oral submissions.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 16 May 2000 taken in the light of the parties' written observations, the application was declared partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry]. The Court decided that no hearing was necessary (Rule 59 § 2).

7. The Court also asked the Government to produce the documents filed by the prosecution at the start of the trial at the Assize Court.

8. On 27 July 2000 the Government filed the documents requested along with further observations on the merits of the application.

9. On 15 September 2000 the applicant's lawyer filed further observations in reply to those of the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The investigation proceedings

10. In the course of a judicial investigation concerning the applicant, his wife, his former brother-in-law and one of his nephews, the applicant was remanded in custody on 16 June 1993 and charged with rape of a child under 15 (his niece), sexual assaults on children under 15 (his nephews) and a number of further counts of sexual assault.

On 16 September 1993 the investigating judge at the Lorient *tribunal de grande instance* ordered medico-psychological examinations of the applicant's niece and all the persons under investigation. He appointed two doctors, named Gautier and Daumer, for that purpose.

11. The two doctors were informed of the applicant's criminal record. In addition to a number of prison sentences, this included an investigation opened in 1989 into charges against the applicant of sexual interference with the daughter of his brother-in-law's sister.

12. On 29 October 1993 the experts filed their report on the applicant. They stated, among other things, that although the applicant, by his own admission, did have fantasist and even mythomaniac tendencies, these were not obviously pathological in nature, as had been shown two years previously by his statements regarding the relations between P.H. and K.S, two of the victims.

13. The doctors concluded as follows:

> "1. Our examination of G.B. has revealed psychopathic traits and signs of sexual perversion for which objective evidence is provided by his statements regarding P.H. and C.H.

2. The offence of which he stands accused with respect to C.H. and P.H. is linked to a state of sexual perversion. It is difficult to assess the extent or the nature of this state in so far as the accused presents the facts as isolated incidents. He denies raping K.S. and so it is not possible to address that issue from a clinical viewpoint.

3. The subject is not in a dangerous state in the psychiatric sense.

4. It would not be inappropriate to impose a criminal penalty on him.

5. Rehabilitation will not pose a problem, but a cure will depend on clearer identification of the subject's underlying sexual problem.

6. The subject was not insane within the meaning of (former) Article 64 of the Criminal Code when committing the offences of which he stands accused.

7. His state is not such as to require confinement or psychotherapeutic assistance."

14. In November 1993 the experts' conclusions were served on the applicant. The applicant's detention pending trial was extended several times during the investigation of the case.

15. On 19 October 1995 the applicant and his co-defendants (J.C.H., C.H. and S.C., the applicant's wife) were committed for trial at the Morbihan Assize Court by a judgment delivered by the Indictment Division of the Rennes Court of Appeal. The Indictment Division pointed out, in particular, that the applicant had initially denied any sexual abuse of his niece and nephews and then admitted to the conduct of which he was accused only to retract that admission. It related what had been said during the examination of the applicant's niece on the one hand and his nephews on the other, the latter having also been accused of rape and sexual abuse by the niece. The Indictment Division also mentioned the previous convictions on the applicant's criminal record, namely driving under the influence of alcohol, insulting a member of the police force in the performance of his duties, a hit-and-run offence and a further conviction for driving under the influence of alcohol.

16. The applicant appealed on points of law against the decision to commit him for trial, drawing attention to the vagueness of the terms used in the operative provisions of that decision. In a judgment of 26 February 1996 the Court of Cassation rejected that appeal.

B. The trial

17. The trial at the Assize Court began on 13 March 1997. The registrar read out the decision of the Indictment Division committing the applicant for trial. At that point the advocate-general stated that he wished to file certain documents regarding the personality of the defendants, including the applicant, and relating primarily to offences reported in 1979 and 1980.

18. The documents in question were records of evidence taken from witnesses, a procedural report by a police superintendent, a psychiatric report on the applicant at the age of 17 and a judgment relating to educational assistance. They comprised mainly a description of the applicant's sexual conduct when he was a minor and information about his family background. They related firstly to a charge of indecent assault on a girl under 15 brought against him in 1979 in proceedings during which the applicant had said that he had done the same thing "at least a dozen times both with little girls and with little boys aged between 7 and 9" and, secondly, to several counts of indecent assault without violence on three children under the age of 15. The proceedings concerning these offences, brought in 1979, and those mentioned above were discontinued.

19. The applicant's lawyer objected to the filing of those documents and requested an adjournment to prepare a pleading to that effect. The hearing was adjourned for thirty-five minutes. The applicant's lawyer lodged an application for all the documents to be rejected on the ground that they related to offences that were subject to limitation and had occurred prior to various amnesty laws which could apply to them. According to the defence, the documents were so old that they contravened the principle that a defendant's antecedents were inadmissible in evidence against him.

20. In an interlocutory judgment delivered on the same day the Assize Court rejected that application on the following grounds:

> "... The prosecution, like every other party to a criminal trial, is entitled to produce at the hearing any documents that appear to be helpful in establishing the truth provided that they relate to the offences of which the defendants stand accused and shed light on their personality.
>
> Provided that they are communicated to all the parties and can thus be examined adversarially, the production of such documents cannot have any adverse effect on the rights of the defence. ..."

21. Copies of the documents filed by the prosecution were distributed to each of the civil parties' lawyers and the defence lawyers but the case was not adjourned.

22. When the examination of the defendants began as to their backgrounds, the applicant's hearing was deliberately put back until the end of the afternoon. Exercising his discretionary powers, the President of the Assize Court called a teacher of children with special needs as a witness to be heard for information purposes only. Following that hearing, the respective lawyers of C.H., who stood accused along with the applicant, and of P.H. declared that they were bringing civil-party proceedings on their clients' behalf and made a written application.

The trial was adjourned.

23. At the beginning of the afternoon the lawyer representing the applicant's wife in turn applied for the investigation to be reopened to take

account of the documents relating to her that had been filed by the prosecution. Those documents included a judgment delivered by the Lorient *tribunal de grande instance* in 1996, records of the hearing by that court's registrar and written statements by S.C. The applicant's wife's lawyer requested that in the course of the reopened investigation the statements on the proceedings made by Mr and Mrs B. in the documents filed by the prosecution be added to the file. Failing that, the trial would have to be adjourned to a subsequent session. In support of his requests, the lawyer relied on the requirement of a fair trial.

24. In an interlocutory judgment the Assize Court deferred its decision on the above application pending completion of the hearing of evidence. The President continued his examination of the defendants until 6 p.m. with one short adjournment of fifteen minutes. At 6.20 p.m. the examination of the defendants resumed and thereafter a witness was heard.

25. Lastly, on the evening of the first day of the trial, that is on 13 March 1997, the Court heard one of the experts who had been appointed to prepare an opinion during the pre-trial investigation. He made an oral presentation of the report he had submitted on 29 October 1993 during the investigation proceedings (see paragraph 13 above).

26. The President then adjourned the proceedings for fifteen minutes during which the expert studied the new documents produced by the prosecution.

27. As soon as the hearing of the expert resumed, the latter allegedly changed his opinion, stating, among other things, that the applicant was a "paedophile" and that "psychotherapy [was] necessary, but would be ineffective for the time being".

28. The examination of the expert lasted about two hours, at the end of which the President authorised him to withdraw permanently, a decision on which he had consulted the parties and to which none of them had raised any objection.

29. On the following day, 14 March 1997, the applicant's lawyer disputed the expert's oral submissions and applied for a second opinion, on the following grounds:

> "After ... one of the two experts appointed by the investigating judge had made his statement before the Assize Court, he was informed of the two discontinued sets of proceedings that had been brought against G.B., who is now 34, when he was 16 years old. The depositions made by G.B. at that time were read out to the expert. Immediately after being informed of those facts, of which he had been unaware when preparing his expert opinion, the expert radically altered his submissions, stating that:
>
> – in his view G.B. is unquestionably a paedophile;
>
> – psychotherapeutic treatment is necessary, but, given G.B.'s current state of mind, would be totally ineffective because he has no feelings of guilt;

– the length of a prison sentence has no effect on an individual of that type as the potential to be cured depends solely on a feeling of guilt, which G.B. lacks;

– in the absence of a feeling of guilt, there is a major risk that G.B. will reoffend even after a long sentence, meaning that imprisonment can only serve as a means of protecting society. ...

G.B. formally disputes the expert's oral submissions. A second opinion is indispensable. If it had considered it necessary, it was during the investigation that the prosecution should have filed the documents it produced at the beginning of the trial relating to proceedings brought over fifteen years ago. In that case the expert would have drawn up his report in the light of the evidence contained therein and G.B. would undoubtedly have requested a second opinion, prepared by two experts.

The Assize Court therefore heard an oral report that differed radically from the written report by the two experts.

Respect for the rights of the defence requires that a new expert opinion be ordered in the context of an application for the investigation to be reopened. Everyone has the right to a fair trial."

30. The lawyer also applied for the applicant's release on the ground that his client should not have to suffer the consequences of the prosecution's having taken three years and nine months to file documents that it considered indispensable.

31. In an interlocutory judgment of 14 March the Assize Court deferred its decision on the application for further investigative measures pending completion of the hearing of evidence and rejected the application for release on the ground that detention was "necessary to ensure that the defendant remain[ed] at the disposal of the judicial authorities".

32. The President continued to examine the defendants and obtained their statements. After that he took evidence from the applicant's mother, from a person sentenced for a serious crime and from eight witnesses.

33. The applicant's lawyer then reiterated his previous submissions while his wife's lawyer withdrew the interlocutory application he had lodged with the Assize Court.

34. On 15 March 1997 the Assize Court took formal note of the withdrawal by S.C.'s lawyer. On 15 March 1997, after a procedural defect vitiating the interlocutory application made by the applicant's lawyer had in the meantime been cured, the Assize Court nevertheless refused it. It made the following points regarding the complaint of an infringement of the rights of the defence:

"Firstly, the new documents produced by the prosecution and duly communicated to each of the parties to the proceedings could have been contested, particularly by G.B., whether directly or through the intermediary of his counsel.

Secondly, once the above documents had been brought to the notice of the expert ... and he had completed the presentation of his report, G.B. and his counsel were in a

position to request any further information or explanations from him that they required.

Thus it cannot legitimately be argued that the production of new documents and their consideration by the psychiatric expert were capable of infringing the rights of the defence.

At all events, in view of the outcome of the oral examination at the hearing, it does not seem essential for the establishment of the truth to seek a second psychiatric opinion.

Consequently, there is no cause for the proceedings to be adjourned ...”

35. The Assize Court also rejected the applicant’s application for release.

36. On 15 March 1997 the Assize Court sentenced the applicant to eighteen years’ imprisonment for a number of counts of raping his niece, a child under 15, sexually assaulting a girl under 15 and sexually assaulting his nephews. The sentences imposed on the three other co-defendants were less severe (ten years’ imprisonment, a fully suspended five-year prison sentence with probation, and a five-year prison sentence, one year of which was suspended with probation).

37. The applicant appealed on points of law. In his first ground of appeal he argued that the Assize Court’s consenting to file the documents produced by the prosecution amounted to a violation of his right to a fair trial, particularly the principle of equality of arms, since his lawyer had only had half a day to study the documents in issue whereas the prosecution had had them for some time. Relying also on Article 6 of the Convention, the applicant submitted another plea regarding the Assize Court’s refusal to order a second opinion. He argued that the examination by the expert of the new documents that had been produced at the hearing, which had made him radically change his initial submissions, required an effective second opinion for the sentence imposed to satisfy the legal requirement that it must be suited to the personality of the defendant.

38. In a judgment of 11 February 1998 the Criminal Division of the Court of Cassation rejected the appeal in its entirety. Regarding the grounds of appeal based on an infringement of the right to a fair trial, the Court of Cassation stated as follows:

“When, after the decision committing the defendant for trial had been read out, the advocate-general produced various documents including the records of a number of discontinued proceedings relating to the defendant, the defence objected and requested that those documents should not be filed.

As justification for its rejection of that request, the Assize Court stated that the prosecution, like every other party to criminal proceedings, is entitled to produce at the trial any documents that appear to afford assistance in establishing the truth in so far as they relate to the offences of which the defendants stand accused and shed light on their personality. If they have been communicated to all the parties so that there has

been an opportunity for adversarial argument about them, the production of such documents cannot legitimately be said to have any adverse effect on the rights of the defence.

In ruling to that effect, the Assize Court provided a legal basis for its decision without laying itself open to the objection raised in the ground of appeal because, the adversarial principle having been respected, no statutory or treaty provision prevented documents relating to offences subject to limitation but not covered by an amnesty being filed in that way. ...

As justification for its refusal to order the second expert opinion sought by the defence, the Court, having deferred its decision on the examination of that application, held, after taking evidence, that the requested measure was not indispensable for the establishment of the truth.

In ruling to that effect, the Assize Court, which was not obliged to respond to mere arguments in submissions, determined a matter over which it alone had jurisdiction, deciding that there was no reason to allow the application."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Hearings before assize courts

1. The Code of Criminal Procedure

39. The relevant provisions of the Code of Criminal Procedure on hearings before assize courts provide as follows:

Article 283

"If the investigation appears to him to be incomplete or if new evidence has emerged since its closure, the president may order any further inquiries he deems necessary. ..."

Article 287

"The president may, of his own motion or on an application by the public prosecutor, order cases which do not seem to him to be ready to be tried during the session in which they have been listed for hearing to be adjourned to a subsequent session."

Article 309

"The president shall be responsible for the proper management of the trial and shall direct the proceedings.

He shall reject anything that is calculated to undermine their dignity or prolong them without creating the hope of more certain results."

Article 310

"The president is vested with a discretionary power under which he may, on his honour and according to his conscience, take any steps that he believes may assist in establishing the truth. He may, if he deems it appropriate, place the matter before the court, which shall rule in accordance with the conditions set out in Article 316.

During the trial he may summon any person, where necessary by means of a warrant, and examine him, or demand to see any new evidence which he considers likely, in the light of argument at the trial, to assist in establishing the truth. Witnesses called in this way shall not be required to take an oath and their statements shall be regarded as being solely for information purposes."

Article 316
(in its wording prior to the Act of 15 June 2000 enhancing the presumption of innocence and victims' rights)

"All interlocutory issues shall be decided by the court, after the prosecution, the parties or their lawyers have been heard.

Interlocutory judgments may not prejudge the merits.

They may be challenged by means of an appeal on points of law, but only at the same time as the judgment on the merits."

Article 346

"Once the evidence has been heard, civil parties or their lawyers shall be heard. The prosecution shall make its submissions.

The defendant and his lawyer shall submit their defence pleadings.

Civil parties and the prosecution have the right to reply but the defendant or his lawyer shall always speak last."

2. Relevant case-law

40. According to the established case-law of the Criminal Division of the Court of Cassation (*Cass. crim.*) (see, in particular, *Cass. crim.* 13 May 1976, *Bulletin criminel* (*Bull. crim.*) no. 157, and *Cass. crim.* 4 May 1988, *Bull. crim.* no. 193):

"The prosecution shall be free to decide the content of its submissions. It shall be entitled to produce any documents and provide any explanations that it considers necessary, subject to the right of the parties concerned to reply."

41. According to other established precedents of the Criminal Division of the Court of Cassation (see, in particular, *Cass. crim.* 19 April 1972, *Bull. crim.* no. 132, and *Cass. crim.* 5 February 1992, *Bull. crim.* no. 51):

> "Under Article 287 of the Code of Criminal Procedure, defendants are not entitled *before* the opening of the trial to file an application for the case relating to them to be adjourned to a subsequent session."

B. Evidence given to trial courts by experts

42. Evidence given by experts is governed by the following provisions of the Code of Criminal Procedure:

Article 168

> "Experts shall, if necessary, give evidence in court on the results of their technical investigations, after swearing to assist the court on their honour and according to their conscience. When giving evidence, they may consult their report and its annexes.
>
> The president may, of his own motion or at the request of the prosecution, the parties or their counsel, ask experts any questions falling within the sphere of the task assigned to them.
>
> Following their statement, experts shall attend the hearing unless the president authorises them to withdraw."

Article 169

> "If at the hearing of a trial court a person heard as a witness or for information purposes contradicts the conclusions of an expert report or provides new technical insights, the president shall ask the experts, the prosecution, the defence and, if the case arises, the civil party, to submit their observations. The court shall declare in a reasoned decision either that the contradiction shall be disregarded or that the case shall be adjourned to a subsequent date. In the latter case, the court may order any measure it deems necessary with regard to the expert opinion."

C. Records of proceedings before assize courts

43. The provisions of the Code of Criminal Procedure relating to such records provide as follows:

Article 378

> "To ensure that the required formalities have been carried out, the registrar shall draw up a record which shall be signed by the president and the registrar.
>
> The record shall be drawn up and signed within three days at the latest of the delivery of judgment."

Article 379

"Unless the president orders otherwise, of his own motion or at the request of the prosecution or the parties, the record shall include neither the defendants' replies nor the content of depositions, subject nonetheless to the implementation of Article 333 regarding additions, changes or variations in witnesses' statements."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 (b) OF THE CONVENTION

44. The applicant alleged violations of Article 6 §§ 1 and 3 (b) of the Convention, the relevant provisions of which provide:

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

...

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

...

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

..."

A. Submissions of the parties

45. The applicant complained that the principles of equality of arms and a fair trial had been infringed when the prosecution produced new evidence at the beginning of the trial at the Assize Court.

46. The applicant did not criticise the production of that evidence in itself but complained that his lawyer had not been given reasonable time to defend him properly in the light of the content of the documents produced. He pointed out in that connection that his lawyer had been granted only a 35-minute adjournment in which to prepare submissions calling for rejection of all the new evidence and then only half a day in which to study the documents in issue while at the same time having to follow the continuing proceedings. The applicant further observed that during the three and a half years of preliminary investigation, neither the prosecution nor the investigating judge had deemed it necessary to conduct any inquiries into the applicant's past. He also argued that the documents in issue, relating to

accusations levelled against him when he was a minor or had only just reached his majority, had shed a new and radically different light on his conduct, as evidenced by the reaction of the expert heard during the trial.

47. The applicant further submitted, with regard to the conditions in which the expert had been examined on the evidence, that, although the formal, written rules had been respected, the seeming respect had in fact led to a violation of the rights of the defence on account of the derisory length of time that the expert had been given – a quarter of an hour during the trial and without any real adjournment of the proceedings – to comment on new documents which had prompted him to change his mind so abruptly.

48. Lastly, the applicant submitted that the rejection of his application for a second opinion had constituted a breach of the rights of the defence because a second opinion had been essential in view both of the expert's volte-face and of the influence that the latter's abrupt change of mind might have had in establishing the defendant's criminal responsibility and deciding on the sentence most suited to him personally. On the latter point, the applicant noted that the sentence imposed on him (eighteen years' imprisonment) had been heavier than that imposed on the three other co-defendants (ten years' imprisonment, a five-year fully suspended prison sentence with probation and a five-year prison sentence one year of which was suspended with probation).

49. The applicant considered therefore that the proceedings before the Assize Court had been unfair.

50. Regarding the filing of documentary evidence by the prosecution, the Government argued that each party was free to submit whatever arguments it wished to the Assize Court. The latter did not decide the case on the written evidence but on the evidence adduced in court. While the defendant was free to choose his defence, the prosecution had the right to produce new evidence in support of its argument. The documents in issue in the instant case had been intended to provide information about the applicant's personality. The Government pointed out that the Assize Court had confirmed that possibility in its interlocutory judgment of 13 March 1997 and stated that the documents in issue had been communicated to the parties and there had been an opportunity to examine them adversarially.

51. In that connection, the Government observed that although, in his initial application, the applicant had criticised the filing of evidence taken from proceedings long before, he had narrowed the scope of that complaint in his further observations, merely alleging a lack of time to prepare his defence. The Government pointed out that the complaint in question had never been raised before the Assize Court. It was only after the expert had made his submissions, and having regard to the possible impact of his statements, that the applicant's lawyer applied for the investigation to be reopened and the hearing to be adjourned to a subsequent session.

52. As to the legality of the prosecution's conduct, the Government considered that the rights of the defence had been respected in the instant case. They noted in that connection that copies of the documents in issue had been distributed to each of the lawyers of the civil parties and the defence lawyers. Moreover, the examination of the applicant as to his background had been adjourned until the afternoon to give the applicant and his counsel the time they needed to study the new evidence. The applicant's lawyer had also been granted an adjournment to prepare his application to reject the documents in issue and had thus been able to criticise them. The defence had also been able to present its version of the facts on the second and third days of the trial and had been given the last word, in accordance with the provisions of Article 346 of the Code of Criminal Procedure. At all events, the Government pointed out that the applicant had not been unaware of the existence of those documents and that his sexual problems in adolescence had already been mentioned in the report on his personality drawn up by the investigating judge. No evidence had therefore been concealed.

53. Furthermore, with regard to the psychiatrist's evidence at the trial, the Government pointed out that psychiatric experts played no part in establishing whether defendants had committed the offences of which they were accused since their sole function was to help the court to arrive at a more informed opinion about the personality of the accused, so that it could determine, *inter alia*, his degree of responsibility at the material time. The expert's comments on the documents in issue came within the scope of his freedom of expression. The Government also pointed out that, as a skilled professional, the expert was entirely at liberty to assess the time he required to familiarise himself with the documents on the file that would provide him with useful information and form an opinion on their potential impact on his previous diagnosis. If the expert had thought the adjournment was not long enough, he would have asked for an extension or even for an adjournment until the following morning in view of the late hour at which he was examined. Moreover, it was impossible to know exactly what the expert had said in evidence because all proceedings before the Assize Court were oral. At all events and contrary to what the applicant asserted, the Government considered that the expert's oral evidence had not conflicted with his report, which had already pointed to the accused's psychopathic traits and signs of sexual perversion.

54. The Government also pointed out that the applicant had had an opportunity to contradict the psychiatric expert's comments freely because he had been able to exercise his right to examine him in accordance with Article 168 of the Code of Criminal Procedure. The Assize Court had not considered it necessary to allow the applicant's application for a second opinion to be ordered because nine other witnesses had been heard after the psychiatric expert. The Government argued that the right to a second

opinion was not an absolute right under the requirements of the Convention, the national courts being free to judge for themselves whether it was appropriate to order a second opinion.

55. Lastly, the Government asserted that the applicant's conviction had not been based solely on the expert's evidence at the trial and that the applicant had been able to put his arguments to the jury throughout the proceedings and make use of the remedies available to him. The documents in issue and the expert's oral evidence had been only a part of the evidence submitted to the jury.

B. The Court's assessment

56. The applicant complained under Article 6 §§ 1 and 3 (b) of the Convention that he had not had a fair trial before the Assize Court. The complaint can be divided into three parts: firstly, the applicant alleged an infringement of the principle of equality of arms and the rights of the defence on account of the circumstances in which the prosecution had filed new documents at the beginning of the trial in the Assize Court and the lack of time that his lawyer had had to prepare his defence thereafter; secondly, he complained that the expert had had only a quarter of an hour to study the new evidence, which nonetheless had caused him to effect a complete volte-face in his submissions; finally, the applicant considered it unfair of the Assize Court to reject his application for a second opinion when the expert's change of mind had strongly influenced the jury's opinion in a direction that was unfavourable to him.

57. Bearing in mind that the requirements of paragraph 3 (b) of Article 6 of the Convention amount to specific elements of the right to a fair trial guaranteed under paragraph 1, the Court will examine all the complaints under both provisions taken together (see, in particular, *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, p. 16, § 31).

58. The Court reiterates that the principle of equality of arms relied on by the applicant – which is one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 107-08, § 23, and *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 102, ECHR 2000-VII).

59. The Court also points out that it is not within the province of the European Court to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which

evidence was taken, were fair (see the following judgments: *Edwards v. the United Kingdom*, 16 December 1992, Series A no. 247-B, pp. 34-35, § 34; *Mantovanelli v. France*, 18 March 1997, *Reports* 1997-II, pp. 436-37, § 34; and *Bernard v. France*, 23 April 1998, *Reports* 1998-II, p. 879, § 37).

1. The time afforded to the applicant's lawyer to prepare his defence following the production of new evidence by the prosecution

60. The Court notes that it was entirely lawful for the prosecution, at the beginning of the trial, to file new documents relating to the applicant's personality; these were communicated to the defence and subsequently examined adversarially. It also notes that the applicant himself did not criticise the production of those documents in itself. It finds therefore that this did not in itself give rise to any infringement of the principle of equality of arms between the parties.

61. The Court has also carefully analysed the sequence of events described in the record of proceedings before the Assize Court, noting that it was at the beginning of the trial, at 10 a.m. on 13 March 1997, that the deputy public prosecutor produced the new evidence, which the applicant's lawyer unsuccessfully asked the court to refuse to place in the file. On 13, 14 and 15 March there followed the examination of the defendants, the hearing of the witnesses and the expert, the civil parties' pleadings, the deputy public prosecutor's submissions, the pleadings of the co-defendants' lawyers and finally the pleadings by the lawyer of the main defendant, namely the applicant, which were submitted from 7.05 to 8.45 p.m. on 15 March 1997 and brought the hearing to a close (the court and the jury then retired to discuss the verdict, which they delivered some three hours later at 11.45 p.m.).

62. In that connection, the Court points out that it is not true that the applicant's lawyer had only half a day to read the new evidence (while following the continuing proceedings), as the applicant submitted. The half day in question was only the time between the production of the evidence and the beginning of the expert's evidence, the importance of which must be examined separately (see paragraphs 68 et seq. below).

63. In view of the foregoing, the Court considers that the applicant had adequate time and facilities to prepare his defence when faced with the new evidence and finds that in the instant case there has been no violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b) on that account.

2. The time afforded to the expert to study the new evidence filed and the Assize Court's refusal to order a second opinion

64. The Court notes that the hearing of Dr Gautier, one of the experts appointed during the investigation, began in the late afternoon of 13 March

when he read out his written report. In that connection, the Court would point out that the psychiatric opinion ordered during the investigation was intended to determine whether the applicant suffered from any kind of mental or psychological anomaly and, if so, whether there was a link between that disorder and the offences of which he stood accused. It was also supposed to assess how dangerous the defendant was. The two experts appointed by the investigating judge concluded that the offences with which the applicant had been charged, and of which his nephews and niece, the alleged victims, had accused him, were linked with a state of sexual perversion. They stated, however, that it was difficult to assess the extent and nature of that perversion – in so far as the applicant presented the facts as isolated incidents – or to gauge the applicant's potential for rehabilitation since a cure would be possible only if his underlying sexual problems were more clearly identified. The experts also asserted that the applicant was not dangerous in the psychiatric sense of that term. Consequently, their written report was, though not favourable towards the applicant, at least mitigated.

65. The Court further notes that in the middle of his evidence to the Assize Court Dr Gautier was granted a fifteen-minute adjournment to examine the new documents produced by the prosecution relating, in particular, to the applicant's sexual conduct at the age of 16 and 17. The expert was thus able to study a statement dating from 1979 in which the applicant spontaneously admitted to having sexually interfered with young children of both sexes on a dozen or so occasions.

66. The applicant asserted that when the hearing resumed, the expert expressed a totally damning opinion about him that was entirely at odds with the written report he had prepared three and a half years earlier. The expert is alleged to have stated as follows:

> "G.B. is a paedophile, for whom psychotherapy is necessary but would be ineffective because G.B. would have no feelings of guilt. The length of a prison sentence has no effect on an individual of this type and there is a high risk that he will reoffend."

67. The Court concedes that it is impossible to know exactly what the expert said in evidence since there are no written records of hearings before assize courts. However, it notes that the Government have never disputed that the expert had a brief opportunity to study the new documents in the middle of his evidence or that he made the comments attributed to him by the applicant; they have merely pointed out that the written report had already drawn attention to the defendant's psychopathic traits and signs of sexual perversion.

68. The Court would point out that the mere fact that an expert expresses a different opinion to that in his written statement when addressing an assize court is not in itself an infringement of the principle of a fair trial (see, *mutatis mutandis*, *Bernard*, cited above, p. 880, § 40). Similarly, the right to a fair trial does not require that a national court should appoint, at the

request of the defence, a further expert even when the opinion of the expert appointed by the defence supports the prosecution case (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 22, § 46). Accordingly, the refusal to order a second opinion cannot in itself be regarded as unfair.

69. The Court notes, however, that in the instant case the expert not only expressed a different opinion when addressing the court from that set out in his written report – he completely changed his mind in the course of one and the same hearing (see, by way of contrast, *Bernard*, cited above). It also notes that the application for a second opinion lodged by the applicant followed this "volte-face" which the expert had effected having rapidly perused the new evidence, adopting a highly unfavourable stance towards the applicant. While it is difficult to ascertain what influence an expert's opinion may have had on the assessment of a jury, the Court considers it highly likely that such an abrupt turnaround would inevitably have lent the expert's opinion particular weight.

70. Having regard to these particular circumstances, namely the expert's volte-face, combined with the rejection of the application for a second opinion, the Court considers that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (b) of the Convention taken together.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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

72. The applicant claimed 500,000 French francs (FRF) in respect of non-pecuniary damage.

73. The Government submitted that if the Court were to find a violation, that finding would in itself constitute sufficient compensation for the non-pecuniary damage sustained by the applicant.

74. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicant as having suffered a loss of real

opportunities (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). To this has to be added the non-pecuniary damage which the finding of a violation of the Convention in the present judgment is not sufficient to make good. Ruling on an equitable basis, in accordance with Article 41, it awards him FRF 90,000.

B. Costs and expenses

75. The applicant did not make any claim in this respect.

76. The Government expressed no view on the matter.

77. This being the case, the Court concludes that it is not necessary to reimburse the applicant's costs and expenses.

C. Default interest

78. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that the respondent State is to pay the applicant, within three months, FRF 90,000 (ninety thousand French francs) in respect of non-pecuniary damage plus simple interest at an annual rate of 4.26% from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 2 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

W. FUHRMANN
President