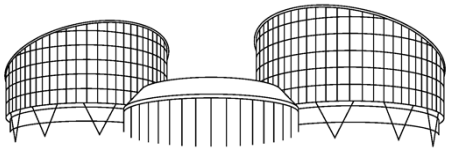

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PIRTSKHALAVA AND TSAADZE v. GEORGIA

(Application no. 29714/18)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Applicants' criminal conviction not based to a decisive degree on witness statements from their initial co-accused, placed in same pre-trial detention cell, but on complex body of additional evidence • Appellate court's reasoning concluding exclusion of statements would not result in acquittal not arbitrary or manifestly unreasonable • Criminal proceedings as a whole fair

STRASBOURG

23 March 2023

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

In the case of Pirtskhalava and Tsaadze v. Georgia,

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

Georges Ravarani*, President*,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lado Chanturia,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková*, judges*,
and Martina Keller, *Deputy Section Registrar*,

Having regard to:

the application (no. 29714/18) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Georgian nationals, Mr Irakli Pirtskhalava and Mr Giorgi Tsaadze ("the applicants"), on 18 June 2018;

the decision to give notice to the Georgian Government ("the Government") of the complaints under Article 6 §§ 1 and 3 (d) of the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 28 February 2023,

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

INTRODUCTION

1. The present case concerns the applicants' complaint that they were not given a fair trial, as required by Article 6 § 1 of the Convention, because of the domestic courts' reliance on what the applicants considered to be unreliable witness evidence.

THE FACTS

2. The applicants were born in 1968 and 1972 respectively. They were represented by Mr J. Kotchlamazashvili, a lawyer practising in Tbilisi.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. BACKGROUND

5. On 2 May 2006 two individuals – Z.V. and A.Kh. – were shot dead by police as they were driving in a street in Tbilisi ("the police operation of

2 May 2006"). The third passenger of the car, B.P., was seriously wounded during the shooting, but survived.

6. Approximately fifty police officers, including the applicants, participated in the police operation of 2 May 2006. At the material time the first applicant was deputy head of the criminal police unit of the Ministry of the Interior ("the MIA"), which was in charge of implementing the operation. The second applicant was a senior officer of that unit.

7. On an unknown date the Chief Prosecutor's Office of Georgia launched a criminal investigation into the circumstances of the police operation of 2 May 2006. The investigation was closed in April 2007 for want of a criminal offence.

8. Following the death of Z.V., his father – I.V. – became actively involved in public life, demanding that all the police officers involved in the operation be brought to justice. He established a non-governmental organisation, Save a Life ("the NGO"), whose mission was to expose the activities of numerous high-ranking law-enforcement officers who had allegedly been involved in various crimes committed by the police. In 2012 the NGO published an article in a national newspaper with a long list of all those police officers it alleged to have been implicated in various criminal offences ("the police blacklist"). The list included the two applicants. At the end of the document the name of officer G.S. (see paragraph 10 below) also appeared.

9. According to the domestic courts' findings, I.V.'s activities led to the reopening in December 2012 of the criminal investigation into the deaths of Z.V. and A.Kh. That investigation resulted, among other things, in the applicants' conviction (see paragraphs 12-32 below).

10. On 20 January 2015 I.V. was killed in a bomb blast caused by an improvised explosive device planted at his son's grave. The Tbilisi City Court found G.S. (see paragraph 8 above *in fine*) guilty of the murder. According to the court, the *mens rea* behind the crime had been G.S.'s wish to punish I.V. for and/or prevent him from carrying out his public activities which had been directed against the officers appearing on the police blacklist (ibid.). In that connection, the trial court noted as suspicious the fact that telephone conversations had taken place between the first applicant and G.S. both a few days before and after the blast. However, as the court was not aware of the content of those conversations, it refrained from making any further inferences. G.S. was sentenced to twenty years' imprisonment.

11. A detailed account of the factual circumstances relating to the police operation of 2 May 2006 and the findings of the domestic courts as part of the subsequent criminal proceedings is set out in the Court's judgment in a case brought before it by Z.V.'s parents (see *Vazagashvili and Shanava v. Georgia*, no. 50375/07, §§ 7-59, 18 July 2019).

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANTS

A. The applicants' arrest

12. On 1 February 2015 the Tbilisi City Court issued an arrest warrant in respect of the two applicants and nine other individuals involved in the police operation of 2 May 2006. The latter comprised I.M., G.G., A.Ts., Z.J., D.A., S.Ch. and A.S. (officers of a special response unit of the MIA – "the seven officers"), L.B. (an employee of the criminal police unit of the MIA), and K.N. (head of the special response unit of the MIA and the seven officers' hierarchical superior).

13. The applicants were arrested on 2 February 2015 and charged with (a) aggravated murder of two individuals, committed as part of a group in a manner that intentionally endangered the life or health of other persons; and (b) perverting the course of justice in a criminal case through the fabrication of evidence in respect of a serious or particularly serious offence. The seven officers and K.N. (see the previous paragraph) were also charged with aggravated murder. Between 6 March and 17 August 2015 the seven officers were placed in the same prison cell.

14. On 9 May 2015 the criminal investigation in respect of the seven officers of the special response unit (see paragraph 12 above) was separated from the case against the applicants and L.B., K.N. and G.K. (another employee of the criminal police unit of the MIA). The prosecutor took that decision after the officers' lawyers had informed him of their choice not to contest the evidence presented by the prosecution, and on the basis that the case against the individuals concerned "would not involve a full examination of the evidence (which, given the volume of the case file, requires considerable time), [and in order not to] come into conflict with the rights of those accused who do intend to contest [such evidence]".

B. Proceedings before the Tbilisi City Court

15. Between 24 and 30 July 2015 the seven officers were examined as witnesses in the criminal proceedings against the applicants. They described the circumstances of the police operation, such as the intentional creation of a traffic jam to trap the victims' car, the first applicant's having been the leader of the police operation, his having given the order to start shooting despite the fact that no shots had been fired by the victims, and the second applicant's having shot the victims at close range. The applicants cross-examined these witnesses.

16. During the trial proceedings, the applicants requested the dismissal of the evidence given by the seven officers as unreliable and unlawfully obtained. They contended that the seven witnesses, who at the same time were charged with exceeding their official authority (an offence under Article 333

of the Criminal Code) in a separate but related set of criminal proceedings, had been kept together in the same prison cell in manifest disregard of the relevant domestic law, and thus had had an opportunity to coordinate their statements against the applicants. The first-instance court dismissed the applicants' request without giving any reasons.

17. In the course of the trial, on 30 September 2015 the first applicant claimed that he needed to have questions put to at least sixty-five additional witnesses. The judge replied that the first applicant was free to have as many witnesses called as necessary. The applicant then requested that certain investigators and experts be examined. That request was granted. During a subsequent hearing the first applicant stated that he had encountered problems in locating some ten witnesses for the defence. He did not name those witnesses or submit an application to the trial court requesting that he be assisted in finding them. Nor did he request that the statements given by those witnesses during the investigation stage be read out at the trial. On 19 October 2015 the Tbilisi City Court asked the defence whether they had finished the examination of the evidence. The applicants' representatives replied that they had examined all of the evidence. The first applicant did not raise any objections.

18. On 30 October 2015 the Tbilisi City Court convicted the two applicants of aggravated murder but acquitted them of the charge relating to perverting the course of justice through the fabrication of evidence. They were sentenced to sixteen years' imprisonment. Reducing that prison sentence by a quarter, pursuant to section 16 of the Amnesty Act of 28 December 2012, the court ultimately fixed their sentence at twelve years.

19. By the same judgment the Tbilisi City Court also convicted K.N., head of the special response unit of the MIA and supervisor of the seven officers (see paragraph 12 above), of exceeding his official authority, an offence under Article 333 § 3 (b) of the Criminal Code. In addition, L.B. and G.K. were found guilty of fabricating evidence and deliberately effecting an unlawful arrest.

20. Among other things, the Tbilisi City Court established, on the basis of various items of evidence (see paragraph 22 below), that the first applicant, in the context of the arrest of his younger brother following a tip-off from A.Kh., as well as organisational tensions with a competing law-enforcement agency, had decided to take revenge against A.Kh. (see paragraph 5 above), whom he considered to have been the source of his family and professional troubles. Driven by that motive, on 1 May 2006 the first applicant had reported to his direct superior, the head of the criminal police unit, that he had received an anonymous tip-off that a robbery of a shop was being planned by a small group of "criminals" led by A.Kh. Having studied the files of the criminal police unit and witness statements, the trial court concluded that the first applicant had fabricated the so-called "anonymous tip-off" about the planned robbery in order to obtain authorisation to conduct the police

operation. He had thus succeeded in obtaining approval to conduct the operation and to mobilise an armed response squad of the MIA, consisting of approximately twenty heavily armed officers. That squad had been led by K.N. (see paragraph 12 above). The first applicant had also mobilised around thirty police officers from the criminal police unit. Since the MIA had been unlawfully tapping the mobile telephone conversations of A.Kh., the first applicant knew about the latter's plan to meet up with his friends, Z.V. and B.P., on the morning of 2 May 2006. He had considered the right bank of the River Mtkvari, where the victims were supposed to pass, the most suitable place to conduct a police operation and so had ordered the mobilised police officers to prepare for an ambush there.

21. According to the court's findings, at around 9.45 a.m., the black car driven by Z.V. had stopped at a red traffic light and at the same time an undercover police van had artificially created a traffic jam ahead of it. The first applicant and eight officers of the special unit, led by K.N., had started approaching the black car. K.N. had been the first to reach the car, from the front passenger side, and, after having attempted to open the closed door from the outside, he had started shooting with his service pistol in the direction of the front passenger and the driver, upon which the latter had started manoeuvring his car in order to escape the traffic jam created by the police van. In the course of that manoeuvre, the car had crossed into the lane for traffic in the opposing direction; at that moment all nine officers had opened heavy fire. Eventually, Z.V. had lost control over his vehicle, which had crashed into a lamp post on the kerb, but the shooting at the car had continued nonetheless. The trial court established that the defence's claim that the shooting had been provoked by the victims' behaviour had been false. Relying on the Court's case-law under Article 2 of the Convention, the trial court additionally drew attention to the police authorities' excessive use of force in terms of the type and sheer number of machine guns they had employed. It also found that after the shooting at Z.V.'s vehicle had stopped, the second applicant had approached the car from the driver's side and fired two shots from his service pistol through the rolled-down window of the car into the heads of the driver, Z.V., and the front passenger, A.Kh. Those two shots were characterised by the trial court as "controlling" (საკონტროლო გასროლა) ones.

22. As is apparent from the trial court's 43-page judgment of 30 October 2015, a number of witnesses and experts were examined during the criminal proceedings against the applicants, along with other evidence including video-recordings of the site of the incident and official documents of the MIA. Among other evidence, the court assessed the following material to decide on the various elements constituting the case against the applicants.

(a) *Absence of a legal basis for implementing the police operation*:

– According to the applicants' version of events, the basis for implementing the operation had been "operational" information from

an anonymous source, which had been verified by the first applicant before mounting the operation, that a robbery was being planned by the victims.

– Sh.N. (an employee of the MIA at the relevant time) indicated that the document confirming the receipt of operational information had been created only after the implementation of the operation.

– M.B. (former head of the Tbilisi police department) indicated that it was only after the end of the police operation that the then Minister of the Interior had asked him to help out the criminal police by finding "compromising (მაკომპრომენტირებელი) information regarding the young individuals shot during the special operation". He confirmed that the information he had managed to gather in respect of only one of the victims (possible involvement in a robbery) had been presented at the subsequent press briefing relating to the incident without any verification and as though it related to all three occupants of the car.

(b) *Possible motive behind the first applicant's planning of the special operation*:

– K.M. (deputy director of the special police unit of the MIA in 2006) described tensions between the first applicant and the special police unit and explained that in April 2006 A.Kh. (see paragraph 5 above), whom K.M. had known to be a drug user, had reported to the MIA that the first applicant's brother (L.P.) had been involved in drug dealing. This information had been confirmed to him by another employee of the MIA. K.M. had then instructed his staff to verify the information. As a result, L.P. had been arrested and later released on the basis of a plea-bargaining agreement.

– I.Z. (at the material time an inspector specially tasked with fighting drug offences) indicated that L.P. had been arrested on the basis of the information provided to the MIA by an anonymous informant.

– J.Sh. (a former cellmate of A.Kh.'s) stated that A.Kh. had been buying drugs from L.P. According to his account, A.Kh. had told him that L.P. had been procuring drugs for sale from the stockpile of narcotic substances seized by the MIA as evidence in drug-trafficking cases and that he had even had a disagreement with L.P. regarding the low quality of the drugs. He also stated that the first applicant had threatened A.Kh. (according to the latter) because of that disagreement.

(c) Unprovoked shooting in the direction of the victims' car:

– The seven officers confirmed that their supervisor, K.N. (see paragraph 12 above *in fine*), had explained to them that a police operation to apprehend individuals suspected of robbery would have to be implemented. For that purpose, they had been instructed to participate in the creation of an artificial traffic jam in order to gain access to the suspects' car.

– T.G. and E.M. (two independent eyewitnesses who had been driving in the car behind the victims' car) confirmed that they had witnessed four armed individuals (including K.N.) exit the car behind theirs and walk through the stationary traffic towards the victims' car before opening fire on that car. As a result, the victims' car had started manoeuvring to drive away, at which point the shooting had intensified. The surviving victim – B.P. – gave a similar account.

– K.G. (an independent eyewitness who had been at the scene of the police operation) and Q.M. (an independent eyewitness who had witnessed the events from her balcony) indicated that they had seen some officers put weapons in the victims' car after the shooting.

– Several forensic experts and documents confirmed that no shots had been fired from the victims' car and that all the marks left on it had been made by bullets going inward, not outward. They also established that the bullet hole identified on one of the police cars could not possibly have been caused by the victims.

(d) *The first applicant's actions during the operation*:

– The seven officers stated that once the victims' car was trapped in the artificially created traffic jam, the first applicant had given an order to start shooting in the car's direction. This had been followed by intense gunfire in which the first applicant himself, K.N. and other officers (including the seven officers) had taken part.

– The independent eyewitness K.G. identified the first applicant as one of the persons who had been shooting in the direction of the victims' car. K.G.'s presence on the ground was confirmed by a video-recording of an interview at the site of the events in which he had given an identical account.

(e) *The second applicant's actions during the operation*:

– The independent eyewitnesses K.G. and Q.M. confirmed that they had seen the second applicant approach the victims' car from the driver's side and fire two shots through the rolled-down window of the car into the heads of the driver and the front passenger.

– The seven officers also indicated that the second applicant had fired the so-called "controlling shots".

(f) *The cause of death of the victims*: K.G. and Q.M. stated that the victims had been alive before the "controlling shots". Forensic experts and documents confirmed the "controlling shots" to have been the cause of death of the victims. The relevant experts also confirmed that the eyewitnesses' description regarding the manner of the shooting was consistent with the injuries to the victims' heads.

(g) *The extent of shooting*: Forensic documents relating to the incident showed that more than one hundred shots had been fired in the direction of the car, with some forty bullets hitting their target. Experts who performed a subsequent post-mortem forensic examination were not

able to establish, owing to the severity of the injuries, the exact number of bullets that had penetrated the victims' bodies.

(h) The trial court also examined photo and video-recordings of the shooting scene made in the immediate aftermath of the police operation.

23. The trial court addressed the first applicant's argument that he had not given the order to shoot as described by the seven officers. The court observed that the first applicant did not deny the fact that he had indeed been the leader of the police operation. It then noted as follows:

> "[While] Irakli Pirtskhalava [the first applicant] denies having given an order to open fire in the circumstances described by the [seven officers of the special response unit], he confirms that he addressed the police officers, by means of a radio transmitter, in the following terms: 'Let the special response unit act (აცადეთ სპეცრაზმს)', which in that moment meant nothing less than giving [those officers] permission to shoot. If the officers of the special response unit misunderstood his instruction, causing them to open fire instead of simply arresting [the victims], why then did the leader of the operation [the first applicant] not give an order remedying the misunderstanding and call on them to stop shooting[?] What is more, the shooting was carried out by means of guns and automatic rifles in a place where their use was prohibited ... in spite of which the leader of the operation did not take any measures to stop such unlawful shooting."

24. The trial court also addressed the second applicant's argument regarding the absence of information as to the weapon used in his alleged administration of "controlling shots", and stated that that circumstance, while important in general, had not been decisive in reaching a conclusion regarding his guilt and could not contradict the finding of fact that the shooting had taken place. The court additionally answered the question as to why the second applicant had shot only two of the passengers and not all three, finding that the third passenger might have gone unnoticed in the back of the car or that the second applicant could have thought that the third passenger was already dead.

25. The Tbilisi City Court noted, in so far as the seven officers were concerned, that "there cannot be a violation of the right to presumption of innocence of the [seven officers] considering that at this stage they have been charged and independent judicial proceedings are pending against them".

C. Proceedings before the Tbilisi Court of Appeal

26. The applicants appealed against their conviction. In the course of the appeal proceedings they reiterated their request for the dismissal of the statements of the seven officers as inadmissible evidence. In support of their request the applicants submitted a report issued by the General Inspectorate of the Ministry of Corrections, dated 19 April 2017, which had established that the seven accused officers had been kept in the same cell between 6 March and 17 August 2015, in breach of the Prison Code (see paragraph 34 below). The applicants also called as witnesses three representatives of the Public Defender of Georgia, who confirmed before the appellate court that

they had seen the seven accused officers sharing cell no. 19 in Prison no. 9 during a monitoring visit on 22 April 2015. The applicants further emphasised that the seven officers had expressed their willingness to cooperate with the investigation and give incriminating evidence against the applicants only after they had been placed in the same cell, and that they had been kept together throughout the first-instance court proceedings. The applicants added that the criminal case against the seven officers had been separated from their own with the aim of obtaining incriminating statements from the seven officers in exchange for the latter's immunity.

27. During the appeal proceedings the first applicant made a request to have questions posed to some ten witnesses. That request was, however, dismissed by the Court of Appeal. It found that the defence had failed, contrary to the requirements of the Code of Criminal Procedure, to prove that the calling of those witnesses had been objectively impossible during the hearing before the trial court.

28. On 21 June 2017 the Tbilisi Court of Appeal upheld, by means of a 70-page judgment, the applicants' conviction and the lower court's reasoning in full. It dismissed the application to have the statements given by the seven officers declared inadmissible on account of their having been placed in the same cell in breach of the domestic law. It found that even though domestic law prohibited the placement of co-defendants in the same criminal proceedings in the same cell and any communication between them until the end of the relevant proceedings (see paragraph 33 below), the statements of the seven officers had been taken in compliance with the law, given that at the moment of their examination in court they had not been charged in relation to the same set of criminal proceedings as the applicants and thus had enjoyed the status of witnesses in the relevant set of proceedings. Thus, any breach of the law in respect of their placement in the same cell had, according to the appellate court, to be addressed as part of the criminal proceedings against the seven officers. The court also noted as follows:

> "[A]s regards the trustworthiness of the evidence in question, the Chamber observes that the statements of [these] witnesses do not constitute the sole and decisive evidence in respect of the factual circumstances described in their testimony. Additionally, the parties had an opportunity to receive information from these witnesses by ... examining them directly; their statements are corroborated by multiple [pieces of] direct evidence[.] Accordingly, the Chamber has no grounds to doubt the statements given by [the seven officers] in their capacity as witnesses.
>
> ... Consequently, the exclusion of the statements [of the seven officers] will not be a decisive factor to prove the innocence of [the two applicants]."

29. The appellate court also emphasised the existence of statements by four independent eyewitnesses (T.G., E.M., K.G. and Q.M.) in the applicants' case and the statement of the surviving victim of the police operation of 2 May 2006. The applicants' objections regarding the trustworthiness of the account provided by those witnesses were dismissed as unsubstantiated.

D. Proceedings before the Supreme Court

30. On 19 and 24 July 2017 the applicants lodged an appeal on points of law with the Supreme Court of Georgia. They challenged the lower courts' findings of fact, assessment of witness evidence and application of the law. The first applicant did not raise a complaint relating to his alleged inability to locate and have examined witnesses for the defence. As regards the statements given by the seven officers, the two applicants reiterated their complaint that these had been unreliable on account of the officers' placement in the same cell, allegedly in breach of the domestic legislation. Criticising the reasoning of the appellate court in that respect, the applicants pointed out that one of the grounds cited in the arrest warrant issued against the seven officers had been the need to prevent communication and collusion between them. Furthermore, even if the status of the officers in the applicants' trial had been changed from that of co-accused to witnesses because of the separation of their case from the applicants' one, that did not change the fact that they had already spent several months in detention in the same cell (initially as co-accused and later as witnesses who, nonetheless, had an interest in the outcome of the case) before giving incriminating statements against the applicants, in breach of the domestic legislation. The applicants also submitted that while the separation of the criminal case against the officers had apparently been motivated by their full acceptance of the evidence presented by the prosecution and considerations of expediency, that case was in fact still awaiting examination before the first-instance court.

31. On 2 August 2017 the Tbilisi City Court to which the case against the seven officers had been assigned stated, in response to a query from the Public Defender regarding the state of the proceedings against the seven officers, that that the criminal case had been "returned" (without specifying the date) to the prosecutor's office at the latter's request. On 31 August 2017 the prosecutor's office replied to a query from the Public Defender, stating that the case against those individuals had been discontinued.

32. On 23 January 2018 the Supreme Court delivered a 58-page decision rejecting, by means of written proceedings, the applicants' appeal on points of law as inadmissible. It reiterated the appellate court's reasoning in so far as the statements given by the seven officers were concerned, noting that such evidence had been neither the sole nor the decisive factor in the applicants' conviction.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODE OF CRIMINAL PROCEDURE

33. The relevant Articles of the Code of Criminal Procedure as in force at the material time read as follows:

Article 72 - Inadmissible evidence

"1. Evidence obtained in substantial violation of this Code, and any other evidence obtained lawfully on the basis of such evidence, if it aggravates the legal status of a defendant, shall be inadmissible and have no legal force.

2. Evidence shall also be inadmissible if it is obtained in observance of the rules established by this Code but there is a reasonable suspicion that it has been altered, its characteristics and qualities have been substantially changed, or that markings on it have been substantially erased ..."

Article 118 - Examination of a witness during a court hearing on the merits

"... 2. A witness shall be examined separately from other witnesses who have not yet been examined. At the same time, the court shall take measures to ensure that witnesses summoned for the same case do not interact with each other until the end of their examination. After the end of the examination, the judge shall inform the witness of his or her right to be present during the court session. ..."

Article 205 - Detention on remand

"4. Co-defendants in the same criminal case shall be placed in separate cells. The administration of a temporary detention centre shall be obliged to take measures to prevent their interaction with each other. By a decision of the investigator, prosecutor or the court, this procedure may also apply to other accused persons ..."

II. PRISON CODE

34. The Prison Code, as it stood at the material time and in so far as relevant, provided as follows:

Article 74 - Conditions in detention facilities

"... 4. Persons accused of being accomplices in respect of the same offence shall be placed in separate cells. The administration shall take measures to prevent their contact with each other. By a decision of the investigator, the prosecutor or the court, this procedure may also apply to other accused persons. ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

35. The applicants complained that they had not been given a fair trial because their convictions had been substantially based on unreliable statements by seven officers – initially the applicants' co-accused – who had been placed in the same cell, where they could have coordinated witness statements against the applicants. The applicants also submitted that the charges against those officers had later been dropped altogether. The first applicant also complained that he had been unable to have ten witnesses for the defence called and examined in court. The applicants relied on Article 6

§§ 1 and 3 (d) of the Convention, which, in so far as relevant, reads as follows:

> "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:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

A. Scope of the case

36. In their observations submitted in reply to those of the Government, the applicants argued that their conviction had partly been based on the statements of three absent witnesses (Z.S., D.N., and K.S.) for the prosecution. The Court notes that the core of the criminal case against the applicants was not based on the statements of those witnesses. In any event, and more importantly, the applicants' initial application form does not contain this complaint. Considering that the original complaint under Article 6 of the Convention related to the applicants' conviction having been based on evidence given by the seven officers and the first applicant's alleged inability to call ten witnesses for the defence, the new complaint regarding the absent witnesses for the prosecution does not constitute an elaboration of the applicants' original complaints. Consequently, it falls outside the scope of the present application.

B. Admissibility

1. The parties' submissions

37. The Government submitted, in relation to the complaint concerning the alleged failure of the trial and appellate courts to secure the attendance and examination of ten witnesses, that the first applicant had failed to use the appropriate procedure to request that those witnesses be examined by the trial court. Additionally, while the matter had been raised before the appellate court, the applicant had failed to raise that complaint before the Supreme Court. In this connection, the Government submitted to the Court illustrative examples from the practice of the Supreme Court showing that the latter could remit a criminal case to the lower courts for re-examination if it found that a complaint regarding a failure to call and examine witnesses for the defence was substantiated.

38. The Government also submitted that the applicants had abused the right of application. According to the Government, the applicants'

submissions alleging bribery of an eyewitness (see paragraph 40 below), which they made in response to the Government's observations before the Court, had not only been false but had constituted a deliberate attempt to mislead the Court. First, a criminal investigation had been opened into the matter approximately a year before the applicants had lodged the present application. However, they had failed to mention that investigation in their application form. Second, the eyewitness in question, contrary to the applicants' submission, had alleged that it had in fact been the applicants who had been willing to pay a bribe for the alteration of his initial statement, leading to the eyewitness being included in the witness protection programme because of his fears of retribution. He had even held a press conference on the matter, at which he had maintained that he had never misrepresented any facts relating to the applicants' case. What is more, it had been the first applicant's wife who had initiated contact with the witness in an attempt to convince him to alter his initial statement. Additionally, the Government pointed out that the statement which the eyewitness had given (and which implicated the applicants) had been consistent with the content of the initial impromptu interview he had given to a journalist just minutes after the police operation. In that interview the eyewitness in question had explained that no shots had been fired from the car to provoke the shooting by the police. The applicants had thus, according to the Government, provided incomplete information and attempted to mislead the Court, which constituted an abuse of their right of individual application.

39. The first applicant submitted, with respect to the complaint relating to the alleged failure of the domestic courts to ensure the examination of ten witnesses on his behalf, that the Supreme Court could not have remedied the matter.

40. The applicants further submitted that one of the eyewitnesses – K.G. (see paragraph 22 above, points (e)-(f)) – had allegedly confessed, in a conversation with the first applicant's wife in 2017, that he had made false statements against the applicants because he had been threatened and later bribed by the Deputy Chief Prosecutor of Georgia. They stated that they had not requested that an investigation be opened into the matter as they had not trusted the relevant authorities to carry out an impartial investigation.

2. The Court's assessment

(a) Exhaustion of domestic remedies

41. The Court observes that the first applicant did not dispute the fact that his appeal on points of law to the Supreme Court had not contained a complaint regarding the alleged failure of the lower courts to ensure the examination of ten witnesses for the defence. Accordingly, and taking into consideration the illustrative examples demonstrating the effectiveness of the Supreme Court in addressing such complaints (see paragraph 37 above), the

Court finds that the applicant failed to duly exhaust the domestic remedies. The relevant complaint under Article 6 §§ 1 and 3 (d) of the Convention must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

(b) Abuse of the right of application

42. As concerns the Government's objection regarding the alleged abuse of the right of application by the applicants, the Court reiterates that the submission of incomplete and therefore misleading information may amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information. However, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014).

43. In the present case, and considering the Government's arguments (see paragraph 38 above), the Court finds that the applicants' submissions regarding the alleged pressure exerted on one of the eyewitnesses did indeed misrepresent facts of which they had been well aware before lodging the present application. First, the witness had publicly denied such allegations. Second, a criminal investigation into the matter had been opened. Third, the first applicant's family may have contacted the witness concerned despite his inclusion in the witness protection programme. However, considering that the investigation into the matter has not been finalised, it is not for the Court to reach premature conclusions on the matter. The Court is also prepared to accept that the issue does not concern "the very core of the case" relating to the reliance on witness statements made by the seven officers of the special response unit.

44. In such circumstances, the Court dismisses the Government's objection.

(c) Conclusion regarding admissibility

45. The Court finds that the applicants' complaint under Article 6 § 1 of the Convention concerning the alleged unfairness of the criminal proceedings on account of the domestic courts' reliance on witness statements given by the seven officers of the special response unit is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

1. The parties' submissions

(a) The applicants

46. The applicants submitted that their conviction had been primarily based on witness statements given by seven officers involved in the police

operation and that those statements should have been declared inadmissible evidence. In this connection, the applicants stated that these officers had been placed, in explicit breach of the relevant domestic law, in the same cell, where they could have coordinated witness statements against the applicants. The applicants also submitted that the criminal investigation into the offences committed by those seven officers – who had initially been the applicants' co-accused – had been artificially separated from the proceedings against the applicants in order to afford those officers "witness" status. Lastly, the applicants argued that the charges against the relevant officers had been first amended and later dropped altogether, once they had made incriminating statements about the applicants. The applicants submitted that the arguments and objections which they had made before the domestic authorities regarding that complaint had not been given a reasoned reply. On account of those circumstances, the applicants complained that the criminal proceedings against them had not been fair.

(b) The Government

47. The Government submitted that there had been no link between, on the one hand, the amendment of the charges against the seven officers of the special response unit and the separation of their criminal case from that against the applicants and, on the other hand, the fact that they had made incriminating statements against the applicants. According to the Government, the charges brought against the seven officers had been amended only after the domestic courts had altered the charge against their supervisor – the head of the group of the special response unit, K.N. – from homicide to exceeding official authority (see paragraphs 12 and 19 above). As regards the separation of the criminal case against the seven officers from that of the applicants, the Government noted that on 8 May 2015 the officers' lawyers had informed the Chief Prosecutor's Office that they would not challenge the evidence presented by the prosecution at the main trial. Therefore, and taking into account the fact that no detailed examination of the evidence presented against the seven officers would have been necessary, it had been appropriate to split the proceedings in order to protect the rights of the police officers because the remaining co-accused, including the applicants, were going to challenge the evidence presented by the prosecuting party and those proceedings would therefore take longer. It was based on these considerations that a decision had been taken by the prosecutor on 9 May 2015 to separate the criminal case of the officers concerned from the case of the applicants.

48. As concerns the placement of the seven officers in the same cell, the Government submitted that the General Inspectorate of the Ministry of Corrections had carried out a disciplinary inquiry, finding that the authorities of Prisons no. 8 and no. 9 had committed disciplinary misconduct by placing the seven officers in the same cell. However, that offence had become

time-barred and no disciplinary liability could ensue. In any case, the domestic courts had addressed the applicants' objections on that point and had determined that the placement of the officers had not had an impact on the overall fairness of the proceedings against the applicants.

49. The Government emphasised that the applicants had been provided with an opportunity to have questions put to all seven officers and to challenge their testimony. Moreover, the appeal lodged by the applicants with respect to the use of the statements of those officers had been examined by the Tbilisi Court of Appeal and the Supreme Court of Georgia, both of which had issued reasoned decisions. The Tbilisi Court of Appeal, and then the Supreme Court, had found in particular that the officers of the special response unit had been examined at the court hearing as witnesses rather than co-accused, meaning that there had been no violation of the procedural law. The domestic courts had also established that those statements had not constituted the sole or decisive evidence against the applicants, whose guilt had been confirmed by other direct evidence available in the case file, including the statements of independent eyewitnesses and forensic expert examinations. The Government thus submitted that having regard to the criminal proceedings conducted against the applicants taken as a whole, the applicants had had a fair hearing in the determination of the criminal charges against them.

2. The Court's assessment

(a) General principles

50. While Article 6 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, § 46, Series A no. 140; *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX; and *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017).

51. There is a distinction to be made between the admissibility of evidence (that is to say the question of which elements of proof may be submitted to the relevant court for its consideration) and the rights of the defence in respect of evidence which in fact has been submitted to the court. There is also a distinction between the latter (that is to say, whether the rights of the defence have been properly ensured in respect of the evidence taken) and the subsequent assessment of that evidence by the court once the proceedings have been concluded. From the perspective of the rights of the defence, issues under Article 6 may arise in terms of whether the evidence produced for or against the defendant was presented in such a way as to ensure a fair trial (see *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, § 125, 27 October 2020, with further references).

52. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009; *Lee Davies v. Belgium*, no. 18704/05, § 41, 28 July 2009; and *Prade v. Germany*, no. 7215/10, § 33, 3 March 2016).

53. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be established, in particular, whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use (see *Szilagyi v. Romania* (dec.), no. 30164/04, 17 December 2013). 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, among other authorities, *Bykov*, cited above, § 90; *Lisica v. Croatia*, no. 20100/06, § 49, 25 February 2010; and *Ayetullah Ay*, cited above, § 126). While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see *Lee Davies*, cited above, § 42; *Bykov*, cited above, § 90; and *Bašić v. Croatia*, no. 22251/13, § 48, 25 October 2016). In this connection, it may also be reiterated that the burden of proof is on the prosecution, and any doubt should benefit the accused (see *Ayetullah Ay*, cited above, § 126).

54. When determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest in the evidence against him being gathered lawfully (see *Jalloh*, cited above, § 97, and *Prade*, cited above, § 35).

(b) Application of these principles to the present case

55. Turning to the circumstances of the present case, the Court notes at the outset that the applicants did not argue that they had been unable to examine the seven officers. Rather, they complained that their conviction had been based on the statements made against them by the officers who (a) had been placed in the same pre-trial detention cell, in breach of the domestic legislation, and thus given the opportunity to coordinate their statements, and (b) had cooperated with the authorities and implicated the applicants in exchange for immunity from prosecution. These issues are closely linked in the present case.

56. As concerns the complaint about the alleged unreliability of the statements given by the seven officers on account of their placement in the same pre-trial detention cell, there is no dispute between the parties as to the fact that those individuals spent several months of their detention in the same cell, in express breach of the domestic legislation (see paragraphs 33-34 and 48 above). While the domestic courts did address the applicants' argument in this regard by reasoning that the requirements of the domestic legislation were no longer being breached by the time the seven officers actually gave their statements against the applicants, they essentially left unaddressed the core of the argument regarding the risk that the placement of the officers in the same cell might have led to their having arranged a coordinated version of events which they had eventually relayed to the domestic authorities. The Court considers that the placement of the relevant witnesses in the same cell, irrespective of whether it had in fact allowed those individuals to coordinate their statements, could hardly have been conducive to the maintenance of the applicants' and the public's trust in the investigation (see *Enukidze and Girgvliani v. Georgia*, no. 25091/07, § 257, 26 April 2011).

57. Furthermore, with regard to the applicants' argument concerning the alleged advantages received by those witnesses from the prosecution authorities in exchange for their statements, the Court observes that the investigation in respect of the seven officers – initially the applicants' co-accused – was disjoined from the criminal case against the applicants (see paragraph 14 above). While the applicants were not given an opportunity to object to this separation (see *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 104, 23 February 2016), the Court is prepared to accept that the reason advanced by the prosecutor – namely, to ensure the speedy processing of the criminal case against the officers who did not challenge the authenticity of the evidence against them (see paragraph 14 above) – constituted, on the face of it, a reasonable justification. As for the amendment to the charges against those seven officers, it appears to have been based on the findings of the domestic courts in respect of the officers' supervisor (compare paragraphs 12 and 19 above).

58. Nevertheless, rather than being processed in a speedy manner, the case against the seven officers was still pending at the trial stage by the time the Tbilisi Court of Appeal delivered its judgment in respect of the applicants (see paragraph 31 above). Moreover, the criminal proceedings against the officers were discontinued altogether, on an unclear basis, soon after the applicants' conviction was upheld by the appellate court (ibid.). The Government provided no explanation in this respect and the domestic courts did not address the matter. In those circumstances, the domestic courts cannot be said to have scrutinised the applicants' argument with reference to its factual basis in its entirety (see *Adamčo v. Slovakia*, no. 45084/14, §§ 65-67, 12 November 2019). Additionally, and while the trial court noted the importance of respecting the officers' right to presumption of innocence (see

paragraph 25 above), it appears that the contested statements were examined by the domestic courts as any ordinary evidence would be. In that connection, the Court notes that the intensity of scrutiny called for with regard to evidence from an accomplice is correlated to the importance of the advantage that the accomplice obtains in return for the evidence he or she gives (see *Erdem v. Germany* (dec.), no. 38321/97, 9 December 1999).

59. However, the Court must assess the effect of the deficiencies identified above on the fairness of a trial taking into account all other relevant factors, depending on the circumstances of each case (see, for instance, *Xenofontos v. Cyprus*, nos. 68725/16 and 2 others, § 79, 25 October 2022; see also *Shiman v. Romania* (dec.), no. 12512/07, § 33, 2 June 2015, and *Oddone and Pecci v. San Marino*, nos. 26581/17 and 31024/17, § 106, 17 October 2019).

60. Within this context, the Court does not lose sight of the fact that the evidence against the two applicants, including the statements given by the seven officers of the special response unit, was produced at a public hearing, in the presence of the applicants and their representatives, who had an unrestricted opportunity to participate in the cross-examination of those witnesses (see paragraph 15 above; see also *Cornelis v. the Netherlands* (dec.), no. 994/03, ECHR-V (extracts)) and that the trial court was able to observe their demeanour at the trial (compare and contrast *Oddone and Pecci*, cited above, § 109). The defence also had an unrestricted opportunity to present their own version of events and relevant evidence.

61. More importantly, the Court pays particular regard to the fact that the contested evidence given by the seven officers was not decisive for the applicants' conviction (compare and contrast, for instance, *Adamčo*, cited above, §§ 58 and 71). In addition to the impugned statements, there was a complex body of evidence, including independent eyewitness testimony and findings of forensic examinations, in the file on the criminal case against the applicants (see paragraph 22 above; see also, for instance, *Habran and Dalem v. Belgium*, nos. 43000/11 and 49380/11, § 105, 17 January 2017, and *Dragoş Ioan Rusu v. Romania*, no. 22767/08, § 55, 31 October 2017).

62. In particular, the fact that the first applicant had been the leader of the special police operation had not been in dispute. The trial court's finding that he had planned and implemented the operation with no valid legal basis and for personal revenge was based on witness statements and documents unrelated to the seven officers (see paragraph 22 above, points (a) and (b)). The conclusion that the shooting had not been provoked by the victims was based, in addition to the statements given by the seven officers, on the account of two independent eyewitnesses who had been driving behind the victims' car and on multiple forensic experts and documents demonstrating that no shots had been fired from the victims' car (ibid., point (c)). An independent eyewitness, K.G., identified the first applicant as one of the persons who had been shooting in the direction of the victims' car (ibid., point (d)). As regards

the second applicant's conduct, his having fired the so-called "controlling shots" was confirmed by two independent eyewitnesses (see paragraph 22 above, point (e)). The fact that the two victims had been alive before the second applicant fired those shots was confirmed by an independent eyewitnesses and the subsequent forensic expert examinations (ibid., point (f)). Furthermore, the domestic courts answered the applicants' other arguments as regards the state of the evidence against them (see paragraphs 23-24 and 28-29 above). The only circumstance testified to by the seven officers and not corroborated by other evidence was the artificial creation of traffic congestion to implement the police operation. However, and taking note of its fundamentally subsidiary role (see *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017 ; see also *Tonkov v. Belgium*, no. 41115/14, § 49, 8 March 2022), the Court does not consider that this element went to the core of the criminal case against the applicants. Additionally, the appellate court explicitly addressed the applicants' objection regarding the lower court's reliance on the witness statements given by the seven officers and concluded that the exclusion of such evidence would not have resulted in the applicants' acquittal in view of the other material in the criminal case against them, including eyewitness statements (see paragraphs 28-29 above). The Court does not consider such reasoning arbitrary or manifestly unreasonable.

63. In the light of the foregoing considerations, the Court concludes that the criminal proceedings as a whole were fair.

There has therefore been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

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

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 23 March 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Georges Ravarani President