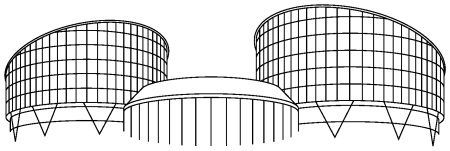

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 9464/14
Gintautas JURGELAITIS
against Lithuania

The European Court of Human Rights (Fourth Section), sitting on 10 October 2017 as a Chamber composed of:

Ganna Yudkivska, *President,*
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Carlo Ranzoni,
Marko Bošnjak,
Péter Paczolay, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having regard to the above application lodged on 21 January 2014,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Gintautas Jurgelaitis, is a Lithuanian national, who was born in 1970 and lives in the village of Žūklijai, in the Šakiai Region. He was represented before the Court by Mr J. Gabraitis, a lawyer practising in Kėpštai.

2. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

A. The circumstances of the case

1. Criminal proceedings concerning the assault against A.A.

3. At around 2.45 a.m. on 26 February 2011, A.A. was wounded with a knife in the village of Žūklijai. He sustained injuries to the face and abdomen, which were initially categorised as a minor health impairment and later as a severe health impairment. On the same day the Šakiai district prosecutor (hereinafter "the prosecutor") opened a pre-trial investigation.

4. On the same day the applicant was served with an official notice informing him that he was suspected of having injured A.A. while acting together with another unidentified individual and while being under the influence of alcohol. He was suspected of having caused A.A. a minor health impairment, as defined in Article 138 § 1 of the Criminal Code (see paragraph 22 below). The applicant was questioned and denied having injured A.A.

5. On unspecified dates the prosecutor questioned the victim, A.A., and several individuals who had been with him on the night of the incident. They all stated that that night they had been celebrating a birthday in the house next to the applicant's. At some point they had decided to go to the applicant's house to buy more alcohol because they had heard that he was selling it. However, nobody had let them into the house, so they had left. Soon afterwards they had noticed two men following them – one of them had been the applicant and the other had been unknown to them at that time. It was the latter who had assaulted A.A. with a knife; subsequently, in an identification parade, A.A. identified his attacker as S.B.

6. On 17 March 2011 the prosecutor discontinued the pre-trial investigation in respect of the applicant. The prosecutor's decision stated that during the investigation it had been established that the applicant had not injured A.A. – this had been confirmed by A.A. himself and by other witnesses (see paragraph 5 above). The investigation in respect of the applicant was therefore discontinued on the grounds that his actions had not constituted a criminal offence under Article 138 § 1 of the Criminal Code. The decision stated that a copy of it had been sent to the applicant, who had the right to appeal against it within fourteen days. He did not lodge an appeal. The applicant later submitted to the domestic courts that he had never received a copy of that decision (see paragraph 18 below).

7. On 18 March 2011 S.B. became a suspect in the investigation. In the course of the investigation against S.B., the applicant was questioned as a witness once and participated in four confrontations with S.B., A.A. and two other witnesses. On each of those occasions the applicant signed to confirm that he had been informed about his rights and obligations as a witness, and had been warned that if he gave false testimony he would incur criminal liability under Article 235 of the Criminal Code (see the contents of the protocol for witness testimonies in paragraph 26 below). The

applicant stated that on the night of the incident he, his friend K.B. and the suspect, S.B., had gone to the applicant's house to get alcohol and cigarettes. At some point S.B. had walked away from the house towards a nearby road and soon thereafter the applicant had heard screams coming from that direction. He had gone there with his car, had seen a group of young men beating up S.B. and had gone back to his house because he had not wanted to get involved. He had not seen S.B. assault anyone, nor had he known whether S.B. had had a knife.

The applicant repeated a similar account of events, with some changes, in confrontations with S.B. and K.B., and the latter stated that they agreed with the applicant's version.

8. On an unspecified date S.B. was charged with causing A.A. a severe health impairment, as defined in Article 135 § 1 of the Criminal Code (see paragraph 22 below).

9. On 6 September 2011 the applicant was questioned as a witness at a court hearing. He was warned that if he gave false testimony he would incur criminal liability under Article 235 of the Criminal Code and signed an oath. He was asked whether on the night of the incident S.B. had had a knife, whether the victim and his friends had been armed, and who had attacked whom during the incident. The applicant provided essentially the same account of the events as before (see paragraph 7 above).

10. On 16 December 2011 the Šakiai District Court found S.B. guilty of causing A.A. a severe health impairment, as defined in Article 135 § 1 of the Criminal Code, and sentenced him to six years of imprisonment. The court considered that the victim, A.A., and the witnesses who had been with him on the night of the incident had given consistent statements which it had no reason to doubt (see paragraph 5 above). Furthermore, their account had been corroborated by police officers and was consistent with the items seized at the scene of the incident. The court also held that the applicant, K.B. and S.B. had given conflicting statements and had changed certain details in their statements when questioned on different occasions. Accordingly, the court viewed their testimonies as an attempt to help S.B. avoid criminal responsibility and dismissed them as unreliable.

11. On the same day the Šakiai District Court also instructed the prosecutor to consider whether a pre-trial investigation should be opened in respect of the applicant and K.B. for giving false testimony under Article 235 § 1 of the Criminal Code.

2. Criminal proceedings concerning false testimony

12. On 11 October 2012 the applicant and K.B. were served with official notices informing them that they were suspected of having given false testimony in the proceedings against S.B., as set out in Article 235 § 1 of the Criminal Code.

13. When questioned on the same day, K.B. admitted his guilt. He stated that he had been afraid to testify against S.B. because the latter was a former prisoner who had been carrying a knife and boasting about assaulting people. Therefore, K.B. had been afraid that S.B. might seek revenge against him for unfavourable testimony. The following day the prosecutor discontinued the investigation against K.B. on the grounds that he had not intended to interfere with the criminal proceedings but that he had been afraid to testify against S.B., which was "understandable" in the light of the serious charges against S.B.

14. The applicant was also questioned on 11 October 2012. He explicitly refused a lawyer, denied his guilt and refused to answer questions. On 15 October 2012 the applicant was informed that the investigation had been completed and that he had the right to acquaint himself with the case file, but he refused to do so. On 17 October 2012 the applicant was charged with giving false testimony under Article 235 § 1 of the Criminal Code. The indictment stated that, when questioned as a witness in the criminal proceedings against S.B. (see paragraphs 7 and 9 above), the applicant had lied about not being present at the scene when S.B. had assaulted A.A. and about not knowing whether S.B. had had a knife, whereas it had been established in those proceedings that he had been present and had witnessed the assault.

15. When questioned at the trial, the applicant insisted that the testimony he had given in the criminal proceedings against S.B. had not been false. In addition, he submitted that he should not have been obliged to give truthful testimony in those proceedings because he had been questioned not only about S.B.'s actions but also about his own role in the assault. The applicant submitted that he had been suspected of having taken part in the assault (see paragraph 4 above), and that even though the investigation against him had been discontinued, the domestic law allowed its reopening if new circumstances emerged (see paragraph 25 below). He further submitted that by giving truthful testimony he might have also revealed information about his possible drunk driving on the night of the incident or the possible unlawful sale of alcohol. The applicant therefore argued that convicting him of giving false testimony would be contrary to his right not to incriminate himself.

16. The prosecutor contested the applicant's arguments and submitted that at the time when the applicant had been called as a witness, it had been established that he had not assaulted A.A., so he had not been questioned about his own actions. The applicant's testimony had only been relevant for establishing S.B.'s actions on the night of the assault, in order to help the authorities determine all the circumstances of the criminal offence, and there had been no intention to reopen the proceedings against the applicant.

17. On 17 January 2013 the Šakiai District Court found the applicant guilty of giving false testimony. The court held that the material collected in

the proceedings against S.B. demonstrated that the applicant had knowingly given false testimony in order to help S.B. avoid criminal liability – the inaccuracy of his testimony had been established by the court in those proceedings (see paragraph 10 above). The court dismissed the applicant's arguments concerning his right not to incriminate himself. It held that at the time when the applicant had been questioned as a witness, the investigation against him had been discontinued on the grounds that his actions had not constituted a criminal offence (see paragraph 6 above), and that the applicant had been questioned only about S.B.'s actions and not his own. The court also stated that the applicant had not been suspected of any other criminal activity, such as drunk driving or the unlawful sale of alcohol, so his arguments in that respect were also dismissed. The applicant was given a fine of 1,950 Lithuanian litai (LTL, approximately 570 euros (EUR)).

18. The applicant appealed against that judgment. He submitted that he had not been served with a copy of the prosecutor's decision to discontinue the investigation against him (see paragraph 6 above), so he had continued to regard himself as a suspected accomplice to S.B. The applicant therefore argued that he had had an obvious interest in the outcome of the proceedings and should not have been obliged to give truthful testimony.

19. On 17 May 2013 the Kaunas Regional Court dismissed the applicant's appeal. It endorsed the lower court's arguments that the false nature of the applicant's testimony in the proceedings against S.B. had been established (see paragraph 17 above). It further stated that it was clear from the case file that before each questioning as a witness, the applicant had been informed about his rights and duties, as required by domestic law, and warned that he would be held criminally liable if he gave false testimony (see paragraphs 7 and 9 above and paragraph 26 below), so he had had no grounds to consider himself a suspect. The court also reiterated that the applicant had been called to testify only about S.B.'s actions which he had seen and not about his own role in the assault. However, the Kaunas Regional Court found that the lower court had erred when determining the sentence because it had applied an old version of Article 235 of the Criminal Code. It therefore changed the applicant's sentence in line with the version of that provision which had been in force at the time when the applicant had given his last testimony in the criminal proceedings against S.B. (see paragraph 9 above), and fined him LTL 15,600 (approximately EUR 4,520).

20. The applicant submitted an appeal on points of law, again arguing that his right not to incriminate himself had been breached. However, on 23 December 2013 the Supreme Court dismissed his appeal. It reiterated that the applicant had been informed about his rights and duties as a witness and warned about criminal liability for giving false testimony, and that he had been questioned about the actions of S.B. and not about his own

actions, so it must have been clear to him that his testimony could not have incriminated him.

B. Relevant domestic law and practice

21. The relevant part of Article 31 of the Constitution provides:

> "It shall be prohibited to compel anyone to give evidence against himself, or his family members or close relatives."

22. The relevant provisions of the Criminal Code, valid at the material time and currently, read:

Article 135. Severe health impairment

> "1. Anyone who has injured another person or caused him or her to be ill, if as a result the victim has lost his or her eyesight, hearing, ability to speak, fertility or pregnancy, or sustained another serious mutilation, or contracted a terminal or long-lasting illness posing a real threat to his or her life or seriously affecting his or her mental health, or lost a considerable part of his or her professional or general capacity to work, or sustained permanent disfigurement, shall be punished by imprisonment for a term of up to ten years.
>
> ..."

Article 138. Minor health impairment

> "1. Anyone who has injured another person or caused him or her to be ill, if as a result the victim has lost a small part of his or her professional or general capacity to work or was ill for a long time but did not suffer the consequences set out in Article 135 § 1 of this Code, shall be punished by restriction of liberty or by detention or by imprisonment for a term of up to three years.
>
> ..."

Article 235. False complaint, application, report, testimony, conclusions and translation

> "1. Anyone who, during a pre-trial investigation or trial or before the International Criminal Court or another international judicial institution, has submitted a false complaint, application or report of a criminal activity, or given false testimony when questioned as a witness or a victim, or has given false conclusions or explanations when acting as an expert or specialist, or provided a false or knowingly inaccurate translation when acting as an interpreter, shall be sentenced to a term of community service or a fine or restriction of liberty or detention or imprisonment for a term of up to two years.
>
> ..."

23. Article 78 of the Code of Criminal Procedure (hereinafter "the CCP") provides that anyone who might know any circumstances relevant to the case can be summoned as a witness. Article 83 § 1 of the CCP provides that anyone who is summoned as a witness must present himself or herself before a pre-trial investigation officer, a prosecutor or a judge and give

truthful testimony about what he or she knows about the relevant circumstances of the case. Article 83 § 4 of the CCP provides that a witness who gives false testimony will be held liable in accordance with Article 235 of the Criminal Code (see paragraph 22 above).

24. Article 80 § 1 of the CCP provides that persons who are to give testimony about their own possibly criminal activity cannot be questioned as witnesses unless they agree to be thus questioned. Article 82 § 3 of the CCP provides that when such persons are questioned, they have the right to legal representation and to apply for status as a suspect, and they are exempted from liability for refusing to testify or giving false testimony.

25. Article 217 § 2 of the CCP allows the reopening of a previously discontinued pre-trial investigation following the discovery of essential circumstances which are relevant for the proper examination of the case and which had not been established at the time the decision to discontinue the investigation had been adopted.

26. The protocol for witness testimonies, adopted by the Prosecutor General on 11 April 2003 and valid, with some amendments, until 29 December 2014, provided that a witness must be informed about his or her right, in line with Article 31 § 3 of the Constitution, not to give evidence against himself or herself, or his or her family members or close relatives (see paragraph 21 above), about his or her rights and obligations as set forth in the CCP (see paragraphs 23 and 24 above), and about criminal liability for giving false testimony (see paragraph 22 above). That protocol had to be signed by the witness to confirm that he or she had been so informed.

27. In its ruling of 31 January 2017 in criminal case no. 2K-55-699/2017, the Supreme Court, relying on its previous case-law (ruling of 23 June 2009 in criminal case no. 2K-255/2009 and ruling of 16 June 2015 in criminal case no. 2K-348-303/2015), held:

> "Article 80 § 1 of the CCP provides that persons who are to give testimony about their own possibly criminal activity cannot be questioned as witnesses unless they agree to be thus questioned, in line with the conditions provided for in Article 82 § 3 of the Code of Criminal Procedure ... In accordance with the emerging case-law of the [Supreme Court] ... the prohibition on compelling someone to testify against himself or herself will be violated if a person who is questioned as a witness is in fact suspected of having committed a criminal offence but for some reason has not been recognised as a suspect in line with the CCP. Testimony which has been obtained in violation of Article 80 § 1 of the CCP cannot be accepted as evidence ... under the CCP. Whether the questions submitted to a witness can be regarded as compulsion to testify against oneself, must be decided in accordance with the circumstances of each case."

COMPLAINT

28. The applicant complained under Article 6 § 1 of the Convention that his conviction for giving false testimony in criminal proceedings in which he had been a witness had breached his right not to incriminate himself. He submitted that in the criminal proceedings against S.B. he had been asked to testify about his own involvement in the assault, so he should have been questioned not as a witness but as a suspect and exempted from the obligation to give truthful testimony.

THE LAW

29. The applicant complained of a violation of his right not to incriminate himself. He relied on Article 6 § 1 of the Convention, the relevant part of which reads:

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

A. The parties' submissions

30. The applicant submitted that in the criminal proceedings against S.B. he had been required to testify about his own involvement in the assault and thereby compelled to incriminate himself. He submitted that he had not been aware of the prosecutor's decision to discontinue the investigation against him (see paragraph 6 above) and that throughout the proceedings he had considered himself as a suspected accomplice to S.B. He also submitted that the domestic law allowed the reopening of a discontinued criminal investigation, so he had continued to be at risk of incriminating himself and becoming an official suspect again.

31. The Government firstly submitted that the applicant's conviction for giving false testimony concerned only the testimony which he had given as a witness in the proceedings against S.B. (see paragraphs 7 and 9 above) and not any of his statements given while he himself had been a suspect (see paragraph 4 above). They argued that Article 6 § 1 of the Convention was not applicable to the applicant once the pre-trial investigation against him had been discontinued (see paragraph 6 above) because from that time he was no longer "charged with a criminal offence" within the meaning of that provision.

32. The Government further submitted that on each occasion when the applicant had been questioned as a witness he had been informed about his rights and duties and warned that he would be held criminally liable for giving false testimony; he had signed to confirm that he had been so

informed (see paragraphs 7 and 9 above). Consequently, the applicant must have been aware that he had not been a suspect and that he had been under an obligation to provide truthful testimony.

33. The Government lastly submitted that when questioned as a witness, the applicant had only been required to state the circumstances known to him about S.B.'s actions on the night of the incident and not his own actions. No subsequent proceedings had been instituted against the applicant regarding his alleged role in the assault against A.A., so nothing in his testimony had in fact been used to incriminate him.

B. The Court's assessment

34. The relevant general principles concerning the right not to incriminate oneself are summarised in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, §§ 266-69, ECHR 2016).

35. The Court reiterates in particular that it has previously found violations of that right in two types of cases. First, there are cases relating to the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him or her – in other words, in respect of an offence with which that person has been "charged" within the autonomous meaning of Article 6 § 1 (see *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 42 and 55, ECHR 2000-XII; *J.B. v. Switzerland*, no. 31827/96, §§ 65-71, ECHR 2001-III; and *Shannon v. the United Kingdom*, no. 6563/03, §§ 38-41, 4 October 2005). Secondly, there are cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution (see *Saunders v. the United Kingdom*, 17 December 1996, §§ 67 and 72-76, *Reports of Judgments and Decisions* 1996-VI, and *I.J.L. and Others v. the United Kingdom*, nos. 29522/95 and 2 others, §§ 82-83, ECHR 2000-IX). However, the Court has also concluded that the privilege against self-incrimination does not *per se* prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned (see *Weh v. Austria*, no. 38544/97, § 44, 8 April 2004).

36. Turning to the circumstances of the present case, the Court observes that the applicant was held liable for the false testimony he had given as a witness in the proceedings against S.B. At the time when the applicant was called to testify in those proceedings, the investigation against him had been discontinued (see paragraphs 6-7 above). Therefore, at that time he was not "charged" with a criminal offence within the meaning of Article 6 § 1 of the Convention (compare and contrast *Heaney and McGuinness*, cited above, §§ 41-42; *Shannon*, cited above, § 38; and *Marttinen v. Finland*,

no. 19235/03, § 62, 21 April 2009). The investigation against the applicant was discontinued because the prosecutor had concluded that his actions at the scene of the assault had not constituted a criminal offence (see paragraph 6 above). In such circumstances, the Court is of the view that despite the fact that the domestic law permitted the reopening of a previously discontinued investigation (see paragraph 25 above), the possibility of such a reopening in the applicant's case was purely hypothetical and could not have been reasonably anticipated (see *Weh*, cited above, §§ 53-54, and *Macko and Kozubal' v. Slovakia*, nos. 64054/00 and 64071/00, § 50, 19 June 2007).

37. Furthermore, although the applicant argued that he had not been aware that the investigation against him had been discontinued and that he was no longer a suspect (see paragraph 30 above), the Court notes that at the latest from his first questioning as a witness the applicant was informed about the rights and duties of a witness, which included the right not to give evidence against himself, and warned that he would be held criminally liable for giving false testimony; the applicant signed to confirm that he had been so informed, and swore an oath at the trial (see paragraphs 7, 9, 19 and 26 above). In such circumstances, the Court considers that the authorities made it sufficiently clear to the applicant that his procedural status was that of a witness and not a suspect (compare and contrast *Heaney and McGuinness*, cited above, § 53).

38. Lastly, the Court is not persuaded by the applicant's argument that the information he was asked to provide in the criminal proceedings against S.B. could have incriminated him. He was essentially asked to describe how the events had unfolded on the night of the assault – who had attacked whom and whether the individuals involved in the assault had been armed (see paragraph 9 above). Taking into account the fact that during the pre-trial investigation several witnesses had already confirmed that the applicant had not assaulted the victim and their testimonies were considered reliable by the prosecutor and the domestic court (see paragraphs 5, 6, 10 and 16 above), the Court cannot agree with the applicant that he was compelled to testify about his own actions and his possible role in the assault (see, *mutatis mutandis*, *Weh*, cited above, § 54; compare and contrast *J.B. v. Switzerland*, cited above, § 66). Even though the domestic courts considered it established that the applicant had been present at the scene of the assault, no subsequent proceedings were instituted against him in relation to his possible role in the assault, which also demonstrates that the information the applicant was asked to provide could not have incriminated him (see *Macko and Kozubal'*, cited above, § 50).

39. In the light of the foregoing considerations, the Court concludes that the applicant's conviction for giving false testimony in the criminal proceedings against S.B. was not incompatible with his right not to incriminate himself. Accordingly, the applicant's complaint under

Article 6 § 1 is manifestly ill-founded and must be dismissed in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 2 November 2017.

Marialena Tsirli Registrar	Ganna Yudkivska President