



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

COURT (PLENARY)

CASE OF ENGLERT v. GERMANY

(Application no. 10282/83)

JUDGMENT

STRASBOURG

25 August 1987

In the Englert case*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,
Mr. N. VALTICOS,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 February and 24 June 1987,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 January 1986, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10282/83) against the Federal Republic of Germany lodged with the Commission

* Note by the Registrar: The case is numbered 9/1986/107/155. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

under Article 25 (art. 25) by a national of that State, Mr. Joachim Englert, on 13 October 1982.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 2 (art. 6-2).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, Mr. Englert stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. On 28 January 1986, the President of the Court decided that in the interests of the proper administration of justice this case and the Lutz and Nölkenbockhoff cases should be considered by the same Chamber (Rule 21 § 6).

The Chamber of seven judges to be constituted included, as *ex officio* members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 19 March 1986, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. F. Matscher, Mr. J. Pinheiro Farinha, Mr. L.-E. Pettiti, Sir Vincent Evans and Mr. R. Macdonald (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. After assuming the office of President of the Chamber (Rule 21 § 5), Mr. Ryssdal consulted - through the Deputy Registrar - the Agent of the German Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure. On 3 April, he directed that the Agent and the applicant's lawyer should have until 1 July 1986 to file memorials and that the Delegate should be entitled to reply in writing within two months (Rule 37 § 1). At the same time, he granted the applicant's lawyer leave to use the German language in the proceedings (Rule 27 § 3).

The President twice extended the first of these time-limits - on 3 July until 31 October, and on 10 November until 21 November 1986.

5. The Government's memorial was lodged with the registry on 17 November 1986. The applicant had informed the Registrar on 13 November that he would not be filing a memorial.

6. On 29 November, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

7. On 15 December, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

8. The next day, having consulted - through the Deputy Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer

for the applicant, the President directed that the oral proceedings should open on 23 February 1987 (Rule 38). On 6 February, he granted the members of the Government's delegation leave to speak in German (Rule 27 § 2).

9. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin,
Federal Ministry of Justice,

Agent,

Mr. H. STÖCKER, Ministerialrat,
Federal Ministry of Justice,

Adviser;

- for the Commission

Mr. A. WEITZEL,

Delegate;

- for the applicant

Mr. N. WINGERTER, Rechtsanwalt,

Counsel,

Ms. A. STIEFEL-BECHDOLF, Rechtsanwältin,

Adviser.

The Court heard addresses by Mrs. Maier for the Government, by Mr. Weitzel for the Commission and by Mr. Wingerter for the applicant, as well as their replies to its questions.

10. On various dates between 6 February and 13 May 1987, the Commission, the Government and the applicant filed a number of documents and written comments either at the Court's request or of their own motion.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

11. Mr. Joachim Englert, a German national born in 1958, was in custody in Ludwigsburg Prison when he applied to the Commission.

Between 1975 and 1980, he was convicted of a number of offences. In 1981, he was sentenced to a year's imprisonment for, among other things, extortion with menaces (räuberische Erpressung); the sentence was suspended, however, and he was put on probation (Bewährung) for four years. In August 1981, the Heilbronn District Court passed on him an aggregate sentence of one year and two months' immediate imprisonment, thereby combining his last two sentences.

12. Earlier, on 24 February 1981, the applicant had been arrested and then, on 25 February, detained on remand; according to the warrant for his

arrest issued by the Heilbronn District Court, he was suspected of extortion with menaces on two occasions and of having caused actual bodily harm (Körperverletzung) and committed a rape. On 26 June 1981, he had been indicted (angeklagt) for these offences before the 3rd Criminal Chamber (3. Grosse Strafkammer) of the Heilbronn Regional Court (Landgericht).

According to the prosecution, Mr. Englert had

(i) in a restaurant on 23 February 1981, threatened to use force against a customer - namely to lie in wait for him one night, break his bones and shoot him dead with a revolver - and by this means extorted DM 50 from him and demanded a further DM 500, to be paid on 7 March 1981;

(ii) on the same day, punched Mr. K a distant relative of his, in the face, injuring him;

(iii) at his lodgings in Bad Wimpfen on the next day, taken from Mr. K's wife - whom he was temporarily accommodating, together with her husband, as they had nowhere to live - all her cash, amounting to DM 150, by threatening to kill her; and

(iv) subsequently, after threatening that he would otherwise beat her up and kill her, sexually abused Mrs. K while her husband was asleep under the influence of drink.

13. During the trial on 2 November 1981, the Regional Court stayed the proceedings in respect of the first two charges under Article 154 § 2 of the Code of Criminal Procedure (see paragraph 19 below), on the ground that the sentence which the defendant could expect was "almost negligible" (nicht beträchtlich ins Gewicht fällt) compared with the sentence he was likely to be given if convicted on the other charges.

On the same day, the Regional Court convicted Mr. Englert of the crime (Verbrechen) of extortion with menaces and sentenced him to one year and three months' imprisonment; it acquitted him on the rape charge.

The court found that the defendant had given Mr. and Mrs. K shelter. On 23 February, the couple had drawn DM 325 in welfare benefits. After buying food, they had spent the evening with the applicant and had had a few drinks at his home. After Mr. K. had fallen asleep, Mr. Englert made Mrs. K. give him DM 150, threatening that he would kill her if she refused. The next day, the couple reported the matter to the police. As regards the allegation of rape, the court found, having regard to a medical report, that it could not be ruled out that the victim, who was mentally handicapped, had not shown her will to resist clearly enough for it to be noticed by the applicant.

The acquittal became final on 10 November 1981.

14. On 4 November 1981, Mr. Englert appealed on points of law against conviction; he filed full pleadings on 25 January 1982.

On 6 April 1982, the Federal Court of Justice (Bundesgerichtshof) set the judgment aside and remitted the case for retrial by a different criminal chamber of the Heilbronn Regional Court. It found that the Regional Court

had not heard evidence from a parish priest whom, according to the defence, Mrs. K had told that she had consented to sexual intercourse with the applicant. The Federal Court held that despite the applicant's acquittal on the rape charge, the witness should have been heard because his evidence might have put Mrs. K's credibility in doubt in respect of all the charges.

15. On 5 August 1982, the priest informed the police that he could not give evidence unless Mrs. K released him from his obligation of professional confidentiality. Mrs. K, who had left her husband in the meantime, refused to do this.

16. On 1 September 1982, the public prosecutor's office applied for the proceedings to be stayed under Article 154 of the Code of Criminal Procedure (see paragraph 19 below), as the sentence Mr. Englert could expect was almost negligible in comparison with the one passed on him in August 1981 (see paragraph 11 above). Having been invited to make any comments he might have, the defence counsel assigned by the court, Mr. Wingerter, informed the Regional Court on 9 September that he could agree on the defendant's behalf to Mr. Englert's bearing his own necessary costs and expenses (notwendige Auslagen) but that his client had no intention of forgoing compensation for his detention on remand.

17. On 13 September 1982, the Regional Court stayed the proceedings under Article 154 § 2 of the Code of Criminal Procedure; it ordered that the costs of the proceedings - but not Mr. Englert's necessary costs and expenses - should be borne by the Treasury, and it refused to award the applicant any compensation in respect of his arrest on 24 February 1981 and of his detention on remand from 25 February 1981 to 12 October 1982.

The reasons for the decision (Beschluss) included the following:

"...

The costs of the proceedings shall be borne by the Treasury, pursuant to Articles 464 and 467 § 1 of the Code of Criminal Procedure, but the court will not order the Treasury to pay the defendant's necessary costs and expenses. Counsel for Mr. Englert stated on his client's behalf that he - Mr. Englert - agreed to bear these. Moreover, it would have been fair, having regard to all the circumstances of the case, to order the person convicted to pay his own necessary costs and expenses. The same reasons are relevant here as justify the refusal of compensation for the time spent in detention on remand.

Mr. Englert made known through his counsel that he was not prepared to forgo [such] compensation ... He cannot, however, claim compensation for the time he spent in detention on remand in the instant case. In the light of the course of the trial so far, the circumstances rebutting the presumption of innocence are, in the view of the Chamber, so overwhelming that a conviction is clearly more likely than an acquittal (Bei Würdigung des bisherigen Prozessgeschehens überwiegen nach Ansicht der Kammer die Umstände, welche die Unschuldsvermutung entkräften, derart, dass eine Verurteilung deutlich wahrscheinlicher ist als ein Freispruch). Furthermore, Mr. Englert - even if he were acquitted - could not be compensated for his detention, since

it was his own actions that gave rise to the strong suspicion that he had committed an offence of extortion with menaces.

On the morning of 24 February 1981, [he] stated that Mrs. K had given him only DM 100, which he had spent while shopping that morning in Heilbronn, except for DM 20 that were found at his home. After Mrs. K had said, when a statement was taken from her on the afternoon of 24 February, that Mr. Englert had put the DM 150 he had extorted from her into his swimming costume, [he] was searched, and a DM 100 note was indeed found in his swimming costume, as [she] had said. Not until 22 April 1981, when the investigating judge (Haftrichter) questioned him, did Mr. Englert explain how he came to have a DM 100 note belonging, as he admitted, to Mrs. K. The reasons why that explanation is unconvincing were set out in detail by the 3rd Criminal Chamber in its judgment of 2 November 1981. Even if the version offered by Mr. Englert was true, however, it has to be said against him that he himself prompted the criminal proceedings by his grossly negligent (grob fahrlässig) behaviour, for he failed to consider the obvious and elementary fact that he could be proved to have lied about the money in his possession and that this would provide evidence of the credibility of Mrs. K's statements and his own lack of credibility. Compensation must therefore be refused him, in accordance with section 5(2) of the Criminal Proceedings (Compensation) Act (Gesetz über die Entschädigung für Strafverfolgungsmassnahmen)."

The Regional Court pointed out, lastly, that as no appeal lay (Unanfechtbarkeit) against the order staying the proceedings, the decision on costs and on compensation for detention on remand was likewise final.

18. On 20 September 1982, the applicant appealed against the refusal to award him compensation for his detention on remand. His lawyer's pleadings consisted of a single sentence: "On behalf of the defendant, I appeal against point III of the ... decision of 13 September 1982."

The Stuttgart Court of Appeal (Oberlandesgericht) declared this appeal (Beschwerde) inadmissible on 30 September. It held, *inter alia* :

"The ... application is directed solely against the refusal to award compensation. No appeal is provided for in law (nicht statthaft) and the application is therefore inadmissible.

The provisional stay of the proceedings under Article 154 § 2 of the Code of Criminal Procedure is a decision which terminates the proceedings, since it was taken on account of a penalty or measure imposed in respect of another offence and which had already become final. In such circumstances, the proceedings can only be reopened, under Article 154 § 3 of the Code of Criminal Procedure, if they have not become time-barred and if the penalty or measure which gave rise to the stay has since been lifted. The provisional stay amounts here to a final ruling putting an end to the proceedings. It is thus a decision which, under Article 464 §§ 1 and 2 of the Code of Criminal Procedure, requires another one to be taken as to the costs and expenses and, on to the same criteria, ... as to any compensation due in respect of the criminal prosecution brought ...

The decision delivered pursuant to Article 154 § 2 of the Code of Criminal Procedure is unappealable. So too are the ancillary decisions (Nebenentscheidungen) delivered at the same time as the principal decision ... These include not only the one as to costs and expenses but also the one as to compensation in respect of the criminal

prosecution ... The decision delivered by the Regional Court with regard to compensation is thus not appealable ..."

II. RELEVANT DOMESTIC LAW

19. Article 154 of the Code of Criminal Procedure, on which the Heilbronn Regional Court based its decision of 13 December 1982, provides:

"1. The public prosecutor may decide not to prosecute

(1) where the penalty or the corrective or preventive measure to be expected if a conviction is secured is almost negligible in comparison with a penalty or corrective or preventive measure imposed on the defendant - or which he must expect to be imposed - for another offence ...

...

2. Once proceedings have been instituted, the court may provisionally stay them at any stage on an application by the public prosecutor.

...."

20. By the terms of Article 464 of the Code of Criminal Procedure, any judgment, order of summary punishment or decision terminating a set of proceedings must determine who is to pay the costs of the proceedings (paragraph 1); the judgment or decision in which the proceedings culminate shall state who is to bear the necessary costs and expenses (paragraph 2).

Article 467 of the Code of Criminal Procedure provides:

"1. If the defendant (Angeschuldigter) is acquitted or if committal for trial (Hauptverfahren) is refused or if the proceedings against him are discontinued, the costs of the proceedings and the defendant's necessary costs and expenses shall be borne by the Treasury.

...

3. ... The court may decline to award the defendant's necessary costs and expenses against the Treasury where the defendant

(1) has brought about the proceedings (Erhebung der öffentlichen Klage) by incriminating himself in vital matters through statements which were inaccurate or contrary to subsequent statements by him or by withholding vital exonerating information, even though he had formally replied to the charge (Beschuldigung)

...

4. If the court stays the proceedings in pursuance of a provision which empowers it to do so, it may decide not to order the Treasury to bear the defendant's necessary costs and expenses.

..."

Inasmuch as the law does not make the reimbursement of necessary costs and expenses mandatory, the courts decide the issue on an equitable basis and have a degree of discretion in the matter.

21. By section 2(1) of the Criminal Proceedings (Compensation) Act of 8 March 1971, any person who has suffered prejudice by reason of having been detained on remand shall be indemnified by the Treasury in the event of his being acquitted or if the proceedings brought against him are discontinued. This rule is, however, subject to certain exceptions, including the one laid down in section 5(2) of the Act, which provides:

"Compensation shall not be payable ... where and in so far as the defendant brought about the criminal proceedings deliberately or through gross negligence. Compensation shall not be precluded by reason only of the fact that the defendant merely did not respond to the charge or charges or that he failed to avail himself of a remedy."

By section 8 of the same Act, the competent court shall give a ruling on indemnification in the judgment or the decision terminating proceedings.

22. The scope of the principle of the presumption of innocence in the context of discontinuance of criminal proceedings has recently been clarified by the Federal Constitutional Court. By a judgment (Beschluss) delivered on 26 March 1987, the Federal Constitutional Court quashed, as contravening the principle, two decisions by district courts and one decision by a regional court whereby the courts, having held the guilt of the defendants to be insignificant (gering), had stayed the private prosecutions brought against them but had awarded the costs of the proceedings against the defendants, including the costs and expenses of the complainants (cases 2 Bvr 589/79, 2 Bvr 740/81 and 2 Bvr 284/85, *Europäische Grundrechte-Zeitschrift* 1987, pp. 203-209).

The Constitutional Court held it to be inconsistent with the presumption of innocence to speak in the reasons given for a discontinuance decision of a defendant's guilt or to base an order as to costs and expenses on the supposition (Annahme) that a defendant has been guilty of an offence if the trial has not reached the stage at which the verdict can be given (Schuldspruchreife). It pointed out that the principle of the presumption of innocence derived from the principle of the rule of law, and it also referred to Article 6 § 2 (art. 6-2) of the Convention. The Convention did not have the status of constitutional law in the Federal Republic, but regard should be had to it and to the case-law of the European Court of Human Rights in interpreting the principles and fundamental rights enshrined in the Basic Law (Grundgesetz).

Reaffirming its case-law, the Constitutional Court reiterated that, by virtue of the principle of the presumption of innocence, no measures amounting in effect to a penalty may be taken against a defendant without his guilt having been established beforehand at a proper trial and no

defendant may be treated as guilty. The Court added that this principle requires that guilt be proved according to law before it can be held against the person concerned. A finding of guilt will accordingly not be legitimate for this purpose unless it is pronounced at the close of a trial which has reached the stage at which a verdict can be given.

Citing the Minelli judgment of 25 March 1983 (Series A no. 62), the Constitutional Court ruled that a decision discontinuing criminal proceedings may offend the presumption of innocence if it contains in its reasoning a finding of the defendant's guilt without that guilt having been proved according to law. On the other hand, nothing precluded a court from making findings in such a decision as to the defendant's guilt and ordering him to pay the necessary costs and expenses of the complainants as well as the costs of the proceedings if it had held a hearing enabling it to reach a verdict (*Entscheidungsreife*).

On the basis of these considerations, the Constitutional Court quashed three of the five decisions challenged but dismissed the application in the first of the three cases concerned, as the defence had made the closing address after a trial.

PROCEEDINGS BEFORE THE COMMISSION

23. In his application of 13 October 1982 to the Commission (no. 10282/83), Mr. Englert complained of the reasons given by the Heilbronn Regional Court in its decision of 13 September 1982, which he alleged were incompatible with Article 6 § 2 (art. 6-2) of the Convention.

24. The Commission declared the application admissible on 12 December 1984.

In its report of 9 October 1985 (made under Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a breach of Article 6 § 2 (art. 6-2). The full text of its opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS BY THOSE APPEARING BEFORE THE COURT

25. In their memorial of 17 November 1986, the Government requested the Court to hold

"1. ... that by reason of the failure to exhaust domestic remedies, the Court is unable to take cognisance of the merits of the case,

2. alternatively, ... that there has been no violation of Article 6 § 2 (art. 6-2) of the Convention."

They reiterated their submissions at the hearing.

Counsel for Mr. Englert asked the Court at the hearing to give judgment for his client.

AS TO THE LAW

26. Mr. Englert complained of the reasons given for the decision of the Heilbronn Regional Court, which on 13 September 1982 had refused to order reimbursement of his necessary costs and expenses and to award him any compensation in respect of his detention on remand. He claimed that they offended the principle of the presumption of innocence enshrined in Article 6 § 2 (art. 6-2) of the Convention, which provides:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government submitted that the application was inadmissible by reason of non-exhaustion of domestic remedies and, in the alternative, that there had been no breach of Article 6 § 2 (art. 6-2).

The Commission shared the view of the applicant.

I. GOVERNMENT'S PRELIMINARY OBJECTION

27. The Government claimed that the applicant had not, as required under Article 26 (art. 26) of the Convention, exhausted the remedies available to him under German law, as he had neither brought his complaint about the failure to reimburse his necessary costs and expenses before the Stuttgart Court of Appeal nor applied to the Federal Constitutional Court.

28. Having raised this objection before the Commission at the stage of the initial examination of admissibility and again subsequently, the Government are not estopped from pleading it before the Court (see, as the most recent authority, the Bozano judgment of 18 December 1986, Series A no. 111, p. 19, § 44).

A. First ground of the objection (Stuttgart Court of Appeal)

29. The applicant's appeal to the Stuttgart Court of Appeal was restricted to the issue of compensation for detention on remand. However, in dismissing it (on the ground that no appeal was provided for in law and that it was thus inadmissible), the Court of Appeal stated that the finality of the decision that put an end to the proceedings extended also to the ancillary

decisions, which included not only the one as to costs and expenses but also the one as to compensation in respect of the criminal prosecution (see paragraph 18 above). Above all, the Regional Court itself had pointed out that its decision as to costs and to compensation for detention on remand was final because the order staying the proceedings was unappealable (see paragraph 17 above).

30. The Government, however, emphasised that the German appellate courts did not always give the same answer to the question whether, in the event of proceedings being discontinued, an appeal lay against an order as to the apportionment of costs. The applicant, they maintained, should consequently have challenged in the Stuttgart Court of Appeal the refusal to order reimbursement of his necessary costs and expenses.

It must be noted in this connection that the appellate court which in principle had jurisdiction in the instant case was indeed the Stuttgart Court of Appeal. Although that Court had indeed allowed an appeal in 1969 against an order as to costs after proceedings had been discontinued, it departed from that precedent in a judgment of 22 February 1974 (*Die Justiz* 1974, p. 228), as the Government acknowledged. Admittedly these judgments were given by two different chambers of the Court of Appeal, but the Government did not produce any decision upholding the 1969 one subsequent to the judgment of 22 February 1974. That being so, the generally recognised rules of international law which are referred to in Article 26 (art. 26) (see the *Guzzardi* judgment of 6 November 1980, Series A no. 39, p. 26, § 72) do not require the applicant to have raised the matter in the Court of Appeal.

31. The Government further maintained that in the Court of Appeal the applicant should have pleaded Article 6 § 2 (art. 6-2), which is directly applicable in German law. In failing to do so, he had not given the court an opportunity to determine whether "exceptionally, ... the separate contestation of the decision on expenses could be regarded as admissible".

Article 26 (art. 26) requires of applicants that they should - at least in substance - have raised before the domestic courts the complaint they subsequently submit to the Convention institutions (see the *Glasenapp* judgment of 28 August 1986, Series A no. 104, p. 24, § 44). Mr. Englert's appeal, however, was limited to Mr. Wingerter's single sentence: "On behalf of the defendant, I appeal against point III of the ... decision of 13 September 1982" (see paragraph 18 above). It contained no reasons and gave no hint that the applicant meant to challenge the Heilbronn Regional Court's decision on the ground that it contravened the principle of the presumption of innocence.

However, the Court does not need to determine whether in the instant case this was sufficient for the purposes of Article 26 (art. 26) of the Convention in view of the relevant rules of German law, because in order for the applicant to be able to complain of a breach of Article 6 § 2 (art. 6-2)

it was first necessary that a remedy should be available - and it has just been pointed out in the present judgment that this was precisely what was lacking (see paragraphs 29-30 above).

B. Second ground of the objection (Federal Constitutional Court)

32. Mr. Englert did not apply to the Federal Constitutional Court in order to challenge the Heilbronn Regional Court's decision on the ground that it offended the presumption of innocence; such an application seemed to him to be bound to fail.

The only remedies that Article 26 (art. 26) of the Convention requires to be exhausted are those that relate to the breaches alleged and that are available and sufficient (see the *de Jong, Baljet and van den Brink* judgment of 22 May 1984, Series A no. 77, p. 19, § 39). While it was possible for the applicant to bring his complaint before the Constitutional Court (under Article 93 § 1, sub-paragraph 4, (a), of the Basic Law), such a remedy would not have been effective in the circumstances of the case. As the Commission pointed out, the Government did not cite any decisions by the Constitutional Court indicating that the applicant could have challenged the reasons given for the impugned decision with some prospect of success.

On the contrary, as recently as 2 February 1982 the Constitutional Court had held such a complaint - lodged by the applicant's counsel in another case - to be inadmissible (*Lutz* case, judgment 2 BvR 1312/81). Admittedly what was at issue in that case was a stay of proceedings instituted in respect of a "regulatory offence"; but the Constitutional Court, which mentioned Article 6 § 2 (art. 6-2) of the Convention among other things, did not base its dismissal of the complaint on the argument that the presumption of innocence was not applicable. Two judgments given by the Constitutional Court more recently and produced by those appearing before this Court (2 BvR 790/84 of 20 July 1984 and 2 BvR 889/86 of 29 August 1986) are to the same effect as the one of 2 February 1982.

The Commission, moreover, dealt with the same issue in the *Liebig* case. On 15 July 1976, it rejected a plea of non-exhaustion of domestic remedies (the applicant had not lodged a constitutional complaint) in view of the Constitutional Court's case-law on the matter under consideration (see *Decisions and Reports*, no. 5, pp. 65 and 67).

Lastly, the Constitutional Court's judgment of 26 March 1987, produced by the Government on 13 May 1987, does not support their argument either: it relates to the discontinuance of a private prosecution on account of the "slight degree of guilt" of the persons concerned, who were ordered to pay the costs of the proceedings and the necessary costs and expenses of the complainants (see paragraph 22 above). It is thus very clearly distinguishable from the instant case, being comparable rather to the

situation the Court had to consider in the Minelli case (see the judgment of 25 March 1983, Series A no. 62).

C. Conclusion

33. In short, the objection pleading non-exhaustion of domestic remedies is unfounded.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 (art. 6-2)

34. In Mr. Englert's submission, the Heilbronn Regional Court's decision of 13 September 1982 manifestly contained a finding of guilt and thus amounted to a "conviction in disguise".

In the Government's submission, the decision terminated the prosecution in the interests of avoiding unnecessary proceedings; that being so, they claimed that there was no longer a person "charged with a criminal offence" and an essential condition of the applicability of Article 6 § 2 (art. 6-2) accordingly no longer existed. Furthermore, the decision did not amount to a penalty or a measure which in its effects could be equated with a penalty. The reasons given for it did not imply any assessment of the defendant's guilt: having regard to the state of the proceedings, the Regional Court was describing a "state of suspicion" with the sole aim of reaching a fair decision on the two issues in question. Moreover, it had refused the applicant's request on the ground that his conduct had given rise to suspicions earlier which had prompted his prosecution and his detention on remand; the sentence complained of by Mr. Englert had no "autonomous meaning" and had to be understood in this general context. Besides, where a prosecution was discontinued, the Convention did not oblige the Contracting States to indemnify a person "charged with a criminal offence" for any detriment he might have suffered. The impugned decision could not be contrary to the Convention on account of its supporting reasoning if its operative provisions - which alone acquired final, binding effect - were in conformity with it.

The Commission considered, like the applicant, that there had been a breach of Article 6 § 2 (art. 6-2), as the reasoning complained of could not be understood as describing merely a "state of suspicion".

35. On 13 September 1982, the Heilbronn Regional Court stayed the proceedings against Mr. Englert on the ground that the sentence he could expect was of no account in comparison with the one he was serving at the time in respect of other offences (Article 154 § 2 of the Code of Criminal Procedure - see paragraphs 17 and 19 above). As required by Articles 464 and 467 § 1 of the Code of Criminal Procedure and sections 5(2) and 8 of the Criminal Proceedings (Compensation) Act, the same decision also settled the issue of costs and the question of awarding the applicant

compensation for his detention on remand (see paragraphs 17, 20 and 21 above). The apportionment of costs and the ruling on compensation were consequences and necessary concomitants of the stay of proceedings (Article 464 of the Code of Criminal Procedure and section 8 of the Criminal Proceedings (Compensation) Act - see paragraphs 20-21 above; see also, *mutatis mutandis*, the Minelli judgment previously cited, Series A no. 62, p. 16, § 30). The operative provisions of the decision clearly confirmed this: after an initial ruling that the proceedings were to be stayed, the other two dealt with the costs of the proceedings (including the applicant's own necessary costs and expenses) and compensation for his detention on remand. Consequently, the applicant can in principle rely on Article 6 § 2 (art. 6-2) of the Convention as regards the impugned decision.

36. The Court points out, however, like the Commission and the Government, that neither Article 6 § 2 (art. 6-2) nor any other provision of the Convention gives a person "charged with a criminal offence" a right to reimbursement of his costs or a right to compensation for lawful detention on remand where proceedings taken against him are discontinued. The double refusal complained of by Mr. Englert accordingly does not in itself offend the presumption of innocence (see, *mutatis mutandis*, the Minelli judgment previously cited, p. 17, §§ 34-35). Counsel for the applicant moreover stated that his client was not challenging the Regional Court's decision as such but solely the reasons given for it.

37. Nevertheless, a decision whereby compensation for detention on remand and reimbursement of an accused's necessary costs and expenses are refused following termination of proceedings may raise an issue under Article 6 § 2 (art. 6-2) if supporting reasoning which cannot be dissociated from the operative provisions (see the same judgment, p. 18, § 38) amounts in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence (*ibid.*, § 37).

38. The double refusal complained of by Mr. Englert was based on Article 467 § 4 of the Code of Criminal Procedure and section 5(2) of the Criminal Proceedings (Compensation) Act (see paragraphs 20-21 above). These provisions set forth exceptions to the rule in German law that, where criminal proceedings are discontinued, the Treasury must bear the necessary costs and expenses of the defendant (Article 467 § 1 of the same Code) and pay him compensation for any detention on remand (section 2 of the same Act). Applying the provisions means that the relevant courts, which decide the matter on an equitable basis and have a degree of discretion, are under an obligation to take into account, *inter alia*, the state of the proceedings when brought to a close, the conduct of the defendant and the weight of the suspicion still falling on him.

39. The Heilbronn Regional Court refused to award Mr. Englert's necessary costs and expenses against the Treasury. Mr. Englert's counsel had indicated that his client was willing to pay his own costs; furthermore, the Regional Court stated, "it would have been fair, having regard to all the circumstances of the case, to order [him to bear them]" - for "the same reasons ... as justify the refusal of compensation for the time spent in detention on remand" (see paragraph 17 above). In this connection, the Regional Court found that "in the light of the course of the trial so far, the circumstances rebutting the presumption of innocence are ... so overwhelming that a conviction is clearly more likely than an acquittal". Lastly, "it was [the defendant's] own actions that gave rise to the strong suspicion that he had committed a crime of extortion with menaces" (ibid.).

The court thereby meant to indicate, as it had to for the purposes of the decision to be taken, that there were still strong suspicions concerning Mr. Englert, who by his own behaviour had caused the criminal proceedings to be taken against him. Even if the terms used were ambiguous and unsatisfactory, the court confined itself in substance to noting the existence of "reasonable suspicion" that the defendant had "committed an offence" (Article 5 § 1 (c) of the Convention) (art. 5-1-c). On the basis of the evidence, the decision described a "state of suspicion" and did not contain any finding of guilt. In this respect it contrasts with the decisions the Court considered in the Minelli case (see the judgment previously cited, Series A no. 62, pp. 8-10, §§ 12-14, and pp. 11-12, § 16) and also with the decisions set aside by the Federal Constitutional Court on 26 March 1987 (see paragraph 22 above).

40. Moreover, the refusal to order reimbursement of Mr. Englert's necessary costs and expenses and to award him any compensation in respect of his detention on remand does not amount to a penalty or a measure that can be equated with a penalty. In this respect too, the instant case very clearly differs from the Minelli case, as also from the cases decided by the Federal Constitutional Court on 26 March 1987 (see paragraph 22 above). The Swiss courts had directed that Mr. Minelli should bear part of the costs of the proceedings and had ordered him to pay the private prosecutors compensation in respect of their expenses (see the judgment previously cited, ibid.), thus treating him as guilty. Nothing comparable occurred in the instant case : Mr. Englert did not have to bear the costs of the proceedings but only his own costs and expenses, and he was not awarded any compensation for his detention on remand. The competent court, acting on an equitable basis and having regard, among other things, to the strong suspicions which seemed to it to exist concerning him, did not impose any sanction on him but merely refused to order that the said costs and expenses or any compensation should be paid out of public funds. And, as the Court has already pointed out, the Convention - more particularly Article 6 § 2 (art. 6-2) - does not oblige the Contracting States, where a prosecution has

been discontinued, to indemnify a person "charged with a criminal offence" for any detriment he may have suffered.

41. In conclusion, the Heilbronn Regional Court's decision of 13 September 1982 did not offend the presumption of innocence guaranteed to the applicant under Article 6 § 2 (art. 6-2).

FOR THESE REASONS, THE COURT

1. Rejects unanimously the objection pleading non-exhaustion of domestic remedies;
2. Holds by sixteen votes to one that there has been no breach of Article 6 § 2 (art. 6-2).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 August 1987.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the dissenting opinion of Mr. Cremona is annexed to this judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE CREMONA

Whilst agreeing with the judgment as to the rejection of the Government's preliminary objection, I regret I cannot do the same with regard to the conclusion that there was no violation of Article 6 § 2 (art. 6-2) of the Convention in the instant case. Instead, I concur with the unanimous Commission that there was.

In order to clear the ground at once of certain matters, I would premise the following:

1. Firstly, I concur with the judgment that neither Article 6 § 2 (art. 6-2) nor any other provision of the Convention gives a person charged with a criminal offence a right to reimbursement of his costs and expenses or a right to compensation for his lawful detention on remand where proceedings taken against him are discontinued, and that the domestic court's refusal to order such reimbursement or award such compensation does not therefore in itself offend the presumption of innocence (paragraph 36 of the judgment).

2. Secondly, I also concur with the judgment that a decision refusing such reimbursement or compensation following a stay of proceedings may, however, raise an issue under Article 6 § 2 (art. 6-2) if supporting reasoning which cannot be dissociated from the operative provisions amounts in substance to a determination (constat) of the accused's guilt (which I understand in the sense of an assessment of his guilt) without his having previously been proved guilty according to law and in particular without his having had an opportunity to exercise his defence rights (paragraph 37 of the judgment).

Having premised that, I consider that the conclusion of non-violation in this judgment rests essentially on two points:

(a) that the contested judicial pronouncements of the domestic court described only "a state of suspicion" and did not involve a finding of guilt (paragraph 39 of the judgment), and

(b) that the court's refusal to order reimbursement of the accused's necessary costs and expenses and to award any compensation in respect of his detention on remand did not amount to a penalty or a measure which could be equated with a penalty (paragraph 40 of the judgment).

As to the first point, clearly an element of suspicion is inherent in the very fact that a person is criminally charged, but that is of course inseparable from the essential machinery of the criminal trial itself. In fact, among the cases where a person may be deprived of his liberty, provided this is done in accordance with a procedure prescribed by law, the Convention itself mentions "the lawful arrest and detention of a person effected for the purpose of bringing him before the competent authority on reasonable suspicion of having committed an offence" (Article 5 § 1 (c)) (art. 5-1-c).

In the present case, however, the clear and explicit wording used by the court in its judicial decision concerning the applicant, who was charged with a criminal offence, goes much further than that.

In fact, the decision of the Regional Court of Heilbronn, in staying the proceedings against the applicant and concurrently refusing to order reimbursement of his costs and expenses and indemnification in respect of his detention on remand under the applicable domestic legislation, stated, in terms which, unlike my colleagues, I find unambiguous, that "in the light of the course of the trial so far, the circumstances rebutting the presumption of innocence are ... so overwhelming that a conviction is clearly more likely than an acquittal". Here the wording used, quite clear in itself, not only speaks of a probable conviction which is also represented as clear (and of course a conviction necessarily postulates guilt), but also actually refers to the presumption of innocence, to conclude in express terms that it is rebutted by overwhelming circumstances, which are obviously taken as proved. In actual fact, therefore, and indeed in express terms, we have here a judicially declared rebuttal of the presumption of innocence in criminal proceedings which did not end up in a conviction but were in fact discontinued.

Thus, in my view, what happened in the instant case is the materialisation of the situation envisaged in paragraph 37 of the judgment (see above). Indeed, we have here a judicial decision discontinuing proceedings for an offence and concurrently refusing reimbursement of the accused's costs and expenses and indemnification in respect of his detention on remand, the supporting reasoning of which (which cannot be dissociated from the operative provisions) amounts in substance to a determination (constat) of the accused's guilt (which, as already stated, I understand in the sense of an assessment thereof) without his having been previously proved guilty according to law and in particular without his having had an opportunity to exercise his defence rights.

Like the unanimous Commission, I find that the above reasoning of the aforesaid court is perfectly capable of being understood as meaning that the accused was in fact guilty of a criminal offence. Indeed this is the ordinary meaning conveyed by the wording actually used, and when it comes to such a basic principle as that of the presumption of innocence, what really matters is not the possible intent with which certain words were uttered in a judicial decision concerning the accused, but the actual meaning of those words to the public at large. What is decisive is that at the end of the day one is left with the impression that the court did consider that the applicant was in fact guilty. The net result is in my view a surrogate conviction of the accused without the benefit of the protection afforded by Article 6 § 2 (art. 6-2).

Incidentally, the offending wording at the centre of this case is not substantially dissimilar from that which was at the centre of the Minelli

case, in which this Court did find a violation of that provision. An attempt has been made to distinguish the two cases on the basis of a "punishment content", and this brings me to the second point on which the finding of non-violation in the present judgment relies.

As to this question of the absence of a penalty or a measure which can be equated with one, I would say that of course the application of such penalty or measure would have reinforced my conclusion, but absence thereof in no way invalidates it. The principle of the presumption of innocence can be violated independently of the application of such penalty or measure. That presumption accompanies a person charged with a criminal offence throughout the whole trial until conviction. Indeed this cardinal principle of the modern criminal trial would have been lamentably improvident if its scope had to be confined to the non-application of a penalty or, to use again the wording of the judgment, a measure which can be equated with one. Punishment is usually only the last stage in the unfolding of a criminal trial and modern criminal legislation also envisages convictions without punishment or a measure which can be equated with it (cf. for instance in the British system "absolute discharge").

What is decisive for the present purpose is not the non-application of punishment, but the fact of a judicial assessment of the applicant's guilt, and in the instant case it is this that the wording of the judicial decision in question in fact entails.

I therefore find a violation of Article 6 § 2 (art. 6-2) of the Convention.