



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

COURT (PLENARY)

CASE OF NÖLKENBOCKHOFF v. GERMANY

(Application no. 10300/83)

JUDGMENT

STRASBOURG

25 August 1987

In the Nölkenbockhoff 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. 10300/83) against the Federal Republic of Germany lodged with the Commission

* Note by the Registrar: The case is numbered 10/1986/108/156. 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, Mrs. Martha Nölkenbockhoff, on 7 February 1983.

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, Mrs. Nölkenbockhoff stated that she wished to take part in the proceedings pending before the Court and designated the lawyer who would represent her (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 Englert 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 2 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).

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 applicant's memorial - drafted in German, with the President's leave (Rule 27 § 3) - was lodged with the registry on 1 July 1986 and the Government's on 19 November.

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,

Mr. W. BEITLICH, Oberstaatsanwalt,

Advisers;

- for the Commission

Mr. A. WEITZEL,

Delegate;

- for the applicant

Mr. J. BERGEMANN, Rechtsanwalt,

Counsel.

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

10. On various dates between 9 February and 22 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. Mrs. Martha Nölkenbockhoff, a German national, is the widow and heir of Mr. Theodor Nölkenbockhoff, who died on 13 November 1981. She lives in Selm-Bork.

12. Her husband was a senior manager in a holding company, Stumm AG, whose trading activities centred on iron, steel and fuel, including motor fuel. He joined the firm on 1 July 1967 and subsequently held a number of key positions in it.

On 25 October 1974, Stumm AG ceased payments by reason of insolvency and asked the Essen District Court (Amtsgericht) to set in motion composition proceedings (Vergleichsverfahren).

On 13 November 1974, Mr. Nölkenbockhoff was arrested under a warrant issued by the Essen District Court on 11 November; he was suspected among other things of bankruptcy offences. Other senior managers in the company were also arrested.

13. On 17 May 1976, the indictment, which was 489 pages long, was served on Mr. Nölkenbockhoff and four co-defendants.

The trial hearings began on 29 October 1976 before the 6th Criminal Chamber (6. Grosse Strafkammer) of the Essen Regional Court (Landgericht). They lasted until 11 July 1980, two or three hearings being held each week. The court heard evidence from hundreds of witnesses, and several thousand documents were read out. The applicant's husband was defended by two counsel, one of whom was assigned by the court.

14. On 11 July 1980, the Regional Court delivered its judgment, which ran to 579 pages.

Mr. Nölkenbockhoff was found guilty *inter alia* on several charges of breach of trust (Untreue), criminal bankruptcy (Bankrott) and fraud (Betrug), and given an aggregate sentence of eight years' imprisonment. His four co-defendants were also sentenced to prison terms - two of them, for more or less identical offences and a few additional ones, to nine years, nine months and to eight years, six months respectively; the other two, for aiding and abetting, to four years, three months each. In respect of a series of fraud charges, the Regional Court stayed the proceedings under Article 154 of the Code of Criminal Procedure (see paragraph 23 below); and it acquitted Mr. Nölkenbockhoff and two of his co-defendants on a number of other charges.

In determining the sentences, the Regional Court took into account as extenuating circumstances the length of the proceedings and, in respect of the applicant's husband, his detention on remand for some three years; this period was deducted from the total sentence.

15. Mr. Nölkenbockhoff entered an appeal on points of law on the same day that judgment was given. After receiving the text of the judgment on 5 October 1981, he filed - on 19 October - full pleadings which ran to 735 pages with 94 appendices. The Federal Court of Justice (Bundesgerichtshof) had not given a decision by the time he died on 13 November, so that the proceedings in respect of Mr. Nölkenbockhoff came to an end without any decision being taken on his appeal.

Three of the co-defendants, who had likewise challenged the Regional Court's judgment, later withdrew their appeals on points of law; the appeal lodged by the fourth person convicted, Mr. M, was dismissed by the Federal Court on 7 July 1982 as being manifestly ill-founded.

16. Having been arrested and detained on remand on 13 November 1974 (see paragraph 12 above), Mr. Nölkenbockhoff was released on bail at the end of March 1977 in order to undergo a bile-duct operation. He was re-arrested on 21 February 1979 but freed by the Hamm Court of Appeal (Oberlandesgericht) on 23 March 1979, the court holding that there was no valid ground for quashing the March 1977 order suspending execution of the arrest warrant.

On 30 April 1980, the Essen Regional Court ordered his re-arrest and, at the same time, the arrest of all the co-defendants; as the public prosecutor

had made his final submissions, calling for heavy sentences, the court held that the measures taken to prevent the defendants absconding were no longer sufficient.

On 26 June 1981, Mr. Nölkenbockhoff was released on health grounds.

17. In written pleadings dated 1 December 1981, the applicant, as her deceased husband's sole heir, sought orders that the Treasury should bear the necessary costs and expenses (notwendige Auslagen) incurred by her late husband in connection with his conviction by the Regional Court and that the estate should be paid compensation for his detention pending trial. In the alternative, she requested the Regional Court to adjourn a decision on her applications until such time as the Federal Court of Justice had given judgment on the appeal brought by the co-defendant Mr. M.

On 5 March 1982, the Essen Regional Court found against Mrs. Nölkenbockhoff. Its decision read as follows:

"...

The applications are admissible ... but ill-founded.

Where proceedings are terminated by reason of a defendant's death, his necessary costs and expenses are normally borne by the Treasury, but this does not apply where, were it not for this technical bar, the defendant would almost certainly have been convicted or his conviction almost certainly have been upheld (wenn es bei Wegdenken des Verfahrenshindernisses annähernd sicher zu erwarten war, dass es zur Verurteilung des Angeklagten gekommen bzw. bei einer Verurteilung geblieben wäre). This was so in the instant case.

The defendant had already been found guilty, in a judgment that had not become final, after lengthy court proceedings in a trial (Hauptverhandlung) lasting more than three and a half years. The judgment convicting the three co-defendants ..., who were likewise sentenced to several years' imprisonment, has become final. The co-defendant M is maintaining his appeal on points of law.

The submissions made by the defence in its full pleadings afford no reason to suppose that the defendant would have been acquitted had the proceedings continued. The pleas alleging procedural defects (formelle Rügen) - even assuming them to be well-founded - would have been material to the decision to be taken in the instant case only if, in the event of a new trial, a different verdict on the merits would have been expected, that is to say an acquittal. The fact that [three of] the defendants ... have withdrawn their appeals on points of law, thereby confirming the judgment against them, argues decisively in favour of the correctness (materielle Richtigkeit) of the judgment.

As to the plea alleging a breach of substantive law (materielle Rüge), the defence's submissions again provide nothing to support the hypothesis that the proceedings were moving towards an acquittal. The quotations from the trial court's judgment are taken out of context, do not cover the considerations (Erörterungen) subsequently set out by that court in the reasons for its judgment and are accordingly not consistent with its assessment of the case as a whole.

For the same reasons the court declines to award compensation for the time spent in detention on remand, pursuant to section 6(1)(2) of the Criminal Proceedings (Compensation) Act (Gesetz über die Entschädigung für Strafverfolgungsmassnahmen) [see paragraph 26 below].

Nor, to the extent that the proceedings were provisionally stayed under Article 154 of the Code of Criminal Procedure [see paragraph 23 below], are there any grounds for ordering the Treasury to pay the defendant's necessary costs and expenses, because in view of the reasons given for the judgment, it was much more likely, having regard to the adverse financial position of the Stumm holding company, that if the proceedings had continued, the defendant would have been convicted on the counts in question (weil nach den Ausführungen im Urteil es bei der ungünstigen wirtschaftlichen Situation des Stummkonzerns bei einer Fortsetzung des Verfahrens wesentlich wahrscheinlicher war, dass es insoweit zu einer Verurteilung des Angeklagten gekommen wäre).

That being so, the court does not consider it necessary to defer judgment until a decision has been given on the co-defendant M's appeal on points of law.

...."

18. The applicant appealed to the Hamm Court of Appeal against that decision on 11 March 1982. In written pleadings dated 18 March, she challenged, inter alia, the Regional Court's finding that, had her husband not died, he "would almost certainly have been convicted or his conviction almost certainly have been upheld". She claimed that that statement was erroneous and infringed the Basic Law (Grundgesetz) and Article 5 (paragraphs 1 and 3) (art. 5-1, art. 5-3) and Article 6 (paragraphs 1 and 2) (art. 6-1, art. 6-2) of the Convention. The court caused the conviction to "become final" posthumously, thereby prejudicing her as the defendant's widow with regard to the rights relied on and, in particular, entailing a violation of Article 6 § 2 (art. 6-2) of the Convention. It was as if it were sought to obtain a final (abschliessend) conviction of the deceased by a side wind in the form of a decision as to costs although no final (rechtskräftig) judgment had been handed down confirming that he had committed the offences with which he was charged. The Regional Court likewise disregarded the presumption of innocence in stating that the grounds of appeal afforded no reason to suppose that the defendant would have been acquitted. It ought at most to have decided, after a summary examination of the case, that the appeal on points of law had some prospects of success, or it should have refrained from expressing a view. It was precisely for that reason that the applicant had requested an adjournment to await the judgment of the Federal Court of Justice in the appeal proceedings brought by one of the co-defendants. The court, however, had prejudged the Federal Court's decision by holding that the plea alleging a breach of substantive law again provided nothing to support the hypothesis of an acquittal: the court should have known that vital points in Mr. Nölkenbockhoff's appeal were also relied on by the co-defendant M.

The applicant pointed out in addition that from the outset her husband had denied having committed any offences and had indeed been acquitted on several counts. In the light, *inter alia*, of Article 6 § 2 (art. 6-2) of the Convention, it therefore had to be assumed that in the event of a new trial he would have been acquitted completely. Since criminal law was based on the principle of individual guilt, it was quite simply unacceptable - and, once again, contrary to Article 6 § 2 (art. 6-2) - to judge the deceased by the conduct of three of the co-defendants. In any case, the fact that those co-defendants had withdrawn their appeals on points of law could not be regarded as an admission of guilt; besides, they had held responsibilities within Stumm AG different from those of her husband.

19. The public prosecutor's office in Bochum and the principal public prosecutor's office (Generalstaatsanwaltschaft) at the Hamm Court of Appeal, to which Mrs. Nölkenbockhoff's appeal (*sofortige Beschwerde*) had been forwarded for any comments, contended that the appeal should be dismissed.

On 28 December 1981, the Bochum public prosecutor submitted that, having regard to the state of the proceedings, there was every likelihood (*hohe Wahrscheinlichkeit*) that the conviction would have been upheld.

The principal public prosecutor gave his opinion on 11 June 1982. He considered that an assessment of the likely outcome of the proceedings (*Prüfung des mutmasslichen Verfahrensausgangs*), having regard to the reasons given in the judgment of the Essen Regional Court and the grounds of the appeal on points of law, could lead to only one conclusion. It could be assumed - and, indeed, had to be - that if the proceedings had been continued, the defendant's conviction would have been upheld. The principal public prosecutor took the view that the outcome of the appeal brought by the co-defendant M and still pending before the Federal Court of Justice was of some relevance in assessing the likely outcome of the proceedings concerning Mr. Nölkenbockhoff, who, according to the aforementioned judgment, had committed his various offences in concert (*Mittäterschaft*) with the said co-defendant.

20. The applicant, to whom the public prosecutors' observations had been communicated, replied on 6 July 1982. She stated, *inter alia*, that there were considerable dissimilarities between M and her husband as regards the charges against them, their behaviour and the grounds of their appeals; and as evidence of this she pointed to the indictment, the judgment convicting the defendants, and the appeals.

21. The Hamm Court of Appeal dismissed the action on 14 July 1982.

It left open the question whether, in the event of a defendant's death before the final conclusion (*rechtskräftiger Abschluss*) of criminal proceedings, a decision such as that sought by Mrs. Nölkenbockhoff could be taken, by analogy, under Article 467 § 1 of the Code of Criminal

Procedure and section 6(1)(2) of the Criminal Proceedings (Compensation) Act (see paragraphs 24-26 below). And it added:

"Even assuming such decisions are possible (Zulässigkeit), the assessment of the probable outcome of the trial, which must be made in both instances, leads to the conclusion that if the proceedings had been pursued until a final decision was handed down, the former defendant's conviction would almost certainly (mit annähernder Sicherheit) have been upheld. In order to avoid repetition, reference is made to the reasons given for the contested decision, which are valid (zutreffend). It should be noted in addition that the appeal on points of law of the co-defendant M was subsequently dismissed, on 7 July 1982, by the Federal Court of Justice ... as being manifestly ill-founded. That fact is of particular importance in assessing the prospects of success which ... Mr. Nölkenbockhoff's appeal would have had, because according to the reasons given for the judgment of 11 July 1980, the offences of which [he] was convicted at first instance were committed together with ... M.

...."

On 2 September 1982, the Court of Appeal rejected the objections (Gegenvorstellungen) which the applicant had lodged against the judgment of 14 July 1982.

22. Mrs. Nölkenbockhoff then applied to the Federal Constitutional Court (Bundesverfassungsgericht), claiming a breach of Article 1 § 1 (protection of the dignity of man), Article 14 § 1 (the right of property) and Article 20 § 3 (principle of the rule of law) of the Basic Law.

On 30 September 1982, a bench of three judges of the Constitutional Court refused to entertain the constitutional complaint because it considered that the complaint did not have sufficient prospects of success. The reasons for its decision were as follows:

"1. The presumption of innocence, which is founded on the principle of the rule of law, precludes treating as guilty a person who has not been finally (rechtskräftig) convicted. That does not mean, however, that in every case costs must be reimbursed where the proceedings are terminated without guilt having been established (Schuldnachweis) ...

2. The refusal of the applications for an order that the Treasury should bear the deceased defendant's necessary costs and expenses is based on Article 467 § 3, second sentence, sub-paragraph 2, of the Code of Criminal Procedure. The decision on the claim for compensation is based on section 6(1)(2) of the Criminal Proceedings (Compensation) Act. Both provisions, whose conformity with the Constitution cannot be doubted, confer on the courts a degree of discretion. There is nothing to suggest that the courts exercised their discretion in a manner contrary to the Constitution.

(a) Admittedly, the decisions being challenged make a prediction of the probable outcome of the proceedings had they been continued. However, such an assessment does not amount to a finding of guilt but merely to a finding of a continuing state of suspicion (Eine derartige Einschätzung enthält indessen nicht die Feststellung einer Schuld, sondern lediglich die Feststellung einer fortbestehenden Verdachtslage). Consequently, it does not offend the presumption of innocence.

(b) Nor was the prediction of the outcome of the proceedings arbitrary in nature.

(aa) Neither the alleged defects ... in the judgment convicting the defendant nor the grounds of the appeal on points of law make it possible to dismiss as untenable the conclusion reached in the contested decisions that a (subsequent) acquittal was unlikely in respect of each of the offences of which the deceased defendant had been convicted. That was the only relevant issue for the order as to costs. The courts' reference to the lack of success of the appeal proceedings instituted by the co-defendant M and to the withdrawal of the appeals on points of law entered by the other defendants is clearly to be regarded merely as an additional argument, and the impugned decisions are not based on it.

(bb) Nor do the grounds advanced in support of the constitutional complaint show the unreasonableness of the Regional Court's opinion that, had the proceedings been continued, a conviction would have been more likely than an acquittal ... [in connection with the charge in respect of which the proceedings had been provisionally stayed] ...

...."

II. RELEVANT DOMESTIC LAW

23. Article 154 of the Code of Criminal Procedure, which was applied by the Essen Regional Court in its judgment of 11 July 1980, 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 in a final decision - 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.

...."

24. 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 further 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

...

(2) has avoided conviction merely because of a technical bar to the proceedings (Verfahrenshindernis).

4. If the court stays the proceedings under a provision which leaves this decision to its discretion, 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.

25. The death of a person who has been convicted, if it occurs before the relevant criminal proceedings have been definitively closed, terminates those proceedings without any decision by the competent court being needed; in such circumstances, the costs of the proceedings cannot be awarded against the estate of the deceased (Article 465 § 3 of the Code of Criminal Procedure).

As regards the deceased's own necessary costs and expenses and indemnification in respect of any time spent by the deceased in detention on remand, the practice of the German courts at the time in question varied. Some courts considered any indemnification to be precluded, whereas others - such as the Essen Regional Court in the present case - applied the relevant provisions of the Code of Criminal Procedure and the Criminal Proceedings (Compensation) Act. On 3 October 1986, the Federal Court of Justice held that, in the absence of any basis in law, the necessary costs and expenses of a defendant who has died before the conviction has become final cannot be awarded out of public funds.

26. 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 6(1)(2) of the Act, which provides:

"1. Compensation may be refused wholly or in part where the defendant

...

(2) is not convicted of an offence or proceedings are discontinued solely on account of ... a technical bar."

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

27. 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

28. The application (no. 10300/83) was originally lodged on 7 February 1983 by both Mrs. Nölkenbockhoff and her lawyer, Mr. Bergemann. Mrs. Nölkenbockhoff complained of the length of her husband's detention on remand and of the length of his trial itself; she relied on Articles 5 § 3 and 6 § 1 (art. 5-3, art. 6-1) of the Convention. Mr. Bergemann claimed to be the victim of a breach of Article 6 § 3 (art. 6-3) in that criminal proceedings were taken against him in order to intimidate the defence in Mr. Nölkenbockhoff's trial. The applicants claimed, lastly, that the presumption of innocence secured in Article 6 § 2 (art. 6-2) had been disregarded by reason of the grounds on which the Essen Regional Court and the Hamm Court of Appeal had refused to award any compensation for the time spent by Mr. Nölkenbockhoff in detention on remand and to order the Treasury to bear Mr. Nölkenbockhoff's necessary costs and expenses.

29. On 12 December 1984, the Commission declared Mrs. Nölkenbockhoff's complaint under Article 6 § 2 (art. 6-2) admissible and rejected the application as to the rest.

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

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

"1. ... that the Court is not in a position to go into the merits of the case because the applicant is not a 'victim' within the meaning of Article 25 (art. 25) of the European Convention on Human Rights;

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

In her memorial of 1 July 1986, the applicant asked the Court to hold that:

"1. Article 6 § 2 (art. 6-2) of the European Convention on Human Rights has been violated by the decisions of 5 March 1982 by the Essen Regional Court and 14 July 1982 by the Hamm Court of Appeal.

2. It is incumbent on the respondent State to refund to the applicant the costs and expenses incurred in the proceedings.

3. It is incumbent on the respondent State to grant just satisfaction to the applicant, the exact amount to be assessed by the Court."

Those appearing before the Court reiterated their submissions at the hearing on 23 February 1987.

AS TO THE LAW

31. Mrs. Nölkenbockhoff complained of the decisions delivered by the Essen Regional Court on 5 March 1982, by the Hamm Court of Appeal on 14 July 1982 and by the Federal Constitutional Court on 30 September 1982. In her submission, the reasons given by these courts for their refusal to order reimbursement of her late husband's necessary costs and expenses and to award compensation in respect of his detention on remand contravened Article 6 § 2 (art. 6-2), which reads:

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

The Government argued in reply that the applicant could not claim to have been a "victim" herself of the violation complained of. In the alternative, they maintained that there had been no breach of Article 6 § 2 (art. 6-2).

The Commission agreed with the applicant's contentions.

I. ALLEGED LACK OF STANDING AS A "VICTIM"

32. In the Government's view, Mrs. Nölkenbockhoff could not claim to be the "victim", within the meaning of Article 25 (art. 25), of a breach of Article 6 § 2 (art. 6-2), since a breach of the principle of the presumption of innocence could affect only a person involved in criminal proceedings and not a third person against whom no such proceedings were being taken.

The Government had previously raised this plea before the Commission at the admissibility stage; there is accordingly no estoppel (see notably the *de Jong, Baljet and van den Brink* judgment of 22 May 1984, Series A no. 77, p. 20, § 40).

33. The principle of the presumption of innocence is intended to protect "everyone charged with a criminal offence" from having a verdict of guilty passed on him without his guilt having been proved according to law. It does not follow, however, that a decision whereby the innocence of a man "charged with a criminal offence" is put in issue after his death cannot be challenged by his widow under Article 25 (art. 25). She may be able to show both a legitimate material interest in her capacity as the deceased's heir and a moral interest, on behalf of herself and of the family, in having her late husband exonerated from any finding of guilt (see, *mutatis mutandis*, the *Deweert* judgment of 27 February 1980, Series A no. 35, pp. 19-20, § 37). As was pointed out by the Delegate, such is indeed the position in the present case. In the circumstances, Mrs. Nölkenbockhoff can consequently claim to be a "victim" within the meaning of Article 25 (art. 25). The Court would, moreover, point out that the German Constitutional Court, whose procedure of individual petitions is similar to the one established under the Convention (see the *Klass and Others* judgment of 6 September 1978, Series A no. 28, p. 19, § 36), did not dismiss Mrs. Nölkenbockhoff's application for lack of locus standi (see paragraph 22 above).

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

34. In Mrs. Nölkenbockhoff's submission, the Essen Regional Court's decision of 5 March 1982 contained a finding of guilt which was not merely confirmed but emphasised in the judgment delivered by the Hamm Court of Appeal on 14 July 1982. The Federal Constitutional Court, far from exonerating her husband from that finding of guilt, simply interpreted the contested decisions as describing a "state of suspicion".

In the Government's submission, the principle of the presumption of innocence no longer applied at the time the Regional Court handed down its ruling, since the death of the applicant's husband had, by operation of law, put an end to the criminal proceedings and therefore precluded any possibility of finding him guilty and imposing a penalty on him. The decision by the Regional Court, which was given after the close of the proceedings, was concerned solely with Mr. Nölkenbockhoff's own necessary costs and expenses and with compensation for his detention on remand. This decision did not amount to a penalty (*Bestrafung*) or a measure which in its effects could be equated with a penalty. As had been clearly stated by the Constitutional Court, the reasons given for it did not imply any assessment of the defendant's guilt; having regard to the state of the proceedings, and in particular Mr. Nölkenbockhoff's conviction at first instance, they described a "state of suspicion" with the sole aim of reaching a fair decision on the two points in issue. Furthermore, 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 undoubtedly gave the impression that, had the proceedings not been terminated by the death of Mr. Nölkenbockhoff, his conviction would have stood. This conclusion was reinforced by the Court of Appeal and in no way altered by the Constitutional Court.

35. Mr. Nölkenbockhoff's death brought to an end the criminal proceedings against him without any formal decision of discontinuance being taken by the competent criminal court. On an application by his widow, the Regional Court refused, on 5 March 1982, to order payment of the defendant's necessary costs and expenses out of public funds and to award any compensation for his detention on remand (see paragraph 17 above). This decision - which was upheld by the Hamm Court of Appeal and, in substance, by the Federal Constitutional Court (see paragraphs 21-22 above) - was a direct sequel to the *de facto* termination of the proceedings. Consequently, Article 6 § 2 (art. 6-2) may in principle be invoked with regard to the impugned decisions.

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 Mrs. Nölkenbockhoff accordingly does not in itself offend the presumption of innocence (see, *mutatis mutandis*, the Minelli judgment of 25 March 1983, Series A no. 62, p. 17, §§ 34-35).

37. Nevertheless, a decision whereby compensation for detention on remand and reimbursement of an accused's (or his heirs') 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 Essen Regional Court based its double refusal on Article 467 § 3, second sentence, sub-paragraph 2, of the Code of Criminal Procedure and on section 6(2)(2) of the Criminal Proceedings (Compensation) Act (see paragraphs 17, 24 and 26 above). The Hamm Court of Appeal upheld the Regional Court's ruling but left open the question whether such claims

could legally be made under these provisions (see paragraph 21 above). In the judgment of the Constitutional Court, the two provisions did indeed furnish the basis in law for the decisions in issue (see paragraph 22 above).

The Article and the section in question 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 Essen Regional Court refused to order the Treasury to bear Mr. Nölkenbockhoff's necessary costs and expenses and to award any compensation for his detention on remand because "the defendant would almost certainly have been convicted or his conviction almost certainly have been upheld" if the proceedings had continued. In support of this conclusion, the Regional Court referred in particular to his conviction at first instance, after a trial lasting more than three and a half years; the final conviction of three co-defendants and their heavy prison sentences; the submissions made by the defence on appeal, "which afford[ed] no reason to suppose that [he] would have been acquitted had the proceedings continued"; and the fact that the aforesaid co-defendants had withdrawn their appeals, which "argue[d] decisively in favour of the correctness of the judgment" delivered (see paragraph 17 above). To the extent that the proceedings had been provisionally stayed under Article 154 of the Code of Criminal Procedure (see paragraph 23 above), the Regional Court added, there were no grounds for ordering the Treasury to pay the necessary costs and expenses, "because in view of the reasons given for the judgment, it would have been much more likely ... that if the proceedings had continued, the defendant would have been convicted" (see paragraph 17 above).

In the judgment of the Hamm Court of Appeal, which spoke of "the reasons given for the contested decision [being] valid", "the assessment of the probable outcome of the trial ... [led] to the conclusion that if the proceedings had been pursued until a final decision [had been] handed down, [Mr. Nölkenbockhoff's] conviction would almost certainly have been upheld" (see paragraph 21 above). The Court of Appeal further referred to the fact that the appeal on points of law brought by one of the co-defendants had in the meanwhile been dismissed by the Federal Court of Justice as being manifestly ill-founded. That fact, so the Court of Appeal found, was "of particular importance in assessing the prospects of success which ... Mr. Nölkenbockhoff's appeal would have had, because according to the reasons given for the judgment [at first instance], the offences of which ... [he] was convicted were committed together with [the co-defendant in question]".

As far as the Federal Constitutional Court was concerned, the decisions being challenged before it made "a prediction of the probable outcome of the proceedings"; they did "not amount to a finding of guilt but merely to a finding of a continuing state of suspicion" (see paragraph 22 above).

The German courts thereby meant to indicate, as they were required to do for the purposes of the decisions to be taken, that there were still strong suspicions concerning the applicant. Even if the terms used by the Essen Regional Court and the Hamm Court of Appeal were ambiguous and unsatisfactory, these courts confined themselves in substance to noting the existence of "reasonable suspicion" that the person concerned had "committed an offence" (Article 5 § 1 (c) of the Convention) (art. 5-1-c). On the basis of the evidence, the decisions described a "state of suspicion". Taking as their starting-point Mr. Nölkenbockhoff's conviction at first instance, they assessed the prospects of success of his appeal on points of law having regard to the fate of the appeals entered by his co-defendants. As was stated by the Constitutional Court, they contained a prediction of the probable outcome of the proceedings had they been continued, but not a finding of guilt. In this respect they contrast 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 27 above).

40. Moreover, the refusal to order the Treasury to pay Mr. Nölkenbockhoff's necessary costs and expenses and to award 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 27 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 : Mrs. Nölkenbockhoff did not have to bear the costs of the proceedings but only the costs and expenses of her late husband, and she was not awarded any compensation in respect of his detention on remand. The competent courts, acting on an equitable basis and having regard to the strong suspicions which seemed to them to exist concerning Mr. Nölkenbockhoff, did not impose a sanction 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 Essen Regional Court's decision, which was upheld by the Hamm Court of Appeal and the Federal Constitutional Court, did not offend the presumption of innocence guaranteed under Article 6 § 2 (art. 6-2).

FOR THESE REASONS, THE COURT

1. Rejects unanimously the objection that the applicant cannot be regarded as a victim within the meaning of Article 25 (art. 25);
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 after the termination of the prosecution of the applicant's husband by reason of his death, the decision of the Essen Regional Court - upheld by the Hamm Court of Appeal and the Federal Constitutional Court - refusing to order reimbursement of his necessary costs and expenses and to award any compensation in respect of his detention on remand, forms a natural sequel to the termination of the proceedings, which occurred *de facto*. Consequently, Article 6 § 2 (art. 6-2) may in principle be invoked with regard to the said decisions (paragraph 35 of the judgment).

2. Secondly, I also concur with the judgment that neither Article 6 § 2 (art. 6-2) nor any other provision of the Convention grants a person charged with a criminal offence a right to reimbursement of his costs and expenses or a right to compensation in respect of his lawful detention on remand where proceedings against him are terminated by reason of his death. The courts' refusal to order such reimbursement or award such compensation does not therefore in itself offend the presumption of innocence (paragraph 36 of the judgment).

3. Thirdly, I also concur with the judgment that a decision refusing such reimbursement or such compensation in the wake of a termination of proceedings by reason of the accused's death 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 courts described only "a state of suspicion" and did not involve a finding of guilt (paragraph 39 of the judgment), and

(b) that the courts' 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 courts in their judicial decisions concerning Mr. Nölkenbockhoff, who was charged with a criminal offence, goes much further than that.

In fact, the decision of the Essen Regional Court, in refusing to order reimbursement of the accused's 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 if the proceedings had continued "the defendant would almost certainly have been convicted or his conviction almost certainly have been upheld" and that "it was much more likely ... that if the proceedings had continued, the defendant would have been convicted". Moreover, the Hamm Court of Appeal, in dismissing the applicant's appeal, stated, again in unambiguous terms, that "if the proceedings had been pursued until a final decision was handed down, the ... defendant's conviction would almost certainly have been upheld". The decision of the group of three judges of the Federal Constitutional Court rejecting the applicant's constitutional complaint against these decisions was confined to an attempt at interpreting the reasons stated in the decisions without, as the Commission pointed out, altering their meaning or scope.

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 judicial decisions refusing, or confirming the refusal of, 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 courts 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 judicial decisions 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 courts did consider that Mr. Nölkenbockhoff 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 Mr. Nölkenbockhoff's guilt, and in the instant case it is this that the wording of the judicial decisions in question in fact entails.

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