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

COURT (CHAMBER)

CASE OF VIDAL v. BELGIUM

(Application no. 12351/86)

JUDGMENT

STRASBOURG

22 April 1992

In the case of Vidal v. Belgium*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr J. DE MEYER,
Mrs E. PALM,

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

Having deliberated in private on 29 November 1991 and 25 March 1992,

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 8 March 1991 and by the Government of the Kingdom of Belgium ("the Government") on 6 May 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12351/86) against Belgium lodged with the Commission under Article 25 (art. 25) by a Belgian national, Mr Frans Vidal, on 7 July 1986. He was referred to by the initial "V." during the proceedings before the Commission, but subsequently agreed to his identity being disclosed.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and the application

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* The case is numbered 14/1991/266/337. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under paragraph 1 in conjunction with paragraph 3 (d) of Article 6 (art. 6-1, art 6-3-d) of the Convention.

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

3. The Chamber to be constituted included ex officio Mr J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 22 March 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr F. Matscher, Mr L.-E. Pettiti, Mr C. Russo, Mr R. Bernhardt and Mrs E. Palm (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the organisation of the procedure (Rule 37 para. 1 and Rule 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 18 July 1991. He was informed by the Government on 19 July and by the Delegate on 16 October 1991 that they would not be submitting memorials.

5. On 8 July 1991 the Commission produced the documents in the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 November 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr J. Lathouwers, Legal Officer,
  Ministry of Justice, *Deputy Agent*,
  Mr E. Jakhian, avocat, *Counsel*;
- for the Commission
  Mr C.L. Rozakis, *Delegate*;
- for the applicant
  Mr M. Forges, avocat, *Counsel*.

The Court heard addresses by Mr Jakhian for the Government, Mr Rozakis for the Commission and Mr Forges for the applicant, as well as their replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. In 1983 Mr Frans Vidal was a warder at Saint-Gilles Prison (Brussels), having previously worked at Namur Prison until October 1982.

A. Background to the case

8. On 6 February 1983 Mr Bosch Hernandez, an inmate of Namur Prison serving a life sentence imposed by the Brabant Assize Court, attempted to escape. Using a revolver which he had managed to obtain clandestinely, he took the chief warder hostage, but another warder succeeded in disarming him. A note signed by Mr Vidal was found on him; it was undated and read as follows:

> "I hereby promise to pay the sum of ten thousand francs by 1 or 2 November 1982."

When questioned by the Namur police and an investigating judge, he first refused to disclose where the weapon had come from, and then stated that he had been given it by the applicant.

9. Mr Vidal was charged on the following day by the investigating judge of the Namur Court of First Instance (tribunal de première instance).

He was detained on the same day and denied that he had provided the weapon. He admitted having written and signed the document, but claimed that he had given it to another inmate, Mr Bieseman, from whom he said he had borrowed the sum of 10,000 Belgian francs to pay gambling debts.

10. The detention order was confirmed on several occasions in 1983.

11. Mr Derriks, the Deputy Director of Namur Prison, indicated that he had new information for the investigators, and was interviewed on 31 August 1983 by the police inspector assigned to the inquiry. He stated as follows:

> "For some months there have been rumours among the prisoners in C wing suggesting that the former warder, Frans Vidal, was not the person who brought into the prison the revolver used by Bosch Hernandez.
>
> More recently, on 29 August 1983, I saw the inmate Alain Scohy in an office of our prison. I had to inform him of an internal administrative decision. On that occasion Scohy told me that he wished to give me information confided in him by other inmates of C wing. He said that the weapon used by Bosch Hernandez had been introduced into the prison initially for the use of the prisoner Omer Bieseman by a certain Miss Lhoir, a visitor of the prisoner Marcel Castris. After she had smuggled the weapon into the prison and hidden it in the visitors' lavatory, Bieseman had escaped when, on 10 January 1983, he had been taken for a medical examination at the Ste-Camille Clinic. The weapon remained in the prison and finally ended up in the hands of Juan Bosch Hernandez, who had planned to escape with Bieseman using the weapon.

According to Scohy, after it had been brought into the building, the weapon was hidden at the bottom of a dustbin, which Bosch alone, as a server, had the possibility of using as a hiding place for at least three months.

...

I must inform you that Alain Scohy made this statement spontaneously, but hoping to increase his chances of release on licence.

I would add that Bieseman has still not been re-arrested since his escape on 10 January 1983 and that Marcel Castris, nicknamed the 'C wing banker', was provisionally released, with a view to deportation, on 19 August 1983.

The latter's visitor may be identified as: Dominique Lhoir ..., or her sister Marie-Eve Lhoir, ...

Again according to Scohy, Frans Vidal is totally unconnected with the bringing into the prison of these weapons.

..."

12. The investigators tried to question the persons referred to in the above statement.

On 8 September 1983 Mr Bosch Hernandez reaffirmed before the investigating judge that the applicant had provided him with the weapon, in exchange for payment of 100,000 Belgian francs.

Mr Scohy, who was questioned in prison on 27 September 1983, refused to say anything, for fear of provoking animosity from the other inmates. He added that he would report of his own accord to the investigating judge once he had obtained his release on licence, and that he would give evidence in the Assize Court if, by then, he was back with his family so that he could protect them from any reprisals by Mr Castris.

On 3 October 1983 the police questioned Miss Marie-Eve Lhoir, who denied the accusation that she had introduced a weapon for the use of Mr Castris, a close friend of her sister Dominique. She stated that, although they used her address, Mr Castris and her sister lived elsewhere.

Mr Castris and Miss Dominique Lhoir were summoned to appear on 4 October 1983. They telephoned the investigators on that day to tell them that for personal reasons they were unable to appear for the time being but they were willing to come forward at a later date. They did not comply with three further summonses. On 14 October 1983 the investigators informed the investigating judge that the two persons concerned had left their residence for an unknown destination, and that Mr Castris, a foreign national, had been released provisionally shortly before and was subject to a deportation order.

13. On 7 October 1983 the Namur Committals Chamber (chambre du conseil) rescinded the detention order concerning the applicant. Its decision

was confirmed by the Liège Indictments Division (chambre des mises en accusation) on 18 October 1983.

B. The trial

1. The judgment of the Namur Criminal Court of 9 August 1984

14. Mr Vidal was sent for trial before the Namur Criminal Court, charged with:

> "A. on 6 February 1983 ... as an accessory ... having procured weapons which were used to commit a criminal offence, knowing that they were intended to be so used, or having knowingly aided or abetted the perpetrator of the offence ... in respect of action which prepared or facilitated the offence or which carried it out, having attempted to take a hostage, by holding, detaining or seizing Roger Frederick, a prison warder, in order to ... prepare or facilitate the escape [of Bosch Hernandez], the intention to commit the offence having been manifested by conduct which objectively constituted the first step towards the perpetration of the offence and which conduct was halted or failed to attain the aim pursued only as a result of circumstances outside the control of its perpetrators.
>
> B. ... having, between 1 October 1982 and 6 February 1983, being the officer on duty with responsibility for an inmate convicted of a criminal offence, namely, Juan Carlos Bosch Hernandez, facilitated the latter's escape by supplying him with a weapon, the said escape having been attempted using violence or threats.
>
> C. ... having, in 1982, prior to 1 November, over an unspecified period, had in his possession a firearm without having duly registered it.
>
> D. ...
>
> E. ... having, in October or November 1982, at a date as yet undetermined, sold a firearm to a person who was neither a manufacturer nor an arms dealer nor in possession of an authorisation to purchase it.
>
> ..."

On 9 August 1984 the court acquitted him on the following grounds:

> "...
>
> It is not possible on the basis of the case-file or the evidence adduced at the hearing to form, beyond all possible doubt, a conviction as to the ... defendant's guilt; the statements, albeit categorical, [of Bosch Hernandez] cannot in fact be verified by any specific objective evidence in the case-file;
>
> ..."

In the same judgment, it convicted Mr Bosch Hernandez and sentenced him to three years' imprisonment.

At the hearing on 28 June 1984 the court had heard the applicant and Mr Bosch Hernandez, and had also taken evidence from two prison warders and three police officers.

2. The judgment of the Liège Court of Appeal of 26 October 1984

15. The prosecution and the civil party seeking damages appealed. By a unanimous judgment of 26 October 1984, the Liège Court of Appeal sentenced Mr Vidal to three years' imprisonment, the part of the sentence exceeding the time spent in detention on remand being suspended for five years.

It found that:

> "... the co-defendant's accusations have remained consistent although he had no interest in ... securing [the applicant's] downfall, and in addition to other information in the case-file concerning the defendant's financial circumstances and conduct, the latter having admitted borrowing money from a prisoner, they give rise to serious, precise and concurring presumptions which constitute proof of the charges ..."

At the same time it confirmed the sentence imposed on Mr Bosch Hernandez at first instance.

16. Mr Vidal appealed, and the Court of Cassation quashed the judgment on 29 May 1985, on the grounds that the Court of Appeal had been presided over by a judge who had on 26 August 1983 presided over the Indictments Division when it had confirmed a decision of the Committals Chamber refusing to order the appellant's release, and, having regard to Article 6 para. 1 (art. 6-1) of the Convention, on which he had relied, such a circumstance could arouse in the appellant "a legitimate doubt as to the ability of the Court of Appeal ... to hear the case in an impartial manner."

3. The judgment of the Brussels Court of Appeal of 11 December 1985

17. On an application by Mr Vidal, the principal public prosecutor of the Brussels Court of Appeal, to which the case had been remitted, sent the public prosecutor of Créteil (Val-de-Marne) a letter of request on 26 July 1985 asking him to question Mr Bieseman, who had in the meantime been arrested in France and was being held at Fresnes Prison. He was questioned by the French police on 25 October 1985 and denied having lent the applicant 10,000 Belgian francs. The record of his statements was added to the applicant's case-file.

18. On 11 December 1985 the Brussels Court of Appeal, by a unanimous decision, sentenced Mr Vidal to four years' imprisonment. The court gave the following reasons for its decision:

> "...
>
> A detailed examination of the evidence in the case-file and of the evidence adduced at the hearing has enabled the court to form the conviction that the defendant is guilty of the offences as charged;

This conviction is based on two items of evidence which are complementary:

(1) the statements of Bosch Hernandez; (2) the promissory note signed by Vidal;

(1) The statements of Bosch Hernandez

Notwithstanding the caution with which the statements of a person such as Bosch Hernandez should be treated, the court is bound to observe that the accusations which he levelled against Vidal have remained consistent throughout the investigation and that the statements which he made on numerous occasions both when questioned by the police and on examination by the investigating judge are precise and coherent;

In addition it should be stressed that the case-file contains no evidence to support the claim that there was between Vidal and Bosch Hernandez a matter of dispute or disagreement capable of explaining or justifying the accusation made by the latter against the former;

Vidal himself has not cited in this respect any reason for his accuser to bear ill-feelings against him;

The defendant unsuccessfully alleged in his submissions that Bosch Hernandez's statements were improbable in numerous respects and contained discrepancies;

The court is bound to note that, as regards the essential question, namely the allegation that Vidal supplied Bosch Hernandez with the firearm which was used to carry out the escape attempt, Bosch Hernandez has never altered his statements;

In short, these statements at no time appeared improbable or incoherent; on the contrary, they are highly believable and capable of sustaining the conviction formed by the court;

(2) The promissory note signed by Vidal

It is established that a document constituting a promissory note for a sum of 10,000 francs, signed by Vidal, was discovered in the search made of Bosch Hernandez after his abortive escape attempt;

The court notes that the existence of this document accordingly constitutes an objective fact which corroborates Bosch Hernandez's accusations and shows that there existed between the two men business relations of which the least that can be said is that they were unacceptable as far as Vidal was concerned because of his duties as a prison warder and that these relations were such as to undermine his independence vis-à-vis prisoners;

Although he is unable to deny that he had contracted a debt, he has unsuccessfully alleged that he had borrowed the sum from another inmate;

This statement, in the first place, is formally contested both by Bosch Hernandez and the other prisoner, a certain Bieseman, and secondly, is not at all consistent with the fact that the disputed document was found in Bosch Hernandez's hands;

It is hard to see why the promissory note should be among the documents in Bosch Hernandez's possession if Vidal had not been his debtor;

These two objective items of evidence, which are in no way incompatible with all the other evidence regarding the defendant's conduct in relation to the inmates (borrowing sums of money from them, abnormal familiarity, serious failures to carry out proper surveillance), are sufficient to lead the court to form its conviction;

The first-instance court wrongly found that charges A, B and E were not established; it did not rule on charge C;

These four charges [see paragraph 14 above] are established; the offences referred to therein are a manifestation of a single criminal intention and justify the imposition of only one sentence, the heaviest of those applicable;

...

The offences committed by the defendant are extremely serious ones;

By facilitating by supplying a weapon the escape of a prisoner serving life imprisonment, even though the escape failed because of circumstances outside his control, the defendant Vidal endangered the lives of certain of his fellow-warders who, like him, were on duty with responsibility for prisoners;

Such actions must be punished by a sentence commensurate with their seriousness, and the imposition of any suspended sentence is consequently out of the question;

..."

19. In submissions of 19 November 1985 counsel for the defence had asked the court:

"...

As principal submission

To hold that each and every charge brought against the defendant Vidal is not established, to find him not guilty and acquit him.

In the alternative

To carry out all appropriate additional investigative measures, and in any event to order Alain Scohy, Jules Bodart, Gérard Dauphin and Pierre Dausin, all detained in Namur Prison at the time of the alleged offences, to be called as witnesses ..."

With respect to Mr Scohy, the application was based on the following considerations (pp. 3-4 and 21-23 of the said submissions):

"...

Short statement of the facts

...

7. During the investigation ...

In late August 1983, following rumours which had circulated persistently for some months in C wing of Namur Prison (Vidal had not been inside this prison since being arrested on 7 February 1983, hence no contact with the prisoners in that wing), it had turned out, according to these rumours among prisoners, that it had not been Vidal who had introduced the revolver 'used by Bosch Hernandez' ...

On 29 August 1983 prisoner Alain Scohy reported these rumours and gave full details as to how the weapon had been introduced and the persons involved - directly or indirectly: Castris, another server in C wing when being visited by his friend Dominique Lhoir - concealment of the weapon, passing it to Bieseman, finally reaching Bosch Hernandez.

Bieseman escaped on 10 January 1983.

Castris released on licence and deported in October 1983.

N.B. No detailed investigation took place regarding these facts.

Scohy was not even questioned by the investigating judge, although he had promised [the police] that he would give evidence (i.e. on oath) before the Court of Assizes if necessary ...

...

Critical appreciation of the investigation ...

...

1. The Deputy Director of Namur Prison, Mr Derriks, considered it his duty to bring to the attention of the judicial authorities certain facts (which he thus considered to be sufficiently important), rumours of long standing and statements made by a prisoner Scohy, all of direct relevance to the Vidal/Bosch Hernandez case-file.

2. Rumours (persistent ones) had been circulating for months among the inmates of C wing (the wing of Bosch, a server, of Bieseman, often in the workshop, of Castris, another server ...)

according to which the former warder Frans Vidal had not been the person who had introduced the revolver used by Bosch Hernandez ...

Commentary

This literal quotation from the beginning of the statement by the Deputy Director itself demonstrates uncontradictably that there was a 'serious' item of evidence here, to be verified and checked in an exhaustive and thorough manner of course, as to the introduction of the revolver into the prison by some person other than Vidal.

The saying 'no smoke without fire' which applies here is a vivid expression of popular wisdom.

3. Statements made by prisoner Scohy (to Mr Derriks on 29.8.83)

These statements are precise enough as to how the weapon was introduced:

(a) by a woman visitor ... in the lavatory (b) Castris, the deported 'banker' (c) Bieseman, escaped on 10 January 1983 ... (d) Bosch Hernandez these two were known as having made plans to escape ... (e) the weapon was hidden at the bottom of a dustbin.

Commentary

These three facts mentioned above would on their own have deserved a thorough investigation (the third fact appears believable since Bosch Hernandez stated it himself).

4. Scohy's offer to give evidence on oath - possibly at the Assizes, with reference to the correctness of the content of his statements ...

Commentary

Even if this declaration appears from his point of view to favour his request for release on licence, nothing prevented such statements and such an offer of sworn evidence at the very least engaging the attention of an impartial investigator, always hard at work in such a case to find out an undeniable method or opportunity of introducing a weapon into the prison (by a method not involving a prison warder), as Mr Gouverneur, the acting Director of the prison, appositely said ...

The investigation appears to us to be manifestly incomplete, as the investigating judge did not consider it necessary to question Scohy before terminating the investigation, even though many facts in the case-file gave Scohy's statements definite verisimilitude - the possibility of an object being introduced by a woman visitor, who is not searched and has access to the lavatory; the undoubted possibility of hiding a weapon there (for example, securing it in the flushing system or elsewhere); because of his duties in the workshop, access to whole prison by Bieseman, Castris, server, Bosch Hernandez, server, obsessed with gaining freedom, as was his fellow-prisoner Bieseman (escape plans).

Extensive contacts between these prisoners in C wing, 20-30 in contact daily for at least two hours usually ... from 12.30 to 1.30 p.m. and from 4.30 to 5.30 p.m., for over ten months.

It follows from the above: persistent specific rumours for some months (Vidal did not introduce the weapon), statements made by a prisoner in C wing (no doubt one prisoner among many, in view of the rumours), offer to testify on oath with reference to these quite precise statements, highly likely to be true at least in part, that additional investigative measures in great detail were necessary, at appropriate times and under appropriate conditions;

The defence must deplore such a deficiency in the case- file, even though it now appears unnecessary or superfluous in view of the conclusions which now necessarily follow, after a methodical examination of all the facts which have been presented and a critical evaluation of them.

..."

This offer to produce evidence was implicitly rejected by the Brussels Court of Appeal, which did not mention it in its decision, and did not call any witnesses before giving judgment.

20. The applicant appealed to the Court of Cassation, relying inter alia on Article 6 paras. 1, 2 and 3 (d) (art. 6-1, art. 6-2, art. 6-3-d) of the Convention. In an appeal comprising six points, he criticised the Court of Appeal in essence for not having replied to certain of his submissions, including his request for witnesses to be called, and for having based its decision on the extremely dubious statements of Mr Bosch Hernandez and a promissory note of no probative value.

The Court of Cassation dismissed the appeal on 12 February 1986, for the following reasons:

"...

... The judgment states: 'that a detailed examination of the evidence in the case-file and of the evidence adduced at the hearing has enabled the [Court of Appeal] to form the conviction that the [appellant] is guilty of the offences as charged' and specifies the facts on which that conviction was based;

As the court thus gave the reasons on the basis of which it formed its conviction, it was not bound to indicate the reasons for which it dismissed the application submitted to it for additional evidence to be taken, considered implicitly but clearly in its decision to be of no value in establishing the truth;

...

... The submission, which ... does not state in what way the Court of Appeal failed to give adequate reasons for its decision, or indicate the defence submissions or applications which the appellant put forward in his appeal and which the judgment allegedly failed to answer, is inadmissible as insufficiently specific;

...

The judgment noted that the accusations made by the co-defendant Bosch Hernandez against Vidal had been consistent throughout the investigation and that the statements which he had made on numerous occasions, both when questioned by the police and before the investigating judge, were precise and coherent, and considered that they were at no time improbable or incoherent, that they were, on the contrary, highly believable and capable of sustaining the conviction formed by the Court of Appeal and that the appellant's allegations concerning the loan which he had contracted were categorically denied both by Bosch Hernandez and by another inmate, a certain Bieseman, and moreover were in no way consistent with the fact that the document in question was in Bosch Hernandez's possession;

Where statute, as in this case, does not lay down a specific form of proof, the trial court assesses with unfettered discretion the probative value of the evidence which has been adduced before it and which the parties have been able freely to contradict;

The judgment was therefore able, without infringing the statutory provisions cited [by the appellant], to rely on the statements of a co-defendant as evidence against the appellant;

...

In addition, the submission which ... amounts to criticising the appellate court's assessment of the facts is inadmissible;

...

... It is not contradictory to consider that certain statements should be treated with caution and to find that the accusations contained in such statements were formulated consistently throughout the investigation, that they were made on numerous occasions, that they were precise, that at no time did they appear improbable or incoherent and that they were, on the contrary, highly believable and capable of sustaining the conviction formed by the court;

... On the basis of such considerations, the judgment, which decided that 'the [appellant] unsuccessfully alleged in his submissions that Bosch Hernandez's statements were improbable in numerous respects and contained discrepancies', answered the submissions indicated in this point of the appeal;

...

That the contested judgment did not base its decision on an element of fact which had been mentioned by the decisions of the investigating authorities or the trial court below does not in itself lead to the conclusion that there has been a violation of the statutory provisions relied on in the appeal;

In so far as the judgment under appeal convicted the appellant on the basis of the statements of a co-defendant and the fact that the appellant had signed a promissory note, it gave an adequate statement of the reasons on which it was based and a justification in law for reaching its decision;

..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Under Article 154 of the Code of Criminal Procedure,

"Petty offences (contraventions) shall be proved by official reports or, where there are no such reports, or in support thereof, by evidence taken from witnesses.

On pain of nullity, witness evidence in addition to or contradicting the contents of official reports or reports of police officers empowered by law to make findings in respect of lesser offences and petty offences, unless it is alleged that they have been tampered with or forged, shall not be admissible. As regards reports made by other officials and officers whose reports are not regarded by the law as authoritative in the absence of such an allegation, they may be contested by written or oral evidence, if the court considers it appropriate to admit such evidence."

This provision applies also to lesser offences (délits correctionnels), under Article 189 of the Code.

22. "Official reports duly drawn up are evidence of the material facts stated by the reporting officers acting within their capacities, and in particular of the reality of the declarations which they state have been made to them", but "this probative force does not extend to the honesty of the declaration or the accuracy of the facts stated to them" (Court of Cassation (Cass.), 22 January 1980, De Rijcke, Pasicrisie (Pas.), 1980, I, p. 575).

23. The above-mentioned Articles 154 and 189 "are merely declaratory" (Cass., 18 September 1950, De Bock et De Broe, Pas., 1951, I, p. 3). "[They are] not an exhaustive list of the means whereby offences may be proved" and "[do] not prevent the trial court, in cases where statute does not prescribe ... a particular method of proof, reaching its conviction on the basis of all the evidence in the case which has been duly admitted and which the parties have been able to contradict" (Cass., 17 August 1978, Segers, Pas., 1978, I, p. 1259; see also Cass., 7 May 1934, Sevrin c. Thill, Pas., 1934, I, p. 269, and the aforementioned De Bock et De Broe judgment). The court may thus also "have regard to items of evidence other than official reports, other reports and the testimony of witness" (see the above-mentioned De Bock et De Broe judgment).

24. The court may base its conviction on presumptions, that is to say, on what Article 1349 of the Civil Code defines as "assumptions about an unknown fact which statute or the court makes on the basis of a known fact", but under Article 1353 of the Code it "can only admit presumptions which are serious, precise and concurring".

Such presumptions may legally be admitted as evidence of an offence and "the court need not state its reasons for considering that the presumptions on which it bases its conviction are serious, precise and concurring" (Cass., 25 March 1981, Gueben c. Godefroid, Pas., 1981, I, p. 805): it has unfettered discretion to assess whether the items of evidence mentioned by it are of such nature (Cass., 6 May 1946, De Broyer, Pas., 1946, I, p. 171).

25. The court decides, again at its discretion, on "the necessity or appropriateness of an investigative measure or additional steps" (Cass., 11 March 1957, Sors et Mniszek, Pas., 1957, I, p. 826; see also Cass., 15 April 1981, De Buck, Pas., 1981, I, p. 919, and Cass., 6 March 1973, Neyrinck, Pas., 1973, I, p. 624), inter alia as to the calling of witnesses (Cass., 13 June 1907, Jolly, Pas., 1907, I, p. 273; see also the aforementioned Neyrinck judgment).

It "is empowered to determine with unfettered discretion whether, having regard to the evidence already received, further witnesses for the prosecution or the defence must be heard in order for it to form its conviction" (Cass., 26 November 1962, Thomas, Pas., 1963, I, p. 395; see also the aforementioned De Buck judgment). "If it refuses such a request on

the grounds that it considers the measure requested to be unnecessary for founding its conviction, it does not violate the rights of the defence" (see the above-mentioned Neyrinck judgment).

This rule applies on appeal as well as at first instance (Cass., 4 March 1912, Bonus, Pas., 1912, I, p. 141; Cass., 23 December 1912, Deckers, Pas., 1913, I, p. 42; Cass., 8 July 1940, De Smedt c. Bultinck et consorts, Pas., 1940, I, p. 188).

26. Finally, unless statute prescribes "a particular method of proof" (see the above-mentioned De Rijcke and Segers judgments), the trial court "assesses in unfettered discretion the probative value of the evidence in the case": this is a "general rule with respect to the taking of evidence in criminal cases" (see the above- mentioned Neyrinck judgment).

27. Under Article 211 bis of the Code of Criminal Procedure, an appellate court may not replace an acquittal by a conviction or impose a more severe sentence on a defendant, unless its members are unanimous in reaching that decision.

PROCEEDINGS BEFORE THE COMMISSION

28. Mr Vidal applied to the Commission on 7 July 1986. He complained of breaches of paragraphs 1, 2 and 3 (d) of Article 6 (art. 6-1, art. 6-2, art. 6-3-d) of the Convention, inasmuch as he had been unable to have defence witnesses called and questioned and had been convicted on the basis of unreliable testimony.

29. On 14 May 1990 the Commission found the latter complaint inadmissible; on the other hand, it declared the application (no. 12351/86) admissible as regards the former.

In its report of 14 January 1991 (Article 31) (art. 31) it expressed the opinion, by twelve votes to one, that there had been a violation of paragraph 1 of Article 6, in conjunction with paragraph 3 (d) (art. 6-1, art. 6-3-d). The full text of its opinion is reproduced as an annex to this judgment*.

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 235-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 3 (d) (art. 6-1, art. 6-3-d)

30. Mr Vidal claimed that there had been a violation of paragraph 1 in conjunction with paragraph 3 (d) of Article 6 (art. 6-1, art. 6-3-d), according to which:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

He claimed that by failing to call the four defence witnesses he had requested (see paragraph 19 above) the Brussels Court of Appeal had deprived him of his only means of establishing his innocence. Its failure to respect the equality of arms had been more blatant in that it had based its decision solely on the untrustworthy statements of Mr Bosch Hernandez, who had testified before the Namur Criminal Court and the Liège Court of Appeal (see paragraphs 14-15 above) but not before itself.

31. The Government maintained that in the present case there were no "exceptional circumstances" which might prompt the Court to conclude, in accordance with its own case-law (see the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, para. 89), that the failure to hear the witnesses in question had been incompatible with Article 6 (art. 6). The Brussels Court of Appeal had found that there were a number of items of evidence which, taken together, were in its opinion sufficient to dispel any doubt as to the applicant's guilt. After examining the matter it had considered that the investigative measure requested was not necessary for establishing the truth. Moreover, its decision had been a unanimous one, as required by Article 211 bis of the Code of Criminal Procedure (see paragraph 27 above), which constituted a safeguard for the defence.

32. The Court notes that the Namur Criminal Court had acquitted the applicant on 9 August 1984 after hearing as witnesses, apart from himself and his co-defendant Bosch Hernandez, two prison officers and three police

officers (see paragraph 14 above). On 26 October 1984 the Liège Court of Appeal had, however, sentenced the applicant to three years' imprisonment, suspended, on the sole basis of the case-file and the allegations of Mr Bosch Hernandez (see paragraph 15 above).

Once his appeal to the Court of Cassation had succeeded, Mr Vidal requested the Brussels Court of Appeal, the court to which the case had been remitted, to call four persons who had been detained at Namur Prison at the time of the alleged offences, Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin, as defence witnesses. This request appeared on page 26 of his counsel's submissions of 19 November 1985. On pages 3-4 and 21-23 his counsel explained in some detail why the evidence of Mr Scohy appeared to him to be likely to fill in certain deficiencies in the investigation (see paragraph 19 above). He did not specify what purposes would be served by the calling of Mr Bodart, Mr Dauphin and Mr Dausin as witnesses, but given the context it could scarcely be doubted that he wished them to be questioned about the rumours Mr Scohy had spoken of to Mr Derriks on 29 August 1983 (see paragraph 11 above).

The Court of Appeal disregarded the point. On 11 December 1985, basing its decision on the earlier statements by Mr Bosch Hernandez, who was no longer involved in the case, and the promissory note signed by the applicant, it sentenced him to four years' imprisonment, not suspended, in view of the "extremely serious" nature of the offences (see paragraphs 18-19 above). On 12 February 1986 the Court of Cassation dismissed the applicant's second appeal, based inter alia on Article 6 (art. 6) (see paragraph 20 above).

33. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce (see, inter alia, the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). More specifically, Article 6 para. 3 (d) (art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system (see, as the most recent authority, the Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 25); it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter" (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, pp. 38-39, para. 91, and the above-mentioned Bricmont v. Belgium judgment, Series A no. 158, p. 31, para. 89). The Brussels Court of Appeal did not hear any witness, whether for the prosecution or for the defence, before giving judgment.

The concept of "equality of arms" does not, however, exhaust the content of paragraph 3 (d) of Article 6 (art. 6-3-d), nor that of paragraph 1 (art. 6-1), of which this phrase represents one application among many others (see,

inter alia, the Delcourt v. Belgium judgment of 17 January 1970, Series A no. 11, p. 15, para. 28, and the Isgrò v. Italy judgment of 21 February 1991, Series A no. 194-A, pp. 11-12, para. 31). The task of the European Court is to ascertain whether the proceedings in issue, considered as a whole, were fair as required by paragraph 1 (art. 6-1) (see, inter alia, the Delta v. France judgment of 19 December 1990, Series A no. 191, p. 15, para. 35).

34. The applicant had originally been acquitted after several witnesses had been heard. When the appellate judges substituted a conviction, they had no fresh evidence; apart from the oral statements of the two defendants (at Liège) or the sole remaining defendant (at Brussels), they based their decision entirely on the documents in the case-file. Moreover, the Brussels Court of Appeal gave no reasons for its rejection, which was merely implicit, of the submissions requesting it to call Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin as witnesses.

To be sure, it is not the function of the Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence, but the complete silence of the judgment of 11 December 1985 on the point in question is not consistent with the concept of a fair trial which is the basis of Article 6 (art. 6). This is all the more the case as the Brussels Court of Appeal increased the sentence which had been passed on 26 October 1984, by substituting four years for three years and not suspending the sentence as the Liège Court of Appeal had done.

35. In short, the rights of the defence were restricted to such an extent in the present case that the applicant did not have a fair trial. There has consequently been a violation of Article 6 (art. 6).

II. APPLICATION OF ARTICLE 50 (art. 50)

36. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Mr Vidal claimed compensation for damage and reimbursement of costs and expenses. However, he invited the Court to hold that the question of the application of Article 50 (art. 50) was not ready for decision, in view of the possibilities which Belgian internal law might offer for remedying the consequences of the violation of Article 6 (art. 6), and also the possibility of an attempt to reach a friendly settlement.

The Government disputed the applicant's claims, while the Delegate of the Commission expressed no opinion.

37. In these circumstances the Court considers that it should reserve the question and fix the subsequent procedure, bearing in mind the possibility of an agreement reached between the respondent State and the applicant (Rule 54 paras.1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there has been a violation of Article 6 (art. 6);

2. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves it in whole;

(b) invites the Government and the applicant to submit to it in writing within three months their observations on the question and in particular to communicate to it any agreement which they may reach;

(c) reserves the subsequent procedure and delegates to the President of the Court power to fix the same if need be.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 April 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Thór Vilhjálmsson is annexed to this judgment.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE THOR VILHJALMSSON

To my regret, I am not able to agree with the Court's finding of a violation of Article 6 (art. 6) of the Convention in this case.

The Court has once more been called upon to consider its role under the Convention as regards the question whether, in the circumstances, the rules on fair trial, as well as the rules on presentation of evidence, were respected. The taking and assessment of evidence fall primarily within the sphere of national legislatures and courts. In the Bricmont case our Court stated as follows: "It is normally for the national courts to decide whether it is necessary or advisable to call a witness. There are exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6 (art. 6) ..." (judgment of 7 July 1989, Series A no. 158, p. 31, para. 89).

When the case of the applicant was remitted to the Brussels Court of Appeal, his defence counsel requested that four named persons, including Mr Scohy, should be called as witnesses. The reasons given by counsel in support of his request are set out in paragraph 19 of the present judgment. Mr Scohy had reported to the Deputy Director of the Namur prison that there were rumours circulating among the inmates in a certain wing of the prison that the applicant had in fact not supplied a revolver to a prisoner. Counsel argued that it was necessary for Mr Scohy to appear before the court. The purpose of calling the three other persons to give evidence is less clear.

In my opinion, it is not the proper role of our Court to assess whether it was necessary to call the above-mentioned persons to give evidence. I do not think that it is of relevance in this connection that the Brussels court gave no reasons for not hearing the four men or that it increased the sentence imposed on the applicant. I find no violation of Article 6 (art. 6) in this case.