AS TO THE ADMISSIBILITY OF

Application No. 29835/96
by C.G.P.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 15 January 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 September 1995 by C.G.P. against the Netherlands and registered on 19 January 1996 under file No. 29835/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch citizen, born in 1946, and residing in Amsterdam, the Netherlands. Before the Commission he is represented by Mrs. P.S.J. Nuijten, a lawyer practising in Amsterdam.

On 23 April 1992 the Regional Court (Arrondissementsrechtbank) of Amsterdam convicted the applicant of drug offences, sentenced him to a suspended term of three months' imprisonment and imposed a fine of 50,000 Dutch guilders to be replaced by six months' imprisonment in case of non-payment.

The Regional Court used in evidence against the applicant, inter alia, a procès-verbal drawn up by two officers of the Amsterdam police on 11 October 1990. According to this procès-verbal information had been received by the Criminal Intelligence Service (Criminele Inlichtingen Dienst, hereinafter "CID") to the effect that the applicant was travelling from Morocco to the Netherlands in a lorry containing hashish hidden in its roof and that he would enter the Netherlands at a specified place on 29 August 1990. The procès-verbal described the subsequent police investigation, consisting of, inter alia, the observation of the lorry by Belgian and Dutch police. The

information contained in the procès-verbal which concerned the following of the lorry on its journey through Belgium and the Netherlands was taken from an observation journal kept by officers manning a central post at the Amsterdam main police station.

The Regional Court also used in evidence a procès-verbal of the police officer P. of 6 December 1991 in which the latter stated that he had seen the applicant crossing the Dutch-Belgian border in a lorry on 29 August 1990, and a procès-verbal drawn up by the police officer B. containing a statement made by the applicant on 30 August 1990.

The applicant filed an appeal with the Court of Appeal (Gerechtshof) of Amsterdam. At the hearing before the Court of Appeal on 22 January 1993 the applicant's defence counsel argued that the prosecution should be declared inadmissible since the Procurator General (Procureur-Generaal) had failed to provide her, at her request, with a copy of the observation journal. The Procurator General replied that she had been unable to comply with this request as she was not in possession of this journal. The Court of Appeal decided not to declare the prosecution inadmissible. It also refused the defence counsel's request for a number of witnesses to be heard by the Court. However, it suspended the hearing and referred the case back to the Investigating Judge (Rechter-Commissaris) in order for him to hear these witnesses.

A number of police officers, some of whom had taken part in the observation of the lorry, were heard by the Investigating Judge in the presence of the applicant's defence counsel. The defence counsel was able to put questions to the witnesses and through her questioning she tried, inter alia, to ascertain the source of the information which had been received by the CID. However, apart from one witness who stated that this information had not been noted in a procès-verbal but that a so-called "tip-off form" had been filled out, none of these witnesses were able to elaborate on this matter.

At the hearing on 8 December 1993 the Procurator General requested the Court of Appeal to declare the prosecution inadmissible. She submitted that none of the persons concerned had been able to explain how and when the CID information had been received by the police and that, therefore, it would be impossible for the Court to determine whether or not the police investigation had commenced lawfully. The applicant's defence counsel agreed with the Procurator General, adding that she had not received the documents which had led to the arrest of the applicant, including the observation journal. In her opinion, the applicant was entitled to take cognisance of all documents relevant to his defence even if the prosecuting authorities did not rely on them.

In an interlocutory judgment of 22 December 1993 the Court of Appeal decided not to declare the prosecution inadmissible. It held that it had not appeared from the hearing of witnesses by the Investigating Judge that irregularities had occurred during the gathering of information by the CID. Furthermore, the lawfulness of the police investigation was not affected by the inability to ascertain exactly how and when the CID information had been received.

Prior to the subsequent hearing on 2 March 1994 the applicant's defence counsel requested the Court of Appeal to hear a number of witnesses. These included the police officers B. and P. who had also been heard by the Investigating Judge following the Court's decision to suspend the hearing on 22 January 1993. The police officer B. had stated that he had interviewed the applicant on 30 August 1990 and his signature featured on the procès-verbal of this interview. However, according to the applicant the interviewing officer had been a native of Aruba (a Caribbean island and an autonomous part of the Kingdom of the Netherlands), whereas during the hearing before the Investigating Judge the defence counsel had seen that B. was white and did not

correspond to the description given by the applicant of the officer who had interviewed him.

The defence counsel further requested that the police officer P. be heard again and she submitted that by questioning this witness she would be able to refute his testimony given before the Investigating Judge to the effect that he had seen the applicant in the lorry when it crossed the border between Belgium and the Netherlands. She finally requested that the police officer in charge of the police investigation be heard as a witness. In this respect counsel submitted that from the examination of the witnesses before the Investigating Judge it had not become clear which police officer had been in charge of the investigation.

In her pleadings before the Court of Appeal on 2 March 1994, the applicant's defence counsel invoked Article 6 of the Convention and argued, inter alia, that in the present case it had not been possible to find an answer to the question whether the evidence against the applicant had been gathered lawfully. In this respect she referred to the fact that the applicant had been unable to take cognisance of all relevant documents since the observation journal and the tip-off form had disappeared.

The applicant's defence counsel further recalled the commotion which had been created by the recent disbandment of a special police task force, consisting of officers from different regional police departments, after it had appeared that investigatory methods had been used by its members the lawfulness of which was in doubt. This affair had received wide press coverage from which, according to counsel, it appeared that there were strong indications that the use of unlawful investigatory methods was not incidental but structural. Counsel submitted that in those circumstances it could no longer be maintained that the lack of information concerning the reason for suspecting the applicant did not affect the lawfulness of the police investigation.

The Procurator General at the Court of Appeal submitted that she had not summoned the witnesses proposed by the applicant since, inter alia, the police officers B. and P. had already been heard by the Investigating Judge. Furthermore, apart from those police officers who had been heard by the Investigating Judge, the prosecution department was not aware that there had been any other police officers in charge of the investigation. The Procurator General moreover denied that the disbandment of the special police task force referred to by the applicant's defence counsel had anything to do with the present case. In her opinion, the defence had failed to submit any concrete facts indicating that irregularities had occurred during the police investigation.

At the hearing on 2 March 1994 the Court of Appeal refused to accede to the defence counsel's request regarding the hearing of witnesses. It considered that this refusal could not be detrimental to the applicant's defence since the requested witnesses B. and P. had already been heard by the Investigating Judge in the presence of counsel. The Court held furthermore that no concrete facts or circumstances had been adduced which could justify the suspicion that irregularities had occurred during the investigations. Moreover, the Court of Appeal found that the request to hear a person indicated only as "the police officer in charge of the investigation" had not been sufficiently elucidated and it was not convinced that "the Aruban" actually existed. It held in this respect that, in any event, it had not been made clear that the presence of this Aruban had influenced the contents of the statement made and signed by the applicant.

On 16 March 1994 the Court of Appeal quashed the judgment of the Regional Court, convicted the applicant and imposed the same sentence as the Regional Court. In accepting the admissibility of the prosecution it referred to the reasoning contained in its interlocutory

judgment of 22 December 1993. It was for these same reasons that the Court decided that the inability to ascertain the lawfulness of the start of the police investigation did not entail the inadmissibility of the evidence.

The Court of Appeal used in evidence the procès-verbaux of 11 October 1990 and 6 December 1991, a statement made by the applicant before the Court on 2 March 1994 and a report drawn up by an expert concerning the substances found in the lorry. In addition, the Court of Appeal noted that it had not used in evidence the statement made by the applicant to the police officer B. on 30 August 1990.

The applicant filed an appeal in cassation against this decision with the Supreme Court (Hoge Raad). He complained in the first place that since relevant information with regard to the start of the police investigation was missing, the lawfulness of his arrest could not be examined and the defence had thus been unable to invoke any possible irregularities in the gathering of evidence which might have occurred. Secondly, he complained that the Court of Appeal had refused to hear certain witnesses.

The Supreme Court rejected the appeal in cassation on 28 March 1995. It held that the Court of Appeal had been right in rejecting the applicant's argument that the fact that documents concerning the CID information and the observation journal were missing should have led to the inadmissibility of the evidence. In this respect the Supreme Court found that it had not been unreasonable for the Court of Appeal to accept that the procès-verbal of 11 October 1990 correctly reflected the contents of the CID information which had been received, that the contents of the observation journal had only been used in evidence by the Court of Appeal to the extent that they had been contained in the procès verbal of 11 October 1990, and that the Court of Appeal had given the applicant the opportunity to question before the Investigating Judge a number of police officers who had been involved in the observation of the lorry.

The Supreme Court also found that the applicant's defence rights had not been prejudiced as a result of the Court of Appeal's refusal to hear certain witnesses. In this respect the Supreme Court took into account the fact that the applicant's defence counsel had not indicated any concrete facts or circumstances about which she wished to have the witnesses heard.

The applicant's subsequent request for a pardon (gratie) was rejected on 11 November 1995.

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention that in the criminal proceedings against him his defence rights were prejudiced as a result of the fact that relevant information concerning the beginning of the police investigation was missing. The lawfulness of this investigation could therefore not be examined and he was thus unable to invoke any possible shortcomings which might have occurred in the gathering of the evidence.

2. The applicant further complains under Article 6 para. 3 (d) of the Convention that the Court of Appeal refused to hear certain witnesses.

THE LAW

1. The applicant complains in the first place that in the criminal proceedings against him his defence rights were prejudiced since certain documents relating to the start of the police investigation against him had disappeared. He invokes Article 6 para. 1 (Art. 6-1) of the Convention, which provides, insofar as relevant:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ..."

The Commission notes that Article 6 para. 3 (b) (Art. 6-3-b) may also be of relevance in its examination of this complaint. Article 6 para. 3 (b) (Art. 6-3-b), insofar as relevant, reads as follows:

"3. Everyone charged with a criminal offence has the following minimum rights:

b. to have adequate ... facilities for the preparation of his defence;"

As the guarantees in para. 3 of Article 6 (Art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1, the Commission will consider the complaint under the two provisions taken together (cf. Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

The Commission recalls in the first place that it is not for the Convention organs to substitute their view for that of the national courts which are primarily competent to determine the admissibility of evidence. The Commission should nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any (cf. Eur. Court HR, Miailhe v. France judgment of 26 September 1996, to be published in Reports of Judgments and Decisions 1996, para. 43).

The Commission notes that in the present case a police investigation was commenced after the CID had received incriminating information about the applicant. The applicant was unable to ascertain where this information came from or how it had been obtained. Moreover, it appears that an observation journal was kept during the police investigation which had involved the following of a lorry through Belgium and the Netherlands. Although information contained in a procès-verbal dated 11 October 1990 was stated to have been taken from this observation journal, the journal itself had apparently disappeared and the applicant had thus not had access to it.

It is true that the "facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. If, therefore, the information received by the CID and the observation journal contained relevant items which could have enabled the applicant to exonerate himself or have his sentence reduced, failure to make those items available to the defence for inspection would constitute a refusal of facilities necessary for the preparation of the defence and, consequently, a violation of the right guaranteed in Article 6 para. 3 (b) (Art. 6-3-b) of the Convention (cf. No. 8403/78, Jespers v. Belgium, Comm. Rep. 14.12.81, paras. 56 and 59, D.R. 27, pp. 87 and 88). However, the Commission considers that an accused may be expected to give specific reasons for his request (cf. Eur. Court HR, Bendenoun v. France judgment of 24 February 1994, Series A no. 284, p. 22, para. 22) and that the domestic courts are entitled to examine the validity of these reasons.

The Commission observes that it is the applicant's contention that the source of the CID information and the observation journal might have revealed irregularities in the investigation which could have led to either the prosecution or the evidence having to be declared inadmissible. For this reason, he submits, this information and this document should have been made available to him.

The Commission further observes that in the domestic proceedings

the Court of Appeal suspended its examination of the case and referred it back to the Investigating Judge in order for witnesses, who had been proposed by the applicant, to be heard. The applicant's defence counsel was thus able to put questions to a number of police officers concerning the source of the CID information and the observation of the lorry. However, the Court of Appeal found that the examination of these witnesses had not produced any support for the applicant's allegation that any irregularity had in fact occurred.

The Commission considers that by acceding to the applicant's request to have certain witnesses examined, the Court of Appeal expressed a willingness to remedy any possible irregularities which might have occurred before the case was brought before the courts of trial and appeal. The Court of Appeal thus also enabled itself to form an opinion as to the validity of the reasons given by the applicant for his request to have access to certain information. The Commission further finds that in the absence of any concrete indication that such irregularities had in fact taken place it does not appear from the information which was available to the domestic courts that the failure to produce the "tip off form" and the observation journal infringed the rights of the defence or the principle of equality of arms.

It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention of the Court of Appeal's refusal to hear certain witnesses. Article 6 para. 3 (d) (Art. 6-3-d) provides as follows:

> "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 ..."

While referring to its observation above, the Commission will consider this complaint under Article 6 paras. 1 and 3 (d) (Art. 6-1+6-3-d) taken together.

The Commission recalls from the outset that the taking of evidence is governed primarily by the rules of domestic law and it is in principle for the national courts to assess the evidence before them. It is therefore not the Commission's task to decide whether the national courts have correctly assessed the evidence, but to determine whether the proceedings as a whole, including the way in which evidence was taken, were fair as required by Article 6 para. 1 (Art. 6-1) (cf. Eur. Court HR, Kostovski v. the Netherlands judgment of 20 November 1989, Series A no. 166, p. 19, para. 39.)

Also, Article 6 para. 3 (d) (Art. 6-3-d) of the Convention does not give an accused an unlimited right to obtain the examination of witnesses. It is in principle within the discretionary power of domestic courts to establish whether the hearing of witnesses is likely to be of assistance for discovering the truth and, if not, to refuse the calling of such witnesses (cf. Eur. Court HR, Bricmont v. France judgment of 7 July 1989, Series A no. 158, p. 31, para. 89).

In the present case the Commission notes that the police officers B. and P. whom the applicant requested be heard, had already been heard by the Investigating Judge in the presence of the applicant's defence counsel who had been able to put questions to these witnesses. The Commission considers that the Court of Appeal's finding that, even though it doubted the existence of "the Aruban", it had in any event

not been established that the presence of this Aruban had influenced the contents of the statement made and signed by the applicant cannot be regarded as arbitrary or unreasonable. The Commission notes, moreover, that the procès-verbal of the police officer P. of 6 December 1991 was not used in evidence by the Court of Appeal.

As regards the request that the police officer in charge of the investigation be heard as a witness, the Commission notes that the prosecution department stated that it was not aware that there had been any other police officers in charge of the investigation apart from those who had already been heard by the Investigating Judge. Without any further indication as to the identity of this police officer the refusal of the Court of Appeal to summon this person as a witness does also not appear arbitrary or unreasonable.

Furthermore, it does not appear that in the course of the criminal proceedings against him the applicant had no opportunity to challenge the version of the police officers B. and P. or the other evidence against him. As to the fairness of the proceedings taken as a whole the Commission, noting that the applicant was convicted following adversarial proceedings in which he was represented by a lawyer, finds that the applicant was provided with ample opportunity to state his case and to challenge the evidence against him and considers that there is no indication that the criminal proceedings against the applicant were not in conformity with the requirements of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

It follows that this part of the application must also be rejected under Article 27 para. 2 (Art. 27-2) of the Convention as being manifestly ill-founded.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber