APPLICATION/REQUÊTE N° 13976/88

Fernand MAYAT and Appolinaire BOI v/FRANCE

Fernand MAYAT et Appolinaire BOI c/FRANCE

DECISION of 4 March 1991 on the admissibility of the application

DÉCISION du 4 mars 1991 sur la recevabilité de la requête

Article 26 of the Convention *: Anyone who claims that the Assize Court (France) is not an independent and impartial tribunal because of the composition of the jury must lodge an application for a new trial on grounds of bias in order to exhaust domestic remedies.*

Article 26 de la Convention *. Celui qui prétend qu'en raison de sa composition le jury d'une cour d'assises (France) n'est pas un tribunal indépendant et impartial doit présenter une requête en renvoi pour cause de suspicion légitime pour épuiser les voies de recours internes.*

(TRANSLATION)

THE FACTS (Extract)

The applicant Fernand Mayat, a French national, was born in Tiwamack (New Caledonia).

The applicant Appolinaire Boi, a French national, was born in Warap Hienghene (New Caledonia).

Both applicants are at present detained at the Nouméa (New Caledonia) remand prison.

Before the Commission they are represented by Mr. G Tehio, a lawyer practising in New Caledonia, Mr J J De Felice and Mr Tubiana, lawyers practising in Paris, and Mr F Roux and Mr. A. Ottan, lawyers practising in Montpellier

The facts of the case, as submitted by the applicants, may be summarised as follows.

At the end of a judicial investigation the applicants were charged on 12 January 1985 with murder and attempted robbery, in the case of the applicant Mayat, and with complicity in murder and attempted robbery in the case of the applicant Boi.

On 18 August 1986 the Indictments Chamber of the Nouméa Court of Appeal discontinued proceedings against five other accused in the same case, but committed the two applicants for trial before the Assize Court.

In a judgment dated 26 March 1987 the New Caledonia Assize Court sentenced the applicant Mayat to fifteen years' imprisonment for murder, and the applicant Boi to ten years' imprisonment for complicity in murder.

The applicants then appealed to the Court of Cassation against this judgment pleading, *inter alia*, violation of the rights of the defence and the requirements of a fair trial within the meaning of Article 6 of the Convention

They pleaded in particular the refusal of the President of the Assize Court to allow their application for an adjournment in view of the length and tenor of the prosecution submissions. They complained that the President had declared inadmissible their counsel's submissions alleging violation of the rights of the defence without first checking the truth of these allegations. Lastly, they argued that the prosecution should not have been allowed to refer in their pleadings to documents not placed before the court, thus violating the principle of equality of arms

However, on 16 December 1987 the Criminal Division of the Court of Cassation dismissed the applicants' appeals

COMPLAINTS (Extract)

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[The applicants] consider, firstly, that because of the composition of the jury at the Assize Court, resulting as it did from application of Articles 240 *et seq.*, of the Code of Criminal Procedure, the Assize Court cannot be held to be an independent and impartial tribunal.

In this connection they refer to the very composition of the commission responsible for drawing up the annual list of jurors, i.e. five judges, the President of the Bar Association and five members of the territory's council, who all happened to belong to the same political party (the RPCR), and the fact that they were not informed either which persons had been excluded from the list or of the reasons for their exclusion. In this connection they assert that of the 125 persons on the annual list 83 (i.e. 65%) were not Melanesians, and that after the names on the session list and then the trial list had been drawn by lot there remained only a single Melanesian on the jury empanelled to hear their case.

Secondly, the applicants consider that the unrepresentative character of the jury in a case concerning two members of the under-represented ethnic group made them victims of discrimination within the meaning of Article 14 of the Convention.

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THE LAW (Extract)

1. The applicants maintain in the first place that because of the composition of the jury at the Assize Court that court cannot be held to be an independent and impartial tribunal within the meaning of Article 6 para. 1 of the Convention. In this connection they refer to the very composition of the commission responsible for drawing up the annual list of jurors and the fact that they were not informed either which persons had been excluded from the list or of the reasons for their exclusion.

They consider themselves victims of a discrimination within the meaning of Article 14 of the Convention because of the unrepresentative character of the jury picked for a case concerning two members of the under-represented Melanesian ethnic group.

Article 6 para. 1 of the Convention provides : "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal ..."

However, the Commission is not required to state its opinion as to whether the facts alleged by the applicants disclose the appearance of a violation of this provision, since under Article 26 of the Convention "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

The Commission notes that there exists in French law an exceptional procedure, the "requête en renvoi pour cause de suspicion légitime" (application for a new trial on the ground of bias), designed to enable the Criminal Division of the Court of Cassation, if it considers the grounds pleaded for suspicion of a court's bias to be well-founded, to remove the case from that court's jurisdiction and send it for trial before a different court. Those permitted to lodge an application of this type include the accused (Article 662 of the Code of Criminal Procedure). Consequently, the applicants could have lodged such an application in this case.

The Commission considers, in accordance with its case-law (cf. Austria v. Italy, Comm. Report 30.3.63, Yearbook 6 p. 740), that by relying if necessary on the provisions of Article 6 para. 1 of the Convention, which have public policy status in French law (cf. Baroum Cherif case : Cass. Crim. 5.12.78, D. 1979, I, 50, note Kehrig), the applicants therefore had an effective and sufficient remedy whereby they could obtain redress in respect of the complaints they now raise before the Commission. This is also true of the complaint relating to Article 14 of the Convention, in so far as the applicants had the possibility of raising it before the French courts in the form of an application for a new trial on the ground of bias.

As they did not use such a remedy in connection with the complaints under consideration, the applicants cannot be held to have exhausted all domestic remedies within the meaning of Article 26 of the Convention. Consequently, this part of the application must be rejected, pursuant to Article 27 para. 3 of the Convention.

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