AS TO THE ADMISSIBILITY OF

Application No. 19125/91
by Konrad BECHTER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 5 April 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

Mrs. M.F. BUQUICCHIO, 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 19 November 1991 by Konrad BECHTER against Austria and registered on 22 November 1991 under file No. 19125/91;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 13 October 1993 to communicate the application ;

the observations submitted by the respondent Government on 14 January 1994 and the observations in reply submitted by the applicant on 9 March 1994 and additional observations of 9 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a police officer, is an Austrian citizen, born in 1941 and living in Krumbach. He is represented by Mr. Ludwig Weh, a lawyer practising in Bregenz.

It follows from the applicant's statements and the documents submitted, that on 29 January 1991 he was convicted by the Feldkirch Regional Court (Landesgericht) of defamation (Verleumdung).

He was sentenced to a fine of 360 day-rates in the amount of AS 200 each.

The court considered it to be established:

- that the applicant had told a colleague, police officer A.M., that police officer H.S. had, upon the occasion of local festivities, allowed his brother P. who was under the influence of alcohol to enter

his car and drive away.

The court found the above statement to be untrue and made with the intent to wrongly incriminate H.S. with whom the applicant had had, for many years, an acrimonious relationship.

The court further found that when heard in the above matter as an accused suspected of having committed defamation:

- the applicant had told the investigating judge on 25 September 1990 that the alleged defamatory remark had been made in good faith as one K.B. who had allegedly witnessed the incident in question had informed the applicant about it.

This statement made before the investigating judge was, according to the court's findings likewise untrue and defamatory as it accused K.B. of having wrongly denounced H.S. for having neglected his duties as a police officer.

The findings of the court were based on evidence given against the applicant by witnesses H.S., A.M., K.B., H.L. and A.S.

K.B. denied as a witness having incriminated H.S. vis-à-vis the applicant. He only admitted that he had met the applicant and his daughter at the local festivities in question and had conversed with them for a while. In the course of the conversation he had mentioned having passed in his own car that of P. who seemed to be drunk as his face was all red. K.B. denied however having spoken of H.S., P.'s brother, whom he had not seen at all.

H.L., a senior police officer, stated that when he questioned the applicant about his remarks incriminating H.S. the applicant had replied that he knew from hearsay only that H.S. had not interfered when his brother decided to drive although he was drunk. The applicant had however not been able to name a person who had given him the information about H.S.

The applicant's daughter, A.S., gave evidence for her father stating that K.B. had told her father in her presence that H.S. had not interfered when his drunken brother P. drove away in his car. The court considered however that this evidence was unreliable and contradicted by the evidence given by K.B. who was considered to be credible.

The applicant's wife stated as witness that K.B. had confirmed in her and her daughter's presence on the occasion of a visit to their house that he had given the applicant the information about H.S. and his brother P.

The trial court considered however that the applicant had intentionally invited K.B. in order to fabricate evidence in his favour. Neither the applicant's wife nor his daughter were considered to be credible.

The defence requested an expert opinion on the question whether it had been possible for K.B. to recognise P. in the circumstances described by him as a witness and to see that his face was red. The trial court rejected this request stating in an order given in the course of the trial that it had itself enough experience to decide this issue without the assistance of an expert.

The applicant lodged an appeal complaining of his conviction and the sentence. He argued, inter alia, that his rights had been violated in that his request to obtain an expert opinion had been rejected. He also argued that there was not sufficient evidence to prove his guilt.

The Senior Public Prosecutor(Oberstaatsanwaltschaft) submitted

the following observations (croquis):

[Translation]

> "The dismissal of the request to obtain a photometric expert opinion did not violate the rights of the defence. Reasons for the dismissal were given at the trial and did not need to be repeated in the judgment. The request related to irrelevant circumstances. The appeal on points of law must therefore fail.
>
> The trial court's assessment of the evidence is extensive and convincing. The reasons stated in the appeal do not give cause to doubt the findings of the trial court.
>
> The sentence likewise does not call for any correction."

[German]

> "Durch die Abweisung des Beweisantrages auf Einholung eines lichttechnischen Sachbefundes, die im Urteil nicht noch einmal eigens begründet werden mußte, nachdem die Gründe dafür in der Hauptverhandlung verkündet wurden, wurden Verteidigungsrechte des Angeklagten nicht verletzt. Mit diesem Beweisantrag sollten nämlich nicht entscheidungswesentliche Umstände bewiesen werden. Es versagt daher die Nichtigkeitsberufung.
>
> Die Beweiswürdigung des Erstgerichtes ist ausführlich und überzeugend. Die Schuldberufung vermag keine Zweifel dagegen zu erwecken.
>
> Auch die Strafe gibt zu keiner Korrektur Anlaß."

These observations were not communicated to the defence. It is stated in the minutes concerning the appeal hearing on 15 May 1991 that a judge rapporteur summarised the case and issues and that subsequently the pleadings of the Public Prosecutor and the defence were delivered.

The appeal was rejected by the Innsbruck Court of Appeal (Oberlandesgericht) on 15 May 1991. The court considered that the dismissal of the request for an expert opinion was unobjectionable as it was irrelevant whether K.B. had in fact been able to see that P. was red-faced or whether he only believed that he had seen this.

The appellate court further considered that the trial court's assessment of the available evidence was unobjectionable. The sentence was considered to be lenient and likewise unobjectionable.

RELEVANT DOMESTIC LAW

At the relevant time it had been a standing practice that the Senior Public Prosecutor file a so-called croquis in such cases as this was deemed appropriate. Such a croquis was not always and automatically communicated to the defendant as it was considered that the defence could safeguard its rights by requesting leave to inspect the file under Section 82 of the Code of Criminal Procedure (see Eur. Court H.R., Brandstetter judgment of 28 August 1991, Series A no. 211, p. 28 para. 67).

In consequence of the Brandstetter judgment, Section 35 (2) of the Austrian Code of Criminal procedure was amended as follows:

[Translation]

> "(2) If the Public Prosecutor at the Court of Appeal submits his observations on a plea of nullity (Nichtigkeitsbeschwerde), an appeal or a complaint, the Court of Appeal shall communicate these observations to the person against whom criminal

investigations are pending (the accused, the person concerned) and shall inform his of his right to comment on these observations within an adequate period of time to be determined by the court. It can refrain from doing so, if the Public Prosecutor confines himself to opposing without further explanations the request set out in the appeal, if he only submits a statement in favour of the person against whom criminal investigations are pending or if the court allows the latter's appeal."

[German]

" Nimmt der Staatsanwalt bei einem Rechtsmittelgericht zu einer Nichtigkeitsbeschwerde, einer Berufung oder einer Beschwerde Stellung, so hat das Rechtsmittelgericht dem Beschuldigten (Angeklagten, Betroffenen) diese Stellungnahme mit dem Bedeuten mitzuteilen, dass er sich binnen einer festzusetzenden angemessenen Frist hiezu äußern könne. Diese Mitteilung kann unterbleiben, wenn der Staatsanwalt sich darauf deschränkt, dem Rechtsmittelbegehren ohne weitere Ausführungen entgegenzutreten, er bloß zugunsten des Beschuldigten Stellung nimmit, oder wenn dem Rechtsmittel des Beschuldigten Folge gegeben wird"

COMPLAINTS

The applicant complains that the courts disregarded his motion to obtain an expert opinion. He further submits that the Public Prosecutor's observations on his appeal had not been communicated to him and had not been in the court file. Consequently he could not comment on it. He therefore alleges violations of Articles 6 para. 1 and 3 (d) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 November 1991 and registered on 22 November 1991.

On 13 October 1993 the Commission decided to communicate the application to the respondent Government under Rule 48 para. 2 (b) of its Rules of Procedure and to invite the parties to submit written observations on admissibility and merits of the complaint relating to the appeal proceedings and the alleged fact that the croquis had not been communicated to the defence.

The Government's observations were submitted by letter dated 14 January 1994 and the applicant's reply by letters of 3 March 1994 and 9 February 1995.

THE LAW

1. The applicant first complains that he was wrongly convicted of defamation.

With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77 ; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

It is true that the applicant invokes Article 6 (Art. 6) complaining that his request to obtain an expert opinion has been disregarded by the trial court.

However, Article 6 (Art. 6) does not give an accused an absolute right to obtain the examination of witnesses or of experts. The domestic judge can refuse to obtain evidence which he considers to be irrelevant (cf. Dec. 9.10.86, No. 10486/83, D.R. 49, p. 86).

In the circumstances of the present case it cannot be found that the domestic courts arbitrarily held the expert opinion proposed by the applicant to be irrelevant.

It follows that there is in this respect no appearance of a violation of Convention rights and the complaint therefore 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 questions the fairness of the domestic proceedings on the ground that the croquis with observations of the Public Prosecution on his appeal had not been communicated to him.

The Government consider that communication had been unnecessary as the croquis did not, in their opinion, contain any relevant new argument.

The Commission considers however that in the light of the Brandstetter judgment (Eur. Court H.R., judgment of 28 August 1991, Series A no. 211) this complaint raises complex issues necessitating an examination on the merits.

It follows that this part of the application cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission, unanimously

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint under Article 6 (Art. 6) of the Convention relating to the appeal proceedings;

and, by a majority

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)