AS TO THE ADMISSIBILITY OF

Application No. 12834/87
by John BOYLE
against the United Kingdom

The European Commission of Human Rights sitting in private on 3 March 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

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

Having regard to the application introduced on 14 February 1987 by John BOYLE against the United Kingdom and registered on 3 April 1987 under file N° 12834/87;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1955 and is, at present, detained in Barlinnie Prison, Scotland. He is represented in the proceedings before the Commission by Messrs. Carroll & Co., Solicitors, Glasgow. The facts presented by the applicant may be summarised as follows:

The applicant, together with another person, was charged on indictment with four offences against the Misuse of Drugs Act 1971 (Scotland). At a sitting of the High Court of Justiciary which commenced 19 May 1986, he was convicted of three of those charges and sentenced to a total of six years imprisonment (four of which were concurrent).

During the course of the summing up to the jury on the question of the proper burden of proof in criminal cases, the trial judge is recorded in the transcript as having made the following remarks:

"As I have said, there is no obligation on any accused to prove anything let alone prove it by corroborated

evidence. If an accused gives evidence, as both accused have in the present case, and if that evidence tends to exculpate that accused and if you accept it then, of course, the result is you acquit the accused. If you believe what either of the two accused said in the witness box then either or both must, of course, be acquitted. That is common sense. If, however, you don't fully believe them but their evidence is sufficient as to raise in your mind a reasonable doubt as to whether the police have been lying and committing perjury you are not entitled to give the benefit of that doubt to the accused because (emphasis added) the case has to be proved beyond reasonable doubt and even, ladies and gentlemen, if you wholly reject the evidence of both accused it doesn't prove the contrary: because you reject perhaps what Mr. Kyle or Mr. Boyle has said the contrary of what they have said is not thereby proved. You still have to accept the evidence given by the Crown as indicating that the accused are guilty according to the standards which I have pointed out."

It appears that the above underlined statement was not challenged by the applicant's counsel at the trial.

The applicant together with the co-accused appealed against his conviction to the High Court of Justiciary (Appeal Division) on five grounds - the first of which dealt with the incorrect statement of the law referred to above. At this stage counsel advised that he supported only grounds two and four but not the first ground. Legal aid to pursue the appeal was subsequently granted following advice from Queen's Counsel who supported the first ground of appeal and recommended that legal aid be sought to employ Queen's Counsel for the appeal.

The Queen's Counsel who had indicated support for the first ground was not available to argue the appeal and another Queen's Counsel was retained. The applicant's solicitor states that it is the practice in the Scots legal profession to brief counsel in criminal appeal work "quite close" to the date of the hearing. In this case Queen's Counsel was briefed and received the papers on 7 January 1987. The appeal was set down for hearing on 9 January 1987.

On the evening of 8 January 1987 the Queen's Counsel who was briefed in the case indicated to the applicant's solicitor that he was not happy with grounds 1 and 5 but that he would ponder the matter over night and discuss it further the next morning before the appeal came on for hearing.

The applicant had been informed of the differences of view as to the first ground of appeal between legal counsel but learned only on the morning of the trial that the Queen's Counsel briefed to argue his appeal had decided that he was not prepared to argue the first ground of appeal and, in fact, was prepared to argue only ground five. The applicant was advised that if he was not satisfied with this advice, Queen's Counsel would seek the leave of the Court to withdraw from the case. The applicant then instructed Queen's Counsel to proceed with all five grounds of appeal. Queen's Counsel then sought and obtained the leave of the Court to withdraw from the case leaving the applicant to present his own case, solicitors not having a right of audience before the High Court of Justiciary.

Before Queen's Counsel withdrew from the case he advised the applicant that he could move for an adjournment to enable him to seek another Queen's Counsel to argue his appeal. The applicant was further advised that he was unlikely to be allowed bail pending any further hearing and that the Court would not look sympathetically on such a motion to adjourn where Queen's Counsel withdrew because the applicant did not accept his advice.

The applicant did not, in fact, seek an adjournment nor did he seek to present his case orally. Instead he placed a memorandum of appeal before the Court which then adjourned over a lengthy lunch period to allow the Lord Advocate to make submissions in reply.

According to the applicant's solicitor it is not the usual practice in Scotland for memoranda of appeal to be placed before the courts in this way. They are prepared not as court documents but as an aide memoire for counsel presenting appeals.

The Court took time for consideration of this appeal and on 6 February 1987 the Lord Justice-Clerk, with whom two other Lord Justices of the High Court of Justiciary (Appeal Division) agreed, gave judgment and held with regard to the trial judge's statement concerning the burden of proof that there was no miscarriage of justice. In particular he stated as follows:

"In my opinion it is inconceivable that any judge would deliberately give the direction: 'you are not entitled to give the benefit of the doubt to the accused because the case has to be proved beyond reasonable doubt'. As the trial judge points out in his Report, if such a direction had been given to the jury this is something which would have been noted at the time by those present. He tells us that the Clerk of Court whom he has consulted did not notice any such error. Likewise the Lord Advocate informed us that the Advocate Depute who took the trial had also been consulted and that in the course of listening to the charge being delivered he was not conscious of any such error. In my opinion the most likely explanation for what appears in the transcript is that three words have been omitted from the passage in question. In my opinion, the probability is that what the trial judge said was: 'you are not entitled to convict but must give the benefit of the doubt to the accused because the case has to be proved beyond reasonable doubt'. Alternatively, as the trial judge himself suggests in his Report, he may have started to say : 'you are not entitled to convict' and then corrected that to saying that the benefit of the doubt must be given to the accused. Whatever the true explanation may be, I find it very hard to believe that the trial judge in fact gave the direction which is the subject of this ground of appeal. However that may be, and whether there was an error in the transcription of the shorthand notes or a slip of the tongue by the trial judge, I am satisfied that there was not any miscarriage of justice in this respect. In a number of passages in his charge both before and after the passage in question, the trial judge emphasised to the jury that before they could convict they required to be satisfied of the guilt of the accused beyond reasonable doubt. Accordingly the jury can have been left in no doubt as to the burden of proof and the standard of proof; in particular they can have been left in no doubt that the accused required to be given the benefit of any reasonable doubt."

The applicant succeeded on ground five of his appeal with the result that conviction on one of the charges was quashed. However his appeal against conviction on the other charges was dismissed.

COMPLAINTS

The applicant complains that he has had an unfair hearing within the meaning of Article 6 para. 1 of the Convention because the trial judge made an error of law when charging the jury on the burden of proof which the prosecution had to discharge before an accused

person could be convicted of an offence under Scots law.

The applicant also complains that he has not had a fair hearing of his appeal within the meaning of Article 6 para. 1 of the Convention because his Queen's Counsel withdrew from the case on the very morning of the appeal leaving him to represent himself.

THE LAW

1. The applicant first complains that he was denied a fair hearing contrary to Article 6 para. 1 (Art. 6-1) of the Convention because the trial judge incorrectly charged the jury as to the burden of proof which has to be discharged by the prosecution before an accused person can be convicted under Scots law.

The relevant part of Article 6 para. 1 (Art. 6-1) of the Convention states:

"1. In the determination of ....any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....".

The Commission examined a similar complaint concerning an alleged error in a judge's summing-up in Application No. 10361/83 (Lynch v. Ireland, Dec. 9.5.84 to be published in D.R.). In this application it held as follows:

"The Commission recalls its function in examining whether or not a trial has been fair within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. It is not called upon to decide whether the domestic courts have correctly assessed the evidence before them, but only 'whether evidence for and against the accused has been presented in such a way, that he has had a fair trial'.....

In addition, as the Commission stated in the Nielsen case, the question whether the proceedings have been unfair must be decided

'on the basis of a consideration of the trial as a whole and not on the basis of an isolated consideration of one particular incident. Admittedly, one particular incident or one particular aspect .... may have been so prominent or may have been of such importance as to be decisive for the general evaluation of the trial as a whole. Nevertheless, even in this contingency, it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether or not there has been a fair trial'.....".

In the present case the High Court of Justiciary (Appeal Division) held that whether there was an error in transcription or a slip of the tongue no miscarriage of justice had occurred. The appeal court further observed that neither the Clerk of Court nor the Advocate Depute had noticed any error in the summing up and that in other parts of the judge's summing up the references to the appropriate burden of proof were correct. The court concluded that the jury can have been left in no doubt as to the burden of proof and the rule that the accused was to be given the benefit of any reasonable doubt.

In such circumstances the Commission considers that even if it could be established that the trial judge had by accident made the remarks imputed to him by the transcript the applicant has not substantiated his claim that he received an unfair trial and that,

accordingly, this part of his complaint must be rejected.

2. The applicant further complains that he was denied a fair hearing of his appeal because of the late withdrawal of counsel.

The Commission considers that in certain circumstances the withdrawal of counsel from a case leaving an accused to present his own case may give rise to an issue under Article 6 para. 1 (Art. 6-1) of the Convention. In the present case, however, the Commission notes that the applicant could have sought an adjournment of the appeal in order to secure the services of counsel who would have been prepared to argue all the grounds of appeal. He chose, however, to pursue his appeal without the assistance of counsel. In addition it is established that the Court was in possession of a detailed memorandum of appeal which sets out in some detail the grounds to be argued and the cases to be relied on. Finally it is evident from the decision of the appeal court that the applicant's arguments on all five grounds of appeal were fully considered by the Court and that the applicant succeeded on one of his grounds of appeal. Against this background the Commission finds no indication that the appeal proceedings in the present case were unfair within the meaning of Article 6 para. 1 (Art.6-1) of the Convention.

It follows that the applicant's complaints under this provision must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission — President of the Commission

H. C. KRÜGER — C. A. NØRGAARD