AS TO THE ADMISSIBILITY OF

Application No. 29335/95
by Donna Elouise CANNON
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 20 October 1995 by Donna Elouise CANNON against the United Kingdom and registered on 21 November 1995 under file No. 29335/95;

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

Having regard to the information submitted by the respondent Government on 27 September 1996 and the applicant's comments of 17 October 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1968 and residing in Farnham, Surrey. Before the Commission, she is represented by Mr. J. Wadham, a lawyer with Liberty, London.

A. Particular circumstances of the case

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

The applicant ran an escort agency, 'Saints and Sinners'. The agency charged a fee for introducing male clients to female escorts, who then provided sexual services in return for money.

In March 1993, the applicant was charged with, inter alia, blackmail of a customer of the agency (Mr. L). The trial took place between 13 and 17 December 1993 before a judge and jury.

In advance of the trial, on 2 December 1993, the prosecution made an ex parte application to the judge to obtain a ruling that certain information concerning the two principal prosecution witnesses need not be disclosed to the defence on the grounds of public interest immunity, in particular the fact that they were police informants. The prosecution could not withhold relevant evidence without applying to the court for a ruling on whether it was appropriate to do so in all circumstances of the case. No other ex parte application was made.

The defence were unaware of the nature of the ex parte application or of the grounds for it until the applicant had been convicted; they were only notified on 1 December 1993 that an ex parte application would be made. Subsequently, the defence became aware that the application concerned matters fundamental to the credibility and motives of the two principal prosecution witnesses.

Mr. L., the first prosecution witness, gave evidence that on 26 February 1993 he rang the 'Saints and Sinners' agency and arranged with the applicant for a girl to come round. He claimed that Ms. B. arrived, negotiated for the price and was paid by cheque. After sexual intercourse with him and his friend, she left. According to Mr. L., the following morning, the applicant telephoned him complaining that he had failed to pay the £30 agency fee. She made several further calls which he tape recorded. She was threatening to allege to the police that he had raped her and she told him that she had arranged for a witness, Ms. W., another prostitute at 'Saints and Sinners', to confirm that she was manning the telephone at the agency on the night of 26 February and had sent the applicant to his house.

Ms. W., the second prosecution witness, gave evidence that in February 1993 the applicant telephoned her and said that Ms. B. had been sent to Mr. L. who had behaved in a threatening manner towards her. She maintained that the applicant asked her to tell the police that she had been on telephone duty at the agency on the night of 26 February and had sent the applicant to Mr. L.'s home, and that the applicant also told her she was intending to allege that Mr. L. had raped her. She stated that she refused to be involved and the applicant became angry with her.

Ms. W. also said that when she had first met Mr. L. she was quite intimidated by him and mentioned this to the applicant, who overreacted and notified the police. Ms. W. was under the impression that the applicant did not like Mr. L. When she was cross-examined, Ms. W. maintained that the allegations about simulated rape and drugs, which she had made against Mr. L. in December 1992, were lies. She made them only because the applicant had told her to and she obeyed because she was dependent on the applicant for her job. She was not frightened of Mr. L. and did not think the police believed the allegations.

The applicant did not give evidence at the trial. The defence case was that no allegation of rape was made in order to blackmail Mr. L., but that if such an allegation was made it was because the agency girls, including the applicant, were in fear of Mr. L. and wished to frighten him off. If true, this would not amount to the offence of blackmail. In any event, it was contended that the applicant had reasonable grounds for making the demand of the £30 agency fee because she was owed the money and she genuinely believed that the device she had adopted for obtaining the money was justified.

On 17 December 1993 the Winchester Crown Court convicted the applicant of an offence of blackmail. On 25 March 1994 she was sentenced to perform 100 hours community service.

Following the applicant's conviction, the defence became aware of an article that appeared in a national magazine in December 1993 which alleged that in 1987 Mr. L. had played a major role in an international drug trafficking conspiracy. From Mr. L.'s interview it

appeared that he had escaped prosecution for his part in the offence by assisting the authorities and giving evidence against his co-accused.

The defence also became aware that the prosecution had known, at the time of the blackmail trial, that Mr. L. had previously been involved in a large scale drug importation which he said was connected to the Mafia and the IRA, and that he had been given immunity from prosecution, and had been provided with a new identity, in return for giving evidence to the prosecution against his accomplices. The prosecution had been also aware that Ms. W. had acted as a police informant throughout the relevant period.

In her appeal the applicant argued that in view of the fact that the credibility of Mr. L. and her fear of him were central issues in the case, there was an overriding interest in favour of disclosure of relevant material in order to secure a fair trial. She also claimed that Mr. L. had forfeited any claim which he might have had to preserving his anonymity by giving interviews to national newspapers at the time of the original drugs trial.

On 30 January 1995 the hearing of the appeal took place. The Court of Appeal dismissed the applicant's appeal in the following terms:

> "The basis of this appeal ... was that the learned judge ought not to have accepted the prosecution submission that they need not disclose the material relating to Mr. [L.] and Ms. [W.] being informants ... [defence counsel] submitted that [by giving interviews to national newspapers] Mr. [L.] had himself chosen to go public about the role he played as an informant and as a prosecution witness in the drug running case. Although, therefore, he had been an informant and would normally be entitled to some protection in that role, he had forfeited the protection by putting his role into the public domain.
>
> The information contained in those press cuttings was not before the trial judge in the present case because, we are told ... those directly involved in this case were not aware of the newspaper articles or the way which Mr. [L.] had publicised his activities ... The argument, therefore, is that the prosecution ought to have informed themselves better and had the information; that it should have been put before the judge; that if the judge had had that information, he would have taken a different view about the prosecution's application for public interest immunity to attach to the informant role of Mr. [L.]. ...
>
> It may be that the prosecution in the present case did have sufficient information to put them on inquiry to investigate further the part Mr. [L.] had played in the earlier proceedings. However that may be, the material before the trial judge did not, in our judgment, require him to order disclosure. We have examined the material which was before the judge and we take the view that doing the balancing act required by the cases, he had to consider whether the relevance for the defence case of the information which was before him in the prosecution file was such as to outweigh the normal and well-established principle that details concerning informants ought not to be disclosed.
>
> We have to consider the position which is now revealed well after the trial. We are in possession of material which was not available to the trial judge and was not in the possession of the prosecution at that time. [The defence]

submitted that our ruling should be that had the learned judge had the information that we have, his decision on disclosure would have been in favour of the defence. We must therefore look at the issues which the learned judge had to consider.

As already pointed out, the defence contention was that the [applicant] acted as she did because she was in fear of Mr. [L.]. There was a good deal of information to show that [he] may well have been a man who inspired some degree of fear: his previous record; his changed name without explanation; his weapons in the house; his minders; all of those may have been matters which would create fear. Would it have made any difference to add, further, that he had been involved as a witness for the Crown (who presumably had been believed because there were convictions in the earlier case) in the drug running case in 1987? In our judgment, looking at the matter purely as a balancing act in regard to disclosure of information about the informant, the judge's decision would not have been any different. We do not consider that the additional weight that the information about the earlier trial would have added to the existing information which the defence had would have justified departure from the general rule to protect the identity of informants. Although Mr. [L.] had put his activities in the public domain in 1987 he did so under the name which he then bore, [McN.]. After that, he changed his name for the express purpose of protecting himself because he was in fear. ...

[Mr. L.], as already pointed out, was discredited in many respects already by reason of material which was available to the defence and which was put before the jury. Even if he had been further cross-examined, we do not think there would have been any proper basis for the jury to regard his evidence as the more incredible by reason of that additional information. ...

Bearing all these matters in mind, we do not feel that the verdict of the jury was unsafe or unsatisfactory. The contention that the defence's inability to put the complete previous character and record of [Mr. L.] to him could only sound on appeal on the basis that, had that been able to be done, a different verdict might have resulted. For the reasons we have given we do not think that it could. We believe that the jury would have convicted in the same way. Accordingly this appeal must be dismissed."

B. Relevant domestic law and practice

In 1995 in R. v. Winston Brown (1995, 1 Cr. App. R. 191) the Court of Appeal reviewed the operation of Guidelines issued in 1981 by the Attorney General to prosecution counsel concerning exceptions to the common-law duty to disclose to the defence certain evidence of potential assistance to it (cf. Eur. Court H.R., the Edwards judgment of 16 December 1992, Series A no. 247-B). The Court of Appeal stated that:

"The Guidelines were issued in 1981. The Attorney General's objective was no doubt to improve the existing practice of disclosure by the Crown. That was a laudable objective. But the Attorney General was not trying to make law and it was certainly beyond his power to do so ... The Guidelines are merely a set of instructions to Crown Prosecution Service lawyers and prosecuting counsel ...

Judged simply as a set of instructions to prosecutors, the

> Guidelines would be unobjectionable if they exactly matched the contours of the common law duty of non-disclosure ... But if the Guidelines, judged by the standards of today, reduce the common law duties of the Crown and thus abridge the common law rights of a defendant, they must be pro tanto unlawful ...
>
> [T]oday, the Guidelines do not conform to the requirements of the law of disclosure in a number of critically important respects.
>
> First, the judgment in R. v. Ward [1993, 96 Cr. App. R. 96] established that it is for the court, not prosecuting counsel, to decide on disputed questions as to discloseable materials, and on any asserted legal ground to withhold production of relevant material ... For present purposes the point of supreme importance is that there is no hint in the Guidelines of the primacy of the Court in deciding on issues of disclosure ...
>
> Secondly, the guidelines are not an exhaustive statement of the Crown's common law duty of disclosure: R. v. Ward (supra) at 25 and 681D. To that extent too the Guidelines are out of date.
>
> Thirdly, the Guidelines were drafted before major developments in the field of public interest immunity. [I]n paragraph 6 the Guidelines are cast in the form of a prosecutor's discretion ... Much of what is listed as 'sensitive material' is no doubt covered by public interest immunity. But not everything so listed is covered by public interest immunity ..."

COMPLAINTS

The applicant submits that her trial at the Central Criminal Court and the Court of Appeal, taken together, violated Article 6 para. 1 in conjunction with Article 6 para. 3(b) and (d) of the Convention in the following respects:

1. The non-disclosure to the defence of relevant information violated the applicant's right to a fair trial and, in particular, her right to adequate facilities for the preparation of her defence guaranteed by paragraph 3 (b). Although the charge against the applicant depended substantially on the credit of two prosecution witnesses, the trial judge authorised the prosecution to withhold the fact that both witnesses were police informants, and that one had been granted immunity from prosecution for a major drugs importation with connections to organised crime. Consequently, the applicant was placed at a substantial disadvantage in the conduct of the proceedings - in particular at the oral examination of witnesses according to paragraph 3 (d) - and became victim of a violation of the principle of equality of arms.

2. The ex parte procedure, whereby the courts approved the non-disclosure of information at hearings held in the absence of her and/or her counsel, and without affording them the opportunity to make informed representations, violated the applicant's right to a fair and public hearing guaranteed by paragraph 1. Moreover, judgment on the issue of disclosure was delivered in secret and remained confidential.

3. The defects were not remedied by the hearing before the Court of Appeal. It cannot reasonably be said that evidence as central to the case as that which was withheld in the applicant's case, could not have affected the jury's verdict. The Court of Appeal's conclusions must therefore be regarded as unfair and arbitrary.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 October 1995 and registered on 21 November 1995.

On 8 July 1996 the member of the Commission appointed as Rapporteur requested pursuant to Rule 47 para. 2 (b) of the Commission's Rules of Procedure the Government of the United Kingdom to submit further information before the Commission decides on the admissibility of the case.

The Government's written information was submitted on 27 September 1996. The applicant's written comments in reply were submitted on 17 October 1996.

THE LAW

The applicant complains under Article 6 paras. 1, 3 (b) and 3 (d) (Art. 6-1, 6-3-b, 6-3-d) of the Convention about an unfair trial and an inability to prepare her defence and effectively to cross-examine prosecution witnesses. The ex parte procedure, in which the courts approved the non-disclosure of relevant evidence on the grounds of public interest immunity, was held in the absence of the applicant and her counsel and without affording them the opportunity to make informed representations. Thus, the applicant claims that she was placed at a substantial disadvantage in the conduct of proceedings and thereby the principle of equality of arms was affected.

Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention, insofar as relevant, read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (b) to have adequate time and facilities for the preparation of his defence;
> ...
> (d) to examine witnesses of 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. ..."

The Commission recalls that the guarantees contained in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the general concept of fair trial set forth in paragraph 1 of this Article. In the circumstances of the present case, it finds it unnecessary to consider the relevance of paragraphs 3 (b) and 3 (d) to the case since the applicant's allegations, in any event, amount to a complaint that the proceedings have been unfair (cf. Eur. Court HR, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, p. 34, para. 33).

In assessing whether defence rights have been secured under Article 6 (Art. 6) of the Convention, the Commission must consider the proceedings in question as a whole, including the proceedings before the appellate court (cf. Eur. Court HR, the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212, p. 15, para. 31; the Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, pp. 13-14, para. 38). Moreover, it is not within the province of the Commission to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings in their entirety, including the way in which

evidence was taken, were fair (cf. Eur. Court HR, the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

Nevertheless, the Commission recalls its case-law concerning the rights of an accused under Article 6 para. 3(b) (Art. 6-3-b) of the Convention in the Jespers case to the extent that an accused must have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities (cf. No. 8403/78, Comm. Report 14.12.81, D.R. 27 pp. 87-88 paras. 55-58).

In the Edwards v. the United Kingdom case the Court considered that it is a requirement of fairness under Article 6 para. 1 (Art. 6-1) of the Convention, indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in that case gave rise to a defect in the trial proceedings. The applicant in the Edwards case could have applied to the Court of Appeal for the production of the material evidence but did not do so. The Court further considered that it was no answer to the failure to make such an application that the Crown might have resisted by claiming pulic interest immunity since such a claim would have been for the Court to determine (the above-mentioned Edwards judgment, p. 35, para. 36).

As regards the facts of the present case, the Commission notes that there was considerable evidence against the applicant as to her involvement in the offence as charged apart from any information which was not disclosed. In fact, her conviction was mainly based on the evidence of the two principal prosecution witnesses, i.e. Mr. L. and Ms. W., who were present at the trial. The applicant, who was represented by counsel, had full opportunity to examine or have examined these witnesses and to contest their evidence at her trial.

However, in advance of the trial, the trial judge in the ex parte procedure approved the non-disclosure of certain information concerning these prosecution witnesses on the grounds of public interest immunity, in particular the fact that they were police informants.

Following her conviction, the applicant became aware that the ex parte application concerned matters relating to the credibility and motives of these prosecution witnesses. She also became aware of an article which had appeared in a national magazine in December 1993 which alleged that in 1987 Mr. L. played a major role in an international drug trafficking conspiracy. The applicant also apprised that the prosecution had known, at the time of the blackmail trial, that Mr. L. had previously been involved in a large scale drug importation which he said was connected to the Mafia and the IRA, he had been given immunity from prosecution and had been provided with a new identity and that Ms. W. had acted as a police informant throughout the relevant period.

The Commission notes that the information which was withheld from the applicant was before the trial judge who balanced the relevance for the defence case of the information against the reasons militating against disclosure. That information was also before the Court of Appeal which took the same view. The new information ascertained subsequently was extensively considered by the Court of Appeal, whose task was to examine whether the applicant's conviction was unsafe or unsatisfactory as a result of the non-disclosure of the information that the prosecution witnesses were police informants. The applicant had an adequate opportunity to try to persuade the Court of Appeal as to the significance of that information.

In the light of all the evidence, the Court of Appeal, which had in its possession material which was not available to the trial judge

and which was not in the possession of the prosecution at that time, dismissed the appeal concluding that: "The contention that the defence's inability to put the complete previous character and record of [Mr. L.] to him could only sound on appeal on the basis that, had that been able to be done, a different verdict might have resulted. For the reasons we have given we do not think that it could. We believe that the jury would have convicted in the same way."

The Commission notes that the Court of Appeal's decision to dismiss the applicant's appeal was based upon a thorough evaluation of the weight to be given to the information which had been withheld. There is no evidence in the present case that the Court of Appeal's decision was in any way unfair or arbitrary.

With regard to the absence of publicity of the decision of 2 December 1993 that certain information need not to disclosed to the defence, the Commission notes that the defence were aware of the intention to make application to the court for such an order. Its existence could be deduced from the fact that no further material was disclosed thereafter. Its existence was made public in the Court of Appeal's judgment of 30 January 1995.

In these circumstances, taking the proceedings as a whole, the Commission considers that the applicant was not denied a fair hearing in the proceedings against her and that the requirement in Article 6 para. 1 (Art. 6-1) of the Convention that judgment shall be pronounced publicly has been observed.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber