AS TO THE ADMISSIBILITY OF

Application No. 18961/91
by D.B.
against Austria

The European Commission of Human Rights sitting in private on 29 March 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
A.S. GÖZÜBÜYÜK
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
M. NOWICKI

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 5 August 1991 by D.B. against Austria and registered on 17 October 1991 under file No. 18961/91 ;

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

The applicant is an Austrian citizen, born in 1966. She resides at Innsbruck. Before the Commission she is represented by her lawyer, Dr. Erwin Köll, Innsbruck.

On 8 May 1990 an incident occurred in the house of the applicant's parents, whereby she injured her father with a knife. The applicant herself called the police and she was taken to the police station for questioning.

The only witnesses involved were the applicant's parents. On 8 May 1990, i.e. the day of the incident, a police officer took down the statements of the applicant's mother (Niederschrift). She explained inter alia that her husband was an alcoholic and aggressive when drunk. On this particular day he was also drunk and he had started calling the applicant names without any reason. First the applicant had not reacted thereto but suddenly the applicant's mother noticed out of the corner of her eye that her husband hit the applicant (ich (habe) aus den Augenwinkeln gesehen wie mein Mann meiner Tochter einen Stoß versetzt). Thereafter the applicant had said: "Now I have stabbed him" (Jetzt habe ich ihn gestochen). She then noticed that her husband was bleeding.

On 9 May 1990 the police took down the statements of the applicant's father. He explained inter alia that he had had 4-5 beers and when the applicant and his wife came home a dispute started between him and the applicant. During this the applicant had all of a sudden taken a knife from a drawer and stabbed him. He maintained that he could not remember whether he had grabbed the applicant by the shoulders and he could not remember either what he had said to her. He maintained, however, that it was a cheap excuse (billige Ausrede) if the applicant alleged that she only wanted to scare him away. In his opinion the applicant had taken the knife from the drawer and immediately stabbed him.

On the basis of the police investigation the applicant was charged with the offence of causing grievous bodily harm (schwere Köperverletzung), Section 83, subsection 1, and Section 84, subsection 1, of the Criminal Code.

The case was heard on 8 October 1990 by a judge of the Innsbruck Regional Court (Landesgericht), sitting alone. The trial commenced at 10:30 hours. According to the records of the hearing, the applicant pleaded not guilty. She admitted that she had injured her father but she maintained that she had had no intention of doing so. During the dispute her father had suddenly staggered forward and then it had happened. She also referred to what she had already told the police.

The Regional Court then called the applicant's parents. On being told by the Court of their right to refuse to give evidence in accordance with Section 152 of the Code of Criminal Procedure, they replied that they wished to avail themselves of that right.

The Court then called an expert witness (Sachverständiger) who explained inter alia that the injury was caused by an active and forceful stab which did not correspond to the applicant's description of the events. He could not exclude, however, that the injury could be due to a combination of a stab and the father staggering forward. He maintained, however, that a forceful stab would be necessary. No further witnesses were heard.

Referring to the police investigation, the defence put forward by the applicant and the medical expert opinion, as explained by the expert witness, the Court found that the following facts had been established:

Over a long period of time disputes had commenced again and again between the applicant and her father because the latter was an alcoholic and quarrelsome when drunk. Also on 8 May 1990 the father, being drunk, started an argument in the family flat calling the applicant names and following her into the kitchen. Opposing each other there, the applicant stabbed her father in anger with a 29 cm kitchen knife in the stomach leaving a 5 cm deep wound and also damaging slightly the large intestine.

The Court furthermore pointed out that the parents had refused to give evidence at the trial. It nonetheless examined their statements to the police against those of the applicant and found, as regards the question of intent (zur subjektiven Tatseite), that the mother's reference to the applicant having said: "now I have stabbed him", clearly showed that it concerned an active act of stabbing. The Court also noted that a situation of self-defence had not been alleged and could not be maintained due to the credible explanations of the victim (auf grund der glaubwürdigen Darstellung des Opfers).

The Regional Court found the applicant guilty of the charge brought against her. She was sentenced to pay 240 day fines totalling 28,800 ÖS. The proceedings ended at 11:30 hours, having lasted exactly one hour.

The applicant lodged an appeal (Berufung) against the judgment with the Court of Appeal (Oberlandesgericht). She argued inter alia that the first-instance court had made an incorrect evaluation of the statements upon which the conviction was based and complained, with reference to the European Convention on Human Rights, that she had not had the possibility to challenge, during the trial, the statements made by the witnesses. She requested the Court of Appeal to review the conviction, accepting only that she had negligently caused bodily harm (fahrlässige Körperverletzung).

On 6 February 1991 the Court of Appeal rejected the appeal. In respect of the evaluation of the evidence the Court stated:

(Translation)

> "The first-instance court followed in particular the explanations by the medical expert witness, who submitted that a mere 'staggering' by the father into the knife held by [the applicant] could be ruled out, whereas an injury as the one in question necessitated a forceful stab with the knife, whereby it must have been an active and strong stab. This also tallies with what [the applicant] stated during the first police interrogation: that she stabbed her father in the stomach as she was again attacked by him. Such objectively established facts would also constitute the basis for the first-instance court's conclusions as regards criminal intent, whereby the applicant's subsequent explanations are without value as evidence. In these circumstances it would not be necessary also to examine the parents' statements to the police, for which reason the appeal in this respect is, from the outset, without substantiation."

On 5 June 1991 the applicant requested the Attorney General (Generalprokurator) to lodge an appeal (Nichtigkeitsbeschwerde) with the Supreme Court (Oberster Gerichtshof) because of an alleged wrongful application of the law. On 2 July 1991, however, the Attorney General informed the applicant that he found no reason to do so.

COMPLAINTS

The applicant complains that her conviction was based, to a considerable extent, on the statements of two witnesses and that she did not have, before or during her trial, any possibility to examine these witnesses. The applicant invokes Article 6 paras. 1 and 3 (d) of the Convention.

THE LAW

The applicant complains of a breach of the following provisions of Article 6 (Art. 6) of the Convention:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing by [a] ... tribunal ... .
>
> 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;

... ."

According to the applicant, her conviction by the Innsbruck Regional Court was based essentially on the statements of her parents to the police, which were read out at the hearing notwithstanding their refusal to give evidence in court. She claims that at no stage of the proceedings did she have the opportunity to examine these witnesses or to have them examined.

The Commission recalls that as the guarantees in paragraph 3 of Article 6 (Art. 6) are specific aspects of the right to a fair trial set forth in paragraph 1, it will consider the complaint under the two provisions taken together (see, for example, Eur. Court H.R., Isgrò judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 31).

Although the applicant's parents refused to testify at the hearing they should, for the purpose of Article 6 para. 3 (d) (Art. 6-3-d), be regarded as witnesses because their statements, as taken down in writing by the police, were in fact before the Court which took account of them.

However, the Commission also recalls that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (ibid., p. 11, para. 31).

All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. The use in this way of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6-3-d), provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings (ibid., p. 12, para. 34).

In the present case the Commission notes that the courts examined the facts of the case as described inter alia by the applicant's parents. It would clearly have been preferable if it had been possible to hear them in person, but the right on which they relied in order to avoid giving evidence cannot be allowed to block the prosecution, the appropriateness of which it is moreover not for the Commission to determine. Subject to the rights of the defence being respected, it was therefore open to the national court to have regard to these statements, in particular, in view of the fact that it could consider them to be corroborated by other evidence before it.

The applicant had the opportunity to discuss the witnesses' version of the events and to submit her own, first to the police and later to the Regional Court. Furthermore, it is clear that these witness statements did not constitute the only item of evidence on which the first-instance court based its judgment. It also had regard to the applicant's own statements and to the objective evidence consisting of the expert witness and the medical opinion submitted by him which, as indicated by the Court of Appeal, made it superfluous to rely also on the parents' statements. It is clear, therefore, that the applicant's conviction was not based mainly on the statements made by her parents to the police, but rather on the objective evidence which had been produced. The fact that it was impossible to question the applicant's parents at the hearing did not in these circumstances violate the rights of the defence. It did not deprive the applicant of a fair trial within the meaning of Article 6 para. 1 (Art. 6-1) of the

Convention as she was not convicted on the basis of "testimony" in respect of which her defence rights were appreciably restricted.

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 by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)