AS TO THE ADMISSIBILITY OF

Application No. 36986/97
by Herman G.J. DU BOIS
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 1998 , the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, 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 6 March 1997 by Herman G.J. DU BOIS against the Netherlands and registered on 22 July 1997 under file No. 36986/97;

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 applicant is a Dutch national, born in 1960, and is currently serving a prison sentence in the Netherlands. In the proceedings before the Commission, the applicant is represented by Mr G. Spong, a lawyer practising in The Hague.

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

On 10 May 1994 a summons was served on the applicant to appear before the Regional Court (Arrondissementsrechtbank) of Zutphen on charges of participation in the rape and subsequent killing of a woman on or about 9 January 1994.

Following adversarial proceedings in the course of which hearings were held on 25 May, 26 October, and on 13, 14 and 23 December 1994, the Regional Court (Arrondissementsrechtbank) of Zutphen, by judgment of 6 January 1995, convicted the applicant of participation in homicide and of participation in attempted rape and sentenced him to nine years' imprisonment. The Regional Court further ordered the applicant's placement at the Government's disposal (terbeschikkingstelling) for compulsory treatment in a mental hospital.

Insofar as the defence had argued that the prosecution should be declared inadmissible for not having disclosed at the outset all relevant documents relating to the investigation of the case, the Regional Court held:

<Translation>

"Unlike counsel for the defence, the court finds that the mere - possibly very - late disclosure to the defence of documents should not automatically lead to the far-reaching consequence of inadmissibility of the prosecution. This would be different where a failure to timely make available documents in all reasonableness has irreparably infringed defence rights and, consequently, the defence could no longer be conducted adequately in the sense of Article 6 of the Convention. The argued facts and circumstances in the present case cannot support such a far-reaching conclusion.

It has appeared after all that the accused and his counsel disposed timely before the hearing of 13 December 1994, when the examination of the substance of the present case was commenced, of all relevant trial documents (processtukken). In addition the defence has in fact availed itself of the possibility to inspect documents, which for reasons of procedural economy the public prosecutor had not added to the case-file, and after that documents have been added to the case-file at the request of the defence. In all reasonableness, also having regard to the scope of the present case, the public prosecutor cannot be blamed for having added trial documents, which had also reached the public prosecutor only at a late stage, to the case-file a number of days before the trial. Even less so as the defence, in conformity with its request, has been sufficiently enabled - after having acquainted itself with these documents - to prepare itself. The defence could further have sought an adjournment of the trial proceedings, which it has not done."

The applicant filed an appeal with the Court of Appeal (Gerechtshof) of Arnhem.

In the course of the hearing held before the Court of Appeal on 31 May 1995, the defence stated that it withdrew its request to summon as witnesses seven persons, but maintained its request to take evidence from ten other persons, including three police officers involved in the questioning of the applicant and three experts. After having deliberated, the Court of Appeal granted this request.

In the course of the hearings held on 26, 27, 28 and 29 June 1995 in the applicant's case, the Court of Appeal took evidence from several witnesses including the applicant's wife, an eye-witness to the events, persons who had seen one or more of the persons involved at the relevant time including Mr V.P., a number of forensic experts, the three police officers involved in the applicant's questioning. The court also took evidence from the applicant himself and one of the two co-accused. Some of these witnesses were questioned before the court more than once. After these persons had given evidence to the Court of Appeal, they were formally excused with the consent of the defence.

In the course of the hearing of 29 June 1995, the defence stated before the Court of Appeal that the case-files, as made available to the defence, were never complete and that many times the defence had complained by letters and formal objections about the withholding of documents by the prosecution. The defence further stated that, despite the order by the Regional Court that the entire file should be made available to the defence, not all documents had been made available as shortly before the hearing a number of further documents were submitted and only two days before the hearing the odontological report was made available. Moreover, only when the defence inspected the prosecution file, the statement of Mr J.L. emerged. This statement was, together with a number of other statements, added to the case-file upon request by the defence. The defence further stated that also in the proceedings on appeal the prosecution failed to transmit without delay the important new statement of the witness Mr V.P. to the defence, in that this person had made this statement on 6 April 1995 whereas it only reached the defence on 23 May 1995. Submitting that the prosecution had consistently failed to transmit all documents to the defence and had even kept important documents outside the case-file, the defence argued that on this basis the prosecution should be declared inadmissible.

In its interim judgment of 13 July 1995, the Court of Appeal held that the investigation in the applicant's case was incomplete and ordered a further investigation of the clothes worn by the victim, the hairs found, the sperm found and a knife found. It further ordered the taking of further evidence from one expert already heard previously before the Court of Appeal on 27 June 1995, one further expert and two further witnesses, one of whom was Mr J.L.

On 7 September 1995, the Court of Appeal considered further written submissions by the parties and the persons mentioned in the interim judgment of 13 July 1995 were heard before the Court of Appeal. On 19 September 1995, the Court of Appeal considered the additional written submissions by the prosecution and heard the parties' final pleas.

In its judgment of 3 October 1995, the Court of Appeal quashed the Regional Court's judgment of 6 January 1995, convicted the applicant of participation in homicide and participation in rape and sentenced him to ten years' imprisonment with deduction of the time spent in pre-trial detention.

As to the grounds for the request by the defence for an adjournment of the proceedings for a further investigation of the facts of the case, the Court of Appeal held that, given the photographs in the case-file and the statement made by the expert K. before the court, it did not find it necessary to view a video recording of the site at issue, that it was not plausible that those parts of the records of the technical investigation which had not been added to the case-file contained information which was not mentioned in documents which did form a part of the case-file and that there were no reasons for assuming that in the technical investigation acts had been omitted which could have shed new light on the case.

The Court of Appeal also did not find it necessary to take further oral evidence holding, as regards the persons proposed by the defence, that one expert would only be able to confirm the findings of the other experts, that it was unnecessary to hear another expert on uncertainties in respect of a certain report as these points had been clarified by additional information submitted by the prosecution and that it was sufficiently informed about those subjects in respect of which other witnesses proposed by the defence could give evidence.

As to the argument raised by the defence that the prosecution should be declared inadmissible on grounds that repeatedly the prosecution had failed to disclose documents to the defence, the Court of Appeal held:

<Translation>
"The position and task of the prosecution department entail that from the documents available from the preliminary investigation a selection is made of formal records and documents which, according to the prosecutor, are relevant for the examination by the trial court and which he adds to the case-file.
Where it would be plausible that documents have not been added to the case-file by the prosecutor with the aim to harm the interests of the defence, the admissibility of the prosecution could be affected. In the court's opinion such an aim has not been made plausible. The interests of the accused have not been harmed by the possibly delayed transmission <of documents>, since the defence has in time and sufficiently been provided with the possibility to yet acquaint itself with documents not added to the case-file and, if it so wished, to have those <documents> added to the case-file."

The applicant's subsequent appeal in cassation was rejected by the Supreme Court (Hoge Raad) on 16 September 1996. As to the applicant's complaint that the Court of Appeal had unjustly rejected the argument by the defence that the prosecution should be declared inadmissible on grounds that the prosecution had repeatedly failed to disclose

documents to the defence, the Supreme Court noted that there is no statutory provision determining who is to decide the composition of a case-file.

As to documents which could have an influence on the evidence, the Supreme Court held that, apart from the competence of the defence to have documents added to the case-file, it is the task of the public prosecutor to add to the case-file the documents relating to the results of the investigation of the case. Those documents which could reasonably be of interest either in the sense that they incriminate or exculpate the accused shall be added to the case-file. Furthermore a judge may order that certain documents be added to the case-file, either upon the request of the defence or following a demand by the prosecution, or ex officio. On this basis, the Supreme Court rejected the argument by the defence that no selection of documents whatsoever may be made in the compilation of a case-file.

As to the complaint that the Court of Appeal had failed to determine whether or not there were still trial documents which had not been added to the file, the Supreme Court noted that this possibility had not been argued before the Court of Appeal and that, consequently, this court was not obliged to determine this issue.

Recalling the reasons stated by the Court of Appeal in its judgment of 3 October 1995 for rejecting the argument of the defence relating to the admissibility of the prosecution, the Supreme Court held that the Court of Appeal had not only expressed the view that there had been no intentional violation of the accused's right to a fair trial, but also stated that there had not been a gross disregard of the accused's interests as a result of which his right to a fair trial had been infringed. It concluded that the Court of Appeal had rejected the arguments raised by the defence as to the admissibility of the prosecution on correct grounds.

COMPLAINTS

The applicant complains under Article 6 paras. 1 and 3 of the Convention that he did not receive a fair trial in the criminal proceedings against him. He submits that it is of crucial importance for a fair trial that an accused in the proceedings before the trial courts, both in first and second instance, can adequately defend himself. Referring to paragraph 36 of the Edwards v. United Kingdom judgment of 16 December 1992 (Eur. Court HR, Series A no. 247-B), the applicant further complains that the Supreme Court in its case-law incorrectly interprets the notion of "material evidence" as "relevant evidence" whereas in his opinion this notion concerns not only each item of physical or other form of lawful evidence, i.e. as defined by law, but also all methods of investigation.

THE LAW

The applicant complains under Article 6 paras. 1 and 3 of the Convention that he did not receive a fair trial in the criminal proceedings against him in that the prosecution

failed to make available to the defence, as from the outset of the proceedings, the complete file held by the prosecution authorities on the investigation at issue.

Article 6 paras. 1 and 3 of the Convention, insofar as relevant, provides as follows:

"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:

...

b. to have adequate time and facilities for the preparation of his defence;"

As the guarantees of Article 6 para. 3 of the Convention are to be seen as particular aspects of the general concept of a fair trial guaranteed by paragraph 1 of this provision (cf. Eur. Court HR, Daud v. Portugal judgment of 21 April 1998, to be published in Reports of Judgments and Decisions 1998, para. 33), the Commission will examine the complaint under both paragraphs taken together.

The Commission recalls that the question whether a trial is in conformity with the requirements of Article 6 of the Convention must be considered on the basis of an examination of the proceedings as a whole, including the decisions of appellate courts. Moreover, the Convention does not regulate, as such, the manner in which evidence should be taken, which is primarily a matter for domestic legislation, the task of the Convention organs being simply to ascertain whether, in the particular circumstances of the case, the proceedings in their entirety were fair (cf. Eur. Court HR, Edwards v. United Kingdom judgment of 16 December 1992, Series A no. 247-B, p. 34, para. 34; and No. 22420/93, Dec. 20.5.97, D.R. 89, p. 17).

The Commission finally recalls that it is a requirement of fairness under Article 6 of the Convention that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so may give rise to a defect in the trial proceedings (Edwards v. United Kingdom judgment, loc. cit., p. 35, para. 36).

The Commission notes that in the course of the proceedings in first instance, the Regional Court ordered that the file held by the prosecution be made available to the defence, and that the defence did in fact avail itself of the opportunity to inspect the file. Following the inspection of this file by the defence, the defence was further enabled to add documents from the prosecution file, which the defence found relevant, to the case-file before the trial court.

The Commission further notes that in the subsequent proceedings before the Court of Appeal, the defence did not argue that the prosecution still held documents of which the defence had no knowledge, but merely recalled that this had occurred during

the first instance proceedings. On appeal the defence in fact only complained of the late transmission to the defence of a new statement by the witness V.P., which statement did in fact reach the defence on 23 May 1995, i.e. more than one month before this witness gave evidence before the Court of Appeal.

The Commission finally notes that the Court of Appeal quashed the Regional Court's judgment of 6 January 1995 and, following adversarial proceedings in which extensive evidence was taken before the Court of Appeal, pronounced the applicant's conviction.

As regards the applicant's assertion that the Netherlands Supreme Court incorrectly interprets the notion of "material evidence" in that this term should also include all methods of investigation, the Commission recalls that it only examines the personal situation of an applicant and not the general scope of the laws applicable to him (No. 21132/93, Dec. 6.4.94, D.R. 77, p. 75). It has not been argued nor has it appeared that the prosecution authorities have refused to disclose their methods of investigation used in the applicant's case. The Commission is, therefore, of the opinion that the applicant cannot claim to be a victim within the meaning of Article 25 of the Convention as regards this aspect of his complaint.

Insofar as the applicant's defence rights under Article 6 of the Convention had been infringed in the initial stage of the proceedings before the Regional Court by the prosecution authorities' failure to add possibly relevant parts of the prosecution file to the case-file before the trial court and thus make those parts available to the defence, the Commission considers that this defect was remedied when the Regional Court ordered the prosecution to make its file available for inspection by the defence.

In these circumstances, and noting that the applicant was subsequently convicted on appeal following adversarial proceedings in which he has been given ample opportunity to state his case, to challenge the evidence against him and to submit whatever he found relevant to the outcome, the Commission finds no indication that the proceedings, taken as a whole, fell short of the requirements of Article 6 of the Convention as regards fairness of proceedings.

It follows that the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary

J.-C. GEUS
President

to the Second Chamber of the Second Chamber