AS TO THE ADMISSIBILITY OF

Application No. 38440/97
by John FASHANU
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 1 July 1998, the following members being present:

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

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 29 October 1997 by John FASHANU against the United Kingdom and registered on 5 November 1997 under file No. 38440/97;

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 British citizen, born in 1962 and resident in London. He is represented before the Commission by Henri Brandman, a solicitor practising in London. The facts of the application, as submitted by the applicant's representative, may be summarised as follows.

A. The particular circumstances of the case

On 14 March 1995, the applicant (who was a professional footballer) and two other footballers (Mr S. and Mr G.) were arrested, together with Mr L., a businessman. Three charges were made against them:

(a) On count 1, the applicant, Mr G. and Mr L. were accused of conspiring to give and receive corrupt payments for influencing the outcome of football matches.

(b) On count 2, the applicant, Mr S. and Mr L. were accused in similar terms.

(c) On count 3, Mr G. was accused of accepting a corrupt payment of £2000 from another individual.

After his arrest, the applicant was interviewed by the police. The applicant exercised his right to remain silent and declined to answer questions put to him by the police. On 4 July 1995, the police again attempted to interview him and he again declined to answer questions. However, in March 1995, the applicant did give the police permission to examine bank accounts under his control.

On 14 January 1997, the trial of all four defendants began but, after hearing all the evidence, the jury was unable to agree on its verdicts and so was discharged on 4 March 1997.

A re-trial began on 4 June 1997 and finished on 8 August 1997. The jury unanimously acquitted the applicant on each of the two counts faced by him. The jury also unanimously acquitted the other defendants on counts 1 and 2. The jury was unable to agree on the third count in relation to Mr G. and the judge entered a not guilty verdict, it being inappropriate to hold a third trial on that issue. The applicant chose not to give evidence himself at either of the trials.

The amount of costs incurred by the applicant in defending himself was about £535,000. Following the acquittal, the applicant's counsel applied to the judge for a defendant's costs order pursuant to section 16(2) of the Prosecution of Offences Act 1985, that is for the applicant's costs in defending himself to be paid out of central funds.

The judge refused to grant the applicant's request for a defendant's costs order and said:

> "I do not grant [the applicant] an order that his defence costs be paid out of public funds. The practice direction, which deals with the exercise of the court's discretion in circumstances such as these, says so far as material this:
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> > "When a person has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Such an order should normally be made unless there are positive reasons for not doing so. Examples of such reasons are -
> >
> > > (a) the defendant's own conduct brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is."
>
> That in my judgment is the situation here. [The applicant] chose, for reasons best known to himself, to receive very substantial sums of money from Joseph/Ellie in the Far East, not in his own name but into accounts in the names of three other people, Miss K., as she then was, Miss A. and an account which he operated with the permission, let it be acknowledged, of the National Westminster Bank, in the name of P.B. When the police searched his premises, no document was found which explained the receipt of any of these sums of money. That can only mean, either that there never were documents to explain the receipt of these sums of money, or such documents as there were had been removed or destroyed. They have never come to the eyes of the police. In those circumstances it seems to me clear that [the applicant's] own conduct has brought suspicion on himself and misled the prosecution into thinking that the case against him was stronger than it was."

Each of the three other defendants was partly legally aided. Neither Mr L., nor Mr G. made an application for a defendant's costs order. Mr S. did apply for such an order but was also refused.

The applicant was advised by counsel that an acquitted defendant has no right of appeal against a refusal to make a defendant's costs order. There is no appeal by way of judicial review to the High Court from a costs refusal because of the restriction in section 29(3) of the Supreme Court Act 1981.

B. Relevant domestic law and practice

Section 16(2) of the Prosecution of Offences Act 1985 provides, so far as relevant, as follows:

> "Where -
>
> (b) any person is tried on indictment and acquitted on any count in the indictment, the Crown Court may make a defendant's costs order in favour of the accused."

On 3 May 1991 Lord Lane issued a Practice Direction of the Court of Appeal (Criminal Division) concerning costs in criminal proceedings (1991 93 Cr. App. R. 89). This Practice Direction, which is binding on the Crown Court, states at para. 2.2:

> "Where a person...has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Such an order should usually be made...unless there are positive reasons for not doing so. Examples of such reasons are: (a) the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case is stronger than it is; (b) there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit."

Costs decisions made by the Crown Cou
rt are deemed to be an integral part of the trial process made in the exercise of the Crown Court's jurisdiction relating to trial on indictment. Accordingly under domestic law costs decisions by the Crown Court are not subject to judicial review (see Re Sampson [1987] 1 WLR 195).

COMPLAINTS

The applicant complains that he has been penalised for exercising his right to remain silent. He asserts that the judge's refusal to grant him a costs' order is unreasonable and unfair and is in breach of Article 6 para. 2 of the Convention. He adds that by the time of the second trial, his stance was completely clear, and to refuse a defendant's costs order in respect of that second trial itself violated Article 6 para. 2.

THE LAW

The applicant complains that his right to the presumption of innocence has been breached contrary to Article 6 para. 2 (Art. 6-2) of the Convention.

Article 6 para. 2 (Art. 6-2) of the Convention provides as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Commission recalls that the Convention does not guarantee to a defendant who has been acquitted, the right to reimbursement of his

costs (cf. Eur. Court HR, Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327, p. 19, para. 49). Notwithstanding the absence of a right to reimbursement of costs, it is incompatible with Article 6 para. 2 (Art. 6-2) of the Convention for a court to rely on suspicions as to the applicant's guilt in, for example, determining an application for costs, if the applicant has been finally acquitted (see Eur. Court HR, Sekanina v. Austria judgment of 25 August 1993, Series A no. 266, p. 13, para. 22 and No. 22613/93, Moody v. United Kingdom, Comm. Report 16.10.96).

The question for the Commission under Article 6 para. 2 (Art. 6-2) is whether the trial judge relied, when making his ruling on the application for costs, on suspicions against the applicant, despite the fact that he was acquitted (cf. B.S., E. and N.P.A. v. United Kingdom, No. 36384/97, Dec. 15.1.98, unpublished).

The Commission notes that under domestic law in the United Kingdom, an acquitted defendant will only be refused his costs if there are positive reasons for doing so. The practice direction on costs in criminal proceedings gives the following example of such a positive reason which would justify refusing to award costs to an acquitted defendant:

> "Where...the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is."

The Commission further notes that the part of the practice direction referred to above, and relied upon by the judge in the present case, relates purely to questions of the defendant's conduct prior to and during the prosecution and does not involve any assessment of whether, despite acquittal, there is continuing suspicion against the defendant. The mere application of this provision under domestic law cannot therefore give rise to issues under Article 6 para. 2 (Art. 6-2) of the Convention (see also No. 22401/93, Dec. 24.10.95, unpublished).

The judge in the present case did not express an opinion that the applicant was guilty of the charges made against him. Rather, he made an express finding in relation to the applicant (in accordance with the practice direction) that it was the applicant's conduct prior to and during the prosecution (he remained silent during both trials and never offered the police an explanation in relation to the bank accounts) which had brought suspicion on himself and misled the prosecution into thinking the case was stronger than it was. The judge's comments relate solely to the applicant's behaviour at the initial stages of the prosecution, and not to any continuing suspicion that the applicant might, in fact, have been guilty of the offences he had been acquitted of.

The Commission does not accept that the applicant was penalised for exercising his right to silence: in the absence of a right to reimbursement of costs on acquittal, the fact that a person has to bear his or her own costs on acquittal cannot be equated to a penalty. Rather, it is an inevitable consequence of the bringing of proceedings.

As to the applicant's contention that he should, at least, have been granted his costs in respect of the second trial, the Commission notes that the question is not whether a defendant's costs order should or should not be made, but whether the judge relied on continuing suspicion after the acquittal. Having found that the judge did not so rely, the merits of whether a costs order should be made in respect of various stages of the proceedings is not relevant to the arguments under Article 6 para. 2 (Art. 6-2) of the Convention.

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.

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| M.F. BUQUICCHIO | M.P. PELLONPÄÄ |
| Secretary | President |
| to the First Chamber | of the First Chamber |