AS TO THE ADMISSIBILITY OF

Application No. 18672/91
by Karstein Jarle GJERDE
against Norway

The European Commission of Human Rights (Second Chamber) sitting in private on 31 March 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
J.-C. GEUS
M. NOWICKI

Mr. K. ROGGE, Secretary to the Second 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 26 July 1991 by Mr. Karstein Gjerde against Norway and registered on 14 August 1991 under file No. 18672/91;

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

The applicant is a Norwegian citizen, born in 1952. He is at present serving a 6 1/2 year prison sentence at Bergen. Before the Commission he is represented by his lawyer, Mr. Bjørn Lillebergen, Bergen.

On 16 November 1989 the Gulating High Court (Lagmannsrett), sitting with a jury, convicted the applicant's brother of having participated in the acquisition and importation into Norway of approximately 1 kilogramme of amphetamine. The judgment acquired legal force. The applicant, who was charged with the same offences, was not tried at the same time as he was detained on remand in Spain and was resisting his extradition to Norway.

In the judgment of 16 November 1989 concerning the applicant's brother the High Court stated inter alia :

(translation)

> "The Court finds it established (det legges til grund) that the accused in this case, in accordance with a previous arrangement with his brother (the applicant), agreed with the latter to obtain approximately one kilogramme of amphetamine and that it should be brought to Norway via a courier provided by the brother ... The Court finds it established that the accused, compared with his brother, played a less important role in respect of

obtaining and bringing to Norway [the amphetamine], but that he was a necessary and important link in the planned trade ..."

Subsequent to his eventual extradition to Norway the applicant's own case was heard from 5 to 8 November 1990 by the Gulating High Court sitting with a jury. During the trial the applicant, represented by counsel, was heard. Furthermore, a total of ten witnesses, including the applicant's brother, were heard and a number of documents were submitted as evidence. Among these documents was a copy of the judgment of 16 November 1989 by which the applicant's brother had been convicted of drug trafficking involving the same kilogramme of amphetamine as the one involved in the applicant's case. When the applicant protested against the use of this judgment as evidence the High Court decided as follows:

(Translation)

"The public prosecutor has in his list of evidence requested the submission of the judgment of 16 November 1989 concerning [the applicant's brother]. He has referred to Section 292, subsection 2, of the Criminal Procedure Act (Straffeprosessloven) and maintained that there are no grounds for rejecting this evidence.

Counsel for the defence has maintained that the judgment is without relevance in the present case. He has inter alia maintained that the judgment contains certain evaluations which cannot be of relevance as evidence in the present case.

The High Court finds that there is no reason for rejecting the judgment as evidence in this case. It concerns a High Court judgment, which has acquired legal force, according to which the applicant's brother was found guilty, and which concerns the same amphetamine as in the present case. It concerns evidence which is readily available. The Court does not find that the evidence concerns matters which are without relevance to this case and it cannot, therefore, be rejected, cf. Section 292, subsection 2, second sentence. This decision is unanimous."

On the basis of all available evidence the jury found the applicant guilty of the charge brought against him. As it was a jury trial the judgment contained no reasons. The applicant was subsequently sentenced to 6 1/2 years' imprisonment.

The applicant appealed against the judgment to the Supreme Court (Høyesterett). In its decision of 1 March 1991 rejecting the appeal Justice Dolva stated on behalf of the unanimous Court inter alia:

(Translation)

"In the Supreme Court the appeal is based partly on the same grounds as in the High Court, but in addition it is submitted that in any event it was so unfortunate that the judgment was produced as evidence before the question of guilt had been decided upon that this must be considered as being contrary to fundamental procedural principles.

I find it obvious that the evidence could not be rejected on the basis of Section 292, subsection 2, of the Criminal Procedure Act which allows the rejection of evidence which 'concerns matters without relevance to the case'. It relates to statements concerning the applicant's role in the same factual circumstances, set out in a judgment which has acquired legal force in respect of another person who was convicted for having dealt with the same amphetamine as

> [the applicant], and where the evidence to a large extent was the same as in the present case. The parts of the judgment which were read out cannot be considered to be without relevance to the case.
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> I cannot see either that the reading out of parts of the judgment should be considered as being contrary to fundamental procedural principles. As mentioned the evidence was to a large extent identical in the two cases, with the exception that [the applicant's brother] appeared as a witness in the case against [the applicant]. The defence had full opportunities to express its views on the documentary evidence submitted, including the statements in the judgment in the other case, and the High Court had to decide upon this in accordance with the principles of the free evaluation of evidence. Of course it would have been an advantage if the cases against both brothers could have been dealt with in the same proceedings. However, when the case against [the applicant's brother] was examined, [the applicant] was detained on remand in Spain and resisted extradition to Norway ..."

The applicant received a copy of the Supreme Court's decision on 13 March 1991.

COMPLAINTS

The applicant complains that in the judgment of 16 November 1989, by which his brother was convicted of drug trafficking, he was described as being the ringleader. He considers this to violate Article 6 para. 2 of the Convention.

Furthermore, the applicant maintains that he was not presumed innocent and that he did not get a fair trial in his own case, since the prosecutor was allowed to use the judgment in the brother's case as evidence. He invokes in this respect Article 6 paras. 2 and 1 of the Convention.

THE LAW

1. The applicant complains that in connection with his brother's conviction on 16 November 1989 the court in question did not respect his right to be presumed innocent until proved guilty according to law. He invokes in this respect Article 6 para. 2 (Art. 6-2) of the Convention.

The Commission notes that the judgment was pronounced on 16 November 1989 whereas the application was submitted on 26 July 1991, that is more than six months after the date of the judgment. The applicant was at that moment in time detained on remand in Spain and may not have been aware of this judgment. However, even assuming that he has complied with the six-months' time-limit set out in Article 26 (Art. 26) of the Convention the application is inadmissible for the following reasons.

The presumption of innocence enshrined in Article 6 para. 2 (Art. 6-2) of the Convention may be violated if a judicial decision amounts in substance to a determination of a person's guilt without that person having been proved guilty according to law and in particular without him having had an opportunity to exercise the rights of the defence (Eur. Court H.R., Minelli judgment of 25 March 1983, Series A no. 62, p. 18, para. 37; mutatis mutandis, Eur. Court H.R., Lutz/Englert/ Nölkenbockhoff judgments of 25 August 1987, Series A no. 123, p. 25, para. 60, pp. 54-55, para. 37, and p. 79, para. 37, respectively).

However, in the present circumstances the Commission finds that this is not the case. In its judgment of 16 November 1989 the High Court was not called upon to determine the guilt of the applicant but that of his brother. Part of the evidence against the brother concerned the extent to which he (the accused) was involved in the drug trafficking and what conclusions could be drawn therefrom. As the facts established indicated the involvement of the applicant in the case the Commission finds that the High Court's impugned findings must be considered to be a relevant part of the Court's evaluation of the evidence presented in the case against the brother. It did not, however, through this evaluation determine the guilt of the applicant, something which was a matter to be considered during the applicant's own trial.

The Commission therefore concludes that the judgment of 16 November 1989 did not amount to a breach of the presumption of innocence guaranteed under Article 6 para. 2 (Art. 6-2) of the Convention and it follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that the use of the judgment of 16 November 1989 as documentary evidence in his own case amounts to a violation of his right to a fair trial under Article 6 para. 1 (Art. 6-1) and his right to be presumed innocent until proved guilty according to law under Article 6 para. 2 (Art. 6-2) of the Convention.

The Commission recalls that its task under Article 6 (Art. 6) of the Convention with regard to the applicant's allegations is to examine whether the evidence for and against him has been presented in such a manner, and the proceedings in general have been conducted in such a way, that he has had a fair trial. However, whether the Court has evaluated the evidence correctly or not is a question on which the Commission is not called upon to pronounce. Furthermore, the validity of the Court's factual conclusions is not subject to the Commission's control.

In the present case the Commission recalls that the High Court examined the statements of ten witnesses and numerous documents and is of the opinion that the judgment was based on an evaluation of these statements and documents. Especially there is nothing indicating that the High Court in fulfilling its functions started from the conviction or assumption that the applicant had committed the acts with which he was charged. An examination of this complaint therefore fails to disclose any appearance of a violation of Article 6 para. 2 (Art. 6-2) of the Convention.

However, the question arises whether the use of the judgment of 16 November 1989 as documentary evidence - a question which was indeed considered by the High Court and the Supreme Court - complied with the requirements of a fair trial as guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention. In this respect the Commission recalls that the admissibility of evidence is primarily a matter for regulation by national law. As a rule it is for the national courts to assess the evidence before them. The Commission's task is, as indicated above, to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (cf. for example Eur. Court H.R., Kostovski judgment of 20 November 1989, Series A no. 166, p. 19, para. 39).

In the present case the Commission finds that the judgment of 18 November 1989 was far from being the only evidence in the case. In the course of the main proceedings in the High Court the testimony of

ten witnesses was heard, including the applicant's brother, as well as the applicant himself. Other documentary evidence was produced. It is undisputed that, in this respect, nothing could give rise to any misgivings as regards the fairness of the applicant's trial or his right to a proper defence. Moreover, the Commission recalls that the question concerning whether or not to allow the judgment of 16 November 1989 as evidence was thoroughly examined by the High Court before the decision was taken.

Having regard to this, and considering the proceedings as a whole, the Commission is of the opinion that the taking of evidence was fair, and it does not find that the fact that the High Court admitted the judgment of 16 November 1989 as evidence could lead to the conclusion that the applicant did not get a fair trial within the meaning of Article 6 (Art. 6) of the Convention.

It follows that this part of the application is also 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.

Secretary to the Second Chamber | President of the Second Chamber

(K. ROGGE) | (S. TRECHSEL)