AS TO THE ADMISSIBILITY OF

Application No. 20341/92
by H.K.
against the Netherlands

The European Commission of Human Rights sitting in private on 6 January 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI

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 10 July 1992 by H.K. against the Netherlands and registered on 21 July 1992 under file No. 20341/92;

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 citizen, born in 1952 and resident at D., the Netherlands. He is represented before the Commission by Mr. C.F. Korvinus, a lawyer in Amsterdam.

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

On 4 August 1989 the applicant was arrested in the Netherlands on suspicion of having participated in the export of about six kg. of heroin from the Netherlands to France. On the same day six Dutch citizens, who had about six kg. of heroin in their possession, were arrested in France. Two of them - M. and L. - told the French police that they had acted upon the instructions of the applicant.

The applicant consistently denied the accusations made by M. and L. He asked the investigating judge (rechter-commissaris) in Amsterdam

that M. and L. be interrogated by his lawyer by way of a commission rogatory.

The investigating judge addressed to the French authorities a commission rogatory in order to have M. and L. heard as witnesses. He repeatedly asked the French authorities to allow the applicant's lawyer and the public prosecutor to attend this hearing. The latter request was rejected by the French authorities by reference to French law which did not allow their presence.

The investigating judge informed the applicant's lawyer of the position taken by the French authorities and gave him the opportunity of formulating written questions which would be put to M. and L. at the time of their hearing in France. However, the lawyer refused to avail himself of this opportunity.

In October 1989 M. and L. were heard in France in the presence of two Dutch policemen and an interpreter.

On 7 February 1990 the Regional Court (Arrondissementsrechtbank) of Amsterdam convicted the applicant of offences against the Opium Act (Opiumwet) and sentenced him to five years' imprisonment.

In its judgment, the Regional Court noted that the six persons arrested in France had been heard under oath in the presence of two Dutch police officers and an interpreter; that the investigating judge had twice requested that the French judicial authorities should allow the applicant's lawyer to attend these hearings, in particular the hearings of M. and L., but that the French authorities had been unable under French law to allow a foreign lawyer, in the present case the applicant's lawyer, or indeed a foreign public prosecutor to be present; that the six persons had been heard earlier by French police officers and that minutes of these hearings had been made available; that the investigating judge had informed the applicant's lawyer of the negative decision of the French authorities and had offered the lawyer an opportunity to formulate written questions to the six persons, which would be given to the two Dutch police officers who would attend the hearing; but that the applicant's lawyer had not been prepared to avail himself of this opportunity.

The Regional Court considered that in those circumstances there was no reason not to use the minutes of the interrogations of the six witnesses as evidence, having regard also to the fact that the applicant's lawyer had not availed himself of the opportunity to put questions in writing to these witnesses.

The Regional Court's judgment also contains an extensive account of the evidence in the case. M.'s and L.'s statements were an important part of that evidence, but reference was also made to the statement made by the applicant himself, who admitted that he knew M. and L. and that he had frequently travelled with M. to Paris, and to certain tapped telephone conversations which gave rather clear indications of the applicant's involvement in the planning of narcotics export to France.

The applicant appealed against the Regional Court's judgment to the Court of Appeal (Gerechtshof) of Amsterdam. He again referred to the fact that the statements of the six witnesses in France had not been made in circumstances which respected the rights of the defence and claimed that, in these circumstances, the statements of the six persons should not be used as evidence against him.

At the request of the defence, the Court of Appeal adjourned the proceedings in order to request the French authorities, on the basis of Article 11 of the European Convention on Legal Assistance in Criminal Matters, to transfer M. and L. temporarily to the Netherlands

for the purpose of hearing them during the trial against the applicant. However, this request was rejected by the French Minister of Justice on 2 January 1991.

In its judgment of 20 February 1991, the Court of Appeal referred to all the efforts which had been made by the Regional Court and the Court of Appeal to make it possible for the defence to put questions directly to the witnesses. The Court of Appeal also mentioned that the applicant's lawyer had declared, at a hearing on 6 February 1991, that he would not be prepared to go to France in order to interrogate M. and L. in the applicant's presence, unless the applicant was released from detention on remand and given assurance that he would not be arrested or prosecuted in France. On the basis of all these facts, the Court of Appeal considered that the use of the minutes of the statements made to the French police, would not be contrary to Article 6 of the Convention.

The Court of Appeal also enumerated the evidence in the case, which consisted primarily of the declarations of the witnesses in France. Reference was also made to a finding that these witnesses had telephoned several times from their hotel to the Netherlands and that a number of these calls had been to the applicant's telephone number. However, no reference is made in the Court of Appeal's judgment to the contents of the applicant's telephone conversations which had been tapped. The Court of Appeal further mentioned as evidence the applicant's own declaration before the Court of Appeal, in which he had admitted that he knew certain persons suspected of being involved in the drug traffic, including M. and L. He had also admitted that he had rented a car for M. in the beginning of August 1989 and that he had, on 3 August, prolonged the contract regarding the car by one day, i.e. to 4 August 1989. The Court of Appeal considered that the offences with which the applicant had been charged were proven and determined the sentence at six years' imprisonment.

After the applicant had appealed to the Supreme Court (Hoge Raad), the Advocate-General (Procureur-Generaal) dealt in his conclusions extensively with the issue under Article 6 of the Convention. He stated that the defence had in principle a right to interrogate the witnesses and that the Dutch Courts had made considerable efforts to make such interrogation possible. However, the French authorities had refused both to let the applicant's lawyer attend a hearing of the witnesses in the course of the execution of a commission rogatory and to allow the provisional transfer of the witnesses to the Netherlands. The Advocate-General pointed out that alternatives had also been suggested by the Dutch courts, namely to put questions in writing or to arrange for the applicant's lawyer to put questions to the witnesses in France in the applicant's presence. However, the lawyer had rejected the first suggestion and had, in regard to the second suggestion, set up conditions which were unreasonable.

The Advocate-General further noted that in the present case there was no question of anonymous witnesses but of persons who were personally acquainted with the applicant. Although their statements were important as evidence, they were not the only evidence, but they were supported by other evidence. The Advocate-General then made a comparison with a witness who had died and stated that it would be wrong to hold that in such a case declarations made while the witness was still alive could in no circumstances be used as evidence. The present situation, where the witnesses were not available to the Dutch courts, could be looked at in a similar way.

On 12 May 1992 the Supreme Court rejected the appeal. In its judgment the Court quoted the reasoning of the Court of Appeal and added that the statements of the witnesses M. and L. found sufficient support in the other evidence in the case. For these reasons the Court of Appeal had not violated the relevant provisions of Dutch law or of

the European Convention on Human Rights.

COMPLAINTS

The applicant alleges violations of Article 6 paras. 1 and 3 (d) of the Convention. He considers that the principle of equality of arms was violated in view of the fact that neither the applicant nor his lawyer had the opportunity of putting questions to the witnesses. Nor were the witnesses heard by an investigating judge or a court. They were only heard by the French police in the presence of Dutch police officers. The applicant adds that these statements were the decisive evidence against him.

THE LAW

The applicant alleges violations of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention, which provide as follows:

> "1. In the determination (...) of any criminal charge against him, everyone is entitled to a fair (...) hearing (...) by an independent and impartial 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;"

He maintains that his conviction was based mainly on the statements made to the French police by the Dutch citizens arrested in France and that, in respect of this evidence, the principles underlying Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) had not been respected, since neither he nor his lawyer had had the opportunity of attending any hearing of these persons and of putting questions to them.

The Commission notes that the guarantees in para. 3 of Article 6 are specific aspects of the right to a fair trial set forth in para. 1 (Art. 6-3, 6-1) of that Article. The complaint made in the present case should therefore be examined under the two paragraphs taken together.

According to the case-law of the European Court of Human Rights, all the evidence in a criminal case must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, a witness must not in all circumstances be heard in court; statements made before the trial may in some cases be invoked as evidence, provided that the rights of the defence have been respected. This means that the defendant shall at some stage have been given an opportunity to challenge and question a witness against him (Eur. Court H.R., Asch judgment of 26 April 1991, Series A vol. 203, para. 27).

In the present case, it appears that the applicant and his lawyer were at no stage confronted with the witnesses and had therefore no opportunity of putting questions to them. At the same time, it is clear that the Dutch courts made considerable efforts to make it possible for the defence to attend a hearing of the witnesses either in France or in the Netherlands and that these attempts failed due to the negative attitude taken by the French authorities. The applicant's lawyer was also offered the opportunity of formulating written questions which would be put to the witnesses when they were heard in France but he did not make use of this possibility.

In such a situation, where a confrontation with the witnesses proves impossible, it cannot as a rule be considered a violation of Article 6 (Art. 6) to invoke the statements made by the witnesses as evidence, although the circumstances in which the statements were made call for particular caution in the evaluation of such evidence. It may nevertheless be of importance, in particular when combined with other evidence.

In the present case it is clear that the statements made by M. and L. before the French police were of considerable importance for the Dutch courts when determining the criminal charge against the applicant. However, these statements were not the only evidence against the applicant. The Court of Appeal also referred to the applicant's own admission that he knew M. and L. and had rented a car for M. a few days before M.'s arrest in France. The Court of Appeal further indicated that it had been established that the six Dutch citizens arrested in France, while in possession of a large quant of heroin, had, before their arrest, repeatedly telephoned from their hotel in France to the applicant's telephone number in the Netherlands.

In these circumstances, and having regard in particular to the fact that it was impossible for the Dutch courts to arrange a hearing of the six witnesses which could be attended by the applicant and his lawyer, the Commission considers that the Dutch courts were justified under Article 6 (Art. 6) of the Convention to take into account the statements made by these witnesses to the French police and to evaluate this evidence which had been invoked in the case.

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)