AS TO THE ADMISSIBILITY OF
Application No. 25935/94
by Colin Mark HARDIMAN
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 28 February 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 5 September 1994 by Colin HARDIMAN against the United Kingdom and registered on 14 December 1994 under file No. 25935/94;

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 as submitted by the applicant may be summarised as follows.

Particular circumstances of the case

The applicant is a British citizen, born in 1967 and is currently in prison in West Yorkshire.

The applicant and two others ("G" and "S") were charged with the murder and manslaughter of a vagrant on 20 February 1992. The joint trial of all three defendants was lengthy and took place in or around March 1993.

The case put forward by the prosecution was that the three defendants acted in concert in deciding to rob and then kill the vagrant. G submitted in his defence that the jury could not be sure that anything he had done had in fact killed the deceased, that G had not intended to cause the victim serious harm when he stabbed him (six times) and that he was, in any event, too drunk to form an intention to kill or to cause serious bodily harm.

The applicant contended that he only intended to rob the victim and, because the applicant knew at the time that the victim was drunk, he knew that only minimal force would have been necessary. The killing

was, according to the applicant, S's idea. S for his part said that he was the innocent party and that the applicant and G were responsible for the killing. The trial judge summed up the evidence to the jury warning of the danger of relying on the evidence of one defendant when it incriminated another.

At 10.45 am on 10 March 1993 the jury retired to consider their verdicts. At 2.35 pm the jury returned to court having sent a note to the trial judge indicating that they were unable to reach a unanimous verdict in respect of G. The trial judge invited the jury to reach unanimous verdicts and the jury again retired at 2.36 pm. At 3.50 pm the jury returned indicating a lack of unanimity as regards G and returning unanimous verdicts of guilty of murder in respect of the applicant and not guilty of murder and manslaughter in relation to S. The trial judge gave the jury a majority direction in relation to G and the jury again retired at 3.53 pm.

Immediately thereafter a female member of the jury handed a note, addressed to leading counsel for S, to the jury usher. The usher and that counsel gave the note to the court clerk who handed it to the trial judge. The note was in a sealed envelope marked, in type, for the attention of S's leading counsel and private and confidential. The trial judge therefore met with all counsel in his chambers at 4.05 pm and after hearing from all counsel opened the envelope. The note (which was handwritten and signed by the juror) read as follows:

"Dear <counsel for S>,

> I hope that you won't think me impertinent for writing. I mean no disrespect to you. I realise that it is highly irregular but I have a question I would like to ask. Would it be at all possible for you to consider an invitation for a drink with me either before leaving Norwich or may be if you return sometime in the future? Of course I do not wish to place you in an embarrassing situation and will quite understand if you decline. But just in case there is a slight possibility of you accepting, <juror's home telephone number>. I hope that I haven't offended you. I has taken a lot of courage writing this letter and I must admit to being somewhat embarrassed."

All counsel subsequently read the juror's note and the trial judge stated that he did not propose to say anything to the juror in question subject to counsel's views. However, no counsel asked the trial judge to take any further step with respect to the note. The jury returned at 4.17 pm and convicted G of murder by a majority of 11 to 1. The applicant and G were sentenced on the same day to life imprisonment.

The applicant appealed to the Court of Appeal (Criminal Division) on numerous grounds including that the contents and timing of the submission of the juror's note constituted evidence that there existed a "real danger of bias" on the part of the juror concerned arguing that the envelope must have been typed the night before the juror came to court (there being no typing facilities in the jury room) which was before the start of the jury's deliberations. Given the direct conflict existing between the evidence of S and the applicant, there was a real likelihood that the applicant's received consideration which was biased against him and in favour of S by the juror who wrote the note.

The court delivered its judgment on 1 July 1994 and, in the first place, described the applicable principles in cases of alleged jury bias as follows. One does not enquire into the actual state of mind of the jurors. There is an overriding public interest in there being confidence in the administration of justice. If there was a real danger of bias (meaning a possibility rather than a probability) then the verdict could not stand and even one source of poison in the jury room

suffices in this respect. The court applied the test for bias as stated by Lord Goff in the Gough case (Gough (1993) 97 Cr.App.R. 188), which case also concerned a note from a female member of a jury to counsel.

The court then indicated that having given thoughtful and earnest consideration to the contents of the note and the circumstances surrounding its creation and submission to the usher, the evidence in the case, the verdicts returned by the jury in light of that evidence and the female juror's actions, decided that there was no possibility of a real danger that this jury was biased against the applicant and participated in the guilty verdicts by reason of bias. In addition and since one function of the Court of Appeal was to consider carefully the evidence against the defendants who were convicted to see if it could be said that the cases upon which they were convicted were slender or weak, the court concluded that the evidence against G was overwhelming and that against the applicant extremely strong. In addition, there was evidence which could render S's acquittal strong.

The Court of Appeal accepted that it appeared that the note was prepared prior to the juror coming to court on 10 March 1993 but considered it unlikely that the juror had communicated her liking for S's counsel to other jurors, that it was still less likely that had she done so that the other jurors would have allowed their judgments to be swayed by her disclosure and that there was no real danger that the juror allowed her liking for S's counsel to transfer itself to S and his case and still less likely that she would have allowed such feelings to prejudice her judgment against the applicant or G.

Before the Court of Appeal the applicant also claimed that after his conviction his representatives were informed, in confidence, that prison psychiatric reports in relation to S existed and were couched in terms that cast much doubt on S's credibility as a witness. The applicant argued before the Court of Appeal that since these reports were disclosed to the prosecution, were not disclosed to the applicant's representatives during the trial (nor thereafter) and affected the credibility of S (with whose evidence the applicant's evidence was in conflict), they should have been furnished to the applicant's representatives to allow the applicant's representatives the opportunity to cross-examine S (on those reports) and the authors of the reports.

In its judgment the Court of Appeal described the general nature of such reports (though did not read the reports on S available to them). The court pointed out that prior to a hearing of serious criminal charges, prison psychiatric reports on the defendant(s) are obtained for the trial judge. A defendant will not be cautioned before, or have his solicitor present during, an interview with the relevant medical practitioner in order that the responses of the defendant will be frank so that the conclusions in the subsequent report (as to a defendant's mental competence, state of mind or as to any other relevant disability) are reliable.

Such reports are furnished to the trial judge to enable the judge to ensure a fair trial on the basis of information which is as reliable as possible. In this respect, the relevant matters considered by the trial judge include the defendant's fitness to plead and stand trial and, in murder cases, the issues of insanity and diminished responsibility are also normally considered so that the court can raise these matters if those acting for the defence do not raise them. The Court of Appeal confirmed that the reports are the property of the court and that they are not brought into existence by the prosecution for the purposes of preparing a case against the defendant in question.

The Court of Appeal noted that, in practice, the disclosure of these reports varies. They are furnished in a serious case to the prosecution counsel in order that such counsel, as a minister of justice, may direct the judge's attention to anything in the report

which might indicate the need to take steps to ensure that a fair trial occurs. In a trial involving one defendant neither the prosecution nor the court can refer to the reports unless, for example, a medical issue arises during the trial to which the report is relevant. The Court of Appeal endorsed this practice stating that it was "sensible and fair" in view of the manner in which the reports are obtained and the clear public interest in ensuring the frankness of the responses and the consequent reliability of the reports.

The Court of Appeal concluded, on the basis of previous case-law, that since the applicant had not made an application to the trial judge for the report, it was too late to raise the matter of disclosure of such reports in relation to S before the Court of Appeal. In any event, the Court of Appeal being cognisant of the applicant's argument as to the alleged benefit to him of being able to rely on them, indicated that even if such an application had been made to the trial judge it would and should have been refused.

The applicant's appeal was therefore dismissed.

Relevant domestic law and practice

The respective roles of the trial judge and jury

The trial judge is the arbiter of issues of law and must ensure that the trial is properly conducted according to the law. He is required at the end of a trial, inter alia, to sum up the evidence, to direct the jury to disregard evidence which is inadmissible, to remind juries of their function, to explain any law which the jury is required to apply and to ask the jury to reach a verdict on the evidence they have heard. The jury, consisting of twelve members who have sworn to "faithfully try the defendant and give a true verdict according to the evidence", is the sole arbiter of fact.

Section 8(1) of the Contempt of Court Act 1981 states that it is a contempt of court to obtain, disclose or solicit any particulars of any statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.

The law on bias

The case of R v. Gough ([1993] 2 All ER 673) re-stated and clarified the law on bias. If the possibility of bias on the part of a juror comes to the attention of the trial judge in the course of a trial, the trial judge should consider whether there is actual bias or not (a subjective test). If this has not been established, that trial judge or appeal court must then consider whether there is a "real danger of bias affecting the mind of the relevant juror or jurors" (an objective test). In this latter respect Lord Goff, in the above-mentioned Gough case, stated as follows:

> "... I think it is unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court, in such cases as these, personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. ... I would prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under

consideration by him;..."

COMPLAINTS

The applicant complains that he did not get a fair hearing by an independent and impartial tribunal in violation of Article 6 para. 1 of the Convention due to the lack of impartiality of the jury demonstrated by the note submitted by the female juror. He also complains under Article 6 paras. 1 and 3(d) in relation to his lack of access (both during the trial and subsequently) to prison psychiatric reports prepared in relation to a co-defendant and about his inability to introduce the reports into evidence or cross-examine the co-defendant and the relevant medical practitioners.

THE LAW

1. The applicant complains, in the first place, that his hearing was unfair due to the lack of impartiality of the jury demonstrated by the note from the female juror. He invokes Article 6 para. 1 (Art. 6-1) of the Convention which reads, insofar as relevant, 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 ..."

The applicant submits in this respect that in view of the fact that the juror in question was attracted to S's counsel and hoped he would accept her invitation and of the fact that the applicant's and S's evidence was in direct conflict, the juror would have been more inclined to accept the position adopted by S, to advance arguments in the jury room in S's favour in order to make a good impression on counsel for S and be partisan in favour of S and against the applicant leading to the applicant's inevitable conviction. Furthermore, since there is an inhibition on inquiring into what takes place in the jury room, the applicant was convicted and his appeals were rejected without the courts being aware of the juror's actions and views due to her attraction to S's counsel.

The Commission recalls that, according to the constant case-law of the Convention organs, the existence of impartiality must be determined according to a subjective test namely, on the basis of a personal conviction of a particular judge in a given case - personal impartiality being assumed until there is proof to the contrary (see, for example, Eur. Court H.R., Padovani judgment of 26 February 1993, Series A no. 257-B, P. 20, paras. 25-26).

In addition, an objective test must be applied. It must be ascertained whether sufficient guarantees exist to exclude any legitimate doubt in this respect. Even appearances may be important; what is at stake is the confidence which the court must inspire in the defendant in criminal proceedings and what is decisive is whether the applicant's fear as to a lack of impartiality can be regarded as objectively justifiable (Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A no. 86, p. 14, para. 26 and Padovani judgment, loc. cit., p. 20, paras. 25 and 27).

Furthermore, the above principles apply equally to each juror as the sole arbiters of fact (Eur. Court H.R., Holm judgment of 25 November 1993, Series A no. 279-A, p. 14, para. 30 and, mutatis mutandis, No. 19874/92, Ferrantelli and Santangelo v. Italy, Comm. Report 2.3.95, unpublished). Moreover, given that juries in the United Kingdom deliberate in private, give no reasons for their decisions and that there is, at the very least, a strong inhibition on enquiring about the nature of juror discussions, it is not possible to adduce evidence as to the subjective impartiality on the part of a juror. In such circumstances additional importance would therefore attach to ensuring that the impartiality of the jury is, "by other means",

objectively guaranteed (No. 14191/88, Holm v. Sweden, Comm. Report 13.10.92, Series A no. 279-A, p. 26, para. 64 and No. 22399/93 and Pullar v. the United Kingdom, Comm. Report 11.1.95, p. 7, para. 39).

In the present case, the Commission finds no evidence of subjective bias on the part of the relevant member of the jury and the question to be determined is whether the applicant's fear as to a lack of impartiality on the part of a member of the jury can be regarded as objectively justifiable.

On the one hand, the Commission notes the serious charges against the applicant and the nature of the issue to which the jury note gave rise. It appears that the juror in question prepared the note prior to coming into court on 10 March 1993 on which date the jury retired to deliberate on the charges. In addition, it is evident that the juror had developed some feelings for counsel in question to the extent that she risked embarrassment in order to sent a note to the relevant counsel. Furthermore, the applicant's and S's accounts of what had taken place were in direct conflict.

However and on the other hand, the Commission notes the following. The trial was complex and lengthy and the Commission considers that the trial judge was well placed to evaluate the jurors by his interaction with them during the trial. The trial judge warned the jurors of the danger of relying on the evidence of one defendant if it incriminated the other. Subsequently and having received the jury note from the court clerk, the trial judge opened the note in chambers namely, in the absence of the jury and with all counsel present. No counsel (including the applicant's own counsel) requested the trial judge to take the matter further. Having considered the matter, the trial judge decided that the jury should not be informed of the contents of the note.

The Commission also notes the controlled and polite nature of the jury note which made no reference at all to the case at hand (and indeed expressed the wish not to offend or place S's counsel in an embarrassing position) and contained no indication that the juror had any difficulty in forming a view on the evidence or that she had voted and encouraged others to vote in a particular way. In addition, the argument that the juror would have acted in the jury room in a certain manner in order to impress S's counsel does not appear to be realistic. Due to the restriction on inquiring into juror deliberations and since it appears that during the applicant's trial the note was the only contact S's counsel had with the juror, it is difficult to see how the juror could have felt that her actions in the jury room could have positively influenced S's counsel.

Furthermore, the Commission, while not drawing any specific conclusions from the juror's vote finds the unanimous decisions in favour of S and against the applicant striking.

Moreover, the Commission finds it indicative of the weight to be attached to the trial judge's assessment as to the most appropriate response to the jury note that, in domestic law, the trial judge must assess the presence of bias in the jury subjectively and must also be satisfied that there is no real danger of bias. The question of jury bias was also reviewed in detail by the Court of Appeal which tribunal considered that a real danger of bias was not a possibility and that it was unlikely that the applicant had communicated her liking for S's counsel to other jurors, even less likely that the other jurors would have been swayed by the applicant even if she had communicated her feelings, that there was no real danger that the juror had allowed her feelings for S's counsel to transfer to S's case and still less likely again that she would have allowed her feelings to affect her judgment of the case against the applicant.

The Commission considers that the above factors suffice to dispel any legitimate doubts as to the impartiality of the jury which

convicted the applicant and finds that the applicant's fears in this respect are not objectively justified. Consequently, the Commission considers that applicant's complaints as to the impartiality of the jury manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. Secondly, the applicant also complains that prison psychiatric reports, which allegedly cast doubt on the credibility of S, were disclosed to the prosecution and not to his representatives prior to, during or subsequent to his trial. Together with Article 6 para. 1 (Art. 6-1) (cited above), the applicant invokes Article 6 para. 3(d) (Art. 6-3-d) of the Convention which reads as follows:

> "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."

The applicant submits in this respect that, since his representatives were unaware of the reports' existence during the trial, it was unrealistic to require, as the Court of Appeal did, an application on the applicant's behalf before the trial judge to be allowed to obtain the reports, to introduce the reports in evidence and to cross-examine S and the relevant medical practitioners on the reports.

The Commission recalls that according to its constant case-law it is not for the Commission to re-assess the factual or legal elements of a case before the domestic courts, given that the relevant decisions of those courts had a basis in law and were based on relevant and sufficient reasons (see, for example, Eur. Court H.R., Barbera, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). It is also recalled that the term "witness" as referred to in Article 6 para. 3(d) (Art. 6-3-d) of the Convention can be understood as relating also to "experts" (see, for example, No. 10532/83, Dec. 15.12.87, D.R. 54, p. 19). However, Article 6 para 3(d) (Art. 6-3-d) of the Convention does not give an absolute right to the examination of every witness proposed by the defence (Eur. Court H.R., Engel and others judgment of 6 June 1976, Series A no. 22).

Whether or not the applicant's legal representatives should have known of the likely existence of such reports, the Commission notes the following. S would not have been cautioned (for example, by being told that any statements made by him in that context may be used against him) or have been entitled to have a solicitor present at the time of his examination by a psychiatrist - indeed that is deliberately done so that the defendant's responses are frank and the resulting report reliable (as regards issues such as a defendant's mental competence, state of mind or as to any other relevant disability) so that the judge can in turn ensure that such issues are addressed if necessary (in the context of, for example, fitness to plead) in order to ensure a fair trial for that defendant. The practice is that neither the prosecution nor the judge can refer to such reports during the trial unless a relevant medical issue arises. The Commission recalls that the jury that found the applicant guilty would not have been aware of the relevant reports, no such reference having been made to the reports during the trial.

The ultimate aim of this procedure is therefore the protection of the rights of defendants by obtaining specific material about a defendant (as to, for example, mental competence) in a particular manner and by consequently ensuring that, unless necessary in certain circumstances, such material is not referred to during the trial. The Commission therefore considers that the fact that the application of

the practice in the applicant's case meant that he could not refer to or rely on the reports against one of his co-defendants was not, in the circumstances of the present case, unfair or arbitrary. Accordingly the Commission does not find that this complaint discloses a violation of Article 6 paras. 1 or 3(d) (Art. 6-1, 6-3-d) of the Convention. It is therefore 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 First Chamber — President of the First Chamber

(M. F. BUQUICCHIO) — (C. L. ROZAKIS)