AS TO THE ADMISSIBILITY OF

Application No. 16512/90
by J.J.
against the Netherlands

The European Commission of Human Rights sitting in private on 7 May 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI

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 20 April 1990 by J.J. against the Netherlands and registered on 26 April 1990 under file No. 16512/90;

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 1959. At the time of the introduction of the application he was detained at the Remand Centre (Huis van Bewaring) in Breda, the Netherlands. Before the Commission he is represented by Mr. R.J.H. Klinkhamer, a lawyer practising at Etten-Leur.

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

On 21 January 1988 the applicant was summoned to appear before the Dordrecht Regional Court (Arrondissementsrechtbank) on 4 February 1988. Together with another person, P., he was charged with the following offences: a drug related robbery on 28 June 1987 in

Hilversum, extortion on 15 December 1986 in St Willebrord, a robbery on 12 June 1986 in Tilburg and a robbery on 30 May 1985 in Breda. P. had made several statements to the police on 29 June and 10 December 1987, to the Investigating Judge (Rechter-Commissaris) on 9 December 1987, 22 December 1987, and in the presence of his lawyer on 18 January 1988 and 12 February 1988.

On 17 March 1988 the Dordrecht Regional Court, whilst requalifying the first offence, convicted the applicant on all charges and sentenced him to eight years' imprisonment. The Court based its finding of guilt on several evidential factors:

The conviction for the drug related robbery in Hilversum was based on eight police reports containing various statements:

- that of the man who was to deliver the hashish; he said, inter alia, that he recognised the applicant from two pictures;
- that of the man's brother who was also present; the two brothers both identified the applicant when confronted with him by means of a one way mirror;
- that of an eye witness;
- that of P.;
- and that of the applicant himself.

The conviction for extortion in St Willebrord was based on the statements of P. and P.'s sister. The conviction for the robbery in Tilburg was based on three police reports containing the investigating officers' own findings concerning, inter alia, identity tests carried out on the applicant and the statements of an eye witness and of P.. Finally, the conviction for the robbery in Breda was based on eight police reports containing the statements of three eye witnesses, the investigating officers' own findings with regard, inter alia, to one of the applicant's sweaters which permitted his identification by means of certain tests, the statements of the expert who carried out those tests and the report on P.'s statements to the Investigating Judge.

The applicant denied all charges and appealed to the Court of Appeal (Gerechtshof) of The Hague. At the hearing on 14 November 1988, the applicant requested the Court to hear P.. However, P. declared that he remembered very little about his previous statements, adding that he did not wish to make any further statements. He invoked his right as co-accused to remain silent. The Court of Appeal dec hear P. on the ground that, in respect of all the charges except the fourth, P.'s interests as a witness and co-accused outweighed those of the applicant.

On 28 November 1988 the Court of Appeal convicted the applicant on all charges, with the exception of the robbery in Hilversum, of which offence he was acquitted. The applicant was sentenced to six years' imprisonment and a fine of 100.000 Dutch guilders, to be commuted to five months' imprisonment in case of non-payment. The Court of Appeal based its finding of guilt on the same evidence as had been used by the Regional Court and on a police report containing a statement by P.. As to the use of P.'s statements as evidence, the Court of Appeal considered, in the light of the Unterpertinger judgment, that the applicant had had several opportunities during the preliminary investigations, before the Regional Court and at the appeal stage, to question P.. Therefore the requirements of Article 6 para. 3 (d) of the Convention had been met. In addition, the fact that during the preliminary investigations P. was prepared to make more extensive statements in the absence of the applicant and his representative, did not mean that his statements could not be used as evidence.

On 15 September 1989 the applicant filed a plea of nullity with the Supreme Court (Hoge Raad). He submitted the following five grounds of cassation:

- that the Court of Appeal had granted P. a general right to remain silent, whereas Dutch law (Article 219 of the Code of Criminal Procedure - Wetboek van Strafvordering) only recognises the right of a witness to remain silent with regard to a specific question;

- that the statement of P.'s sister used as evidence by the Court of Appeal could not be considered a statement about facts or circumstances observed or experienced by her;

- that the Court of Appeal had unjustly relied on the statements of two investigating police officers who had arrested the applicant;

- that the Court of Appeal had given too restrictive an interpretation of the Unterpertinger judgment since the conditions under which the defence had heard P. were fundamentally different from those under which the Investigating Judge had heard him and, in particular, that a witness cannot derive from Article 6 para. 3 (d) of the Convention a right or privilege to make more extensive statements to the Investigating Judge than he makes in the presence of the suspect or his representative;

- that the Court of Appeal had failed to decide on the applicant's plea about certain wrongfully obtained evidence.

On 16 January 1990 the Supreme Court rejected the applicant's plea of nullity, holding, inter alia, that a reasonable interpretation of Article 219 of the Code of Criminal Procedure implies that a witness, who is a co-accused, can be granted a general right to remain silent. It also found that Article 6 para. 3 (d) had not been infringed since, as the Court of Appeal had already held, the applicant's representative had had several opportunities to question P., even though the latter was reluctant to provide full answers, and he had challenged P.'s statements before the Regional Court and the Court of Appeal. The Supreme Court finally pointed out that the applicant's conviction was based on various evidential factors and not just P.'s statements.

COMPLAINTS

The applicant complains that, by granting the witness P. a general right to remain silent, the Court of Appeal wrongly applied Article 219 of the Code of Criminal Procedure and consequently infringed his right to a fair hearing and the principle of equality of arms. He submits that in these circumstances he had not had an adequate opportunity to question P.. He invokes Article 6 paras. 1 and 3 (d) of the Convention.

THE LAW

The applicant complains that, by granting the witness P. a general right to remain silent, the Court of Appeal wrongly applied Article 219 of the Code of Criminal Procedure and consequently infringed his right to a fair hearing and the principle of equality of arms. He submits that in these circumstances he did not have an adequate opportunity to question P.. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) 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 and public 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; ...".

The Commission notes that the applicant only complains that he could not have P. examined in court as the Court of Appeal granted P. the right to remain silent under Article 219 of the Code of Criminal Procedure. The Commission will therefore confine itself to this point.

With regard to the decisions of the Dutch courts in the present case to allow the witness P. to remain silent pursuant to Article 219 of the Code of Criminal Procedure, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competetent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45). Accordingly, it cannot examine the applicant's complaint that the Court of Appeal had wrongly applied Dutch law in this instance.

However, it may examine the applicant's complaint that he was unable to question P. before the Court of Appeal, because this is a matter falling within the scope of the guarantees laid down in para. 3 of Article 6 (Art. 6-3) of the Convention, which are specific aspects of the right to a fair hearing ensured by para. 1 of this provision. The Commission will examine the complaint under the two provisions taken together (cf. Eur. Court H.R., Isgrò judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 31).

According to the case-law of the European Court of Human Rights, all evidence must in principle be adduced in the presence of the accused at a public hearing with a view to adversarial argument, but this does not mean that a statement from a witness must always be made in court and in public if it is to be admitted in evidence (Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 27). The defendant must however be given an adequate and proper opportunity to challenge and question the witnesses against him (ibid.).

The Commission further recalls that it is normally for the national courts to decide whether it is necessary or advisable to hear a witness (cf. No. 10563/83, Dec. 5.7.85, D.R. 44 p. 113, and Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89). It also recalls that, as a rule, it is for the national courts to assess the evidence before them (cf. Eur. Court H.R., Asch judgment of 26 April 1991, loc. cit., p. 10, para. 26). The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.

In the present case both the Regional Court and the Court of Appeal based their decision on an extensive number of police reports containing, inter alia, the statements of the applicant himself, and the statements of several investigating officers, eye witnesses, P.'s sister and P.. It would clearly have been preferable if P. had been

willing to make a statement during the hearing before the Court of Appeal. However, as the Court of Appeal and the Supreme Court observed, the applicant was given the opportunity, of which he availed himself, to question P. during the preliminary investigations, before the Regional Court and on appeal. The Commission therefore finds no evidence in the case to suggest that the applicant's hearing in relation to his co-accused was unfair.

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)