AS TO THE ADMISSIBILITY OF

Application No. 18425/91
by K.J.
against Denmark

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
C. A. NØRGAARD
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 14 June 1991 by K.J. against Denmark and registered on 28 June 1991 under file No. 18425/91;

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 Danish citizen, born in 1964. At present, he is serving an eight year prison sentence at Vridsløselille, Denmark. Before the Commission he is represented by his lawyer, Mr. Peter Ørbæk.

In 1987 the applicant rented a workshop where he started a business of repairing and selling old cars. Subsequently, the applicant let an office in his workshop to his father (one of the co-accused in the case) from where the latter apparently ran a business of buying and selling used cars.

On 23 November 1988 the applicant and his father were arrested on suspicion of having committed certain drug offences contrary to Section 191 of the Danish Penal Code. The applicant was released by the police the same day.

However, on 5 April 1989 he was arrested again and this time charged with having participated in his father's drug trafficking.

According to the indictment of 22 January 1990 the applicant and four co-accused were charged with a total of 15 counts of drug trafficking. The charges concerning inter alia the applicant, nos. 8-9 and 11-15 of the indictment, related to the importation of a total of approximately 26 kilogrammes of amphetamine from the Netherlands to Denmark.

The case commenced in the High Court of Eastern Denmark (Østre Landsret) sitting with a jury on 14 June 1990. From 14 June until 22 June the accused had the possibility of addressing the Court and to submit what they found to be of relevance to the case. Furthermore, a total of nine witnesses were heard. One of the witnesses, who was asked to give evidence on 19 June, requested leave to be relieved from this duty as he had received a threatening letter. This was granted by the High Court and the prosecutor was allowed to submit as evidence the statements made by the witness during a pre-trial court session of 31 August 1988. No objection was made against this by counsel for the defence.

On 22 June another witness, H, refused to give evidence fearing for his own and his family's safety. He had participated in the drug trafficking and had already been convicted therefor. He also refused to give evidence in the absence of the accused. In these circumstances the prosecutor read out the statements H had made during his own trial, a procedure to which counsel for the applicant objected. Counsel furthermore requested the Court to use coercive measures in order to make H give evidence and pointed out that H's statements differed substantially from those of the applicant. H nevertheless refused to answer any questions and the Court did not use coercive measures. Subsequently the presiding judge informed the applicant and the co-accused of the contents of the statements in question. There were no further incidents in respect of the hearing of the other seven witnesses.

On 25 June the prosecution and counsel for the defence pleaded the case. The prosecutor dropped the charges nos. 8 and 9 in so far as the applicant was concerned. On 26 June the presiding judge summed up the case and instructed the jury. In respect of the applicant and the witness H, who on 22 June had refused to give evidence, the presiding judge directed the jury as follows:

(translation)

> "There exists a police report of 14 June 1989, with subsequent corrections, which concerns [the applicant] and which involves him in the offences committed to a certain degree. We know why [the applicant] rejects this report. I agree with [the applicant's] counsel that police reports which are not abided by in Court are of very little value as evidence - if any - in particular if they are retracted for plausible reasons. I leave it to the jury to decide whether the retraction is plausible, but let us disregard the police report.
>
> Next [the applicant] wants to disregard [the witness H's] statements made in Court during his own trial. Statements which [the applicant's] counsel otherwise uses against [a co-accused]. In my opinion the statements involve both [the applicant] and [the co-accused] in the offences committed to such an extent that they could lead to their conviction in respect of the charges nos. 11-15, if the statements could be taken into account.
>
> However, I agree with [the applicant's] counsel that these statements were made by [the witness H] during his own trial - at a time when he was not, as an accused, obliged

to make statements under criminal liability and when [the applicant's] counsel did not have the possibility of cross-examination. This is unfortunate, and it is clear that it reduces the value of the evidence when [H] refused to confirm the statements during the present trial - to what extent it reduces the value is for the jury to determine.

But let us also disregard [H's] statements.

With what may the prosecutor then reproach [the applicant] - and now I only refer to what [he] has stated himself:

- in so far as the charge no. 11 is concerned, probably only that it is his landcruiser which was used for the smuggling and which, according to his own statements, he sometimes let to [one of the co-accused].

- in so far as the charge no. 12 is concerned, that [H] maybe by the end of the summer came with the landcruiser - maybe together with [a co-accused] who said he needed the car a few more days.

By the way the car has disappeared under mysterious circumstances - and an attempt has been made to make it unrecognisable,

- in so far as the charge no. 13 is concerned, that induced by [a co-accused], he delivered 10,000 DKK to [H] in order to rent or buy a car - the money came from [the co-accused's] safe in the workshop to which [the applicant] had access. [H] delivered the car and the keys and said that it was a car which he should deliver to [the co-accused].

- in so far as the charge no. 14 is concerned, that when dismantling the spare tyre he found 3 strange packets and that he had 3 conversations with [a co-accused] in which the latter first told him to look at the damage to the camper and when [the applicant] called to explain that the damage was an insurance matter, he was subsequently asked to repair the spare tyre, and that when he found the 3 strange packets he was informed by [the co-accused] to tell [H] that the latter would only get 30,000 DKK; there was something about there not being enough,

- in so far as the charge no. 15 is concerned, that for money belonging to [a co-accused] and also deriving from the safe in the workshop, he bought a Toyota Corolla under a false name (because the co-accused bought and sold cars without declaring the income), and that he delivered the car to [H] and gave the latter 10,000 DKK from [the co-accused's] safe on his request."

After the presiding judge's summing up and after the jury's deliberations in camera the applicant was found guilty in respect of the charges nos. 13-15. He was acquitted of the charges nos. 11-12. He was sentenced to eight years' imprisonment. His co-accused received sentences of between six and twelve years.

On 29 June 1990 the applicant appealed against the judgment to the Supreme Court (Højesteret). In his appeal the applicant inter alia referred to Article 6 para. 3 (d) of the Convention complaining of the fact that the High Court had allowed the prosecution to use the statements of the witness H, made during his own trial, thereby preventing the applicant from cross-examining this witness.

By judgment of 1 February 1991 the Supreme Court upheld the

judgment of the High Court in its entirety. In respect of the hearing of the witness H the Court stated:

(translation)

> "Regardless of the fact that the witness refused to speak and that [the applicant's] counsel therefore did not have the possibility of cross-examining him, the Supreme Court finds, on the basis of an evaluation of the case as a whole, that there is no basis for reaching the conclusion that [the applicant] did not get a fair trial."

COMPLAINTS

The applicant complains that he did not get a fair trial by an impartial tribunal. He maintains that due to the fact that the witness H refused to give evidence and that, therefore, the High Court allowed the prosecutor to use his statements made during his own trial, his rights secured to him under Article 6 para. 3 (d) of the Convention have been violated.

The applicant also complains that since the High Court allowed such a procedure, despite the applicant's protests, this Court cannot be considered impartial within the meaning of Article 6 para. 1 of the Convention.

THE LAW

1. The applicant complains that he did not get a fair trial by an impartial tribunal as he was convicted on the basis of statements made by a witness during his own trial. The statements of the witness were read out at the hearing and therefore the applicant was not given the opportunity to examine or have examined the witness against him. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention which reads in so far as relevant:

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

As the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1, the Commission will consider the complaint under the two provisions taken together (cf. Eur. Court H.R., Asch Judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

The Commission further recalls that according to its own case-law, and that of the European Court of Human Rights, all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. The use of statements obtained at a pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6), provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he is making his statement or at a

later stage of the proceedings (Eur. Court H.R., ibid., p. 10, para. 27).

In the present case, the Commission first recalls that before the decision was taken to allow the statements made by the witness H to be read out at the hearing both sides had the opportunity to express their views to the Court. The fact that the witness refused to give evidence meant that the applicant's counsel was not able to examine the witness at the hearing but neither was the prosecutor. However, the applicant's counsel who was present at the hearing when the statements were read out had the possibility to criticise the witness's statements and thus cast doubt on his credibility. The Commission does not consider that the High Court's refusal to use coercive measures in order to make the witness give evidence, as requested by the applicant's counsel, raises an issue under Article 6 para. 3 (d) (Art. 6-3-d) as it would most likely have been to no avail. In these circumstances, the Commission finds that the rights of the defence have been sufficiently respected at this stage.

However, the question arises whether the use as evidence of the statements made by the witness H during his own trial 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 and, as a rule, it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (Eur. Court H.R., ibid., p. 10, para. 26).

In the present case the Commission recalls that the witness H's statements from his own trial were not the only evidence in the case. In the course of the main proceedings in the High Court several witnesses were heard as well as the applicant and the co-accused. Other documentary evidence was also 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 statements made by H at his own trial and his refusal to give evidence at the applicant's trial were considered by the presiding judge in his summing up and instructions to the jury at the applicant's trial. The presiding judge then observed that H had made the said statements "at a time when he was not ... obliged to make statements under criminal liability", that it was 'unfortunate' that the applicant's counsel could not cross-examine H and that "it is clear that it reduces the value of the evidence when (H) refused to confirm the statements during the present trial." Furthermore, he directed the jury rather to base their decision on the applicant's own statements.

Having regard to this the Commission is of the opinion that the administration of evidence in the applicant's case was fair, also in respect of H's statements, and it does not find that the fact that the High Court did not expressly exclude H's statements 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 manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. Leaving aside the question whether the applicant has exhausted domestic remedies as regards the complaint that his case was not heard by an impartial tribunal, the Commission has not found any substantiated allegations which would merit a further examination

thereof. 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 by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)