AS TO THE ADMISSIBILITY OF

Application No. 21266/93
by K.
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 30 June 1993, the following members being present:

MM. F. ERMACORA, Acting President of the First Chamber
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI

Mrs. M.F. BUQUICCHIO, Secretary to the First 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 2 June 1992 by K. against the United Kingdom and registered on 21 January 1993 under file No. 21266/93;

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 British citizen born in 1964 and currently serving a prison sentence in Glenochil prison.

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

The applicant was tried before the High Court of Justiciary between 10 and 16 March 1989 on 13 charges of mobbing and rioting arising out of disturbances in Perth prison. He had been granted legal aid and was represented by solicitor and counsel.

The indictment stated that the applicant

"did on 1 and 2 May 1988, in 'C' Hall, Prison of Perth, form part of a mob of evilly disposed persons which acting of a common purpose did conduct itself in a violent riotous and tumultuous manner, to the great terror and alarm of the lieges and in breach of the peace and did, with faces masked.

(a) brandish knives, sticks, metal bars, wooden and metal batons and other similar instruments, shout, swear, threaten violence to officers and prisoners there and place them in a state of fear and alarm for their safety;"

followed by (b) to (m) which listed other acts of violence.

The applicant was found guilty of 7 of the charges. In convicting the applicant, the jury deleted the words "acting of a common purpose" from the preamble. He was sentenced on 16 March 1989 to 7 years' imprisonment, to be served consecutively to the term of 13 years' imprisonment which he was already serving.

The applicant's solicitor and counsel advised the applicant to appeal, considering an important and complex principle of law arose concerning the definition of mobbing and rioting as a result of the jury's deletion. The grounds of the appeal were that the deletion of the words meant that the jury had concluded that there was no mob in existence, and that therefore there was no evidence to convict, on six of the items in particular. An application was made for legal aid, submitted with a note by the applicant's solicitor and senior counsel supporting the appeal.

The Scottish Legal Aid Board refused legal aid on 1 November 1989. A renewed application was refused on 9 November 1989.

As a result, the applicant presented his appeal in person before the High Court. On 10 November 1989, the High Court, sitting as an appeal court, dismissed the appeal, but reduced the sentence to 5 years' imprisonment.

The Court concluded that the jury's deletion did not mean that there was no mob in existence. The matter was however reconsidered by the applicant's legal advisers and in early 1991 Senior Counsel gave advice first that it would have been impossible on the evidence to have convicted the applicant on at least some of the heads as actor, and that the deletion of the words "acting of common purpose" meant that he could not be convicted as a member of a mob with a common purpose. A petition was addressed to the Secretary of State.

Following the applicant's petition, the Secretary of State decided to exercise his power under Section 263 (1) of the Criminal Procedure (Scotland) Act 1975 and referred the case to the High Court for a fresh appeal to be considered.

The applicant was granted legal aid on 15 March 1991 and was represented by counsel at the hearing which took place on 1 November 1991.

The applicant's grounds of appeal included:

a) the question of law as to whether an accused person charged with mobbing only and not with any crime committed in an individual capacity can be convicted if the mob of which he is said to have been a part is held by the jury to have had no common purpose;

b) that there was insufficient evidence to convict the applicant as an individual (as opposed to member of a mob) of the relevant sub-heads of the charges.

The High Court found that there was substance in the first ground and commented that the Solicitor General for the Crown had conceded that a charge of mobbing and rioting could not stand if there was no finding of a common purpose to commit the criminal acts libelled. The Court held that the applicant's convictions on the general charge of robbery and violence could not be allowed to stand. The question

however remained whether the jury's verdicts on the individual acts libelled in the separately lettered paragraphs in the indictment should also be quashed. The Court held that the applicant had not been charged with mobbing alone but that the structure of the indictment was such that it was open to the jury to convict the accused on the basis that he had participated in and was guilty of the specific riotous acts as an individual. The trial judge in his summing-up had directed the jury as to this alternative course and drawn their attention to the need to consider whether an accused was guilty either because he committed the acts himself or was part of a gang which did and which was acting with a common purpose. The Court then adjourned for a further report from the trial judge on whether there was sufficient evidence as affected the question of whether the applicant was guilty of any of the crimes as an individual.

The High Court resumed the appeal at a hearing on 6 March 1992 at which the applicant was represented. It rejected the appeal. It found that there was sufficient evidence to entitle the jury to convict the applicant in an individual capacity of 5 of the charges (one of which they amended) which included assaults on prison officers and the threat of assault to other prisoners. The convictions on two of the charges were quashed for insufficiency of evidence but it did not reduce sentence in light of the gravity of the charges which remained.

COMPLAINTS

The applicant submits that his convictions constitute a breach of Article 7 of the Convention. He states that he was charged with mobbing which includes a requirement of establishing a "common purpose". Since the jury deleted the words "acting of a common purpose" from the indictment, the applicant could not under Scottish law be convicted of acting as part of a mob and consequently was found guilty under an indictment which did not disclose an offence which existed under Scottish law.

THE LAW

The applicant complains that he has been convicted on an indictment which did not disclose a crime under Scottish law. He invokes Article 7 (Art. 7) of the Convention which in its first paragraph provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Article 7 (Art. 7) prohibits the retrospective application of the criminal law to the detriment of the accused and enshrines the principle of legality of criminal offences. While the interpretation and application of law can be the subject of development by the courts as in the common law system, this law-making function must remain within reasonable limits. In particular acts not previously punishable should not be held by the courts to entail criminal liability nor should existing offences be extended to cover facts which previously clearly did not constitute a criminal offence (see eg. No. 8710/79, Dec. 7.5.82,D.R. 28 p. 77).

In the present case, the applicant alleges that he was convicted on an indictment which accused him of mobbing whereas the jury had deleted from it an essential requirement of "acting of a common purpose." The Commission notes however that the High Court on appeal found that this ground of appeal was substantiated and that a person could not be convicted of mobbing if he did not act with the common

purpose of the mob. It upheld 5 of the convictions on the basis that the applicant had been found guilty by the jury on the alternative basis of having participated in the crimes charged in an individual capacity and that there was sufficient evidence to uphold these convictions which included, inter alia, two charges of assault.

In light of the above, the Commission finds that the acts for which the applicant was convicted did entail criminal liability and that the offence of mobbing was not in fact extended to facts which previously did not constitute criminal offences. It concludes therefore that there is no indication of a violation of Article 7 para.1 (Art. 7-1) of the Convention.

It follows that this application must be declared 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 — Acting President of the First Chamber

(M.F. BUQUICCHIO) — (F. ERMACORA)