AS TO THE ADMISSIBILITY OF

Application No. 36428/97
by Malcolm Goodbarn KENNEDY
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 21 October 1998, the following members being present:

MM	M.P. PELLONPÄÄ, President
	N. BRATZA
	E. BUSUTTIL
	A. WEITZEL
	C.L. ROZAKIS
Mrs	J. LIDDY
MM	L. LOUCAIDES
	I. BÉKÉS
	G. RESS
	A. PERENIČ
	M. VILA AMIGÓ
Mrs	M. HION
Mr	R. NICOLINI

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 27 September 1996 by Malcolm Goodbarn KENNEDY against the United Kingdom and registered on 10 June 1997 under file No. 36428/97;

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 1946. He is represented before the Commission by Michael Schwarz, a solicitor practising in London.

The facts of the case, as they have been submitted by the applicant, may be summarised as follows:

On 20 September 1991 the Central Criminal Court found the applicant guilty of murdering Q in the early hours of 24 December 1990 in a cell at Hammersmith police station. The court sentenced the applicant to life imprisonment.

The applicant's case from the outset was that Q had been killed not by him but in his presence by some unidentified police officer, probably Police Constable (PC) G, who entered and left the cell. The other police officers who were on duty that night, knowing what had happened, then covered up and attributed the responsibility to the applicant.

Subsequent to the trial, the applicant's defence team managed to trace two women, SW and SD, who were at Hammersmith police station on the night of the killing. SW and SD had made certain statements to the police that had not been put before the applicant's jury and had not been disclosed to the defence.

The applicant was given leave to appeal out of time against conviction. Furthermore, the Court of Appeal gave the applicant leave to adduce SW's and SD's evidence and further documentary evidence that had come to light during an investigation by the Police Complaints Authority following a complaint by the applicant. Further evidence was adduced on behalf of the Crown as well.

On 19 February 1993 the Court of Appeal quashed the applicant's conviction and ordered that the case be retried at the Central Criminal Court on a fresh indictment. The re-trial commenced on 6 September 1993 but was abandoned when further evidence came to light.

On an unspecified date PC G, who had given evidence during the first trial, in the Court of Appeal and at the re-trial, was admitted to a mental hospital. He was diagnosed by Dr F as suffering from severe "hypomanic illness" - a major mental illness in which a person loses touch with reality. In a report dated 24 January 1994, Dr F opined that, if G were to have to face the stress of cross-examination again, he would be likely to break down and give unreliable answers and statements. This would also be detrimental for G's mental health.

The re-trial recommenced on 22 February 1994. The applicant's defence immediately asked for an adjournment because of the problem that had arisen concerning the ability of PC G to testify. The prosecution made it clear that on Dr F's advice they would not call G to give evidence. Dr F confirmed that it was unlikely that G would recover sufficiently to withstand the stress of cross examination in the foreseeable future. The judge refused to adjourn the proceedings.

Thereupon the defence submitted that, if G was not to give oral evidence, the trial should not proceed. According to the defence, he was an important witness and there could not be a fair trial without him. While accepting that G was a relevant witness and a

witness of some importance, the judge refused to stay the proceedings on the following ground:

"I am not satisfied that the absence of G so prejudices the defence that a fair trial is no longer possible. In my view a fair trial is possible, and it does not offend the court's sense of justice and propriety to be asked to try the accused in the circumstances of this case."

The re-trial then begun.

On 8 March 1994 G submitted to an examination by a consultant psychiatrist, Dr E, nominated by the defence. Dr E rendered a report in which he accepted that after the first phase of the re-trial G had developed a "hypomanic illness". However, in Dr E's view, on 8 March 1994 G was "entirely fit to give evidence". The prosecution maintained its position but indicated that if the judge directed that G should be called as a witness they would make him available. On 12 April 1994 the judge considered that Dr F was right and that G was not fit to give evidence.

On 6 May 1994 the Central Criminal Court found the applicant guilty of manslaughter and sentenced him to nine years imprisonment.

The applicant applied for leave to appeal against conviction relying on G's unavailability to give evidence. His argument was that, once G became unavailable, there could not be a fair trial whatever the reason for the unavailability.

The applicant was given leave to appeal by a single judge. The Court of Appeal delivered its judgment on 16 July 1996.

The appeal court first noted that the applicant had not directly attacked the judge's finding of fact that G was not fit to give evidence - a finding which, according to the court of appeal, was plainly open to the trial judge on the evidence before him. As a result, the refusal of the judge to grant an adjournment on 22 February 1994 could not be questioned. Even if such an adjournment had been granted, this would have only resulted in the judge reaching the conclusion which he reached on 12 April 199 before the beginning of the trial rather than part way through. Moreover, the appeal court was satisfied that Dr F had not been misled as to the importance of G's evidence. In any event, there was no indication that Dr F would have treated G differently if he had had a different understanding as to the importance of this evidence. As a result, the only issue that the court of appeal had to decide was the following:

"Because the jury did not hear G give evidence orally, may they have formed an exaggerated impression of the strength of the prosecution case; may the absence of G have prevented the defendant from properly deploying his defence, and if the trial may have been distorted in either of those ways, was the distortion such as to lead us to conclude that the conviction is unsafe."

In order to deal with this issue the appeal court considered that it had to look first at the shape of the prosecution case, then at the shape of the defence case and then to evaluate the applicant's submissions as to how the defence was disadvantaged by G not being available at the trial.

Before doing that, however, the court of appeal noted that the jury had heard a great deal of what G had said when giving evidence on previous occasions, had heard his history and had also heard two doctors who had examined him as well as his former wife.

As regards the shape of the prosecution case, the court recalled that on 23 December 1990 at about 11.05 pm PC G arrested Q, the victim, for being drunk. Q was taken to Hammersmith police station. At about 11.15 pm he was placed in cell No. 5, called "the Tank", and a few minutes later a doctor, W, was sent for to examine him. Dr W arrived at 11.50 pm and examined Q in the cell with a police officer in attendance. G claimed that he was that officer. Dr W recorded that Q was under the influence of drink and that he had a "small laceration on the centre of the back of the scalp". Thereafter, Q was observed in the Tank by Police Sergeant (PS) B at half hour intervals up to and including 1.30 am.

Sometime after midnight, i.e. on 24 December 1990, the applicant was arrested by two officers, PC M and C, for being drunk and disorderly. At 1.00 am he was taken to Hammersmith Police Station, which on that evening was also providing custody services for police officers based in Fulham. As the applicant was a Fulham prisoner, he was received by PS H and was placed in the Tank.

At about 1.50 am, when PS H went to check the Tank, Q was found beaten to death. The only other person in the cell was the applicant and there were only two sets of keys, one held by the Hammersmith custody officer, PS B, and the other by PS H himself, the Fulham custody officer.

After PS H raised the alarm he observed that the applicant was standing by Q's head with his coat and shoes on the bench behind them and had blood on his hands. In response to his enquiry as to what had happened the applicant looked at him and smiled. When asked if he had done it, he gave no reply. The applicant was then moved to another cell and his clothing was collected from him. Dr W examined the applicant and found blood on his hands and wrists and a small bruise on his left temple. He had no serious injury, but he was extremely agitated, and apparently quite detached - not realising what had happened.

An analysis made by Dr T of a blood sample taken from the applicant indicated that at 1.50 am his blood/alcohol level would have been 240 mg in 100 ml of blood, which is normally associated with drunkenness and nausea. The blood alcohol level of Q at the time of his death was 356 mg in 100 ml - a level normally associated with extreme drunkenness and probable loss of consciousness. It suggested that when Q was attacked he was in no fit condition to resist.

Between 2.30 am and 4.10 am the applicant was heard by two police officers denying responsibility for Q's death, blaming the police - and more specifically a particular police officer - for it and claiming that he had blood on his hands because he had tried to help Q. At about 4.30 am the applicant requested to see a solicitor. At 8.11 am he was interviewed in the presence of a solicitor and repeated his earlier claims.

When the applicant was asked to describe the person who had allegedly assailed Q, he said that the assailant was "a big guy" with a full head of hair and no beard or moustache. However, PC G had a moustache at the material time.

At 9.45 am a pathologist examined the body at the scene and later performed a post mortem examination. According to him, death was caused by laceration of the heart with multiple injuries. It seemed as if someone had jumped with both feet onto the chest and upper abdomen crushing the chest and the heart and also crushing the larynx. There were also head and facial injuries and injuries to other parts of Q's body including the back of the hands which could have been defence injuries received warding off kicks or stamps. There were also injuries to his face some of which were consistent with punching than kicking, and if caused by a hand would have caused injury to the assailant.

The following forensic evidence brought by the prosecution linked the applicant to the killing:

(a) the vast majority of the footwear marks on the floor showed the same pattern as that on the applicant's shoes;

(b) footwear marks found on the jacket, shirt and trousers of the deceased showed a similar pattern to those on the applicant's shoes and one mark showed fine detail which corresponded to moulded stripping on the right heel;

(c) a footprint on the deceased's body showed pattern elements broadly similar to those on the applicant's shoes;

(d) the applicant's shoes were heavily stained with human blood over most of their surface and had been in repeated contact with blood - either with the deceased's head or his clothing or both. The spray effect on the shoes was consistent with the wearer kicking an object wet with blood. The blood on the applicant's shoes was consistent with him having caused the injuries to the deceased;

(e) there was staining and splashing on the front and rear of the applicant's trouser legs. Blood stains at the front of his trousers could have been explained by kneeling down to move the body, or standing astride it and trying to pull it up. The staining at the back might have been caused by stamping backwards into blood. There was also some blood staining inside the applicant's blood-stained shoes, and both of the applicant's socks were in fact blood stained;

(f) there were fibres in some splits in the front of the right toe of the applicant's shoes. There were grey acrylic fibres similar to those in the deceased's jumper, and one fibre similar to the fibres in the deceased's jacket;

(g) overall, the distribution of blood stains on the applicant's trousers was consistent with the wearer having repeatedly kicked an object wet with blood of the deceased's group. The stains on the back of the shoes were consistent with a backward kick or stamp, or sliding backwards into a blood-stained object;

(h) the shoes and trousers of a number of other persons present at the relevant night, including PC G, were examined without significant result.

The court of appeal then moved on to examine the defence's case. The defence had pointed out to the applicant's good character and to a series of mistakes committed by the police before and after the killing. Moreover, the appeal court recognised that there existed evidence that did not fit the prosecution case. The most important of this was the evidence of SW and SD who were present at Hammersmith police station on the night of the killing.

SW testified that she called the police at about 11.15 to 11.45 pm because she had been assaulted by WS, her former boyfriend. She, SD and WS arrived at the police station at 12.00 pm or shortly thereafter. When PC W was preparing to take a statement from her she became aware of some ranting and raving which seemed fairly close. PC G then put his head round the door, and he and PC W disappeared for about 20 minutes. When PC W returned he was flustered and made more than one attempt to take the statement (scientific evidence showed that SW's statement was in fact taken on the third attempt). Later PS B appeared and told PC W to hurry up and complete the statements because there had been an incident in the police station.

The appeal court noted that the prosecution had given different times for these events. For example, according to the prosecution, Dr W who had been summoned to the Tank at about 1.50 am to look at Q who had been found dead, had arrived at the police station at about 1.40 am to make notes in relation to the examination of SW.

So the defence case was that the police had changed the timing of these events in order to conceal that something had happened between Q and some police officers between midnight and 1 am that resulted in the vicious attack on Q an hour later. However, the court of appeal noted that SW's version of events was not fully supported by SD's and WS's evidence.

Having examined the shape of the prosecution and defence cases, the court of appeal turned its attention to the applicant's submissions as to why it was imperative to have had G cross-examined before the jury. According to the applicant, G would have been able to speak about Q's arrest, his identification (there had been an incident with a tetanus card which was subsequently lost) and the place where he was detained during SW's testimony. G would also have been questioned about the discrepancy in the evidence concerning WS's arrest. He would have been asked to provide certain

clarifications about omissions and discrepancies in the testimony concerning his visit to the applicant's cell after Q's death. He would have been asked also to explain the presence of blood stains on his clothing and why he, unlike many other officers, had been asked to hand in his shoes before the end of his shift. Finally, he would have been asked about his propensity to violence. However, the appeal court considered that the matters about which G would have spoken had been covered by other witnesses. Also there existed the transcripts of what he had said on previous occasions and which had been submitted to the jury.

In the light of all the above, the Court of Appeal reached the following conclusion:

"There is nothing to indicate that the absence of G caused the jury to have an exaggerated impression of the strength of the prosecution case, or prevented the defendant from properly deploying his defence. Indeed, as (counsel for the prosecution) pointed out, it enabled the defence in this re-trial to focus on G in a way that might well have been impossible if he had been able to testify. Apart from G, whose evidence they heard read, the jury saw and heard from a whole host of witnesses, including the defendant and police officers one of whom, according to the defence may have been a killer and others who were involved in a grave conspiracy to pervert the course of justice. The jury was therefore in an excellent position to decide whether the prosecution case was proved. Every point made to us was available to and argued by the defence at the trial, and no doubt each point received careful consideration by the jury. The jury must also have considered (the prosecution counsel's) submission that the irregularities and inconsistencies were so wide spread and so unfocused as positively to indicate that there was no cover up, and the jury was assisted by a careful and fair summing up, which has not been criticised before us in any way. In reality the weight of the prosecution evidence, including in particular the circumstantial and scientific evidence as well as the oral testimony to which we have referred, was and is so great that it is impossible for us - as no doubt it was impossible for the jury - to regard this conviction as unsafe."

Therefore, the Court of Appeal rejected the applicant's appeal against conviction. The applicant was advised against seeking leave to appeal to the House of Lords.

COMPLAINTS

The applicant complains of a violation of Article 6 paras. 1 and 3 (d) of the Convention. In particular, he submits that the failure of the prosecution to call a witness, PC G, during the second phase of the re-trial rendered the proceedings unfair as a whole. Moreover, it prevented the applicant from properly conducting his defence. Further, the applicant submits that the absence of PC G during the second phase of the re-trial caused the jury to have an exaggerated impression of the strength of the prosecution case and this unfairness was not remedied by the fact that the jury had before them transcripts of what G had said in evidence on previous occasions.

THE LAW

The applicant complains that he has not received a fair trial mainly because a prosecution witness, PC G, was not called to give evidence during the second phase of his re-trial. The applicant appears to be making his complaints firstly in relation to paragraph 3 (d) of Article 6 of the Convention and then in relation to paragraph 1 of the same provision.

The Commission recalls that Article 6 of the Convention provides as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... 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 recalls that the guarantees contained in paragraph 3 of Article 6 are specific aspects of the general concept of a fair trial set forth in paragraph 1 (Eur. Court HR, Bönisch v. Austria judgment of 6 May 1985, Series A no. 92, pp. 14-15, para. 29).

It also recalls that Article 6 para. 3 (d) distinguishes, from the point of view of the accused, between "witnesses against him" and "witnesses on his behalf", both of which are autonomous notions, and guarantees for the accused different rights in respect of each category of witnesses (Unterpertinger v. Austria, Comm. Report 12.3.84, paras. 89-92, Eur. Court HR, Series A no. 92, pp. 21-22). As regards the first category, the Commission recalls that as a general rule paragraphs 3 (d) and 1 of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage of the proceedings (see, inter alia, Isgro judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 34).

As regards the second category, the Commission recalls that Article 6 para. 3 (d) does not require the attendance and examination of every witnesses on the applicant's behalf. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. However, the Convention organs must ascertain whether the proceedings as a whole, including the way

in which evidence was taken, were fair (see, inter alia, Eur. Court HR, Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

In the circumstances of the case, the Commission notes that the Court of Appeal, when considering the effect that the absence of G might have had on the fairness of the proceedings, asked itself two questions. First, "because the jury did not hear G give evidence orally, may they have formed an exaggerated impression of the strength of the prosecution case?" Secondly, "may the absence of G have prevented the defendant from properly deploying his defence?" The Commission, therefore, considers that both the guarantees in Article 6 para. 3 (d) concerning "witnesses against the accused" and the guarantees concerning "witnesses in his favour" may be relevant for the examination of the applicant's complaint concerning the absence of G.

However, the Commission recalls that the trial judge had considered that G was not able to participate in the second phase of the re-trial that resulted in the applicant's conviction for manslaughter because of his medical condition. The applicant did not directly challenge this finding of fact before the Court of Appeal.

The Commission also recalls that, although G was unavailable during the second phase of the applicant's re-trial, he gave evidence during the first trial, in the Court of Appeal during the first appeal, and during the first phase of the re-trial at the Central Criminal Court. The defence must, therefore, have had the chance to examine him extensively.

Moreover, the Commission notes that the jury of the second phase of the re-trial heard both doctors who had examined G and his former wife. In addition a great deal of G's evidence were read to the jury during the second phase of the re-trial. It follows that this jury must have had an accurate impression of G's story and of its relevance for the applicant's case.

Furthermore, at the re-trial the applicant had the opportunity to examine other police officers who, according to his defence line, were said to have been involved in a conspiracy to pervert the course of justice.

Finally and most importantly, the Commission recalls that the prosecution case did not rest alone on the evidence which G had previously given. There was important forensic evidence which linked the applicant with the killing.

In these circumstances, the Commission considers that no appearance of a violation of Article 6 para. 3 (d) taken together with Article 6 para. 1 arises as a result of the unavailability of G in the second phase of the re-trial. Accordingly, the application is manifestly-ill founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber