AS TO THE ADMISSIBILITY OF

Application No. 27837/95
by Barry KINGSTON
against the United Kingdom

The European Commission of Human Rights (Second Chamber) sitting in private on 9 April 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, 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 June 1995 by Barry KINGSTON against the United Kingdom and registered on 11 July 1995 under file No. 27837/95;

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 1944 and currently resident in the United Kingdom. He is represented before the Commission by Mr. Charles Taylor, a barrister practising in Chichester.

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

In March 1992 the applicant was tried before a judge and jury sitting at Lewes Crown Court on a count of indecent assault on a youth of 15 years. He was convicted by a majority verdict of ten to two, and sentenced to five years' imprisonment.

The applicant was jointly charged on the count of indecent assault with his co-defendant, K.P.. K.P. was charged on a further count of unlawfully causing to be taken by the youth a stupefying drug with intent. K.P. admitted the offence of indecent assault but denied administering any drug to the youth. In the event the jury convicted K.P. on the outstanding charge of administering a drug with intent.

It was the applicant's case that he too had been drugged by K.P. as part of an attempt to blackmail him by photographing and audio-taping him in a compromising situation with the youth, that had

he not been drugged he would not have acted as he was shown to have acted, and that he had no recollection of so acting.

In the course of the trial the judge, in the absence of the jury, was invited to rule, inter alia, on two issues.

At the outset of the trial the judge was asked to rule whether, in the event that the jury found the applicant had assaulted the youth pursuant to an intent induced by the influence of drugs secretly administered by K.P., it was open to them to find the applicant not guilty.

It was the applicant's contention that in circumstances where the prosecution had proved that despite the effect of any drink or drugs surreptitiously administered the defendant still intended to perform the actus reus of the substantive offence, it was open to the defendant to raise as a defence the possibility that although the act was intentional the intent was formed by disinhibition or loss of self-control brought about by drink or drugs surreptitiously administered.

The judge found that the common law did not recognise such a defence and in the event directed the jury on the issue of intention, so far as is relevant, in the following terms:

> "In deciding whether <the applicant> intended to commit this offence, you must take into account any findings that you make that he was affected by drugs. If you think that because he was so affected by drugs he did not intend or may not have intended to commit an indecent assault upon <the youth> then you must acquit him; but if you are sure that despite the effect of any drugs that he might have been slipped - and it is for you to find whether he was drugged or not - this part of the case is proved, because a drugged intent is still an intent. So intention is crucial, intention at the time; and, of course, members of the jury, you will bear in mind there is a distinction between intention at the time and a lack of memory as to what happened after the time."

Second, in the course of cross-examining K.S., a witness called by the prosecution, the applicant's counsel sought the leave of the trial judge to question K.S. about a conversation he had with K.P. some two years prior to the events in issue with a view to eliciting evidence that in response to a question from K.S. as to "how he <K.P.> managed to persuade them boys to indulge in homosexual acts", K.P. had responded, "It's surprising what a couple of valium in their drinks will do."

The prosecution did not propose to rely upon this evidence since it related to a conversation some two years prior to the events in issue. The applicant's counsel argued that the evidence was relevant to the applicant's defence in that it went to K.P.'s systematic use of drugs not just to render unconscious but to obtain sexual acquiescence and was material to the question of whether the applicant was drugged and manipulated so as not to have criminal intent. Counsel for K.P. resisted the introduction of this evidence on grounds that it was indicative only of propensity on the part of K.P. to drug boys so as to render then insensible and therefore not relevant to the specific issue raised by the applicant in his defence. Following argument the trial judge ruled that whilst as between co-accused the sole test of admissibility was relevance, the evidence in question went no further than "to indicate a propensity on the part of K.P. to drug boys so as to have his way with them, and was not indicative of behaviour on his part in relation to adult men who may be present at the time of such conduct", and was not in the circumstances relevant in the sense that the applicant sought to rely on it in his defence.

The applicant appealed against conviction on grounds, inter alia, that the judge had erred in law in ruling that involuntary intoxication was not a defence recognised by the common law, and in refusing to allow cross-examination of K.S. as to the conversation with K.P., and that accordingly the conviction was unsafe.

The Court of Appeal allowed the applicant's appeal and quashed the conviction on grounds that the common law recognised a defence of involuntary intoxication. In the judgment of the court, given by the Lord Chief Justice on 6 May 1993, the court reasoned that 1) if there was a reasonable doubt that drink or a drug surreptitiously administered caused a person to lose his self-control and form an intent which he would not otherwise have formed it was consistent with the principle that the law should exculpate him because the operative fault was not his; and 2) the effect of the judge's summing up had been to withdraw this issue from the jury and, that whilst the issue of involuntary intoxication may not have troubled them, it was not certain that they would have inevitably convicted.

The Court of Appeal further ruled that the applicant's counsel ought to have been allowed to cross-examine K.S. as to the conversation with K.P.. Whilst it made no finding that this was of itself a sufficient ground to render the conviction unsafe, the Court of Appeal considered that the presence of this evidence before the jury reinforced the possibility that they might have acquitted if properly directed on the issue of involuntary intoxication.

The prosecutor was refused leave to appeal by the Court of Appeal, but obtained a certificate that a point of law of general public importance was involved in the decision to allow the appeal, namely:

> "Whether, if it is proved that the necessary intent was present when the necessary act was done by him, a defendant has open to him a defence of involuntary intoxication ? (b) If so, on whom did the burden of proof lie ?"

On 17 January 1994 the prosecutor was granted leave to appeal by the House of Lords. The appeal was heard on 6 May 1994 and the unanimous judgment of the House of Lords was handed down on 21 July 1994.

The House of Lords concluded that there were three grounds on which the applicant might be held free from criminal responsibility.

> "First, that his immunity flows from general principles of common law. Secondly, that his immunity is already established by a solid line of authority. Finally, that the court should, when face with a new problem acknowledge the justice of the case and boldly create a new common law defence."

As to the first, this had been the approach adopted by the Court of Appeal in finding that exceptionally the law recognised that an accused might be entitled to be acquitted "if there is a possibility that although his act was intentional, the intent itself arose out of circumstances for which he bears no blame."

Giving judgment in the House of Lords, Lord Mustill stated as follows:

> "My Lords, with every respect I must suggest that no such principle exists or, until the present case, had ever in modern times been thought to exist. Each offence consists of a prohibited act or omission coupled with whatever state of mind is called for by the statute or common law which creates the offence ... to assume that contemporary moral

judgments affect the criminality of the act, as distinct from the punishment appropriate to the crime once proved, is to be misled by the expression mens ... the "mens" of the defendant must usually be involved in the offence: but the epithet "rea" refers to the criminality of the act in which the mind is engaged, not its moral character."

As to the second ground, he noted that, before the issue came before the Court of Appeal on the applicant's appeal, the availability of a defence of involuntary intoxication had not been the subject of any decided authority under English law. It was thought that an obiter remark by Park J in Pearson's Case (1835) 2 Lew 144 that "if a party be made drunk by stratagem, or the fraud of another, he is not responsible"; and a passage in Hale's Pleas of the Crown (1736), vol. 1, pp. 31 - 32 could be interpreted consistent with the existence of such a defence, but neither could be read as authority for such a principle.

Following an extensive review of the relevant case law Lord Mustill concluded:

"My Lords, I cannot find in this material any sufficient grounds for holding that the defence relied upon is already established by the common law, any more than it can be derived from general principles."

Having concluded that a defence of involuntary intoxication neither followed from any general principle of common law, nor had been recognised or established by any decided authority, the House of Lords declined to extend the common law to encompass the defence, indicating that if such a defence were to be created it would need to be articulated within a statutory framework. The House of Lords accordingly answered the certified question in the negative and remitted the case to the Court of Appeal to dispose of the appeal in the light of its ruling.

On 21 March 1995 the Lord Chief Justice gave the judgment of Court of Appeal on the remitted appeal. In allowing the conviction to stand in light of the House of Lord's ruling the Court of Appeal determined, inter alia, that in the absence of a defence of involuntary intoxication: 1) the decision of the trial judge as to the relevance of K.S.'s evidence of his conversation with K.P. could not be said to have been wrong in law; and 2) that trial judge had not misdirected the jury on the issue of intention.

COMPLAINTS

1. The applicant complains in general terms that he did not receive a fair trial in breach of Article 6 of the Convention. Specifically the applicant complains that the Court of Appeal's failure, in hearing the remitted appeal, to warn the applicant through his counsel that it would reconsider and review its earlier ruling as to admissibility of evidence of the conversation between K.P. and K.S. was such as to deprive the applicant of a fair hearing, and constituted a breach of the specific rights guaranteed under para. 3(a), (b) and (c) of Article 6 of the Convention.

2. The applicant further complains under Article 7 of the Convention he was convicted of an offence which did not constitute a criminal offence under domestic law at the time when it was committed. The applicant complains that at the time of the commission of the offence the relevant domestic law recognised a defence of involuntary intoxication which was removed by the subsequent decision of the House of Lords.

THE LAW

1. The applicant complains that the absence of any warning by the Court of Appeal that it would review its earlier ruling as to the relevance and admissibility of the evidence of the conversation between K.P. and S.F. was a breach of para. 3(a), (b) and (c) of Article 6 (Art. 6-3-a, 6-3-b, 6-3-c) and such as to render the hearing unfair contrary to para. 1 of Article 6 (Art. 6-1) of the Convention. These provisions, insofar as relevant, provide:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence;
>
> c. to defend himself in person or through legal assistance ...;"

The Commission recalls that in the context of Article 6 (Art. 6) the overriding question is whether the proceedings when considered in their entirety, including any appeal proceedings, were fair (see inter alia Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32 - 33, para. 33, and Helmers v. Sweden judgment of 29 October 1991, Series A no. 212, p. 15, para. 31). The guarantees provided for by para. 3 of Article 6 (Art. 6-3) are but specific features of the more general right to a fair trial provided for within paragraph 1 (see inter alia Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, para. 29; and T v. Italy judgment of 12 October 1992, Series A no. 245-C, p. 41, para. 25). Accordingly the Commission finds it appropriate to examine the applicant's submissions from the angle of para. 1 of Article 6 taken together with the principles inherent in paragraph 3 (Art. 6-1+6-3).

The Commission further recalls that the rules of admissibility and the assessment of evidence are principally matters for the domestic courts to determine. The Commission notes that it is not, as a general rule, within the purview of the Commission to gainsay the assessment of the domestic courts as to relevance of the evidence which was before them, save where it is apparent that the approach of the court in making its assessment was arbitrary or capricious and such as to render the proceedings, taken as a whole, unfair (see inter alia Vidal v. Belgium, loc. cit., pp. 32 - 33, paras. 33 - 34; Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34; and Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, para. 43).

The Commission notes that the Court of Appeal's earlier ruling that the evidence was relevant and therefore ought to have been admitted was made in the context of its finding that the defence of involuntary intoxication was available to the applicant. The Court of Appeal did not find that the evidence ought to have been admitted irrespective of the availability of a defence of involuntary intoxication, nor that the exclusion of the evidence was a sufficient ground of itself to render the conviction unsafe. The Commission does not therefore consider the Court of Appeal's subsequent ruling that the evidence was inadmissible inconsistent with its earlier ruling.

Moreover, the Commission notes that the issue regarding the admissibility of this evidence had been the subject of full argument

before the Court of Appeal on the earlier appeal. Although the two judges sitting with the Lord Chief Justice differed in each appeal, in both cases the judgment of the court was given by the Lord Chief Justice. The Commission does not therefore consider that there was any absence of continuity between the two courts, or, more particularly, that the Court of Appeal's subsequent ruling could be said to have been made in ignorance of the relevant issues.

Accordingly, the Commission does not consider that the Court of Appeal acted in a manner which was either arbitrary or capricious, or was such as to amount to a breach of paras. 1 and 3 of Article 6 (Art. 6-1, 6-3), and in any way to render the proceedings taken as a whole unfair.

The applicant complains in general terms of an unfair trial. The Commission has considered the proceedings taken as a whole and does not discern any evidence to sustain this complaint. Accordingly the Commission finds no appearance of a violation 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. The applicant complains that in breach of Article 7 para. 1 (Art. 7-1) of the Convention he was convicted of an offence which did not at the time when it was committed constitute a criminal offence under domestic law.

Article 7 para. 1 (Art. 7-1) of the Convention, insofar as relevant, 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."

The Commission recalls that Article 7 para.1 (Art. 7-1) is to be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution and conviction (see Eur. Court HR, S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, p. 41, para. 34; and C.R. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-C, p. 68, para. 32). Thus what Article 7 para. 1 (Art. 7-1) prohibits is the development of the law in a way such that acts not previously punishable are held to entail criminal liability, or existing offences extended to include acts which it is clear did not previously constitute a criminal offence (see No. 8710/79, Dec. 7.5.82, DR 28, p. 81).

The Commission recalls that the development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (Art. 7) does not outlaw the general clarification of the rules of criminal liability through judicial interpretation provided this is consistent with the essence of the offence and could reasonably be foreseen (see S.W. v. the United Kingdom, loc. cit., p. 42, para. 36; and C.R. v. the United Kingdom, loc. cit., p. 69, para. 43).

The Commission further recalls that it is in the first place for the courts to interpret and apply domestic law since they are in the nature of things particularly qualified to settle issues arising in this connection (see Eur. Court HR, Kemmache v. France (No. 3) judgment of 24 November 1994, Series A no. 296-C, p. 87, para. 37).

The Commission notes that the applicant's complaint is not that any element of the substantive offence was unclear, but rather that at

the time of the commission of the offence domestic law recognised a defence of involuntary intoxication.

The Commission recalls that in reaching its judgment, the House of Lords submitted the relevant case-law to extensive review. The Commission finds no reason to doubt that the position under the domestic law was otherwise than is stated to be within the judgment of the House of Lords. The Commission recalls that the House of Lords concluded 1) that a defence of involuntary intoxication could not be said to follow from any general principles of common law; nor 2) could it be said that the defence had ever been recognised by any established line of authority. The Commission does not therefore consider that in reaching its decision the House of Lords created any new law in the sense that it overruled any existing or established authority current at the time of the commission of the offence. The Commission notes that whilst the Court of Appeal reached a different conclusion as to the availability of the defence of involuntary intoxication, it did so by reasoning from first principles, not on the basis that the defence had already been established by any solid line of authority.

Accordingly, the Commission does not consider that at the time of the commission of the offence it could be said that the defence of involuntary intoxication had been sufficiently recognised or established within domestic law that the decision of the House of Lords represented a departure from existing or established principle so as to overstep the limits of what could be regarded as acceptable clarification of the law, or was such as represented an unforeseeable departure from any existing or established law. Accordingly, the Commission finds there was no violation of Article 7 para. 1 (Art. 7-1) 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.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber