AS TO THE ADMISSIBILITY OF

Application No. 25205/94
by Adrianus KREMERS
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 19 October 1995, the following members being present:

MM. H. DANELIUS, President
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN

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 14 December 1993 by Adrianus KREMERS against the Netherlands and registered on 20 September 1994 under file No. 25205/94;

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, and residing in Velp, the Netherlands. Before the Commission he is represented by Mr. L.J.L. Heukels, a lawyer practising in Haarlem, the Netherlands.

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

a. Particular circumstances of the case

In or around August 1990, the police started investigating accusations of rape and sexual abuse, lodged by three sisters: A. (born in 1968), B. (born in 1972), and C. (born in 1974). The sisters alleged that they had been raped and sexually abused over a long period of time by several relatives, amongst whom the applicant who is their uncle.

The police investigation was initially directed against, inter alia, the applicant and two of his brothers. Later, at the end of 1990 or the beginning of 1991, A., B. and C. also accused two other relatives, Mr. H. and a third brother of the applicant. Subsequently, the public prosecutor (officier van justitie) ordered the re-opening of the police investigation. During the re-opened police investigation additional evidence against the applicant appeared. The results of the re-opened police investigation were added to the applicant's case-file in November 1991.

It appears that, as a result of the complaints by the three

sisters, criminal proceedings were brought against at least seven persons, amongst whom the applicant, three of his brothers, his brother-in-law H., his sister Mrs. B.K. who is also the mother of A., B. and C., and Mr. H.W. who is married to a sister of A., B. and C.

The applicant was arrested on 18 September 1990 and subsequently detained on remand. He remained detained throughout the criminal proceedings against him. His requests for release were rejected on 26 February, 6 May, 5, 10 and 19 June 1992, respectively.

During the applicant's interrogations by the police on 18, 19, 20 and 28 September and 2 October 1990, he admitted having raped A., B. and C.

On 23 November 1990, the applicant was summoned to appear before the Regional Court (Arrondissementsrechtbank) of Arnhem on 11 December 1990. He was charged with the multiple rape of A., the multiple rape of B., and the multiple rape, committed either alone or together with another, of C. These offences were alleged to have taken place between 1981 and 1987.

On 11 December 1990, the Regional Court adjourned its examination of the case. On 22 January 1991, the Regional Court referred the case to the investigating judge (rechter-commissaris) for the examination of a number of witnesses.

In January and February 1991, the investigating judge heard A., B. and C., two of their sisters and their mother. The applicant and his lawyer were given the opportunity to submit questions in writing to the investigating judge but were not allowed to question the witnesses directly. The applicant and the public prosecutor could follow the examinations on a TV-monitor in a separate room.

On 26 and 27 March 1991, the Regional Court tried the case. The applicant denied all accusations against him. He stated that his confessions to the police were incorrect and that they were the result of pressure exerted by the police during the interrogations. He admitted, however, that he had had sexual intercourse with A., but stated that this had happened with her consent.

On 9 April 1991, the Regional Court convicted the applicant of all charges and sentenced him to seven years' imprisonment. It used in evidence statements made by A., B. and C. to the police and the applicant's confessions before the police. The Regional Court stated that it had not been made plausible that the police had exerted unacceptable pressure on the applicant. Both the applicant and the public prosecutor lodged an appeal with the Court of Appeal (Gerechtshof) of Arnhem.

In November 1991, the results of the re-opened police investigation (see above) were added to the applicant's case-file by the Procurator General (Procureur-Generaal) to the Court of Appeal.

On 10 December 1991, the Court of Appeal started its examination of the case. In compliance with the applicant's request, the Court of Appeal referred the case to the investigating judge, in order to examine witnesses, amongst whom the alleged victims.

On 13 and 14 January 1992, the investigating judge heard B. and C., A. was not heard. The investigating judge, the court registrar and the witnesses were in a room on the first floor of the police station of Velp. The Procurator General was in an adjacent room. The applicant and his lawyer were in a room on the second floor. The Procurator General and the defence could follow the hearings on TV-monitors. Video recordings were made of the hearings. The investigating judge interrupted each of the hearings to give the defence the opportunity to put additional questions to the witnesses. In addition to B. and C.,

the investigating judge also heard their elder brother, one of the other accused Mr. H.W., and Ms. H., a friend of A., B. and C.

On 25 February 1992, the Court of Appeal resumed its examination of the case. At that time, the separate cases of all accused, except Mr. H.W. who had not filed an appeal against his conviction by the Regional Court, were pending before the Court of Appeal. The Court of Appeal dealt with all the cases on 25 and 26 February, 6 May and 2, 3, 5, 10, 17 and 19 June 1992. Although all cases were dealt with simultaneously, they remained formally separated. The applicant denied the accusations against him. He admitted he had had intercourse with A., but maintained that she had consented.

On 25 February 1992, the Court of Appeal heard police officers K., M., S. and W. These police officers had been involved in the examinations of the alleged victims and/or the interrogations of the applicant and the other accused. The Court of Appeal questioned them, inter alia, on the interrogation tactics used, on how the applicant's confession before them had come about and whether they had exerted pressure on the applicant.

On 26 February 1992, at the applicant's request, the Court of Appeal heard Mr. P., a psychologist having a certain expertise as regards the particular problems surrounding incest. On the same day, the Court of Appeal viewed parts of the video recordings of the hearings of B. and C. by the investigating judge on 13 and 14 January 1992. Subsequently, the applicant filed objections to the way in which the investigating judge had carried out the examinations of the witnesses on 13 and 14 January 1992. He objected, inter alia, to the fact that the questions had to be submitted in writing beforehand, that not all the questions he had submitted had been put to the witnesses, and that the defence had not been given the opportunity to question the witnesses directly. He also alleged that the investigating judge had played too active a role when questioning B. and C. The applicant argued that as a consequence of these irregularities the prosecution should be declared inadmissible. If the Court of Appeal should reject the request to declare the prosecution inadmissible, he requested that A. be summoned before the Court of Appeal.

The Procurator General, stating that A. was in hospital, objected to a further hearing of the alleged victims in view of the mental stress such examinations already had caused and would continue to cause them.

The Court of Appeal, however, decided to summon A. and adjourned its further examination until 6 May 1992.

On 6 May 1992, the Court of Appeal adjourned its further examination of the case until 2 June 1992 as the Procurator General could not attend the hearing and as it had not been possible for a colleague to get acquainted with the extensive case-file in time.

On 2 June 1992, the Court of Appeal resumed its examination. Despite objections by the defence, the Court of Appeal decided to examine A. in camera and in the absence of the applicant. It considered, inter alia:

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> "... that the hearing of the witness A. ... shall take place in camera, for the weighty reason that the interest of the investigation and the finding of the truth so require. After all, the witness must be enabled to respond as freely and frankly as possible to the questions that will be put to her about the charges against the suspect, knowing that her statements will not immediately come to

public notice ... that, furthermore, the hearing shall take place in the absence of the suspect, since a direct confrontation between the witness and the suspect is psychologically and emotionally too burdensome for the witness...."

A. was heard in a separate room in the presence of the three judges of the Court of Appeal, the Registrar to the Court of Appeal, the Procurator General, the applicant's lawyer and her own lawyer. The applicant remained in the court room, where he could follow the examination via a TV-monitor. In addition to the applicant, the lawyers of the other accused, the expert-witness Mr. P. and a number of court officers (parketpolitie) were present in the court room. They too could follow the examination on the TV-monitor.

The Court of Appeal put a number of questions to A., which had been submitted beforehand in writing by the applicant. The Court of Appeal gave the applicant's lawyer and the Procurator General the opportunity to put additional questions to the witness directly. The examination of the witness was interrupted in order to allow the applicant's lawyer to consult his client to find out whether he wished to put additional questions to the witness. The applicant availed himself of this opportunity. After A. had been heard, the applicant stated that he did not request her presence any longer. Subsequently, the three judges, the Registrar, the Procurator General and the applicant's lawyer returned to the court room, where the President of the Court of Appeal gave a summary of the statements of the witness.

Also on 2 June 1992, the Court of Appeal heard B. and C. in the cases of some of the other accused. At the applicant's request, the transcripts of their examinations were added to his case-file.

On 3 June 1992, the applicant informed the Court of Appeal that he did not wish to examine any more witnesses. At his request, the Court of Appeal added to his case-file statements made on 3 June 1992 by witnesses in the cases against some of the other accused in the case.

On the same day, the Court of Appeal again heard Mr. P. He said that he had seen the hearings of A., B. and C. on 2 June 1992 via a TV-monitor. He stated that his first impression was that the hearings had been extremely burdensome, painful and emotional for them, that they had repeatedly been unable to answer a question because of their emotions, and that these emotions appeared to be genuine.

In the course of Mr. P.'s examination, the applicant's lawyer mentioned that in April 1988, B. and C. had reported to the police that Mr. W., at that time a friend of their mother, had raped them.

On 5 June 1992, the applicant stated that the contents of the case-file concerning Mr. W. had come to his attention the day before. That case-file contained two medical certificates from the gynaecologist Dr. H.-K., who had examined B. and C. on 27 April 1988. In the certificates, Dr. H.-K. stated that B.'s hymen was ruptured and that C.'s hymen appeared not to be ruptured. Mr. W.'s case-file also contained a procès-verbal in which B. stated that she did not know much about sex and that she supposed that her hymen had been ruptured by Mr. W. when he had intercourse with her for the first time in 1987 or 1988, because she had lost blood on that occasion. Police officer M. had been involved in the case against Mr. W.

The Court of Appeal decided to add the case-file of Mr. W. to the applicant's case-file and to summon Dr. H.-K. as an expert witness. The Court of Appeal heard Dr. H.-K. that same afternoon.

Dr. H.-K. stated that it is practically impossible to state with 100% certainty whether intercourse has taken place on the basis of an

inspection of the hymen. Dr. H.-K. had had the impression, given the state of B.'s hymen and the state of B.'s vaginal secretion, that B. had had frequent sexual intercourse. She further stated that B.'s behaviour had given her the impression that she had "a complete life behind her". As regards C. she had had the impression that C. had not had frequent sexual intercourse.

On 10 June 1992, the applicant's lawyer informed the Court of Appeal that, in accordance with an agreement concluded between the lawyers representing the other accused in the separate appeal proceedings simultaneously pending before the Court of Appeal, the defence wished to submit a general defence plea. This general plea concerning all cases was subsequently submitted by one of the lawyers representing one of the accused, namely Mr. L.J.L. Heukels. The defence, inter alia, drew attention to the apparent discrepancies between B.'s and C.'s accusations against the applicant on the one hand and the contents of Mr. W.'s case-file on the other. The defence requested the Court of Appeal to appoint one or more experts, such as a psychiatrist, a clinical psychologist, an incest expert and/or a traumatologist, in order to investigate the mental health of B. and C.

The Court of Appeal decided to hear another gynaecologist. It rejected the request by the defence to appoint other experts since it did not consider this necessary. The Court of Appeal decided to summon the gynaecologist Professor H., who had been proposed by both the Procurator General and the defence.

On 17 June 1992, the Court of Appeal heard Professor H. and Dr. H.-K. The applicant was given the opportunity to question both witnesses. Professor H. stated that, having regard to the inspection method used by Dr. H.-K. in this medical examination, the latter's finding that C.'s hymen appeared to have been intact was not necessarily correct.

On 19 June 1992, the Court of Appeal, at the applicant's request, heard another gynaecologist, Professor E., as an expert witness. He stated that Dr. H.-K.'s method of examination was reliable and that he had no reason to doubt her conclusions.

Also on 19 June 1992, the Court of Appeal heard the Procurator General's closing speech, in which she demanded a sentence of fourteen years' imprisonment, and the applicant's final pleas. The applicant's final pleas consisted of a general final plea concerning the separate cases of all accused, presented by Mr. L.J.L. Heukels, an additional final plea concerning all accused, presented by Mr. P.R. Wery, and an additional final plea concerning the specific case against the applicant, presented by his lawyer Mr. J.C.C.M. Brand.

The defence argued, inter alia, that the prosecution should be declared inadmissible for a number of reasons. It alleged that the police, for whose actions and failures the prosecuting authorities are responsible, had intentionally withheld Mr. W.'s case-file, including the medical certificates on B. and C. The defence pointed out that the public prosecutor had ordered the re-opening of the police investigation during the trial before the Regional Court without informing the defence or the Regional Court, and that the results of the re-opened police investigation were added to his case-file by the Procurator General in November 1991, after he had lodged his appeal. He further objected to the fact that during a recess of one of the hearings before the Court of Appeal, the Procurator General had entered the judges' chambers, where the fully-robed judges were present.

In addition, the applicant complained that the Court of Appeal had refused to summon other experts as witnesses and that the Court of Appeal had told A. before she was examined that she was not obliged to answer every question. The applicant requested a new examination of B. and C. in view of the contents of the case-file of Mr. W. as well as

the appointment of experts.

In its judgment of 3 July 1992, the Court of Appeal quashed the Regional Court's judgment of 9 April 1991, acquitted the applicant of the charges involving C., convicted him of the charges involving A. and B. and sentenced him to five years' imprisonment with deduction of the time he had been detained on remand. The Court of Appeal used in evidence statements made by A. to the police and before the Court of Appeal, statements made by B. to the police, the applicant's statement before the Court of Appeal that he had had intercourse with A. and his confessions to the police. The Court of Appeal held that the methods used in the police investigation had not been incorrect and that it had not been made plausible in any way that the police had acted improperly or without due care.

As regards the alleged withholding of documents, the Court of Appeal held:

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> "The argument that the police intentionally failed to add to the case-file [the reports made by B. and C. against Mr. W. and the medical certificates on them of 27 April 1988] lacks foundation, because both in the ... procès-verbal in the present criminal proceedings nr. M 9932/AB/1991 of March 1991 ... and in the procès-verbal of the examination of C. dated 29 January 1991, nr. M 9931/G/1991 ... the police officers explicitly referred to the case-file of the criminal case against Mr. W., mentioning both the date of the criminal complaint and the registration number of the case-file."

As regards the presence of the Procurator General in the judges' chambers, the Court of Appeal held:

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> "The court considers on this point that the Procurator General entered the judges' chambers during a recess of the trial only in order to hand a number of letters from the lawyers in the present and other cases to the members of the court. This happened while no deliberations were taking place in the judges' chambers, which, as is correctly stated in the [defence's] written plea, has been stated by the President [of the Court of Appeal].
>
> In the opinion of the court there were, under these circumstances, no reasonable grounds to fear that the Procurator General was involved in any way in deliberations in chambers."

As regards the re-opening of the police investigation, the Court of Appeal held:

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> "The court rejects this argument. The re-opened [police] investigation, which resulted in the second procès-verbal with annexes, took place because [A., B. and C.] made new statements, causing suspicions to arise against persons who, up to that moment, had not been suspected of ... involvement in respect of the facts at issue. This second [police] investigation was, therefore, not a further investigation in respect of the suspects who, at that moment, had already been summoned, but was directed against new suspects. This does not alter the fact that during the re-opened police investigation information came forward

concerning the suspects who had already been summoned at that moment.

It was open to the Procurator General, pursuant to Section 414 of the Code of Criminal Procedure, which gives the suspect and his lawyer the same competence, to add new documents to the case-file pending the appeal proceedings."

Insofar as the applicant had complained that the proceedings had been unfair, the Court of Appeal considered, inter alia, that:

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"In the course of the various court hearings, the defence has been able to submit whatever it considered relevant. As a result of the addition of documents to the case-file at the court hearing of 5 June 1992, an expert witness was heard on the same day and two additional experts were heard during the court hearings of 17 June and 19 June 1992, respectively. Those additional hearing dates were determined in consultation with and with the approval of the defence and the Procurator General. The court finds that the suspect - in view of this procedure - cannot have been harmed in his defence and that there has been no violation of the principle of a fair trial."

The Court of Appeal further rejected the applicant's request to re-open its investigation and to examine several witnesses and experts.

The applicant subsequently lodged an appeal in cassation with the Supreme Court (Hoge Raad) within the time-limit of 14 days after the pronouncement of the Court of Appeal's judgment, as provided for in Section 432 of the Code of Criminal Procedure (Wetboek van Strafvordering).

The hearing before the Supreme Court was scheduled for 17 February 1993. A notification was sent to the applicant in person. However, no notice was sent to his lawyer. At that time, the lawyer who had represented the applicant before the Court of Appeal was replaced by Mr. Heukels, who had represented Mrs. B.K. before the Court of Appeal. Mr. Heukels did not become aware of the date of the Supreme Court hearing until 11 February 1993. At Mr. Heukels' request, the Supreme Court postponed the hearing until 23 February 1993. It rejected a request for a longer postponement.

On 23 February 1993, the applicant objected to the fact that he had not been informed in accordance with Section 437 in conjunction with Section 51 of the Code of Criminal Procedure of the date of the hearing before the Supreme Court and that the Supreme Court had postponed the hearing for six days only, due to which he allegedly did not have adequate time and facilities to prepare the defence. The applicant reiterated his complaints on the alleged withholding of documents, the re-opening of the police investigation, and the presence of the Procurator General in the judges' chambers. He further complained of the length of the criminal proceedings against him and objected to the fact that the Court of Appeal had failed to decide on his request to examine B. and C.

On 27 April 1993, the Advocate General (Advocaat-Generaal) to the Supreme Court submitted his written conclusions, which were sent to the applicant, who replied on 7 June 1993.

On 22 June 1993, the Supreme Court rejected the applicant's appeal in cassation. It upheld the reasoning of the Court of Appeal and considered that the Court of Appeal, given its rejection to re-open its investigation and to examine several witnesses and experts, had not failed to reply to the request to summon B. and C. as witnesses.

As regards the failure to notify the applicant's lawyer, the Supreme Court held that, in cassation proceedings, it can only examine complaints concerning a judicial decision against which an appeal in cassation has been lodged. Complaints concerning decisions of the Supreme Court or acts of the Public Prosecutions Department to the Supreme Court cannot be examined in cassation proceedings.

The Supreme Court also rejected the complaint of the length of the proceedings. It noted that this complaint had not been raised before the trial courts and found that these courts had dealt with the complex case with the required expediency. It further did not find that significant delays had occurred in the cassation proceedings. Finally the Supreme Court found that the total duration of the criminal proceedings, during which the case had been dealt with at three levels, had not exceeded a reasonable time.

b. Relevant domestic law

Pursuant to Section 24 of the Judicial Organisation Act (Wet op de Rechterlijke Organisatie) it is prohibited for members of the judiciary to have private contacts about pending or future proceedings with the parties to those proceedings. Non-compliance with this prohibition may result in a disciplinary reprimand (Section 14 of the Judicial Organisation Act) or, if the offence is repeated, even dismissal (Section 11 d.3 of the Judicial Organisation Act). Pursuant to Section 28 of the Judicial Organisation Act members of the judiciary are obliged to keep deliberations secret.

Pursuant to Sections 433 and 439 of the Code of Criminal Procedure an appellant in cassation may submit his grounds of appeal in cassation (middelen van cassatie) at the latest on the day of the hearing before the Supreme Court. Pursuant to Section 99 of the Act on Judicial Organisation the scope of an appeal in cassation is limited to points of law.

COMPLAINTS

1. The applicant complains that, during the proceedings before the Regional Court, the public prosecutor ordered the police to re-open the police investigation, without informing the Regional Court or the defence whilst the results of the re-opened investigation were added to his case-file after he had lodged his appeal with the Court of Appeal.

2. The applicant complains that the police withheld crucial information, in particular the medical reports of 27 April 1988 and B.'s and C.'s statements made to the police in the case against Mr. W.

3. The applicant finally complains that the Court of Appeal failed to summon B. and C. for a second time, although new relevant facts had come to light thereby depriving the defence of the possibility to question these witnesses about these new facts.

4. The applicant complains that the Procurator General was present in the judges' chambers of the Court of Appeal while the judges of that court were there to deliberate. The Court of Appeal thus gave the impression of allowing itself to be influenced by the Procurator General and therefore not to be impartial.

5. The applicant complains that the Procurator General to the Supreme Court, contrary to Section 437 para. 1 in conjunction with Section 51 of the Code of Criminal Procedure, failed to inform his lawyer of the date of the hearing before the Supreme Court.

6. The applicant complains that the Supreme Court postponed its hearing for only six days, which, in view of the size of the case-file,

was insufficiently long for his lawyer to study the case-file.

7. The applicant further complains that the Supreme Court failed to decide the two previous complaints, although they had been raised explicitly in the cassation proceedings.

8. The applicant complains that the criminal charges against him were not determined within a reasonable time.

The applicant relies on Article 6 paras. 1, 2 and 3 of the Convention.

THE LAW

1. The applicant has lodged a number of complaints under Article 6 (Art. 6) of the Convention. This provision reads, insofar as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal....
> ....
>
> 2. Everone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights:
> ....
> b. to have adequate time and facilities for the preparation of his defence;
> ....
> 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;
> ...."

2. Insofar as the applicant alleges that the proceedings against him were not in conformity with Article 6 para. 2 (Art. 6-2) of the Convention and insofar as this complaint has been raised in the domestic proceedings, the Commission considers that it has remained fully unsubstantiated.

It follows that this part of the application is manifeslty ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The Commission will examine the applicant's complaints under Article 6 paras. 1 and 3 (Art. 6-1, 6-3) taken together, since the guarantees in paragraph 3 of Article 6 (Art. 6-3) represent constituent elements of the general concept of a fair hearing set forth in paragraph 1 (Art. 6-1) of this provision (cf. Eur. Court H.R., Lala judgment of 22 September 1994, Series A no. 297-A, p. 12, para. 26).

4. The applicant complains that during his trial before the Regional Court, the public prosecutor ordered the police to re-open its investigation, without informing the Regional Court or the defence, and that the results of the re-opened investigation were added to his case-file after he had lodged his appeal with the Court of Appeal.

The Commission notes that the Regional Court rendered its judgment in the applicant's case on 9 April 1991. In accordance with Section 414 of the Code of Criminal Procedure, which allows both the Procurator General and the defence to add new documents to the case-file during proceedings on appeal, the results of the re-opened police investigation were added to the applicant's case-file in November 1991.

The Commission further notes that the Court of Appeal started its examination of the applicant's case on 10 December 1991. It then adjourned its examination until 25 February 1992. Between 25 February and 19 June 1992, the Court of Appeal examined the case in the course of nine hearings and pronounced its judgment on 3 July 1992.

The Commission finds, as regards the addition of the results of the re-opened police investigation to the applicant's case-file, that the defence has been provided with ample time and opportunity to study and to challenge these additional means of evidence and does not find, on this point, that the defence was placed at a substantial disadvantage vis-à-vis the prosecuting authorities.

It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant further complains that the police withheld crucial information, in particular Dr. H.-K.'s medical reports of 27 April 1988 and the statements B. and C. made to the police in the case against Mr. W.

The Commission recalls that the domestic courts rejected this complaint for lack of foundation. The Commission notes that, after the defence had realised the possible relevance of the facts of the case of Mr. W., it requested the Court of Appeal to add Mr. W.'s case-file to the applicant's file, which request was granted. The Commission further notes that, in the course of the last four hearings before the Court of Appeal, the contents and relevance of the material contained in Mr. W.'s case-file formed the subject of an elaborate examination before the Court of Appeal, including the hearing of three gynaecologists. The Commission finally notes, on this point, that in its judgment the Court of Appeal acquitted the applicant of the charges involving C.

The Commission, therefore, finds that on this point there is no indication that the proceedings were not in conformity with the requirements 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.

6. The applicant complains that the Court of Appeal rejected the request by the defence to summon B. and C. in order to examine them on their statements made in the case of Mr. W.

Insofar as the present complaint concerns C., the Commission observes that the applicant was acquitted of the charges involving her. As regards this part of the complaint, the applicant cannot, therefore, claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention.

Insofar as the present complaint concerns B., the Commission recalls that Article 6 (Art. 6) does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (cf. No. 8231/78, Dec. 6.3.82, D.R. 28, p. 5; 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).

The Commission further recalls that the taking of evidence is primarily governed by the rules of domestic law, and that it is in principle for the domestic courts to assess the evidence before them. The task of the Convention organs in this respect is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (cf. Eur. Court H.R., Saïdi judgment of

20 September 1993, Series A no. 261-C, p. 56, para. 43).

All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of other statements previously made is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6-3-d, 6-1), provided that the rights of the defence have been respected. As a rule, these rights require that defendants be given an adequate and proper opportunity to challenge and question witnesses against them either when these statement were made or at a later stage of the proceedings (Saïdi judgment, loc. cit., p. 56, para. 43).

As to the notion of "witness", the Commission recalls that B., for the purposes of Article 6 para. 3 (d) (Art. 6-3-d) of the Convention, is to be regarded as a witness - a term to be given its autonomous interpretation - because her statements in the case of Mr. W. were in fact before the Court of Appeal, which took them into account (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

It must, therefore, be examined whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 (Art. 6) of the Convention in respect of the evidence submitted by B.

B. was, in the applicant's case, not heard by the trial courts. She was, however, examined by the investigating judge in the presence of the applicant's lawyer, the first time in early 1991 and the second time on 13 January 1992. The defence was provided with the opportunity to put questions to her. The Commission notes in this respect that the applicant did not avail himself of the possibility to have B. heard by the Court of Appeal in his own case, when she was heard by the Court of Appeal on 2 June 1992 in respect of the other related cases, which were being dealt with simultaneously.

The Commission further notes, that after the case-file of Mr. W. had been admitted as evidence, three gynaecologists were extensively examined before the Court of Appeal in connection with information contained in this case-file.

The Commission has regard to the special features of criminal proceedings concerning rape and other sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life. Therefore, the Commission accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence (Baegen v. the Netherlands, Comm. Report 20.10.94, para. 77).

The Commission recalls that Mr. P., a psychiatrist, stated before the Court of Appeal that his first impression was that the examination before the Court of Appeal had been extremely burdensome, painful and emotional for the witnesses, that it happened repeatedly that they could not answer a question because of their emotions, and that these emotions appeared to be genuine.

In these circumstances the Court of Appeal's decision not to summon B. cannot be considered as arbitrary or unreasonable.

In addition, B.'s statements were not the only evidence on which the Court of Appeal based its conviction of the applicant as regards the charges involving her. It had regard in particular to the confessions the applicant had made to the police. It is true that the

applicant withdrew his earlier confessions before the trial courts, but, where a court is confronted with a contradiction between an earlier statement and subsequent evidence at the trial, it is the task of this court to consider the credibility of the various statements concerned (cf. No. 8414/78, Dec. 4.7.79, D.R. 17, p. 231).

The Commission, therefore, finds that the proceedings against the applicant in this respect do not disclose a violation of his rights under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

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.

7. The applicant further complains of the Procurator General's presence in the judges' chambers of the Court of Appeal during an interruption of the court hearing. He submits that this cast a doubt on the impartiality of the Court of Appeal.

The Commission recalls that the existence of impartiality for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (Eur. Court H.R., Hauschildt judgment of 24 May 1989, Series A no. 154, p. 21, para. 46; Padovani judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 25).

The Commission notes that the applicant has not expressed doubts as to the personal impartiality of the members of the Court of Appeal.

As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. It follows that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the opinion of the accused is important but not decisive. What is decisive is whether his fear can be regarded as objectively justified (Padovani judgment, loc. cit., p. 20, para. 27).

In its judgment of 3 July 1992, the Court of Appeal stated on this point that during an interruption of the trial, the Procurator General entered the judges' chambers only in order to hand a number of letters to the members of the Court of Appeal and that no deliberations were taking place at that time. The Commission has no reason to doubt the accuracy of this statement. Having regard also to Section 24 in conjunction with Sections 14 and 11 of the Judicial Organisation Act, the Commission finds no elements that warrant misgivings about the objective impartiality of the Court of Appeal.

It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

8. The applicant complains that his lawyer was not duly informed of the date of the hearing before the Supreme Court. He submits that the lawyer was not aware of this hearing until 11 February 1993. When his lawyer requested a postponement, the Supreme Court postponed the hearing for only six days, which gave the lawyer insufficient time to study the case-file.

Insofar as the applicant complains that the Procurator General to the Supreme Court violated Section 437 para. 1 in conjunction with

Section 51 of the Code of Criminal Procedure, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its task is to ensure the observation of the obligations undertaken by the parties to the Convention. It is not competent to deal with a complaint alleging that errors of law or fact have been committed by domestic authorities, 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 (cf. No. 21283/93, Dec. 5.4.94, D.R. 77 pp. 81 and 88).

Therefore, it has to be examined whether in the proceedings before the Supreme Court the applicant's rights under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention have been respected.

The Commission notes in the first place that the applicant filed a timely appeal in cassation, i.e. not later than 17 July 1992. The Supreme Court examined the case in February 1993, which is more than six months later.

The Commission further notes that the applicant himself was notified of the date of the hearing before the Supreme Court. It has not been alleged nor appeared that this notification did not reach the applicant before 11 February 1993, or that he was prevented from informing his lawyer of this notification in time.

The Commission also notes that the lawyer, who had represented the applicant before the Court of Appeal, did not represent the applicant before the Supreme Court. In the latter proceedings the applicant was represented by another lawyer, namely Mr. Heukels who had, at two occasions, delivered general defence pleas concerning the separate cases of all accused, including the applicant, in the proceedings before the Court of Appeal, which had dealt with all cases simultaneously.

The Commission finally notes that Mr. Heukels learned on 11 February 1993 that the hearing before the Supreme Court was scheduled for 17 February 1993 and that, following his request for a postponement, this hearing was postponed until 23 February 1993.

The Commission finds that, in view of the fact that Mr. Heukels presented on two occasions a general defence plea to the Court of Appeal in the cases of the applicant and the other accused, he cannot be regarded as having been unfamiliar with the facts of the applicant's case. Moreover, he learned of the date of the hearing before the Supreme Court on 11 February 1993. Following his request for a postponement, this hearing was postponed and took place on 23 February 1993. The applicant's lawyer thus had twelve days to prepare the appeal in cassation, which was limited to points of law, and he could submit the grounds of appeal at the latest on the day of the hearing before the Supreme Court.

In these circumstances the Commission considers that, on this point, there is no appearance of a violation of the applicant's rights under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) 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.

9. The applicant complains that the Supreme Court did not deal with his complaints of the failure to notify his lawyer of the date of the hearing before the Supreme Court and of the postponement of this hearing.

The Commission recalls that if a State makes provisions for an appeal in cassation, it is entitled to lay down the provisions by which

the appeal shall be governed and fix the conditions under which it may be brought (cf. No. 12972/87, Dec. 9.11.87, D.R. 54, p. 207).

In the present case the Supreme Court considered that the complaints at issue fell outside the scope of a cassation procedure. This finding cannot be considered to violate Article 6 (Art. 6) of the Convention.

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.

10. The applicant complains that the criminal charges against him were not determined within a reasonable time.

The Commission observes that the proceedings at issue began on 18 September 1990 when the applicant was arrested, and ended with the Supreme Court's judgment of 22 June 1993. They thus lasted two years, nine months and four days.

The Commission recalls that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Convention organs' case-law and in the light of the particular circumstances of the case, which in the present case call for an overall assessment (cf. Eur. Court H.R., Vendittelli judgment of 20 February 1991, Series A no. 293-A, p. 10, para. 22).

The Commission notes that the present proceedings formed part of a relatively complex case. The proceedings concerned serious offences which were alleged to have taken place over a long period of time, involving three victims and at least seven accused. Both the police investigation and the examination before the trial courts were elaborate, involving the examination of the accused, the victims, several witnesses and experts. In addition, the applicant's case was considered by three different courts.

For these reasons, the Commission is of the opinion that the charges against the applicant have been determined within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this complaint must be rejected as 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 Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)