AS TO THE ADMISSIBILITY OF

Application No. 25208/94
by Ronald 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 17 December 1993 by Ronald KREMERS against the Netherlands and registered on 20 September 1994 under file No. 25208/94;

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 1961, 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.

The police investigation was initially not directed against the applicant. However, at the end of 1990 or in the beginning of 1991, the three sisters also lodged accusations against the applicant, who is their uncle. Subsequently, the police started investigating these allegations as well.

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 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 in February 1991 and subsequently detained on remand. He remained in detention throughout the criminal proceedings against him. His requests for release were rejected on 26 February, 6 May, 5, 10 and 19 June 1992, respectively.

On 8 May 1991, the investigating judge (rechter-commissaris) heard B.

Also on 8 May 1991, the applicant was summoned to appear before the Regional Court (Arrondissementsrechtbank) of Arnhem on 21 May 1991. He was charged with the multiple rape of B., committed either alone or together with one or more other persons, and the multiple rape of C., committed either alone or together with one or more other persons. The offences were alleged to have taken place between 1984 and 1989.

On 21 May 1991, the Regional Court adjourned its examination of the case. On 13 and 14 August 1991, the Regional Court examined the case. The applicant denied the accusations against him. In its judgment of 27 August 1991, the Regional Court acquitted the applicant of the charges involving C., convicted him of the charges involving B., and sentenced him to five years' imprisonment. The Regional Court used in evidence statements made by B. to the police and the investigating judge, and inculpating statements made by Mr. H.W., one of the other accused members of the applicant's family, to the police. The applicant filed an appeal with the Court of Appeal (Gerechtshof) of Arnhem.

On 13 and 14 January 1992, in the cases of some of the other accused members of the applicant's family but not in the applicant's case, the investigating judge heard several witnesses, including B. and C., and two of the accused in the related cases, namely Mr. H.W. and Mr. E.H. Video recordings were made of these examinations.

On 25 February 1992, the Court of Appeal of Arnhem started its examination of the applicant's case. At that time, the separate cases of all accused, except the case of Mr. H.W. who had not appealed against his conviction by the Regional Court, were all pending before the Court of Appeal. The Court of Appeal dealt with 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. In the proceedings on appeal the applicant denied the charges against him.

On 25 February 1992, the Court of Appeal heard police officers K. and M., who had been involved in the examinations of the alleged victims and/or the interrogations of some of the suspects.

On the same day, the Court of Appeal viewed the video recordings that had been made of the examination of Mr. H.W. by the investigating judge on 14 January 1992. The Court of Appeal subsequently heard Mr. H.W. as a witness. He stated before the Court of Appeal that he did not wish to testify and invoked his right to be exempted from testifying (verschoningsrecht), which the Court of Appeal accepted.

On 26 February 1992, at the applicant's request, the Court of Appeal heard Mr. P., a psychologist with a certain expertise as regards the particular problems surrounding incest. The Court of Appeal subsequently viewed parts of the video recordings that had been made of the examinations of B. and C. before the investigating judge on 13 January 1992 and adjourned its further examination of the case until 6 May 1992. On 6 May 1992, it adjourned its 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, in the cases of the other accused but not in the applicant's case, the Court of Appeal heard A., B. and C. The applicant had not requested the Court of Appeal to hear them in his case. At the

applicant's request, the transcripts of their respective examinations on 2 June 1992 were added to his case-file, although on the explicit understanding that they were not to be considered as having been made in the applicant's case.

On 3 June 1992, in the applicant's case, the Court of Appeal heard the witnesses Ms. N.T. and Ms. D.L., both of whom had occasionally gone swimming with A., B. and C. between 1986 and 1988 or 1989. At the applicant's request, the Court of Appeal added the transcripts of the examinations of the other witnesses who had been heard on 3 June 1992 in the cases of the other accused to the applicant's case-file on the explicit understanding, however, that they were not to be considered as having been made in the applicant's case. The applicant stated he did not wish the Court of Appeal to hear any further witnesses in his case.

The Court of Appeal subsequently heard Mr. P. again. He said that he had seen the examinations of A., B. and C. on 2 June 1992 via a TV-monitor. He stated that his first impression was that the examinations had been very 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's lawyer informed the Court of Appeal that he had recently been informed, by one of the lawyers representing one of the other accused in the related cases, of the case-file on the criminal proceedings against Mr. W., whom C. and B. had accused of rape in 1988. That case-file contained two medical certificates from the gynaecologist Dr. H.-K., who had examined B. and C. on 27 April 1988. In these certificates, Dr. H.-K. stated that B.'s hymen was ruptured and 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 she had intercourse with him 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 decided 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 related cases simultaneously pending before the Court of Appeal, the defence wished to submit a general defence plea. This general plea was subsequently submitted by one of the lawyers, 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, to investigate the mental health of the alleged victims.

The Court of Appeal decided to hear the testimony of 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. 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. The applicant was given the opportunity to put questions to both witnesses.

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 inspection 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 five years' imprisonment, and the applicant's final pleas. The applicant's final pleas consisted of a general plea concerning all the accused in the related cases, presented by Mr. L.J.L. Heukels, an additional final plea in all cases, presented by Mr. P.R. Wery, and a final plea concerning the applicant's case in particular, presented by the applicant's lawyer Mr. D.J.L. Wijnveldt.

The defence argued, inter alia, that the prosecution should be declared inadmissible for a number of reasons. The defence 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 further argued that the charges were not in conformity with Section 261 of the Code of Criminal Procedure (Wetboek van Strafvordering) in that they were too vague. The defence also 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. The defence further requested, for the first time, that B. and C. should be heard in order to confront them with the contents of Mr. W.'s case-file.

In its judgment of 3 July 1992, the Court of Appeal, finding that the scope of the applicant's appeal was limited to the charges of which the Regional Court had convicted him and did not include the charges of which he had been acquitted, quashed the Regional Court's conviction of 27 August 1991, convicted the applicant of the charges involving B. and sentenced him to three years' imprisonment. It used in evidence the statements of B. to the police, a statement of Mr. H.W. to the police, a statement of C. to the police and statements by the applicant to the police and before the Court of Appeal. It found the charges to be in conformity with Section 261 of the Code of Criminal Procedure and held that the methods used in the police investigations had not been incorrect and that it had not been made plausible in any way that the police had acted improperly and without due care.

As regards the alleged withholding of documents, the Court of Appeal considered, inter alia:

<translation>

> "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:

<translation>

"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."

Regarding the applicant's argument that he was not given adequate time and facilities to prepare his defence, the Court of Appeal considered, inter alia:

<translation>

"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 rejected the applicant's request to appoint experts to investigate the mental health of B. and her faculty of memory, or to hear further witnesses, considering that it did not find it necessary to do so. It also rejected the applicant's request to hear several witnesses and experts.

The applicant filed an appeal in cassation with the Supreme Court (Hoge Raad). He submitted two complaints. He complained of the presence of the Procurator General in the judges' chambers and of the Court of Appeal's failure to reply to his request of 19 June 1992 to hear B. and C. in connection with the contents of Mr. W.'s case-file.

On 27 April 1993, the Advocate General (Advocaat-Generaal) to the Supreme Court submitted his written conclusions, which were transmitted to the applicant.

On 22 June 1993, the Supreme Court rejected the applicant's appeal in cassation. The Supreme Court accepted the grounds on which the Court of Appeal had rejected the applicant's complaint about the presence of the Procurator General in judges' chambers. The Supreme Court found the second complaint unfounded, as, in its judgment, the Court of Appeal had explicitly rejected the applicant's request to hear several witnesses and experts. According to the Supreme Court this decision implied that the Court of Appeal did not find such hearings

necessary.

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 it concerns a second time, 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.

COMPLAINTS

1. 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.

2. 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 of not being impartial.

3. The applicant complains that the Court of Appeal used the statements by B. and C. in evidence although the defence had had insufficient opportunity to challenge or verify these statements in the light of the exculpating facts which appeared pending the proceedings on appeal.

4. The applicant complains that the criminal charges against him have not been determined within a reasonable time.

The applicant invokes 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, insofar as relevant, reads:

> "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. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 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. As regards the applicant's complaint of the length of the criminal proceedings against him, the Commission notes that this complaint has not been raised in the domestic proceedings.

The Commission recalls that the mere fact that all remedies have been tried does not of itself constitute compliance with the requirement as to the exhaustion of domestic remedies. It is also required that the applicant, either in form or in substance, has submitted to the competent domestic authorities the complaint brought before the Commission (cf. No. 11921/86, Dec. 12.10.88, D.R. 57, p. 81; No. 16810/90, Dec. 9.9.92, D.R. 73, p. 136).

It follows that in this respect the applicant has not complied with the requirements of Article 26 (Art. 26) of the Convention and that this complaint must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. 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, the Commission notes that, insofar as this complaint has been raised in the domestic proceedings, it has remained fully unsubstantiated.

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.

4. The Commission will examine the applicant's remaining 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).

5. The applicant 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.

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 notes that the Court of Appeal rejected this complaint for lack of foundation. The Commission further 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, a request which 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 which included the hearing of three gynaecologists.

The Commission, therefore, finds that on this point there is no indication that the applicant was deprived of a fair hearing within the meaning of Article 6 (Art. 6) of the Convention.

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

6. The applicant complains that the Court of Appeal used the statements of B. and C. in evidence although the defence had had insufficient opportunity to challenge or verify these statements in the light of allegedly exculpating facts which appeared pending the proceedings on appeal.

The Commission 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 statements were made or at a later stage of the proceedings (Saïdi judgment, loc. cit., p. 56, para. 43).

The Commission further 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).

As to the notion of "witness", the Commission recalls that B. and C., for the purposes of Article 6 para. 3 (d) (Art. 6-3-d) of the Convention, are to be regarded as witnesses - a term to be given its autonomous interpretation - because their statements gave relevant information to the Court of Appeal (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 as regards the administration of evidence in his case.

The Commission notes that B. and C. were not heard before the trial courts in the applicant's case. They were, however, heard before the Court of Appeal in the cases against the other accused in the related cases. In accordance with the applicant's request, the statements they had made in these other cases were added to the applicant's case-file. The applicant had not requested that, on 2 June 1992, B. and C. would also be heard in his case.

The Commission further notes that only in his final plea to the Court of Appeal of 19 June 1992 the applicant requested that B. and C. be heard.

The Commission does not find that the Court of Appeal's refusal of this request violated the applicant's right to a fair trial given that he has failed to make such a request at an earlier stage of the proceedings against him whilst the case-file discloses no special reason which could have excused him from requesting the examination of B. and C. at such an earlier stage.

Furthermore, given that the applicant was convicted following adversarial proceedings in which he was represented by a lawyer, in the course of which nine hearings took place, and in which he was provided with ample opportunity to state his case, to challenge the evidence against him and to seek the examination of witnesses, the Commission finds that the administration of evidence in the present case and the proceedings against the applicant, considered as a whole, satisfied the requirements of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) 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 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 any 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.

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)