AS TO THE ADMISSIBILITY OF

Application No. 26596/95
by Willem 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 22 December 1993 by Willem KREMERS against the Netherlands and registered on 1 March 1995 under file No. 26596/95;

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 Dutch citizen, born in 1946, and residing in Velp, the Netherlands. Before the Commission he is represented by Mr. A.H.M.M. Romviel, a lawyer practising in Weurt, the Netherlands.

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 in 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 Mr. 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 on 18 September 1990 and subsequently detained on remand. He was released on 2 April 1991.

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 multiple rape of B. and, alternatively, indecent assault of B. The offences were alleged to have taken place between 1979 and 1985.

On 11 December 1990, the Regional Court, following a request by the applicant's lawyer, referred the case to the investigating judge (rechter-commissaris) in order to hear five witnesses, amongst whom A., B. and C., and adjourned its examination of the case.

On 22 January 1991, the Regional Court referred the case to the investigating judge for a full investigation of the case, and in particular an examination of the alleged victims and witnesses. It adjourned its further examination until 26 March 1991.

In January and February 1991, the investigating judge heard A., B. and C., two of their sisters and their mother in the absence of both the public prosecutor and the applicant. The applicant and his lawyer and the public prosecutor could follow the examinations on a TV-monitor in a separate room and had been provided with the possibility to submit their questions to these witnesses beforehand in writing.

On 26 and 27 March 1991, the Regional Court resumed its examination of the case. The applicant denied all accusations against him. At the applicant's request, the Regional Court subsequently heard the applicant's wife. After having heard the final pleas, the Regional Court closed its examination.

On 2 April 1991, the Regional Court acquitted the applicant of the charges against him and ordered his immediate release. The public prosecutor filed an appeal with the Court of Appeal (Gerechtshof) of Arnhem.

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

On 24 December 1991, the Court of Appeal started its examination of the applicant's case. Following the applicant's request, the Court of Appeal referred the case to the investigating judge for an examination of B., her sister D., Mr. H.W., Mr. H. and Ms. S.H. who had regularly spent weekends at B.'s home. The Court of Appeal rejected the applicant's request to order an examination by the investigating judge of B.'s sister E. It adjourned its further examination until 25 February 1992.

On 13 January 1992, the investigating judge heard B. The investigating judge, the court registrar, and the witnesses were in a room on the first floor. 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 examinations on TV-monitors. Video recordings were made of the examinations. The investigating judge interrupted each of the examinations to give the defence the opportunity to put additional questions to the witnesses.

In addition to B. and C., the investigating judge, on 13 and 14 January 1992, also heard Mr. H.W., Mr. H. and Ms. S.H. The investigating judge decided not to hear B.'s sister D. as the defence had no questions for her.

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 charges against him.

On 25 February 1992, the Court of Appeal heard the applicant who denied the charges against him. The Court of Appeal further heard the police officers K. and M., who had been involved in the examinations of A., B. and C. and/or the interrogations of some of the accused in the related cases.

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 examination of B. by the investigating judge on 13 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. 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 B. be heard before the Court of Appeal.

The Procurator General objected to a new hearing of B. in view of the mental stress this would cause her. She stated that B. had been advised by her psychiatrist not to testify again. The Court of Appeal, however, decided to summon B.

Also on 26 February 1992, the applicant stated that, pending a court recess, he had seen the Procurator General enter the judge's chambers via the door in the court room several times and that she entered the court room together with the three Court of Appeal judges. He objected to this. The President of the Court of Appeal informed the applicant that it is customary that the Procurator General and the members of the Court of Appeal enter and leave the court room together and through the same door. The President further informed the applicant that no deliberations had taken place in the presence of the Procurator General. The Court of Appeal subsequently 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. It further informed the defence that it would hear B. in camera and in the applicant's absence. The latter would be enabled to follow the examination via a TV-monitor and to put questions to her.

On 2 June 1992, the Court of Appeal resumed its examination. It informed the parties that it intended to hear B. in camera and in the applicant's absence. The Procurator General stated that she had no objections. The applicant's lawyer objected to B. being heard in camera.

After having deliberated, the Court of Appeal decided to hear B. in camera in the absence of the applicant, holding, inter alia:

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> "... that the hearing of the witness B. 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...."

The defence requested the Court of Appeal to add the statements made by A., B. and C. on the same day in the related proceedings to the applicant's case-file. The Court of Appeal granted the request, but on the explicit understanding that these statements were not to be regarded as having been made in the applicant's case.

The Court of Appeal subsequently proceeded with its examination of B. She 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, as well as B.'s lawyer and a social worker. The applicant remained in the court room, where he could follow the examination on a TV-monitor. In addition to the applicant, the lawyers of the accused in the related cases, Mr. P. and a number of court officers (parketpolitie) were present in the court room. They too could follow the examinations on the TV-monitor.

The Court of Appeal put a number of questions to B., which had been submitted beforehand in writing by the defence. One of the questions put to her by the defence concerned the punishment she received from the applicant and other persons immediately after she had filed a criminal complaint with the police against Mr. W.

The Court of Appeal gave the applicant's lawyer and the Procurator General the opportunity to put an additional question to B. The examination was also interrupted in order to allow the applicant's lawyer to consult his client to see if he wished to put additional questions to B. The applicant availed himself of this opportunity. The defence put in total nine questions to B., of which she refused to answer two.

According to the procès-verbal, those questions and her answers were as follows:

<Dutch>

> "Hoe vonden de verkrachtingen plaats?
> Daar kan ik niet meer op antwoorden. Ik wil niet meer over allerlei details verklaren.
>
> Kunt u precies vertellen wat gebeurde bij de verkrachtingen door Willem Kremers?
> Ik weet nog wel wat er gebeurd is bij de verkrachtingen, doch ik kan hierover niet meer verklaren."

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> "How did the rapes take place?
> I cannot answer that anymore. I do not want to make any statement about all sorts of details anymore.
>
> Can you recount precisely what happened during the rapes by Willem Kremers?

I still know what happened during the rapes, but I can no more declare anything about this."

The Procurator General put two questions to her, which she answered.

After having put the applicant's additional questions to B., 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 the applicant a summary of what B. had stated. The applicant stated that he was aware of the contents of B.'s statement.

The doors of the court room were subsequently opened and the Court of Appeal adjourned its examination until 3 June 1992 ordering the applicant, his lawyer and Mr. P to be present on that day.

On 3 June 1992, the Court of Appeal heard the applicant's daughter, who, together with others, had occasionally gone swimming with A., B. and C. in the past. It also heard the applicant's son. After they had been heard before the Court of Appeal, the defence requested that the statements made that same day by the witnesses before the Court of Appeal in the related criminal proceedings be added to the applicant's case-file. Having deliberated, the Court of Appeal decided to add the statements by S.H., S.-H., N.T., D.L., as made in the other cases, to the applicant's case-file, but on the explicit understanding that these statements were not to be considered as having been made in the applicant's case.

The applicant subsequently requested a new hearing of B. before the Court of Appeal in order to confront her with the statements made by the witnesses on 3 June 1992. He wished to ask B. when exactly she went swimming and what kind of bathing attire she then wore.

The Procurator General objected to a further hearing of B., arguing that the interest of the victims in not being confronted any longer with traumatic events spoke against such a hearing and that a new hearing would be psychologically irresponsible. The request by the defence to be allowed to react to the objection of the Procurator General was rejected by the Court of Appeal. Its President stated that the Court or Appeal was aware of the opinion and arguments of the defence. After having deliberated, the Court of Appeal rejected the request to hear B. again, considering, inter alia:

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"... that the defence has been given ample opportunity to question the witness. The court itself has observed that the recollection of the events produced very burdensome negative emotions on the part of the witness. The interest of the defence in an additional examination does not, in the court's opinion, outweigh the detriment to be experienced by the witness as a result of this [an additional hearing]. The court finds a further hearing of B. neither desirable nor necessary."

The Court of Appeal subsequently heard Mr. P. again. He stated that he had seen the examinations of A., B. and C. on 2 June 1992 via a TV-monitor and that his first impression was that the examinations were very burdensome, painful and emotional for them, that it happened repeatedly that they had been unable to answer a question because of their emotions, and that the emotions appeared to be genuine.

In the course of Mr. P.'s examination, the applicant's lawyer, Mr. A.H.M.M. Romviel, mentioned that in April 1988, the alleged victims had reported to the police that Mr. W., at that time a friend of their mother, had raped them without, at that time, complaining of having been raped by other family members. Mr. Romviel asked Mr. P. whether

this situation occurs frequently.

On 5 June 1992, the applicant's lawyer stated to the Court of Appeal that only the day before he had become acquainted with the case-file on the criminal proceedings against Mr. W. following a criminal complaint for rape against Mr. W. filed by B. and C. in 1988. The applicant's lawyer submitted that this file contains two medical certificates concerning B. and C., from which it appears that, in April 1988, C.'s hymen appeared not to be ruptured. The applicant's lawyer further submitted that, in the case against Mr. W., B. had stated to the police that she supposed that her hymen had been ruptured by Mr. W. when he raped her at the end of 1987. The police officer M. had been involved in the proceedings 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., the gynaecologist who had examined B. and C. in April 1988 as an expert witness. The Court of Appeal heard Dr. H.-K. later that day.

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 accusations against the applicant and the contents of Mr. W.'s case-file. The defence requested the court 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 applicant's request to appoint other experts since it did not consider this necessary. The Court of Appeal decided to summon 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, at the applicant's request, the Court of Appeal heard another gynaecologist, Professor E., who 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 three 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 general 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. A.H.H.M. Romviel.

The defence argued, inter alia, that the prosecution should be declared inadmissible for a number of reasons. It argued, inter alia, that the charges against the applicant were too vague, 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. of 27 April 1988, and 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 the applicant had lodged his appeal. The defence further complained 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. It also complained that the rights of the defence, as regards the hearing of the victims had been restricted to such an extent that it could not be held that the applicant had received a fair trial. In particular the Court of Appeal had refused to summon other experts as witnesses and had allowed B. not to answer certain questions. The defence also argued that the hearing of B. was not completed, as the defence had not waived its right to hear her. The defence requested the Court of Appeal, inter alia, to hear B. again in connection with the information which had appeared from Mr. W.'s case-file.

In its judgment of 3 July 1992 the Court of Appeal quashed the Regional Court's judgment of 2 April 1991, convicted the applicant of multiple rape of B., acquitted him of the remaining charges and sentenced him to eight months' imprisonment. The Court of Appeal used in evidence statements made by B. before the police, the investigating judge and the Court of Appeal, statements by the applicant before the police and the Court of Appeal and statements before the police by two other members of B.'s family.

The Court of Appeal held that the charges against the applicant were in conformity with the requirements of Section 261 of the Code of Criminal Procedure (Wetboek van Strafvordering) and that the methods used in the police investigations had not been incorrect and that it had not been shown to be 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:

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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 (page 2) and in the procès-verbal of the examination of C. dated 29 January 1991, nr. M 9931/G/1991 (added to the ... procès-verbal mentioned above, page 43) 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 considered, inter alia:

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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 considered:

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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 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."

As regards the applicant's complaint that he was not given an adequate and proper opportunity to question B., the Court of Appeal considered:

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"The court itself has observed that the examination in general, and some of the questions put by the defence in particular, entailed a strong emotional burden for B. The hearing had to be interrupted several times because the witness, as a result of intense emotions, was not capable of replying to the questions put to her. At certain moments the witness B. lapsed into fits of crying. This was apparently the result of the confrontation with, and the recollection of, the suffering experienced in her youth.

The court finds that with this the limit had been reached of what could be required of this obviously traumatised young woman - who, in the course of the present criminal proceedings had already been heard repeatedly about the experiences in her youth - as regards the interest of the defence. For that reason it was in the opinion of the court unacceptable to require this witness to stay in the room after she had been heard, or after a recess of the hearing to be present again the next day(s), so that possibly she could be subjected again to questioning. For the same reason it was undesirable to comply with the request of the defence, which was made at a subsequent stage of the trial, to summon this witness once again.

Insofar as it was not allowed to put a question, or insofar as the witnesses were allowed not to answer a question, this was done because, in the opinion of the court, the

question at issue implied a confrontation with, and the recollection of suffering experienced in youth, which could not be done in view of the emotional state of the witness."

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

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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 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. The Court found itself sufficiently informed and considered that the necessity or desirability of hearing further witnesses had not been made plausible.

The applicant subsequently lodged an appeal in cassation with the Supreme Court (Hoge Raad). He complained that the Court of Appeal had unjustly allowed B., after she had been heard on 2 June 1992, to leave the court room without instructing her to be present again at the next hearing, as she had not yet been formally excused as a witness by the defence and the prosecution, that the Court of Appeal had unjustly rejected the request by the defence to put additional questions to B. after she had been heard on 2 June 1992. He further reiterated his complaint about the re-opening of the police investigation, arguing that the Court of Appeal had insufficiently reasoned its rejection of this complaint.

The Advocate General (Advocaat-Generaal) to the Supreme Court submitted his written conclusions on 27 April 1993. These conclusions were transmitted to the applicant, who replied to them on 3 June 1993.

On 22 June 1993, the Supreme Court rejected the applicant's appeal in cassation. It accepted the grounds on which the Court of Appeal had rejected the applicant's complaints about the re-opening of the police investigation.

As regards the applicant's complaints in respect of the examination of B., the Supreme Court considered, inter alia, that on 2 June 1992 the applicant had not objected when B. did not appear in the court room after she had been heard before the Court of Appeal in a separate room. Moreover, the applicant had not objected when the President of the Court of Appeal gave the names of the people who had to be present again on 3 June 1992 without mentioning B.'s name. The Supreme Court did not find that when hearing B. the Court of Appeal had violated the relevant Sections of the Code of Criminal Procedure and accepted the reasons the Court of Appeal gave for its decision to refuse to summon B. for a further hearing.

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, 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 complains that his defence rights were unduly restricted during the hearing of B. on 2 June 1992, as she was not required to answer emotionally burdensome questions.

4. The applicant complains that, contrary to the Code of Criminal Procedure B., after being heard, did not remain in the court room until she was given formal permission to leave with the consent of the defence and the Procurator General and that she was not notified that she should be present when the Court of Appeal resumed its examination the next day.

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

6. The applicant complains that the Court of Appeal used the statements of B. in evidence although the defence had had insufficient opportunity to challenge or verify these statements in the light of the exculpating facts which appeared after she had been heard.

7. 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.

The applicant invokes Article 6 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 and public hearing ... by an independent and impartial tribunal ...
>
> 2. ...
>
> 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. 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).

3. 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.

The Commission observes that the Regional Court rendered its judgment in the applicant's case on 2 April 1991, against which an appeal was filed by the prosecution authorities. 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 24 December 1991. On that day, in accordance with the applicant's request, it referred the case to the investigating judge in order to have a number of witnesses heard and adjourned its further 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.

4. 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, 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 before the Court of Appeal, which included the hearing of three gynaecologists.

In these circumstances the Commission 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.

5. The applicant complains that, on 2 June 1992, B. was allowed not to answer emotionally burdensome questions, and that therefore he was unduly restricted in the exercise of his defence rights as regards her questioning before the Court of Appeal.

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 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 finds that, in exceptional circumstances, there may be reasons for allowing a witness not to answer certain questions.

The Commission notes that the Court of Appeal heard B., who had already been questioned a number of times on her allegations against the applicant, at the explicit request of the defence. The Procurator General had objected to her being heard before the Court of Appeal in view of the mental stress this would entail for her.

The Commission further notes that of the nine questions the defence put to B., she refused to answer two. These questions concerned factual details of the alleged rapes, which apparently had already been answered by her at various stages of the proceedings. The Commission finally notes the Court of Appeal's statement in its judgment of 3 July 1992 that the questioning of B. had to be interrupted several times because, as a result of intense emotions, she was not capable of replying to the questions put to her and that, at certain moments, she lapsed into fits of crying.

In these circumstances the Commission cannot find that it was arbitrary or unreasonable to allow B. not to answer certain questions in view of her emotional state and the fact that she was in fact being asked to repeat factual details which she had already given previously. The Commission finds that the defence was provided with sufficient opportunity to question B. on 2 June 1992 and cannot find that the applicant was substantially affected in the exercise of his defence rights in B.'s examination before the Court of Appeal.

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

6. The applicant further complains that, although the defence had not formally waived its right to question B., she did not return to the court room after her examination before the Court of Appeal, and that the Court of Appeal, contrary to the Code of Criminal Procedure, failed to notify her that she should be present when the Court of Appeal would resume its examination. The applicant also raises a number of complaints in respect of his unsuccessful request to the Court of Appeal to hear B. again and to hear other witnesses in connection with new and allegedly exculpating facts which had appeared after B. was heard on 2 June 1992. He complains in particular that the Court of Appeal used B.'s statements in evidence whereas it had rejected the request by the defence to hear her again and to hear other witnesses, thereby depriving the defence of the opportunity to challenge B.'s statements in the light of the facts which had appeared after she was

heard before the Court of Appeal.

Insofar as the applicant complains that the Court of Appeal violated the Code of Criminal Procedure by failing to notify B. that, following her examination on 2 June 1992, she had to be present at the next court hearing as the defence had not formally waived its right to question her, 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).

It remains to be examined whether the applicant's rights under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention have been respected as regards the administration of evidence before the Court of Appeal.

The Commission notes that, when B. was heard, the applicant's lawyer was provided with the possibility to put additional questions to her and that the questioning was interrupted in order to enable the applicant's lawyer to consult the applicant to verify whether the latter wished to put additional questions to B., which both the lawyer and the applicant did.

The Commission does not find it established that, when on 2 June 1992 the Court of Appeal returned to the court room, the defence still had any questions to put to B. Moreover, it was open for the applicant to request the Court of Appeal to hear B. a second time, which the applicant did, although unsuccessfully.

In these circumstances the Commission does not find that the fact that B., after being heard, did not return to the court room and was not told to be present at the next hearing of the Court of Appeal harmed the applicant in his defence.

As regards the Court of Appeal's rejection of the applicant's request to hear B. again and to hear other witnesses, 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; Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89).

The Commission, recalling its finding that B. was heard before the Court of Appeal in accordance with the requirements of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention (see para. 5), notes that Mr. P., a psychiatrist, stated before the Court of Appeal that he had the impression that the hearing before the Court of Appeal had been extremely burdensome, painful and emotional for B. and her sisters. Also the Court of Appeal itself had observed that B.'s examination before it had been emotionally very burdensome for her and had found that the limit had been reached of what could be required of her in respect of the interest of the defence.

In these circumstances, and taking into consideration the special features of criminal proceedings concerning rape and other sexual offences and, in particular, the situation of victims of such offences, the Commission cannot consider the Court of Appeal's decision not to hear B. again as arbitrary or unreasonable.

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

contained in that case-file, and that the Court of Appeal did not find it necessary to appoint further experts to investigate the mental health of B. and her faculty of memory, or to hear further witnesses.

The Commission also notes that B.'s statements were not the only evidence on which the Court of Appeal based the applicant's conviction. It also had regard to statements by the applicant and two other family members.

The Commission, therefore, cannot find that the Court of Appeal's refusal to hear B. again or to summon further witnesses deprived the applicant of a fair hearing within the meaning of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention.

Furthermore, noting that the applicant was convicted on the basis of evidence which was debated in the course of adversarial proceedings in which the applicant was represented by a lawyer, who, in the course of nine hearings before the Court of Appeal, was provided with ample opportunity to state the applicant's case and to challenge the evidence against the applicant, the Commission finds that the proceedings against the applicant, considered as a whole, were in conformity with 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 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, and 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 took 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 11 and 14 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 (M.-T. SCHOEPFER)

President of the Second Chamber (H. DANELIUS)