AS TO THE ADMISSIBILITY OF

Application No. 26324/95
by Marko LIHTAVUO
against Finland

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

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 26 December 1994 by Marko LIHTAVUO against Finland and registered on 26 January 1995 under file No. 26324/95;

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 Finnish citizen, born in 1966 and currently serving a prison sentence in Helsinki. He is represented by Mr Kari Aarrevuo, a lawyer in Helsinki.

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

I.

The applicant was charged before the Helsinki City Court (raastuvanoikeus, rådstuvurätten) with various narcotics offences, all committed between May and August 1992. There was no evidence directly linking him to any of the suspected offences.

(1) The applicant, H, R, S and T were charged with aggravated smuggling of narcotic substances as well as with an aggravated narcotics offence committed on 12 May 1992. The applicant was suspected of having been in a boat together with R and T, receiving a package containing 8 kilograms of amphetamine which S had tied to a life buoy which he had thrown off a ferry boat approaching the Helsinki harbour. The package had not been found but a life buoy from the ferry in

question had been seized by the police in the boat in which the applicant was suspected to have been. Together with H and S the applicant was also suspected of having, later on 12 May 1992, packaged the amphetamine into bags for further distribution. Part of the amphetamine was apparently seized at a later stage.

S initially confessed to the charges relating to the events on 12 May 1992. He stated, inter alia, that the applicant had accompanied him and T to the Netherlands knowing that they would collect the drugs from there. Before the City Court on 2 June 1993 S retracted his confession. H initially denied the charges, later confessed but retracted his confession after S had retracted his own confession. T denied the charges but did not explain why he had travelled to the Netherlands.

The applicant denied the charges. Having been confronted with evidence showing that he had accompanied S and T to the Netherlands, the applicant confirmed having accompanied T there. He did not, however, state any reasons for their trip. Heard as a witness the applicant's girlfriend stated that the applicant had been sleeping in her bed at the time of the ferry's arrival on 12 May 1992.

By judgment of 9 June 1993 the City Court convicted all accused. It noted that S's and H's confessions, though later retracted, were supported by data pertaining to the use and location on 12 May 1992 of a mobile telephone belonging to one of the accused. (These data showed, among other things, that the telephone in the flat where the applicant had allegedly been sleeping had received a call from that mobile telephone.) The City Court noted that the applicant had eventually stated that he had accompanied T to the Netherlands. However, neither he nor T had provided any verifiable reason for going there, if the purpose of their trip had not been to collect drugs. Finally, the City Court noted that illegally sold amphetamine-based drugs normally contain 10-20 per cent pure amphetamine. It transpired from the statements of S and N (the applicant's co-accused in another case before the City Court; see below) that part of the amphetamine in question had been exceptionally diluted, whereas part of it had been exceptionally pure.(2) The applicant was charged with an aggravated narcotics offence committed together with S and R in June 1992. The prosecution relied on a confession by S according to which he and the applicant had received from R about six kilograms of amphetamine which they had hidden in a forest. S had further stated that the drug quantity had been of poor quality, containing only about one per cent of pure amphetamine. However, before the City Court on 2 June 1993 S retracted his confession also on this point. The applicant and R denied the charges.

The City Court regarded S's initial statement as credible evidence and convicted the applicant, S and R of a further narcotics offence which was not aggravated, however, considering the quality of the drug quantity in question.

(3) The applicant and N were charged with three aggravated narcotics offences. In June/July 1992 the applicant had handed over to N 200 grams of amphetamine for sales purposes. (This drug quantity was later found to contain 0,5 per cent of pure amphetamine.) In July/August 1992 the applicant had handed over to N 300 grams of amphetamine for sales purposes. (This drug quantity was later found to contain 70-75 per cent of pure amphetamine.) On 8 September 1992 the applicant had brought 1 kilogram of amphetamine to N's flat, where it had been separated into smaller bags for sales purposes. (This drug quantity was later found to contain 75 per cent of pure amphetamine.)

The prosecution relied on a confession by N. N furthermore confirmed the percentage of amphetamine in the first-mentioned drug quantity. He had also referred to a list indicating the names of those receiving money from the sale of the drugs. The applicant's name was

said to appear on it. N also confirmed that the applicant had visited him in his and his mother's home one evening and that he and N had then dealt with amphetamine.

Denying the charges, the applicant stated that he had met N only in order to borrow money from him. Heard as a witness N's mother confirmed N's statement that the applicant had visited him in her and N's home one evening. She found it unlikely that the applicant could have borrowed money from N, as N had been almost out of money.

The City Court found the applicant and N guilty of one narcotics offence and two aggravated narcotics offences. It found that in so far as N's statement pertained to the applicant it had been supported by N's mother's witness testimony. The City Court again had regard to the fact that part of the seized amphetamine had been exceptionally pure, while part had been exceptionally diluted.

(4) The applicant, P, R and S were charged with an aggravated narcotics offence committed on 7 August 1992. The prosecution relied on a confession by S according to which he had received from P and R 2 kilograms of amphetamine out of which he had passed 400 grams on to the applicant. However, before the City Court on 2 June 1993 S retracted his confession also on this point. The applicant, P and R denied the charges.

The City Court found the applicant guilty of a narcotics offence. P, R and S were found guilty of an aggravated narcotics offence. S's initial statement was regarded as credible evidence.

(5) The applicant, K, S and T were charged with aggravated smuggling of narcotic substances as well as an aggravated narcotics offence committed on 8 August 1992. The prosecution relied on confessions by K and S according to which they and T had smuggled in 13 kilograms of amphetamine on a ferry boat arriving to Helsinki from Germany. The drug quantity had been fetched from Germany by K. S had rented the motorcycle used by K but since S had not possessed a driver's licence, he had rented the motorcycle in the applicant's name. K, S and the applicant had later separated 1 kilogram of the quantity into smaller bags and the applicant had left with some bags, riding the motorcycle rented in his name. The applicant and T denied the charges.

The City Court found K, S and T guilty of aggravated smuggling of narcotic substances as well as of an aggravated narcotics offence. As for the latter count, it convicted also the applicant. It relied on K's and S's confessions which were supported by data pertaining to the use and location of a mobile telephone.

In its judgment the City Court also assessed the evidence in the cases in general terms. It found, inter alia, that S's statements relating to the various charges against him and others had been very detailed with references to time and place later found to be correct. The applicant received a total sentence of seven years' and six months' imprisonment.

The applicant appealed to the Helsinki Court of Appeal (hovioikeus, hovrätten), questioning, inter alia, the evidential value of the statements of co-accused S and the inferences drawn from his own silence as regards his trip to the Netherlands. He did not request a further oral hearing. On 1 March 1994 the Court of Appeal, without holding a re-hearing, upheld the applicant's conviction but reduced his sentence by one year.

The applicant requested leave to appeal to the Supreme Court (korkein oikeus, högsta domstolen). He now also questioned the evidential value of the statements of co-accused N. On 4 July 1994 leave to appeal was refused.

The applicant was assisted by court-appointed counsel throughout the proceedings.

II.

The applicant was charged before the Helsinki City Court with aggravated robbery. He denied the charges but confessed to having acted as an accessory after the fact, alternatively to having aided and abetted in the crime. Eventually he also confessed to having agreed to participate in the robbery by driving the car used for the escape. He also explained his motive for participating.

On 29 April 1993 the City Court found the applicant and two further co-accused guilty of robbery, considering it established that they had jointly planned and carried out the crime. The applicant was sentenced to one year's imprisonment. His conviction and sentence were upheld by the Helsinki Court of Appeal on 24 February 1994. On 28 June 1994 the Supreme Court refused leave to appeal.

The applicant was assisted by court-appointed counsel throughout the proceedings. According to the Code of Judicial Procedure (Oikeudenkäymiskaari, Rättegångs Balk), a court shall decide what is to be regarded as the truth in a case after having carefully considered all the evidence adduced. If the effect of the presentation of certain evidence is governed by lex specialis, such legislation shall be applied (chapter 17, section 2). (No lex specialis was applicable in the present case.) If a party, though having been ordered to do so by the court, fails to respond to a question intended to clarify the case, the court shall consider the possible evidential value of such behaviour, taking into account all the circumstances of the case (chapter 17, section 5).

COMPLAINTS

The applicant complains that he was convicted of narcotics offences in the absence of any objective or circumstantial evidence supporting the charges against him. His conviction was based solely on the statements of his co-accused and clearly arbitrary, as those statements allegedly concerned totally different facts than those of relevance to the charges against the applicant. Moreover, co-accused S changed his statements during the trial.

Insofar as the applicant was convicted of robbery he complains that the courts arbitrarily assessed the evidence before and wrongly applied domestic law. The main evidence against him consisted of the co-accused's statements as well as his own confession to having acted as an accessory after the fact or at the most to having aided and abetted in the crime. He should therefore have been convicted only of such an offence. The courts did not advance sufficient reasons for finding him guilty of robbery.

The applicant invokes Article 6 para. 2 of the Convention.

THE LAW

The Commission has examined the application under Article 6 paras. 1 and 2 (Art. 6-1, 6-2) of the Convention which, as far as relevant, read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Commission first recalls that its task is not to examine whether or not the applicant was guilty or innocent of the offences of which he was convicted. The taking of evidence is governed primarily by the rules of domestic law and that is in principle for the national courts to assess the evidence before them, in particular since they have the benefit of hearing witnesses and assessing their credibility (see, e.g., Eur. Court HR, Klaas v. Germany judgment of 22 September 1993, Series A no. 269-A, pp. 17-18, paras. 29-30). The Convention organs' task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained prior to the trial is not in itself inconsistent with Article 6 (Art. 6) of the Convention, provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see, e.g., Eur. Court HR, Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, para. 43).

The Commission furthermore recalls that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (Art. 6). It is incompatible with these immunities to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. However, in situations which clearly call for an explanation from the accused his silence can be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Whether the drawing of inferences infringes Article 6 (Art. 6) must be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (see Eur. Court HR, John Murray v. the United Kingdom judgment of 8 February 1996, Reports 1996-I, pp. 49-50 and 51-52, paras. 45-47 and 54).

The presumption of innocence guaranteed by Article 6 para. 2 (Art. 6-2) of the Convention requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused (see Eur. Court HR, Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 33, para. 77).

2. Insofar as the applicant complains of his conviction of narcotics offences it is true that in its judgment of 9 June 1993 the City Court drew certain inferences from his silence in regard to the reasons for his trip to the Netherlands. The Commission notes, however, that this inference was not the sole or main basis for his conviction, given that the City Court had regard especially to the confessions by co-accused S. In addition, it had at its disposal certain circumstantial evidence such as that relating to the particular quality of the drug quantities in question as well as to the use of a mobile telephone.

The Commission furthermore notes that the applicant was assisted by court-appointed counsel throughout the proceedings. It has not been alleged that counsel was in any way prevented from adducing evidence in support of the defence. In its submissions to the Court of Appeal and the Supreme Court the defence indeed questioned the evidential value of the statements of co-accused S and N. In spite of this, however, the defence never requested a re-hearing for the purpose of cross-examining those co-accused further.

3. In so far as the applicant complains of his conviction of robbery it is true that the City Court's reasons for establishing his guilt were rather summary. The Commission notes, however, that before that court the applicant had confessed to having participated in the robbery. He had furthermore described his participation in detail.The Commission again notes that the applicant was assisted by court-appointed counsel throughout the proceedings. It has not been alleged that counsel was in any way prevented from adducing evidence in support of the defence.

4. In these particular circumstances and assessing the proceedings as a whole, the Commission finds no indication that the applicant was denied a fair trial within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention as regards any of the criminal proceedings to which he refers. Nor is there any indication that the trial court - contrary to Article 6 para. 2 (Art. 6-2) of the Convention - started from the presumption that the applicant had committed the offences of which he had been charged.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber