AS TO THE ADMISSIBILITY OF

Application No. 21982/93
by M.K.
against the Netherlands

The European Commission of Human Rights sitting in private on 30 November 1994, the following members being present:

Present:

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

Mr. K. ROGGE, 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 19 May 1993 by M.K. against the Netherlands and registered on 7 June 1993 under file No. 21982/93;

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 was born in 1964 in Rijeka in former Yugoslavia. At the time of the introduction of the application he was in detention on remand in Rotterdam. Before the Commission he is represented by Mr. P.W.J. van der Spek, a lawyer practising in The Hague.

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

On 16 December 1990 the applicant was arrested and detained on remand on the suspicion of having participated in an armed robbery in a jeweller's shop.

On 18 December 1990 the applicant assisted in a scent-association test (sorteerproef) at the police office. In this test a specially trained dog, after having sniffed at a piece of cloth that had been placed up a sleeve of a raincoat found near the place of the robbery and in respect of which the employees of the shop had stated that a similar coat had been worn by one of the robbers, selected from six stainless steel tubes, which had been held for ten minutes by six different persons (five police officers and the applicant), the tube that had been held by the applicant. The dog performed this test twice and both tests had the same result.

By summons of 12 March 1991 the applicant was ordered to appear before the Regional Court (Arrondissementsrechtbank) of The Hague on charges of armed robbery.

On 11 April 1991 the Regional Court convicted the applicant of participation in the armed robbery in the jeweller's shop and sentenced him to four years' imprisonment. It based this conviction, inter alia, on the results of the scent-association test of 18 December 1990.

The applicant filed an appeal against this judgment with the Court of Appeal (Gerechtshof) of The Hague. On 2 August 1991 a hearing was held before the Court of Appeal. During that hearing the Court of Appeal examined the procès-verbaux of the police concerning the robbery, heard the applicant and the police officer who had carried out the scent-association test and heard the parties' final pleas.

On 16 August 1991 the Court of Appeal, which made a different appreciation of the evidence, quashed the judgment of 11 April 1991, while at the same time convicting the applicant of participation in armed robbery and sentencing him to four years' imprisonment. The Court of Appeal based its judgment on statements made by the applicant, by another person also accused in the case and by the manager and employees of the jeweller's shop, one of whom had recognised the applicant, and on the findings of the police officers involved in the investigation of the robbery and a statement of the police officer E.W. who had carried out the scent-association test.

The Court of Appeal noted the applicant's complaint that the scent-association test had not been carried out correctly and his request for a second test with a different dog. It held:

<Dutch>

> "Het hof verwerpt het betoog dat de sorteerproef onbetrouwbaar zou zijn. Het acht aan de hand van de ter terechtzitting in hoger beroep door de getuige-deskundige E.W. afgelegde verklaring aannemelijk geworden dat de sorteerproef op zorgvuldige wijze is uitgevoerd. Voor het houden van een contra-expertise bestaat derhalve geen reden."

<Translation>

> "The court rejects the argument that the scent-association test was unreliable. On the basis of the statement made by the expert-witness E.W. at the hearing on appeal, it finds it has been made plausible that the test has been carried out in a careful way. There is therefore no reason for a counter-test."

The applicant's subsequent appeal in cassation was dismissed by the Supreme Court (Hoge Raad) on 24 November 1992. The Supreme Court rejected the applicant's complaint that the Court of Appeal had wrongly refused his request for a new scent-association test. It held that the Court of Appeal's refusal of this request was in conformity with the law and not unreasonable, the more so since the applicant and his lawyer were provided with an opportunity to question the expert-witness E.W. and to challenge him and his statement.

COMPLAINT

The applicant complains that the refusal of his request to have a new scent-association test carried out placed him at a disadvantage vis-à-vis the prosecution and constituted a violation of his right to a fair trial within the meaning of Article 6 para. 1 of the Convention.

THE LAW

The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the refusal of his request to have a second scent-association test deprived him of a fair trial.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads:

> "In the determination of (...) any criminal charge against him, everyone is entitled to a fair (...) hearing (...) by a (...) tribunal."

The Commission recalls at the outset that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observations of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of fact or law have been committed by domestic courts, 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. 12013/86, Dec. 10.3.89, D.R. 59 p. 100).

The Commission further recalls that the evaluation of evidence and the determination of whether or not to accept certain proposed evidence are essentially matters for the domestic courts. The task of the Convention organs is to ascertain whether the proceedings as a whole, including the way the 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).

The Commission notes that in the present case the applicant and his lawyer were provided with ample opportunity before the Court of Appeal to question the expert-witness E.W. and to challenge his statement and the way the scent-association test had been carried out, and also to challenge the other evidence invoked against the applicant. It was primarily the task of the Court of Appeal to decide whether a further scent-association test was required, and the Commission cannot find that the Court of Appeal, by finding such a test not to be required, deprived the applicant of a fair hearing within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

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.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)