AS TO THE ADMISSIBILITY OF

Application No. 14483/88
by T.M.
against Norway

The European Commission of Human Rights sitting in private on 10 February 1992, the following members being present:

MM.C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs.G. H. THUNE
SirBasil HALL
MM.F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 29 November 1988 by T.M. against Norway and registered on 19 December 1988 under file No. 14483/88;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 12 November 1990 and the observations submitted in reply by the applicant on 23 April 1991;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of the United States of America. He was born in 1954 and is at present serving a seven-year prison sentence in Norway. Before the Commission he is represented by his lawyer, Mr. Gert Nørrevang, Nykøbing Falster, Denmark.

A. The particular facts of the case

On 18 December 1985 the applicant was arrested in Rio de Janeiro, Brazil. He was in possession of approximately one kilogramme of cocaine hidden in his pocket and his boots. Criminal proceedings were instituted against him. As the applicant had a Danish wife, living in Copenhagen, and his air ticket was a return ticket Copenhagen-Rio-Copenhagen, the Danish police was informed and an investigation into the question whether the cocaine was intended for import to Denmark commenced. On 20 February 1986 the Copenhagen City Court (Københavns Byret) issued a letter rogatory addressed to the Brazilian authorities

for a Danish police officer to question the applicant in Brazil, where he was now in detention on remand. The interrogation took place in Brazil on 17 March 1986 in the presence of the applicant's counsel and an interpreter. The Danish police officer wrote down the applicant's explanation by hand due to lack of typing facilities in the prison and later the same day prepared a typewritten report. The applicant did not receive a copy thereof. According to the report the applicant explained about his personal situation and his involvement in the pending drug case in Brazil. He denied, however, having had the intention to import the cocaine into Denmark.

In August 1986 the applicant escaped from prison before he had been brought to trial in Brazil and was, therefore, at that time wanted in Denmark. However, no charges relating to the Brazilian drug case were brought against him in Denmark and he is not wanted at present in Denmark for any criminal activity or any other matter. The outcome of the proceedings in Brazil is unknown.

On 15 September 1987 the German police in Frankfurt discovered approximately five kilogrammes of cocaine hidden in a hole carved into the bottom of a wooden crate containing pottery. The crate had been sent from Ecuador and was bound for Oslo. The Norwegian police was informed and they placed the crate under surveillance. On 2 October 1987 it was fetched at the Fornebu airport near Oslo by the applicant and another person. In a rented van they transported the crate to a nearby parking lot and in the process of dismantling it they were arrested by the police under suspicion of illicit drug traffic contrary to Section 162 of the Norwegian Penal Code.

Through investigations in Germany and contacts with Interpol the Norwegian authorities became aware of the applicant's previous arrest and detention in Brazil. Steps were accordingly taken in order to obtain information in this respect, and the Danish police were inter alia requested to submit a copy of the above mentioned report of 17 March 1986.

By indictment of 7 January 1988 the applicant and the co-accused were charged with drug trafficking. The hearing of the case was scheduled for 21 to 22 April 1988 in the Eidsivating High Court (lagmannsrett) sitting with a jury.

The day before, on 20 April 1988, the public prosecutor received a copy of the report of 17 March 1986 from the Danish police. The Government submit that the applicant's counsel received a copy of the report the following morning before the commencement of the trial, whereas the applicant submits that counsel received the copy after the trial had started. During the trial the applicant and the co-accused were heard. In addition seven witnesses were heard, five of whom were police officers. In connection with the examination of these witnesses the public prosecutor submitted photos of the wooden crate when it contained cocaine and of the accused dismantling the wooden crate. A police report was also read out. The two other witnesses were the manager of a hardware store where the accused had bought the tools to dismantle the crate and the Head of the Cargo Department at Oslo Customs Control.

In connection with the hearing of an expert, exhibits of a piece of wood with traces of cocaine were shown to the Court, and the report from the laboratory tests was also made available. Moreover, two transcripts of telephone conversations of 6 and 9 October 1987 between the co-accused and a person called "Petr" were submitted.

Among the documents submitted as evidence by the public prosecutor was the report of 17 March 1986 containing the reproduction of the statement from the applicant to the Danish police officer made while the applicant was detained in Brazil. When the applicant protested against the use of this report as evidence the Court decided

as follows:

(translation)

"The public prosecutor requested permission to use as evidence the report of [17] March 1986 to the Chief of Police, Interpol, Copenhagen containing an interrogation of (the applicant). The public prosecutor referred to Section 292, subsection 2, of the Criminal Procedure Act (straffeprosessloven) which appeared to regulate this. He also referred to the official law gazette of 1987, page 1318 and to the Supreme Court decision of 7 January 1982 which relied on the same conception of the law.

(The applicant) contended that, although the report in question could be considered as evidence per se within the meaning of Section 292, Section 296 and Section 297 further regulated in what circumstances such evidence could be used. It had been established that the police officer who had made the report could appear before the High Court and give evidence or could do so through commissions rogatory if only the evidence had been made known earlier. There was nothing in the case which indicated the contrary. It would be unjustifiable and unacceptable to obtain the police officer's explanations through the available report when there was reason to obtain his explanations in court.

The Court finds unanimously that the evidence in question can be allowed in accordance with Section 292, subsection 2, of the Criminal Procedure Act. The document refers to circumstances which are of significance to the case. This is not in dispute. It concerns a police interrogation in another narcotics case which also concerns cocaine and a relatively considerable amount. The interrogation was carried out by a Danish police officer in the presence of (the applicant's) defence counsel. It appears from the report that (the applicant) was informed that it was up to him whether he wanted to explain anything.

Conclusion:

The Court allows the use of the evidence in question."

Neither the applicant nor his counsel requested that the hearing be adjourned until it would be possible for the Danish police officer, who had made the report, to appear in court and answer questions.

After the report had been read out the applicant was given the opportunity to comment on it. He stated that he had never given a statement to the Danish police officer.

On the basis of all the above-mentioned evidence the jury found the applicant guilty of the charge brought against him. As it was a jury trial the judgment contained no reasons. The applicant was subsequently sentenced to seven years' imprisonment. The co-accused was acquitted.

The applicant appealed against the judgment to the Supreme Court (Høyesterett) maintaining that the use of the report of 17 March 1986 constituted such a procedural error that the judgment should be declared null and void.

On 22 June 1988 the Supreme Court decided not to allow the appeal.

B. Relevant domestic law

Criminal Procedure Act (translation)

Section 292

"If the accused pleads guilty the court decides to what extent further production of evidence regarding the question of guilt is necessary.

Otherwise evidence which is readily available may only be refused when the court finds that it concerns matters which are without relevance to the case or matters which are already sufficiently clarified."

Section 293

"The Court may refuse to adjourn the trial with a view to the taking of evidence if it finds that the evidence would be without relevance or it would lead to delays or inconveniences which are without reasonable proportion to the importance of the evidence and the case."

Section 294

"The Court shall ex officio see to it that the case is fully elucidated. For this purpose it may decide to take new evidence and to adjourn the case."

Section 296

"Witnesses who can submit statements of relevance to the case should be heard orally during the main hearing unless special circumstances prevent this.

During the questioning the use of the reproduction of the witness' previous statements concerning the case to a court or a police report may only be used if they differ from the witness' statement during the main hearing or concern matters on which the witness refuses to express himself or which he claims not to remember. The same applies to a written statement concerning the case which the witness has submitted previously."

Section 297

"When a witness is not present during the main hearing the reproduction of his previous statements to a court or in a police report concerning the case may only be read out if oral questioning is not possible or would cause disproportionate inconvenience or expense... .

A written statement which the witness has submitted concerning the case may only be read out if both parties agree or questioning in court cannot take place."

COMPLAINTS

The applicant invokes Article 6 paras. 1 and 3 (d) of the Convention. He maintains that he was barred from examining a very important witness, namely the policeman who had drafted the report of 17 March 1986. The report was used to present him to the jury as a very suspicious person, and it led to his conviction. The applicant disputes the contents of the report and submits that for this reason it would have been vital to hear the policeman in court.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 November 1988 and registered on 19 December 1988.

The Commission decided on 2 July 1990 to bring the application to the notice of the respondent Government, inviting them to submit written observations on the admissibility and merits of the case.

The Government's observations were submitted on 12 November 1990 and the applicant's observations in reply were submitted on 23 April 1991.

Legal aid was granted to the applicant by the Commission on 14 December 1990.

THE LAW

The applicant complains that he could not hear as a witness the policeman who drafted the report of 17 March 1986, and of the fact that this report was used as documentary evidence. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention which read in so far as relevant:

"1.In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal ...
...
3.Everyone charged with a criminal offence has the following minimum rights:
...

(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;
..."

The Government submit that the case against the applicant was based on ample evidence to the effect that he came to Norway to fetch the crate containing cocaine. He was charged on the basis of these circumstances. The police report of 17 March 1986 did not alter the basis for the indictment. The report was simply an item of information and not proof of the truth in respect of the accusation against the applicant for the acts committed in Norway. The purpose of submitting the report, so the Government maintain, was to show that the information received from Interpol was correct, and both parties were given the opportunity to state their views in this respect. The applicant's wish to put questions to the police officer should be seen in this perspective, having regard to the fact that he maintained only in his appeal to the Supreme Court that the use of the police report constituted a procedural error.

In conclusion the Government contend that the submission of the report of 17 March 1986 was not in conflict with Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention as it had no bearing on the basis for the indictment and nothing indicates that the verdict was based on it.

The applicant submits that the reason for using the report was to show that he was not trustworthy, which in itself is contrary to the principle of not using evidence which concerns an accused person's antecedents. Furthermore, the report was made under unacceptable circumstances and never seen by the applicant. It was therefore of particular importance to hear the police officer who drafted the report as a witness in order to clarify its contents. By not doing so, while allowing the report as evidence, the Court deprived the applicant of a fair trial and of the right secured to him under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention.

The Commission recalls that, according to its own case-law and

that of the European Court of Human Rights, witnesses must be heard in the presence of the accused at a hearing where both parties can present their arguments, save in exceptional circumstances requiring specific justification (cf. for example Eur. Court H.R., Isgro judgment of 19 February 1991, Series A no. 194-A). However, in the present case the dispute in the High Court concerned the question whether or not the police report of 17 March 1986 could or should be accepted as evidence. According to the court transcript the High Court did not at any stage consider a request from the applicant to hear the police officer in question as a witness, and in his appeal to the Supreme Court the applicant did not complain thereof either, but only maintained that the use of the report as evidence constituted a procedural error. In these circumstances the Commission finds no basis for the conclusion that the applicant has been denied, in the domestic courts, the right secured to him under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention.

However, the question arises whether the use of the report of 17 March 1986 as documentary evidence - a question which was indeed considered by the High Court and the Supreme Court - complied with the requirements of a fair trial as guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention. In this respect the Commission recalls that the admissibility of evidence is primarily a matter for regulation by national law. As a rule it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (cf. for example Eur. Court H.R., Kostovski judgment of 20 November 1989, Series A no. 166).

In the present case the Commission finds that the report of 17 March 1986 was far from being the only evidence in the case. In the course of the main proceedings in the High Court the testimony of seven witnesses was heard as well as the applicant and the co-accused. An expert was heard and other documentary evidence was produced concerning the cocaine, the crate in which it was found and the circumstances surrounding the applicant's arrest. It is undisputed that nothing could give rise to any misgivings as regards the fairness of the applicant's trial or his right to a proper defence in this respect. Moreover, the Commission recalls that the question concerning whether or not to allow the police report of 17 March 1986 was thoroughly examined by the Court and both sides had the opportunity to express their views to the Court before a decision was taken. In these circumstances the Commission finds that it was clear to the Court how the report had been made, that the applicant denied any knowledge of its contents, and that, therefore, it could not be considered to be a reliable first-hand source of information.

It is true that it is not possible to establish to what extent the jury relied on the report in question when reaching the verdict of guilty. This is, however, always so in jury trials, but it is not the Commission's task to examine the question of guilt or innocence. Having regard to the above considerations, and considering the proceedings as a whole, the Commission is of the opinion that the taking of evidence was done in a fair manner, and it does not find that the fact that the High Court did not exclude the police report of 17 March 1986 as evidence could lead to the conclusion that the applicant did not get a fair trial within the meaning of Article 6 (Art. 6) of the Convention.

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)