CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

# THIRD SECTION

# DECISION

# AS TO THE ADMISSIBILITY OF

Application no. 40285/98
by Charles Joseph MARTIN
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 7 September 1999 as a Chamber composed of

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mr K. Traja, *Judges,*

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 September 1997 by Charles Joseph Martin against the United Kingdom and registered on 16 March 1998 under file no. 40285/98;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

## THE FACTS

The applicants are British national, born in 1958 and detained in H.M. Prison Shotts, Scotland.

He represented before the Court by Mr. Harvie S. Diamond, a lawyer practising at Ross Harper, Solicitors, in Glasgow, Scotland.

### A. Particular circumstances of the case

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

The applicant owned a public house jointly with a partner. The applicant had financial difficulties and agreed to accept a sizeable loan from a customer which he was unable to repay. He agreed to act as a drugs courier in the hope of clearing his debt to the customer. On 2 February 1996 he drove a car from Glasgow to Liverpool to collect the packages and on his return to Glasgow he was stopped by the police and about 50kg of cannabis was found to the value of £135,000-£156,000.

On 20 January 1997, the applicant pleaded guilty to a charge that on 2 February 1996 he was concerned in the supplying of a controlled substance, namely cannabis resin, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971. At the trial the Crown accepted that the applicant's involvement was as a courier only.

The court adjourned to consider a number of reports prior to sentencing the applicant. These reports included, *inter alia*, a Social Enquiry report, reports from the applicant's psychologist and general practitioner and a letter from the applicant's sister. These reports revealed that the applicant was previously of good character and had no previous convictions. He was a married man with 2 children and retained the support of his family. He had come under extreme financial pressure in his partnership of the public house, and the business had been repossessed. This financial anxiety, combined with the resurgence of repressed psychological problems due to childhood sexual abuse, caused the applicant to become depressed, for which he sought professional help. The applicant had become less depressed with medical assistance and had commenced a college course.

On 10 February 1997, the court sentenced the applicant to five years' imprisonment.

Counsel advised the applicant that the sentence was excessive and the applicant lodged a written note seeking leave to appeal against his sentence referring to, *inter alia*, his previous good character, the stress and depression he was under when the offence was committed, and the fact that his role was limited to that of a courier of a class B drug on one day. The medical and social reports relied on at his trial were attached to the note.

The trial judge prepared a note for the appeal against sentence in which he stated that he had to balance, on the one hand, the serious nature of the offence involving a substantial quantity of cannabis, the need for the court to publicly recognise this and, on the other hand, the mitigating factors. He considered the balance had been appropriately struck. Furthermore, the grounds of appeal appeared to add nothing to that which was put before him in mitigation.

Leave to appeal against the sentence was refused by a single High Court judge on 14 March 1997. He stated:

> "Having regard to the whole circumstances of the offence, it cannot be argued that the sentence imposed failed to take account of the matters raised in the Court of Appeal, nor that (even for an offence on a single day) the sentence excessive."

The applicant was not present when the application for leave to appeal was considered and was not heard on the application by the judge.

The applicant appealed against the refusal of leave to appeal. Counsel's written opinion supporting the appeal was filed at the court. His appeal against the refusal to grant leave to appeal was refused by the High Court on 3 April 1997, which adopted the same reasons as the single judge. The applicant was not present when the application for leave to appeal was being considered and was not heard on the application by the court.

## B. Relevant domestic law and practice

In Scotland, appeals against the sentences imposed by the High Court of Justiciary are regulated by Part VIII of the Criminal Procedure (Scotland) Act 1995. The appeal lies to the High Court of Justiciary sitting as an appellate court. It is necessary for leave to appeal to be granted. There is no provision in the law of Scotland for an appeal against sentence to be heard without leave being granted, and no further national remedy if leave is refused. If leave to appeal is granted, the Crown is represented at the hearing of the appeal.

Section 107 of the Criminal Procedure (Scotland) Act 1995 provides;

" (1) The decision whether to grant leave to appeal for the purposes of s.106(1) of this Act shall be made by a judge of the High Court who shall -

(a) if he considers that the documents mentioned in this subsection (2) below disclose arguable grounds of appeal, grant leave to appeal and make such comments in writing as he considers appropriate; and

(b) in any other case-

(i) refuse leave to appeal and give reasons in writing for the refusal ...

(2) The documents referred to in subsection (1) above are -

(a) the note of Appeal...

(c) where the judge who presided at the trial furnishes a report under section 113 of this Act, that report; ...

(4) Where leave to appeal is refused under subsection (1) above the appellant may, within 14 day....., apply to the High Court for leave to appeal.

(5) In deciding an application under subsection (4) above the High Court shall-

(a) if after considering the documents mentioned in the subsection (2) above and the reasons for the refusal, the court is of the opinion that there are arguable grounds of appeal, grant leave to appeal and make such comments in writing as the court considers appropriate; and

(b) in any other case -

(i) refuse leave to appeal and give reasons in writing for the refusal; ...

(6) Consideration whether or not to grant leave to appeal under subsections (1) or (5) shall take place in chambers without the parties being present."

The Crown have the right to appeal against unduly lenient sentences under section 108 of the Act. Such an appeal does not require the granting of leave to appeal.

**COMPLAINTS**

1. The applicants complain that his right to a fair trial under Article 6 § 1 of the Convention has been breached by the decisions taken by the High Court of Justiciary sitting as an appellate court on 12 March 1997 and 3 April 1997 whereby the court refused him leave to appeal against sentence. The applicant complains that if leave had been granted the Crown would have been represented at the hearing of the appeal whereas the applicant would not. The Crown can also appeal against an unduly lenient sentence and the system is therefore discriminatory against the accused person.

2. The applicant complains that the considerations of both applications for leave to appeal were separate and cumulative violations of Article 6 § 1 and Article 6 § 3 (b) of the Convention in that he was not entitled to defend himself in person or through legal assistance of his own choosing. The applicant therefore has to serve his sentence without having an opportunity to argue orally that it was excessive to impose such a sentence. The applicant argues that his case can be distinguished from the case of Monnell and Morris (see Monnell and Morris v. the United Kingdom judgment of 2 March 1987, Series A, No. 115, p. 6). Firstly the applicant was advised to appeal by counsel, secondly the applicant had no right to instruct counsel to appear on his behalf at the leave to appeal hearing, and thirdly the judges considering the appeal did not have a transcript of the proceedings available, only the trial judge's report. The applicant complains that there is nothing in Scottish law which requires a sifting judge to consider any written submissions.

**THE LAW**

The applicant complains that there has been a breach of Article 6 of the Convention. He complains that he did not have a fair trial because he was not able to appear or instruct counsel to appear on his applications for leave to appeal against sentence. He alleges that there have therefore been separate and cumulative violations of Article 6 § 1 and Article 6 § 3(c) of the Convention. Further he complains that the system is discriminatory against the accused person as if leave is granted the Crown is represented at the appeal, unlike the accused person, and the Crown can appeal against an unduly lenient sentence without leave of the court.

Article 6 of the Convention provides so far as is relevant:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ..."

Where a judicial system provides for appeals, the Court has held that the fundamental guarantees of Article 6 apply (see Delcourt v. Belgium judgment of 17 January 1970, Series A, No. 11, pp. 14-15, §§ 25-26). The application of Article 6 in respect of appeals involves consideration of the functions, in law and in practice, of the appellate body, its powers and the manner in which the interests of the parties are presented and protected (see Monnell and Morris v. the United Kingdom judgment 2 March 1987, Series A, no. 115, p. 22, § 56). In the case of Monnell and Morris the Court found that the limited nature of the issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal presence of the appellant before the Court of Appeal (see ibid. p. 22, § 58). The Court also needs to consider the equality of arms which is inherent in the notion of fairness under Article 6 (see Delcourt v. Belgium judgment, loc. cit., p. 15, § 28). The Court notes that in the case of Monnell and Morris this principle was found to be respected as neither the Crown nor the accused were represented before the court on the application for leave. The Court stated that the interests of justice and fairness had in the circumstances been met by the applicants being able to present relevant considerations through making written submissions (see Monnell and Morris v. the United Kingdom, loc. cit., p. 25, § 68).

The Court notes that the applicant seeks to distinguish his case from that of Monnell on the basis that he was advised to appeal by his own counsel. However, this would not appear to be of any relevance to the fairness of the leave to appeal process, as the appeal judges would consider the grounds and documents submitted whether such advice had been obtained or not. In respect of the second alleged distinction, namely that counsel could not have appeared on the leave application in any event, the Court notes that in Monnell and Morris counsel did not appear on the leave to appeal application although he could have done so. However, the Court does not find this to be a material difference as in both cases no counsel were in fact present.

The Court observes that the Crown was not represented before the appeal court on either of the applicant's applications for leave. The applicant is accordingly in no different a position than the applicants in Monnell and Morris, as written submissions were put forward by counsel on his behalf. A copy of counsel's written submissions were filed at the court, together with the applicant's grounds for appealing and annexed mitigating material. While a transcript of the proceedings was before the judges in the Monnell and Morris case and was not included in the material before the appeal court in the applicant's case, the Court is not persuaded that in the circumstances of the applicant's application for leave to appeal against sentence a transcript was necessary for a fair and effective examination of the points raised by him. The Court has no reason to doubt that the High Court's decision to refuse the applicant leave to appeal was based on a full and thorough evaluation of the relevant factors. The Court finds that the applicant did receive legal assistance in relation to his application for leave to appeal and the applicant's interests have been adequately safeguarded thereby.

In respect of the allegation that the appeal system discriminates against the accused person, the Court notes that no leave to appeal was granted in this case and the Crown were not therefore heard in the absence of the applicant in this case. Further, there was no appeal by the Crown on the basis that the sentence was too lenient. The Court is therefore not called

upon to rule on these aspects which do not disclose an interference in the enjoyment of any of the applicant's rights under the Convention.

It follows that this application must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

**DECLARES THE APPLICATION INADMISSIBLE**.

S. Dollé
Registrar

J.-P. Costa
President