AS TO THE ADMISSIBILITY OF

Application No. 23451/94
by Giuseppe MOTTA
against Italy

The European Commission of Human Rights (First Chamber) sitting in private on 6 April 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

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 20 November 1993 by Giuseppe MOTTA against Italy and registered on 14 February 1994 under file No. 23451/94 ;

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

(a) The particular circumstances of the case

The applicant is an Italian national, born in 1952 and currently residing in Rome. He is a private detective by profession.

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

On 25 April 1987, on the occasion of an inspection of the applicant's car in the applicant's presence, the police found a bullet for military use. On that occasion, the applicant indicated an address for service in Rome.

He was subsequently charged with illegal detention of military ammunition.

At the address he had indicated to the police, on 5 January 1988 the applicant was delivered a notice to appear before the police on 8 January 1988, in order to be interrogated in relation to the charge against him. He failed to do so.

The police, having tried in vain to contact the applicant at that address, and after having carried out further searches, concluded, in their report dated 14 March 1988, that the applicant had become untraceable.

By decree issued by the Public Prosecutor's Office of Rome on 28 March 1988, the applicant was therefore declared untraceable ("irreperibile") and a lawyer for his defence was appointed. The notification of the summons to appear before the investigating judge was therefore effected by being lodged in the registry, and the applicant's appointed lawyer was promptly informed thereof (see below).

By judgment of the Rome Court of 6 October 1988, the applicant was convicted in absentia ("in contumacia") and sentenced to six months' imprisonment; the sentence was suspended.

On 9 January 1989 the extract from the judgment rendered by default was served on the applicant at another address; it was delivered to his cohabiting partner, who allegedly forgot to inform him thereof. The judgment became final on 13 January 1989.

On 12 October 1990, the applicant applied to the Rome Court of Appeal for a review ("revisione") of the first instance judgment. The Court of Appeal rejected the application as manifestly ill-founded on 21 May 1991, after a hearing on the same day.

On 7 December 1991 the applicant, claiming to have only recently learnt about his conviction and sentence and challenging the validity of the serving of both the summons to appear before the investigating judge and the sentence, applied to the Rome Court for an extension of the time-limit in order to lodge an appeal against the first instance judgment. His application was rejected on 19 December 1991, on the grounds that the serving of the sentence by default was valid, the negligence of the applicant's partner being irrelevant, and that a late appeal was therefore inadmissible.

The applicant's subsequent appeal was rejected by the Rome Court of Appeal on 7 May 1992, on the grounds that the serving of the sentence was valid and that the applicant had in any event failed to give evidence of the date on which he had had knowledge of his conviction in absentia and, as a consequence, of his compliance with the ten days' time-limit to apply for the extension (see below).

The applicant's appeal on points of law was rejected by the Court of Cassation by judgment of 21 April 1993, filed with the Registry on 22 September 1993.

(b) Relevant domestic law

A. Notification to an accused who is untraceable ("irreperibile")

Article 170 of the former Italian Code of Criminal Procedure:

> "Se non é possibile eseguire le notificazioni (...) l'ufficiale giudiziario ne fa relazione al giudice (...) o al pubblico ministero (...).
>
> (Questi) dopo aver disposto nuove ricerche (...) emette decreto con il quale, nominato un difensore all'imputato (...), ordina che le notificazioni (...) siano eseguite mediante deposito nella cancelleria (...). Di ogni deposito deve essere dato avviso senza ritardo al difensore."
>
> (translation)
>
> "When it is not possible to carry out a notification, the bailiff informs the judge or the public prosecutor (who ordered the notification).
>
> After directing that further searches be conducted, the judge or the public prosecutor shall take a decision appointing a defence lawyer to act for the accused, and ordering that notifications

be effected by means of lodging the relevant documents with the registry. The defence lawyer shall be informed without delay when any such document is so lodged."

B. Extension of the time-limit

Article 175 para. 2 and 3 of the new Italian Code of Criminal Procedure:

"Se é stata pronunciata sentenza contumaciale (...) puo' essere chiesta la restituzione nel termine per proporre impugnazione (...) dall'imputato che provi di non avere avuto effettiva conoscenza del provvedimento, sempre che (...) il fatto non sia dovuto a sua colpa.

La richiesta per la restituzione nel termine é presentata, a pena di decadenza, entro dieci giorni da quello (...) in cui l'imputato ha avuto effettiva conoscenza dell'atto (...)."

(translation)

"When a judgment has been rendered by default, the accused can apply for an extension of the time-limit to lodge an appeal against it, if he can give evidence that he did not have knowledge thereof through no fault of his own.
The request for the extension of the time-limit must be filed within ten days of the date of the actual knowledge of the judgment by the accused."

COMPLAINT

The applicant complains under Article 6 para. 1 of the Convention that he was convicted in absentia without the benefit of a fair and public hearing and without the opportunity to defend himself. He challenges the validity of the notifications of the summons and of the sentence by default.

THE LAW

The applicant complains that he did not have a fair trial, in that he was convicted in absentia without having the possibility of defending himself. He alleges that neither the serving of the summons nor the conviction in absentia was valid.

He invokes Article 6 (Art. 6) of the Convention, which, as far as relevant, reads:

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

However, the Commission is not required to decide whether or not this complaint discloses any appearance of a violation of the Convention, as the application is inadmissible for the following reasons.

The Commission recalls that, pursuant to Article 26 (Art. 26) of the Convention, it can only deal with a matter after all domestic remedies have been exhausted and within a period of six months from the date in which the final decision was taken.

In the present case, the Commission observes that, even assuming that the summons to appear before the investigating judge and the judgment by default were not duly served on the applicant, it appears from the file that he became aware of his conviction and sentence in absentia at the latest when he applied to the Court of Appeal for review of the judgment, namely on 12 October 1990.

The Commission recalls that the person who is unaware, at the time when it was committed, of an act which causes him a prejudice, is not absolved from exercising available remedies as soon as he becomes aware of this act (cf. No. 8334/78, dec. 7.5.81, D.R. 24 pp. 103 ss.).

It notes that in October 1990, after he had become aware of his conviction in absentia, the applicant applied to the Court of Appeal for a review of the judgment, which was declared inadmissible, rather than applying for an extension of the time-limit to lodge a late appeal, a faculty which was available to him under Italian law.

It follows that the applicant failed to avail himself of the remedy at his disposal under domestic law.

The Commission furthermore considers that in the present case there are no special circumstances that could absolve the applicant from exhausting the above remedy.

It follows that the applicant has not met the requirements of Article 26 (Art. 26) of the Convention as to the exhaustion of domestic remedies (cf. No. 9022/80, dec. 13.7.83, D.R. 33 p. 21; No. 10363/83, dec. 1.7.85, D.R. 43 pp. 171, 173) and that the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)