AS TO THE ADMISSIBILITY OF

Application No. 17168/90
by Gabor NEMET
against Sweden

The European Commission of Human Rights sitting in private on 7 October 1991, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ RUIZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

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 14 August 1990 by Gabor NEMET against Sweden and registered on 19 September 1990 under file No. 17168/90;

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 Hungarian citizen, born in 1954. He resides in Sweden. For the time being he is serving a sentence of seven years imprisonment. Before the Commission he is represented by his lawyer, Mr. Per Svensson, Njurunda, Sweden.

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

On 26 January, 4 February and 23 February 1987 the Swedish Police held interviews in the Netherlands with a Hungarian citizen, J.O., who had been arrested there. At the interviews, J.O. gave himself up as being one of the robbers in a robbery which took place on 22 September 1986 at Stuvsta, a suburb of Stockholm. J.O. stated that he, the applicant and a third Hungarian, J.N., had committed the robbery.

Subsequently, the applicant was prosecuted at the District Court (tingsrätten) of Huddinge for inter alia the robbery. The prosecutor claimed in essence the following: The applicant had together with two other men [J.O. and J.N.] decided and planned to commit an armed robbery at a bank at Stuvsta. The robbery was

committed on 22 September 1986. The previous night the applicant and the two others went to Stuvsta in a car. The applicant and J.O. broke into the bank, each of them armed with a sawn-off shotgun. In the morning the two men, who were masked, overpowered the arriving bank clerks and had them tied up with tape. One of the clerks was forced to open the vault. The robbers managed to get away with approximately 1,5 million SEK (Swedish Crowns). They escaped together with the third man [J.N.], who was waiting outside. The stolen money was shared between the three of them.

There was a hearing at the District Court. The applicant, who was present, denied that he had anything to do with the robbery.

Neither J.O. nor J.N. were present at the hearing. However, the three police reports containing the interviews with J.O. were invoked by the prosecutor and read out at the hearing. The two policemen, L.-G.J. and N.E., who had conducted the interviews were heard. Furthermore, the four bank clerks concerned were heard as well as two other witnesses.

The applicant admitted that he knew J.N. and J.O. The latter he had met earlier in a prison in Sweden. He had no explanation for the statements made by J.O. The applicant further stated that during the period of 13 December 1985 - 27 January 1987, when he was on the run from prison in Sweden, he had earned his living inter alia by undeclared work and that some money (87,000 SEK) that was found when he was arrested, derived from this work.

In its judgment of 28 December 1988 the District Court stated inter alia the following:

(translation)

"When considering the question of guilt the Court finds that the applicant essentially has refused to answer questions. [The applicant], who has been on the run from prison since September 1986, has not even tried to provide an alibi for the relevant period of time.
...
The statements made by J.O. at the interviews in the Netherlands are of great importance when deciding the question of guilt.
...
When examining the police reports more closely, the Court finds that the statements of J.O. are very detailed and that the contents strongly indicate that J.O. himself took part in the relevant course of events.

Considering whether the statement of J.O. can be used in order to find [the applicant] guilty of the robbery the Court notes [inter alia] that it was not possible to have J.O. examined before a Swedish Court. [The applicant's] lawyer had not had the possibility to put questions to J.O. Therefore the Court must be very careful when evaluating the strength of J.O.'s statements. Only when they are supported by other evidence invoked, the statements can be used in a judgment against [the applicant].

In accordance with the statements of [the bank clerks and a policeman] it is without any doubt that the course of events concerning the robbery was similar to what the prosecutor has alleged. The statements of J.O. are in all important parts essentially consistent with this scenario. As an example it could be mentioned that J.O. described that he first tried to drill a hole into the bank, but failed. This is in accordance with what the policeman who examined the bank observed. Further examples are J.O.'s statements

on how and in what order the bank clerks were overpowered and how the robbers took the money.
...
To sum up, the Court finds that the statements made by J.O. are so detailed and that they get such a support from other evidence in the case that they must be considered as being a correct description of the robbery.

There is nothing to indicate that J.O. should have any reason for reporting [the applicant] on false grounds. [The applicant] has no alibi and he has not co-operated in the investigation at all. What he has alleged about the 87,000 SEK, is not probable.

All in all the Court finds that the statements of J.O. are getting so much support from other circumstances that it is without any doubt that [the applicant] was one of the persons committing the robbery."

The applicant was found guilty of inter alia aggravated robbery. He was sentenced to seven years imprisonment and ordered to pay 1,368,000 SEK in damages to the bank and 10,000 SEK to each of two bank clerks.

The prosecutor and the applicant appealed against the judgment of the District Court to the Svea Court of Appeal (Svea hovrätt), the prosecutor applying for an increased sentence and the applicant claiming that he should be acquitted or, a least, that the penalty should be reduced.

In addition the applicant alternatively claimed the following:

1. The Court should not allow the prosecutor to invoke the police reports containing the interviews with J.O.

2. The Swedish authorities should make a request for the extradition of J.O. to Sweden in order to ensure his presence at the hearing before the Court of Appeal.

3. The Court of Appeal judges, the applicant's counsel and the prosecutor should be present if there were to be a separate hearing of J.O. before a Belgian Court. (At the time of the proceedings in the Svea Court of Appeal, J.O. was in prison in Belgium where he served a life sentence.)

4. At least the applicant's counsel and the prosecutor should be present at such a separate hearing before a Belgian Court.

A Swedish request for the extradition of J.O. to Sweden was rejected by the Belgian authorities.

Subsequently, in a decision of 31 March 1989, the Svea Court of Appeal stated:

"The Court considers that taking of evidence at a Belgian Court is the best available possibility and decides accordingly as there are particular reasons (synnerliga skäl) at hand for the taking of such evidence."

The prosecutor and the applicant's lawyer were invited to submit questions in writing to the Court of Appeal to be asked at the Belgian Court.

Later, it was known that according to Belgian law a defence counsel was not allowed to be present at an examination before a Belgian Court. Therefore, the applicant objected to the Svea Court of Appeal against the taking of evidence at a Belgian Court unless his counsel was allowed to be present at the examination. Furthemore, his

counsel submitted a list of questions he wished to be put to J.O. and reserved the possibility to ask supplementary questions.

In a decision of 7 June 1989 the Svea Court of Appeal decided to maintain its decision of 31 March 1989. The Court stated that it had no competence to decide who should be present at a hearing before a foreign court.

On 9 and 10 November 1989 J.O. was heard before the Belgian Court.

On 11 December 1989 the Svea Court of Appeal started the hearing in the case. The applicant's lawyer invoked an obstacle to the hearing (hinder mot huvudförhandling) on the ground that the interrogation of J.O. in Belgium was not reliable as evidence. After delibarations the Court stated:
(translation)

"The taking of evidence in Belgium is in accordance with Swedish law. It does not concern an anonymous witness. [The applicant] has had the possibility to put questions to J.O. through his lawyer. The question of the reliability of J.O.'s testimony will later be examined by the Court in the light of the other evidence adduced. There are no reasons to change previous decisions to admit J.O.'s statements as evidence before the Court. There is accordingly no obstacle to a hearing."

At the hearing before the Svea Court of Appeal, which was on 11 and 13 December 1989, all the witnesses and victims heard by the District Court were heard again. The questions put to J.O. and his answers at the examination before the Belgian Court were read out. Some parts of the police reports containing the interviews with J.O., in the Netherlands, were invoked by the applicant.

The applicant invoked as new evidence a doctor's certificate (läkarintyg enl 7 § lagen om personundersökning i brottmål) originally used in a criminal case in 1980 in Sweden against J.O. The certificate stated that J.O. is inter alia "subsolid" (verbally talented, imaginative, opportunistic, unreliable, a duper, attracted to things being unusual and sensational), "super-valid" (full of energy and enterprise) and "super-stable" (insensitive).

In its judgment of 22 December 1989 the Svea Court of Appeal stated inter alia:

(translation)

"[The applicant] has essentially refused to answer questions. He claimed that the confiscated money - 87,000 SEK - originates from another robbery in which he took part. He believes that J.O. reported him as a revenge.
...
At the interrogation before the Belgian Court, J.O. has explained in detail how he and [the applicant] robbed the bank while J.N. was waiting in an escape car. J.O. has essentially confirmed what he previously told the police.
...
There is no technical evidence nor are there witnesses' statements that link [the applicant] with the robbery or its preparation. It is, however, clear that [the applicant], J.O. and J.N. were in the area of Stockholm at the relevant time and that they knew each other before then. The observations of the bank clerks do not exclude that [the applicant] was one of the robbers. Both J.O. and [the applicant] have been convicted for armed robbery before. J.O. has also confessed other robberies during 1986.

...
There are a number of aggravating circumstances against [the applicant] which he has refused to comment upon, i.e. the money hidden in the flat and the packet in J.M.'s safe deposit box, the possession of typical robbery equipment (inter alia a sawn-off shotgun and a pistol with ammunition

and tear-gas spray) and his contacts with J.N. In addition there is [the applicant's] trip to Norway together with J.M. at the end of September 1986 in order to buy weapons.
...
It is in the light of these circumstances that the statements of J.O. should be considered. The examination of J.O. in Belgium took place before an investigating judge. J.O. was asked more than 70 questions and has essentially confirmed what he has stated on several previous occasions. The witnesses L.-G.J. and N.E., who are investigating policemen with great experience, have considered the answers of J.O. as being truthful and without any subsidiary motives. N.E. has added that J.O. also reported four other robberies during 1986 and that his statements, so far, have not been refuted. Concerning these robberies J.O. has named many other perpetrators. [The applicant's] assumption that J.O. wanted to take revenge on him by having him wrongly convicted is not very likely. There is nothing to indicate that J.O. is lying about the robbery. [The applicant's] refusal to speak about what he was doing during the time of the robbery and to comment upon the circumstances against him therefore strikes back on him. His explanation about the hidden money is not convincing.
...
To sum up, the Court holds the following. Except for [the applicant's] denial there is nothing that speaks against the conclusion that he took part in the robbery. On the contrary, there are a number of circumstances indicating that he is one of the robbers. The statements of J.O. must be considered as being reliable in all important parts. The Court finds the evidence against [the applicant] convincing..."

The Svea Court of Appeal thus upheld the judgment of the District Court in its relevant parts.

The applicant appealed to the Supreme Court (Högsta domstolen), which on 20 March 1990 granted leave to appeal only concerning the question whether the decision of the Svea Court of Appeal of 31 March 1989 to order the taking of evidence before a Belgian Court was in accordance with the 1946 Act on Taking of Evidence before a Foreign Court (lagen (1946:817) om bevisupptagning vid utländsk domstol), and decided that the remainder of the case remain pending before the Supreme Court awaiting its decision on this particular point.

In this respect the applicant argued that the 1946 Act was not applicable to the examination of an accomplice.

In a judgment of 11 May 1990 the Supreme Court stated that the interrogation of J.O. before the Belgian Court was in accordance with Swedish law as the 1946 Act should be interpreted to cover the examination of an accomplice. The Supreme Court found no reason to grant leave to appeal in respect of the remainder of the complaint and therefore upheld the judgment of the Svea Court of Appeal of 22 December 1989.

In a dissenting opinion two of the five judges in essence argued that further examination of the case would be necessary before deciding whether the taking of evidence before the Belgian Court was

in accordance with Swedish law. They therefore suggested that the Supreme Court grant leave to appeal for the whole case and that a new hearing be held.

COMPLAINTS

The applicant complains that he did not get a fair trial as he was convicted on the basis of statements made by the accomplice, J.O., who was not present at the hearing. Furthermore, he complains that J.O.'s statements were made before an investigating judge at a Belgian Court without him or his counsel being present and without a possibility to ask J.O. supplementary questions. The applicant also complains that the decision to have J.O. questioned by a Belgian judge was not in accordance with Swedish law. He invokes Article 6 paras. 1 and 3 (d) of the Convention.

THE LAW

1. The applicant complains under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention that he did not get a fair trial as he was convicted on the basis of statements made by the accomplice, who was not present at the hearing, that the statements were made without him or his counsel being present and without a possibility for him to ask supplementary questions. Article 6 (Art. 6) in so far as relevant reads:

"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; ..."

As the guarantees contained in paragraph 3 of Article 6 (Art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1, the Commission will consider the complaint under the two provisions taken together (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, para. 25).

Although J.O. was questioned as an accomplice, he should for the purposes of Article 6 para. 3 (d) (Art. 6-3)d) be regarded as a witness - a term to be given an autonomous interpretation (Eur. Court H.R., ibid.) - because the Court of Appeal took account of his statements, which were read out at the trial.

The Commission recalls that the admissibility of evidence is primarily a matter for regulation by national law and, 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 (Eur. Court H.R., ibid., para. 26).

The Commission further recalls that according to constant case-law all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness for it to be admitted in evidence must always be made in court and in public; in particular, this may prove impossible in certain cases. The use of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6-1,

6-3-d), 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 is making his statements or at a later stage of the proceedings (Eur. Court H.R., ibid., para. 27).

In the present case the Swedish authorities tried to have J.O. extradited to Sweden in order for him to give evidence before the Court of Appeal. However, he served a life sentence in Belgium and the request was refused. Therefore the Court decided to have him questioned by a Belgian Court, this being the best available possibility. The Commission considers that it would clearly have been preferable if it had been possible to hear J.O. in person, but in the circumstances, this could not be done. Subject to the rights of the defence being respected, it was therefore open to the Svea Court of Appeal to have regard to the statements made by J.O. before the Belgian Court, in particular in view of the fact that it could consider them to be corroborated by other evidence (cf. Eur. Court H.R., ibid., para. 28).

The applicant and his counsel were not, according to Belgian law, allowed to be present when J.O. was questioned. On this situation, however, the Swedish Court had no influence. Both the prosecutor and the counsel of the applicant submitted questions in writing to be asked at the Belgian Court. The previous statements of J.O. from the pre-trial stage were then available to them. J.O. was asked more than 70 questions. In his answers he essentially confirmed what he had stated earlier. His statements were detailed. The defence had the possibility to criticise the statements before the Court of Appeal. In these circumstances, the Commission finds that the rights of the defence have been sufficiently respected on this point.

Furthermore, the Commission notes that, although the statements in question were of great importance in the case, which the Svea Court of Appeal was well aware of, the Court also considered other circumstances - i.e. the hidden money, the packet in a safe deposit box, typical robbery equipment that was found, etc. - when evaluating the statements of J.O. Moreover, the bank clerks and the investigating policemen were heard. The statements of J.O. were thus not the only evidence on which the Svea Court of Appeal based the conviction.

In the light of these circumstances, the Commission does not find that the limitation, which derived from J.O.'s absence at the trial, restricted the possibilities of the defence to a degree irreconcilable with the Convention. Accordingly, the Commission does not find that the applicant's trial was unfair.

2. As regards the question whether the decision to take evidence at a Belgian Court was in accordance with Swedish law, the Supreme Court gave an affirmative reply. The admissibility of evidence is primarily a matter for regulation by national law, and it is, as a rule, for the national courts to assess the evidence before them (Eur. Court. H.R., Asch judgment of 26 April 1991, Series A no. 203, para. 26). This is therefore not a task incumbent on the Commission.

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)