AS TO THE ADMISSIBILITY OF

Application No. 16779/90
by Joseph Ludwig PLASMAN
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 30 June 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO

Mr. K. ROGGE, Secretary to the Second 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 6 June 1990 by Joseph Ludwig PLASMAN against the Netherlands and registered on 22 June 1990 under file No. 16779/90;

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 Dutch citizen born in 1966. At the time of the introduction of the application he was detained in Amsterdam and subsequently transferred to a prison in Zutphen. Before the Commission he is represented by Mr. G.G.J. Knoops, a lawyer practising at Eindhoven.

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

On 21 January 1988 the applicant was summoned to appear before the Dordrecht Regional Court (Arrondissementsrechtbank) on 4 February 1988 on charges of extortion committed on 22 April 1987 in Zwijndrecht, extortion committed on 15 December 1986 in St Willebrord, robbery committed on 12 June 1986 in Tilburg and drug related robbery committed on 28 June 1987 in Hilversum. P., a co-suspect, had made declarations to the police on 8 November, 17 November, 9 December and 10 December 1987 and to the Investigating Judge (Rechter-Commissaris) on 22 December 1987 and on 12 February 1988 in the presence of his lawyer. The applicant denied all the charges.

On 17 March 1988 the Dordrecht Regional Court convicted the

applicant of all the offences he was charged with and sentenced him to eight years' imprisonment. The conviction of extortion in Zwijndrecht was based on six police procès-verbaux containing the declarations of four eye witnesses, one of whom had recognised the applicant when confronted with him by means of a see-through mirror, the declarations of P. and the investigating officer's own findings. The conviction of extortion in St Willebrord was based on nine police procès-verbaux containing the declarations of five witnesses, the declarations of P. and P.'s sister and the investigating officer's own findings. The conviction of robbery in Tilburg was based on two police procès-verbaux containing the declarations of one witness, of P. and the investigating officer's own findings. The conviction of robbery in Hilversum was based on eight police procès-verbaux containing the declarations of a man who was to deliver hashish to the applicant, the declarations of this man's brother and of an eye witness, the investigating officers' own findings, the declarations of two friends of the applicant, the applicant's declarations to the Investigating Judge and his declarations at the hearing before the Regional Court.

The applicant filed an appeal to the Court of Appeal (Gerechtshof) of The Hague. At the hearing on 14 November 1988, the applicant requested the Court to hear P. and another witness. P. stated that he remembered very little of his previous declarations, added that he did not wish to make any declaration and invoked in his capacity of suspect his right to remain silent. The applicant's representative further stated that "a photofit picture would be made after Van E.'s statement. It is not in the case-file. I consider it to be very important that this picture be shown to your Court."

The Court of Appeal renounced a further hearing of P. on the ground that P.'s interests as a witness and suspect of all the charges except the first, outweighed the applicant's interests. It held in addition that the applicant did have several opportunities during the preliminary investigations and subsequently before the Court of Appeal to question P., "although the result was unsatisfactory for the defence". The applicant however persisted in his request to hear P. with regard to certain details.

On 28 November 1988 the Court of Appeal convicted the applicant of all charges except the charge of robbery in Hilversum and sentenced him to six years' imprisonment and a fine of 100.000,- Dutch guilders to be replaced by five months' imprisonment in case of non payment. The Court of Appeal based its finding of guilt on the evidence before the Regional Court.

On 15 September 1989 the applicant filed a plea of nullity with the Supreme Court (Hoge Raad). He complained that the Court of Appeal had granted P. a general right to remain silent whereas Dutch law (Article 219 of the Code of Criminal Procedure - Wetboek van Strafvordering) allows a witness the right to remain silent concerning a specific question; that the declaration of P.'s sister used as evidence by the Court of Appeal could not be considered as a statement about facts or circumstances observed or experienced by her; and finally that the Court of Appeal had failed to deal with the applicant's request to have a certain photofit picture (montagefoto), made after the testimony of one of the witnesses and apparently used by the police as means of investigation, shown to the Court by the prosecution.

On 16 January 1990 the Supreme Court rejected the applicant's plea of nullity on the ground that a reasonable interpretation of Article 219 of the Code of Criminal Procedure implies that a witness, who is a suspect, can be granted a general right to remain silent. With regard to the second ground, the Supreme Court found that the Court could, as it had done, use P.'s sister's declaration as evidence. As to the applicant's request to have a photofit picture shown to the Court of Appeal, the Supreme Court considered that the Court of Appeal

did not need to consider this statement as a request.

COMPLAINTS

1. The applicant complains that, by granting witness P. a general right to remain silent, the Court of Appeal wrongfully applied Article 219 of the Code of Criminal Procedure and consequently infringed his right to a fair hearing including the equality of arms. He submits that in these circumstances he did not have an adequate opportunity to question witness P. He invokes Article 6 paras. 1 and 3 (d) of the Convention.

2. The applicant also complains that he did not have a fair trial since the Court of Appeal failed to deal with his request to order the prosecution to produce the photofit picture. He submits in particular that, as this picture was not made available to the defence, the equality of arms has been violated. He relies on Article 6 para. 1 of the Convention.

THE LAW

1. The applicant complains that, by granting witness P. a general right to remain silent, the Court of Appeal wrongfully applied Article 219 of the Code of Criminal Procedure and consequently infringed his right to a fair hearing including the equality of arms. He submits that in these circumstances he did not have an adequate opportunity to question witness P. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention which reads, insofar as relevant, as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial 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; ...".

With regard to the decision of the Dutch courts in the present case to allow the witness P. to remain silent pursuant to Article 219 of the Code of Criminal Procedure, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact 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. The Commission refers, on this point, to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45). Accordingly, it cannot examine the applicant's complaint that the Court of Appeal wrongly applied Dutch law in this instance.

However, it may examine the applicant's complaint that he was unable to question P. before the Court of Appeal, because this is a matter falling within the scope of the guarantees laid down in para. 3 of Article 6 (Art. 6-3) of the Convention, which guarantees are specific aspects of the right to a fair hearing ensured by para. 1 of this provision. The Commission will examine the complaint under the two provisions taken together (cf. Eur. Court H.R., Isgrò judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 31).

According to the case-law of the European Court of Human Rights, all evidence must in principle be adduced in the presence of the accused at a public hearing with a view to adversarial argument, but this does not mean that a statement from a witness must always be made in court and in public if it is to be admitted in evidence (Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 27). The defendant must be given an adequate and proper opportunity to challenge and question the witnesses against him (ibid.).

The Commission further recalls that it is normally for the national courts to decide whether it is necessary or advisable to hear a witness (cf. No. 10563/83, Dec. 5.7.85, D.R. 44 p. 113, and Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89). It also recalls that, as a rule, it is for the national courts to assess the evidence before them (cf. Eur. Court H.R., Asch judgment of 26 April 1991, loc. cit., p. 10, para. 26). The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.

In the present case both the Regional Court and the Court of Appeal based their decision on an extensive number of police reports containing, inter alia, the statements of the applicant himself, and the statements of several investigating officers, eye witnesses, P.'s sister and P. Before the Court of Appeal P. refused to give evidence. However, as the Court of Appeal observed, the applicant was given the opportunity, of which he availed himself, to put questions to P. during the preliminary investigations and on appeal. Although on the latter occasion P. refused to answer the questions put to him, the Commission, recalling the fundamental right of protection against self-incrimination (see K. v. Austria, Comm. Rep. 13.10.92, para. 56), finds no indication that the procedure applied to the hearing of P. was unfair.

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

2. The applicant also complains that he did not have a fair trial since the Court of Appeal failed to deal with his request to order the prosecution to produce the photofit picture. As this picture was not made available to the defence, the equality of arms has been violated. He invokes Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission notes that the Supreme Court dismissed this complaint on the ground that the applicant's request constituted a statement which the Court of Appeal did not need to consider as a formal request. Moreover, there is no indication in the case-file to the effect that the photofit picture at issue was used as evidence by the Dutch courts nor that it had any bearing on the assessment of the applicant's guilt.

It follows that this part of the application is also 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 Second Chamber

(K. ROGGE)

President of
the Second Chamber

(S. TRECHSEL)