AS TO THE ADMISSIBILITY OF

Application No. 29424/95
by Bernard William REES
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 27 November 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

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 25 August 1995 by Bernard William REES against the United Kingdom and registered on 1 December 1995 under file No. 29424/95;

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 British citizen born in 1944 and currently detained in HM Prison Full Sutton.

A. Particular circumstances of the case

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

On 29 January 1992 five men (three British and two Belgians) were arrested in Kortrijk in Belgium in possession of 1 kg of cocaine, 8 kg of amphetamine and 70 ecstasy tablets. The case involved importation from Belgium and distribution within the United Kingdom of very large quantities of illegal drugs. All five men were convicted by a Belgian court of drug trafficking between Holland and Belgium. It was not disputed that they had conspired to import drugs into the United Kingdom.

On 28 April 1992 the applicant and a number of other persons were arrested in London and South Wales.

In March 1993 a trial took place before the Newport Crown Court. The applicant and other four co-accused were charged with conspiracy to import and supply cocaine and amphetamine between 1 October 1991 and 1 May 1992. All accused denied having been involved in drugs and none

of them gave evidence before the jury. They claimed that they had been falsely implicated in the offences.

The prosecution asserted that the applicant had "masterminded" the whole operation, that he had been the "general" in South Wales and one of the co-accused his counterpart in London. The prosecution alleged that between October 1991 and April 1992 there had been at least two successful importations of drugs into the United Kingdom. It was further submitted that a third importation had been prevented by Anglo-Belgian police co-operation resulting in an arrest of drug traffickers in Belgium in January 1992 and seizure of drugs.

The prosecution case fell into four broad categories of evidence: observations by police officers, flights of the accused in private planes to and from the United Kingdom and Belgium and associated documentation, telephone communications within the United Kingdom and Belgium (a schedule was produced) and matters resulting from the arrest and search of the accused and their homes.

The evidence disclosed that on a number of occasions police officers had arrived at a precise location of a meeting of the co-accused, or that they had arrived there before the defendants. It was submitted that such police action could have only occurred as a result of advance knowledge derived from either a covert electronic surveillance or an informant.

A number of phone calls to and from persons alleged to have been involved in the conspiracy were set out in a schedule. This included phone calls made by an unidentified person in Belgium to a telephone number in the United Kingdom and phone calls between all co-accused at a time and from a place which the prosecution asserted was relevant to the conspiracy. The schedule came from computer printouts of recorded calls from each subscriber number.

Two different sets of exhibits concerning the police interviews of the five defendants were introduced by the prosecution: (1) unedited tape recordings; (2) an edited version of a transcript of the recordings from which prejudicial material had been removed. The applicant alleges that certain words were inserted into two questions "to make understandable what everybody understood in the circumstances".

The jury were not provided with the original recordings in the course of the trial. When the jury retired to deliberate, they were given, among other exhibits, the edited transcript. Nevertheless, the trial judge told the jurors in his final directions that they could request "any other original exhibits", and that it would be sent to them if asked on an "all things being equal" basis. He confirmed that if there was any problem in supplying any further exhibits requested by the jury, they would be called back into court to discuss it.

Shortly after retiring to consider their verdict, the jury sent a note requesting the trial judge to provide them with the tapes of the police interviews of all five co-accused.

The trial judge, after consultations with the Crown and counsels of the accused, refused the jury's request. He considered that:

> "In this case, which has not been without ... difficult points from the very first morning, another one has arisen after the retirement of the jury with a note. The note reads: "Is it possible to hear the tapes of the police interviews of all five defendants?
>
> I preface my remarks by making these observations. No counsel in this case at any stage has asked that the jury should hear the tapes of interviews. There are no alleged

> confessions, no allegations have been made against the police officers in relation to the conducting of the interviews, no issue has been raised at any stage about tones of voice or ways of speaking. Agreed transcripts in edited form, and in [accused W.]'s case in summarised form, have been put before the jury. The substantial editing has been done in order to remove prejudicial material.
>
> The jury now ask their question. If I permit such a course, and I have a discretion, the following practical matters arise. Firstly, the tapes will have to be edited. That will take up to about 24 hours from now, and then they will have to be heard by me and counsel before a decision can be made as to whether the edited versions are acceptable to be heard by the jury. In their unedited form they last approximately three and a half hour, if my mathematics is correct, so there is no possibility of the jury's having the tapes until Friday morning. If they were to have them then they would have to listen to them for, I presume, at least two to two and a half hours. They retired this morning, Wednesday, at about eleven o'clock in a case where they have been hearing evidence since 6 May so the practical difficulties of permitting them to hear the tapes are very great indeed, in my judgment.
>
> Counsel for [accused W.] does not wish the jury to hear the tape of his client's interview as it seems it could not be edited in any way that would be satisfactory. [The applicant]'s counsel does wish the jury to hear the tape of his client's interview. Other counsels wish to hear edited versions before deciding.
>
> I think there is a danger of prejudice to a defendant in the circumstances of this case if the jury were not to hear his interview and they were to hear others, I have to balance all these matters. I have considered guidance in the cases of Riaz and Burke 94 Cr. App. R. 339 and Emmerson 92 Cr. App. R. 284. In the exercise of my discretion, and in particular the huge practical difficulties and problems and timing of this request I intend to tell the jury that it is not possible at this stage for them to hear the tapes."

On 22 July 1993 the applicant and two of his co-accused were convicted of conspiracy to import and supply controlled drugs. On 22 October 1993 the applicant was sentenced to 13 years' imprisonment.

Following the conviction, the applicant's counsel drafted, on behalf of the applicant, ten grounds of appeal against the conviction and sentence in which the last one concerned the trial judge's refusal of the jury's request. The arguments were summarised as follows:

> "The learned judge wrongly refused a request from the jury when they retired that they should be supplied with the original interviews tapes. The request was rejected on the basis of convenience and the time required to amend the tapes of co-defendants. No such difficulties were present in the applicant's tape and his counsel urged the learned judge to comply with the request."

On 18 February 1994 the single judge refused an application for leave to appeal on either basis. The judge considered inter alia that:

> "If [the tapes] they were not played to the jury in the course of the trial, it was inappropriate to play them once the jury had retired, the more so if there were editing difficulties."

On 28 July 1994 the applicant renewed his application for leave to appeal before the Full Court of Appeal.

On 10 April 1995 the hearing of the appeal took place. The Court of Appeal upheld the applicant's conviction. The last ground of appeal was dismissed in the following terms:

> "The last matter which is canvassed before this court relates to the interviews of [the applicant]. The submission is made that when the jury, after they had been out deliberating for some time, came back and asked to hear tapes of the interviews of all five defendants, that request should have been acceded to by the learned judge. There was no difficulty in providing the jury with tapes of this applicant's interviews, although it is accepted that it might well have caused a 24-hour delay before tapes could have been provided of the interviews of other defendants. In order to understand that submission and the attitude of this court to it, it is necessary to explain that, during the course of the trial, the tapes of the interviews of all the defendants had not been played before the jury; they contained, in some cases, considerable amounts of prejudicial and inadmissible evidence, for example in relation to time spent in French jails, which had very properly been excluded from the transcript of the interviews with which the jury were provided. We are told that in the course of final speeches prosecuting counsel had sought to comment upon the 'no comment' which had been made by the [defendants] in course of interviews ... We shall come in a moment to the way in which the judge dealt with that. But, so far as [the applicant]'s application for leave is concerned, it suffices to say that, bearing in mind the acceptance of [his counsel] that the jury's request could not have been satisfactorily answered in relation to the other defendants without some 24 hours or so delay, the practicability and practicality of playing only one defendant's tapes of interview was manifestly a matter for the judge's discretion. We are wholly unpersuaded, having regard to the circumstances to which we have referred and to which in a moment we shall return in relation to the application on behalf of [the applicant's co-accused], that he exercised his discretion in an inappropriate fashion.
>
> Accordingly, so far as [the applicant]'s application is concerned, in relation to his conviction, we take the view that there are no arguable grounds for the Court to consider and that application is dismissed."

B. Relevant domestic law and practice

In R. v. Emmerson (1992 Cr. App. R. 294) the Court of Appeal considered it "... permissible to accede to a request made by a jury after it has required to hear the tape recording of the police interview with the defendant that has been made an exhibit but which has not previously been played to the jury".

The case of R. v. Riaz and Burke (1995 Cr. App. R. 339) was summarised in the present case as "... in essence the position would seem to be that tapes were exhibited and in what I might call normal circumstances, even if they have not been played prior to the jury retirement, the jury would be entitled to hear them; and those cases were essentially concerned with situation where in one case the jury were said to be entitled to hear tapes after their retirement and, in the other, where they were precluded from hearing them after their retirement for a number of reasons".

COMPLAINTS

The applicant complains, under Article 6 of the Convention, that the trial judge prevented the jury from knowing all the actual, complete and correct evidence supporting allegations he made in his defence by dismissing the jury's request to hear a tape of police interviews, in spite of it having been introduced on trial by the prosecution as the only piece of original evidence on his behalf.

The applicant submits that the "prejudicial material" was removed from the edited transcript because it contained matters irrelevant to the case. He claims that certain words were inserted into some questions and distorted and biased the meaning of his answers. The applicant contends that he had not been informed about these alterations, not even before the edited version of the transcript was given to the jury.

THE LAW

The applicant complains that the trial judge prevented the jury from knowing all the actual, complete and correct evidence supporting allegations he made in his defence by dismissing the jury's request to hear a tape of police interviews, in spite of it having been introduced on trial by the prosecution as original evidence. He invokes Article 6 (Art. 6) of the Convention which, insofar as relevant, reads 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 established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (b) to have adequate time and facilities for the preparation of his defence;
> ..."

The Commission recalls that according to Article 19 (Art. 19) of the Convention, the duty of the Commission and of the European Court of Human Rights is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not their function to deal with errors of facts or of law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention (cf. Eur. Court HR, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, para. 45).

While Article 6 (Art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules concerning the national courts' internal procedure, which is therefore primarily a matter for regulation under national law. In particular, none of the Convention's provisions expressly requires that a jury must be allowed to hear tapes of police interviews of an accused if it has an edited transcript at its disposal.

The question of whether the case was given a fair hearing must always be decided on the basis of an appraisal of the trial as a whole, including the decision of the appellate court (cf. No. 9000/80, Dec. 11.3.83, D.R. 28 pp. 127, 134; Eur. Court HR, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, p. 34, para. 34).

In the present case the applicant's conviction was based on a series of elements such as: the observations by police officers, flights of all co-accused in private planes to and from the United

Kingdom and Belgium and associated documentation, telephone communications within the United Kingdom and Belgium and matters resulting from the arrest and search of the accused and their homes and not solely or even essentially on his police interviews, as the applicant claims.

The Commission notes that the applicant, who was represented by counsel, had the opportunity to address the court and to submit whatever he found relevant to his case. In particular, neither the applicant nor his counsel at any stage of the trial asked for the jury to hear the tapes of the interviews. They made no allegations against the police officers in relation to the conducting of the interviews and no issue was raised at any stage about tones of voice or ways of speaking. Transcripts in edited form agreed by the defence and the prosecution were put before the jury. The substantial editing was done in order to remove prejudicial material.

The Commission notes that that the trial judge's decision to refuse the request from the jury to be supplied with the original interviews tapes was taken in exercise of discretion of the trial judge, in accordance with the domestic case-law, i.e. R. v. Emmerson and R. v. Riaz and Burke (cf., mutatis mutandis, the Gillow v. the United Kingdom judgment of 24 November 1986, Series A no. 109, p. 28, para. 71). The applicant was able to put and did put this point to the appeal courts, which were of the opinion that - given that the applicant had never requested the tapes to be played and the technical problems which would be caused by the necessary editing - the judge rightly exercised his discretion.

The Commission finds that no lack of fairness arose from the judge's refusal to have edited tapes prepared for the jury: the jury was ultimately required to decide the case on the basis of precisely the evidence which was put before the jury.

In these circumstances the Commission finds that the applicant's trial, when regarded as a whole, cannot be considered to have been conducted in a manner contrary to 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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber