AS TO THE ADMISSIBILITY OF

Application No. 29838/96
by Ivan SLOBODAN
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 15 January 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, 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 September 1995 by Ivan SLOBODAN against the Netherlands and registered on 19 January 1996 under file No. 29838/96;

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 1938 in Yugoslavia, and residing in Zwolle. Before the Commission he is not represented by a lawyer.

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

In October and November 1992 Ms. D. and Ms. W. informed the police that they had been raped by the applicant. Also in November 1992 the applicant's former wife and his daughter informed the police that the latter had been sexually abused by him. In her statement the applicant's former wife stated that during their marriage she had been ill-treated by the applicant and that she had fled to a reception centre for battered women with her daughter whom she thought to have been sexually abused by the applicant.

On 11 November 1992 Ms. D. was heard by the Investigating Judge (Rechter-Commissaris) of the Regional Court (Arrondissementsrechtbank) of Zwolle. The applicant's lawyer had been informed of the time and place of the hearing of Ms. D. but he chose not to attend. On 28 January 1993 the applicant's former wife and his daughter were heard by the Investigating Judge in the presence of the applicant's lawyer.

In spite of various requests the applicant has failed to submit a copy of the judgment of the Regional Court of Zwolle. However, it appears from the file that on 11 May 1993 the Regional Court acquitted the applicant of both counts of rape and convicted him of having sexually abused his daughter and that both the applicant and the public prosecutor filed an appeal against this judgment with the Court of Appeal. It further appears that the applicant's conviction by the Regional Court was based on, inter alia, the testimony of his daughter before the Investigating Judge and a psychiatrist's report concerning the daughter.

At the subsequent hearing on appeal before the Court of Appeal (Gerechtshof) of Arnhem on 17 December 1993 the alleged rape victim Ms. W. was heard in the absence of the applicant. However, the applicant's defence counsel was able to put questions to Ms. W. The Court of Appeal did not call the three other witnesses (the second alleged rape victim Ms. D., the applicant's former wife and his daughter), despite a request from the applicant. The Court of Appeal held that these witnesses had already been heard by the Investigating Judge and recalled that the applicant's defence counsel had been granted the opportunity to put questions to these witnesses. It considered that the applicant could not reasonably be held to have been prejudiced in his defence by the refusal to summon the witnesses.

In its judgment of 29 December 1993, the Court of Appeal quashed the judgment of the Regional Court and, after a new examination of the facts and evidence, convicted the applicant of all charges and sentenced him to a partially suspended term of three years' imprisonment. The Court of Appeal used the following in evidence against the applicant:

- a statement of the alleged rape victim Ms. W. to the police and her statement given before the Court of Appeal;
- a statement of the alleged rape victim Ms. D. to the police and her statement before the Investigating Judge;
- a statement of a neighbour of the applicant to the police;
- various statements of the applicant to the police;
- a statement of the applicant at the hearing before the Regional Court;
- a statement of the applicant's former wife to the police;
- a statement of the applicant's daughter to the police;
- the birth-certificate of the applicant's daughter; and
- a statement of a police officer.

The applicant filed an appeal in cassation against this decision with the Supreme Court (Hoge Raad). He complained, inter alia, that the Court of Appeal had not allowed the examination of three witnesses (his former wife, his daughter and one of the alleged rape victims) and that the Court of Appeal had also not allowed him to attend the Court's examination of the second alleged rape victim.

The Supreme Court rejected the appeal in cassation on 4 April 1995.

Relevant domestic law and practice

Section 292 of the Code of Criminal Procedure (Wetboek van Strafvordering) enables the President of a Court to order an accused to leave the courtroom so that a witness may be examined in the absence of the accused. If such an order is made, counsel for the defence may question the witness and the accused shall be told immediately what has happened during his absence and only then will the investigation be resumed.

COMPLAINTS

1. The applicant complains under Article 3 of the Convention that

his wrongful conviction amounted to ill-treatment.

2. He further complains under Article 5 of the Convention that since he was wrongfully convicted his detention is unlawful.

3. The applicant also complains under Article 6 paras. 1 and 3 (d) of the Convention that the Court of Appeal failed to summon three witnesses. In addition, he complains that he had not been allowed to attend the Court of Appeal's examination of a further witness.

4. Finally, he invokes Article 14 of the Convention without further substantiation.

THE LAW

1. The applicant complains that his wrongful conviction amounted to treatment contrary to Article 3 (Art. 3) of the Convention.

Article 3 (Art. 3) of the Convention reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission recalls that it is no court of appeal from domestic courts. It cannot examine allegations that the domestic courts incorrectly assessed the facts before them or incorrectly applied domestic law. The Commission is, therefore, unable to determine whether or not the applicant was wrongfully convicted.

Consequently, the Commission finds 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 further complains under Article 5 (Art. 5) of the Convention that his detention is unlawful.

Article 5 para. 1 (Art. 5-1) of the Convention reads, insofar as relevant, as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court; ..."

The Commission refers to its reasoning concerning the complaint under Article 3 (Art. 3) of the Convention above. Furthermore, there is nothing in the present case which could warrant the conclusion that the applicant was not convicted by a competent court.

Accordingly, the Commission finds 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.

3. The applicant further complains that the Court of Appeal failed to summon his former wife, his daughter and one of the alleged rape victims as witnesses. He also complains that he was not allowed to attend the Court of Appeal's examination of the second alleged rape victim. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention, which, insofar as relevant, provide as follows:

"1. In the determination ... 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:
...
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; ..."

The Commission recalls from the outset that the taking of evidence is governed primarily by the rules of domestic law and it is in principle for the national courts to assess the evidence before them. It is therefore not the Commission's task to decide whether the national courts have correctly assessed the evidence, but to determinew hether the proceedings as a whole, including the way in which evidence was taken, were fair as required by Article 6 para. 1 (Art. 6-1) (cf. Eur. Court HR, Kostovski v. the Netherlands judgment of 20 November 1989, Series A no. 166, p. 19, para. 39.)

Also, Article 6 para. 3 (d) (Art. 6-3-d) of the Convention does not give an accused an unlimited right to obtain the examination of witnesses. It is in principle within the discretionary power of domestic courts to establish whether the hearing of witnesses is likely to be of assistance for discovering the truth and, if not, to refuse the calling of such witnesses (cf. Eur. Court HR, Bricmont v. France judgment of 7 July 1989, Series A no. 158, p. 31, para. 89).

Furthermore, the Commission reiterates that the Convention does not preclude reliance on statements obtained at the stage of the police inquiry and the judicial investigation, 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 was making his statements or at a later stage of the proceedings (cf. Eur. Court HR, Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, para. 43).

As to the notion of "witness", the Commission notes that although the applicant's former wife, his daughter and the alleged rape victim Ms. D. did not testify at the hearing, they should for the purposes of Article 6 para. 3 (d) (Art. 6-3-d) of the Convention, be regarded as a witness - a term to be given its autonomous interpretation - because their statements, as taken down by the police and the investigating judge, were used in evidence by the Court of Appeal (cf. Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

The Commission, moreover, has had regard to the Court's judgment in the case of Doorson v. the Netherlands (Eur. Court HR, judgment of 26 March 1996, to be published in Reports 1996) in which it is considered that Article 6 (Art. 6) of the Convention does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration but that, however, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (Art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that the Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (op. cit., para. 70).

In addition, the Commission has previously held that criminal proceedings concerning rape contain special features in that they are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of the question whether or not in such proceedings an accused received

a fair trial, account must be taken of the right to respect for the victim's private life. The Commission has accepted that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of defence (cf. Baegen v. the Netherlands, Comm. Rep. 20.10.1994, para. 77, Eur. Court HR, Series A no. 327-B, p. 44).

In the present case the Commission notes that the applicant's former wife and his daughter were heard by an Investigating Judge in the presence of the applicant's defence counsel. The Commission observes, furthermore, that it has not been submitted by the applicant that his defence counsel was unable to put questions to the above mentioned witnesses. Moreover, counsel was enabled to attend the hearing by the Investigating Judge of the alleged rape victim Ms. D. but he chose not to do so.

The Commission observes that the Court of Appeal refused to accede to the applicant's request to summon the three witnesses since they had already been heard by the Investigating Judge and the applicant's defence counsel had then been given the opportunity to question the witnesses. For this reason the Court of Appeal found that its refusal to summon the witnesses could not be considered prejudicial to the applicant's defence. The Commission finds that in the circumstances of the present case the refusal to summon the three witnesses does not appear to be unreasonable or arbitrary. Moreover, the Commission considers that, although the applicant's former wife did not allege to be a victim, special circumstances existed which justified the decision not to confront her with the applicant during the trial. In this respect the Commission recalls that she had alleged having been ill-treated by the applicant during their marriage as a result of which she had fled to a reception centre for battered women with her daughter whom she thought to have been sexually abused by the applicant.

As regards the applicant's complaint that he was not allowed to attend the Court of Appeal's examination of the alleged rape victim Ms. W., the Commission observes that the applicant's defence counsel was allowed to question this witness at the hearing before the Court of Appeal.

Furthermore, it does not appear that, in the course of the criminal proceedings against him, during which he was represented throughout, the applicant had no opportunity to challenge the witnesses' versions of the events, could not properly challenge their reliability, or could not challenge the other evidence against him.

In these circumstances the Commission is of the opinion that the criminal proceedings against the applicant, considered as a whole, cannot be regarded as unfair.

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.

4. The applicant finally complains under Article 14 (Art. 14) of the Convention.

The applicant has failed to substantiate this complaint. The Commission considers that the circumstances of the present case do not disclose any appearance of a violation of this right under the Convention.

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.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber