AS TO THE ADMISSIBILITY OF

Application No. 17293/90
by Mohammad Saleem SULTAN
against Denmark

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
C.A. NØRGAARD
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
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 16 February 1990 by Mohammad Saleem Sultan against Denmark and registered on 15 October 1990 under file No. 17293/90;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the Government on 19 February 1993 and the observations in reply submitted by the applicant on 19 March 1993;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows:

The applicant is a Pakistani citizen, born in 1949. He resides at Brøndby, Denmark. Before the Commission he is represented by Mr. Thorkild Høyer, a lawyer practising in Copenhagen.

A. The particular facts of the case

Prior to February 1988 the Danish narcotics police received information indicating that the applicant was in possession of two kilogrammes of heroin intended for sale in Denmark. The subsequent investigation led the police to the conclusion that in order to prevent such sale and in order to arrest the applicant it would be necessary to use an undercover agent. Accordingly an application was submitted to the Copenhagen City Court (Københavns Byret) under section 754 c of the Administration of Justice Act (Retsplejeloven; hereinafter AJA) requesting permission to do so. On 3 February 1988 the City Court sitting with one judge, judge ME, considered the request under section

754 a of the AJA.

On the basis of the available information judge ME found that there was a particularly confirmed suspicion that the applicant was in the process of committing an offence under Section 191 of the Penal Code, which carries a maximum sentence of 10 years imprisonment, in trying to sell a significant amount of heroin. Judge ME also found that other investigative measures would not be suitable in order to secure evidence in the case for which reason he allowed the police to use an undercover agent.

The police then installed a Norwegian police officer in a hotel in Copenhagen and spread the rumour in the narcotics milieu, through their informers, that someone wanted to buy heroin. The hotel was kept under surveillance and on the following day, 4 February 1988, the applicant and two others were arrested suspected of drug trafficking after 454 grammes of heroin had been handed over to the undercover agent outside the hotel in exchange for a briefcase containing 400,000 Danish crowns.

On 5 February 1988 the applicant was brought before the Copenhagen City Court sitting with one judge, judge JA, who examined the question of detention on remand. The applicant who was present and represented by counsel denied the charge and alleged that he suspected that an undercover agent was involved and that he in fact had assisted the police by helping them get in contact with drug dealers.

Judge JA nevertheless detained the applicant on remand and he remained in detention until the end of his trial. During subsequent court sessions in connection with the continuing detention on remand the applicant maintained his allegation that he had assisted the police. He maintained that another person, QH, had been involved, acting as a contact person between him and the undercover agent, and that this person had promised him a reward for his assistance.

During the continuing investigations the applicant's counsel several times requested that QH be identified and interrogated. The police, however, maintained they could not find him.

By indictment of 9 August 1988 the applicant was charged with two counts of drug trafficking, one count of illegal possession of drugs, two counts of handling stolen goods and two counts of illegal possession of firearms. The trial commenced in November 1988 in the Copenhagen City Court sitting with one professional judge, judge ME, and two lay judges. Counsel for the applicant was aware of the fact that judge ME on one occasion prior to the trial, on 3 February 1988, had dealt with the case when he allowed the police to use the undercover agent, but he did not for this reason question the judge's impartiality as he considered this prior involvement to be to the applicant's advantage. Counsel was also aware of the fact that judge ME, on 19 September 1988, had rejected a request from the applicant to cancel the control of letters and visits as far as the applicant's spouse and children were concerned. This, however, did not prompt the applicant or counsel to question judge ME's impartiality either.

During the trial the applicant and a co-accused, K, were heard. Another co-accused, M, had absconded from prison but his prior statements to the Court were submitted. In addition 6 police officers were heard as witnesses. A number of tape recorded telephone conversations and other documentary evidence were also submitted. On the basis of the available evidence the City Court, on 29 November 1988, acquitted the applicant of the two counts of handling stolen goods and found him guilty of the other charges brought against him. He was sentenced to three and a half years imprisonment.

As regards the charge of drug trafficking with which the present case is concerned the City Court stated as follows:

(translation)

"The Court finds it established that the narcotics police in January 1988 received information from the narcotics milieu indicating that (the applicant) was in possession of 1-2 kilogrammes of heroin, for which he tried to find buyers as he was willing to sell in significant portions. After having obtained the Court's permission it was agreed between the Danish and the Norwegian police that a Norwegian police officer should appear as undercover agent and act as a buyer of a part of the heroin.

The undercover agent was accommodated at the Sheraton hotel on 3 February 1988 and the narcotics police spread the rumour through some of their contacts that there was a buyer of (the applicant's) heroin and that this buyer could be reached in the hotel lobby the following day at 10 o'clock.

At this hour the undercover agent was contacted by a Pakistani-looking man who presented himself as Urban (the name might be Qurban Malik). In the undercover agent's room he was shown a briefcase containing 400,000 Danish crowns which the undercover agent had received from his Danish colleagues. It was agreed that Urban would return the same day at 1 o'clock with a possible seller and with a sample of the heroin.

At 1 o'clock Urban arrived at the hotel with (the applicant). After having given the undercover agent the heroin sample and introduced him to (the applicant) Urban left the hotel.

The undercover agent and (the applicant) then proceeded to the hotel room where (the applicant) was shown the money. During the meeting it was agreed that the undercover agent for 400,000 Danish crowns would receive 470 grammes of heroin. (The applicant) and the undercover agent thereafter had some additional meetings in the hotel.

Upon (the applicant's) proposal it was agreed that delivery should take place at (the applicant's) car and the parties met there at approximately 17.10 hours when the accused arrived in a car which was in K's possession.

The heroin, which was kept in M's trousers, was shown to the undercover agent and handed over to him who gave the briefcase with the money to (the applicant). (The applicant) thereafter went to his car, placed the briefcase behind the front seat and was about to enter the car when he and the others were arrested by the police.

The Court rejects (the applicant's) explanations according to which he should have been encouraged by Urban earlier the same day to assist the police in finding drug dealers as well as the allegation that he knew all the time that it was an undercover agent situation in which he had no other role than that of the intermediary. These explanations, which appear unlikely, do not correspond with (the applicant's) behaviour towards the undercover agent or the police observations.

The Court does not consider it of decisive importance that the police in their investigations used an undercover agent. It is pointed out in this respect that this does not appear to have increased the accused's crime as (the

applicant), according to what has been submitted, possessed a substantially larger amount of heroin than what was handed over to the undercover agent, and as the undercover agent did not, during the negotiations with (the applicant), try to force delivery of more heroin than what was equivalent to the 400,000 Danish crowns he had.

The Court finds it established that Urban, whose identity has not been clarified, has acted as one of probably several links between the narcotics police's informers and (the applicant) who in this way was made aware of the fact that a probable buyer was at the Sheraton hotel. Urban's first contact with the undercover agent, who during this meeting presented the money and thereby showed that he was a serious buyer, must have taken place in agreement with (the applicant). After having introduced (the applicant) to the undercover agent Urban left the hotel and he did not participate in the negotiations which only involved (the applicant) and the undercover agent.

The evidence submitted does not give any reason to believe that Urban's participation in the transactions was based on an agreement with the police and thus Urban did not act as an undercover agent."

Subsequent to the judgment the applicant changed counsel and appealed against the judgment to the High Court of Eastern Denmark (Østre Landsret). In his appeal he now maintained that the judgment should be quashed since the presiding judge, ME, had previously, on 3 February 1988, allowed the police to use an undercover agent in accordance with section 754 a of the AJA. In the alternative the applicant requested his acquittal or a more lenient sentence. The applicant did not, however, refer to judge ME's prior involvement in the case in respect of the decision of 19 September 1988 concerning the control of letters and visits.

The trial commenced in the High Court in June 1989 but was adjourned as two of the judges were found to be disqualified. A new trial with new judges was then scheduled for October 1989 and took place on 16-17 and 19-20 October 1989 in the High Court sitting with three professional judges and three lay judges. The applicant was present and represented by counsel but he refused to answer questions, except those put to him by his counsel. Furthermore, the High Court refused the prosecution permission to use the statements made by the applicant in the previous trial which, as indicated above, had been adjourned in June.

During the trial the co-accused K and a total of eight witnesses were heard, among those QH, five Danish police officers and the Norwegian police officer who had acted as an undercover agent. During the interrogation of QH on 19 October 1989 he refused out of fear for reprisals to answer certain questions. The Court considered this issue separately and found that it could not be excluded on the basis of the available material that QH or his family by giving evidence would risk reprisals. The Court thus adjourned the further examination of this witness until all other witnesses had been heard. QH was heard again the following day and informed by the Court that he had to answer the questions put. He maintained, however, that he did not want to do so but nevertheless answered certain questions put by the presiding judge and the applicant's defence counsel.

As regards the five Danish police officers, three of them refused to answer a question from the applicant's defence counsel as to their sources in the narcotics milieu. They referred to section 169, subsection 1, of the AJA.

Against the applicant's protests the Court decided not to set

aside the prosecution's discretion concerning on the one hand the public interest in safeguarding its sources and on the other hand the risk of not being able to provide sufficient evidence. The policemen did not, therefore, reveal their sources in the narcotics milieu.

On the basis of the above trial and the evidence submitted the High Court pronounced judgment on 20 October 1989. The Court first rejected the applicant's request for a new trial. It found that the fact that judge ME had decided to allow the use of an undercover agent prior to his participation in the trial before the City Court did not disqualify him. Furthermore, after an evaluation of the evidence before it, the High Court also found the applicant guilty of the charges to the extent found by the City Court. The sentence was upheld.

The applicant subsequently requested leave to appeal to the Supreme Court (Højesteret). He referred again to the fact that judge ME had, prior to the trial, decided on the use of an undercover agent. He furthermore maintained that it had not been possible to cross-examine QH properly and also referred to the police officers' refusal to answer certain questions. On 11 April 1990 the Ministry of Justice rejected the request for leave to appeal.

B. Relevant domestic law and practice

The Danish legal system does not operate with examining judges who decide which offences are to be investigated and how. According to the AJA, the prosecution conducts investigations in criminal cases, cf. sections 742 and 743 of the AJA which read as follows:

(translation)

> "Reports on criminal offences shall be submitted to the police. The police shall, after an offence has been reported or on its own initiative, institute an investigation, if it is reasonable to assume that a criminal offence to be prosecuted by the public authorities has been committed."

> "The purpose of the investigation is to establish whether the conditions for criminal liability or other prosecution have been fulfilled, and to procure information to decide the case and to prepare the hearing of the case in court."

According to the Danish legal system the courts of law never decide, on their own initiative, to institute enforcement measures or any measures of investigation but are only involved in a case, if the police or counsel for the defence submit the question to the court. The role of the courts of law during the investigation is of a controlling nature which means that certain particularly radical measures of investigation require the approval of the court. Regulation of the many different situations likely to arise during the investigation of a criminal case is varied. In many cases, therefore, the courts of law are only involved, if the accused does not consent to the measures of investigation contemplated by the police. In other situations where consent cannot be obtained, for example because the accused must not know about the contemplated measure of investigation (e.g. telephone tapping or using a police agent), or where the measure is otherwise considered so serious that consent is not sufficient for carrying out the measure (e.g. remanding in custody), the courts must agree with the measure envisaged by the police.

As far as the present case is concerned, where the Copenhagen City Court approved the use of an agent by the police pursuant to section 754 a of the AJA, it follows from the provision in section 754 c of the AJA that approval by the court of such a measure is compulsory. Section 754 a of the AJA reads as follows:

(translation)

> "The police may not, as part of the investigation of a criminal offence, provide that assistance is offered, or that measures are taken, with a view to inciting someone to commit or continue the offence except where:
>
> 1) a particularly confirmed suspicion shows that the offence is in the process of being committed or attempted,
>
> 2) other investigative measures would not be suitable in order to secure evidence, and
>
> 3) the investigation concerns an offence which according to the law carries a sentence of 6 years imprisonment or more, or concerns an offence under section 289, second sentence, of the Penal Code."

Section 169, subsection 1, of the AJA relied upon by the police officers in order not to reveal their sources in the narcotics milieu reads as follows:

(translation)

> "Civil servants or others who act as such may not, without permission from the authority involved, be requested to make witness statements concerning matters which are covered by secrecy in the public interest."

COMPLAINTS

As regards the proceedings in the Copenhagen City Court the applicant alleges that this Court was not an impartial tribunal within the meaning of Article 6 para. 1 of the Convention due to the fact that the presiding judge, judge ME, had prior to the trial taken the decision to allow the police to make use of an undercover agent in the case. The applicant also alleges that he was prevented from hearing the witness QH in the City Court.

As regards the proceedings in the High Court the applicant complains that he did not receive a fair trial since he could not properly cross-examine QH and some of the police officers who refused to answer certain questions.

The applicant invokes Article 6 paras. 1 and 3 (d) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 February 1990 and registered on 15 October 1990.

On 14 October 1992 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the application.

The Government submitted their observations on admissibility and merits on 19 February 1993. The applicants observations in reply were submitted on 19 March 1993.

THE LAW

1. The applicant complains that he was convicted by a partial tribunal and that he did not get a fair trial. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention which read in their relevant parts:

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

The Commission has first examined the applicant's complaint that the Copenhagen City Court was not an impartial tribunal when it convicted and sentenced him by its judgment of 29 November 1988.

The Government submit that the question of guilt was re-examined by the High Court where the case was heard by three professional judges and three lay judges. None of these judges had been involved in the case at any time prior to the trial.

Furthermore, the Government submit, in particular, that judge ME was only involved very peripherally at the investigation stage. However, a much larger degree of participation must be established in order for the objective test established by the Convention organs' case-law to raise any doubts about the impartiality of the Court. The Government also submit that the evaluation of the particularly confirmed suspicion, which was required in the present case, was directed towards something in the future which was uncertain and would thus not involve an advance evaluation of the question of guilt to be determined during a subsequent trial.

The applicant maintains, in particular, that the criterion "particularly confirmed suspicion" must be understood as meaning that the accused will presumably subsequently be found guilty on the basis of this suspicion if no other evidence is produced. It follows, therefore, that a judge who has found, prior to the trial, that there is such a particularly confirmed suspicion against the accused cannot subsequently be considered impartial, either from a subjective or an objective point of view. In the present case, judge ME decided to allow the use of an undercover agent having found that there was a particularly confirmed suspicion against the applicant, and he further decided, prior to the trial, on a question of correspondence and visits to the applicant's detriment. In these circumstances, so the applicant submits, judge ME could not be considered to be impartial when he subsequently had to decide on the question of guilt or innocence.

The Commission has taken cognizance of both parties' submissions. After a preliminary examination of the above complaint the Commission has reached the conclusion that it raises serious issues as to the interpretation and application of Article 6 (Art. 6) of the Convention and that these issues can only be determined after a full examination of their merits. It follows that this part of the application cannot be regarded as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant also complains that he was prevented from hearing the witness QH in the City Court, that he could not properly cross-examine QH or certain police officers in the High Court and that

therefore he did not get a fair trial.

The Commission recalls that the European Court of Human Rights has held on several occasions 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 task for the Commission is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair. Furthermore, the rights provided for in paragraphs 3 (d) and 1 of Article 6 (Art. 6) require that the defendant be given an adequate and proper opportunity to challenge and question a witness, who is making statements against him (cf. for example, Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, paras. 26-27).

In the present case QH was not heard at all in the City Court due to the fact that he could not be found. Furthermore, there is no evidence showing that the City Court in these circumstances relied on any written statements which might have been submitted by him. As regards the High Court proceedings QH was present and heard. The prosecution and the defence as well as the Court itself put questions to QH who answered some questions but refused out of fear for reprisals, which the Court considered to be well-founded, to answer certain other questions. Likewise the prosecution as well as the defence could put questions to the police officers called as witnesses and it is clear that the Court placed the risk of insufficient evidence in respect of their statements on the prosecution. Furthermore, there is no indication that the conviction was based on any written statements which the witnesses might have submitted and which the defence could not challenge.

In these circumstances the Commission does not find that the fact that some witnesses refused to answer certain questions restricted the possibilities of the defence to a degree which was irreconcilable with Article 6 (Art. 6).

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.

For these reasons, the Commission

by a majority,
DECLARES ADMISSIBLE, without prejudging the merits of the case, the complaint that the criminal charges brought against the applicant were not determined by an impartial tribunal,

and

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)