AS TO THE ADMISSIBILITY OF

Application No. 24384/94
by Peter Johnny VAN REESWIJK
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 18 May 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

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 27 April 1994 by Peter Johnny VAN REESWIJK against the Netherlands and registered on 13 June 1994 under file No. 24384/94;

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 national, born in 1955, who at present serves a prison sentence in Veenhuizen, the Netherlands. Before the Commission, he is represented by Mrs. T. Spronken, a lawyer practising in Maastricht.

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

In the context of an investigation, started in 1989, into a South American group, operating from Columbia and involved in large scale transports of cocaine and marihuana from South America to Germany, Italy, Spain and the Netherlands, the German Federal Office of Criminal Investigation (Bundeskriminalamt, hereinafter referred to as "BKA") at Wiesbaden, Germany, set up a transport company called Mertrans. This company was run by police officers and its telephone was tapped. Two police officers, known under the code names of A 253 and A 256, were registered as the company's owners.

The aim of this operation was to infiltrate the European distribution network of the South American organisation, by providing it with storage facilities for the imported drugs pending a further distribution to other European countries and thus to find the buyers of those drugs. A central role in Mertrans was given to "Hugo", a police informer who apparently had good contacts with the Columbian

group and its clients.

The BKA informed the Dutch Central Investigation Department (Centrale Recherche Informatiedienst, hereinafter referred to as "CRI") of the Netherlands Ministry of Justice of this investigation and requested the Dutch police and judicial authorities to co-operate where necessary in order to make it possible to trace and arrest the organisers, suppliers, transporters and buyers involved in this drug traffic.

On 5 October 1990 a first shipment of about 960 kilogrammes of cocaine sent by the South American group at issue was seized by the BKA in Frankfurt, Germany. It further appeared that a second shipment consisting of about 800 kilogrammes of cocaine and about 10.000 kilogrammes of marihuana was on its way to Germany.

In the beginning of November 1990, Mertrans was contacted by telephone by H.M., a Dutchman, who presented himself as "Martin". On 26 October 1990 the German police authorities involved requested the Public Prosecutor (officier van justitie) at Roermond, the Netherlands, to allow a supervised delivery of drugs. This request was granted under the condition that the German police officers involved would be accompanied by Dutch police officers.

Following several telephone conversations in Spanish between H.M. and "Hugo", they met on 6 November 1990 in Venlo, the Netherlands, in order to discuss the transaction. On that occasion H.M. was accompanied by the applicant. "Hugo" was accompanied by the two "owners" of Mertrans, A 253 and A 256. During this meeting, while being observed by the Dutch police, H.M. handed 500.000 Dutch guilders over to "Hugo", after the applicant had given him a plastic bag out of which H.M. took the money.

On 12 November 1990, while being observed and photographed by the Dutch police, A 253 and A 256 delivered five carton boxes and a plastic bag, containing altogether about 125 kilogrammes of cocaine, to H.M. and the applicant on a parking lot in Venlo. H.M., the applicant, A 253 and A 256 placed the cocaine in the car in which H.M. and the applicant had arrived. Thereupon H.M. and the applicant drove to another nearby town in the Netherlands, where they met E.G. at a hospital parking lot. They then loaded the drugs into the car of E.G. and drove away. Shortly after they had left the parking lot, H.M. and the applicant were arrested by the Dutch police and subsequently detained on remand.

On 13 and 14 January 1991 the Dutch police questioned A 253 and A 256 on the drug transaction and their respective part in it. The police were aware of the identity and function of both A 253 and A 256, who both identified the applicant and H.M. from photographs.

On 23 January 1991 the investigating judge (rechter-commissaris) of the Regional Court (Arrondissementsrechtbank) of Roermond, assisted by an interpreter, examined A 253, A 256 and M., the BKA officer who had been in charge of the investigation in Germany in respect of the second shipment from the South American group. The lawyers of the applicant and of the co-suspects H.M. and E.G. were present and were provided with the opportunity to put questions to A 253, A 256 and H.M., and they availed themselves of this opportunity. During the examination of the witnesses, the applicant and his co-suspects H.M. and E.G. were present in another room with sound equipment enabling them to listen to and communicate with the persons in the room where the witnesses were examined.

As the investigating judge considered that, because of their anonymity, A 253 and A 256 would not appear before the trial court, they were examined under oath pursuant to Section 216 of the Code of Criminal Procedure (Wetboek van Strafvordering). Before A 253 and A 256 were heard, the investigating judge verified their identity and their

status as German police officers.

A 253 declared to the investigating judge that he was not authorised to make any statement concerning "Hugo"'s particulars, to indicate whether or not he was a police officer, or to give any information about his relation to the BKA. A 253 stated that "Hugo" and A 256 were not the same person, that "Hugo" had offered his services at his own initiative and had not been invited or recruited. He stated that at some point in time "Hugo" had come forward with the information that he had obtained contacts with South American cocaine dealers, who had offered him 6.000 German Marks per kilo imported cocaine if he would organise storage facilities in Germany from where the imported drugs could be further distributed and transported. It was on the basis of that information that the investigation at issue, including the creation of the Mertrans company, had started. As regards the transaction with H.M., A 253 stated that all contacts with the Columbian organisation had been made through "Hugo" and that the contacts between the Columbian organisation and the drug purchasers had been made directly between them, without passing via Mertrans. When at some point in time Mertrans had made certain financial demands to the Columbian organisation for its services, it was informed that its requests would be met from the Netherlands. Subsequently, on 5 November 1990, a certain "Martin" called from the Netherlands offering 500.000 Dutch guilders. "Hugo", in the presence of A 253, spoke with "Martin" over the telephone in Spanish. During the subsequent meeting in Venlo A 253 spoke directly with "Martin". Insofar as "Martin" and "Hugo" spoke Spanish at that meeting, "Hugo" translated from Spanish into German for A 253, although the latter had a passive knowledge of Spanish and had understood the contents of the conversation. At that meeting it became clear that "Martin" wished to obtain 300 kilogrammes in three parts of 100 kilogrammes each. A 253 did not recall whether "Martin" had used the codeword of "balineros" for cocaine and "verduras" for marihuana. A 253 further stated that he had made written reports on all his activities to the officers in charge of the investigation.

Following a question from the applicant's lawyer, A 253 stated that the applicant had remained passive during the meeting on 6 November 1990, but that he had participated in the conversation that took place on 12 November 1990, when the cocaine was delivered. A 253 stated that on that occasion "Martin", the applicant, "Hugo" and himself discussed a delivery of 6.000 kilogrammes of marihuana. It was agreed that "Martin" would provide a car, which A 253 and his partners would then fill with marihuana and return to "Martin". They had also discussed the delivery of the cocaine, but insofar as A 253 could recall, only briefly in the form of statements such as "Is the cocaine there" and "Yes".

A 256 stated before the investigating judge that he had nothing to correct or add to his previous statement made to police on 13 November 1990. He further answered questions by the suspects' lawyers.

The investigating judge further examined M., whose identity was disclosed. He stated that the CRI had been informed of the BKA investigation on 23 October 1990 and that on 26 October 1990 the CRI informed the German authorities that the supervised deliveries in the Netherlands could proceed. He further stated that the meetings on 6 and 12 November 1990 had been organised in agreement with the Venlo police authorities. He also answered questions by the suspects' lawyers.

All witnesses refused to answer questions put by the suspects' lawyers insofar as these questions concerned the identity, role, status, function and remuneration of "Hugo".

Following two hearings, on 14 May and 18 July 1991 respectively, the Regional Court (Arrondissementsrechtbank) of Roermond convicted the

applicant on 30 July 1991 of drug trafficking and sentenced him to seven years' imprisonment. The applicant filed an appeal.

On 25 March 1992 a hearing took place before the Court of Appeal (Gerechtshof) of 's-Hertogenbosch. The defence requested the Court to summon "Hugo", D. - the German officer in charge of the BKA narcotics department -, H. of the German public prosecution department at Mainz, Germany, and G., V, and P., three Dutch police officers involved in the operation.

After deliberating, the Court of Appeal rejected the request to summon "Hugo". It observed that his name and address were not known to the Dutch police and judicial authorities and that it was clear from the statements of A 253, 256 and M. of 23 January 1991 before the investigating judge that the German authorities did not wish to disclose the identity of "Hugo" for policy reasons. Moreover, given these witnesses' statements that they were not allowed to disclose "Hugo"'s identity, role and functioning, the Court found it very unlikely that "Hugo" himself would appear before the Court to answer any questions on these points.

The Court of Appeal also rejected the applicant's request to hear D. and H. It considered that the applicant would only have a valid interest in examining these persons if they could state that he had been provoked by them or committed the acts he was charged with under their responsibility, as this could form the basis for a plea for the inadmissibility of the prosecution or unlawfully obtained evidence. The Court of Appeal found this not at all likely given the applicant's statement that he had only acted upon the request of the co-suspect H.M. and not following any act of "Hugo", A 253, A 256 or any other person in Germany. In this respect the Court also had regard to the statement of the co-suspect H.M. that he had acted at the request of "a person from Amsterdam" who had given him the telephone number of a drug supplier named "Hugo", and that he had subsequently called "Hugo". Since H.M. had refused to provide any information as regards this "person from Amsterdam", the Court did not find that an examination of D. and H. would be useful for a clarification of the relations between "Hugo" and the "person from Amsterdam".

The Court of Appeal granted the applicant's request to summon the three Dutch police officers G., V. and P. The Court of Appeal further decided to summon the investigating judge, who had examined A 253, A 256 and M. on 23 January 1991 in order to put certain questions in respect of that examination.

The Court of Appeal further examined the applicant, who stated that he had been approached by the co-suspect H.M. requesting him to assist in a marihuana deal. He further admitted that he had been present when H.M. handed over 500.000 Dutch guilders on 6 November 1990, that H.M. had shown him the money beforehand and that H.M. was called "Martin" by the persons he and H.M. met on 6 November 1990. The applicant stated he had acted throughout at H.M.'s request and that he had always assumed that the deal concerned soft drugs as H.M. had told him so and in view of the amount of money paid for the drugs.

On 8 April 1992 the Court of Appeal examined the investigating judge, who stated that he knew the function and identity of A 253 and A 256 and that he had found them to be reliable witnesses. He further considered that they had given valid reasons for wishing to remain anonymous, i.e. their normal professional usefulness and the danger of reprisals (hun normale inzetbaarheid en gevaar voor represailles). He also stated that A 253 and A 256 had stated in a preliminary meeting with him before their actual examination that, if during the examination they would be questioned about their identity, they would not tell the truth. The Court of Appeal subsequently examined G., V, and P., the three Dutch police officers whose examination had been

requested by the defence. At the request of the defence, the Court also examined E., a police officer from The Hague. The defence was given the opportunity of questioning the five witnesses heard.

On 6 July 1992 the Court of Appeal heard the applicant and the final pleas, and subsequently closed its examination.

In its judgment of 20 July 1992 the Court of Appeal quashed the judgment of 30 July 1991, finding that the Regional Court had insufficiently dealt with certain arguments of the defence, and finding that the Regional Court had admitted the statements of A 253 and A 256 before the police as evidence whereas the requirements for the use of anonymous statements in evidence, as defined by the European Court of Human Rights and the Dutch Supreme Court, had not been complied with.

After a full new examination of the case, the Court of Appeal convicted the applicant of drug offences and, after having noted the applicant's previous conviction for similar offences, sentenced him to seven years' imprisonment. It based its conviction, inter alia, on the statements of the applicant of 23 November 1990 before the police and of 25 March 1992 before the Court of Appeal, the statements of A 253 and A 256 before the police and the investigating judge, the minutes of the statements of the Dutch police officers involved in the operation, reports of the Forensic Laboratory of the Ministry of Justice and a statement made by the co-suspect H.M. before the police.

The Court of Appeal rejected the defence's argument that the prosecution should be declared inadmissible as the investigation method used, i.e. the sham transaction, was disproportionate to the aim pursued, had incited the applicant to commit offences and had insufficiently been supervised by the Dutch prosecution authorities. The Court of Appeal found that, given the nature and scope of the investigation, namely an organised international hard drug traffic, the investigating authorities' choice of a sham transaction, provided this did not incite the persons under investigation to commit other offences than those originally intended, was reasonable and could not be regarded as disproportionate. The Court of Appeal did not find it established that the applicant or H.M. had been incited by A 253, A 256 or "Hugo" to commit any act other than those they had already intended to commit and further found that none of the suspects involved had been deprived of the possibility to withdraw from the planned transaction. The Court of Appeal further did not find it established that the investigation, insofar as the operation had taken place in the Netherlands, had violated any Dutch norms.

As regards the use of the statements of the witnesses A 253 and A 256, the Court of Appeal noted that the investigating judge was aware of and had verified their identity and status as German police officers, that the investigating judge had heard them under oath and had found no reasons to doubt the reliability of these witnesses. The Court of Appeal found that the investigating judge had examined these witnesses with the required caution. It accepted the investigating judge's finding as regards the reliability of these witnesses and observed that it had used and assessed their statements with the required caution.

Furthermore, the Court of Appeal, noting the investigating judge's finding that the reasons put forward by these witnesses for wishing to remain anonymous, i.e. their normal professional usefulness and the danger of reprisals, were valid, and considering the nature of the offences committed and the nature of the anonymous witnesses' professional activities, found that they had justified their wishes to remain anonymous. Finally, noting that the defence had been provided with ample opportunity to question the anonymous witnesses, of which the defence had in fact availed itself extensively, the Court of Appeal did not find that the use in evidence of the statements of A 253 and A 256 violated the applicant's right to a fair trial within the meaning

of Article 6 para. 1 of the Convention.

The applicant's appeal in cassation, in which he challenged the Court of Appeal's findings concerning the admissibility of the prosecution in respect of the investigation method used and concerning the rejection of his request to summon "Hugo" as a witness, was rejected by the Supreme Court (Hoge Raad) on 2 November 1993. The Supreme Court accepted the Court of Appeal's findings on both points.

COMPLAINTS

The applicant complains under Article 6 paras. 1 and 3 (d) of the Convention that the domestic courts rejected his requests to summon and examine "Hugo" as a witness. He submits that, as the statements by A 253 and A 256 were largely based on what "Hugo" had told them, the trial courts should not have used their statements as evidence without having examined "Hugo". The applicant argues that also the co-suspects in this case, H.M., E.G., maintained throughout the criminal proceedings against them that it had been agreed with "Hugo" that the delivery at issue would concern soft drugs, i.e. marihuana or hashish. According to the applicant, "Hugo" was the only person who could clarify this issue, as he was the only one who could indicate what H.M. and himself had agreed upon in their coded telephone conversations and which code word meaning which substance was used in these conversations.

THE LAW

The applicant complains under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention that the domestic courts rejected his requests to summon and examine "Hugo" as a witness. He states that, since "Hugo" was not heard, it was unfair to use as evidence the statements of A 252 and A 256.

Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention, insofar as relevant, provides as follows:

> "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;
>
> (...)."

The Commission recalls that, as a general rule, it is for the domestic courts to assess the relevance of the evidence which the parties seek to adduce. It is the task of these courts to assess whether proposed evidence is relevant to the case or necessary for the proper conduct of the proceedings, although their assessment can to some extent be reviewed by the Convention organs on the basis of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention. Article 6 para. 3 (d) (Art. 6-1, 6-3-d) of the Convention does not require the attendance and examination of every witness proposed by an accused, but it requires that witnesses proposed by the accused should be called and examined "under the same conditions" as 0witnesses against him or, in other words, that there should be full equality of arms between the prosecution and the defence. The concept of "equality of arms" does not, however, exhaust the content of Article 6 para. 3 (d) (Art. 6-1, 6-3-d), nor that of Article 6 para. 1 (Art. 6-1) of the

Convention. It has to be ascertained whether the proceedings, considered as a whole, were fair as required by Article 6 para. 1 (Art. 6-1) of the Convention, of which the guarantees contained in Article 6 para. 3 (d) (Art. 6-1, 6-3-d) form a specific aspect (Eur. Court H.R., Vidal judgment of 22 April 1992, Series A no. 235, p. 32, paras. 33).

The Commission notes that the prosecution authorities did not have any more information about "Hugo" than the applicant and, like the applicant, were not in a position to put any questions to him. It follows that the Court of Appeal's refusal to summon "Hugo" as a witness did not place the applicant at a disadvantage vis-à-vis the prosecution. Consequently, there was no lack of equality of arms in this respect.

Nevertheless, it is clear that "Hugo" was a central witness and that a fair trial would normally have required that he should be heard at the request of the defence.

The Commission notes that the German police officers, who were examined by the Dutch police and the investigating judge, refused to give any information about the identity, role, status, function and remuneration of "Hugo", stating they were not authorised to do so. The Commission further notes that the Court of Appeal rejected the applicant's request to summon "Hugo", observing that his name and address were not known to the Dutch police and judicial authorities, that it was clear from the statements of A 253, 256 and M. of 23 January 1991 before the investigating judge that the German authorities were not prepared to disclose the identity of "Hugo" for policy reasons and that, in view of these circumstances, it was very unlikely that "Hugo" would appear before the court in order to be examined.

At the relevant time, "Hugo" was apparently not in the Netherlands but on German territory and the Commission finds it a reasonable assumption that he would not have voluntarily appeared before the Dutch courts and that, moreover, the German authorities would not have assisted in making him available as a witness in the Netherlands. In these circumstances, the Commission considers that it must be accepted as a fact that it was impossible to hear "Hugo" before the courts in the proceedings against the applicant. The failure to call him as a witness cannot, therefore, be considered as unfair but merely reflects a factual impossibility.

It remains to be considered whether, in these circumstances, it was unfair to use as evidence the statements of A 253 and A 256, insofar as they conveyed information which they had obtained from "Hugo".

In this respect, the Commission first notes that the applicant does not complain of the fact that the identity of A 253 and A 256 was not disclosed to the defence. It is clear that they were German police officers and that they were heard under conditions which made it possible for the defence to put questions to them. Article 6 (Art. 6) of the Convention cannot be considered to prevent a court from using as evidence witness statements providing information about what the witness has heard from a third person. It is another matter that such information may often have a reduced value as evidence, in particular where, as in the present case, that third person is not also heard in the proceedings.

However, when determining the case against the applicant, the Court of Appeal did not only rely on the statements of A 253 and A 256, but they also had other important evidence at their disposal. Moreover, the applicant himself had admitted participation in the narcotics transactions, although he had stated that he had believed that the drugs were soft drugs and not cocaine.

When examining the proceedings in their entirety, the Commission cannot find that they violated the principles of fairness inherent in Article 6 (Art. 6) of the Convention.

It follows that the application must be rejected as being 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 — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)