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No. 16-40772 George Alvarez v. City of Brownsville
USDC No. 1:11-CV-78

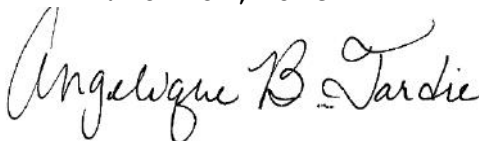
Dear Mr. Warren,

We have reviewed your electronically filed Amicus Curiae brief and it is sufficient.

You must submit the **20** paper copies of your brief required by 5TH CIR. R. 31.1 to be sent by **overnight delivery**.

Sincerely,

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16-40772

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

GEORGE ALVAREZ,

Plaintiff-Appellee,

—v.—

CITY OF BROWNSVILLE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE
CIVIL ACTION NO. 1:11-CV-00078

**[PROPOSED] BRIEF OF FAIR TRIALS INTERNATIONAL
AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF-APPELLEE GEORGE ALVAREZ**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE ALVAREZ,
PLAINTIFF-APPELLEE,
V.
CITY OF BROWNSVILLE,
DEFENDANT-APPELLANT.

CERTIFICATE OF INTERESTED PERSONS

In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that the *amicus curiae* is a non-profit organization. The *amicus curiae* does not have a parent corporation or issue shares of stock.

Undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusal.

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ACCOMPANYING MOTION FOR LEAVE TO FILE

Defendant-Appellant City of Brownsville opposes this filing unless the Court simultaneously grants it leave to file a reply. Accordingly, *amicus curiae* has filed an accompanying motion for leave to file this brief in accordance with Federal Rule of Appellate Procedure 29(a)(3).¹

INTEREST AND IDENTITY OF *AMICUS CURIAE*

Fair Trials International (“Fair Trials”) is a non-profit human rights organization that promotes the right to a fair trial incorporating internationally-recognized standards of justice.² Fair Trials was founded in 1992 and is headquartered in London, with offices in Washington, D.C. and Brussels.

In 2017, Fair Trials conducted a global survey of plea bargaining practices.³ This ongoing research is one of the most comprehensive efforts conducted to date on this issue. Fair Trials is therefore uniquely situated to provide relevant information on comparative pre-plea disclosure practices. This is relevant to the

¹ Plaintiff-Appellee George Alvarez, the Department of Justice, and the National Association of Criminal Defense Lawyers have consented to the filing of this brief. Because this is an *en banc* proceeding, however, we understand that Fair Trials needs leave of Court to appear as *amicus curiae* even if it had secured the consent of all parties.

² In accordance with Federal Rules of Appellate Procedure Rule 29(a)(4)(E), counsel for Fair Trials certifies that (1) no party’s counsel authored this brief in whole or in part, (2) no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief, and (3) no person other than Fair Trials’ counsel contributed money that was intended to fund the preparation or submission of this brief.

³ See Fair Trials, *The Disappearing Trial* (2017), <https://www.fairtrials.org/wp-content/uploads/2017/12/Report-The-Disappearing-Trial.pdf>.

Court’s consideration of whether the Due Process Clause requires the government—as a matter of fundamental fairness to the accused—to disclose exculpatory evidence in its possession prior to the entry of a guilty plea.

Fair Trials respectfully submits that it will present information that is relevant and helpful to the disposition of the case and that it has a well-founded interest in this matter. It therefore requests leave to file this brief as *amicus curiae*.

PRELIMINARY STATEMENT

This appeal addresses the question of whether due process requires the government to disclose exculpatory evidence to a criminal defendant before that defendant enters into a plea agreement. Many countries require such disclosure, recognizing the defendant’s right to make an informed and voluntary plea decision to safeguard against the entry of false convictions. Two other federal circuits and four other state supreme courts have similarly held that defendants are constitutionally entitled to exculpatory evidence during the plea negotiation stage.⁴ See Appellee’s Supp. Br. 22. This practice shows an emerging consensus that such disclosure is consistent with principles of fundamental fairness to the accused. This consensus is relevant to the Court’s consideration here because, as the

⁴ Two other federal circuits have also held that a defendant may challenge the validity of a guilty plea based on the government’s pre-plea failure to disclose material exculpatory evidence. See Supp. Br. of Appellee George Alvarez on Reh’g En Banc 5 & n.1, Jan. 3, 2018, Doc. 00514292513 (hereinafter “Appellee’s Supp. Br.”).

Supreme Court has recognized, practices and norms from other jurisdictions can be instructive in interpreting the scope of due process rights for criminal defendants.

In this case, the defendant George Alvarez pled guilty to a crime he did not commit. After serving four years in prison, he learned that officers within the Brownsville Police Department had withheld exculpatory video evidence at the time of his plea. He was declared “actually innocent” by the Texas Court of Criminal Appeals and released from prison 12 days later. If Mr. Alvarez had been arraigned in any number of other countries around the world—including (for example), Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, England and Wales, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Finland, the Netherlands, Russia, Spain, Switzerland, or New Zealand—he would have been entitled to receive the video proving his actual innocence prior to his plea decision.⁵ Denying him such critical evidence during plea negotiations is incompatible with commonly-held principles of due process in all of those jurisdictions. It should likewise be considered fundamentally unfair here.

Fair Trials respectfully submits that this coalescing norm—of providing exculpatory evidence to defendants before they plead guilty—should be instructive for this Court in determining what due process requires. This is an important issue,

⁵ Or, for that matter, South Carolina, Nevada, Utah, West Virginia, or one of the 13 other western states and two territories comprising the Ninth and Tenth Circuits. See Appellee’s Supp. Br. 22.

because Mr. Alvarez’s experience is not unique. As the Supreme Court has recognized, the “simple reality” is that “97 percent of federal convictions and 94 percent of state convictions are the result of a guilty plea.”⁶ *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Pleas are thus “central to today’s justice system” in our country. *Id.*

For many defendants, a plea bargain is the only way to proceed without imposing significant costs on their families or rolling the dice in a high-stakes trial, regardless of their factual guilt or innocence. Several particular features of US criminal procedure—including the routine use of cash bail systems that lead to excessive reliance on pre-trial detention,⁷ and sentences that are on average much longer than those elsewhere in the world⁸—have been associated with the uniquely high rates of plea bargaining found in US jurisdictions.⁹ The Innocence Project estimated in 2011 that approximately 20,000 factually innocent people were in US

⁶ See also Appellee’s Supp. Br. at 28.

⁷ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017). See also Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Distorts Case Outcomes* (2016), <http://www.econ.pitt.edu/sites/default/files/Stevenson.jmp2016.pdf>.

⁸ See, e.g., Justice Policy Institute, *Finding Direction: Expanding Criminal Justice Options by Considering the Policies of Other Nations* 2 (2011), <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>.

⁹ See, e.g., Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013), <https://www.hrw.org/news/2013/12/05/us-forced-guilty-pleas-drug-cases>.

prisons.¹⁰ In 2016, 58 people in Texas were exonerated of the crimes of which they were convicted; 52 of those exonerations involved guilty pleas.¹¹

What happened to Mr. Alvarez and these other victims cannot be squared with any modern conception of fundamental fairness. It can also be prevented. Fair Trials respectfully submits that due process requires the government to disclose exculpatory evidence to a criminal defendant before that defendant enters into a plea agreement.

APPLICABLE LEGAL STANDARDS¹²

The Due Process Clause requires that criminal process be conducted in accordance with principles of fundamental fairness. *See, e.g., Medina v. California*, 505 U.S. 437, 446 (1992) (collecting cases and noting that “it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”) (internal citations omitted).

¹⁰ The Innocence Project, *How Many Innocent People are in Prison* (2011), <https://www.innocenceproject.org/how-many-innocent-people-are-in-prison/>.

¹¹ The National Registry of Exonerations, *Exoneration Detail List*, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Jan. 5, 2018).

¹² *See also* Appellee’s Supp. Br. at 3-8 for a detailed discussion of the relevant legal authority in this case.

Principles of justice from other jurisdictions can help guide a court's determination of whether a particular policy or practice is consistent with generally-recognized traditions and principles of fundamental fairness. *See, e.g., Graham v. Florida*, 560 U.S. 48, 80 (2010) (discussing “the global consensus” against a certain sentencing practice). Indeed, the Supreme Court has a well-established tradition of looking to foreign practices or global norms as persuasive authority for purposes of interpreting issues of fundamental fairness under the Constitution. *See, e.g., id.; Roper v. Simmons*, 543 U.S. 551, 575-77 (2005) (noting that “the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation” of the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (referring to practice of the British Parliament and the European Court of Human Rights in interpreting the Fourteenth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting that the imposition of the death penalty for mentally handicapped offenders is “overwhelmingly disapproved” by the “world community”); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (discussing the abolition or restriction of the felony murder doctrine in England, India, Canada, other Commonwealth countries, and Continental Europe); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (finding it instructive that “out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue”).

References to foreign and international practice have been most frequent in the Supreme Court’s jurisprudence dealing with criminal procedure.¹³ The Supreme Court has found it appropriate to rely on such practice in cases requiring, as potentially here with the *Matthew*¹⁴ and *Conroy*¹⁵ panel opinions, reconsideration of earlier precedent.¹⁶ See, e.g., *Roper*, 543 U.S. at 574 (reversing *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Lawrence*, 539 U.S. at 577-78 (reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Atkins*, 536 U.S. at 321 (reversing *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

This Court and other circuits have followed suit in considering international laws, norms, and practices in deciding cases invoking constitutional questions. See, e.g., *United States v. Williams*, 617 F.2d 1063, 1089 (5th Cir. 1980) (noting that “the approbation of international law is a factor suggesting that a search or seizure is reasonable within the meaning of the fourth amendment”); *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 572 (6th Cir. 2013) (citing United Nations and Amnesty International practice “decrying the . . . shackling [of]

¹³ Stephen A. Simon, *The Supreme Court’s Use of Foreign Law in Constitutional Rights Cases*, 1 J.L. & Cts. 279, 287 (2013).

¹⁴ *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000).

¹⁵ *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009).

¹⁶ *Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (“It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.”) (emphasis added).

pregnant women, especially while in labor”); *Sandoval v. Calderon*, 241 F.3d 765, 777 (9th Cir. 2000) (discussing Canadian law and noting that “[o]ur nation’s courts are not alone in rejecting religious argument” before juries); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing Universal Declaration of Human Rights and American Convention on Human Rights in support of due process protection against arbitrary imprisonment); *United States v. Powers*, 622 F.2d 317, 323 (8th Cir. 1980) (“The practice in Western civilization, and the common-law rule, has been to require public trials.”).

Accordingly, comparative practices from other jurisdictions are relevant to the ultimate question before this Court of whether due process requires the government to disclose exculpatory evidence to a criminal defendant before that defendant enters into a plea agreement in this Circuit. The weight of foreign and international practice supports the conclusion that it does.

ARGUMENT

GLOBAL PLEA BARGAINING PRACTICES SHOW THAT PRE-PLEA DISCLOSURE IS CONSISTENT WITH FUNDAMENTAL FAIRNESS

A. Introduction

In the most comprehensive survey of global plea bargaining disclosure practices to date,¹⁷ Fair Trials and its counsel collected information on the operation of plea bargaining in 90 jurisdictions. Of these, 66 were found to

¹⁷ See generally, Fair Trials, *The Disappearing Trial*, *supra* note 3.

employ some form of plea bargaining (including cooperation agreements and some forms of abbreviated and summary proceedings). In a second phase of research, Fair Trials collected further information with more specificity on the operation of pre-plea disclosure requirements in 22 jurisdictions.¹⁸ Of these 22 jurisdictions, 20—including Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, England and Wales, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Finland, the Netherlands, Russia, Spain, Switzerland, and New Zealand—require disclosure of exculpatory evidence to defendants before they plead guilty or otherwise waive their right to a trial.¹⁹ In addition, leading international courts—such as the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR)—provide for pre-plea disclosure of exculpatory evidence.

Accordingly, when other courts and legislatures in the United States and abroad have squarely addressed the question of pre-plea disclosure, they have almost uniformly found it to be required by principles of fundamental fairness. Indeed, as the earlier panel already recognized in this case, “it is highly likely that

¹⁸ Surveys were distributed to lawyers in jurisdictions across the European Union, some common law countries, and other jurisdictions in which Fair Trials has relationships with expert lawyers. Where plea bargaining is not practiced in a particular jurisdiction—as in Sweden, Portugal, and Greece—no data relating to pre-plea disclosure could be gathered. See Fair Trials, *The Disappearing Trial*, *supra* note 3, Annex I.

¹⁹ Only Hong Kong and Singapore did not require pre-plea disclosure of exculpatory evidence.

the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." Panel Op. at 6-8, June 26, 2017, Doc. 00514048746 (quoting *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003)) (internal quotation marks omitted). In light of this growing consensus, this Court need not continue to stand nearly alone in rejecting a pre-plea right to disclosure of exculpatory information.

B. Comparative International Pre-Plea Disclosure Practices²⁰

The international legal landscape shows that pre-plea disclosure is an emerging norm of due process. This practice is instructive to the determination of what due process requires here. Although plea bargaining systems and other criminal practices and procedures can vary by jurisdiction, a few consistent themes have emerged.

First, multiple countries require automatic disclosure at certain early, pre-plea stages of the criminal proceedings. Germany, for example, requires automatic disclosure of the prosecutor's entire file at the conclusion of a criminal

²⁰ In accordance with Federal Rule of Appellate Procedure 32.1(b), Fair Trials has included cited foreign legal authorities in an indexed addendum to this brief. Pursuant to guidance received from the Clerk of Court, certified English translations and signed certification statements have also been provided in the addendum for non-English language authorities.

investigation, before an indictment is issued and a plea entered.²¹ The entire prosecution file includes all inculpatory and exculpatory evidence collected to date and is fully available to the court and the defense upon completion of the investigation and before the defendant enters into plea negotiations.²² Austria,²³ Belgium,²⁴ Bulgaria,²⁵ Chile,²⁶ Croatia,²⁷ Estonia,²⁸ France,²⁹ Italy,³⁰ Lithuania,³¹ the Netherlands,³² Russia,³³ Spain,³⁴ and Switzerland³⁵ provide similar

²¹ See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 23, 2014 § 147(1) (Ger.), <https://www.gesetze-im-internet.de/stpo/>.

²² Jenia I. Turner, *Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons*, 57 Wm. & Mary L. Rev. 1549, 1562 (2016).

²³ STRAFPROZESSORDNUNG [STPO] (Code of Criminal Procedure) §3 (2), §51(1) (Austria.).

²⁴ CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.] art. 21bis, 28bis, 56, 61ter (Belg.); LOI RELATIVE À LA DÉTENTION PRÉVENTIVE [Law of Pretrial Detention] art. 21 § 3, 22 (Belg.).

²⁵ PENAL PROCEDURE CODE OF THE REPUBLIC OF BULGARIA, art. 227(8).

²⁶ CÓD. PROC. PEN., art. 77. 93 (Chile); ACT OF PUBLIC PROSECUTION OFFICE, art. 1, 3 (Chile).

²⁷ ZAKON O KAZNENOM POSTUPKU [CRIMINAL PROCEDURE CODE], art. 184(2)(1) (Croat.).

²⁸ KRIMINAALMENETLUSE SEADUSTIK [Code of Criminal Procedure] art. 341 (Estonia).

²⁹ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 81, 82-1 (Fr.).

³⁰ Codice di procedura penal [C.p.p] art. 358, 415bis (It.).

³¹ BAUDŽIAMOJO PROCESO KODEKSO PATVIRTINIMO [Code of Criminal Procedure] art. 181 (Lith.).

³² Wetboek van Strafvordering (Code of Criminal Procedure) [SV] art. 30(1) (Neth.); HR 7 mei 1996, NJ 1996, 687 m.nt. T.M. Schalken (Dev Sol) (Neth.) (making clear that all relevant and exculpatory evidence is included in the case file).

³³ UGOLOVNO-PROTSESSUAL'NYI KODEKS ROSSIJSKOI FEDERATSII [UPK RF] [Criminal Procedural Code] art. 215, 217 (Russ.); see also Jenia I. Turner, *Plea Bargaining Across Borders* 163 (2009).

³⁴ LEY DE ENJUICIAMIENTO CRIMINAL (Code of Criminal Procedure) L.E.CIV. art. 118 (Spain).

protections.³⁶ And in 2008 and 2009 respectively, New Zealand³⁷ and Australia³⁸ granted defendants the right to disclosure of any “relevant” evidence prior to entering into a plea agreement.

Criminal codes in these countries make clear that these disclosure requirements stem from considerations of fundamental procedural fairness to defendants. *See, e.g.*, ZAKON O KAZNENOM POSTUPKU [CRIMINAL PROCEDURE CODE], art. 1(1) (Croat.) (“This Act defines the rules ensuring that no innocent person is convicted”); SCHWEIZERISCHE STRAFPROZESSORDNUNG [STGB] [CRIMINAL CODE] Oct. 5, 2007, art. 3(c), 6 (Switz.) (identifying the “requirement to treat all parties . . . justly” and the “requirement of fairness” as aims of criminal procedure code); CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.] art. 28bis (Belg.) (“The royal prosecutor shall

³⁵ SCHWEIZERISCHE STRAFPROZESSORDNUNG [STGB] [CRIMINAL CODE] Oct. 5, 2007, art. 101 (Switz.).

³⁶ In most civil law jurisdictions, criminal proceedings are divided into investigation and post-indictment trial phases, and “plea bargaining” often takes the form of a simplified or abbreviated trial at the conclusion of the investigative period. Evidence is collected in a “case file,” which contains all material evidence whether helpful to the prosecution or defense.

³⁷ Under New Zealand’s Criminal Disclosure Act, the prosecutor is required to disclose “any relevant information” “as soon as is reasonably practicable after a defendant has pleaded not guilty.” Criminal Disclosure Act 2008, 13 (N.Z.). The defendant may also request disclosure of certain law enforcement records and testing evidence “[a]t any time after criminal proceedings have commenced.” *Id.* s 12(2).

³⁸ The Australian Criminal Procedure Act similarly gives defendants the right to request, “[a]t any time after the commencement of a proceeding,” “any . . . information, document or thing in the possession of the prosecution that is relevant to the alleged offence” *Criminal Procedure Act* 2009 (Vic) s 39, 41 (Austl.).

ensure the . . . fairness of the manner in which said evidence is obtained.”). Courts in these jurisdictions have also stressed the importance of these requirements to protecting the due process rights of the accused. In a 2012 ruling, the Belgian Court of Cassation (the court of last resort in Belgium) noted that the obligation of prosecutors to collect and disclose exculpatory evidence in investigative files was necessary to achieve “the fairest solution to the case” and ensure that “inquir[ies] [are] not conducted solely to inculpate.”³⁹

Second, other countries have further clarified the right of pre-plea access to exculpatory evidence by explicitly requiring that defendants have access to all information within the prosecution’s possession before a plea can be entered. Relevant laws in France⁴⁰ and Belgium⁴¹ specifically require that a defendant have access to the prosecution’s case file on or before making a decision about whether to waive his or her right to a trial and accept a plea (or the legal equivalent). Luxembourg⁴² and Finland⁴³ also explicitly require disclosure as soon as plea proceedings are initiated.

³⁹ Hof van Cassatie [Cass.] [Court of Cassation], Dec. 19, 2012, Arr.Cass. 2012, 1310 (Belg.); *see also* Corte Cost., 16 April 2002, n.120 (It.) (noting that a defendant’s waiver of trial rights “presupposes knowledge of the preliminary investigation file”).

⁴⁰ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 495-8 (Fr.).

⁴¹ CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.] art. 216 § 3 (Belg.).

⁴² CODE D'INSTRUCTION CRIMINELLE ART. 564 (Lux.).

Third, case law from common law jurisdictions also recognizes the importance of pre-plea disclosure of exculpatory evidence. In *R. v. Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45 (SCC) (Can.), the Canadian Supreme Court held that the prosecution had a duty to disclose “all relevant information” to the defense “whether favourable to the accused or not,” and that this disclosure should occur “before the accused is called upon to elect the mode of trial or to plead.” Characterizing the right as “one of the principles of fundamental justice,” the Canadian Supreme Court emphasized that this protection is necessary “to ensure that the innocent are not convicted” and that “[r]ecent events have demonstrated that . . . non-disclosure [i]s an important factor in the conviction and incarceration of an innocent person[s].”

The Canadian Supreme Court in *Stinchcombe* also rejected the state’s contentions of excessive burden in that case, noting that any increase in burden would be offset through the realization of other efficiencies. This reasoning is equally applicable here. Available evidence suggests that an obligation to disclose material exculpatory evidence prior to the entry of a guilty plea would actually result in substantial *savings* to the government and court system. Savings would accrue through, for example, avoiding costs associated with incarceration, exoneration proceedings, subsequent lawsuits, and compensation provided to

⁴³ LAKI OIKEUDENKÄYNNISTÄ RIKOSASIOISSA [Criminal Procedure Act] Ch. 5(b), §3 (Finland); see also Fair Trials, *The Disappearing Trial*, *supra* note 3, at 52.

wrongfully imprisoned individuals.⁴⁴ These figures can be substantial. On average, a wrongfully convicted person spends approximately 13 years in jail before he is exonerated or his sentence is fully served,⁴⁵ and the average yearly cost of keeping an inmate in a federal prison is approximately \$31,977.65.⁴⁶ According to data from the Texas state comptroller's office, Texas has paid 101 men and women who were wrongfully sent to prison \$93.6 million in compensation over the past 25 years.⁴⁷

In England and Wales, there is a statutory duty on the prosecution to disclose any evidence “which might reasonably be considered capable of undermining the case for the prosecution.”⁴⁸ Although the statutory disclosure requirement is not triggered until a defendant is indicted, common law disclosure

⁴⁴ Additionally, cross-country comparisons reveal no obvious correlation between countries' imposition of such disclosure requirements and the per capita cost of their criminal proceedings. Some countries with pre-plea disclosure requirements, such as Germany and Switzerland, spend more per capita on prosecution costs than the United States, while others, such as Finland and Spain, do not. See The European Institute for Crime Prevention and Control, Graham Farrell and Ken Clark, *What Does the World Spend on Criminal Justice?* (HEUNI Paper No. 20, 2004).

⁴⁵ Emilio C. Viano, *Plea Bargaining in the United States: A Perversion of Justice*, 83 *Revue Internationale De Droit Penal* 109 (2012).

⁴⁶ *Annual Determination of Average Cost of Incarceration*, Fed. Reg. 81, 138, (Jul. 19, 2016). One study of the California criminal justice system found that over 24 years, wrongful convictions cost the state's taxpayers a total of \$282 million, including \$80 million on incarceration costs, \$68 million in lawsuit settlements, \$5 million in compensation for wrongful imprisonment, and \$68 million for the trials and appeals. See Tom Jackman, *Wrongful Convictions Cost California Taxpayers \$282 Million Over 24 years, Study Finds*, The Wash. Post (Mar. 14, 2016).

⁴⁷ Jonathan Silver & Lindsay Carbonell, *Wrongful Convictions Have Cost Texans More Than \$93 Million*, The Texas Tribune (June 24, 2016).

⁴⁸ Criminal Procedure and Investigations Act 1996 c. 25, §3 (Eng.).

requirements apply from the time of arrest and require “any immediate disclosure [which] justice and fairness require . . . in the particular circumstances of the case.”⁴⁹ Accordingly, from the point of laying a criminal charge, the officer in the case is required to certify that to the best of his “knowledge and belief no information has been withheld which would assist the accused in the preparation of the defence case,” and investigating authorities are required to bring such material to the attention of the prosecutor for disclosure to the defense—including where it is anticipated that the defendant will plead guilty.⁵⁰

Finally, the practice of international bodies and international courts also illustrates the growing recognition of pre-plea disclosure as an element of fundamental procedural fairness. For example, the European Union has recognized the need to safeguard defendants’ rights by providing for early disclosure of exculpatory evidence. Directive 2012/13/EU on the right to information in criminal proceedings, adopted in 2012 and applicable in 27

⁴⁹ R v DPP ex parte Lee [1999] 1 WLR 1950 at 1962 (Eng.).

⁵⁰ Crown Prosecution Service Disclosure Manual, *Chapter 2.5: General Duties of Disclosure outside the CIPA* (Jan. 1, 2018), <https://www.cps.gov.uk/legal-guidance/disclosure-manual-chapter-2-general-duties-disclosure-outside-cpia-1996>; Crown Prosecution Service, *Streamlined Summary Disclosure*, <https://www.cps.gov.uk/legal-guidance/streamlined-summary-disclosure> (last visited Jan. 9, 2018); see also Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 23(1)): Code of Practice §6.6* (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf.

European Union member states,⁵¹ requires that “all material evidence” be disclosed to a defendant “in order to safeguard the fairness of the proceedings and to prepare the defence” and “in due time to allow the effective exercise of the rights of the defence.”⁵² The right to access material evidence is not framed as a right attaching only to trial proceedings, but rather to “criminal proceedings” more broadly. The Directive (which largely codifies the case law of the European Court of Human Rights) applies to criminal proceedings generally—including both trial *and pre-trial* phases—underscoring a broad-based recognition by the EU of the importance of early disclosure to protecting the fairness of pre-trial criminal proceedings.

Similarly, the practice of leading international courts also illustrates the growing recognition of pre-plea disclosure as an element of fundamental procedural fairness. The ICC’s⁵³ founding document, the Rome Statute, requires the disclosure of exculpatory evidence to defendants “as soon as practicable.”⁵⁴ The ICC Pre-Trial Division, which is the organ of the court responsible for

⁵¹ Exempting only Denmark, which is not bound by the Directive but which nonetheless contains similar provisions in its domestic law.

⁵² Directive 2012/13/EU, of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, art. 7(2)-(3), 2012 O.J. (L 1421) 1.

⁵³ The ICC is a permanent international criminal court that investigates and prosecutes individuals for crimes universally recognized under international law, such as genocide, war crimes, crimes against humanity and the crime of aggression.

⁵⁴ Rome Statute of the International Criminal Court art. 67(2), 17 July 1998, A/CONF.183/9.

deciding whether to confirm the charges against the accused, requires the prosecution to disclose the “totality” of exculpatory evidence before the charges are confirmed and any plea entered.⁵⁵

Likewise, the rules of the ICTY and the ICTR⁵⁶ allow the defense to “inspect any books, documents, photographs and tangible objects . . . which are material to the preparation of the defence” and further provide that all exculpatory evidence must affirmatively be disclosed “as soon as practicable.”⁵⁷ The practice of international courts is particularly illustrative given that they are relatively new creations (many within the past 30 years) and their procedures are based on global consensus about internationally-recognized due process standards.

C. Conclusion

Taken together, the practices researched by Fair Trials, recent developments in EU law, and the practice of international courts, all suggest that pre-plea disclosure is a growing international norm of due process that should be taken into account by this Court in evaluating fundamental fairness here. The rationale for requiring pre-plea disclosure in these jurisdictions is clear: to ensure that criminal

⁵⁵ Jenia Iontcheva Turner, *Plea Bargaining and International Criminal Justice*, 48 Univ. Pac. L. Rev. 219, 236 (2017).

⁵⁶ The ICTY and ICTR are international criminal tribunals established to prosecute violations of war crimes and other violations of international humanitarian law that occurred during the 1990s in the Balkans and Rwanda respectively.

⁵⁷ ICTY R. P. & Evid., 66(b), 68(i); ICTR R. P. & Evid., 66(b), 68(a).

proceedings—including plea bargains—are conducted fairly.⁵⁸ The idea that all criminal proceedings leading to possible conviction and deprivation of liberty—not just trials—need to be fair is not a foreign concept. The Supreme Court recognized in *Brady* that “our system of the administration of justice suffers when any accused is treated unfairly.” *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

This mandate takes on a particular urgency in the context of plea bargaining, given that our justice system “is for the most part a system of pleas.” *Frye*, 566 U.S. at 143-44. With 97% of federal convictions⁵⁹ and 94% of state convictions⁶⁰ won through guilty pleas, the United States has no peer in the world in the frequency of use of plea bargaining to resolve criminal proceedings. Even in other common law systems in which plea bargaining has long been practiced, guilty pleas make up a lower proportion of convictions than in the United States. In Australia, for example, rates of pleas at local and district levels range from 60-75%

⁵⁸ See, e.g., *R. v. Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45 (SCC) (Can.) (characterizing pre-plea disclosure as “one of the principles of fundamental justice” and necessary “to ensure that the innocent are not convicted”); SCHWEIZERISCHE STRAFPROZESSORDNUNG [STGB] [CRIMINAL CODE] Oct. 5, 2007, art. 3(c), 6 (Switz.) (identifying the “[p]rinciple of substantive truth” and the “requirement of fairness” as aims of criminal procedure code); ZAKON O KAZNENOM POSTUPKU [CRIMINAL PROCEDURE CODE], art. 1(1) (Croat.) (“This Act establishes the rules which guarantee that an innocent person shall not be convicted.”).

⁵⁹ U.S. Sentencing Comm’n, *2016 Sourcebook of Federal Sentencing Statistics* fig.C (2016), <https://www.ussc.gov/research/sourcebook-2016>.

⁶⁰ Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons*, (Jan. 9, 2018), <https://www.bjs.gov/index.cfm?ty=tp&tid=23>.

of cases.⁶¹ Many other jurisdictions limit the applicability of plea bargaining to certain types of cases; for example, to minor cases carrying sentences of less than a few years imprisonment or for corruption or organized crime cases only,⁶² with trials complete with full procedural protections remaining the main arbiter of justice for most cases. From that perspective, the US appears to be an extreme outlier in that only a small percentage of criminal proceedings are ever subject to disclosure of exculpatory material.

Accordingly, consistent with the widespread international recognition of the importance of pre-plea evidentiary disclosure, this Court should extend the principles underlying *Brady* and its progeny to guilty pleas as well.

⁶¹ New South Wales Bureau of Crime Statistics and Research, *Archived annual NSW Criminal Court Statistics*, tbls. 1.1 & 3.6, http://www.bocsar.nsw.gov.au/Pages/bocsar_Court_stats/bocsar_Court_stats_archived.aspx (last visited Jan. 7, 2018).

⁶² See Fair Trials, *The Disappearing Trial*, *supra* note 3, at 52, 80, Annex II.

CONCLUSION

For all of the foregoing reasons, Fair Trials respectfully submits that the judgment of the trial court should be upheld in its entirety, and this Court should clarify that criminal defendants within this Circuit are entitled to receive exculpatory evidence prior to the entry of a guilty plea.

Dated: January 10, 2018

Respectfully Submitted,

/s/ John K. Warren

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2018, I electronically filed the foregoing [Proposed] Brief for Fair Trials as *Amicus Curiae* in Support of Plaintiffs-Appellees with the Clerk for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ John K. Warren
John K. Warren
Dated: January 10, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because this brief contains 5,049 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2013 in 14-point Times New Roman font.

/s/ John K. Warren
John K. Warren
Dated: January 10, 2018

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- O. Spain
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- (2) An informant who acknowledges a statement referred to in subsection (1) which the informant knows at the time to be false is liable to the penalties of perjury.

Note

See section 314 of the **Crimes Act 1958** for the offence of perjury.

39 When full brief must be served

- (1) At any time after a criminal proceeding has commenced or, if a preliminary brief is served under section 24, at any time after a summary case conference is held, the accused, by written notice to the informant, may request that a full brief be served.

Note

Section 54 provides for summary case conferences.

- (2) If the accused gives a notice under subsection (1), the informant must serve a full brief on the accused at least 14 days before—
- (a) the contest mention hearing; or
 - (b) if a contest mention hearing is not held, the summary hearing.
- (3) The Magistrates' Court, by order, may vary the date for service of a full brief to a specified date that is earlier or later than the date for service required by subsection (2).
- (4) Nothing in this section prevents agreement between the informant and the accused to more limited disclosure than is required in a full brief.

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40 How full brief must be served

- (1) A full brief must be served personally on the accused in accordance with section 339 unless the informant is satisfied that ordinary service is appropriate in all the circumstances.

Note

Section 342 provides for ordinary service.

- (2) In considering whether to effect service of a full brief by ordinary service, the informant must consider whether it is an appropriate method of service in all the circumstances as known by the informant including—
- (a) the nature and gravity of the alleged offence;
 - (b) whether the accused has previously been found guilty or convicted of any similar offence;
 - (c) the period of time that has elapsed since the accused's address for service was ascertained;
 - (d) the manner of service of the summons to answer to the charge.

41 Contents of full brief

- (1) Unless earlier disclosed to the accused, whether in a preliminary brief, at a summary case conference or otherwise, a full brief must contain—
- (a) a notice in the form prescribed by the rules of court—
 - (i) explaining this section and section 83;
 - and

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- (ii) explaining the importance of the accused obtaining legal representation; and
 - (iii) advising that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (iv) providing details of how to contact Victoria Legal Aid; and
 - (b) a copy of the charge-sheet relating to the alleged offence; and
 - (c) a copy of the criminal record of the accused or a statement that the accused has no previous convictions; and
 - (d) any information, document or thing on which the prosecution intends to rely at the hearing of the charge including—
 - (i) a copy of any statement relevant to the charge signed by the accused, or a record of interview of the accused, that is in the possession of the informant; and
 - (ii) a copy, or a transcript, of any audio-recording or audiovisual recording required to be made under Subdivision (30A) of Division 1 of Part III of the **Crimes Act 1958**; and
 - (iii) a copy or statement of any other evidentiary material that is in the possession of the informant relating to a confession or admission made by the accused relevant to the charge.
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- (iv) a list of the persons the prosecution intends to call as witnesses at the hearing, together with a copy of each of the statements made by those persons; and

Note

See section 47 for requirements for statements.

- (v) a legible copy of any document which the prosecution intends to produce as evidence; and
 - (vi) a list of any things the prosecution intends to tender as exhibits; and
 - (vii) a clear photograph, or a clear copy of such a photograph, of any proposed exhibit that cannot be described in detail in the list; and
 - (viii) a description of any forensic procedure, examination or test that has not yet been completed and on which the prosecution intends to rely as tending to establish the guilt of the accused; and
 - (ix) any evidentiary certificate issued under any Act that is likely to be relevant to the alleged offence; and
- (e) any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence including—
 - (i) a list of the persons (including experts) who have made statements or given information relevant to the alleged offence but who the prosecution does not intend to call as witnesses at the hearing; and
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- (ii) a copy of every statement referred to in subparagraph (i) made by each of those persons or, if the person has not made a statement, a written summary of the substance of any evidence likely to be given by that person or a list of those statements or written summaries; and
 - (iii) a copy of every document relevant to the alleged offence that the prosecution does not intend to tender as an exhibit at the hearing or a list of those documents; and
 - (iv) a list containing descriptions of any things relevant to the alleged offence that the prosecution does not intend to tender as exhibits at the hearing; and
 - (v) a clear photograph, or a clear copy of such a photograph, of any thing relevant to the alleged offence that cannot be described in detail in the list; and
 - (vi) a copy of—
 - (A) records of any medical examination of the accused; and
 - (B) reports of any forensic procedure or forensic examination conducted on the accused; and
 - (C) the results of any tests—
carried out on behalf of the prosecution and relevant to the alleged offence but on which the prosecution does not intend to rely; and
-

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- (vii) a copy of any other information, document or thing required by the rules of court to be included in a full brief; and
 - (f) if the informant refuses to disclose any information, document or thing that is required to be included in the full brief, a written notice that the informant refuses disclosure under section 45, identifying the ground for refusing disclosure.
- (2) Section 48 applies to information and other material supplied in a full brief.

Notes

- 1 See section 363 as to the prosecution's general obligation of disclosure.
- 2 Section 39(4) enables an informant and an accused to agree to the provision of less material in the full brief than is required by section 41.
- 3 If the Magistrates' Court hears and determines a charge in the absence of the accused, section 83 provides that certain documents in a full brief served on the accused are admissible in evidence.
- 4 See section 86 as to proof of criminal record in the absence of the accused.

42 Continuing obligation of disclosure

- (1) This section applies to any information, document or thing that—
- (a) comes into the informant's possession or comes to the informant's notice after the service of a preliminary brief or a full brief, as the case may be; and
 - (b) would have been required to be listed, or a copy of which would have been required to be served, in the preliminary brief or the full brief.
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Supreme Court Judgments

R. v. Stinchcombe

Collection: Supreme Court Judgments

Date: 1991-11-07

Report: [1991] 3 SCR 326

Case number: 21904

Judges: La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from: Alberta

Subjects: Criminal law

Notes: SCC Case Information: [21904](#)

R. v. Stinchcombe, [1991] 3 S.C.R. 326

William B. Stinchcombe

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Stinchcombe

File No.: 21904.

1991: May 2; 1991: November 7.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Criminal law -- Evidence -- Crown's obligation to make disclosure to defence -- Witness favourable to accused interviewed by police -- Crown not calling witness and refusing to produce statements obtained -- Whether Crown obliged to disclose statements.

The accused, a lawyer, was charged with breach of trust, theft and fraud. A former secretary of his was a Crown witness at the preliminary inquiry, where she gave evidence apparently favourable to the defence. After the preliminary inquiry but prior to trial, the witness was interviewed by an RCMP officer and a tape-recorded statement was taken. Later, during the course of the trial, the witness was again interviewed by a police officer and a written statement taken. Defence counsel was informed of the existence but not of the content of the statements. His requests for disclosure were refused. During the trial defence counsel learned conclusively that the witness would not be called by the Crown and sought an order that the witness be called or that the Crown disclose the contents of the statements to the defence. The trial judge dismissed the application. The trial proceeded and the accused was convicted of breach of trust and fraud. Conditional stays were entered with respect to the theft counts. The Court of Appeal affirmed the convictions without giving reasons.

Held: The appeal should be allowed and a new trial ordered.

The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. The obligation to disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right

of the accused to make full answer and defence. The absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. This privilege is reviewable, however, on the ground that it is not a reasonable limit on the right to make full answer and defence in a particular case.

Counsel for the accused must bring to the trial judge's attention at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. This will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. All statements obtained from persons who have provided relevant information to the authorities should be produced, even if they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes, all information in the prosecution's possession relating to any relevant evidence the person could give should be supplied.

Crown counsel was not justified in refusing disclosure here on the ground that the witness was not worthy of credit: whether the witness is credible is for the trial judge to determine after hearing the evidence. The trial judge ought to have examined the statements. Since the information withheld might have affected the outcome of the trial, the failure to disclose impaired the right to make full answer and defence. There should be a new trial at which the statements are produced.

Cases Cited

Referred to: *Cunliffe v. Law Society of British Columbia* (1984), 40 C.R. (3d) 67; *Savion v. The Queen* (1980), 13 C.R. (3d) 259; *R. v. Bourget* (1987), 56 C.R. (3d) 97; *Boucher v. The Queen*,

[1955] S.C.R. 16; *Marks v. Beyfus* (1890), 25 Q.B.D. 494; *R. v. Scott*, [1990] 3 S.C.R. 979; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *Lemay v. The King*, [1952] 1 S.C.R. 232; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, affg (1988), 46 C.C.C. (3d) 142; *Caccamo v. The Queen*, [1976] 1 S.C.R. 786; *Piché v. The Queen*, [1971] S.C.R. 23; *Rothman v. The Queen*, [1981] 1 S.C.R. 640; *McInroy v. The Queen*, [1979] 1 S.C.R. 588; *R. v. Mannion*, [1986] 2 S.C.R. 272.

Statutes and Regulations Cited

[Canadian Charter of Rights and Freedoms, s. 7](#) .

Criminal Code, R.S.C. 1970, c. C-34, ss. 294(a), 296, 338(1)(a).

Criminal Code, R.S.C., 1985, c. C-46, ss. 334(a), 336, 380(1)(a), 482, 603.

Criminal Justice Act 1967 (U.K.), 1967, c. 80.

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Bench and Bar Council of Ontario. Special Committee on Preliminary Hearings. Report of the Special Committee on Preliminary Hearings. Toronto: Bench and Bar Council of Ontario, 1982.

Canada. Law Reform Commission. Report 22. *Disclosure by the Prosecution*. Ottawa: Minister of Supply and Services Canada, 1984.

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Nova Scotia. *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1, *Findings and Recommendations*. Halifax: The Commission, 1989.

APPEAL from a judgment of the Alberta Court of Appeal affirming the judgment of Brennan J. sitting without a jury convicting the appellant of breach of trust and fraud. Appeal allowed.

William E. Code, Q.C., and John Kingman Phillips, for the appellant.

Daniel M. McDonald, Q.C., and Bruce R. Fraser, Q.C., for the respondent.

//Sopinka J.//

The judgment of the Court was delivered by

SOPINKA J. -- This appeal raises the issue of the Crown's obligation to make disclosure to the defence. A witness who gave evidence at the preliminary inquiry favourable to the accused was subsequently interviewed by agents for the Crown. Crown counsel decided not to call the witness and would not produce the statements obtained at the interview. The trial judge refused an application by the defence for disclosure on the ground that there was no obligation on the Crown to disclose the statements. The Court of Appeal affirmed the judgment at trial and the case is here with leave of this Court.

1. Facts

The appellant was a Calgary lawyer charged with appropriating certain financial instruments from a client, one Jack Abrams. The indictment charged thirteen counts of criminal breach of trust contrary to s. 296 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now [s. 336](#)), thirteen counts of theft contrary to s. 294(a) (now [s. 334\(a\)](#)) of the *Code*, and one count of fraud contrary to s. 338(1)(a) (now [s. 380\(1\)\(a\)](#)) of the *Code*. The trial in the Alberta Court of Queen's Bench was before Brennan J. without a jury.

The Crown alleged that the appellant had wrongfully appropriated property which he held in trust for Abrams. The defence did not contest the receipt of funds by the appellant. The defence did contend, however, that despite Stinchcombe's formal status as trustee of the property, Abrams had in fact made Stinchcombe his business partner. Under this theory, Stinchcombe had acted as he was legally

entitled to act. At issue therefore was the actual, as opposed to the formal, nature of the relationship between the two men.

Patricia Lineham is a former secretary of Mr. Stinchcombe. She was a Crown witness at the preliminary inquiry. There, she gave evidence which was, apparently, very favourable to the defence regarding the conduct of Abrams. The precise content of this testimony was not before the trial judge and is not in the record. Lineham was not listed on the indictment, but was subpoenaed by the Crown.

After the preliminary inquiry but prior to the trial, Lineham was interviewed by an RCMP officer. A tape-recorded statement was taken. Crown counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure was refused. Later, during the course of the trial, Lineham was again interviewed by a police officer and a written statement taken. Again, though defence counsel was advised of the existence of the statement, a request for disclosure was refused. Crown counsel also indicated that he would not be calling Lineham as she was not worthy of credit.

It was not until the third day of the trial that defence counsel learned conclusively that Lineham would not be called by the Crown. At this time, he moved before the trial judge for an order that (i) the Crown call the witness, or (ii) the Court call the witness, or (iii) the Crown disclose the contents of the statements to the defence. A review of the record makes it clear that defence counsel was pressing for access to, or production of, both the tape-recorded and written statements and was not pressing the alternative requests. In support of this motion, counsel for the defendant indicated that Ms. Lineham refused to speak to him or his staff when they attempted to interview her about the contents of the statements. Crown counsel did not provide any basis for resisting production other than to say that in his view the potential witness was not worthy of credit.

The trial judge dismissed the application. Brennan J. ruled that under the circumstances there was no obligation on the Crown to call the witness and that there was no obligation on the Crown to

disclose the contents of the statements. The trial proceeded, and the accused was found guilty of all twenty-seven counts charged. A conditional stay was entered with respect to the thirteen theft counts. The Alberta Court of Appeal dismissed the appeal from conviction without issuing reasons. Leave to appeal to this Court was granted on the disclosure issue.

During argument before this Court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

2. Crown's Obligation to Disclose

The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject. See, for example, *Cunliffe v. Law Society of British Columbia* (1984), 40 C.R. (3d) 67 (B.C.C.A.); *Savion v. The Queen* (1980), 13 C.R. (3d) 259 (Ont. C.A.); *R. v. Bourget* (1987), 56 C.R. (3d) 97 (Sask. C.A.). No case in this Court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 Working Paper") and a 1984 report titled *Disclosure by the Prosecution* (the "1984 Report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in [s. 603](#) of the [Criminal Code, R.S.C., 1985, c. C-46](#), enacted in the 1953-54 overhaul of the *Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the

adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence (see 1974 Working Paper at pp. 29-31; 1984 Report at pp. 13-15; Marshall Commission Report, *infra*, Vol. 1, at pp. 242-44).

It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. The Queen*, [1955] S.C.R. 16, Rand J. states, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution

and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

Other grounds advanced by advocates of the absence of a general duty to disclose all relevant information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 Report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 Working Paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

In England, under the provisions of the *Criminal Justice Act 1967* (U.K.), 1967, c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: *Report of the Special Committee on Preliminary Hearings*, Bench and Bar Council of Ontario (1982), at pp. 12-15.

Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or

counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979), and any rules with respect to disclosure would be subject to this and other rules of privilege. With respect to witnesses, persons who have information that may be evidence favourable to the accused will have to have their identity disclosed sooner or later. Even the identity of an informer is subject to this fact of life by virtue of the "innocence exception" to the informer privilege rule (*Marks v. Beyfus*, *supra*, at pp. 498-99; *R. v. Scott*, *supra*, at p. 996; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 93; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494). It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart

from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in [s. 7](#) of the [Canadian Charter of Rights and Freedoms](#) as one of the principles of fundamental justice. (See *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at p. 1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1: *Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238). The Commission recommended an extensive regime of disclosure of which the key provisions are as follows (Vol. 1 at p. 243):

- 2(1)** *Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:*
- (a)** *to receive a copy of his criminal record;*
 - (b)** *to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;*
 - (c)** *to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;*
 - (d)** *to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;*
 - (e)** *to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;*

- (f) *to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;*
- (g) *to receive a copy of the criminal record of any proposed witness; and*
- (h) *to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.*
- 2(2)** *The disclosure contemplated in subsection (1), paragraphs (d), (e) and (h) shall be provided by the Crown and may be limited only where, upon an inter partes application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.*

In my opinion there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in *Lemay v. The King*, [1952] 1 S.C.R. 232, at p. 257:

I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise.... [Emphasis added.]

This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production to the defence is then the only way in which the injunction of Cartwright J. can be obeyed.

In *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155, McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it". This passage was cited with approval by McLachlin J. in her reasons on behalf of the Court ([1991] 1 S.C.R. 763). She went on to add: "This Court has previously stated that the Crown is under a

duty at common law to disclose to the defence all material evidence whether favourable to the accused or not" (p. 774).

As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be re-opened and the Crown must have some discretion to delay disclosure in these circumstances.

The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose all relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters.

Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so

by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

These are the general principles that govern the duty of the Crown to make disclosure to the defence. There are many details with respect to their application that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here. Although the basic principles of disclosure will apply across the country, the details may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by [s. 482](#) of the [Criminal Code](#) which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure.

The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in [s. 7](#) of the [Charter](#) may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this Court.

There are, however, two additional matters which require further elaboration of the general principles of disclosure outlined above. They are: (1) the timing of disclosure, and (2) what should be disclosed. Some detail with respect to these issues is essential if the duty to disclose is to be meaningful.

Moreover, with respect to the second matter, resolution of the dispute over disclosure in this case requires a closer examination of the issue.

With respect to timing, I agree with the recommendation of the Law Reform Commission of Canada in both of its reports that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. It will be of great assistance to the accused to know what are the strengths and weaknesses of the Crown's case before committing on these issues. As I have pointed out above, the system will also profit from early disclosure as it will foster the resolution of many charges without trial, through increased numbers of withdrawals and pleas of guilty. The obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. At this stage, the Crown's brief will often not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. The attempt to make this distinction in connection with the confession rule proved to be unworkable and was eventually discarded by this Court. See *Piché v. The Queen*, [1971] S.C.R. 23, at p. 36; *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 645. To re-introduce the distinction here would lead to interminable controversy at trial that should be avoided. The Crown must, therefore, disclose relevant material whether it is inculpatory or exculpatory.

A special problem arises in respect to witness statements and is specifically raised in this

With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

The Marshall Commission Report recommended disclosure of "any statement made by a

This Court, in *R. v. C. (M.H.)*, *supra*, dealt with the failure to disclose either the identity or statement of a person who provided relevant information to the police but who was not called as a witness. McLachlin J., speaking for the Court, indicated that failure to disclose in such cases could impair the fairness of the trial.

I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the Commission in its 1984 Report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. Moreover, I do not understand the Commission's statement that "[t]heir statements are not evidence". That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called *viva voce*. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

3. Application to This Case

No request was made in this case for disclosure prior to pleading or electing the mode of trial and this issue does not, therefore, arise. A request for disclosure was made during the trial for the disclosure of two statements taken subsequent to the preliminary hearing. An application for disclosure

was dismissed by the trial judge on the ground that there was no obligation on the Crown to disclose the statements.

Applying the above principles, I conclude that the following errors were committed:

- (1) Counsel for the Crown misconceived his obligation to disclose the statements;
- (2) The explanation for refusal that the witness was not worthy of credit was completely inadequate to support the exercise of this discretion on the ground of irrelevance. Whether the witness is credible is for the trial judge to determine after hearing the evidence;
- (3) The trial judge ought to have examined the statements. The suggestion that this would have prejudiced the trial judge is without merit. Trial judges are frequently apprised of evidence which is ruled inadmissible. One example is a confession that fails to meet the test of voluntariness. No one would suggest that knowledge of such evidence prejudices the trial judge. We operate on the principle that a judge trained to screen out inadmissible evidence will disabuse himself or herself of such evidence;
- (4) The trial judge erred in his statement of the duty to disclose on the part of the Crown.

It was submitted that the appellant was not deprived of the opportunity to make full answer and defence because he could have:

- (a) interviewed the witness and obtained his own statement;
- (b) called the witness, and if her evidence proved adverse, cross-examined on the basis of the preliminary hearing transcript.

With respect to (a), counsel for the appellant pointed out that the witness refused to be interviewed. In any event, even if such an interview took place, what the witness said on two prior occasions could be very material to the defence.

As for (b), counsel for the defence is entitled to know whether the witness he/she is calling will give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement. The latter usually creates an undesirable atmosphere at the trial and the most that can be achieved is to impeach or destroy the credibility of the witness. See *McInroy v. The Queen*, [1979] 1 S.C.R. 588, and *R. v. Mannion*, [1986] 2 S.C.R. 272, at pp. 277-78. Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence.

What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This in turn depends on the nature of the information withheld and whether it might have affected the outcome. As McLachlin J. put it in *R. v. C. (M.H.)*, *supra*, at p. 776:

Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.

In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and therefore we have no indication from the trial judge as to whether they were favourable or unfavourable. Examination of the statements, which were tendered as fresh evidence in this Court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence. In the circumstances, we must assume that non-production of the

statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.

Accordingly, I would allow the appeal and direct a new trial at which the statements should be produced.

Appeal allowed.

Solicitors for the appellant: Code Hunter, Calgary.

Solicitor for the respondent: The Attorney General for Alberta, Calgary.

***1950 Regina v Director of Public Prosecutions**

Queen's Bench Division

18 March 1999

[1999] 1 W.L.R. 1950

Kennedy L.J. and Blofeld J.

1999 March 10, 11; 18

Crime—Evidence—Prosecution evidence—Disclosure of information to defence—Witness statements—Complainant's and victim's previous convictions—Whether duty to disclose to defence prior to committal— [Criminal Procedure and Investigations Act 1996 \(c. 25\), s. 3](#)

The applicant was charged with murder and detained in custody. His solicitors sought disclosure of copies of prosecution witness statements and the deceased victim's criminal record in order to advise their client and take proper instructions prior to committal. Though some disclosure followed, the prosecution maintained that, in accordance with the [Criminal Procedure and Investigations Act 1996](#), ¹ it was unable to disclose all of the material required by the defence prior to committal.

On the defendant's application for judicial review: —

Held, that although [Part 1](#) of the Act of 1996, which replaced the common law rules on the disclosure of prosecution material to the defence with a new and more restrictive regime, did not specifically deal with the period between arrest and committal, and although in most cases prosecution disclosure could wait until after committal without jeopardising the defendant's right to a fair trial, a prosecutor had nevertheless always to be alive to the need to make advance disclosure of material which he was aware of and recognised as being of a type that should be disclosed at an earlier stage; that such material included previous convictions of a complainant or deceased if that information could reasonably assist the defence when applying for bail, material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process or to submit that he should be committed for trial on a lesser charge or not be committed at all, and material (such as the names of eye-witnesses whom the prosecution did not intend to use) which would enable the defendant and his legal advisers to make preparations for trial which might be significantly less effective if disclosure were delayed; that any disclosure by the prosecution prior to committal would not normally exceed the primary disclosure which after committal would be required by [section 3](#) of the Act, namely disclosure of material which in the prosecutor's opinion might undermine its case against the defendant; and that, accordingly, the defendant was entitled to the disclosure sought but, the prosecution having voluntarily made such disclosure, no formal order to that effect need be granted (post pp. 1962C–1963B).

The following cases are referred to in the judgment of Kennedy L.J.:

***1951**

Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734

[Reg. v. Brown \(Winston\) \[1998\] A.C. 367; \[1997\] 3 W.L.R. 447; \[1997\] 3 All E.R. 769, H.L.\(E.\)](#)

[Reg. v. Crown Prosecution Service, Ex parte Warby \(1993\) 158 J.P. 190, D.C.](#)

[Reg. v. Davis \[1993\] 1 W.L.R. 613; \[1993\] 2 All E.R. 643, C.A.](#)

Reg. v. Director of Public Prosecutions, Ex parte C. [1995] 1 Cr.App.R. 136, D.C.

[Reg. v. Keane \[1994\] 1 W.L.R. 746; \[1994\] 2 All E.R. 478, C.A.](#)

Reg. v. Melvin (unreported), 20 December 1993, C.C.C. *1951

[Reg. v. Secretary of State for the Home Department, Ex parte Q. \(unreported\) 5 March 1999](#), Richards J.

Reg. v. Stratford Justices, Ex parte Imbert, *The Times*, 25 February 1999, D.C.

[Reg. v. Ward \(Judith\) \[1993\] 1 W.L.R. 619; \[1993\] 2 All E.R. 577, C.A.](#)

The following additional cases, although not cited, were referred to in the skeleton arguments:

[Arulanandam v. Secretary of State for the Home Department \[1996\] Imm.A.R. 587, C.A.](#)

[Baksh v. The Queen \[1958\] A.C. 167; \[1958\] 2 W.L.R. 536, P.C.](#)

[Reg. v. Bromley Magistrates' Court, Ex parte Smith \[1995\] 1 W.L.R. 944; \[1995\] 4 All E.R. 146, D.C.](#)

[Reg. v. Collister \(1955\) 39 Cr.App.R. 100, C.C.A.](#)

[Reg. v. Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell \[1990\] 2 A.C. 738; \[1990\] 2 W.L.R. 1320; \[1990\] 2 All E.R. 434, H.L.\(E.\)](#)

[Reg. v. Gough \[1993\] A.C. 646; \[1993\] 2 W.L.R. 883; \[1993\] 2 All E.R. 724, H.L.\(E.\)](#)

[Reg. v. Greater Manchester Coroner, Ex parte Tal \[1985\] Q.B. 67; \[1984\] 3 W.L.R. 643; \[1984\] 3 All E.R. 240, D.C.](#)

[Reg. v. Livingstone \[1993\] Crim.L.R. 597, C.A.](#)

[Reg. v. Lord Chancellor, Ex parte Witham \[1998\] Q.B. 575; \[1998\] 2 W.L.R. 849; \[1997\] 2 All E.R. 779, D.C.](#)

[Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Dairy Trade Federation Ltd. \[1995\] C.O.D. 3](#)

[Reg. v. Secretary of State for the Home Department, Ex parte Doody \[1994\] 1 A.C. 531; \[1993\] 3 W.L.R. 154; \[1993\] 3 All E.R. 92, H.L.\(E.\)](#)

[Reg. v. Secretary of State for the Home Department, Ex parte Patel \[1995\] Imm.A.R. 223](#)

[Reg. v. Secretary of State for the Home Department, Ex parte Ruddock \[1987\] 1 W.L.R. 1482; \[1987\] 2 All E.R. 518, D.C.](#)

Reg. v. Secretary of State for the Home Department, Ex parte Wynne [1992] Q.B. 406; [1992] 2 W.L.R. 564; [1992] 2 All E.R. 301, C.A. ; [1993] 1 W.L.R. 115; [1993] 1 All E.R. 574, H.L.(E.)

Reg. v. Stratford-on-Avon District Council, Ex parte Jackson [1985] 1 W.L.R. 1319; [1985] 3 All E.R. 769, C.A.

Taylor v. Director of the Serious Fraud Office [1999] 2 A.C. 177; [1998] 3 W.L.R. 1040; [1998] 4 All E.R. 801, H.L.(E.)

Application for judicial review.

By notice of motion dated 19 January 1999 the applicant, Roger Lee, by leave of Ognall J., sought judicial review of the failure or refusal of the Crown Prosecution Service, communicated by decision letter dated 21 December 1998, to consider making or to make disclosure to the applicant of certain material required in preparation of his defence. The relief sought was (a) interim relief by way of a stay of committal proceedings against the applicant, (b) an order of certiorari to quash the decision, (c) an order of mandamus requiring the Crown Prosecution Service to consider making, and to make disclosure of the material sought in accordance with the common law and/or guidelines.

The facts are stated in the judgment of Kennedy L.J.

Representation

James Turner Q.C. and James Roberts for the applicant.

Jeremy Carter-Manning Q.C. and Christopher Kinch for the Director of Public Prosecutions.

Cur. adv. vult.

***1952**

Kennedy L.J.

18 March. The following judgments were handed down.

This is an application for judicial review of a decision of the Crown Prosecution Service in relation to disclosure of information prior to committal proceedings in a case triable on indictment.

The facts

On 12 September 1998 at Aylesford, Kent, there was violence between the applicant and a man named George Ennis, who died two days later, allegedly as a result of injuries inflicted by the applicant. On 25 September 1998 the applicant was arrested and interviewed three times. He was charged with murder, and detained in custody. On 28 September solicitors acting for the applicant wrote to the Crown Prosecution Service seeking copies of the prosecution witness statements, or at least a summary of the prosecution evidence, so as to enable them to take proper instructions and advise their client. They also asked for information as to his previous convictions if any, and as to the previous convictions of any prosecution witnesses, copies of any statements made by the applicant, or notes of interview, and, significantly for present purposes "the names and addresses of any witnesses (including their statements if taken) whom you are not calling ... full unused material"

A second letter of the same date raised a question of a second post-mortem examination of the deceased, and stressed the need for any pathologist instructed on behalf of the defence to have access not only to the crown pathologist's report but also to all available evidence from those who witnessed the violence. The letter also asked for details of previous convictions of the

deceased.

The Crown Prosecution Service initially sent a brief holding letter, and then on 14 October 1998 sent what it described as a "courtesy core bundle" which contained statements from three witnesses and a record of the interviews with the applicant on 25 September 1998. The letter ended "disclosure of unused material will take place in accordance with the [Criminal Procedure and Investigations Act 1996](#) following committal proceedings"

On 15 October 1998 the Crown Prosecution Service disclosed the post-mortem report which they had obtained, and some press material. That letter ended:

"I provide copies of these to you as they are, to a certain extent, 'public documents' but I reiterate the last paragraph of my letter dated 14 October 1998 that disclosure of unused material will take place in accordance with the [Criminal Procedure and Investigations Act 1996](#) following committal proceedings."

On the same day the applicant's solicitors wrote two letters to the Crown Prosecution Service to say that following meetings with counsel (in fact it was counsel for the applicant's mother who was also at that time in custody) consideration was being given to making additional voluntary disclosure to the prosecution, but only after the prosecution had itself made full disclosure. The second letter indicated that the defence hoped to be in a position to apply for bail on 19 October 1998, and continued "it would, of course, be helpful if we could receive the disclosure well ahead of that date"

On 16 October 1998 the defence solicitors wrote to the Crown Prosecution Service to point out that the pathologist's report referred to a ***1953** further neuro-pathological report to follow, and asked when it would be available. The letter also enquired about the possibility of further disclosure. On 19 October 1998 the defence solicitors wrote of their concern over "the unusual slowness" with which material was being disclosed and their further concern that the prosecution was going to rely on the Act of 1996 "to ensure that disclosure is as limited as possible." The letter therefore asked for:

"a full list of all potential witnesses including names and addresses in order that we may contact these people and take statements from them at this stage just in case the Crown has either not taken a statement or may not release the statement to us. It is quite clear that this is a case where many people have been interviewed by the police and we ought to make our own inquiries without delay."

On the same day a similar request was made direct to the police officer in charge of the investigation.

An application by the applicant for bail had been refused by the magistrates' court on 19 October, and on 22 October it was refused by a High Court judge. Meanwhile on 21 October the Crown Prosecution Service replied to the defence solicitors saying:

"The prosecution are not dealing with this case in an exceptional fashion, except in so far as I have already provided you with copies of key witness statements in advance of the formal committal papers. Should I receive any further statements from the police upon which the prosecution propose to rely in advance of the committal papers I shall adopt the same practice, bearing in mind Roger Lee is in custody. I understand that you have been advised that witnesses likely to be prosecution witnesses have been seen by the police and have declined to be interviewed by yourselves. In due course you will receive the list of prosecution witnesses, but that will not include their addresses in accordance with the [Magistrates' Courts \(Witnesses' Addresses\) Rules](#) . The names of persons seen by the police who are not treated as prosecution witnesses will be provided to you in due course. If you wish to make arrangements to see any of these persons, whether they be prosecution witnesses or part of the unused material, unless they expressly consent to their addresses being disclosed to yourselves contact will need to be made through the offices of the police."

The defence solicitors maintained pressure for disclosure, and on 29 October 1998 the Crown Prosecution Service sent a set of post-mortem photographs under cover of a letter part of which reads:

“We have already made it clear to you that in addition to the disclosure that has already taken place on a voluntary basis such other material as we receive (and upon review decide that we shall rely upon as part of the prosecution case) will also be supplied to you. We are of course under no legal obligation to make any disclosure to you until the service of committal papers, but I would hope that you would agree that by what we have disclosed and a declaration of continuing the same vein we are demonstrating, and indeed actually showing, appropriate and due expedition to the handling of this case.”

On 10 November 1998 the Crown Prosecution Service sent some more copy documents and expressed the hope of being in a position to serve ***1954** formal committal papers by 20 November 1998, the relevant custody time limit being due to expire on 7 December 1998. In fact the formal committal bundle was served one day earlier, on 19 November. Initially committal proceedings were to be on 30 November 1998, but they were adjourned to 4 December at the request of the Crown Prosecution Service to enable them to deal with matters raised by the defence solicitors in correspondence, which included a request for information as to the outstanding cases against the deceased. On 3 December 1998 the Crown Prosecution Service wrote to say that would be dealt with “if appropriate within the rules of disclosure.” The letter ends: “Disclosure will be dealt with in accordance with the [Criminal Procedure and Investigations Act](#) as soon as reasonably practicable after committal”

On 4 December 1998 there was a further adjournment, and the custody time limit was extended to 21 December 1998. On 14 December 1998 the defence formally requested disclosure prior to committal. On 21 December 1998 the Crown Prosecution Service replied that: “The disclosure of the unused material in this matter will be provided in accordance with Criminal Procedure and Investigation Act 1996 as soon as is reasonably practicable after committal has taken place”

On 18 January 1999 the committal proceedings were adjourned to enable an application to be made for leave to move for judicial review, and these proceedings then commenced on the following day. Leave to move was granted on 26 January, and on 16 February an appeal against the first extension of the custody time limit was allowed. The applicant was then released on conditional bail.

On 19 February 1999 the Crown Prosecution Service made some further disclosure in recognition of the fact that but for these proceedings primary disclosure pursuant to the Act of 1996 would have already taken place. They simply listed the names of various persons, no doubt those who had been interviewed, and furnished some information as to the previous convictions of the deceased. In their reply of 24 February 1999 the defence solicitors pointed out that the lists of names were of little use and continued:

“Presumably there are either statements and/or relevant notes of some sort in respect of the material that has been obtained by the police from each person named on the three pages. Is there any reason why such documents cannot be disclosed to us? We will then be able to take a view as to which, if any, of the persons so named should be interviewed by us.”

They also asked for a copy of the police action book, and more information as to the previous convictions of the deceased. The letter was acknowledged, but only to inform the solicitors that “any further disclosure outside the terms of the Criminal Procedure and Investigation Act 1996 must await the decision of the Divisional Court”

The issue

The Crown Prosecution Service could have argued that this application was not made promptly, and therefore the applicant is not entitled to ask this court to intervene. Sensibly it decided not to

take that course because there is a substantive point which does need to be resolved. The issue in this case is not about what should be disclosed, but about when disclosure should take place. The prosecution accepts that after committal there must be disclosure in accordance with the Act of 1996 but prior to this hearing ***1955** the Crown Prosecution Service was contending that until the committal has taken place the defence is not entitled even to the amount of disclosure which in this case they have had already.

Mr. Turner, for the applicant, contends that the obligation upon the prosecution to disclose arises at the outset, when the applicant is taken into custody and charged, and it is continuous thereafter. This does not mean that every item of information must be passed on piecemeal to the defence as soon as it becomes available to the prosecution, but it does mean that the prosecution must be constantly asking themselves "what disclosure does justice require now in all the circumstances of this case?" If the case involves an incident in a street seen by a lot of people the defence solicitors need to know the identities of the eyewitnesses before their memories fade. They may need a good deal of factual information in order to give proper instructions to a pathologist, or to advise the accused as to his plea. Information as to the previous convictions and general reputation of a complainant or a deceased may be highly material in connection with an application for bail, so, Mr. Turner contends, fairness demands that information such as that is disclosed at an early stage. A trial begins with a charge and ends with a verdict, so the procedure must be fair throughout. The disclosure obligation cannot be locked into one segment of the trial process.

Pre-Act authorities on disclosure

Leaving aside for the moment the provisions of the Act of 1996, most of the authorities to which our attention has been invited deal with the extent of the obligation to disclose rather than when disclosure should take place, but, as Mr. Turner points out, they show some evolution of the common law and they explain the obligation of disclosure in a way which throws some light upon when disclosure ought to occur.

For present purposes I can start with the Attorney-General's guidelines (*Practice Note (Criminal Evidence: Unused Material)* [1982] 1 All E.R. 734). Paragraph 2 provides:

"In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary exceptions mentioned in paragraph 6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case."

Paragraph 3(a) continues:

"If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important (and even might justify delay) if the material might have some influence upon the course of the committal proceedings or the charges upon which the justices might decide to commit."

Clearly the guidelines envisaged disclosure normally taking place before committal proceedings, and indeed "as soon as possible before the date fixed," but that obligation was qualified by paragraph 6 which asserted that there exists a discretion not to make a disclosure, at least until counsel has considered and advised on the matter in certain circumstances. The circumstances are set out, and they are not limited to sensitive material.

***1956**

In *Reg. v. Ward (Judith)* [1993] 1 W.L.R. 619 a good deal was said about the extent of disclosure to be expected, including the observation that, at p. 642:

"Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened a new line of defence."

It was also made clear that the Attorney-General's guidelines did not fully represent the extent of the obligation at common law, and in dealing with scientific evidence the court said in [Reg. v. Ward \[1993\] 1 W.L.R. 619](#), 674, that an "incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters." Mr. Turner invites us to focus on the word "timely." The duty was said by the court to be continuous, applying "not only to the pre-trial period but also throughout the trial"

In a summary of its conclusions in relation to non-disclosure the court made it clear that where the prosecution have a statement from a person who they know can give material evidence but who they decide not to call as a witness they should normally supply a copy of that statement to the defence. That is material in relation to the correspondence which has taken place in this case. What has happened so far is only a very limited start to the process of discovery as envisaged by the court in [Reg. v. Ward](#).

In [Reg. v. Davis \[1993\] 1 W.L.R. 613 the Court of Appeal Criminal Division](#) recognised that the general common law approach to the question of discovery had been changed by the decision in [Reg. v. Ward \[1993\] 1 W.L.R. 619](#), and Lord Taylor of Gosforth C.J. reiterated the need to comply, voluntarily and without more, with the requirements in paragraph 2 of *Practice Note (Criminal Evidence: Unused Material) [1981] 1 All E.R. 734*. He also recognised [\[1993\] 1 W.L.R. 613](#), 617 that: "open justice requires maximum disclosure and whenever possible the opportunity for the defence to make representations on the basis of fullest information"

The report of the Royal Commission on Criminal Justice (1993) (Cm. 2263) in chapter 5 expressed concern about the state of the law relating to prosecution disclosure following the decisions in [Reg. v. Ward \[1993\] 1 W.L.R. 619](#) and [Reg. v. Davis \[1993\] 1 W.L.R. 613](#). Much of the concern related to the proper way to deal with sensitive material, which is not so far as I am aware an issue in this case, but then the Royal Commission turned to the situation where sensitivity is not in issue and said in chapter 6, p. 95, at para. 49:

"We strongly support the aim of the recent decisions to compel the prosecution to disclose everything that may be relevant to the defence's case. But we accept the evidence that we have received that the decisions have created burdens for the prosecution that go beyond what is reasonable. At present the prosecution can be required to disclose the existence of matters whose potential relevance is speculative in the extreme. Moreover, the sheer bulk of the material involved in many cases makes it wholly impracticable for everyone of what may be hundreds of thousands of individual transactions to be disclosed."

Paragraph 50 of the report provides:

"In our unanimous view a reasonable balance between the duties of the prosecution and the rights of the defence requires that a new ***1957** regime be created with two stages of disclosure. The first stage, of primary disclosure, would subject to appropriate exceptions be automatic. The second stage, of secondary or further disclosure, would be made if the defence could establish its relevance to the case. Where the prosecution and defence disagree on this aspect, the court would rule on the matter after weighing the potential importance of the material to the defence"

The Royal Commission then went on to deal with the mechanics of its proposal in detail, but did not address the question of when primary disclosure should take place. It is however worth noting that what was proposed was not a modification of existing procedures, but the creation of "a new regime"

The next decision to which I refer, [Reg. v. Crown Prosecution Service, Ex parte Warby \(1993\) 158 J.P. 190](#), is a decision of this court upon which Mr. Carter-Manning, for the Director of Public Prosecutions, places considerable reliance. The charge was handling stolen goods. The Crown Prosecution Service, and in response to a defence application, the magistrates' court, refused to order disclosure of unused material prior to committal proceedings. The applicant then sought judicially to review the decision of the Crown Prosecution Service, and it is clear from the judgment of Watkins L.J. that the Attorney-General's guidelines and [Reg. v. Davis \[1993\] 1 W.L.R. 613](#), as well as the newly published Royal Commission report, were considered. The

argument in favour of pre-committal disclosure was very much the same as the argument advanced before us, but with stress being laid upon the need to adduce material which might influence the course of the committal proceedings. The court in *Warby's* case was obviously concerned about burdening magistrates' courts with decisions as to disclosure, especially in relation to sensitive unused material relating to a trial on indictment, and Watkins L.J. said, 158 J.P. 190, 196:

"it would be entirely inappropriate for decisions as to disclosure of unused material to be taken at a lower level of judicial activity than the Crown Court." He then said: "as to a decision by the Crown Prosecution Service to refuse to disclose unused material upon request prior to committal proceedings, I cannot see how that can possibly be reviewable. It is for the court to decide whether the Crown Prosecution Service is entitled to withhold unused material. Any challenge, therefore, through non-disclosure can only be made following a court's decision alone. For the sake of emphasis, I should add that by court, in this context, I refer exclusively to the Crown Court."

Auld J. agreed.

What therefore is clear is that in the end *Warby's* case did not address the issue of what disclosure should be made by the prosecution prior to committal proceedings. The Divisional Court simply decided that it had no jurisdiction to review the exercise of discretion by the Crown Prosecution Service. In later cases this court has shown rather less reluctance to consider the legal basis of decisions by the Crown Prosecution Service, albeit the jurisdiction is one to be sparingly exercised: see *Reg. v. Director of Public Prosecutions, Ex parte C.* [1995] 1 Cr.App.R. 136. It is therefore not surprising that, as I understand the position, Mr. Carter-Manning does not submit that we lack jurisdiction in the present case.

In *Reg. v. Keane* [1994] 1 W.L.R. 746 the Court of Appeal considered the Crown Court's exercise of jurisdiction in relation to sensitive material *1958 which the prosecution wished to withhold, and adopted what had been said by Jowitt J. in *Reg. v. Melvin* (unreported), 20 December 1993, namely that the trial judge should only be asked to consider documents which are material, that is to say those which can be seen on a sensible appraisal by the prosecution, at p. 752:

"(1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

In the present case Mr. Turner submits that the *Melvin* approach should have been adopted by the Crown Prosecution Service from the outset.

In May 1995 the government published its consultation document on disclosure. That was obviously triggered by the recommendations of the Royal Commission but the commission had also made recommendations in relation to committal proceedings which were at that time still under consideration.

The Act of 1996: disclosure

[Part I](#) of the Act of 1996 deals with disclosure and applies to offences into which a criminal investigation was commenced on or after 1 April 1997. It is clear that in broad terms it adopts the two-stage procedure for disclosure recommended by the Royal Commission, but in the case of an indictable offence the Act does not apply until after committal ([section 1\(2\)\(a\)](#)), and, as Mr. Turner points out, the obligation upon the prosecutor in [section 3](#) to give primary disclosure clearly envisages the possibility that some disclosure will have already taken place because [section 3\(1\)\(a\)](#) reads:

"(1) The prosecutor must —

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused ..."

The section then goes on to consider what prosecution material is material for the purposes of disclosure, and in [section 3\(6\)](#) provides that sensitive material must not be disclosed if the court so orders.

Once there has been primary disclosure by the prosecution, [section 5\(5\)](#) requires an accused to give a defence statement to the court and to the prosecution within 14 days: see [regulation 2 of the Criminal Procedure and Investigations Act 1996 \(Defence Disclosure Time Limits\) Regulations 1997](#) (S.I.1997 No. 684). [Section 5\(6\)](#) provides that a defence statement is a written statement (a) setting out in general terms the nature of the accused's defence, (b) indicating the matters on which he takes issue with the prosecution, and (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution. [Section 5\(7\)](#) sets out how a defence statement must deal with the defence of alibi.

Service of the defence statement imposes upon the prosecution the obligation to give secondary disclosure. Subsequent sections make it clear that disclosure is a continuing obligation, and [section 17](#) imposes an obligation of confidentiality in relation to material disclosed, contravention of which is a contempt of court: [section 18](#).

[Section 21\(1\)](#) excludes the application of rules of common law as to disclosure from the time of committal for trial, but not, as Mr. Turner ^{*1959} points out, from the time of arrest. By contrast where, pursuant to [sections 23 and 25 in Part II](#) of the Act of 1996, a code of practice has been prepared and brought into operation in relation to criminal investigations, [section 27\(1\)](#) provides that the rules of common law "shall not apply in relation to the suspected or alleged offence"

The relevant code of practice under [section 23\(1\)](#) came into force on 1 April 1997, and it defines the "disclosure officer" as, in para 2.1:

"the person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor ..."

Paragraph 6.6 of the code of practice makes it clear that where an offence is triable only on indictment, or is likely to be tried on indictment, the disclosure officer must ensure that a schedule is prepared which lists each item of material. Paragraph 2.1 defines "material" as "material of any kind, including information and objects, which is obtained in the course of a criminal investigation and which may be relevant to the investigation." Paragraph 6.9 requires that:

"The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed."

The schedule is then given to the prosecutor, preferably at the time when he gets the file containing material for the prosecution case. Paragraph 7 of the code of practice also particularises certain information which should pass from the disclosure officer to the prosecutor, and enables the prosecutor generally to inspect and obtain copies. Paragraph 8 provides for the assistance of the disclosure officer in relation to secondary disclosure, and paragraph 10 provides for his assistance in relation to disclosure to the accused. Mr. Carter-Manning has invited our attention to the code of practice as a clear demonstration of the fact that in many criminal prosecutions the Crown Prosecution Service prosecutor does not have control of or even immediate access to all potentially relevant material. Its access to the material is regulated by a statutory code framed in such a way as to facilitate the two-stage disclosure provided for by the Act of 1996.

The Act of 1996: committal

The Act of 1996 deals with other matters as well as disclosure, and of particular relevance for present purposes are the changes which were introduced in relation to committal proceedings in magistrates' courts. [Paragraph 3 of Schedule 1](#) to the Act of 1996 introduced [sections 5A to 5F into the Magistrates' Courts Act 1980](#), and the effect is that (1) only evidence tendered by or on

behalf of the prosecutor is admissible; (2) witnesses do not have to attend, so there is no cross examination; (3) if the evidence discloses a case to answer, the court will commit for trial.

Clearly the scope for defence activity in relation to committal proceedings has been drastically reduced and so, Mr. Carter-Manning contends, the need for discovery prior to committal proceedings has also been reduced. As the changes to committal proceedings were introduced in ***1960** the same statute as the two-stage procedure in relation to discovery it was clearly the intention of Parliament they should work in harmony.

Authorities after the Act of 1996

Commentators were not slow to realise that the wording of Part I of the new Act of 1996 in relation to disclosure was such as apparently to leave undisturbed part of the old law. So *Archbold, Criminal Pleading, Evidence & Practice*, 1999 ed., p. 1191, para. 12–47 reads:

“The express abolition of the common law rules in relation to the period after the time at which the Act is made to apply, begs the question as to what happens to the common law rules relating to the disclosure of material by the prosecutor before the time when the Act applies. The Act does not purport to abolish any such rules.”

As is pointed out in the subsequent paragraph, the times from which the Act of 1996 comes into operation in any particular case are arbitrary points in the committal process, and that paragraph continues:

“The common law duty of disclosure is plainly not dependent on such points in the criminal process being reached. The duty flowed from the general responsibility of prosecuting solicitor or counsel to act fairly, with a duty not to strive for conviction but to act in the character of a minister of justice assisting in the administration of justice ... This general duty arose at the institution of proceedings and was a continuing duty that lasted until the conclusion of the proceedings.”

One of the cases cited in support of that proposition is [*Reg. v. Brown \(Winston\)* \[1998\] A.C. 367](#) , which concerned non-disclosure of material relating to the credibility of defence witnesses. Lord Hope of Craighead, delivering a speech with which the other members of the House of Lords agreed, said, at p. 374:

“The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every applicant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed.”

He then reviewed the authorities and began his conclusion by saying, at p. 380:

“I would be inclined to attach less weight to the practical problems than that which was given to them by the Court of Appeal. If fairness demands disclosure, then a way of ensuring that disclosure will be made must be found.”

In *Reg. v. Stratford Justices, Ex parte Imbert*, *The Times*, 25 February 1999, the Divisional Court considered a contention that in summary proceedings the refusal by the Crown Prosecution Service to serve in advance of the hearing statements of witnesses on whom the prosecution proposed to rely amounted to an abuse of process. Reliance was placed on the Act of 1996 and upon article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), and Buxton L.J. said:

“I of course accept that article 6, although it speaks of the right to a fair trial, is concerned also with the fairness of pre-trial proceedings, ***1961** including not only disclosure but also investigation and the obtaining of evidence”

Mr. Turner, whilst reserving his position as to whether or not *Reg. v. Stratford Justices, Ex parte Imbert* was rightly decided, contends that some obligation must rest upon the Crown Prosecution Service in relation to the period after arrest and before committal takes place. In many cases fairness demands there must be some disclosure at that time. Even if the custody time limit is not extended, the period prior to committal may be quite considerable, and if the defence does not have access to information which it needs at an early stage it may not be able compellingly to advance points which should be advanced at the earliest possible opportunity (e.g. in support of an application for bail) and efforts to prepare the defence after the trail has gone cold may prove ineffective.

The last authority to which I need refer is [*Reg. v. the Secretary of State for the Home Department, Ex parte Q. \(unreported\), 5 March 1999*](#), Richards J., which concerned a challenge to a refusal of the Secretary of State to relocate a prisoner to another prison for the duration of a criminal trial. Although it was accepted that it was open to the Crown Court to stay proceedings where a public authority had acted in such a way as to prevent a fair trial taking place, Richards J. found that exceptionally it was appropriate for the High Court to entertain an application for judicial review rather than leave the matter to be dealt with by the trial judge. He said:

“Not only does the case concern the lawfulness of the decision of the Secretary of State outwith the trial process, but it also raises issues of principle which are the proper subject of consideration by this court.”

Mr. Turner submits that we are in a similar position in this case.

Further submissions

The principal submissions made on each side have been canvassed in the preceding paragraphs of this judgement, but it was an important part of Mr. Turner's case that as the defence is expected to produce a defence statement within 14 days of completion of primary disclosure (even though that period can be extended) fairness does require that the defence should have as much relevant information as possible before time begins to run. He further submits that as the prosecution clearly has power to disclose prior to committal proceedings there must be a corresponding duty to exercise that power in the overall interests of justice. What therefore remains is a decision as to what the interests of justice require.

Mr. Carter-Manning rightly points out that it is important for this court not to undermine the two-stage disclosure process set up by the Act of 1996, or to ignore the mischief which that two-stage process is intended to address, part of which was the burden cast upon the Crown Prosecution Service by the pre-existing provisions of the common law. Paragraph 6 of his amended skeleton argument reads:

“It is submitted, in summary, that in matters to be tried in the Crown Court, the common law regards pre-committal disclosure as necessary where and only where the needs of the committal proceedings themselves require it to take place. Even then, the decision as to the need to disclose must be one to be taken by the responsible prosecutor.”

*1962

As the case proceeded before us it was my impression that both leading counsel sensibly and helpfully adjusted their positions. Mr. Carter-Manning recognised that his original formulation in his paragraph 6 was untenable, and in his further written submission he drew a distinction between (a) material which is drawn to the attention of the prosecutor during his ordinary work of preparation prior to committal and which he recognises he should disclose forthwith, and (b) the prosecutor's exercise of considering the file after committal in order to comply with the requirements of the Act of 1996. As Mr. Carter-Manning put it in his final submission:

“The common law does not require full consideration of unused material until that stage. It does remain, however, to the extent, if matters are known by the prosecutor which, under ‘the old rules’ would undoubtedly have been disclosed or information given, that ‘disclosure’ should still take place.”

Conclusion

In my judgement certain propositions can now be said to have emerged.

(1) The Act of 1996 considerably reduced the ability of the defence to take an active part in committal proceedings, so the need for disclosure prior to committal was also reduced.

(2) Part I of the Act introduced a completely new regime in relation to disclosure. It replaces most if not all of the provisions of the common law from the moment of committal with a two-stage process set out in [sections 3 and 7](#). The second stage only occurs in response to a defence statement.

(3) The disclosure required by the Act of 1996 is, and is intended to be, less extensive than would have been required prior to the Act at common law.

(4) Although some disclosure may be required prior to committal (and thus prior to the period to which the Act of 1996 applies) it would undermine the statutory provisions if the pre-committal discovery were to exceed the discovery obtainable after committal pursuant to the statute.

(5) The Act of 1996 does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial, the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage. Examples canvassed before us were (a) previous convictions of a complainant or deceased if that information could reasonably be expected to assist the defence when applying for bail; (b) material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process; (c) material which might enable a defendant to submit that he should only be committed for trial on a lesser charge, or perhaps that he should not be committed for trial at all; (d) material which will enable the defendant and his legal advisers to make preparations for trial which may be significantly less effective if disclosure is delayed (e.g. names of eye-witnesses who the prosecution do not intend to use).

(6) Clearly any disclosure by the prosecution prior to committal cannot normally exceed the primary disclosure which after committal would be ***1963** required by section 3 of the Act of 1996, i.e. disclosure of material which in the prosecutor's opinion might undermine the case for the prosecution. However, to the extent that a defendant or his solicitor chooses to reveal what he would normally only disclose in his defence statement, the prosecutor may in advance, if justice requires, give the secondary disclosure which such a revelation would trigger, so whereas no difficulty would arise in relation to disclosing material of the type referred to in sub-paragraphs 5(a)–(c) above, and I accept that such material should be disclosed, the disclosure of material of the type referred to in sub-paragraph 5(d) would depend very much on what the defendant chose to reveal about his case.

(7) No doubt additions can be made to the list of material which in a particular case ought to be disclosed at an early stage, but what is not required of the prosecutor in any case is to give what might be described as full blown common law discovery at the pre-committal stage. Although the Act of 1996 has not abolished pre-committal discovery the provisions of the Act taken as whole are such as to require that the common law obligations in relation to the pre-committal period be radically recast in the way that I have indicated.

(8) Within the framework which I have attempted to outline I would accept Mr. Turner's submission that, even before committal, a responsible prosecutor should be asking himself what if any immediate disclosure justice and fairness requires him to make in the particular circumstances of the case. Very often the answer will be none, and rarely if at all should the prosecutor's answer to that continuing piece of self-examination be the subject matter of dispute in this court. If the matter does have to be ventilated it should, save in a very exceptional case, be before the trial judge.

Remedy

At the conclusion of the hearing before us the prosecution agreed to give what amounts to full primary disclosure forthwith, and we therefore discharged the stay which has existed in relation to the committal proceedings pending the determination of the matter by this court. The magistrate's court will soon fix a date for the committal proceedings. As disclosure is now taking place it was agreed that we need make no formal order. In the light of this judgement it will be apparent that in my view the defence asked for too much too soon, and the prosecution offered too little too late, especially in relation to the previous convictions of the deceased. Hopefully, however, what we have said may prevent similar clashes in the future.

Blofeld J.

I agree.

[Reported by Glenda Vencatachellum, Barrister]

Representation

Solicitors: Clarke Kiernan, Tonbridge; Crown Prosecution Service, Maidstone .

No order. Applicant's costs.

1. [Criminal Procedure and Investigations Act 1996, s. 3\(1\)](#) : post, p. 1958E .

Status: ☒ Law In Force ☐ Amendment(s) Pending

Criminal Procedure and Investigations Act 1996 c. 25

Part I DISCLOSURE

The main provisions

This version in force from: **July 15, 2005** to **present**

(version 5 of 6)

3.— [Initial duty of prosecutor to disclose]

¹

(1) The prosecutor must—

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which [might reasonably be considered capable of undermining]

²

the case for the prosecution against the accused [or of assisting the case for the accused]

²

, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)

(2) For the purposes of this section prosecution material is material—

(a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or

(b) which, in pursuance of a code operative under [Part II](#), he has inspected in connection with the case for the prosecution against the accused.

(3) Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section—

(a) by securing that a copy is made of it and that the copy is given to the accused, or

(b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;

and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

(4) Where material consists of information which has not been recorded the prosecutor

discloses it for the purposes of this section by securing that it is recorded in such form as he thinks fit and—

(a) by securing that a copy is made of it and that the copy is given to the accused, or

(b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(5) Where material does not consist of information the prosecutor discloses it for the purposes of this section by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(6) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(7) Material must not be disclosed under this section to the extent that [it is material the disclosure of which is prohibited by [section 17](#) of the [Regulation of Investigatory Powers Act 2000](#).]

³

[...]

³

(8) The prosecutor must act under this section during the period which, by virtue of [section 12](#), is the relevant period for this section.

Notes

- ¹. Words substituted by Criminal Justice Act 2003 c. 44 [Sch.36\(3\) para.21](#) (July 15, 2005 as SI 2005/1817)
- ². Amended by Criminal Justice Act 2003 c. 44 [Pt 5 s.32](#) (July 15, 2005 as SI 2005/1817)
- ³. Substituted by Regulation of Investigatory Powers Act 2000 c. 23 [Sch.4 para.7\(1\)](#) (October 2, 2000 subject to transitional provisions specified in SI 2000/2543 art.5)

Modifications

Pt I s. 3(8)	Modified in relation to time limits by Crime and Disorder Act 1998 c. 37, Sch. 8 para. 127(a) , Pt V s. 119
	Modified in relation to time limits by Crime and Disorder Act 1998 c. 37, Sch. 8 para. 127(b) , Pt V s. 119
	Modified by Criminal Procedure and Investigations Act 1996 c. 25, Pt I s. 13(1) , Pt I s. 12

Subject: Criminal procedure

Keywords: Disclosure; Prosecutors' powers and duties

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 22 May 2012

on the right to information in criminal proceedings

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

is 'designed to strengthen cooperation between Member States but also to enhance the protection of individual rights'.

(3) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other's criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

(4) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied.

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency Conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights.

(2) On 29 November 2000, the Council, in accordance with the Tampere conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters ⁽³⁾. The introduction to the programme states that mutual recognition

(5) Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter') and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the ECHR') enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the rights of the defence.

(6) Article 6 of the Charter and Article 5 ECHR enshrine the right to liberty and security of person. Any restrictions on that right must not exceed those permitted in accordance with Article 5 ECHR and inferred from the case-law of the European Court of Human Rights.

(7) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(8) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR.

⁽¹⁾ OJ C 54, 19.2.2011, p. 48.

⁽²⁾ Position of the European Parliament of 13 December 2011 (not yet published in the Official Journal) and decision of the Council of 26 April 2012.

⁽³⁾ OJ C 12, 15.1.2001, p. 10.

2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.

Article 7

Right of access to the materials of the case

1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

5. Access, as referred to in this Article, shall be provided free of charge.

Article 8

Verification and remedies

1. Member States shall ensure that when information is provided to suspects or accused persons in accordance with

Articles 3 to 6 this is noted using the recording procedure specified in the law of the Member State concerned.

2. Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.

Article 9

Training

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors, police and judicial staff involved in criminal proceedings to provide appropriate training with respect to the objectives of this Directive.

Article 10

Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under the Charter, the ECHR, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 11

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 2 June 2014.

2. Member States shall transmit the text of those measures to the Commission.

3. When Member States adopt those measures they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 12

Report

The Commission shall, by 2 June 2015, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Article 13

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Rome Statute of the International Criminal Court

Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

Article 66**Presumption of innocence**

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67**Rights of the accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
 - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
 - (c) To be tried without undue delay;
 - (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
 - (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
 - (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (h) To make an unsworn oral or written statement in his or her defence; and
 - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

ICTR RULES OF PROCEDURE AND EVIDENCE RÈGLEMENT DE PROCÉDURE ET DE PREUVE

Adopted on 29 June 1995; as amended on: Adopté le 29 juin 1995 et modifié
successivement les :

12 January 1996	12 janvier 1996
15 May 1996	15 mai 1996
4 July 1996	4 juillet 1996
5 June 1997	5 juin 1997
8 June 1998	8 juin 1998
1 July 1999	1 juillet 1999
21 February 2000	21 février 2000
26 June 2000	26 juin 2000
3 November 2000	3 novembre 2000
31 May 2001	31 mai 2001
6 July 2002	6 juillet 2002
27 May 2003	27 mai 2003
15 May 2004	15 mai 2004
7 June 2005	7 juin 2005
10 November 2006	10 novembre 2006
15 June 2007	15 juin 2007
14 March 2008	14 mars 2008
2 February 2009	2 février 2009
1 October 2009	1 octobre 2009
9 February 2010	9 février 2010
1 April 2011	1 avril 2011
10 April 2013	10 avril 2013
13 May 2015	13 mai 2015

Section 3: Production of Evidence

Rule 66: Disclosure of Exculpatory and Other Relevant Material

Subject to the provisions of Rules 53 and 69;

- (A) The Prosecutor shall disclose to the Defence:
 - i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and
 - ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.
- (B) At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.
- (C) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-Rules (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.

Rule 67: Reciprocal Disclosure of Evidence

Subject to the provisions of Rules 53 and 69:

- (A) As early as reasonably practicable and in any event prior to the commencement of the trial:
 - (i) The Prosecutor shall notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;
 - (ii) The Defence shall notify the Prosecutor of its intent to enter:
 - (a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

- (b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.
- (B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.
- (C) If the Defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial.
- (D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

Rule 68: Disclosure of Exculpatory and Other Relevant Material

- (A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.
- (B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically.
- (C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.
- (D) The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.
- (E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

Rule 69: Protection of Victims and Witnesses

- (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

**UNITED
NATIONS**



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in the
Territory of the former Yugoslavia since 1991

IT/32/Rev.50
8 July 2015

Original:
English & French

The Hague
The Netherlands
8 July 2015

RULES OF PROCEDURE AND EVIDENCE

Section 4: Production of Evidence

Rule 66

Disclosure by the Prosecutor

(Adopted 11 Feb 1994)

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

- (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and

(Amended 12 Nov 1997)

- (ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

(Amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Sept 2006)

(Amended 30 Jan 1995, amended 3 Dec 1996, amended 12 Nov 1997, amended 10 July 1998)

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. (Amended 30 Jan 1995, amended 12 Nov 1997, amended 17 Nov 1999)

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential. (Amended 30 Jan 1995, amended 10 July 1998, amended 17 Nov 1999)

Rule 67

Additional Disclosure

(Adopted 11 Feb 1994, amended 12 Dec 2003, amended 28 Feb 2008)

- (A) Within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98 *bis*, but not less than one week prior to the commencement of the Defence case, the Defence shall:
- (i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the Defence's custody or control, which are intended for use by the Defence as evidence at trial; and
 - (ii) provide to the Prosecutor copies of statements, if any, of all witnesses whom the Defence intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, or Rule 92 *quater*, which the Defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.

(Adopted 28 Feb 2008)

- (B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*:
- (i) the defence shall notify the Prosecutor of its intent to offer:
 - (a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
 - (b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and
 - (ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.

(Amended 12 Nov 1997, amended 12 Apr 2001, amended 12 Dec 2003)

- (C) Failure of the Defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.
- (D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.
(Amended 13 Dec 2001)

Rule 68

Disclosure of Exculpatory and Other Relevant Material

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 July 2001, amended 12 Dec 2003, amended 28 July 2004)

Subject to the provisions of Rule 70,

- (i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;
- (ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;
- (iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;
- (iv) the Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential;

- (v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

Rule 68 bis
Failure to Comply with Disclosure Obligations

(Adopted 13 Dec 2001)

The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

Rule 69
Protection of Victims and Witnesses

(Adopted 11 Feb 1994)

- (A) In exceptional circumstances, either party may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001, amended 28 Aug 2012)
- (B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001)
- (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution or Defence. (Amended 28 Aug 2012)

Rule 70
Matters not Subject to Disclosure

(Adopted 11 Feb 1994)

- (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.
- (B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin

**Reprint
as at 14 July 2017**



Criminal Disclosure Act 2008

Public Act 2008 No 38
Date of assent 25 June 2008
Commencement see section 2

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Note

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.
Note 4 at the end of this reprint provides a list of the amendments incorporated.

This Act is administered by the Ministry of Justice.

Reprinted as at
14 July 2017

Criminal Disclosure Act 2008

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- (a) by personal delivery to that person or, if the person refuses to accept the document or notice, by bringing the document or notice to that person's attention; or
 - (b) by post or facsimile addressed to that person, or by electronic means, at an address nominated by the person or, if no such address has been nominated, at the person's last known postal address or place of residence or business.
- (2) Information required to be disclosed to, and any notice or application required to be given to or served on, a defendant under this Act may, if the defendant is represented by counsel, be given by any of the methods described in subsection (1) to the defendant's counsel.
- (3) If information or a notice or application is posted to any person (whether physically or by electronic means), it will be treated as having been received by that person not later than 3 working days after the date on which it was posted, unless the person proves that, otherwise than through fault on the person's part, it was not so received.
- (4) Information required to be disclosed under this Act may be disclosed in whatever form (including electronically) that the person disclosing the information holds it in at the time the obligation to disclose arises and that is readily accessible to the defendant.

Section 10(3): amended, on 1 July 2013, by section 8 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

11 Exercise of defendant's rights and duties by defendant's counsel

- (1) A right or duty conferred on a defendant by this Act may be exercised or performed by counsel representing the defendant.
- (2) A notice or report purporting to be given under this Act on behalf of the defendant by his or her counsel is, unless the contrary is proved, deemed to be given with the authority of the defendant.

Disclosure by prosecutor

12 Initial disclosure

- (1) At the commencement of criminal proceedings, or as soon as practicable after that time, and in any event not later than the applicable date, the prosecutor must disclose the following information to the defendant:
 - (aa) a copy of the charging document; and
 - (a) a summary that is sufficient to fairly inform the defendant of the facts on which it is alleged that an offence has been committed and the facts alleged against the defendant; and
 - (b) a summary of the defendant's right to apply for further information under subsection (2); and

- (c) the maximum penalty, and the minimum penalty (if one is provided for), for the offence; and
 - (d) a list of the defendant's previous convictions that are known to the prosecutor; and
 - (e) a list of any previous offences proved to have been committed by the defendant and of a kind to which section 284(1)(g) of the Oranga Tamariki Act 1989 applies, that are known to the prosecutor.
- (2) At any time after criminal proceedings are commenced or, in the case of a child or young person who appears in the Youth Court in relation to the commission or possible commission of an offence, at any time after that person's first appearance in the Youth Court, the prosecutor must, if requested by the defendant in writing, as soon as is reasonably practicable disclose the following information to the defendant:
- (a) the names of any witnesses whom the prosecutor intends to call at the hearing or trial; and
 - (b) a list of the exhibits that are proposed to be produced on behalf of the prosecution at the hearing or trial; and
 - (c) a copy of all records of interviews with the defendant; and
 - (d) a copy of all records of interviews of prosecution witnesses by a law enforcement officer that contain relevant information; and
 - (e) a copy of job sheets and other notes of evidence completed or taken by a law enforcement officer that contain relevant information; and
 - (f) a copy of any records of evidence produced by a testing device that contain relevant information; and
 - (g) a copy of any diagrams and photographs made or taken by a law enforcement officer that contain relevant information and are intended to be introduced as evidence as part of the case for the prosecution; and
 - (h) a video copy of any video interview with the defendant; and
 - (i) a copy of relevant records concerning compliance with the New Zealand Bill of Rights Act 1990; and
 - (j) a copy of any statement made by, or record of an interview with, a co-defendant in any case where the defendants are to be proceeded against together for the same offence; and
 - (k) a list of any information described in paragraphs (a) to (j) that the prosecutor refuses under section 15, 16, 17, or 18 to disclose to the defendant, together with—
 - (i) the reason for the refusal; and
 - (ii) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the inter-

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ests protected by section 16, 17, or 18 and (in the case of the interests protected by section 18) there is no overriding public interest.

- (3) This section does not apply to a defendant who is charged with an infringement offence as defined in section 2(1) of the Summary Proceedings Act 1957.
- (4) In this section, **applicable date** means—
 - (a) the date that is 15 working days after the commencement of criminal proceedings;
 - (b) in the case of a child or young person who is required to appear in the Youth Court in relation to the commission or possible commission of an offence, the date on which that person first appears in that court;
 - (c) any later date that the court or Registrar allows, on application by the prosecutor, for the purposes of disclosure under this section.

Section 12(1)(aa): inserted, on 1 July 2013, by section 4 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

Section 12(1)(b): amended, on 1 July 2013, by section 8 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

Section 12(1)(e): amended, on 14 July 2017, by section 149 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (2017 No 31).

Section 12(2): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

Section 12(3): amended, on 1 July 2013, by section 8 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

Section 12(4)(a): amended, on 1 July 2013, by section 8 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

Section 12(4)(b): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

13 Full disclosure

- (1) The prosecutor must disclose to the defendant the information described in subsection (2) as soon as is reasonably practicable after a defendant has pleaded not guilty.
- (2) The information referred to in subsection (1) is—
 - (a) any relevant information, including, without limitation, the information (**standard information**) described in subsection (3); and
 - (b) a list of any relevant information that the prosecutor refuses under section 15, 16, 17, or 18 to disclose to the defendant together with—
 - (i) the reason for the refusal; and
 - (ii) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 16, 17, or 18 and (in the case of the interests protected by section 18) there is no overriding public interest.
- (3) The standard information referred to in subsection (2)(a) is—

- (a) a copy of any statement made by a prosecution witness; and
 - (b) a copy of any brief of evidence that has been prepared in relation to a prosecution witness; and
 - (c) the name and, if disclosure is authorised under section 17, the address of any person interviewed by the prosecutor who gave relevant information and whom the prosecutor does not intend to call as a witness; and—
 - (i) any written account of the interview, whether signed or unsigned, and any other record of the interview; and
 - (ii) any statement made to the prosecutor by the person; and
 - (d) any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness; and
 - (e) a list of all exhibits that the prosecutor proposes to have introduced as evidence as part of the case for the prosecution; and
 - (f) a list of all relevant exhibits in the possession of the prosecutor that the prosecutor does not propose to have introduced as evidence; and
 - (g) a copy of any information supplied to the prosecutor in connection with the case by any person or persons whom the prosecutor proposes to call to give evidence as an expert witness or witnesses; and
 - (h) a copy of any relevant information supplied to the prosecutor by a person or persons whom the prosecutor considered calling to give evidence as an expert witness or witnesses, but elected not to do so.
- (4) The obligation to disclose information to the defendant under this section as soon as is reasonably practicable is subject to any order made under section 30 or 32.
- (5) If information referred to in subsection (2) comes into the possession or control of the prosecutor, or is prepared in recorded form, after the prosecutor has disclosed information in accordance with subsection (1) and before the hearing or trial is completed, the prosecutor must disclose the information to the defendant as soon as is reasonably practicable.
- (6) The entitlement of a defendant to information under this section continues while the criminal proceedings are in progress (including any appeal against conviction) and during the period from the conviction until the expiry of the time for lodging an appeal against conviction.
- (7) To avoid doubt, a reference in subsection (1) to pleading not guilty includes—
- (a) *[Repealed]*
 - (b) requesting a hearing in accordance with section 21(6) of the Summary Proceedings Act 1957 (unless the request is accompanied by an admission of liability); or
 - (c) denying the charge during any appearance before the Youth Court under Part 4 of the Oranga Tamariki Act 1989.

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Section 13(1): replaced, on 1 July 2013, by section 8 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

Section 13(7)(a): repealed, on 1 July 2013, by section 8 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

Section 13(7)(b): amended, on 1 July 2013, by section 8 of the Criminal Disclosure Amendment Act 2011 (2011 No 86).

Section 13(7)(c): amended, on 14 July 2017, by section 149 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (2017 No 31).

14 Request for additional disclosure

- (1) At any time after the duty to make full disclosure has arisen under section 13, the defendant may request that the prosecutor disclose any particular information, identified by the defendant with as much particularity as possible.
- (2) The prosecutor must disclose information requested by the defendant under subsection (1) unless—
 - (a) the information is not relevant; or
 - (b) the information may be withheld under section 15, 16, 17, or 18; or
 - (c) the request appears to be frivolous or vexatious.
- (3) If a request under subsection (1) is declined by the prosecutor under subsection (2), the prosecutor must, as soon as is reasonably practicable after making the decision to decline the request, inform the defendant of that decision, together with—
 - (a) the reason for the decision; and
 - (b) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 15, 16, 17, or 18 and (in the case of the interests protected by section 18) there is no overriding public interest.
- (4) Nothing in this section limits the duty to disclose information under section 13.

14A Information relating to identification witnesses to be supplied to defendant

- (1) In this section, **identification witness**, in relation to the trial of a person accused of any offence, means a person who claims to have seen the offender in the circumstances of the offence.
- (2) Subject to subsection (3), at any time after a person has been charged with an offence, the prosecutor must, on request by or on behalf of that person, supply to that person—
 - (a) the name and, if disclosure is authorised under section 17, the address of each identification witness known to the prosecutor, whether or not the prosecutor intends to call that witness to give evidence at the trial; and
 - (b) a statement of any description of the offender given by each such witness to the Police or the prosecutor; and

**CITED FOREIGN LANGUAGE INTERNATIONAL
AUTHORITIES (WITH TRANSLATIONS)**

Austria (German)

**STRAFPROZESSORDNUNG [STPO] (Code of Criminal Procedure)
Section 3 para 2, and 51 para 1**

**Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für
Strafprozeßordnung 1975, Fassung vom 09.01.2018**

Objektivität und Wahrheitserforschung

§ 3. (2) Alle Richter, Staatsanwälte und kriminalpolizeilichen Organe haben ihr Amt unparteilich und unvoreingenommen auszuüben und jeden Anschein der Befangenheit zu vermeiden. Sie haben die zur Belastung und die zur Verteidigung des Beschuldigten dienenden Umstände mit der gleichen Sorgfalt zu ermitteln.

Akteneinsicht

§ 51. (1) Der Beschuldigte ist berechtigt, in die der Kriminalpolizei, der Staatsanwaltschaft und dem Gericht vorliegenden Ergebnisse des Ermittlungs- und des Hauptverfahrens Einsicht zu nehmen. Das Recht auf Akteneinsicht berechtigt auch dazu, Beweisgegenstände in Augenschein zu nehmen, soweit dies ohne Nachteil für die Ermittlungen möglich ist.

**Federal law consolidated: Entire text of the 1975 Code of
Criminal Procedure, version of 01/09/2018**

Objectivity and investigation of the truth

§ 3. (2) All judges, prosecutors and criminal police authorities shall exercise their office impartially and without bias and avoid any appearance of prejudice. They are required to investigate the circumstances that incriminate and exculpate the accused with equal care.

File review

§ 51. (1) The accused is entitled to review the results of the investigatory and primary proceedings available to the criminal police, the prosecuting authority and the court. The right of file review also entitles to inspect evidence to the extent possible without detriment to the investigations.

Belgium (French)

19 DÉCEMBRE 2012

P.12.1310.F/1

Cour de cassation de Belgique

Arrêt

N° P.12.1310.F

I. DE SCH. Ch.

inculpée,

demanderesse en cassation,

ayant pour conseil Maître Pierre-Louis Bodson, avocat au barreau de

Liège,

II. DI PR. A.

inculpé,

demandeur en cassation,

ayant pour conseil Maître Adrien Masset, avocat au barreau de

Verviers.

I. LA PROCÉDURE DEVANT LA COUR

19 DÉCEMBRE 2012

P.12.1310.F/2

Les pourvois sont dirigés contre un arrêt rendu le 11 juin 2012 par la cour d'appel de Liège, chambre des mises en accusation.

Les demandeurs invoquent un moyen dans deux mémoires annexés au présent arrêt, en copie certifiée conforme.

Le président de section chevalier Jean de Codt a fait rapport.

L'avocat général Raymond Loop a conclu.

II. LA DÉCISION DE LA COUR

Fondés sur le même moyen, les deux pourvois appellent une réponse commune.

1. Les demandeurs reprochent aux juges d'appel d'avoir violé l'article 6.1 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, les articles 43 et 56 du Code d'instruction criminelle, ainsi que le principe général du droit relatif au respect des droits de la défense, en refusant d'annuler la désignation de l'expert par le juge d'instruction.

Il a été soutenu devant les juges du fond et il est soutenu devant la Cour que le magistrat instructeur ne peut pas commettre en qualité d'expert une personne qui, dans le cadre de l'information préliminaire, a été désignée comme conseil technique par le parquet. Etant intervenu pour une partie au procès, cet expert ne saurait, d'après le moyen, présenter les garanties d'impartialité objective requises dans le cadre d'une instruction menée, contrairement à l'information, aussi bien à décharge qu'à charge.

2. La mission impartie au ministère public ne se réduit pas à celle d'un accusateur. Il intervient aussi au procès pour proposer au juge une solution de justice.

Il en résulte notamment que, contrairement à ce que les demandeurs ont soutenu, l'information n'est pas menée uniquement à charge. L'article

19 DÉCEMBRE 2012

P.12.1310.F/3

§ 3, alinéa 2, du Code d'instruction criminelle la soumet à l'obligation de veiller à la légalité des moyens de preuve ainsi qu'à la loyauté avec laquelle ils sont rassemblés.

La loyauté du ministère public se présume. Des éléments précis et objectifs sont requis pour renverser cette présomption.

Le principe de loyauté implique que tous les éléments recueillis par le parquet soient versés au dossier répressif et, plus particulièrement, les éléments à décharge. S'il est donc partie au procès pénal, le procureur du Roi ne l'est pas au même titre que l'inculpé ou la partie civile, lesquels ne sont pas tenus de verser aux débats les éléments contraires aux intérêts qu'ils défendent.

3. A l'instar des autres actes de l'information, la désignation d'un conseil technique pour donner un avis à propos de faits susceptibles de révéler l'existence d'une infraction, n'a pas uniquement pour objet d'établir qu'un crime ou un délit a été commis. Elle a aussi pour but et pour effet d'établir, le cas échéant, que l'infraction soupçonnée est inexistante, et d'ouvrir ainsi la voie à une décision de classement sans suite.

De la circonstance qu'une infraction a été découverte ou pressentie par le conseil technique du parquet, il ne résulte pas qu'il ne puisse plus, sous peine de rendre impossible la tenue d'un procès équitable, être désigné en qualité d'expert par le juge d'instruction. En effet, l'avis émis par l'expert judiciaire, qu'il soit ou non intervenu au stade de l'information, ne bénéficie pas d'une force probante particulière. Les juges en apprécient librement le contenu. Rien ne les oblige à donner au rapport de l'homme de l'art plus de crédit qu'à celui du conseil technique de l'inculpé ou de la partie civile.

L'expert judiciaire ne joue pas de rôle prépondérant dans la procédure. Et si l'accusation se fonde entièrement sur ses travaux, elle peut être

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par une défense fondée entièrement sur les conclusions contraires du conseil technique des parties.

Le fait pour l'expert d'être déjà intervenu au stade de l'information ne le soustrait pas au pouvoir du magistrat instructeur de soumettre les opérations d'expertise à la contradiction.

4. Recueilli par le ministère public dans le cadre d'une mission de service public exclusive de toute défense d'un intérêt personnel, et assujetti au principe de loyauté, l'avis rendu par un conseil technique au stade de l'information ne saurait frapper son auteur d'une présomption de partialité objective lui interdisant sa désignation subséquente par le juge d'instruction dans le cadre des mêmes faits.

En considérant notamment que le grief prêté à la désignation de l'expert procède d'une conception erronée de la mission du procureur du Roi avant la mise à l'instruction, les juges d'appel ont répondu aux conclusions des demandeurs et légalement justifié leur décision.

Le moyen ne peut être accueilli.

Et les formalités substantielles ou prescrites à peine de nullité ont été observées et la décision est conforme à la loi.

PAR CES MOTIFS,

19 DÉCEMBRE 2012

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LA COUR

Rejette les pourvois ;

Condamne chacun des demandeurs aux frais de son pourvoi.

Lesdits frais taxés en totalité à la somme de cent cinquante euros quarante-huit centimes dont I) sur le pourvoi de Chr. De Sc. : septante-cinq euros vingt-quatre centimes dus et II) sur le pourvoi de A. Di P. : septante-cinq euros vingt-quatre centimes dus.

Ainsi jugé par la Cour de cassation, deuxième chambre, à Bruxelles, où siégeaient le chevalier Jean de Codt, président de section, président, Frédéric Close, président de section, Benoît Dejemeppe, Gustave Steffens et Françoise Roggen, conseillers, et prononcé en audience publique du dix-neuf décembre deux mille douze par le chevalier Jean de Codt, président de section, en présence de Raymond Loop, avocat général, avec l'assistance de Fabienne Gobert, greffier.

F. Gobert

F. Roggen

G. Steffens

B. Dejemeppe

F. Close

J. de Codt

DECEMBER 19, 2012

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Court of Cassation of Belgium

Decision

N° P.12.1310.F

III. DE SCH. Ch.

accused,

appellant,

represented by Maître Pierre-Louis Bodson, admitted to the Bar in

Liège,

IV. DI PR. A.

accused,

appellant,

represented by Maître Adrien Masset, admitted to the Bar in

Verviers.

DECEMBER 19, 2012

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I. PROCEDURE BEFORE THE COURT

Plaintiffs' appeals are brought against a decision rendered on June 11, 2012 by the court of appeals of Liège, indictment division.

The appellants plead a single ground in two briefs annexed to this judgment, in certified copy.

The President of the division, Sir Jean de Codt, made the report.

The Prosecutor, Raymond Loop, concluded.

II. DECISION OF THE COURT

As they are based on the same ground, the two appeals call for a single response.

3. The appellants argue that the judges of the court of appeals breached Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 43 and 56 of the Code of Criminal Procedure, as well as their due process rights, by refusing to annul the appointment of an expert by the investigating judge.

It was argued before the trial court, and it is argued before this Court, that the investigating magistrate cannot appoint, as an expert, a person who, as part of the preliminary investigation, was appointed as a technical advisor by the prosecutor's office. Having participated in favor of a party at trial, this expert cannot, according to the pleadings, guarantee impartiality, which is required in the context of an investigation/procedure, in respect of all exculpatory and inculpatory evidence, but is not required in a preliminary investigation.

4. The mission bestowed on the prosecutor cannot be reduced to that of an accuser. The prosecution also intervenes at trial to submit to the judge the fairest solution to the case.

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Therefore, contrary to what the appellants have maintained, an inquiry is not conducted solely to inculcate. Article 28*bis*, § 3, paragraph 2, of the Code of Criminal Procedure states that an inquiry must abide by the legality of the evidence and the loyalty/good faith with which it is collected.

The loyalty of the prosecutor is presumed. Precise and objective elements are required to reverse this presumption.

The principle of loyalty implies that all information collected by the prosecutor's office should be included in the criminal record – this most particularly applies to exculpatory evidence. If the public prosecutor is therefore a party to the criminal trial, they are not on the same level as the accused or the civil party, who are not required to in the proceedings to make contributions contrary to the interests they are defending.

3. Like other parts in an investigation, the goal of designating of a technical advisor to give an opinion on facts likely to reveal the existence of an offence, is not just to establish that a crime or a misdemeanor has been committed. Another purpose and effect is to establish, where appropriate, that the suspected offense is non-existent, thus opening the way to a decision dismissing the case.

The fact than an offense has been discovered or foreseen by the technical advisor of the prosecution does not mean that he cannot, under the risk of making it impossible to hold a fair trial, be appointed as an expert by the investigating judge. Effectively, the opinion given by the judicial expert, whether or not he has intervened at the stage of investigation, doesn't hold any higher persuasive weight. The judges freely examine its content. Nothing obliges them to give more credit to the judicial expert's report than to the report of the technical advisor of the accused or the civil parties.

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The judicial expert does not play a leading role in the proceedings. And if the accusation is based entirely on his work, it can be defended against based on the contrary conclusions of the technical advisor of the parties.

The fact that the expert has already participated at the information stage does not exempt him from the power of the investigating magistrate to let the expert's opinions be challenged.

4. Collected by the prosecution as part of a public service, beyond the defense of any personal interest, and subject to the principle of loyalty, the opinion given by a technical advisor at the information stage cannot, at the same time, make its author presumptively objectively partial, preventing his subsequent appointment as an expert by the investigating judge.

Noting in particular that the complaint regarding the expert's appointment was based on an erroneous conception of the mission of the public prosecutor before the pre-trial investigation, the appellate judges responded to the plaintiffs' submissions and legally justified their decision.

The ground cannot be accepted.

The substantial or prescribed formalities, under the risk of annulment, were observed, and the decision is in accordance with the law.

ON THESE GROUNDS,

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THE COURT

Rejects the appeals ;

Condemns each of the appellants to the fees of their appeal.

The fees, taxed in their totality are 150,48€, encompassing I) on the appeal of Chr. De Sc. : 75.24€ and II) on the appeal of A. Di P. : 75.24€.

Henceforth decided by the Cour de cassation, second chamber, in Brussels, where Sir Jean de Codt sits, President of the section, President, Frédéric Close, President of the section, Benoît Dejemeppe, Gustave Steffens et Françoise Roggen, advisers, and pronounced at the public audience on December 19, 2012 by Sir Jean de Codt, President of the section, in the presence of Raymond Loop, Prosecutor, with the assistance of Fabienne Gobert, clerk.

F. Gobert

F. Roggen

G. Steffens

B. Dejemeppe

F. Close

J. de Codt

**CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN
STRAFVORDERING [C.I.CR./SV.] art. 21bis, 28bis, 56, 61ter, 216 § 3 (Belg.)**

Code D'Instruction Criminelle

Art. 21bis BCPC (Full version): [Sans préjudice des dispositions des lois particulières et de l'application des articles 28quinquies, § 2, 57, § 2, et 127, § 2, il est statué sur la demande de la personne directement intéressée de consulter le dossier ou d'en obtenir copie par le juge d'instruction, conformément à l'article 61ter, ou par le ministère public, en fonction de l'état de la procédure.

Est considérée comme personne directement intéressée : l'inculpé, la personne à l'égard de laquelle l'action publique est engagée dans le cadre de l'instruction, la personne soupçonnée, la partie civilement responsable, la partie civile, celui qui a fait une déclaration de personne lésée, ainsi que ceux qui sont subrogés dans leurs droits ou les personnes qui les représentent en qualité de mandataire ad hoc, de curateur, d'administrateur provisoire, de tuteur ou de tuteur ad hoc.

Dans tous les autres cas, la décision sur l'autorisation de consulter le dossier ou d'en obtenir copie est prise par le ministère public, même pendant l'instruction.]]1

(1)<Inséré par L 2012-12-27/29, art. 24, 066; En vigueur : 10-02-2013>

Art. 21bis BCPC (Translated extract): [Without prejudice to the provisions of specific laws and to the application of Articles 28quinquies, § 2, 57, § 2, et 127, § 2, the investigative magistrate pursuant to Article 61ter, or the public prosecutor's office, depending on the stage of the proceedings, shall decide on the request of the directly interested party to obtain access to the file or obtain a copy thereof.

The following people are considered to be directly involved: the accused, a person who is prosecuted in the course of an investigation, a suspect, a party who is civilly liable, a civil party, anyone who has made a statement of injury, and any persons subrogated to their rights or persons representing them as ad hoc agents, trustees, provisional administrators, guardians or ad hoc guardians.

In all other cases, the decision on whether to grant authorization to view or obtain copies of the dossier is made by the Office of the Public Prosecutor, even during the preliminary investigation.]

Art. 28bis BCPC (Full version) <inséré par L 1998-03-12/39, art. 5; En vigueur : 1998-10-02> § 1er. L'information est l'ensemble des actes destinés à rechercher les infractions, leurs auteurs et les preuves, et à rassembler les éléments utiles à l'exercice de l'action publique.

Les principes généraux selon lesquels les services de police peuvent agir de manière autonome sont établis par la loi et selon les modalités particulières fixées par des directives prises conformément aux articles 143bis et 143ter du Code judiciaire.

Indépendamment de ce qui est prévu aux alinéas précédents, l'information est conduite sous la direction et l'autorité du procureur du Roi compétent. Il en assume la responsabilité.

§ 2. L'information s'étend à l'enquête proactive. Celle-ci, dans le but de permettre la poursuite d'auteurs d'infractions, consiste en la recherche, la collecte, l'enregistrement et le traitement de données et d'informations sur la base d'une suspicion raisonnable que des faits punissables vont être commis ou ont été commis mais ne sont pas encore connus, et qui sont ou seraient commis dans le cadre d'une organisation criminelle, telle que définie par la loi, ou constituent ou constitueraient un crime ou un délit tel que visé à l'article 90ter, §§ 2, 3 et 4. Pour entamer une enquête proactive, l'autorisation écrite et préalable du procureur du Roi, de l'auditeur du travail, [ou du procureur fédéral], dans le cadre de leur compétence respective, est requise, sans préjudice du respect des dispositions légales spécifiques réglant [les méthodes particulières de recherche et autres méthodes]. <L 2001-06-21/42, art. 56, 027; En vigueur : 21-05-2002> <L 2003-01-06/34, art. 2, 038; En vigueur : 22-05-2003>

§ 3. Sauf les exceptions prévues par la loi, les actes d'information ne peuvent comporter aucun acte de contrainte ni porter atteinte aux libertés et aux droits individuels. Ces actes peuvent toutefois comprendre la saisie des choses citées [aux articles 35 et 35ter]. <L 2002-12-19/86, art. 6, 036; En vigueur : 24-02-2003>

Le procureur du Roi veille à la légalité des moyens de preuve ainsi qu'à la loyauté avec laquelle ils sont rassemblés.

Art. 28bis BCPC (Full version) <inserted by L 1998-03-12/39, art. 5; Effective on: 1998-10-02> § 1er. An inquiry means all actions taken to investigate offences and their perpetrators and to gather the evidence and any and all information required to prosecute.

The general principles that authorize police to act autonomously are established by the law pursuant to the specific conditions set forth in directives enacted under Articles 143bis and 143ter of the Judicial Code.

Notwithstanding the provisions of the preceding paragraphs, an inquiry is conducted under the supervision and authority of the competent Crown Prosecutor. The Crown Prosecutor is responsible for the inquiry§

§ 2. The inquiry includes the active investigation. The active investigation, whose purpose is to prosecute perpetrators of offences, consists of conducting an investigation and gathering, recording and processing data and information based on a reasonable suspicion that punishable but as yet unknown offences will be committed or have been committed, and that such offences will be or could be committed by parties engaged in organized crime as defined by law, or that they are or could constitute a crime or delictual offence as set forth in Article 90ter, §§ 2, 3 and 4. To launch an active investigation, prior, written authorization is required from the Crowd Prosecutor, the Labor Board, [or the Federal Prosecutor] acting within their respective purviews, without prejudice to compliance with any specific legal statutes governing [specific methods for conducting investigations and other related methods]. <L 2001-06-21/42, art. 56, 027; Effective on: 21-05-2002> <L 2003-01-06/34, art. 2, 038; Effective on: 22-05-2003>

§ 3. Except as provided by law, suspects may not be placed in investigative detention, nor may their individual rights and freedoms be infringed during the investigation. Nevertheless, the mentioned items [Articles 35 and 35ter] may be seized in the course of an investigation. <L 2002-12-19/86, art. 6, 036; Effective on: 24-02-2003>

The royal prosecutor shall ensure the legality of the evidence and the fairness of the manner in which said evidence is obtained.

Art. 56 BCPC (Full version) <L 1998-03-12/39, art. 9, 016 ; En vigueur : 1998-10-02> § 1er. Le juge d'instruction assume la responsabilité de l'instruction qui est menée à charge et à décharge. Il veille à la légalité des moyens de preuve ainsi qu'à la loyauté avec laquelle ils sont rassemblés.

Il peut poser lui-même les actes qui relèvent de la police judiciaire, de l'information et de l'instruction.

Le juge d'instruction a, dans l'exercice de ses fonctions, le droit de requérir directement la force publique.

Il décide de la nécessité d'utiliser la contrainte ou de porter atteinte aux libertés et aux droits individuels.

Lorsqu'au cours d'une instruction, il découvre des faits susceptibles de constituer un crime ou un délit dont il n'est pas saisi, il en informe immédiatement le procureur du Roi.

[Le juge d'instruction porte sans délai a la connaissance du procureur fédéral et du procureur du Roi, ou, dans les cas où il exerce l'action publique, uniquement du procureur fédéral, les informations et les renseignements qu'il a recueillis au cours

de l'instruction et qui révèlent un péril grave et immédiat pour la sécurité publique et la santé publique.] <L 2004-06-21/33, art. 2, 041; En vigueur : 23-07-2004>

§ 2. Le juge d'instruction a le droit de requérir les [services de police visés à l'article 2 de la loi sur la fonction de police et tous les autres officiers de police judiciaire] pour accomplir, sauf les restrictions établies par la loi, tous les actes de police judiciaire nécessaires à l'instruction. <L 1999-04-19/50, art. 6, 023; En vigueur : 23-05-1999>

Ces réquisitions sont faites et exécutées conformément [aux articles 8 à 8/3 et 8/6 à 8/8 de la loi sur la fonction de police et, pour ce qui concerne la police fédérale, à l'article 110 de la loi du 7 décembre 1998 organisant un service de police intégré, structuré à deux niveaux]. Les services de police requis sont tenus d'obtempérer aux réquisitions et de prêter le concours des officiers et agents de police judiciaire nécessaire à leur exécution. <L 1998-12-07/31, art. 222, 018; En vigueur : 01-01-2001>

[Le juge d'instruction a, dans le cadre de l'instruction, le droit de requérir les services d'inspection visés à l'article 16, 1°, du Code pénal social. Il peut requérir les services d'inspection pour accomplir, tous les actes nécessaires à l'instruction, dans le cadre de leurs compétences. Ce droit de réquisition ne porte pas préjudice aux compétences de l'inspection du travail prévues à l'article 21 du code pénal social pour les infractions autres que celles auxquelles se rapporte la réquisition du juge d'instruction et qui sont constatées en exécution de cette dernière. Seuls les faits qui font l'objet d'une saisine du juge d'instruction ne peuvent plus faire l'objet d'un avertissement ou d'un délai de régularisation.]

Lorsqu'un service de police [ou un service d'inspection]¹ ne peut donner au juge d'instruction les effectifs et les moyens nécessaires, celui-ci peut solliciter l'intervention du procureur du Roi [1 ou de l'auditeur du travail]¹ après l'avoir informé de la situation. Le juge d'instruction peut, en outre, transmettre copie de son ordonnance au procureur général et à la chambre des mises en accusation.

§ 3. Le juge d'instruction peut désigner le ou les services de police chargés des missions de police judiciaire dans une enquête particulière, et auxquels les réquisitions et délégations seront, sauf exception, adressées. Si plusieurs services sont désignés, le juge d'instruction veille à la coordination de leurs interventions.

Les fonctionnaires de police du service de police désigné conformément à l'alinéa précédent informent immédiatement l'autorité judiciaire compétente des informations et renseignements en leur possession et de toute recherche entreprise selon les modalités fixées par le procureur du Roi, sauf décision contraire du juge d'instruction. Pour toutes les missions de police judiciaire relatives à cette

désignation, ils agissent prioritairement vis-à-vis des autres fonctionnaires de police, lesquels informent immédiatement l'autorité judiciaire compétente et le service de police désigné des informations et renseignements en leur possession et de toute recherche entreprise selon les modalités que le procureur du Roi fixe par directive.

----- (1)<L 2010-06-06/06, art. 5, 058; En vigueur : 01-07-2011>

Art. 56 BCPC: The investigating judge can order that the police take action to further investigate the offence.

In performing his duties, the investigating judge has the right to directly give orders to law enforcement officials.

The judge has the discretion to decide whether it is necessary to order a detention or take an action that infringes individual rights and freedoms.

When the investigating judge discovers any events that could constitute a crime or an offence of which he has not been seized, he must immediately inform the Crown Prosecutor.

[Any information or intelligence that the investigating judge has gathered in the course of the inquiry that represents a serious and immediate threat to public health and safety is immediately reported to the Federal Prosecutor and the Crown Prosecutor, or in the case of public prosecutions, only the Federal Prosecutor.] <L 2004-06-21/33, art. 2, 041; Effective on: 23-07-2004>

§ 2. The investigating judge has the right to give orders to the [police services set forth Article 2 of the Law on Police Operations and to any other law enforcement officers] to perform any types of actions required conduct the investigation, within the confines of the law. <L 1999-04-19/50, art. 6, 023; Effective on: 23-05-1999>

These orders are handed down and executed according to [Articles 8 to 8/3 and 8/6 to 8/8 of the Law on Police Operations, and for the federal police, according to Article 110 of Law of December 7, 1998 organizing an integrated two-tier police service]. Any law enforcement officials receiving these orders must obey them and actively ensure that their officers and agents cooperate in their timely and appropriate execution. <L 1998-12-07/31, art. 222, 018; Effective on: 01-01-2001>

[The investigating judge has the right to give orders to the investigative services set forth Article 16, 1 of the Social Criminal Code. He may order the investigative services to perform any activities or actions that fall within their competence required to conduct the investigation. This right to hand down orders to law enforcement officers is not an infringement to the authority of the Labor Inspectorate set forth in Article 21 of Social Criminal Code for offences that other

than those that relate to orders given by the investigating judge are discovered in the course of conducting the aforementioned investigation. Only events relating to the matter brought before the investigating judge may no longer be dealt with by a warning or a deadline within which compliance must occur.]

When a police service or inspection service is unable to provide the necessary resources and manpower to the investigating judge, the judge may request that the Crown Prosecutor [1 or the Labor Authority] become involved after having notified them of the situation. Furthermore, the investigating judge may send a copy of his order to the General Prosecutor and to the Indictment Division.

Le procureur du Roi [ou l'auditeur du travail]¹ peut lui-même transmettre le dossier au procureur général. Ce dernier peut solliciter l'intervention du collègue des procureurs généraux afin qu'il prenne les initiatives qui s'imposent.

The Crown Prosecutor [or the Labor Authority] himself may send the dossier to the General Prosecutor. The General Prosecutor may request that the Order of General Prosecutors become involved in order to take the required initiatives.

§ 3. The investigating judge may choose which law enforcement authorities will be involved in a specific investigation, and all orders and instructions will be given to those authorities without exception. If several branches of law enforcement become involved, the investigating judge coordinates their respective involvement.

Agents from the chosen law enforcement branch as described in the preceding paragraph must immediately inform the appropriate judicial authority of any information and intelligence that comes into their possession and of all investigative activities taken according to the conditions set forth by the Crown Prosecutor, unless the judge decides otherwise. All missions involving the law enforcement authorities related to these orders take precedence over investigations conducted by other branches of law enforcement, who must immediately inform the competent judicial authority and the chosen branch of law enforcement and hand over all information and intelligence that they possess as well as details on all investigations that they have taken according to the conditions set forth by the Crown Prosecutor as determined in a Directive.

----- (1)<L 2010-06-06/06, art. 5, 058; Effective on: 01-07-2011>

Art. 61ter.<inséré par L 1998-03-12/39, art. 13; En vigueur : 1998-10-02> § 1er.
[Les parties directement intéressées, visées à l'article 21bis, peuvent, pendant l'instruction, demander au juge d'instruction l'autorisation de consulter le dossier ou d'en obtenir copie.]

§ 2. [A peine d'irrecevabilité, la requête est motivée et contient éléction de domicile en Belgique si le requérant n'y a pas son domicile. Elle est adressée ou déposée au greffe du tribunal de première instance au plus tôt un mois après l'engagement des poursuites et est inscrite dans un registre ouvert à cet effet. Le greffier en communique sans délai une copie au procureur du Roi. Celui-ci prend les réquisitions qu'il juge utiles.]

Le juge d'instruction statue au plus tard dans le mois de l'inscription de la requête dans le registre.

L'ordonnance est communiquée par le greffier au procureur du Roi et est notifiée au requérant et, le cas échéant, à son conseil par télécopie ou par envoi recommandé dans les huit jours à dater de la décision.]

§ 3. [1 Le juge d'instruction peut interdire la consultation ou la copie du dossier ou de certaines pièces si les nécessités de l'instruction le requièrent, ou si la consultation présente un danger pour les personnes ou porte gravement atteinte à leur vie privée ou que le requérant ne justifie pas d'un motif légitime pour consulter le dossier. Le juge d'instruction peut limiter la consultation ou la copie à la partie du dossier pour laquelle le requérant peut justifier d'un intérêt.]

§ 4. [1 S'il est accédé à la demande de consultation ou d'obtention d'une copie, le dossier est, sans préjudice de l'application éventuelle du § 3, mis à disposition dans les vingt jours de l'ordonnance du juge d'instruction et au plus tôt après le délai visé au § 5, alinéa 1er, en original ou en copie, pour être consulté par le requérant et son conseil pendant quarante-huit heures au moins. Le greffier donne avis au requérant et à son conseil, par télécopie ou par envoi recommandé, du moment où le dossier pourra être consulté.]

Le requérant ne peut faire usage des renseignements obtenus par la consultation ou la copie que dans l'intérêt de sa défense, à la condition de respecter la présomption d'innocence, ainsi que les droits de la défense de tiers, la vie privée et la dignité de la personne, sans préjudice du droit prévu à l'article 61quinquies pour l'inculpé et la partie civile.]

§ 5. Le procureur du Roi et le requérant peuvent saisir la chambre des mises en accusation d'un recours par requête motivée [déposée au greffe du tribunal de première instance dans un délai de huit jours et inscrite dans un registre ouvert à cet effet]. Ce délai court à l'égard du procureur du Roi à compter du jour où l'ordonnance est portée à sa connaissance et à l'égard du requérant, du jour où elle lui est notifiée. Le recours du procureur du Roi a un effet suspensif sur l'exécution de l'ordonnance du juge d'instruction. <L 2001-07-04/40, art. 3, 028; En vigueur : 03-08-2001>

La chambre des mises en accusation statue sans débat dans les quinze jours du dépôt de la requête.

Le greffier donne avis au requérant et, le cas échéant, à son conseil, par télécopie ou par lettre recommandée à la poste, des lieu, jour et heure de l'audience, au plus tard quarante-huit heures à l'avance.

Le procureur général peut transmettre ses réquisitions écrites et le juge d'instruction peut transmettre un rapport à la chambre des mises en accusation. La chambre des mises en accusation peut entendre séparément le procureur général, le juge d'instruction, le requérant ou son conseil.

§ 6. [Si le juge d'instruction n'a pas statué dans le délai prévu au § 2, alinéa 2, majoré de quinze jours, le requérant peut saisir la chambre des mises en accusation. Celui-ci est déchu de ce droit si la requête motivée n'est pas déposée, dans les huit jours, au greffe du tribunal de première instance. La requête est inscrite dans un registre ouvert à cet effet. La procédure se déroule conformément au § 5, alinéas 2 à 4.] <L 2001-07-04/40, art. 3, 028; En vigueur : 03-08-2001>

§ 7. Le requérant ne peut [adresser ni déposer] de requête ayant le même objet avant l'expiration d'un délai de trois mois à compter de la dernière décision portant sur le même objet. <L 2001-07-04/40, art. 3, 028; En vigueur : 03-08-2001>

Art. 61ter. <inserted by L 1998-03-12/39, art. 13; Effective on: 1998-10-02> § 1er. [1Parties who are directly involved as per Article 21bis may ask the investigating judge for authorization to view the dossier or obtain a copy of it during the investigation.]

§ 2. [On pain of being inadmissible, any such request must be documented and grounded and contain information on the address for service in Belgium if the requesting party is not a resident of Belgium. The request must be sent or submitted to the office of the Court Clerk of the Regional Trial Court no later than one month after prosecution begins and is recorded in a record created for that purpose. The Court Clerk must immediately send a copy to the Crown Prosecutor. The Crown Prosecutor may issue any related orders as he or she sees fit.

The investigating judge will hand down a ruling no later than one month after the request is recorded in the registry.

The order is sent by the Court Clerk to the Crown Prosecutor and notice thereof this issued to the requesting party and, where applicable, his legal counsel, sent by fax or registered mail within eight days of the date of the decision.]]1

§ 3. [The investigating judge may refuse to grant permission to view the dossier or make a copy of it or of some exhibits in it if the needs of the investigation require this, or if permission to view or copy the dossier could endanger any person or represent a serious threat to their privacy or if the requesting party does not provide a legitimate reason for viewing the dossier. The investigating judge may limit the permission to view or copy the dossier to the portions thereof which the requesting party proves he needs to view.]

§ 4. [If permission is granted to view or copy the dossier, without prejudice to potentially applying § 3, either the original or a copy of the dossier is made available within 20 days of the date of the order of the investigating judge and no later than the term set forth in paragraph 1 of § 5, for the requesting party and his legal counsel to view it for at least 48 hours. The Court Clerk notifies the requesting party and his legal counsel by sending a fax or a registered letter as soon as permission to view the dossier is given.

The requesting party can only use the information obtained by viewing or copying the dossier to defend himself, on condition that the presumption of innocence is respected, and on condition of respecting the rights of third parties to defend themselves in court, and the privacy and dignity of others, without prejudice to the rights of the accused and of civil parties set forth in Article 61 quinquies.

§ 5. The Crown Prosecutor and the requesting party may file an appeal with grounds before the indictment division [to be filed at the office of the Court Clerk of the Regional Trial Court within eight days and recorded in a record for that purpose.] That term begins to elapse for the Crown Prosecutor beginning from the day that he becomes aware of the order, and for the requesting party, beginning from the date he receives notice thereof. An appeal by a Crown Prosecutor suspends the execution of an order by the investigating judge. <L 2001-07-04/40, art. 3, 028; Effective on: 03-08-2001>

The indictment division hands down a ruling without deliberation within 15 days after the request is filed.

The Court Clerk issues notice to the requesting party and where applicable to his legal counsel, by fax or by registered letter, issuing the information on the place, date and time of the hearing, at least 48 hours before it takes place.

The General Prosecutor may issue written orders and the investigating judge may send a report to the indictment division. The indictment division may provide separate hearings to the General Prosecutor, the investigating judge, the requesting party or his legal counsel.

§ 6. [If the investigating judge has not handed down a ruling within the deadline set forth in paragraph 2 of § 2, plus 15 days, the requesting party may seize the indictment division of the matter. This right may only be exercised if a grounded request has been filed within eight days before the Court Clerk of the Regional Trial Court. The request is filed in a record created for that purpose. The proceedings take place according to paragraphs 2 to 4 of § 5,] <L 2001-07-04/40, art. 3, 028; Effective on: 03-08-2001>

§ 7. The requesting party is prohibited [from sending or filing] a request for the same purpose until three months after the latest decision handed down for the same purpose. <L 2001-07-04/40, art. 3, 028; Effective on: 03-08-2001>

Art. 216. § 3. Les déclarations par lesquelles le suspect ou le prévenu reconnaît être coupable des faits qui lui sont imputés sont faites en présence d'un avocat de son choix ou qui lui est désigné.

Si le suspect ou le prévenu dispose de ressources insuffisantes, les articles 508/13 à 508/18 du Code judiciaire relatifs au bénéfice de la gratuité complète ou partielle de l'aide juridique de deuxième ligne sont intégralement applicables.

L'avocat prend connaissance du dossier et des faits imputés au suspect ou prévenu et informe celui-ci de ses droits, des conséquences de la reconnaissance de culpabilité sur la procédure en cours et sur le déroulement ultérieur de celle-ci. Le suspect ou le prévenu peut à tout moment se concerter confidentiellement avec son avocat hors la présence du procureur du Roi.

Après avoir entendu les peines proposées par le procureur du Roi, le suspect ou le prévenu peut demander un délai de réflexion de dix jours au plus avant de faire savoir au procureur du Roi s'il reconnaît ou non être coupable des faits qui lui sont imputés et accepte ou non les qualifications légales retenues et les peines proposées.

Le cas échéant, les déclarations par lesquelles le suspect ou le prévenu reconnaît être coupable des faits qui lui sont imputés et accepte les peines proposées par le procureur du Roi sont actées dans une convention qui décrit avec précision les faits et leur qualification et qui est signée tant par le suspect ou le prévenu et son avocat que par le procureur du Roi.

Cette convention détermine notamment les frais à couvrir et les objets ou avantages patrimoniaux à remettre et à confisquer.

Si l'affaire n'est pas encore fixée devant un juge du fond, la convention fixe les lieu, jour et heure de l'audience du tribunal devant lequel le suspect ou le prévenu doit comparaître, dans un délai qui ne peut être inférieur à dix jours et supérieur à deux mois. Une copie de la convention est remise immédiatement au suspect ou au

prévenu. Cette notification vaut citation. Toutefois, lorsque l'affaire a déjà été fixée devant le juge du fond, la convention est soumise pour homologation lors de ladite audience.

Tant qu'il n'est pas signé de convention, les pièces rédigées dans le cadre des paragraphes 1er et 2 et du présent paragraphe ne peuvent être ni versées au dossier, ni consultées.

Le procureur du Roi communique le cas échéant une copie de la convention signée aux victimes connues. La victime et son avocat ont le droit d'accéder au dossier.

CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING
[C.I.CR./SV.] art. 216 § 3 (Belg.)

Code of Criminal Procedure

Art. 216. § 3. Art. 216. § 3. The statements in which the suspect or the accused admits to be guilty of the acts of which he is accused, are made in the presence of a lawyer of his choice or one appointed for him.

If the suspect or the accused does not have sufficient resources, articles 508/13 to 508/18 of the Belgian Judicial Code on entitlement to full or partial secondary free legal aid are fully applicable.

The lawyer familiarizes himself with the case file and the facts attributed to the suspect or the accused and informs him of his rights, the consequences of admission of guilt on the proceedings in progress and on the subsequent outcome thereof. The suspect or the accused may at any time confidentially confer with his lawyer, without the Crown Prosecutor being present.

After having heard the penalties proposed by the Crown Prosecutor, the suspect or the accused may request a period of reflection of ten days at most before advising the Crown Prosecutor whether or not he admits to be guilty of the acts that he is accused of, and whether or not he accepts the legal classifications adopted and the penalties proposed.

If applicable, the statements by which the suspect or the accused admits to being guilty of the acts attributed to him and accepts the penalties proposed by the Crown Prosecutor are recorded in an agreement that accurately describes the facts and their classification and which is signed by the suspect or the accused and his lawyer as well as by the Crown Prosecutor.

This agreement notably determines the costs to be covered and the objects or the financial gains to be returned or to be confiscated.

If the case has not yet been scheduled for a hearing before a trial judge, the agreement sets the place, date and time for the hearing of the court before which the suspect of the accused must appear, within a period that cannot be less than ten days or more than two months. A copy of the agreement is immediately handed to the suspect or the accused. This notification serves as a summons. When the case had, however, already been scheduled for a hearing before the trial judge, the agreement is subject to homologation during the said hearing.

As long as the agreement is not signed, the documents drafted in the context of paragraphs 1 and 2 of this paragraph cannot be included in the case file, nor can it be consulted.

If necessary, the Crown Prosecutor provides a copy of the signed agreement to the known victims. The victim and his lawyer are entitled to access the case file.

Loi relative à la détention préventive. 21 § 3, 22

Art. 21: § 1. Le mandat d'arrêt délivré par le juge d'instruction est valable pour une durée maximale de cinq jours à compter de son exécution.

§1 la chambre du conseil, sur le rapport du juge d'instruction, le procureur du Roi [3 et l'inculpé et/ou son conseil]3 entendus, décide s'il y a lieu de maintenir la détention préventive [1 ainsi que de la modalité de l'exécution de celle-ci].

Avant l'expiration de ce délai et sans préjudice de l'application de l'article 25, § 1er,

§ 2. Vingt-quatre heures au moins avant la comparution en chambre du conseil, les lieu, jour et heure de la comparution sont indiqués dans un registre spécial tenu au greffe et le greffier en donne avis, par télécopieur [3 , par envoi recommandé ou par voie électronique]3, à l'inculpé et à son conseil.

§ 3. Le dossier est mis à la disposition de l'inculpé et de son conseil pendant le dernier jour ouvrable avant la comparution.

[Cette mise à la disposition peut se faire sous forme de copies, le cas échéant sous forme électronique, certifiées conformes par le greffier.]

Le dossier est à nouveau mis à leur disposition pendant la matinée du jour de la comparution si la veille n'était pas un jour ouvrable; dans ce cas, la comparution en chambre du conseil a lieu l'après-midi.

§ 4. La chambre du conseil s'assure de la régularité du mandat d'arrêt au regard des dispositions de la présente loi. Elle juge en outre de la nécessité du maintien de la détention [1 et se prononce sur la modalité de l'exécution de celle-ci]1 suivant les critères prévus à l'article 16, § 1er.

§ 5. Si la chambre du conseil estime que la détention préventive doit être maintenue, elle motive sa décision comme il est prévu à l'article 16, § 5, premier et deuxième alinéas.

§ 6. L'ordonnance de maintien en détention est valable pour un mois à dater du jour où elle est rendue.

Art. 21 (Full version): § 1. A detention order handed down by the investigating judge is valid for a maximum of five days from its enforceable date.

Before this term expires, without prejudice to the application of Article 25, § 1er,

§1. the court in chambers (chambre de conseil/raadkamer), on the report of the examining magistrate, the royal prosecutor [3 and the accused and/or his counsel]

heard, shall decide whether it is necessary to uphold the pre-trial detention [and on the manner in which it is to be carried out].

§ 2. At least 24 hours before the accused is to appear in the court, the place, time and date of appearance is posted in a special record kept at the office of the Court Clerk, and the Court Clerk sends notice to the accused and his legal counsel by fax [3, by registered letter or by email].

§3. The file shall be made available to the accused and his counsel during the last working day prior to the appearance before the court-.

[2 Said provision may be made in the form of copies, where appropriate in electronic form, certified by the clerk.]

The file is again made available to them on the morning of the day of the hearing if the previous day was not a business day; in this case, the hearing before the court in chambers shall take place in the afternoon [...]

§ 4. The court ensures that the arrest warrant is legal in light of the provisions of this law. Furthermore, it determines whether there is a need to keep [the accused] in detention [1 and hands down an order on the method of detention] according to the criteria set forth in Article 16, § 1er.

§ 5. If the court deems that the suspect should remain in preventative detention, it must provide grounds for that decision as set forth in Article 16, § 5, paragraphs one and two.

§ 6. The order for a suspect to remain in preventative detention is valid for one month from the date when it is handed down.

Art. 22 : Tant qu'il n'est pas mis fin à la détention préventive et que l'instruction n'est pas close, la chambre du conseil est appelée à statuer, de mois en mois [5 ou, à partir de la troisième décision, tous les deux mois], sur le maintien de la détention [et sur la modalité de l'exécution de celle-ci]. [5 A partir de la troisième décision, l'ordonnance de maintien en détention préventive et relative à la modalité de l'exécution de celle-ci forme un titre de privation de liberté pour deux mois.]

Sur requête de l'inculpé ou de son conseil, le juge d'instruction convoque l'inculpé dans les dix jours qui précèdent chaque comparution en chambre du conseil ou en chambre des mises en accusation statuant sur renvoi conformément à l'article 31, § 4, pour un interrogatoire récapitulatif; le greffier notifie immédiatement et par écrit ou par télécopieur la convocation au conseil de l'inculpé et au procureur du Roi, lesquels peuvent assister à cet interrogatoire.

Avant la comparution, le dossier est mis pendant deux jours à la disposition de l'inculpé et de son conseil. Le greffier leur en donne avis [par envoi recommandé à la poste ou par voie électronique].

[Cette mise à la disposition peut se faire sous forme de copies, le cas échéant sous forme électronique, certifiées conformes par le greffier.]

La chambre du conseil vérifie s'il subsiste des indices sérieux de culpabilité à charge de l'inculpé et s'il existe des raisons conformes à l'article 16, § 1er, de maintenir la détention [ou de modifier la modalité de l'exécution de celle-ci].

Si elle décide que la détention doit être maintenue [ou que la modalité de l'exécution doit être modifiée], elle motive sa décision comme il est dit à l'article 16, § 5, premier et deuxième alinéas.

Art. 22 Law on Pre-trial detention (Translation of relevant extract): As long as pre-trial detention is not lifted and the investigation is not closed, the court in chambers is called upon to rule, from month to month [or, beginning with the third decision, every two months], on whether the pre-trial detention shall be upheld [and the manner in which it is to be carried out].

[After the third decision, the order to keep the suspect in preventative detention and the order on the method for executing the detention are grounds for 2 months' imprisonment.]

Upon the request of the accused or his legal counsel, the investigating judge summons the accused with ten days' notice before each court appearance or indictment division appearance to hand down a ruling on the appeal pursuant to Article 31, § 4, for a concluding cross-examination; the Court Clerk immediately notifies the counsel of the accused and the Crown Prosecutor in writing or via fax of the summons. Both of the latter may attend the cross-examination.

After the court appearance, the dossier is made available to the accused and his legal counsel for 2 days. The Court Clerk notifies them [by registered mail or by email or electronic notification].

[Said provision may be made in the form of copies, where appropriate in electronic form, certified by the clerk.]

The court verifies whether reasonable suspicions remain that the accused is guilty and if there are reasons to keep the accused in custody under Article 16, § 1er, [or to change the conditions for detention]

If the court decides that the accused must remain in custody [or that the conditions of detention must be modified], it provides grounds for that decision pursuant to Article 16, § 5, paragraphs one and two.

Bulgaria (Bulgarian)

PENAL PROCEDURE CODE OF THE REPUBLIC OF BULGARIA, art. 227(8).

Чл. 227. (1) След извършване на действията по чл. 226 разследващият орган предявява разследването.

(2) (Изм. - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г.) Обвиняемият и неговият защитник, пострадалият и неговият повереник се призовават за предявяването на разследването, ако са поискали това.

(3) (Изм. - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г.) Призоваването се извършва на посочените по делото адреси за призоваване в страната, като призовката се връчва не по-късно от три дни преди датата за предявяване на разследването.

(4) (Изм. - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г.) Разследването не се предявява, ако лицето не е намерено на посочените по делото адреси за призоваване в страната или е редовно призовано, но не е посочило уважителни причини за неявяването си.

(5) (Изм. - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г.) Когато обвиняемият се яви без упълномощен защитник, разследващият орган му предявява разследването, като в случаите по чл. 94, ал. 1 му назначава защитник.

(6) (Отм. - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г.)

(7) Преди предявяването разследващият орган разяснява на явилите се лица техните права.

(8) Разследването се предявява, като разследващият орган предоставя на явилите се лица всички материали по него за проучване.

(9) (Изм. - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г.) Прокурорът може да предяви разследването, когато сам е извършил действията по чл. 226, ал. 3.

(10) (Нова - ДВ, бр. 109 от 2008 г., отм. - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г.)

Article 227. (1) After performing the actions under Article 226, the investigative body has brought the investigation.

(2) (as amended, State Gazette (SG) issue No. 32/2010, effective since 05/28/2010) The defendant and his defense counsel, the victim and his or her trustee shall be summoned for the investigation launch if they have asked for it.

(3) (as amended, SG issue No. 32/2010, effective since 05/28/2010) The summoning shall be made at the country-relevant addresses for the summons and the summons shall be delivered not later than three days before the date of the investigation launch.

(4) (as amended, SG issue No. 32/2010, effective since 05/28/2010) The investigation shall not be launched if the person has not been found at the country-relevant addresses for the summons or is regularly summoned, but has not specified any valid reasons for his/her failure to attend.

(5) (as amended, SG issue No. 32/2010, effective since 05/28/2010) Wherever the defendant attends without an authorized defense counsel, the investigative body shall bring launch the investigation against him/her, while in the cases under Article 94, paragraph 1 it shall appoint him a defense counsel.

(6) (revoked - SG issue No. 32/2010, effective since 05/28/2010)

(7) Before the case launch, the investigative body shall explain to the attending persons their rights.

(8) The investigation shall be carried out with the investigative body providing the respondents with all the materials for the investigation.

(9) (as amended, SG issue No. 32/2010, effective since 05/28/2010) The prosecutor may launch the investigation wherever he/she himself/herself has committed the actions under Article 226, paragraph 3.

(10) (new – SG issue No. 109/2008, revoked – SG issue No. 32/10, effective since 05/28/2010)

Chile (Spanish)

Ley Orgánica Constitucional del Ministerio Público

Artículo 1º.- El Ministerio Público es un organismo autónomo y jerarquizado, cuya función es dirigir en forma exclusiva la investigación de los hechos constitutivos de delito, los que determinen la participación punible y los que acrediten la inocencia del imputado y, en su caso, ejercer la acción penal pública en la forma prevista por la ley. De igual manera, le corresponderá la adopción de medidas para proteger a las víctimas y a los testigos. No podrá ejercer funciones jurisdiccionales.

Artículo 3º.- En el ejercicio de su función, los fiscales del Ministerio Público adecuarán sus actos a un criterio objetivo, velando únicamente por la correcta aplicación de la ley. De acuerdo con ese criterio, deberán investigar con igual celo no sólo los hechos y circunstancias que funden o agraven la responsabilidad del imputado, sino también los que le eximan de ella, la extingan o la atenúen.

Constitutional Organic Law of the Public Prosecutor's Office

Article 1.- The Public Prosecutor's Office is an autonomous hierarchical body whose function is to exclusively direct the investigation of acts constituting crimes, both those that determine punishable involvement and those that prove the innocence of the accused party, and if relevant, exercise the public criminal action established by the law. Similarly, it is responsible for adopting measures to protect victims and witnesses. It cannot exercise jurisdictional functions.

Article 3.- In carrying out their functions, prosecutors from the Public Prosecutor's Office shall act in accordance with objective criteria, only ensuring the proper application of the law. In accordance with this criteria, they must investigate with equal zeal not only the facts and circumstances upon which the accused party's liability is founded or aggravated, but also those that absolve, extinguish, or reduce it.

CRIMINAL PROCEDURE CODE OF CHILE, art. 77, 93; ACT OF PUBLIC PROSECUTION OFFICE, art. 1, 3

Codigo Procesal Penal

Artículo 77.- Facultades. Los fiscales ejercerán y sustentarán la acción penal pública en la forma prevista por la ley. Con ese propósito practicarán todas las diligencias que fueren conducentes al éxito de la investigación y dirigirán la actuación de la policía, con estricta sujeción al principio de objetividad consagrado en la Ley Orgánica Constitucional del Ministerio Público.

Artículo 93.- Derechos y garantías del imputado. Todo imputado podrá hacer valer, hasta la terminación del proceso, los derechos y garantías que le confieren las leyes.

c) Solicitar de los fiscales diligencias de investigación destinadas a desvirtuar las imputaciones que se le formularen;

e) Solicitar que se active la investigación y conocer su contenido, salvo en los casos en que alguna parte de ella hubiere sido declarada secreta y sólo por el tiempo que esa declaración se prolongare;

Criminal Procedural Code

Article 77.- Powers. Prosecuting attorneys shall exercise and support public criminal actions in the manner established by the law. With this purpose, they shall carry out all of the tasks that would lead to the success of the investigation and shall direct the actions of the police, strictly subject to the principle of objectivity established in the Constitutional Organic Law of the Public Prosecutor's Office.

Article 93.- Rights and guarantees of the accused. All accused parties shall be able to enforce the rights and guarantees conferred upon them by the laws until the end of the process.

c) Request criminal investigations from the prosecuting attorneys that are aimed at refuting the accusations formulated against them.

e) Request that the investigation be activated and know its contents, except in cases in which a party to it has been declared secret and only for the amount of time that this declaration lasts;

Croatia (Croatian)

ZAKON O KAZNENOM POSTUPKU [CRIMINAL PROCEDURE CODE], art. 1(1), 184(2)(1) (Croat.)

Članak 1.

(1) Ovaj Zakon utvrđuje pravila kojima se osigurava da nitko nedužan ne bude osuđen, a da se počinitelju kaznenog djela izrekne kazna ili druga mjera uz uvjete koje predviđa zakon i na temelju zakonito provedenog postupka pred nadležnim sudom.

(2) Prije donošenja pravomoćne presude okrivljenik može biti ograničen u svojoj slobodi i drugim pravima samo uz uvjete koje određuje ovaj Zakon, razmjerno težini kaznenog djela, stupnju sumnje i jačini ugrožavanja ili povrede zaštićenog dobra.

(3) Uz uvjete propisane ovim i drugim zakonom mogu se poduzeti radnje radi otkrivanja počinitelja kaznenog djela.

Article 1

(1) This Act stipulates the rules ensuring that no innocent person is convicted, and that any perpetrator of a criminal offence is subject to punishment or other measures under the conditions stipulated by law and based on a lawfully conducted procedure in the competent court.

(2) Before a final judgment is passed, the defendant's freedom and other rights may be limited only under the conditions stipulated by this Act, proportionately to the severity of the criminal offence, level of suspicion and level of danger to or violation of protected goods.

(3) Under the conditions stipulated by this and other acts, actions may be taken for the purpose of identifying the perpetrator of a criminal offence.

Članak 184.

(2) Pravo razgledavanja, prepisivanje, preslikavanje i snimanje spisa i predmeta koji se imaju uporabiti kao dokaz, ako zakonom nije propisano drukčije ima:

1) okrivljenik i branitelj, nakon što je nalog o istrazi upisan u odgovarajući upisnik, ili nakon što je protiv osumnjičenika podnesena kaznena prijava ili je obavljena pretraga osumnjičenika, njegova doma ili drugih prostorija koje koristi ili pokretne

stvari koju koristi, ili je od osumnjičenika privremeno oduzet predmet, izvršeno prepoznavanje, uzimanje otisaka prstiju i drugih dijelova tijela od osumnjičenika, ili je od osumnjičenika uzet uzorak biološkog materijala ili određeno vještačenje, pod uvjetom da je osumnjičenik prethodno ispitan, osim ako drukčije nije propisano ovim Zakonom,

Article 184

(2) The following persons have the right to review, copy, scan and record files and objects to be used as evidence, unless stipulated otherwise by law:

1) the defendant and his/her attorney, after the investigation warrant has been entered into the appropriate register, or after criminal charges have been filed against the suspect, or a search of the suspect, his/her home or other premises or movables used by him/her has been conducted, or an object has been temporarily confiscated from the suspect, or identification of the suspect has been performed, or fingerprints and other body parts have been taken from the suspect, or a sample of biological material has been taken from the suspect, or an expert examination of the suspect has been ordered, provided that the suspect has been previously questioned, unless stipulated otherwise by this Code.

Estonia (Estonian)

Kriminaalmenetluse seadustik

§ 341. Kahtlustatava õigus tutvuda kriminaaltoimiku materjalidega

(1) Kahtlustataval on õigus taotleda juurdepääsu tõenditele, mis on olulised tema vastu esitatud kahtlustuse sisu täpsustamiseks, kui see on vajalik õiglase menetluse ja kaitse ettevalmistamise tagamiseks. Juurdepääs kogutud tõenditele tagatakse hiljemalt pärast seda, kui prokuratuur on kohtueelse menetluse lõpuleviiduks tunnistanud ja esitanud kriminaaltoimiku tutvumiseks käesoleva seadustiku § 224 järgi.

(2) Kahtlustataval on õigus taotleda juurdepääsu tõenditele, mis on olulised vahistamistaotluse põhjendatuse arutamiseks ning kinnipidamise ja vahistamise vaidlustamiseks kohtus.

(3) Käesoleva paragrahvi lõigetes 1 ja 2 nimetatud tõenditele juurdepääsu võimaldamise otsustab prokuratuur. Prokuratuur võib määrusega keelduda tõenditele juurdepääsu võimaldamisest, kui see võib oluliselt kahjustada teise isiku õigusi või kui see võib kahjustada kriminaalmenetlust.

(4) Käesoleva paragrahvi lõikes 3 sätestatud prokuratuuri keeldumise määruse peale võib esitada kaebuse vastavalt käesoleva seadustiku § 228 sätetele.

[RT I, 21.06.2014, 11 - jõust. 01.07.2014]

Code of Criminal Procedure

§ 341. Suspect's right to examine materials of criminal file

(1) A suspect has the right to request access to the evidence which is essential for specifying the content of the suspicion filed against them, if this is required for ensuring fair proceedings and the preparation of a defense. Access to the evidence collected shall be ensured at the latest after the Prosecutor's Office has declared the pre-trial proceedings completed and submitted the criminal file for examination pursuant to § 224 of this Code.

(2) A suspect has the right to request access to any evidence which is essential in order to discuss whether an arrest warrant is justified and for contesting detention and taking into custody in court.

(3) Enabling access to the evidence specified in subsection 1 and 2 of this section shall be decided by a Prosecutor's Office. A Prosecutor's Office may make a ruling

on refusal to enable access to evidence if this may significantly damage the rights of another person or if this may damage the criminal proceedings.

(4) An appeal may be filed against the ruling of the Prosecutor's Office on refusal provided for in subsection 3 of this section in accordance with the provisions of § 228 of this Code.

[RT I, June 21, 2014, 11 - entry into force July 01, 2014]

Finland (Finish)**Finland Criminal Procedure Act Chapter 5(b) Section 3****Laki oikeudenkäynnistä rikosasioissa****3 § (22.8.2014/670)**

Tunnustamisoikeudenkäynnissä on, jollei tuomioistuin toisin päättä, seuraavassa järjestyksessä:

- 1) syyttäjän tehtävä selkoa tuomioesityksen sisällöstä ja muista siihen liittyvistä seikoista sekä esiteltävä tarpeellisessa määrin asiaa koskeva esitutkinta-aineisto;
- 2) tuomioistuimen tiedusteltava vastaajalta, tunnustaako hän edelleen rikoksen ja suostuu asian käsittelyyn tässä luvussa säädetyssä menettelyssä sekä ymmärtääkö hän muiltakin osin tuomioesityksen sisällön ja merkityksen, sekä pyrittävä varmistautumaan, että esitys vastaa hänen tarkoitustaan;
- 3) varattava vastaajalle tilaisuus muutoin lausua tuomioesityksestä ja esitutkinta-aineistosta;
- 4) varattava asianomistajalle tilaisuus lausua tuomioesityksestä;
- 5) käsiteltävä muut vaatimukset;
- 6) annettava asianosaisille tilaisuus esittää loppulausuntonsa.

Tuomioistuimen tulee valvoa, että asia tulee asianmukaisesti käsiteltyksi eikä asiaan sekoiteta mitään siihen kuulumatonta. Tuomioistuimen tulee kysymyksin poistaa asianosaisten lausuntojen epäselvyyksiä ja puutteellisuuksia.

The Criminal Procedure Act**3 § (08.22.2014/670)**

Unless the court decides otherwise, proceedings on the basis of a plea of guilty consist of the following stages, in the order indicated:

- 1) the prosecutor shall clarify the content of the proposal for judgment and the other circumstances connected with it, and present to the necessary extent the criminal investigation material dealing with the case;
- 2) the court shall inquire of the defendant, whether or not he or she continues to admit the offence and consents to the consideration of the case in the procedure provided in this Chapter and whether or not he or she understands also in other respects the content and significance of the proposal for judgment, and seek to ensure that the proposal corresponds to the intent of the defendant

3) reserve the defendant an opportunity to otherwise comment on the proposal for judgment and the criminal investigation material;

4) reserve the injured party an opportunity to comment on the proposal for judgment;

“5) other claims are heard;

6) the parties are provided with an opportunity to present their closing statement;

The court shall ensure that the case is dealt with appropriately and that irrelevant matters are not mixed into the case. The court shall use questions to eliminate ambiguities and deficiencies in the statements of the parties.

France (French)

CODE DE PROCEDURE PENALE [C. PR. PEN.] art. 495-8 (Fr.)

Article 81

Modifié par LOI n°2012-409 du 27 mars 2012 - art. 4

Le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge.

Il est établi une copie de ces actes ainsi que de toutes les pièces de la procédure ; chaque copie est certifiée conforme par le greffier ou l'officier de police judiciaire commis mentionné à l'alinéa 4. Toutes les pièces du dossier sont cotées par le greffier au fur et à mesure de leur rédaction ou de leur réception par le juge d'instruction.

Toutefois, si les copies peuvent être établies à l'aide de procédés photographiques ou similaires, elles sont exécutées à l'occasion de la transmission du dossier. Il en est alors établi autant d'exemplaires qu'il est nécessaire à l'administration de la justice. Le greffier certifie la conformité du dossier reproduit avec le dossier original. Si le dessaisissement momentané a pour cause l'exercice d'une voie de recours, l'établissement des copies doit être effectué immédiatement pour qu'en aucun cas ne soit retardée la mise en état de l'affaire prévue à l'article 194.

Si le juge d'instruction est dans l'impossibilité de procéder lui-même à tous les actes d'instruction, il peut donner commission rogatoire aux officiers de police judiciaire afin de leur faire exécuter tous les actes d'information nécessaires dans les conditions et sous les réserves prévues aux articles 151 et 152.

Le juge d'instruction doit vérifier les éléments d'information ainsi recueillis.

Le juge d'instruction procède ou fait procéder, soit par des officiers de police judiciaire, conformément à l'alinéa 4, soit par toute personne habilitée dans des conditions déterminées par décret en Conseil d'Etat, à une enquête sur la personnalité des personnes mises en examen, ainsi que sur leur situation matérielle, familiale ou sociale. Toutefois, en matière de délit, cette enquête est facultative.

Le juge d'instruction peut également commettre une personne habilitée en application du sixième alinéa ou, en cas d'impossibilité matérielle, le service pénitentiaire d'insertion et de probation à l'effet de vérifier la situation matérielle, familiale et sociale d'une personne mise en examen et de l'informer sur les mesures propres à favoriser l'insertion sociale de l'intéressée. A moins qu'elles n'aient été déjà prescrites par le ministère public, ces diligences doivent être prescrites par le juge

d'instruction chaque fois qu'il envisage de placer en détention provisoire un majeur âgé de moins de vingt et un ans au moment de la commission de l'infraction lorsque la peine encourue n'excède pas cinq ans d'emprisonnement.

Le juge d'instruction peut prescrire un examen médical, un examen psychologique ou ordonner toutes mesures utiles.

S'il est saisi par une partie d'une demande écrite et motivée tendant à ce qu'il soit procédé à l'un des examens ou à toutes autres mesures utiles prévus par l'alinéa qui précède, le juge d'instruction doit, s'il n'entend pas y faire droit, rendre une ordonnance motivée au plus tard dans le délai d'un mois à compter de la réception de la demande.

La demande mentionnée à l'alinéa précédent doit faire l'objet d'une déclaration au greffier du juge d'instruction saisi du dossier. Elle est constatée et datée par le greffier qui la signe ainsi que le demandeur ou son avocat. Si le demandeur ne peut signer, il en est fait mention par le greffier. Lorsque le demandeur ou son avocat ne réside pas dans le ressort de la juridiction compétente, la déclaration au greffier peut être faite au moyen d'une lettre recommandée avec demande d'avis de réception. Lorsque la personne mise en examen est détenue, la demande peut également être faite au moyen d'une déclaration auprès du chef de l'établissement pénitentiaire. Cette déclaration est constatée et datée par le chef de l'établissement pénitentiaire qui la signe, ainsi que le demandeur. Si celui-ci ne peut signer, il en est fait mention par le chef de l'établissement. Ce document est adressé sans délai, en original ou copie et par tout moyen, au greffier du juge d'instruction.

Faute par le juge d'instruction d'avoir statué dans le délai d'un mois, la partie peut saisir directement le président de la chambre de l'instruction, qui statue et procède conformément aux troisième, quatrième et cinquième alinéas de l'article 186-1.

[English Translation]

Article 82-1

Modifié par Loi n°2000-1354 du 30 décembre 2000 - art. 24 JORF 31 décembre 2000 en vigueur le 1er janvier 2001

Les parties peuvent, au cours de l'information, saisir le juge d'instruction d'une demande écrite et motivée tendant à ce qu'il soit procédé à leur audition ou à leur interrogatoire, à l'audition d'un témoin, à une confrontation ou à un transport sur les lieux, à ce qu'il soit ordonné la production par l'une d'entre elles d'une pièce utile à l'information, ou à ce qu'il soit procédé à tous autres actes qui leur paraissent nécessaires à la manifestation de la vérité. A peine de nullité, cette demande doit être formée conformément aux dispositions du dixième alinéa de l'article 81 ; elle doit

porter sur des actes déterminés et, lorsqu'elle concerne une audition, préciser l'identité de la personne dont l'audition est souhaitée.

Le juge d'instruction doit, s'il n'entend pas y faire droit, rendre une ordonnance motivée au plus tard dans le délai d'un mois à compter de la réception de la demande. Les dispositions du dernier alinéa de l'article 81 sont applicables.

A l'expiration d'un délai de quatre mois depuis sa dernière comparution, la personne mise en examen qui en fait la demande écrite doit être entendue par le juge d'instruction. Le juge d'instruction procède à son interrogatoire dans les trente jours de la réception de la demande, qui doit être formée conformément aux dispositions du dixième alinéa de l'article 81.

Article 81

The investigating judge undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt.

A copy of these steps and of all of the documents in the proceedings is made; each copy is certified true by the clerk or by the designated judicial police officer mentioned under paragraph four. All the case file documents are numbered by the clerk as they are drafted or received by the investigating judge.

However, if copies can be made through photographic processes or similar techniques, they are made upon the transmission of the case file. As many sets are made as necessary for the administration of justice. The clerk certifies the conformity of the duplicated case file with the original copy of the file. If the investigation is temporarily interrupted because an appeal is filed, the drafting of copies must be done immediately so that in no circumstances is the preparation of the case for trial provided for by article 194 delayed.

Where it is impossible for the investigating judge to undertake in person all the investigative steps, he may give a rogatory letter to judicial police officers in order to have them perform the necessary investigative steps pursuant to the conditions and under the restrictions set out by articles 151 and 152.

The investigating judge is required to check the pieces of information thus collected.

The investigating judge undertakes or procures, either by judicial police officers in accordance with paragraph four, or by any person accredited pursuant to the conditions determined by a Decree of the Conseil d'Etat, an inquiry into the personality of the persons investigated, as well as into their financial, family or social situation. This inquiry is however optional for a misdemeanour.

The investigating judge may also appoint according to the nature of the case the prison social insertion and probation service, the competent child protection

service or any organisation authorised according to the previous paragraph, in order to check the financial, family and social situation of a person under judicial examination and to inform the judge of the appropriate steps to support the social integration of the person concerned. Unless they were already ordered by the public prosecutor, such proceedings must be ordered by the investigating judge every time he considers placing in pre-trial detention an adult of less than twenty-one years of age at the moment of the commission of the offence, where the penalty incurred does not exceed five years of imprisonment.

The investigating judge may order a medical examination, a psychological examination or any appropriate measure.

Where a party refers to him by a written and reasoned application for the implementation of one of these examinations or any other appropriate measure provided for by the previous paragraph, the investigating judge must make a reasoned order within one month from receiving the application if he decides not to defer to the application.

The application mentioned under the previous paragraph must be filed with the clerk of the investigating judge seised of the case. It is recorded and date-stamped by the clerk who signs it as well as the applicant or the latter's advocate. The clerk makes a specific entry where the applicant is unable to sign. Where the applicant or his advocate do not reside within the area jurisdiction of the competent court, the statement filed with the clerk may be sent by recorded delivery letter with request for acknowledgement of receipt. Where the person under judicial examination is detained, the application may also be made by a statement to the prison governor. This statement is recorded and date-stamped by the governor who signs it as well as the applicant. The governor makes a specific entry if the latter is unable to sign. This document is immediately sent to the investigating judge's clerk as an original or simple copy and by any means of transmission.

Where the investigating judge fails to decide on the application within one month, the party may apply directly to the president of the investigating chamber, who decides and acts in accordance with the third, fourth and fifth paragraphs of article 186-1.

Article 82-1

In the course of the investigation the parties may file with the investigating judge a written and reasoned application in order to be heard or interrogated, to hear a witness, for a confrontation or an inspection of the scene of the offence, to order one of them to disclose an element useful for the investigation, or for any other step to be taken which seems to them necessary for the discovery of the truth. On pain of nullity, this application must be made in accordance with the provisions of the tenth

paragraph of article 81; it must mention all the acts requested, and where a hearing is concerned, specify the identity of the person whose hearing is requested.

The investigating judge must make a reasoned order within one month from receiving the application, when he decides not to grant it. The provisions of the last paragraph of article 81 are applicable.

Upon the expiry of a four-month term since his last appearance, the person under judicial examination who requests it in writing must be heard by the investigating judge. The investigating judge carries out this interrogation within thirty days from receiving the application, which must be drafted in accordance with the provisions of the tenth paragraph of article 81.

Article 495-8 **Modifié par LOI n°2014-896 du 15 août 2014 - art. 3**

Le procureur de la République peut proposer à la personne d'exécuter une ou plusieurs des peines principales ou complémentaires encourues ; la nature et le quantum de la ou des peines sont déterminés conformément aux articles 130-1 et 132-1 du code pénal.

Lorsqu'est proposée une peine d'emprisonnement, sa durée ne peut être supérieure à un an ni excéder la moitié de la peine d'emprisonnement encourue. Le procureur peut proposer qu'elle soit assortie en tout ou partie du sursis. Il peut également proposer qu'elle fasse l'objet d'une des mesures d'aménagement énumérées par l'article 712-6. Si le procureur de la République propose une peine d'emprisonnement ferme, il précise à la personne s'il entend que cette peine soit immédiatement mise à exécution ou si la personne sera convoquée devant le juge de l'application des peines pour que soient déterminées les modalités de son exécution, notamment la semi-liberté, le placement à l'extérieur ou le placement sous surveillance électronique.

Lorsqu'est proposée une peine d'amende, son montant ne peut être supérieur à celui de l'amende encourue. Elle peut être assortie du sursis.

Les déclarations par lesquelles la personne reconnaît les faits qui lui sont reprochés sont recueillies, et la proposition de peine est faite par le procureur de la République, en présence de l'avocat de l'intéressé choisi par lui ou, à sa demande, désigné par le bâtonnier de l'ordre des avocats, l'intéressé étant informé que les frais seront à sa charge sauf s'il remplit les conditions d'accès à l'aide juridictionnelle. La personne ne peut renoncer à son droit d'être assistée par un avocat. L'avocat doit pouvoir consulter sur-le-champ le dossier.

La personne peut librement s'entretenir avec son avocat, hors la présence du procureur de la République, avant de faire connaître sa décision. Elle est avisée par le procureur de la République qu'elle peut demander à disposer d'un délai de dix

jours avant de faire connaître si elle accepte ou si elle refuse la ou les peines proposées.

Article 495-8
Amended by ACT n°2014-896 of August 15, 2014 - art. 3

The Public Prosecutor can propose that the person serves one or more of the main or additional penalties incurred; the type and quantum of the penalty or penalties are determined in accordance with article 130-1 and 132-1 of the Penal Code.

When the proposed penalty is a term of imprisonment, the duration may not exceed one year, nor may it exceed half of the prison sentence incurred. The Public Prosecutor can offer to suspend it in part or in full. He may also propose that it is subject to one of the adjustment measures listed in article 712-6. If the Public Prosecutor proposes a firm prison sentence, he must explain to the person whether he intends this sentence to be enforced immediately or whether the person shall be summoned before the penalty enforcement judge so that the conditions of its implementation can be determined, including/such as semi-detention, external placement or placement under electronic surveillance.

When the proposed penalty is a fine, the amount cannot exceed that of the incurred fine. It may be suspended.

The statements by which the person admits to the actions of which he is accused, are collected and the proposed penalty is put forward by the Public Prosecutor, in the presence of the lawyer of the person concerned chosen by him or, at his request, appointed by the president of the bar association, the person concerned having been informed that he will be responsible for the costs unless he qualifies to receive legal aid. The person may not waive his right to be assisted by a lawyer. The lawyer must be able to consult the file right away.

The person may freely meet with his lawyer, without the Public Prosecutor being present, before making his decision known. He is advised by the Public Prosecutor that he may request to be granted a period of ten days before announcing whether he accepts or turns down the proposed penalty or penalties.

Germany (German)

**STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL
PROCEDURE] § 147(1) (Ger.)**

Strafprozeßordnung (StPO)

**§ 147 Akteneinsichtsrecht, Besichtigungsrecht; Auskunftsrecht des
Beschuldigten**

(1) Der Verteidiger ist befugt, die Akten, die dem Gericht vorliegen oder diesem im Falle der Erhebung der Anklage vorzulegen wären, einzusehen sowie amtlich verwahrte Beweisstücke zu besichtigen.

Code of Criminal Procedure (Strafprozeßordnung - StPO)

**§ 147 File review right; Right of inspection; Information rights of the accused/
suspect**

(1) The counsel for defense is authorized to review the files that are available to the court, or that would be required to be submitted to the court in the event charges were to be brought, as well as to inspect any officially stored pieces of evidence.

Italy (Italian)

Archivio selezionato: Sentenze Corte Costituzionale

Autorità: Corte Costituzionale

Data:

16/04/2002 n.

120

Classificazioni: GIUDIZI PENALI SPECIALI - Voce storica "GIUDIZIO IMMEDIATO" - - richiesta dell'imputato

REPUBBLICA ITALIANA
IN NOME DEL POPOLO ITALIANO
LA CORTE COSTITUZIONALE

composta dai signori:

- Cesare RUPERTO Presidente
- Massimo VARI Giudice
- Riccardo CHIEPPA"
- Gustavo ZAGREBELSKY"
- Valerio ONIDA"
- Carlo MEZZANOTTE"
- Fernanda CONTRI"
- Guido NEPPI MODONA"
- Piero Alberto CAPOTOSTI"
- Annibale MARINI"
- Franco BILE"
- Giovanni Maria FLICK"
- Francesco AMIRANTE"

ha pronunciato la seguente

SENTENZA

nei giudizi di legittimità costituzionale dell'art. 458, comma 1, del codice di procedura penale, promossi nell'ambito di diversi procedimenti penali con ordinanze emesse il 1° dicembre 2000 dal Tribunale di Busto Arsizio, il 14 febbraio 2001 dal Tribunale di Latina, il 16 maggio 2001 dal Tribunale di Savona e il 17 luglio 2001 dal Tribunale di Bergamo, rispettivamente iscritte ai nn. 98, 310, 655 e 793 del registro ordinanze 2001 e pubblicate nella Gazzetta Ufficiale della Repubblica nn. 7, 18, 36 e 40, prima serie

speciale, dell'anno 2001.

Visto l'atto di costituzione degli imputati nel procedimento relativo al giudizio promosso con l'ordinanza iscritta al n. 310 del registro ordinanze 2001, nonché gli atti di intervento del Presidente del Consiglio dei ministri;

udito nell'udienza pubblica del 26 febbraio 2002 e nella camera di consiglio del 27 febbraio 2002 il Giudice relatore Guido Neppi Modona;

uditi l'avvocato Pasquale Ciampa per le parti private e l'Avvocato dello Stato per il Presidente del Consiglio dei ministri.

Fatto

Ritenuto in fatto

1. - Con ordinanza del 14 febbraio 2001 (r.o. n. 310 del 2001) il Tribunale di Latina ha sollevato, in riferimento agli artt. 3 e 24, secondo comma, della Costituzione, questione di legittimità costituzionale dell'art. 458, comma 1, del codice di procedura penale, nella parte in cui prevede, ai fini della richiesta di giudizio abbreviato, che il termine di sette giorni decorre dalla notificazione del decreto di giudizio immediato all'imputato e non invece anche dalla notificazione al difensore dell'avviso della data fissata per il giudizio, nonché nella parte in cui prevede il medesimo termine per l'imputato detenuto e per l'imputato libero.

Il Tribunale rimettente premette che gli imputati, entrambi detenuti, hanno proposto richiesta di

giudizio abbreviato oltre il termine di sette giorni dalla notifica del decreto di giudizio immediato, e che soltanto l'accoglimento della questione di costituzionalità consentirebbe loro di godere dei benefici sostanziali scaturenti dal rito richiesto.

Nel merito, il rimettente rileva che, nonostante con la ordinanza n. 36 del 1994 la Corte costituzionale abbia dichiarato infondata un'analogia questione, la norma censurata deve ritenersi in contrasto con gli artt. 3 e 24 della Costituzione, in quanto, pur essendo quella di richiedere il giudizio abbreviato "una scelta in gran parte tecnica che non può essere adottata senza la consultazione del difensore", essa è di fatto affidata esclusivamente all'imputato, atteso che la possibilità che l'imputato ha di consultarsi con il suo difensore è "ristretta in un termine decisamente breve [...] ulteriormente ridotto se si considera che con la richiesta deve essere data la prova della avvenuta notifica al pubblico ministero".

L'imputato detenuto, che neppure è in condizione di verificare se i suoi messaggi siano stati tempestivamente ricevuti dal difensore, subisce inoltre un trattamento sicuramente peggiore rispetto all'imputato libero che ha invece ampia facoltà di contattare il difensore e maggiori possibilità, dunque, di rispettare il termine fissato dalla norma.

1.1. - È intervenuto in giudizio il Presidente del Consiglio dei ministri, rappresentato e difeso dall'Avvocatura generale dello Stato, chiedendo che la questione sia dichiarata infondata.

Ad avviso dell'Avvocatura, infatti, da un canto il termine assegnato all'imputato - unico titolare del diritto di chiedere il giudizio abbreviato - può ritenersi "ampio a sufficienza per consentire al destinatario, sia esso libero o detenuto, di consultarsi con il proprio difensore prima della scadenza", dall'altro una regolamentazione e una delimitazione delle modalità dell'esercizio del diritto di difesa non possono reputarsi idonee a menomare l'esistenza stessa del diritto, "allorché di esso vengano assicurati lo scopo e la funzione di effettiva assistenza tecnica e professionale (sentenze n. 46 del 1957 e n. 16 del 1970)".

1.2. - Si sono costituiti gli imputati nel procedimento a quo, rappresentati e difesi dall'avvocato Pasquale Ciampa, chiedendo che sia dichiarata l'illegittimità costituzionale dell'art. 458, comma 1, cod. proc. pen., nella parte in cui prevede che il termine entro il quale può chiedersi il giudizio abbreviato decorre dalla sola data di notificazione del decreto di giudizio immediato all'imputato.

Il difensore premette che: i suoi assistiti erano stati arrestati l'11 dicembre 2000; interrogati e convalidato l'arresto nei termini di legge, era stata loro applicata la misura cautelare della custodia in carcere; successivamente, a seguito di richiesta del pubblico ministero, il giudice per le indagini preliminari aveva disposto il giudizio immediato con decreto notificato agli imputati il 10 gennaio 2001, mentre l'avviso della data fissata per il giudizio era stato notificato al difensore il 22 gennaio. Il 24 gennaio, dopo essersi consultati con il difensore, gli imputati presentavano richiesta di giudizio abbreviato, che veniva dichiarata inammissibile, perché tardiva, dal giudice per le indagini preliminari con ordinanza del 26 gennaio 2001.

Con riferimento al quadro normativo precedente alle modifiche recate dalla legge n. 63 del 2001, il difensore rileva come il presupposto interpretativo da cui muove il rimettente - e cioè che il termine di cui al comma 1 dell'art. 458 cod. proc. pen. decorre dalla sola data della notificazione del decreto all'imputato - è assolutamente pacifico, sulla base del diritto vivente: può dunque accadere che il difensore riceva la notifica dell'avviso del giudizio immediato - in relazione al quale non è neppure previsto l'obbligo di preventiva notifica dell'avviso di chiusura delle indagini preliminari ex art. 415-bis cod. proc. pen. - quando il termine di sette giorni è già scaduto.

La parte privata sottolinea inoltre che, a differenza della situazione presa in esame dalla Corte con l'ordinanza n. 588 del 1990 e con le successive che a quella si richiamavano, la questione di

costituzionalità prospettata dal Tribunale di Latina concerne imputati detenuti, per i quali le possibilità di comunicare tempestivamente con il difensore non sono agevoli. Inoltre, dovendo

indubitabilmente ritenersi che "fra le condizioni necessarie al fine di individuare quale rito processuale scegliere - attività sicuramente rientranti nell'accezione "preparare la propria difesa" - vi siano quelle di potere consultare il fascicolo processuale e di consultare il proprio difensore", la norma censurata priverebbe l'imputato detenuto del diritto di disporre "del tempo e delle condizioni necessari per preparare la difesa".

Il termine per chiedere il giudizio abbreviato non sarebbe dunque adeguato all'effettivo esercizio del diritto di difesa e si porrebbe in contrasto non solo con i parametri evocati dal rimettente, ma anche con gli artt. 2 e 10 Cost. - perché menoma il diritto inviolabile all'equo processo assicurato dall'art. 6 della Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali - nonché con l'art. 111 Cost.

Con memoria depositata il 27 settembre 2001 il difensore degli imputati, in replica alle deduzioni dell'Avvocatura, ha sviluppato le argomentazioni già illustrate nell'atto di costituzione, ed ha sottoposto ad esame critico le argomentazioni svolte nella sentenza di questa Corte n. 122 del 1997.

1.3. - Nella discussione in pubblica udienza le parti costituite hanno ribadito le argomentazioni già svolte nelle memorie; in particolare, la difesa degli imputati ha messo in rilievo le importanti modifiche intervenute nel quadro normativo di riferimento, sia processuale che costituzionale, successivamente alle decisioni della Corte su analoghe questioni e segnatamente dopo la sentenza n. 122 del 1997, sottolineando il valore precettivo dei principi enunciati nel nuovo art. 111 Cost. e l'aumentato tecnicismo della scelta del rito conseguente al mutamento della disciplina del giudizio abbreviato per effetto della legge 16 dicembre 1999, n. 479.

2. - Con ordinanza del 1° dicembre 2000 (r.o. n. 98 del 2001) il Tribunale di Busto Arsizio ha sollevato analoga questione di legittimità costituzionale dell'art. 458 cod. proc. pen., in riferimento agli artt. 3, 24, secondo comma, e 111, terzo comma, Cost.

Il Tribunale ritiene che la questione sia rilevante atteso che l'imputato, a seguito del decreto di giudizio immediato, ha avanzato al giudice per le indagini preliminari istanza di ammissione al giudizio abbreviato, respinta proprio perché tardiva.

Ad avviso del rimettente la norma censurata si porrebbe in contrasto con l'art. 3 Cost., in quanto determina un'irragionevole disparità di trattamento dell'imputato nei cui confronti si procede con giudizio immediato, rispetto all'imputato citato a giudizio a seguito di udienza preliminare o con citazione diretta ovvero tratto a giudizio direttissimo, situazioni nelle quali sono previsti termini ben più ampi per la richiesta di giudizio abbreviato e l'esercizio della relativa facoltà è garantita fino alla comparizione davanti all'organo giudicante.

Sarebbero inoltre violati gli artt. 24 e 111, terzo comma, Cost., in quanto la scelta di chiedere il giudizio abbreviato presuppone specifiche cognizioni tecnico-giuridiche e una capacità di analisi del materiale probatorio raccolto dal pubblico ministero tali da rendere indispensabile l'apporto del difensore, mentre questi, anche quando sia munito di procura speciale preventiva, non può, di fatto, presentare richiesta di rito abbreviato se l'avviso della data fissata per il giudizio immediato gli è notificato dopo lo spirare del termine. La brevità del termine concesso all'imputato per chiedere il giudizio abbreviato dà pertanto luogo ad una "ingiustificata compressione del diritto di difesa, inteso nella sua completezza ovvero quale possibilità di operare consapevoli e mirate scelte processuali, di rito oltre che di merito".

3. - Questione di costituzionalità affatto analoga alle precedenti è stata sollevata con ordinanza del 16 maggio 2001 (r.o. n. 655 del 2001) dal Tribunale di Savona.

Il Tribunale premette che il 6 novembre 2000 era stato emesso il decreto di giudizio immediato per l'udienza del 13 dicembre, notificato all'imputato il 9 novembre 2000; il relativo avviso veniva

notificato al difensore il 15 novembre. Il 18 novembre l'imputato avanzava richiesta di rito

abbreviato, dichiarata inammissibile dal giudice per le indagini preliminari perché proposta oltre il termine, previsto a pena di decadenza, di sette giorni decorrenti dalla notificazione del decreto di giudizio immediato all'imputato. Poiché il provvedimento del giudice per le indagini preliminari era stato preso in data successiva a quella fissata per il giudizio immediato, questo subì dei ritardi, di talché intervenne, nelle more, la legge n. 63 del 2001, ampliando a quindici giorni il termine previsto dalla disposizione impugnata: peraltro il Tribunale rimettente osserva che, in applicazione del principio *tempus regit actum*, tale modifica normativa non rileva nella fattispecie del giudizio a quo.

L'art. 458, comma 1, cod. proc. pen., nel testo precedente alle modifiche recate dall'art. 14, comma 2, della legge n. 63 del 2001, sarebbe dunque, ad avviso del rimettente, in contrasto con l'art. 24, secondo comma, Cost.: la scelta del giudizio abbreviato presupporrebbe infatti adeguate conoscenze tecniche anche con riferimento alla particolare disciplina "del materiale utilizzabile ai fini probatori, del trattamento sanzionatorio e dei limiti all'appello", mentre la decorrenza del termine dalla sola notifica del decreto all'imputato non consente un'effettiva assistenza difensiva.

3.1 - È intervenuto in giudizio il Presidente del Consiglio dei ministri, rappresentato e difeso dall'Avvocatura generale dello Stato, chiedendo che la questione sia dichiarata inammissibile o infondata.

Desta perplessità, a parere dell'Avvocatura, la "qualificazione del carattere esclusivamente tecnico della scelta del rito abbreviato", in quanto se "è vero che occorre professionalità per valutare gli effetti della scelta di rito speciale", è comunque "di primaria importanza la decisione finale dell'imputato". Inoltre l'Avvocatura ritiene che sarebbe improprio ed inverosimile far decorrere il termine per effettuare una scelta dalla comunicazione a "persona diversa da quella che la scelta deve operare", anche nel caso in cui la persona diversa sia il difensore di fiducia dell'imputato.

4. - Il Tribunale di Bergamo, con ordinanza del 17 luglio 2001 (r.o. n. 793 del 2001), solleva infine, in riferimento agli artt. 24, secondo comma, e 111, terzo comma, Cost., questione di costituzionalità concernente la decorrenza del termine previsto dall'art. 458, comma 1, cod. proc. pen., nel testo modificato dall'art. 14, comma 2, della legge 1° marzo 2001, n. 63.

Il Tribunale premette che procede nei confronti di imputato tratto in arresto il 15 marzo 2001 per il delitto di importazione di stupefacenti; che il 17 marzo l'arresto era stato convalidato ed era stata applicata all'imputato la misura cautelare della custodia in carcere. Il 13 aprile il giudice per le indagini preliminari aveva disposto il giudizio immediato per l'udienza del 26 giugno 2001; il decreto era stato notificato all'imputato detenuto il 14 aprile, mentre l'avviso al difensore di fiducia era stato dato il 26 aprile 2001. Il 9 maggio il difensore aveva depositato richiesta di giudizio abbreviato, condizionato all'esame di due testimoni, richiesta dichiarata, in pari data, inammissibile perché formulata oltre la scadenza del termine di quindici giorni, decorrente dalla notificazione all'imputato del decreto che dispone il giudizio immediato.

Ad avviso del rimettente, la norma censurata, non prevedendo "che il termine di quindici giorni per la proposizione della richiesta di giudizio abbreviato decorra dall'ultima delle notificazioni: del decreto, ex art. 456, comma 3, cod. proc. pen. all'imputato o dell'avviso, ex art. 456, comma 5, al difensore", violerebbe gli artt. 24, secondo comma, e 111, terzo comma, Cost., perché, in un sistema improntato ad elevato tecnicismo, determina "un vuoto nella difesa tecnica", proprio nel momento in cui l'imputato deve, a pena di decadenza, esercitare la scelta di chiedere un rito alternativo cui conseguono benefici sostanziali rilevanti e non gli assicura quindi di disporre "del tempo e delle condizioni necessarie per preparare la sua difesa".

Né il preventivo rilascio di una procura speciale al difensore sarebbe sufficiente a risolvere il problema quando è lo stesso difensore che riceve in ritardo la notificazione dell'avviso di giudizio immediato.

4.1 - È intervenuto il Presidente del Consiglio dei ministri, rappresentato e difeso dall'Avvocatura generale dello Stato, riportandosi alla memoria depositata nel giudizio avente a oggetto la questione sollevata con l'ordinanza n. 655 del 2001.

Diritto

Considerato in diritto

1 - Con quattro ordinanze emesse dai Tribunali di Latina (r.o. n. 310 del 2001), Busto Arsizio (r.o. n. 98 del 2001), Savona (r.o. n. 655 del 2001) e Bergamo (r.o. n. 793 del 2001) è stata sollevata, in riferimento agli artt. 3, 24, secondo comma, e 111, terzo comma, della Costituzione, questione di legittimità costituzionale dell'art. 458, comma 1, del codice di procedura penale, nella parte in cui non prevede che il termine per proporre richiesta di giudizio abbreviato decorra, anziché dalla notificazione del decreto di giudizio immediato all'imputato, dall'ultima delle notificazioni, all'imputato o al difensore, rispettivamente del decreto ovvero dell'avviso della data fissata per il giudizio.

Poiché le ordinanze hanno per oggetto la medesima disposizione ed hanno contenuti analoghi, va disposta la riunione dei relativi giudizi.

2. - La questione è sostanzialmente nuova, in quanto si inserisce su di un contesto normativo segnato dalle profonde modifiche apportate alla disciplina del giudizio abbreviato dalla legge 16 dicembre 1999, n. 479 (v., al riguardo, sentenza n. 115 del 2001). Non soccorrono pertanto le precedenti pronunce di questa Corte sul medesimo comma 1 dell'art. 458 cod. proc. pen. (sentenza n. 122 del 1997, ordinanze n. 36 del 1994, n. 335 e n. 225 del 1991 e n. 588 del 1990), che si collocavano in un quadro normativo affatto diverso, nel quale le scelte dell'imputato non erano connotate dalla attuale rilevante complessità delle valutazioni connesse alla richiesta del giudizio abbreviato.

3. - L'art. 458, comma 1, cod. proc. pen. stabilisce che l'imputato può chiedere il giudizio abbreviato, a pena di decadenza, entro quindici giorni dalla notificazione del decreto di giudizio immediato (tale termine è stato così modificato dall'art. 14, comma 2, della legge 1° marzo 2001, n. 63, che ha sostituito l'originario termine di sette giorni: tre delle quattro ordinanze si riferiscono a situazioni in cui era ancora operante il termine di sette giorni). Dal canto suo, il comma 3 dell'art. 456 cod. proc. pen. prevede che il decreto che dispone il giudizio immediato venga notificato all'imputato almeno trenta giorni prima della data fissata per il giudizio e il comma 2 precisa che il decreto contiene anche l'avviso che l'imputato può chiedere il giudizio abbreviato o l'applicazione della pena. Il comma 5 dispone, infine, che al difensore è notificato l'avviso della data fissata per il giudizio entro il medesimo termine previsto per l'imputato.

Da tale disciplina emerge che all'imputato e al difensore vengono notificati due atti distinti e che la scansione temporale delle relative notifiche è lasciata all'iniziativa dell'ufficio giudiziario che procede. Può quindi avvenire - come è accaduto nei giudizi a quibus - che il difensore riceva l'avviso della data fissata per il giudizio immediato in un momento in cui il termine per presentare la richiesta di giudizio abbreviato sia già scaduto o sia prossimo alla scadenza.

4. - Il nucleo centrale della questione di legittimità costituzionale dell'art. 458, comma 1, cod. proc. pen. attiene appunto alla violazione del diritto alla difesa tecnica, in quanto la disciplina censurata è congegnata in maniera tale che il termine stabilito a pena di decadenza per presentare richiesta di giudizio abbreviato può scadere senza che il difensore abbia potuto illustrare al proprio assistito le opzioni difensive rispettivamente collegate al giudizio abbreviato e alla celebrazione del dibattimento.

In effetti, l'essenziale funzione della difesa tecnica (sentenze n. 80 del 1984 e n. 125 del 1979), che postula il diritto dell'imputato di conferire con il difensore per predisporre le più opportune strategie difensive (cfr. sentenze n. 212 del 1997 e n. 216 del 1996), assume particolare incidenza

in relazione ad una scelta - quale quella di percorrere la via del giudizio abbreviato - che implica, specie dopo le modifiche introdotte dalla legge n. 479 del 1999, cognizioni e valutazioni squisitamente tecnico-giuridiche, estranee al patrimonio di conoscenze dell'imputato.

In primo luogo, la decisione se accedere o meno al rito abbreviato presuppone la conoscenza del fascicolo delle indagini preliminari, di cui, a norma dell'art. 139 disp. att. cod. proc. pen., le parti e i difensori hanno facoltà di prendere visione, ed eventualmente estrarre copia, durante il breve termine previsto per presentare la relativa richiesta.

Tali attività richiedono necessariamente l'intervento della difesa tecnica, perché solo il difensore può valutare, dopo avere esaminato il fascicolo, se sia conveniente per l'imputato prestare il consenso, mediante la richiesta di giudizio abbreviato, a che gli atti delle indagini vengano utilizzati come prova. Tanto più che, rispetto alla disciplina vigente prima della legge n. 479 del 1999, l'imputato è ora posto di fronte all'alternativa tra una richiesta di definizione del processo allo stato degli atti ex art. 438, comma 1, cod. proc. pen. e una richiesta subordinata ad una integrazione probatoria a norma del comma 5, destinata ad essere accolta solo ove il giudice ritenga che l'integrazione probatoria sia necessaria ai fini della decisione e compatibile con le finalità di economia processuale proprie del procedimento, tenuto conto degli atti già acquisiti ed utilizzabili.

Inoltre, nel decidere se optare per il rito abbreviato, l'imputato dovrà in ogni caso valutare l'eventualità che il giudice assuma anche d'ufficio, a norma dell'art. 441, comma 5, cod. proc. pen., gli elementi necessari ai fini della decisione, e tenere presente, ove la richiesta sia subordinata ad una integrazione probatoria, che il pubblico ministero può chiedere l'ammissione di prova contraria ex art. 438, comma 5, cod. proc. pen.

L'imputato viene cioè chiamato a compiere valutazioni che, coinvolgendo i poteri dispositivi sulla prova e implicando una peculiare esperienza professionale e processuale, esigono l'apporto della difesa tecnica (cfr., di recente, ordinanza n. 182 del 2001), in quanto solo il difensore, sulla base della conoscenza degli atti del fascicolo del pubblico ministero, può a ragion veduta valutare la completezza delle indagini e gli effetti dell'utilizzazione in giudizio degli atti già acquisiti.

5. - Il diritto di difesa, inteso come effettiva possibilità di ricorrere all'assistenza tecnica del difensore, risulta violato, come questa Corte ha avuto ripetutamente occasione di affermare, in ogni caso in cui, ai fini dell'esercizio di facoltà processuali che comportano "la cognizione di elementi tecnici rientranti nelle specifiche competenze professionali del difensore", venga posto a pena di decadenza un termine decorrente dalla notificazione all'imputato, anziché al difensore, dell'atto da cui tali facoltà conseguono (v., con riferimento al termine per dedurre eccezioni di nullità, sentenza n. 162 del 1975, nonché, in relazione al termine per proporre richiesta di riesame, decorrente dalla conoscenza del provvedimento da parte dell'imputato, anziché dalla notifica dell'atto al difensore, la già menzionata sentenza n. 80 del 1984).

Va pertanto dichiarata, in riferimento all'art. 24 Cost., l'illegittimità costituzionale dell'art. 458, comma 1, cod. proc. pen., nella parte in cui prevede che il termine entro cui l'imputato può chiedere il giudizio abbreviato decorre dalla notificazione del decreto di giudizio immediato, anziché dall'ultima notificazione, all'imputato o al difensore, rispettivamente del decreto ovvero dell'avviso della data fissata per il giudizio immediato.

Rimangono così assorbite le censure riferite agli altri parametri costituzionali evocati dai rimettenti.

6. - Nell'ordinanza r.o. n. 310 del 2001 il rimettente solleva questione di legittimità costituzionale dell'art. 458, comma 1, cod. proc. pen. anche nella parte in cui non prevede un termine maggiore per l'imputato in stato di detenzione.

La censura risulta superata dall'accoglimento della questione principale di legittimità costituzionale nei termini sopra precisati, in quanto il difensore è comunque posto in condizione di conferire tempestivamente con il proprio assistito, anche se detenuto, al fine di fornirgli l'assistenza tecnico-giuridica necessaria per adottare la strategia difensiva più consona alla sua posizione processuale.

PQM

PER QUESTI MOTIVI

LA CORTE COSTITUZIONALE

riuniti i giudizi,

dichiara l'illegittimità costituzionale dell'art. 458, comma 1, del codice di procedura penale, nella parte in cui prevede che il termine entro cui l'imputato può chiedere il giudizio abbreviato decorre dalla notificazione del decreto di giudizio immediato, anziché dall'ultima notificazione, all'imputato o al difensore, rispettivamente del decreto ovvero dell'avviso della data fissata per il giudizio immediato.

Così deciso in Roma, nella sede della Corte costituzionale, Palazzo della Consulta, il 10 aprile 2002.

DEPOSITATA IN CANCELLERIA IL 16 APR. 2002.

Note

Utente: Francesca Loretowww.iusexplorer.it - 09.01.2018

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Classifications: SPECIAL CRIMINAL PROCEEDINGS - Historical entry

"IMMEDIATE JUDGMENT" - - request of the defendant

ITALIAN REPUBLIC
IN THE NAME OF THE ITALIAN PEOPLE
CONSTITUTIONAL COURT

composed of:

- Cesare RUPERTO President
- Massimo VARI Judge
- Riccardo CHIEPPA"
- Gustavo ZAGREBELSKY"
- Valerio ONIDA"
- Carlo MEZZANOTTE"
- Fernanda CONTRI"
- Guido NEPPI MODONA"
- Piero Alberto CAPOTOSTI"
- Annibale MARINI"
- Franco BILE"
- Giovanni Maria FLICK"
- Francesco AMIRANTE"

issued the following

DECISION

in the judgments of constitutional legitimacy of art. 458, paragraph 1, of the code of criminal procedure, promoted in the context of several criminal proceedings issued with orders on 1 December 2000 by the Court of Busto Arsizio, February 14, 2001 by the Court of Latina, May 16, 2001 by the Court of Savona and July 17 2001 by the Court of Bergamo, respectively registered under no. 98, 310, 655 and 793 of the Ordinances Register 2001 and published in Official Gazette of the Republic n. 7, 18, 36 and 40, first series special year 2001.

Considered the constitution act of the defendants in the procedure relating to the proceeding promoted with the ordinance registered under no. 310 of the Ordinances Register of 2001, as well as the act of intervention of the President of the Council of Ministers;

Having heard in the public hearing of February 26, 2002 and in the hearing chamber of 27 February 2002 the Judge Rapporteur Guido Neppi Modona;

Having heard the lawyer Pasquale Ciampa for the private parties and the State Attorney for the President of the Council of Ministers.

Fact

Holding to be true that

1. - By ordinance dated February 14, 2001 (o.r. No. 310 of 2001) the Court of Latina raised, with reference to articles 3 and 24, paragraph 2, of the Italian Constitution, question of constitutional legitimacy of art. 458, paragraph 1, of the Code of Criminal Procedure, with reference to the part in which it provides, for the purpose of the request for the summary trial, that the term of seven days runs from the notification of the decree of immediate trial to the defendant and not from the notification to the defender of the notice of the date of the trial, as well as in the part in which it foresees the same term for the detained defendant and for the non-detained defendant.

The referring Court starts by saying that the defendants, both detained, had proposed a request for summary trial beyond the seven-day period from the notification of the immediate trial decree, and that only the acceptance of the question of constitutional legitimacy would have allowed them to enjoy the substantial benefits resulting from the request.

With regards to the merit, the referring judge underlines that despite the Constitutional Court ordinance no. 36 of 1994 has declared a similar question to be groundless, the contested provision must be considered in contrast with articles. 3 and 24 of the Italian Constitution, although the choice of requesting the abbreviated judgment is "a largely technical choice that cannot be adopted without consulting counsel", it is in reality entrusted exclusively to the defendant, since defendant's opportunity to consult with his or her lawyer is "restricted to a decidedly short [...] period, further reduced considering that proof of the notification to the public prosecutor shall be submitted together with the request".

The defendant detained, who is not even in a position to verify whether his or her messages have been promptly received by his or her counsel, also suffers a treatment definitely worse than the one of the non-detained defendant who has the opportunity to contact the counsel and has more chances, therefore, of respecting the deadline set by the rule.

1.1. - The President of the Council of Ministers intervened in court, represented and defended by the State Attorney, asking the question to be declared groundless.

Indeed, according to the State Attorney, on the one hand the term assigned to the defendant - the only one entitled to ask for an summary trial- can be considered "long enough to allow the defendant, whether free or detained, to consult with his or her own counsel before the deadline", and, on the other hand, the regulation and the delimitation of the modalities of the exercise of the right of defense cannot be deemed to be appropriate to curb the existence of the right, "when the purpose and the function of effective technical and professional assistance is ensured (Decisions No. 46 of 1957 and No. 16 of 1970) ".

1.2. - The defendants took part to the proceedings giving rise to the constitutionality issue, represented and defended by the lawyer Pasquale Ciampa, asking for the declaration of constitutional illegitimacy of art. 458, paragraph 1, of the code of criminal procedure, in the part in which it provide that the term within which the summary trial can be asked

would start running from the date of the notification of the decree of immediate trial to the defendant.

The counsel states that: his clients had been arrested on 11 December 2000; they were questioned and the arrest was validated within the terms established by the law, they had been subject to the precautionary measure of custody in prison; subsequently, following a request from the public prosecutor, the judge for preliminary investigations had ordered the immediate judgment by decree notified to the defendants on January 10, 2001, while the notice of the date set for the trial had been notified to the defender on January 22nd. On 24 January, after having consulted with his lawyer, the defendants submitted a request for an summary trial, which was declared inadmissible, because late, by the judge for preliminary investigations by order dated 26 January 2001.

With reference to the regulatory framework in place prior to the amendments provided by law no. 63 of 2001, the counsel points out that the interpretative assumption from which the referring judge starts - that is, the term referred to in paragraph 1 of art. 458 criminal procedure code runs from the date of notification of the decree to the defendant - is absolutely clear, on the basis of current law: it can therefore happen that the lawyer receives the notification of the immediate judgment - in relation to which the obligation to advanced notification of the notice of closure of the preliminary investigations pursuant to art. 415-bis cod. proc. pen. - when the seven-day deadline has already expired.

The private party also stresses that, differently from the case examined by the Court with the order no. 588 of 1990 and with the subsequent ones referred to, the question of constitutional legitimacy proposed by the Court of Latina regarded defendants who are imprisoned, for whom the possibility of promptly communicating with their lawyer is made difficult. Moreover, undoubtedly considering that "among the necessary conditions in order to identify which trial to choose - activities certainly falling within the meaning of "prepare their own defense"- there are the opportunity of consulting the files and their lawyer", the contested provision would prevent a detained defendant from exercising the right to dispose "of the time and conditions necessary to prepare the defense".

The term for requesting the summary trial would therefore not be adequate for the effective exercise of the right of defense and would be in contrast not only with the parameters evoked by the referring judge, but also with the articles 2 and 10 of the Italian Constitution - because it reduces the inviolable right to a fair trial ensured by art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms - as well as with art. 111 Cost.

In a memorial filed on September 27, 2001, counsel for the defendants, in reply to the State Attorney's submissions, has developed the arguments already illustrated in the constitution act, and has critically examined the arguments made in the decision of this Court n. 122 of 1997.

1.3. - During the discussion at the public hearing the parties reiterated the arguments already made in the memorials filed; in particular, the defense of the defendants highlighted the important changes in the relevant regulatory framework, both procedural

and constitutional, after the Court's decisions on similar issues and especially after decision no. 122 of 1997, emphasizing the mandatory value of the principles enunciated in the new art. 111 of the Constitution and the increased technicality of the choice of the rite consequent to the change in the rules of the abbreviated judgment as a result of the law of 16 December 1999, n. 479.

2. - By order of 1 December 2000 (o.r. n.198 of 2001) the Court of Busto Arsizio raised a similar question of constitutional legitimacy of art. 458 of the code of criminal procedure, with reference to articles 3, 24, second paragraph, and 111, third paragraph, of the Italian Constitution.

The Court considers the question as relevant since the defendant, following the immediate judgment decree, has submitted to the judge for preliminary investigations a request for the admission to the summary trial, that was rejected precisely because it was late.

In the opinion of the referring court, the contested provision would be in contrast with art. 3 of the Italian Constitution, as it determines an unreasonable inequality of treatment of the accused against who immediate judgment is undertaken, with respect to the accused person who is sued after a preliminary hearing or by direct summons or brought in a direct judgment, situations in which far wider deadlines are required for the request of an abbreviated judgment and the exercise of the relative faculty is guaranteed until the appearance before the judging body.

Furthermore the art. 24 and 111, third paragraph, of the Italian Constitution, will be violated since the choice of asking for a shortened judgment presupposes specific technical-legal knowledge and an ability to analyze the evidentiary material collected by the public prosecutor in such a way as to make counsel's contribution indispensable even if the counsel; even when it is granted a special preventive power of attorney, cannot, in fact, make a request for the abbreviated procedure if the notice of the date fixed for immediate judgment is notified to him after the expiration of the deadline. The brevity of the term granted to the defendant to request a summary trial therefore gives rise to an "unjustified limitation of the right of defense, considered in its completeness or as a possibility to perform informed and precise procedural choices, as well as choices on merits".

3. A quite similar question of constitutional legitimacy was raised by the Court of Savona with order dated 16 May 2001 (o.r. 655 of 2001).

The Court explains that on 6 November 2000 the decree of immediate trial had been issued for the hearing on 13 December, notified to the defendant on 9 November 2000; the notice was notified to the counsel on November 15th. On 18 November the defendant submitted a request for summary trial, which was declared inadmissible by the Judge for Preliminary Investigation because it was submitted after the expiration of the time limit of seven days starting from the moment when the decree of immediate trial was served on the defendant. Since the decision of the Judge for Preliminary Investigation was taken after the scheduled date of the immediate trial, the latter was delayed so that during this time Law n. 63 of 2001 was passed extending to fifteen days the time limit set by the

challenged provision: in addition, the referring court takes the view that, pursuant to the principle *tempus regit actum*, such amendment does not apply to the present case.

Article 458, paragraph 1, Italian Code of Criminal Procedure, as worded before the amendments introduced by article 14, paragraph 2, Law n. 63 of 2001, would be – according to the referring court – inconsistent with article 24, paragraph 2, of the Constitution: the decision of the summary trial in fact presupposes an adequate technical expertise even with respect to the rules on “the materials that can be used for evidentiary purposes, the punishments and the appeal limits”, whereas the fact that the time limit starts running from the moment when the decree is served on the defendant does not allow effective defensive assistance.

3.1 - The President of the Council of Ministers intervened in court, represented and defended by the Attorney General, pleading that the case shall be found inadmissible or rejected.

In the opinion of the Attorney General, the “characterization of the decision to opt for the summary trial as exclusively technical” is doubtful since, though “it is true that it calls for professionalism in order to evaluate the effects of the special procedure”, it is still “of primary importance the final decision of the defendant”. Furthermore, the Attorney General believes that it would be improper and absurd to let the time limit to take the decision run from the communication “to a person other than the one who takes the decision”, even if that other person is the defense attorney.

4 – The Court of Bergamo, with the order dated 17 July 2001 (r.o. n. 793 of 2001), raises the issue as to whether the *dies a quo* of the time limit set out by article 458, paragraph 1, Italian Code of Criminal Procedure, as amended by article 14, paragraph 2, of the Law 1 March 2001, n. 63, is constitutional with reference to articles 24, paragraph 2, and 111, paragraph 3 of the Constitution.

The Court considers that the defendant was arrested on 15 March 2001 for the crime of narcotics importation; that on 17 March the arrest had been validated and the precautionary measure of custody in prison had been applied to the defendant. On 13 April, the Judge for the Preliminary Investigation ordered the immediate trial for the hearing of 26 June 2001; the decree was served on the defendant in detention on 14 April, whereas the notice to the defense attorney was given on 26 April 2001. On 9 May the counsel filed a request for summary trial, subject to the examination of two witnesses; such request was declared inadmissible, on the same date, because submitted after the expiration of the 15 day-time limit, running from the moment when the decree of immediate trial was served on the defendant.

According to the referring court, the norm, by not providing that “the time limit of 15 days to submit a request for summary trial starts from the last notification: of the decree, ex art. 456, paragraph 3, Italian Code of Criminal Procedure, to the defendant or of the notice, ex art. 456, paragraph 5, to the defense attorney”, violates articles 24, paragraph 2, and 111, paragraph 3 of the Constitution because, in a highly technical system, it determines a “hole in the technical defense” precisely in the moment when the defendant must, under

penalty of forfeiture, take the decision to request an alternative procedure that entails substantial benefits and therefore it does not ensure that the defendant has “the necessary time and conditions to prepare the defense”.

The preventive release of a special power of attorney to the attorney would not be sufficient either to resolve the problem when it is the same counsel who receives a late notification of the notice of immediate trial.

4.1. - The President of the Council of Ministers intervened in court, represented and defended by the Attorney General, referring to the brief filed and concerning the issue raised with the order n. 655 of 2001.

Law

Considered that

1 – With four orders issued by the Courts of Latina (r.o. n. 310 del 2001), Busto Arsizio (r.o. n. 98 del 2001), Savona (r.o. n. 655 del 2001) and Bergamo (r.o. n. 793 del 2001), it has been raised, in relation to articles 3, 24, paragraph 2 and 111, paragraph 3, of the Constitution, the potential unconstitutionality of article 458, paragraph 1, Italian Code of Criminal Procedure, in the part in which it does not provide that the time limit within which the defendant is entitled to request the summary trial starts from the last notification, to either the defendant or his or her counsel, of the decree or of the notice of the date set for the immediate trial, rather than from the moment when the decree of immediate judgment is served on the defendant.

Since the subject of the orders is the same provision and since the orders have similar contents, the proceedings are joined.

2. – The issue is essentially new as it is inserted into a normative landscape affected by the great amendments introduced by Law 16 December 1999, n. 479 (see decision n. 115 of 2001) to the law applicable to the summary trial. As a consequence, the previous decisions of this Court on the same paragraph 1 of article 458, Italian Code of Criminal Procedure (decision n. 122 of 1997, orders n. 36 of 1994, n. 335 and n. 225 of 1991 and n. 588 of 1990) are of no help because they belong to a different normative landscape where the decisions of the defendant were not characterized by the current relevant complexity of the assessments linked to the request for a summary trial.

3. - Article 458, paragraph 1, of the Italian Code of Criminal Procedure provides that the defendant may opt for the summary trial subject to a time limit of fifteen days starting from the day when it was served the decree of immediate trial (such deadline results from the amendment introduced by article 14, paragraph 2, Law 1st March 2001, n. 63, which has replaced the original deadline of seven days: three of the four orders regard situations where the seven day-deadline was still applicable). On the other hand, paragraph 3 of article 456 Italian Code of Criminal Procedure provides that the decree of immediate trial

shall be served on the defendant at least thirty days before the date scheduled for the trial and paragraph 2 clarifies that the decree comprises the warning that the defendant may opt for the summary trial or the application of punishment upon request. Finally, paragraph 5 provides that the notice of the trial scheduled date is served on the defender subject to the same time limit applicable to the defendant.

From these provisions, it emerges that the defendant and his or her counsel receive two separate acts and that the timescale of the related notifications is left to the initiative of the judicial office that proceeds. It can therefore happen - as happened in the judgments *a quibus* - that the counsel receives the notice of the date set for immediate trial at a time when the deadline for submitting the request for summary trial has already expired or is about to expire.

4. - The central core of the issue of the constitutionality of article 458, paragraph 1, Italian Code of Criminal Procedure concerns the violation of the right to technical defense, because the law is designed so that the time limit to opt for the summary trial may expire before the defense attorney had the chance to illustrate to the defendant the defensive possibilities connected with the summary trial and with the (ordinary) trial.

In fact, the essential function of the technical defense (case n. 80 of 1984 and n. 125 of 1979) which entails the right of the defendant to communicate with his/her attorney so to prepare the most appropriate defensive strategies (cfr. decision n. 212 of 1997 and n. 216 of 1996) is particularly important with respect to a decision - the one to opt for the summary trial - which implies, especially after the amendments introduced by Law n. 479 of 1999, an expertise and an assessment exclusively of technical-legal character, not possessed by the defendant.

First, the decision to opt for the summary judgement presupposes knowledge of the preliminary investigation file, that, pursuant to article 139 of the Implementing Rules, the parties and the lawyers are entitled to view and potentially make copy of, during the short time period given to make the relevant request.

Such activities necessarily require the intervention of the technical defense, because only the defender is able to assess, after examining the file, whether it is convenient for the defendant to consent, through the request for summary trial, to the fact that the investigative acts are used as evidence. Especially since, compared to the legislation in force before the Law n. 479 of the 1999, the defendant is now faced with the alternative between a request to define the proceeding based on the available elements of evidence pursuant to art. 438, paragraph 1, Italian Code of Criminal Procedure and a request subordinated to supplementary evidence pursuant to paragraph 5, intended to be accepted only if the judge considers that the supplementary evidence is necessary for the decision and compatible with the purposes of economy of the proceedings specific to the procedure, considering the usable elements of evidence already gathered.

Moreover, in deciding whether to opt of the summary trial, the defendant shall in any event consider that potentially the judge may collect *ex officio* the elements necessary to the decision and the defendant shall also take into account that, when the request is

subordinated to supplementary evidence, the prosecution may request the admission of counter-evidence ex art. 438, paragraph 5, Italian Code of Criminal Procedure.

In other terms, the defendant is called to carry out evaluations that by involving the powers of evidence disposal and by implying a particular professional and trial experience, demand the contribution of a technical defense (cfr. recently order n. 182 of 2001), because only an attorney, who knows the documents of the prosecution's file, can assess the completeness of the investigation and the effects of the use in trial of the elements of evidence already gathered.

5. - The right of defense, understood as the actual possibility of resorting to the technical assistance of the defendant, is violated, as this Court has repeatedly had occasion to state, in any case in which, in order to exercise the procedural powers that imply the "the knowledge of technical elements falling within the specific professional skills of the defender", it is placed a time limit starting from the communication to the defendant, rather than to the counsel, of the act from which the powers arise (see with respect to the time limit to invoke nullity, decision n. 162 of 1975, and, with respect to the time limit for proposing a review request, which runs from the moment when the defendant, rather than the defender, is aware of the act, the aforementioned decision no. 80 of 1984)

It must therefore be declared, with reference to art. 24 of the Constitution, the constitutional illegitimacy of art. 458, paragraph 1, Italian Code of Criminal Procedure, in the part in which it provides that the time limit within which the defendant is entitled to request the summary trial starts from the moment when the decree of immediate judgment is served instead of from the moment the last notification, to either the defendant or the defender, of the decree or of the notice of the date set for the immediate trial.

The claims related to other constitutional parameters evoked by the referring court are thus absorbed.

6. – In the order r.o. n. 310 of 2001 the referring court raises the issue of the constitutionality of article 458, paragraph 1, Italian Code of Criminal Procedure, in the part where it does not provide for longer time limit for the defendant in detention.

The claim appears to be superseded by the acceptance of the main issue of constitutionality, as the defender is in any case placed in the condition to promptly confer with the client, even if in detention, in order to provide the technical-legal assistance necessary to adopt the defensive strategy more suited to his/her procedural position.

FOR THESE REASONS

THE CONSTITUTIONAL COURT

joined the proceedings,

declares the constitutional illegitimacy of art. 458, paragraph 1, Italian Code of Criminal Procedure, in the part in which it provides that the time limit within which the defendant

is entitled to request the summary trial starts from the moment when the decree of immediate judgment is served instead of the last notification, to either the defendant or the defender, of the decree or of the notice of the date set for the immediate trial.

So decided in Rome, in the seat of the Constitutional Court, Palazzo della Consulta, on 10 April 2002

FILED WITH THE COURT REGISTRY ON 16 APRIL 2002.

Codice di procedura penal (C.p.p) art. 358, 415bis (It.).

Codice di procedura penale

Art. 358 - Attività di indagine del pubblico ministero.

1. Il pubblico ministero compie ogni attività necessaria ai fini indicati nell'articolo 326 e svolge altresì accertamenti su fatti e circostanze a favore della persona sottoposta alle indagini.

Art. 415 Bis - Avviso all'indagato della conclusione delle indagini preliminari (1).

1. Prima della scadenza del termine previsto dal comma 2 dell'articolo 405, anche se prorogato, il pubblico ministero, se non deve formulare richiesta di archiviazione ai sensi degli articoli 408 e 411, fa notificare alla persona sottoposta alle indagini e al difensore nonché, quando si procede per i reati di cui agli articoli 572 e 612-bis del codice penale, anche al difensore della persona offesa o, in mancanza di questo, alla persona offesa avviso della conclusione delle indagini preliminari (2).

2. L'avviso contiene la sommaria enunciazione del fatto per il quale si procede, delle norme di legge che si assumono violate, della data e del luogo del fatto, con l'avvertimento che la documentazione relativa alle indagini espletate è depositata presso la segreteria del pubblico ministero e che l'indagato e il suo difensore hanno facoltà di prenderne visione ed estrarne copia.

3. L'avviso contiene altresì l'avvertimento che l'indagato ha facoltà, entro il termine di venti giorni, di presentare memorie, produrre documenti, depositare documentazione relativa ad investigazioni del difensore, chiedere al pubblico ministero il compimento di atti di indagine, nonché di presentarsi per rilasciare dichiarazioni ovvero chiedere di essere sottoposto ad interrogatorio. Se l'indagato chiede di essere sottoposto ad interrogatorio il pubblico ministero deve procedervi.

Article 358 – Investigation activities of the Public Prosecutor

1. The Public Prosecutor shall perform any activity deemed necessary for the purposes listed in Article 326 and shall carry out checks on facts and circumstances in the interest of the person subject to investigation.

Article 415-bis - Notice to the suspect on the conclusion of preliminary investigations

1. Prior to the expiry of the time limit provided for in paragraph 2 of Article 405, also if extended, when the case must not be discontinued under Articles 408 and 411, the Public Prosecutor shall serve the notice on the conclusion of preliminary investigations on the suspect and his/her lawyer. When any of the offences referred to in Articles 572 and 612-

bis of the Criminal Code are prosecuted, the same notice shall be served on the victim's lawyer or, in his/her absence, the victim.

2. The notice shall contain a brief description of the criminal act under prosecution, the rules of law allegedly violated, the date and place of the act, along with the notice that the record of the completed investigations is filed with the Clerk's Office of the Public Prosecutor and the suspect and his/her lawyer shall be entitled to examine it and copy it.

3. The notice shall also specify that, within twenty days, the suspect is entitled to submit briefs, produce documentary evidence, file the results of the defense investigations, request that the Public Prosecutor conduct investigative actions. He or she is also entitled to appear to either make statements or request to be questioned. If the suspect requests to be questioned, the Public Prosecutor shall question him/her.

Lithuania (Lithuanian):

Baudžiamojo Proceso Kodekso Patvirtinimo (Code of Criminal Procedure) art. 181 (Lith.).

**LIETUVOS RESPUBLIKOS
BAUDŽIAMOJO PROCESO KODEKSO PATVIRTINIMO, ĮSIGALIOJIMO IR
ĮGYVENDINIMO
Į S T A T Y M A S**

181 straipsnis. Įtariamąjo ir jo gynėjo, nukentėjusiojo ir jo atstovo teisė susipažinti su ikiteisminio tyrimo duomenimis

1. Įtariamasis ir jo gynėjas, taip pat nukentėjusysis ir jo atstovas ikiteisminio tyrimo metu bet kuriuo momentu turi teisę susipažinti su ikiteisminio tyrimo duomenimis. Prašymas susipažinti su ikiteisminio tyrimo medžiaga pateikiamas prokurorui. Prokuroras turi teisę neleisti susipažinti su visais ikiteisminio tyrimo duomenimis ar jų dalimi, jei toks susipažinimas, prokuroro manymu, galėtų pakenkti ikiteisminio tyrimo sėkmei. Atsisakydamas leisti susipažinti su visais ikiteisminio tyrimo duomenimis ar jų dalimi, prokuroras privalo surašyti nutarimą. Šis nutarimas per septynias dienas gali būti apskųstas ikiteisminio tyrimo teisėjui. Ikiteisminio tyrimo teisėjas privalo tokį skundą išnagrinėti per tris dienas nuo jo gavimo ir priimti nutartį. Ikiteisminio tyrimo teisėjo priimta nutartis neskundžiama.

2. Prokuroras neturi teisės neleisti susipažinti su visais ikiteisminio tyrimo duomenimis, jei ikiteisminis tyrimas baigtas ir yra rašomas kaltinamasis aktas.

3. Jeigu įtariamasis yra suimtas, teisę susipažinti su ikiteisminio tyrimo duomenimis turi jo gynėjas.

Code of Criminal Procedure, art. 181 (Lith.).

**APPROVAL, ENTRY INTO FORCE, AND IMPLEMENTATION OF THE LAW
OF CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF LITHUANIA**

Article 181. The Suspect's and his/her Defense Lawyer's, Victim's and his/her Representative's right to familiarize themselves with the pre-trial investigation information.

1. The Suspect and his/her Defense Lawyer as well as the Victim and his/her Representative have a right to familiarize themselves with the pre-trial investigation information at any moment during the pre-trial investigation. A request to access the pre-trial investigation material is submitted to the Prosecutor. Prosecutor has a right not to grant permission to access all pre-trial investigation information or a part of it, if such access, in the opinion of the Prosecutor could hinder the success of the pre-trial investigation. When refusing to grant access to all pre-trial investigation information or

part of it, the Prosecutor must write a ruling. This ruling may be appealed to the Pre-trial Investigation Judge within seven days. Pre-trial Investigation Judge must investigate such an appeal within three days from receiving it and make a ruling. Pre-trial Investigation Judge's ruling cannot be appealed.

2. The Prosecutor does not have a right to not grant access to all pre-trial investigation information, if pre-trial investigation is over and the indictment is being drawn.

3. If the Suspect is under arrest, his/her Defense Lawyer has a right to familiarize himself/herself with the pre-trial investigation information.

Luxembourg (French)

CODE D'INSTRUCTION CRIMINELLE ART. 564 [Lux.]

Art. 564. L'accord est proposé par le procureur d'Etat ou par la personne poursuivie. La proposition énonce les faits qui feront l'objet de l'accord et la peine proposée à titre de sanction. Cette proposition est notifiée par lettre recommandée avec avis de réception.

Pour tous les actes relatifs à la procédure d'accord, la personne poursuivie doit être assistée d'un avocat.

Le procureur d'Etat et la personne poursuivie restent libres de la refuser sans indication de motifs.

En cas d'enquête préliminaire, le procureur d'Etat procède à la communication immédiate des pièces du dossier sauf en cas d'un refus complet de sa part de conclure un accord.

Lorsqu'une information judiciaire est ouverte par le juge d'instruction, la communication des pièces du dossier se fait conformément à l'article 85.

Un refus complet de la proposition d'accord, notifié par lettre recommandée avec avis de réception, ou le défaut d'y répondre dans un délai d'un mois à partir de sa réception rend la proposition caduque. Ce délai n'est pas susceptible de prorogation.

Le défaut de conclusion d'un accord dans un délai de quatre mois à partir de la réception de la proposition initiale rend tous les actes ultérieurs effectués en vue de cette conclusion caducs. Ce délai peut être prorogé une seule fois pour le même terme par une déclaration conjointe du procureur d'Etat et de la personne poursuivie.

En cas de caducité, toutes les pièces relatives à l'accord sont détruites.

CODE OF CRIMINAL PROCEDURE ART. 564 [Lux.]

Art. 564. An agreement is proposed by the State Prosecutor or by the prosecuted person. The proposal states the subject-matter of the agreement and the proposed penalty as sanction. This proposal is notified by registered letter with acknowledgment of receipt.

In any actions related to the agreement procedure, the prosecuted person must be assisted by a lawyer.

The State Prosecutor and the prosecuted person remain free to reject it without stating any reasons.

In case of a preliminary investigation, the State Prosecutor immediately communicates the case file documents except in the event of a complete refusal on his part to conclude the agreement.

When a legal investigation is initiated by the investigating judge, the communication of the file documents takes place in accordance with article 85.

A complete rejection of the agreement proposal, notified via registered letter with acknowledgment of receipt, or failing to provide a response within a period of one month from its receipt, renders the proposal null and void. This deadline cannot be extended.

Failing to reach an agreement within a deadline of four months as from receipt of the initial proposal shall render all subsequent actions taken in view of its conclusion null and void. This deadline can be extended once only for the same term by a joint statement by the State Prosecutor and the prosecuted person.

In the event that it is null and void, all documents related to the agreement are destroyed.

Netherlands (Dutch):

NJ 1996, 687

Fotoboeken politie geen processtukken / niet zonder meer kennisneming / afgifte zulke documenten bij verweer inz. betrouwbaarheid / rechtmatigheid be...

HR 07-05-1996, ECLI:NL:PHR:1996:AB9820, m.nt. T.M. Schalken (Dev Sol)

Instantie

Hoge Raad (Strafkamer)

Datum

7 mei 1996

Magistraten

Hermans, Davids, Bleichrodt, Schipper, Corstens, Fokkens

Zaaknummer

101910

Noot

T.M. Schalken

UJN

AB9820

Roepnaam

Dev Sol

Vakgebied(en)

Voorlopig (V)

Internationaal belastingrecht / Algemeen

Strafprocesrecht / Voorfase

Essentie

1. Fotoboeken van de politie zijn geen processtukken. Bij verweer mag kennisneming, indien voor beoordeling verweer van belang, aan verdediging niet worden onthouden. Beperking kennisneming door verdachte mogelijk. 2. Directe betrokkenheid van verdachte bij het bewezenverklaarde blijkt slechts uit getuigenverklaring in ambtsedig proces-verbaal. Nu de verdediging de getuige niet heeft ondervraagd en diens verklaring onvoldoende steun vindt in andere bewijsmiddelen is het gebruik daarvan in strijd met art. 6 lid 3 sub d EVRM.

Voorgaande uitspraak

Arrest op het beroep in cassatie van A.A., te Rotterdam, ten tijde van de bestreden uitspraak gedetineerd in het Huis van Bewaring 'De Koepel' te Haarlem, [adv. mr.](#) E. Prakken te Amsterdam.

Rechtbank en Hof:**Bewezenverklaring en****bewijsmiddelen** Bewezenverklaard datLink: <http://deeplinking.kluwer.nl/?param=0019F008&cpid=WKNL-LTR-Nav2>

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1

Subsidiar (enz.)

3

hij op 9 september 1993 te 's-Gravenhage tezamen en in vereniging met anderen, met het oogmerk van wederrechtelijke toeëigening heeft weggenomen persoonlijke bescheiden, toebehorende aan A. Ay en D. Kayahan, welke diefstal werd voorafgegaan en vergezeld van geweld en bedreiging met geweld tegen die Ay en die Kayahan, gepleegd met het oogmerk om die diefstal voor te bereiden en gemakkelijk te maken, welk geweld en welke bedreiging met geweld hierin bestond(en) dat hij, verdachte, tezamen en in vereniging met zijn mededader(s), heeft gehandeld als hierna — zakelijk — is weergegeven:

- hij, verdachte, en zijn mededader(s) hebben tegen die Ay en die Kayahan gezegd dat zij hun handen omhoog moesten doen, althans woorden van gelijke dreigende aard of strekking en
- hij, verdachte, en zijn mededader(s) hebben die Ay en die Kayahan met (een) vuurwapen in de rug (voort)geduwd en
- hij, verdachte, en zijn mededader(s) hebben die Ay en die Kayahan tegen (de traptreden van) een portiek geduwd en
- hij, verdachte, en zijn mededader(s) hebben tegen die Ay en die Kayahan gezegd: 'wij zijn van Dev Sol' en 'als je naar de politie gaat, schieten we je dood', althans woorden van gelijke dreigende aard of strekking. *Feit 3*

7.

De verklaring van de verdachte ter terechtzitting in hoger beroep, inhoudende — zakelijk weergegeven —:

'Het kan zijn dat ik ten tijde van mijn aanhouding een visitekaartje van Hans Leysen van Noroma BV in mijn bezit had.'

8

Het proces-verbaal d.d. 15 februari 1994 van de rechter-commissaris, belast met de behandeling van strafzaken in de arrondissementsrechtbank te 's-Gravenhage, inhoudende — zakelijk weergegeven —:

als de op 15 februari 1994 tegenover de rechter-commissaris afgelegde verklaring van Durak Kayahan:

"Op 9 september 1993 was ik samen met Ahmet Ay in Den Haag. Wij kwamen Celal tegen. Celal liep weg. Ik was nog samen met Ahmet op straat toen er mannen naar ons toe kwamen. Zij zeiden dat wij onze handen omhoog moesten doen. Ik heb toen mijn handen omhoog gedaan. Wij liepen naar een portiek. Er werd toen een mapje met mijn rijbewijs en andere papieren van mij afgepakt."

9

Het ambtsedig proces-verbaal van de gemeentepolitie te 's-Gravenhage, (...), inhoudende — zakelijk weergegeven —:

9.1.

als de op 16 september 1993 tegenover verbalisant Rimmelzwaan afgelegde verklaring van Ahmet Ay (doorgenummerd blz. 76 e.v.):

"Op 9 september 1993 werd ik telefonisch benaderd door een kennis van mij genaamd Celal (Noot verbalisant: bedoeld wordt I. Kaya). Celal vroeg aan mij of ik naar café Deniz aan de Hoefkade wilde komen omdat hij daar een afspraak had met personen. Dit als een soort bescherming. Ik ben daar toen naartoe gegaan en ik bleef buiten wachten. Ik was samen met Durak Kayahan. Ik zag dat Celal wegreed. Nabij de hoek Hoefkade/De Heemstraat werd ik door drie van in totaal zes personen in de richting van een portiek in de Heemstraat geduwd. Toen de zes personen op ons kwamen toelopen zag ik dat allen een pistool trokken. Het waren naar mijn mening echte vuurwapens. Ik voelde dat de drie personen die mij wegduwden in de richting van een portiek, hun pistool krachtig tegen mijn rug duwden. Ik zag dat Durak ook door drie personen met pistolen werd bedreigd. Ik zag dat hij ook de lopen van pistolen die die mannen vasthielden in de rug kreeg. Wij werden onder bedreiging van de vuurwapens geleid naar het portiek. Ik werd onder andere bedreigd door een man met een bril. Ik hoorde dat de man met de bril zei: 'Wij zijn van Dev Sol'. Ik werd tegen de traptreden van het portiek

geduwd. Ik zag dat de man met de bril bij mij wegnam een rijbewijs, een postidentiteitsbewijs, een HTM-maandabonnement, alle op mijn naam, en een aantal papiertjes met adressen. Ik zag dat Durak ook tegen de trap treden van het portiek werd geduwd en dat hij gefouilleerd werd door het andere driel. Later hoorde ik dat bij Durak een rijbewijs was weggenomen. De man met de bril zei tegen mij: 'Als je naar de politie gaat, schieten wij je dood'. Ik heb aan niemand het recht of toestemming gegeven mijn rijbewijs, HTM-kaart, postidentiteitskaart, welke goederen mij geheel in eigendom toebehoren, weg te nemen en zich toe te eigenen.'

9.2.

als de op 17 september 1993 tegenover verbalisant Rimmelzwaan afgelegde verklaring van Durak Kayahan (doorgenummerd blz. 82 e.v.):

"Ik zag een zestal personen uit café Deniz komen. Alle personen hadden een pistool in hun hand. Zij kwamen op Ahmet Ay en mij toelopen.'

10.

Het ambtsedig proces-verbaal van de gemeentepolitie te 's-Gravenhage nummer 16.718/1993, d.d. 9 december 1993, opgemaakt en ondertekend door S.L. van der Linden, brigadier-rechercheur van gemeentepolitie, en andere bevoegde opsporingsambtenaren, inhoudende — zakelijk weergegeven —: **10.1.**

als relaas van de verbalisanten Rimmelzwaan en Holtslag (doorgenummerd blz. 32):

"Op 7 december 1993 confronteerden wij, verbalisanten voornoemd, aangever Ahmet Ay middels een confrontatiespiegel met onder andere de verdachte A. Bij het zien van verdachte A. verklaarde Ahmet Ay: 'Dit is de man met de bril die op 9 september 1993 mij met een pistool heeft bedreigd. Ik ben hier zeker van.'

10.2.

als relaas van de verbalisant Van der Linden (doorgenummerd blz. 19):

"Uit de fouillering van de verdachte A.A., heb ik, verbalisant Van der Linden, de volgende goederen in beslag genomen:

(...)

4.

Een visitekaartje van Hans Leysen van Noroma BV, gevestigd Heeswijkplein 95, Den Haag. Dit is de compagnon van de aangever I. Kaya.'

Verzoek en beslissing

In cassatie moet worden uitgegaan van de volgende feiten. Bij het opsporingsonderzoek naar de onderhavige feiten, ten aanzien waarvan de verdenking bestond dat zij waren begaan door personen behorende tot 'Dev Sol', heeft de politie naar aanleiding van gedane aangiften bepaalde aangevers een of meer eerder door de politie samengestelde fotoboeken getoond, waarin de foto's voorkwamen van personen ten aanzien van wie de politie over aanwijzingen beschikte dat zij betrokken waren bij 'Dev Sol'. Van een en ander is proces-verbaal opgemaakt, waarbij kopieën zijn gevoegd van de in dat boek voorkomende foto's van de verdachte die tot herkenning hebben geleid.

Blijkens het proces-verbaal van de terechtzitting in eerste aanleg van 17 maart 1994 heeft de raadsvrouw, mede namens de raadslieden van de medeverdachten, aldaar het verzoek gedaan om alle fotoboeken/fotoseries die in het kader van de opsporing zijn gebruikt in het dossier te voegen opdat zowel de raadslieden als de verdachten daarvan kennis kunnen nemen.

Zij heeft aan dit verzoek ten grondslag gelegd — kort samengevat — dat de opsporing, aanhouding en het onderzoek geheel of in zeer belangrijke mate gebaseerd is geweest op herkenningen door getuigen/aangevers uit deze fotoboeken. Nu de fotoboeken in het onderzoek ter beschikking hebben gestaan aan de opsporende en vervolgende instanties, en bij dat onderzoek een uiterst belangrijke rol hebben gespeeld, moeten deze — aldus nog steeds de raadsvrouw — zonder meer als processtukken worden beschouwd waarvan de kennisneming op grond van art. 33 Sv aan de verdachte niet mag worden onthouden.

Blijkens het genoemde proces-verbaal heeft de Rechtbank het verzoek tot voeging van de fotoboeken in het dossier

afgewezen, waartoe zij heeft overwogen:

"Het algemeen opsporingsbelang verzet zich daartegen, terwijl het recht van de verdediging om het gebruik van de fotoboeken te controleren voldoende gewaarborgd is door inzage door de raadslieden, tot welke inzage zij de raadslieden uitnodigt. Bovendien zal verbalisant Van der Linden een toelichting kunnen geven op de samenstelling en het gebruik van de fotoboeken."

De raadvrouw heeft daarop zowel in eerste aanleg als in hoger beroep het verweer gevoerd dat het Openbaar Ministerie niet-ontvankelijk dient te worden verklaard in de vervolging. De daartoe aangevoerde gronden zijn door de rechtbank in haar vonnis onder 3a — onder het hoofd 'Beroep op de niet-ontvankelijkheid van het openbaar ministerie' — als volgt samengevat:

"Essentiële processtukken als de verschillende fotoboeken zijn niet ruim voor de zitting aan de verdediging en verdachten ter inzage verstrekt. Tijdens de terechtzitting is wel aan de raadslieden, maar niet aan de verdachte inzage aangeboden in twee van de gebruikte fotoboeken. Geschonden is dan ook het in art. 6 EVRM neergelegde fair trial-beginsel."

De Rechtbank heeft het hiervoor bedoelde verweer verworpen op grond van haar oordeel:

De rechtbank heeft het verzoek om de fotoboeken in het dossier te voegen ter terechtzitting van 17 maart 1994 afgewezen.

Verdachte en de raadslieden hebben belang bij inzage in de fotoboeken, teneinde te kunnen vaststellen of deze boeken evenwichtig zijn samengesteld op een wijze die een betrouwbare herkenning waarborgt.

Het Openbaar Ministerie heeft belang bij geheimhouding van de identiteit van de overige personen, wier foto's zich in de fotoboeken bevinden, en van wie blijkens de mededelingen van de officier van justitie aanwijzingen bestaan dat zij betrokken zijn bij Dev Sol, zulks onder meer met het oog op toekomstige onderzoeken naar

afpersingsactiviteiten van deze organisatie.

Naar het oordeel van de rechtbank weegt het belang van verdachte in casu niet op tegen het algemene opsporingsbelang van het Openbaar Ministerie. De rechtbank overweegt daarbij voorts dat de privacy van de overige op de foto's afgebeelde personen zoveel mogelijk gerespecteerd dient te worden.

De rechtbank heeft zich ter terechtzitting vergewist van de inhoud van de fotoboeken en zij heeft ook de raadvrouw daartoe tijdens de terechtzitting van 17 maart 1994 in de gelegenheid gesteld. De raadvrouw heeft van die gelegenheid geen gebruik gemaakt.

Gelet op het bovenstaande acht de rechtbank verdachte niet in zijn verdediging geschaad en is zij van oordeel dat het onthouden van inzage aan de verdachte niet kan leiden tot niet-ontvankelijkverklaring van het Openbaar Ministerie.

Het Hof heeft als volgt overwogen en beslist:

Ter terechtzitting is door de verdediging, op dezelfde gronden als in eerste aanleg aangevoerd, betoogd dat het openbaar ministerie niet-ontvankelijk behoort te worden verklaard. Aan die stelling zijn geen nieuwe gronden ten grondslag gelegd. Het hof verenigt zich met de verwerping door de rechtbank van dat betoog en met de daartoe door haar gebezigde motiveringen, zij het met een enkele hieronder nader te bespreken uitzondering, amendering en toevoeging op die motiveringen. Het hof verwijst in zoverre naar de overwegingen van de rechtbank in haar vonnis onder het hoofdstuk 'Beroep op de niet-ontvankelijkheid van het openbaar ministerie'. (...)

ad r.o. 3a

Aan deze overweging laat het hof het oordeel voorafgaan dat de litigieuze fotoboeken, anders dan de raadvrouw stelt, geen processtukken zijn in de zin van de wet. Die boeken dienen te worden aangemerkt als opsporingsmiddel op basis waarvan processtukken — zoals in een proces-verbaal neergelegde verklaringen van getuigen en afschriften van foto's van de verdachte die tot de herkenning hebben geleid — tot stand komen. Derhalve kan de verdediging geen recht doen gelden op afschriften van dat fotomateriaal. Het hof merkt daarbij nog op dat de raadvrouw ter terechtzitting — met het hof — de gelegenheid heeft gehad de samenstelling van de fotoboeken te controleren, doch zulks geweigerd heeft.

Cassatiemiddelen:

Middel I

Het recht is geschonden en vormen zijn verzuimd waarvan de niet-nakoming nietigheid meebrengt. Met name zijn geschonden artikel 6, lid 1 en lid 3 (b) Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (EVRM), de beginselen van een goede strafrechtspleging en de artikelen 33, 137, 309, 338, 359, lid 3 jo. 415 Sv, doordat het hof

a

. heeft nagelaten de fotoboeken die in het onderzoek en bij de bewijsvoering een belangrijke rol spelen als processtukken aan te merken;

b

. heeft nagelaten het openbaar ministerie niet-ontvankelijk te verklaren in zijn vervolging hoewel die vervolging in hoge mate steunde op herkenningen uit fotoboeken die het OM in beide instanties weigerde aan het dossier toe te voegen;

c

. ten onrechte het belang van de verdediging bij het zich in het dossier bevinden van die fotoboeken heeft afgewogen (ten nadele van verzoeker) tegen het algemeen opsporingsbelang van het openbaar ministerie bij de 'geheimhouding van de identiteit van de overige personen wier foto's zich in de fotoboeken bevinden en van wie blijkens de mededelingen van de officier van justitie aanwijzingen bestaan dat zij betrokken zijn bij Dev Sol, zulks onder meer met het oog op toekomstige onderzoeken naar afpersingsactiviteiten van deze organisatie';

(...)

e. het bewijs voor de feiten sub 1 subsidiair en sub 3 van de telastelegging direct of indirect heeft doen steunen op herkenning door getuigen van verzoeker uit een of meer fotoboeken waarin zijn foto voorkwam zonder dat die fotoboeken zich in het dossier bevonden.

Voor zover door bovengenoemde beslissingen het recht niet is geschonden zijn zij in ieder geval onbegrijpelijk of anderszins onvoldoende gemotiveerd.

De verdediging, die bij herhaling om voeging in het dossier van de fotoboeken heeft verzocht, is door deze gang van zaken ernstig in haar legitieme belangen geschaad.

Toelichting

g (...)

2

Ad onderdeel a.: Verzoeker is (met uitzondering van voor het onder 4 telastegelegde vuurwapenbezit) niet op heterdaad aangehouden maar maanden nadat derden aangifte hadden gedaan van verschillende strafbare feiten. Zijn aanhouding was mogelijk omdat de politie met een groot aantal foto's, gegroepeerd in verschillende fotoboeken die in de loop van het opsporingsonderzoek nog zijn gewijzigd en aangevuld, bij getuigen en aangevers uit de Turks-Koerdische gemeenschap in Den Haag is langs geweest, en sommige getuigen verzoeker toen hebben aangewezen als (mede)dader van het feit waarover zij een verklaring hadden afgelegd of waarvan zij aangifte hadden gedaan. Verzoeker heeft daarom een rechtens te beschermen belang bij tijdige en ongestoorde kennisneming, zowel in persoon als door zijn raadvrouw, van de fotocollectie(s) teneinde na te gaan in hoeverre de bewering van de vervolgende instanties, dat de daarin voorkomende personen vermoedelijk bij Dev Sol betrokken zijn, juist is, en te kunnen controleren of ook overigens herkenning door getuigen van zijn foto eerlijk en betrouwbaar is geweest. Verzoeker heeft vanaf het allereerste begin van de strafzaak tot en met de zitting voor het hof vergeefs gevraagd om voeging in het dossier van de bewuste fotoboeken.

3

De fotoboeken zijn niet alleen een opsporingsmiddel zoals het hof stelt, want zij zijn niet alleen in de oriënterende fase van het onderzoek door de politie gebruikt, maar de herkenning door getuigen uit die boeken ligt klaarblijkelijk ten grondslag aan de aanhouding buiten heterdaad van verzoeker en zijn medeverdachten en speelt bovendien een aanzienlijke rol in de bewijsvoering. Aan het bewijs van feit 1 subsidiair (bedreiging) heeft blijkens bewijsmiddel 6 meegewerkt de herkenning door getuige Hikmet Gündüz van verzoeker als de afgebeelde op foto 7.

De betrokkenheid van verzoeker bij feit 3 (diefstal met geweld) was door de rechtbank (praktisch) uitsluitend bewezen

verklaard door een verklaring van verbalisant Rimmelzwaan (doorgenummerd proces-verbaal p. 91), waarin gewag wordt gemaakt van de herkenning van verzoeker uit een van de fotoboeken door de getuige Ahmet Ay op 19 november 1994. Onder deze omstandigheden was het een eis van eerlijke procesvoering in hoger beroep dat verzoeker beschikte over (deugdelijke kopieën van) de fotoboeken, teneinde de eerlijkheid en de betrouwbaarheid van die herkenning te kunnen controleren en gemotiveerd betwisten. Bij deze klacht heeft verzoeker ook in cassatie nog belang, hoewel het hof feit 3 uit de latere spiegelherkenning bewezen heeft verklaard, o.a. in verband met de strekking van middel II.

4

Dat deze fotoboeken juridisch als processtukken behoren te worden aangemerkt volgt o.m. uit het algemene rechtsbeginsel dat men niet veroordeeld hoort te kunnen worden op basis van bewijsmateriaal dat men niet kent. De redenering van het hof dat de boeken slechts een opsporingsmiddel zijn op basis waarvan processtukken tot stand komen, miskent dat de taak van de verdediging niet beperkt is tot het beoordelen van de uiteindelijke bewijsmiddelen, maar dat de verdediging in beginsel ook dient te worden toegelaten tot een beoordeling van de totstandkoming van die bewijsmiddelen. Dat aan die beoordeling van de totstandkoming van het bewijs uiteindelijk een grens zit, neemt niet weg dat het directe materiaal waaruit getuigen een verdachte herkend hebben, binnen die grens valt. Het begrip 'opsporingsmiddel', wat dat ook precies moge betekenen, kan niet als criterium dienen voor wat wel en wat niet tot de processtukken gerekend moet worden. Het criterium daarvoor kan alleen zijn gelegen in de normen voor een eerlijk proces, waaronder begrepen dat de verdediging in staat wordt gesteld de proceshandelingen van het openbaar ministerie op hun rechtmatigheid te controleren en het gepresenteerde bewijs aan de hand van het door de vervolgende instanties verzamelde en gebezigde materiaal zo nodig te kunnen betwisten.

5

Wat betreft de stukken waarover de verdediging ingevolge artikel 6, lid 1 en/of lid 3 (b) toegang hoort te hebben is o.m. van belang ECRM 14 december 1981, D&R 27 (Jespers/België):

"Article 6, par. 3 (b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary 'facility' if, as in the present case, it concerns acts of which the defendant is accused, the credibility of testimony etc.'

I.c. gaat het om materiaal waaruit de geloofwaardigheid van de herkende getuigen kan worden beoordeeld.

Het Europese Hof voor de rechten van de mens (EHRM) heeft in de zaak Edwards/UK (EHRM 16 december 1992, A 247–B, NJCM 18–3 (1993), p. 315–316 en NJCM 18–4 (1993), p. 449–453) beslist dat de vervolgende instanties 'all material evidence' voor de verdediging hoort open te leggen teneinde te voldoen aan de eisen van 'fair trial'. De fotoboeken waaruit de voor deze zaak zo belangrijke herkenningen hebben plaatsgevonden, horen zeker tot de 'material evidence'. Juist het gebruik van de term 'material' verzet zich tegen de formele benadering van het hof waarin slechts de resultaten van het gebruik van de fotoboeken processtukken zouden opleveren. (Het door het hof gemaakte onderscheid doet enigszins denken aan de vroeger in de Nederlandse rechtspraak gehuldigde opvatting dat het vereiste dat een getuigeverklaring op naam wordt afgelegd zich niet verzet tegen gebruik van een anonieme verklaring die 'de auditu' is opgenomen in een alsbewijsmiddel geldende verklaring van een opsporingsambtenaar. Het is het EHRM geweest dat o.m. in de bekende Kostovski-zaak deze redenering te formalistisch heeft bevonden en zich oriënteert op de materiële getuigeverklaring voor de beoordeling van de aanvaardbaarheid daarvan in het licht van artikel 6 EVRM.)

Tenslotte heeft de ECRM recentelijk in een Nederlandse zaak waarin een beroep op schending van artikel 6 overigens niet-ontvankelijk werd verklaard, wel een paar criteria verschaft voor de eisen waaraan een dossier moet voldoen in verband met de normen voor een eerlijk proces (ECRM 6 april 1995, nr. 23231/94, Mulders/Nederland, NJCM 20–6 (1995), p. 830–836):

"(...) The documents submitted by the applicant disclose no appearance of a violation of the principle of equality of arms. It has not been alleged that the prosecution has used material which the applicant was unaware of, nor that the applicant's conviction was based on evidence that he could not challenge. It had furthermore not been argued that during the proceedings the domestic courts placed the prosecution in a more advantageous position than the applicant.'

Dit betekent dat een klacht wegens het ontbreken van relevante processtukken wel een goede kans maakt wanneer hij gebaseerd is op (1) *gebruik door het OM* van materiaal dat aan de verdediging onbekend is, (2) een *veroordeling* op basis van bewijs dat niet door de verdediging gecontroleerd kon worden en (3) het verschaffen door de rechter van een *bevoordeelde positie van het OM boven de verdediging*.

Het komt verzoeker voor dat van alle drie bedoelde gevallen in de onderhavige procedure sprake is: de vervolgende

instanties hebben uitvoerig gebruik gemaakt (in situaties die direct tot bewijs hebben geleid) van de fotoboeken waar de verdediging geen toegang toe heeft, de bewijsvoering als gevolg van die fotoboeken kan door de verdediging niet gecontroleerd worden en de rechter heeft tot nu toe aan de verdediging de fotoboeken onthouden die het openbaar ministerie wel heeft en gebruikt heeft. Het hof had daarom de fotoboeken als processtukken dienen aan te merken.

6

Ad onderdeel b.: Het openbaar ministerie heeft steeds geweigerd de fotoboeken aan het dossier toe te voegen, ondanks herhaalde verzoeken van de verdediging dat wel te doen. Op grond van het bovenstaande, en met name op grond van de omstandigheid dat het OM de fotoboeken heeft gebruikt in de zin van de uitspraak van de Europese Commissie voor de rechten van de mens (ECRM) in de zaak Mulders en vervolgens geweigerd ze in het dossier te voegen, hadden rechtbank en hof het openbaar ministerie niet-ontvankelijk dienen te verklaren in plaats van met de argumentatie van het OM (zie volgende punt van de toelichting) mee te gaan.

7

Ad onderdeel c.: Op p. 2 van het proces-verbaal van de zitting van het hof van 27 januari wordt vermeld dat de voorzitter de korte inhoud heeft meegedeeld van aan de zitting voorafgaande correspondentie tussen de raadvrouw en de procureur-generaal, welke correspondentie o.m. over de fotoboeken ging. In zijn brief van 12 januari 1995 aan de raadvrouw deelt de procureur-generaal als zijn standpunt mee dat de rechtbank (die met betrekking tot de fotoboeken de afweging tussen het algemeen opsporingsbelang en het verdedigingsbelang ten gunste van het eerste had laten doorslaan) een juiste afweging had gemaakt, dat voeging in het dossier uit oogpunt van privacybescherming van de andere in de fotoboeken voorkomende personen ongewenst was, en:

"In casu is het fotoboek, zo is mij verzekerd, samengesteld uit foto's van lieden van wie aanwijzingen bestaan dat zij betrokken zijn bij Dev Sol. Hun foto's kunnen onder meer dienen voor onverhoopt ook in de toekomst noodzakelijke onderzoeken naar gewelddadige geldinzamelingsacties. Hoezeer wellicht van kennisname door Uw cliënt van die foto's ten opzichte van de daarop afgebeelde lieden ook een preventieve werking zou kunnen uitgaan, ook om opsporingstechnische redenen is het van belang dat de inhoud waar mogelijk niet aan bekenden van de op die foto's afgebeelde lieden bekend wordt."

Meer dan de privacy van de betrokkenen lijkt het toekomstig opsporingsbelang met betrekking van nog te plegen (?) feiten het openbaar ministerie te inspireren de fotoboeken in kwestie koste wat het kost niet aan verzoeker en zijn medeverdachten ter inzage te geven.

De rechtbank is met deze redenering expliciet meegegaan, het hof heeft de overwegingen van de rechtbank tot de zijne gemaakt onder toevoeging van de beslissing dat de fotoboeken geen processtukken zijn.

De erkenning, bij de beoordeling van de vraag of de fotoboeken zich in het dossier behoren te bevinden, van 'het algemeen opsporingsbelang', dwz het belang van politie en OM om met de fotoboeken verder te reageren naar veronderstelde betrokkenen bij een beweging, die geacht worden in de toekomst strafbare feiten te plegen, miskent dat de afweging van zulke belangen gemaakt had moeten worden door de politie op het moment dat zij besloot de fotoboeken van veronderstelde betrokkenen bij Dev Sol aan getuigen en aangevers van strafbare feiten te laten zien met de bedoeling daarmee tot bewijs van die feiten te komen. Wanneer de politie zich beperkt had tot het tonen van die collectie aan een enkele getuige van de strafbare feiten om er achter te komen of men met het onderzoek op het goede spoor zat, dan was er wellicht nog iets te zeggen geweest voor de stelling dat de boeken geen processtukken zijn. De politie had dan verder wel de boeken onder zich moeten houden en voor het verkrijgen van bewijs gebruik moeten maken van fotoboeken die geschikt zijn voor een eerlijke herkenning (foto's van mensen die allemaal voldoen aan door getuigen verschaft signalementen).

Dan zou en de bewijsvoering aanzienlijk minder suggestief zijn geweest, en men had de Dev Sol boeken kunnen bewaren voor datgene waarvoor men ze kennelijk bewaren wil. Nu de politie verkozen heeft deze boeken te gebruiken om systematisch aan getuigen te laten zien met het oog op het verzamelen van bewijs in deze zaak, is daarmee tevens de beslissing genomen dat de boeken in ieder geval niet meer als voor toekomstige verdachten verborgen te houden 'opsporingsmiddel' gebruikt kunnen worden. 'You can't eat your cake and have it' geldt ook voor politie en OM.

Het privacy-argument voor het niet aan het dossier toevoegen van de fotoboeken overtuigt weinig: fotoseries die voor herkenning gebruikt zijn zonder dat de politie met die series nog andere plannen heeft, plegen zich ondanks de privacy-aspecten op verzoek wel in de dossiers te bevinden, en voorts geldt dat, indien de aanwijzingen die de politie zegt te hebben dat het bij de personen wier foto's voorkomen in de boeken zou gaan om betrokkenen bij Dev Sol, juist zouden zijn, zich in de fotoboeken de foto's van de politieke vrienden van verzoeker zouden bevinden. Deze mensen voelen zich

ongetwijfeld aanzienlijk meer in hun privacy aangetast door het tonen door de politie van die boeken aan de getuigen die de boeken nu te zien hebben gekregen dan door het tonen van de foto's aan verzoeker en zijn raadvrouw.

(...)

10

Ad onderdeel e.: Het hof heeft voor het bewijs van feit 1 subsidiair laten meewerken verklaring van verbalisanten Linssen en Barnas dat de getuige Hikmet Gündüz verzoeker uit het 'toonboek Dev Sol' op 19 januari 1994 herkende als een van de mannen die een wapen op hem richtte (bewijsmiddel 6). Voor het bewijs van feit 3 gebruikt het hof de verklaring van verbalisanten Rimmelzwaan en Holtslag dat aangever Ahmet Ay verzoeker via een confrontatiespiegel herkent op 7 december 1993 (bewijsmiddel 10.1). Nu deze Ahmet Ay blijkt p. 91 van het doorgenummerde proces-verbaal al op 19 november 1993 aan verbalisant Rimmelzwaan verzoeker uit het fotoboek had aangewezen als een van de daders, had het hof ook deze spiegelherkenning als direct uit de fotoherkenning voortvloeiende herkenning niet voor het bewijs mogen gebruiken nu de fotoboeken zich niet bij de processtukken bevinden.

Middel II

Het recht is geschonden en vormen zijn verzuimd waarvan de niet-nakoming nietigheid meebrengt. Met name zijn geschonden artikel 6, lid 1 en lid 3 (d) EVRM, de artikelen 338, 344, 350, 359 jo. 415 SV en de beginselen van een behoorlijke strafrechtspleging, doordat het hof voor het bewijs van feit 3 van de telastelegging gebruik heeft gemaakt van een passage uit het proces-verbaal van relaas van verbalisanten Rimmelzwaan en Holtslag (doorgenummerd procesverbaal p. 32), inhoudende: 'Op 7 december 1993 confronteerden wij, verbalisanten voornoemd, aangever Ahmet Ay middels een confrontatiespiegel met onder andere de verdachte A. Bij het zien van verdachte A. verklaarde Ahmet Ay: 'Dit is de man met de bril die op 9 september 1993 mij met een pistool heeft bedreigd. Ik ben hier zeker van'.', zulks hoewel: (...)

c de verklaring van Ay het enige bewijsmiddel is waaruit de betrokkenheid van verzoeker bij feit 3 kan blijken, terwijl de verdediging in geen enkel stadium van het proces in de gelegenheid is geweest deze getuige, wiens verhoor door de verdediging zowel in eerste instantie als in hoger beroep is verzocht, te ondervragen; hoewel het hof om begrijpelijke redenen een nadere oproep van de getuige nutteloos heeft bevonden, had het onder deze omstandigheden de verklaring van Ay bij de politie niet voor het bewijs mogen bezigen;

(...)

Toelichting

g (...)

3

Ad onderdeel c.: Verzoeker is van oordeel dat de herkenning door Ay het enige bewijsmiddel is waaruit zijn betrokkenheid bij feit 3 door het hof kon worden aangenomen. Hierbij wordt aangetekend dat bij de bewijsmiddelen met betrekking tot dit onderdeel van de telastelegging er één is, bewijsmiddel 10.2, waarvan verzoeker niet begrijpt wat het tot het bewijs van het feit bijdraagt. Het gaat om het aantreffen in zijn fouillering van een visitekaartje van de compagnon van aangever Kaya, die aangifte deed van een ander delict, namelijk afpersing. Voor zover dit bewijsmiddel, waarvan het gebruik niet nader gemotiveerd is, de strekking mocht hebben ook een aanwijzing voor verzoekers betrokkenheid bij de telastegelegde diefstal met geweld op te leveren, is dus de verklaring van Ay niet het enige bewijs van verzoekers betrokkenheid. Verzoeker doet deze opmerking maken teneinde niet het ontbreken van feitelijke grondslag aan het middel tegengeworpen te krijgen.

4

Verzoeker heeft aanvankelijk de rechter-commissaris verzocht Ay als getuige te horen, maar hij is toen niet verschenen. In hoger beroep heeft verzoekers raadvrouw verzocht Ay ter zitting als getuige op te roepen, wat gebeurd is, maar ook daar is hij niet verschenen. De politie heeft toen gerapporteerd dat hij zoek was. Verzoeker is niet in staat geweest dat gemotiveerd te betwisten, en heeft zich neergelegd bij het oordeel van het hof dat nadere oproepingen zinloos waren. Dat alles neemt echter niet weg dat verzoeker in geen enkel stadium van het onderzoek deze getuige, die van cruciaal belang is, heeft kunnen ondervragen. De jurisprudentie, gezien in onderlinge samenhang, verzet zich naar het oordeel van verzoeker onder deze omstandigheden tegen het gebruik voor het bewijs van de verklaring van Ay, zoals bij de politie afgelegd.

In de eerste plaats is er de uitspraak van het EHRM inzake Artner/Oostenrijk (A 242-A), waarin het Hof bereid was een

uitzondering op de regel, geformuleerd in het Unterpertinger-arrest te accepteren, enerzijds omdat het mede aan de verdachte had gelegen dat zoveel tijd verstreken was dat de getuige onvindbaar was geworden, en anderzijds omdat de verklaring van de getuige niet de enige was waaruit de schuld van Artner bleek. Die omstandigheden zijn er i.c. in ieder geval niet: er is van de kant van de verdediging voortvarend geprocedeerd en de betrokkenheid van verzoeker kan uitsluitend (onder voorbehoud van het onder 3 gestelde) worden afgeleid uit de verklaring van Ay. In die zin is er dus geen reden om af te wijken van de door de Straatsburgse rechters gestelde hoofdnorm dat de verdediging ten minste een gelegenheid moet hebben gehad belangrijke getuigen te ondervragen (zie bijv. A-G Fokkens in zijn conclusie bij HR 29 oktober 1991, *NJ* 1992, 481). Belangrijker, want positief geformuleerd, is de zaak Saïdi/Frankrijk (EHRM 20 september 1993, A 261-C, *NJ* 1994, 358, m.n. Kn.). In die zaak draaide ook alles om getuigenverklaringen, inhoudende herkenningen van de verdachte alleen waren het er daar meer dan alleen één enkele. Het enige mogelijk relevante verschil met de onderhavige zaak is dat de Franse rechters de getuigen weigerden op te roepen, terwijl de getuige die verzoeker als enige belastte zoek is. Het EHRM besliste in die zaak:

"The testimony therefore constituted the sole basis for the applicant's conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial."

Deze formulering laat geen ruimte voor het maken van een onderscheid tussen een getuige die niet kan worden gehoord en een getuige die geweigerd wordt. De verklaring van Ay kan dan ook onder de huidige omstandigheden niet voor het bewijs gebezigd worden. Aan die conclusie dragen nog de volgende omstandigheden bij, van belang tegen het licht van de daarbij aangehaalde jurisprudentie: er zijn i.c. ook geen andere indirecte manieren geweest voor verzoeker om het door Ay geleverde bewijs op de proef te stellen (HR 29 oktober 1991, *NJ* 1992, 481, hierboven al aangehaald); het bewijs van verzoekers betrokkenheid rust zo niet uitsluitend, dan toch in ieder geval 'mainly' op de verklaring van Ay (HR 12 oktober 1993, *NJ* 1994, 159); de getuige is in geen enkel stadium door de verdediging ondervraagd, hoewel daarop door de verdediging is aangedrongen, en ook nooit door een rechter ondervraagd (a contrario HR 30 november 1993, *NJ* 1994, 247).

Belangrijk is uiteraard ook de toets aan het richtinggevende arrest van Uw raad HR 1 februari 1994, *NJ* 1994, 427: i.c. heeft de verdediging voldoende initiatief genomen om de getuige ter zitting of bij de rechter-commissaris te krijgen, doch zonder succes; hoewel de gelegenheid tot ondervragen heeft ontbroken, is de verklaring van Ay bij de politie, als enige herkenkende verklaring voor het bewijs gebruikt; er is daarom geen sprake van een van de situaties als bedoeld onder (ii) van genoemd arrest en bij gebrek aan verschijning voor welke rechter dan ook, ook niet van een situatie als bedoeld onder (iii-2) of (iii-3). Ook wordt de verklaring bij de politie van Ay, inhoudende zijn herkenning van verzoeker, door geen enkele andere getuige bevestigd of ondersteund, laat staan versterkt (HR 10 mei 1994, *NJ* 1994, 643). De conclusie kan dan ook alleen zijn dat in dit geval de hoofdregel, als geformuleerd door het EHRM, dat getuigenverklaringen, elders dan ter zitting afgelegd, alleen tot het overwegend bewijs mogen dienen wanneer de verdediging de kans heeft gehad de getuige te ondervragen, onverminderd van toepassing is.

(...)

Hoge Raad:

5. Beoordeling van het eerste

middel (...)

5.7

In 's Hofs overwegingen en beslissing, als hiervoor onder 5.6 (zie onder Rechtbank en Hof; *red.*) weergegeven, ligt besloten dat het de beslissing van de Rechtbank tot afwijzing van het verzoek tot voeging van de fotoboeken in het dossier en de gronden waarop die beslissing berust, heeft overgenomen.

5.8

Onderdeel a van het middel bestrijdt de afwijzing van het verzoek om de fotoboeken in het dossier te voegen. Het voert daartoe aan dat die fotoboeken als processtukken zijn aan te merken.

5.9

Het begrip processtukken is in de wet niet gedefinieerd, noch is daarin geregeld welke functionaris beslist

omtrent de samenstelling van het dossier.

Voor zover het gaat om stukken die van invloed kunnen zijn op het bewijs, moet worden aangenomen dat — behoudens de bevoegdheid van de verdediging om harerzijds stukken in het geding te brengen en het bepaalde in art. 414 Sv — de officier van justitie de stukken behelzende de resultaten van het opsporingsonderzoek aan het dossier toevoegt. Indien een gerechtelijk vooronderzoek is ingesteld heeft de rechter-commissaris een soortgelijke taak ten aanzien van de resultaten van het gerechtelijk vooronderzoek. In het dossier dienen te worden gevoegd stukken die redelijkerwijze van belang kunnen zijn hetzij in voor de verdachte belastende hetzij in voor hem ontlastende zin. Het voorgaande neemt niet weg dat de rechter hetzij ambtshalve, hetzij op verzoek van de verdediging dan wel op vordering van het openbaar ministerie alsnog de toevoeging aan het dossier van bepaalde stukken kan gelasten. Kennisneming van de processtukken mag, behoudens hier niet terzake doende uitzonderingen voor beperkte duur, aan de verdachte en zijn raadsman niet worden onthouden. Van de processtukken worden ook afschriften verstrekt.

5.10

Gelet op hetgeen hiervoor onder 5.1 (zie onder Rechtbank en Hof; *red.*) is overwogen omtrent de aard van de fotoboeken en hun functie in het opsporingsonderzoek, geeft 's Hofs oordeel dat deze fotoboeken — naast hetgeen in het desbetreffende tot de processtukken behorende proces-verbaal ten aanzien van de resultaten van het gebruik daarvan is gerelateerd en door toevoeging aan dat proces-verbaal van de desbetreffende foto's van de verdachte is verantwoord — op zichzelf niet als processtukken moeten worden beschouwd welke aan het dossier dienen te worden toegevoegd, geen blijk van een verkeerde rechtsopvatting. Het is ook niet onbegrijpelijk.

5.11

Het geval kan zich voordoen dat de verdediging de betrouwbaarheid of rechtmatigheid van de verkrijging van enig bewijsmiddel aanvecht. Een zodanig verweer dient te worden onderzocht. Beginselen van een behoorlijke procesorde brengen mee dat de verdediging in beginsel de kennisneming van voor de beoordeling van die vragen van belang zijnde, niet tot de processtukken behorende, documenten niet mag worden onthouden. Dat betekent niet dat zowel de raadsman als de verdachte zonder meer aanspraak hebben op een afschrift of kennisneming van een hulpmiddel als te dezen door de politie is gebruikt of van andere documentatie.

5.12

Het Hof heeft geoordeeld dat in het onderhavige geval bij afweging van de belangen van de opsporingsautoriteiten bij toekomstige onderzoeken naar afpersingspraktijken van Dev Sol en de gerechtvaardigde belangen van de in bedoelde fotoboeken afgebeelde personen enerzijds en de belangen van de verdediging bij kennisneming van die boeken anderzijds, eerstbedoelde belangen in zoverre zwaarder wegen dat aan de verdachte de kennisneming van die boeken niet kan worden toegestaan, doch dat de raadsvrouw in de gelegenheid zal worden gesteld om van de inhoud van die boeken kennis te nemen, van welke mogelijkheid de raadsvrouw echter geweigerd heeft gebruik te maken. Dat oordeel geeft geen blijk van een verkeerde rechtsopvatting, met name niet omtrent de in het middel vermelde verdragsbepalingen en is niet onbegrijpelijk.

5.13

Het vorenoverwogene brengt mee dat het Hof de in het middel bedoelde bewijsmiddelen tot het bewijs heeft mogen bezigen en dat het beroep op niet-ontvankelijkheid van de Officier van Justitie op toereikende gronden heeft verworpen. De onderdelen a, b, c en e van het middel falen dus.

5.14

Hetzelfde geldt voor onderdeel d van het middel. Zulks behoeft, gelet op art. 101a RO, geen nadere motivering, nu de in dat onderdeel vervatte klacht niet noopt tot beantwoording van rechtsvragen in het belang van de rechtseenheid of van de rechtsontwikkeling.

6. Beoordeling van onderdeel c van het tweede

middel 6.1

Uit het hiervoor onder 4 (zie onder Rechtbank en Hof; *red.*) weergegevene volgt dat de directe betrokkenheid van de verdachte bij het bewezenverklarde sub 3 slechts blijkt uit de in het ambtsedig proces-verbaal van de gemeentepolitie te 's-Gravenhage vervatte verklaring van getuige Ay, zoals hiervoor onder 4.2 sub 10 is weergegeven. Nu de gedingstukken niets inhouden waaruit kan volgen dat de verdediging in enig stadium van het geding de gelegenheid heeft gehad deze verklaring op haar betrouwbaarheid te toetsen en aan te vechten door de persoon die de verklaring heeft afgelegd als getuige te (doen) ondervragen en die verklaring onvoldoende steun vindt in andere bewijsmiddelen, is het gebruik van die verklaring in strijd met het bepaalde in art. 6 EVRM.

6.2

Mitsdien treft de in het tweede middel onder c vervatte klacht

doel. **7. Slotsom**

Uit het hiervoor onder 6 overwogene volgt — nu de Hoge Raad geen grond aanwezig oordeelt, waarop de bestreden uitspraak ambtshalve zou behoren te worden vernietigd, — dat de bestreden uitspraak, voor zover aan het oordeel van de Hoge Raad onderworpen, voor wat betreft de ten aanzien van het onder 3 telastegelegde gegeven beslissingen en de strafoplegging niet in stand kan blijven, het tweede middel voor het overige alsmede het derde en het vierde middel geen bespreking behoeven en verwijzing moet volgen.

8. Beslissing

De Hoge Raad:

Vernietigt de bestreden uitspraak, voor zover aan zijn oordeel onderworpen, doch uitsluitend voor wat betreft de ten aanzien van het onder 3 telastegelegde gegeven beslissingen en de strafoplegging;

Verwijst de zaak naar het Gerechtshof te Amsterdam ten einde in zoverre op het bestaande hoger beroep opnieuw te worden berecht en afgedaan;

Verwerpt het beroep voor het

overige. **Conclusie**

Conclusie

A-G mr. Fokkens

1

Het hof te 's-Gravenhage heeft bij arrest van 6 februari 1995 verzoeker in hoger beroep — met vrijspraak van het hem onder 1 telastegelegde feit — wegens kort gezegd bedreiging, diefstal met geweld en het op de openbare weg voorhanden hebben van een pistool veroordeeld tot drie jaren en zes maanden gevangenisstraf, met onttrekking aan het verkeer van een pistool met bijbehorende patroonhouder en patronen en met verbeurdverklaring van een visitekaartje. Verzoeker, die de bewuste feiten ontkent, zou zich in het kader van het verwerven van gelden ten behoeve van de Turkse mensenrechtenorganisatie Dev Sol aan bedreiging en diefstal met geweld hebben schuldig gemaakt.

2

Namens verzoeker heeft mr. E. Prakken, advocaat te Amsterdam, bij schriftuur vier middelen van cassatie voorgesteld, **3**

Het eerste middel stelt de vraag aan de orde of door de politie in het opsporingsonderzoek gebruikte fotoboeken als processtukken dienden te worden aangemerkt, zodat ook verzoeker van die fotoboeken kennis had kunnen nemen.

4

Blijkens het proces-verbaal van de terechtzitting in hoger beroep heeft de raadvrouw aldaar verzocht de fotoboeken bij de processtukken te voegen om die fotoboeken te kunnen controleren op een evenwichtige samenstelling. Toen de

voorzitter de raadvrouw voorstelde dat zij ter terechtzitting de aldaar aanwezige fotoboeken zou controleren, weigerde zij van die mogelijkheid gebruik te maken (vanwege het principiële karakter van haar verzoek). Daarop wees het hof het verzoek af overwegende dat: (enz.; zie onder Rechtbank en Hof; *red.*)

7

Het middel bevat diverse klachten. Kern van het middel is de onder (a) geformuleerde klacht: het hof heeft de fotoboeken ten onrechte niet als processtukken aangemerkt. Welke stukken als zodanig moeten worden beschouwd, wordt bepaald door de eisen voor een eerlijk proces: de verdediging moet in staat worden gesteld de proceshandelingen van het openbaar ministerie op haar rechtmatigheid te controleren en het bewijs aan de hand van het in het voorbereidend onderzoek verzamelde materiaal te betwisten. De fotoboeken zijn niet alleen als opsporingsmiddel gebezigd, want herkenningen aan de hand van die boeken liggen ten grondslag aan de aanhouding van verzoeker en spelen een belangrijke rol in de bewijsvoering. Het gaat derhalve om 'material evidence' als bedoeld in EHRM 16 december 1992, Series A 247–B

(Edwards/Verenigd Koninkrijk). En dat betekent — gelet op ECRM 6 april 1995, NJCM-bulletin 1995, p. 830–836 (Mulders/Nederland) — dat er een inbreuk is gemaakt op het door art. 6 EVRM gewaarborgde recht op 'fair trial' nu: (i) het openbaar ministerie materiaal heeft gebruikt waartoe de verdediging geen toegang had, en dat direct tot bewijs leidde, (ii) de verdediging de bewijsvoering niet kon controleren en (iii) het openbaar ministerie boven de verdediging bevoordeeld is.

8

Aan het middel ligt de opvatting ten grondslag dat de verdediging op grond van art. 6, derde lid, onder b EVRM — dat voorziet in het recht 'to have adequate facilities for the preparation of his defence' — toegang tot de fotoboeken moest hebben.

9

In haar rapport in de zaak-Jespers (rapport van 14 december 1981, D&R 27, p. 87–88) oordeelde de ECRM dat hij die van een strafbaar feit is beschuldigd in de gelegenheid moet zijn 'to acquaint himself, for the purposes of preparing his defense, with the results of investigations carried out throughout the proceedings' en dat, hoewel dit niet met zoveel woorden door het EVRM wordt gewaarborgd, het recht op toegang tot het dossier uit genoemde verdragsbepaling kan worden afgeleid (r.o. 56). Voorts overwoog de Commissie (r.o. 58) dat die bepaling:

"recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction of his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary 'facility' (...) if (...) it concerns acts of which the defendant is accused, the credibility of testimony etc."

10

Het EHRM heeft in zijn arrest inz. Edwards nader bepaald tot welke stukken de verdediging toegang behoort te hebben. Het overwoog (r.o. 36):

"The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (...) that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings."

11

En in haar rapport in de zaak-Mulders oordeelde de ECRM (1, onder b, vijfde alinea):

"The documents submitted by the applicant disclose no appearance of a violation of the principle of equality of arms. It has not been alleged that the prosecution had used material which the applicant was unaware of, nor that the applicant's conviction was based on evidence that he could not challenge. It had furthermore not been argued that during the proceedings the domestic courts placed the prosecution in a more advantageous position than the applicant."

12

De verdachte heeft, ter voorbereiding van de verdediging, dus het recht kennis te nemen van de resultaten van het onderzoek in zijn zaak. Wanneer een document betrekking heeft op de feiten waarvan hij wordt beschuldigd of de betrouwbaarheid van getuigenverklaringen raakt, moet de verdachte over dat document kunnen beschikken. Het is nl. te beschouwen als 'material evidence' en het verzuim van de vervolgende instanties hem met het bestaan ervan

bekend te maken levert schending van art. 6 EVRM op.

13

Dat betekent dat in de zaak van verzoeker het recht op informatie zich niet beperkte tot het kennis nemen van de processen-verbaal waarin (de resultaten van) het gebruik van de fotoboeken is gerelateerd. Ook de fotoboeken — 'material evidence' ter zake van de betrouwbaarheid van de tot het bewijs gebezigde herkenningen van verzoeker — mochten de verdediging, nu zij de betrouwbaarheid van de herkenning wenste te onderzoeken, niet in enige vorm worden onthouden.

14

In de laatste zin heb ik met opzet geschreven niet onthouden aan de 'verdediging' in plaats van niet onthouden aan de 'verzoeker'. Het is immers de vraag of het boven omschreven recht op kennisneming van het belastend materiaal betekent dat de verdachte onder alle omstandigheden het recht heeft persoonlijk van dat materiaal, in casu de fotoboeken, kennis te nemen. Die vraag moet, zo meen ik, ontkennend worden beantwoord. Zoals het recht tot ondervraging ook door de raadsman/raadvrouw buiten aanwezigheid van de verdachte kan worden uitgeoefend, zo kan ook de kennisneming van bepaalde stukken door de raadsman/raadvrouw voldoende zijn om aan de vereisten van een eerlijk proces te voldoen.

15

Ik wil de raadvrouw onmiddellijk toegeven dat een dergelijke beperking van het recht op kennisneming onder omstandigheden een handicap voor de verdediging kan opleveren. Of die beperking aanvaardbaar is, hangt af van de mate waarin de verdediging wordt gehandicapt gezien in samenhang met de redenen waarom die beperking wordt toegepast.

16

Hier is het hof met de rechtbank van mening dat het belang van verzoeker bij inzage van de fotoboeken moet worden afgewogen tegen a) het belang van de politie dat niet bij verzoeker en vervolgens anderen bekend wordt wie de politie als mogelijk bij Dev Sol betrokken personen heeft geregistreerd en b) het belang van de privacy van de andere geportretteerden.

17

's Hofs oordeel dat de belangen die zich verzetten tegen kennisname van de fotoboeken door verzoeker zwaarder wegen, acht ik niet onbegrijpelijk. De verdediging heeft ook niet duidelijk gemaakt, waarom het in dit geval voor de beoordeling van de betrouwbaarheid van de herkenning belangrijk zou zijn dat ook verzoeker dat fotoboek kon zien.

18

In dit verband noem ik van de rechtspraak van de Hoge Raad over afweging van de belangen van de verdediging tegen andere belangen: *NJ* 1993, 209 (beletten van vraag naar observatiemethode), *NJ* 1994, 745 (beletten van vraag naar herkomst van observatiepost) en HR 5–12–1995, nr. 100.055 (*NJ* 1996, 422; *red.*) (ten aanzien van de vorm waarin waarnemingen door observanten op de voet van art. 152 Sv worden vastgelegd mag in redelijkheid rekening worden gehouden met het algemene belang dat ten dienste van de opsporing van ernstige misdrijven inlichtingenbronnen blijven bestaan door hun anonimiteit te waarborgen en de kans op wraakacties te vermijden en met het belang dat de effectiviteit van de opsporing niet wordt bedreigd).

19

Ik acht de onder a) geformuleerde klacht niet gegrond, nu — achtereenvolgens op de drie punten ingaand — (i) de verdediging toegang had tot het materiaal, maar van die mogelijkheid geen gebruik heeft gemaakt, (ii) de verdediging aldus ook in zoverre de bewijsvoering kon controleren en (iii) er van bevoordeling van het openbaar ministerie boven de verdediging dus geen sprake is geweest.

20

De onder (b) verwoorde klacht — het hof had het openbaar ministerie niet-ontvankelijk moeten verklaren nu de vervolging in hoge mate steunde op herkenningen uit de fotoboeken, die het weigerde aan het dossier toe te voegen — faalt om dezelfde reden. Van schending van het recht op een eerlijk proces door deze handelwijze van het openbaar ministerie is geen sprake.

21

Klacht (c) luidt: ten onrechte heeft het hof het belang van de verdediging bij voeging van de fotoboeken in het dossier

afgewogen tegen het algemene opsporingsbelang dat zich daartegen zou verzetten. Die afweging moest door de politie worden gemaakt op het moment dat zij besloot de fotoboeken aan getuigen en aangevers te laten zien. Toen zij dat deed konden de fotoboeken niet meer als 'opsporingsmiddel voor toekomstige verdachten' verborgen gehouden worden. Bovendien is 's hofs argument, dat ook de privacy van personen wier foto's in de fotoboeken zijn opgenomen zich tegen het verlenen van inzage daarin aan de verdachte verzet, niet overtuigend.

22

Onderdeel (c) faalt omdat het aan de rechter is om te beoordelen of eventuele beperkingen van de rechten van de verdediging zodanig zijn dat de verdachte geen eerlijk proces meer heeft. Ik heb hierboven al uiteengezet dat hier van een onaanvaardbare beperking van de rechten van de verdediging geen sprake is geweest en dat de uitkomst van de belangenafweging niet onbegrijpelijk is.

(...)

24

Voor zover klacht (e) niet samenvalt met middel 2, volgt uit het voorafgaande dat ook dit onderdeel van het eerste middel niet kan slagen. Het middel faalt in al zijn onderdelen.

25

Het tweede middel houdt de klacht in dat tot het bewijs van het onder 3 telastgelegde feit ten onrechte het ambtsedig proces-verbaal van de verbalisanten Rimmelzwaan en Holtslag (doorgenummerd proces-verbaal, p. 32) is gebezigd, dat de verklaring van Ahmet Ay inhoudt dat hij verzoeker bij een spiegelconfrontatie herkent.

26

Bij de beoordeling van het middel moet allereerst de daarin onder (c) vervatte klacht worden beschouwd. Die houdt in dat de verklaring van Ay het enige bewijsmiddel is waaruit de betrokkenheid van verzoeker bij het onder 3 telastgelegde feit kan blijken, althans dat het bewijs daarvan 'mainly' op die verklaring berust, en de verdediging — hoewel daarom bij de RC en in hoger beroep is verzocht — niet in de gelegenheid is geweest Ay te ondervragen, terwijl het door deze geleverde bewijs ook niet indirect op de proef kon worden gesteld.

27

Het bewijs van het onder 3 telastgelegde berust op de volgende bewijsmiddelen: (enz.; zie onder Rechtbank en Hof; *red.*) **28**

Alleen Ay spreekt van zes mannen, van wie er een — degene die hem met een pistool bedreigde — een bril droeg en die hij vervolgens als verzoeker herkent. Uit de tot het bewijs gebezigde verklaring van Kayahan blijkt niet hoeveel mannen hem en Ay hebben bedreigd en evenmin spreekt Kayahan van een man met een bril. En ook uit de omstandigheid dat onder verzoeker een visitekaartje ten name van de compagnon van Celal in beslag is genomen kan niet rechtstreeks van verzoekers betrokkenheid bij het onder 3 telastgelegde feit blijken: weliswaar hebben Ay en Kayahan verklaard dat zij kort voor zij door een aantal mannen werden bedreigd Celal hebben getroffen, heeft verzoeker niet weersproken dat hij ten tijde van zijn aanhouding — drie maanden na het feit — het visitekaartje van diens compagnon in zijn bezit had en heeft Ay verklaard dat hem door de man met de bril papiertjes met adressen zijn afgenomen, daaruit volgt niet dat verzoeker Ay het visitekaartje heeft afgenomen. Het aantreffen van het visitekaartje is in de bewijsvoering niet meer dan een aanwijzing dat verzoeker ter plaatse is geweest ten tijde van het feit. Bewijsmiddel 10.1 is dus het enige waaruit verzoekers betrokkenheid bij het onder 3 telastgelegde feit rechtstreeks volgt.

29

In het dossier liggen twee brieven van de rechter-commissaris aan de raadvrouw van verzoeker. In de eerste brief, die is gedateerd 7 januari 1994, deelt de rechter-commissaris de raadvrouw mede Ay op 19 januari te willen horen, in de tweede brief, gedateerd 20 januari 1994, deelt zij de raadvrouw mede Ay op 27 januari te willen horen. Niet blijkt dat Ay bij een van die gelegenheden door de rechter-commissaris is gehoord.

30

Voorts bevindt zich een brief van de raadvrouw aan de procureur-generaal van 13 januari 1995 in het dossier,

waarin zij verzoekt Ay op te roepen ten einde ter terechtzitting in hoger beroep als getuige te worden gehoord. Bij brief van 18 januari 1995 heeft de procureur-generaal geantwoord dat hij naar aanleiding van het verzoek van de raadsvrouw heeft geïnformeerd bij de politie en dat daarbij gebleken is dat Ay niet bij de vreemdelingenpolitie stond ingeschreven en zijn woon- of verblijfplaats ook anderszins niet te achterhalen bleek. Niettemin heeft de procureur-generaal Ay voor de terechtzitting in hoger beroep laten oproepen, maar hij is niet verschenen.

31

Ter zitting heeft de raadsvrouw gepersisteerd bij haar verzoek, waarop het hof het verzoek heeft afgewezen. Nu uit de brief van de procureur-generaal bleek dat Ay geen bekende woon- of verblijfplaats had en niet over een verblijfsvergunning beschikte achtte het hof het onaannemelijk dat Ay binnen een aanvaardbare termijn wel zou verschijnen, waardoor hernieuwde oproeping zinloos was.

32

In zijn arrest van 1 februari 1994, *NJ* 1994, 427 besliste de Hoge Raad dat het gebruik voor het bewijs van een ambtsedig proces-verbaal voor zover inhoudende een niet ter terechtzitting afgelegde de verdachte belastende verklaring niet zonder meer ongeoorloofd en in het bijzonder niet onverenigbaar is met art. 6, eerste lid en derde lid, aanhef en onder d EVRM. Van zodanige onverenigbaarheid is in elk geval geen sprake als de verdediging in enig stadium van het geding, hetzij ter terechtzitting (in eerste aanleg en/of in hoger beroep; vgl. HR *NJ* 1994, 159), hetzij daarvoor, de gelegenheid heeft gehad een dergelijke verklaring op haar betrouwbaarheid te toetsen en aan te vechten door de persoon die de verklaring heeft afgelegd als getuige te (doen) ondervragen. Daartoe mag van de verdediging in de regel het nodige initiatief worden verwacht. Vgl. (COM voor) HR *NJ* 1992, 481. Voorts oordeelde de Hoge Raad dat het niet ongeoorloofd is een verklaring als hiervoor bedoeld tot het bewijs te bezigen indien de gelegenheid die verklaring op haar betrouwbaarheid te toetsen en

aan te vechten weliswaar heeft ontbroken maar die verklaring in belangrijke mate steun vindt in andere bewijsmiddelen.

33

In de zaak van verzoeker heeft de verdediging geen enkele gelegenheid gehad de door Ay bij de politie afgelegde verklaring dat hij verzoeker herkent, op haar betrouwbaarheid te toetsen en aan te vechten door Ay als getuige te (doen) ondervragen: noch bij de rechter-commissaris noch ter terechtzitting in hoger beroep is hij verschenen. De verdediging beschikte ook niet over een andere, toereikende mogelijkheid om de verklaring van Ay te bestrijden; vgl. mijn conclusie voor HR NJ 1992, 481. Met name het verhoor van Kayahan kan niet als zodanig gelden nu deze, toen hem het ook aan Ay getoonde fotoboek werd voorgehouden, verzoeker niet herkende. En nu — naar uit hetgeen ik onder 28 schreef volgt — de verklaring van Ay niet in belangrijke mate steun vindt in andere bewijsmiddelen, kan niet onder verwijzing naar HR NJ 1994, 427 worden gesproken van een geval waarin van schending van het recht op een 'fair trial' zeker geen sprake is.

34

Dat wil nog niet zeggen dat er geen eerlijk proces is geweest. In de rechtspraak van het EHRM wordt schending van dit recht door het niet kunnen horen van getuigen vooral aangenomen, indien het recht op ondervraging door de verdediging niet kon worden uitgeoefend door toedoen van de justitiële autoriteiten (al waren daarvoor begrijpelijke gronden, zie bijv. EHRM NJ 1993, 707 nt. EAA (Windish) en 1994, 358 nt. Kn (Saïdi)). In zaken, waarin de vervolgende instantie daar buiten stond, bijv. Unterpertinger (NJ 1988, 745), Asch (NJ 1993, 710) en Arntner (Human Rights Law Journal 1992, p. 461–463) was het Hof veel terughoudender met het aannemen van schending van art. 6. Zo heeft m.i. in de zaak Unterpertinger de doorslag gegeven dat de verdediging ook de mogelijkheid was onthouden de betrouwbaarheid van de (niet gehoorde) getuigen te betwisten door daarover andere getuigen te doen horen.

35

Dat neemt niet weg dat uit de zaken Asch en Arntner kan worden opgemaakt dat substantieel steunbewijs nodig is¹ — hier te meer nu de zaak 'hangt' op één herkenning van verzoeker als de dader — en dat moet worden vastgesteld dat dit in deze zaak ontbreekt. Het aantreffen van het 'visitekaartje', zoals dat door het hof voor het bewijs is gebruikt, is daarvoor niet voldoende. Ik acht het tweede middel gegrond.

(...)

Deze conclusie strekt tot vernietiging van de bestreden uitspraak ten aanzien van het onder 3 bewezenverklaarde feit en de strafoplegging, met verwijzing van de zaak naar een aangrenzend hof ten einde in zoverre op het bestaande hoger beroep te worden berecht en afgedaan en verwerping van het beroep voor het overige.

Noot

Auteur: T.M. Schalken

Noot

1

De verdachte in deze zaak is veroordeeld voor betrokkenheid bij afpersingsactiviteiten ten behoeve van de Turkse organisatie Dev Sol. Hij werd bij de politie op basis van fotoboeken herkend. Die fotoboeken waren niet in het dossier gevoegd, hoewel de fotoherkenning niet alleen in het kader van de opsporing, maar ook bij

de bewijsvoering is gebruikt. Nu de verdediging, aldus het verweer, de toegang tot het bewijs was onthouden, zij de totstandkoming van het bewijs niet kon controleren en het OM op deze manier boven de verdediging was bevoordeeld, diende het OM niet-ontvankelijk te worden verklaard. Volgens de verdediging zijn de fotoboeken als processtukken aan te merken, zodat kennisneming daarvan niet mag worden onthouden.

2

De Hoge Raad is het met die opvatting niet eens. De redenering die tot deze conclusie heeft geleid, komt op het volgende neer. Als regel mag kennisneming van processtukken niet worden onthouden (artt. 30–34 Sv). Processtukken zijn stukken die zich in het dossier bevinden of daarvan deel dienen uit te maken. Dit houdt in dat het antwoord op de vraag wat onder processtukken moet worden verstaan, zowel een feitelijk als een normatief oordeel omvat. In het dossier behoren, aldus de Hoge Raad, die stukken te worden gevoegd die, hetzij in belastende, hetzij in ontlastende zin, redelijkerwijze van belang kunnen zijn voor het bewijs, waartoe de resultaten van het opsporingsonderzoek en het gerechtelijk vooronderzoek moeten worden gerekend (5.9). Kennisneming van processtukken mag, behoudens uitzonderingen voor beperkte duur, aan de verdachte en zijn raadsman niet worden onthouden. De fotoboeken daarentegen zijn, gelet op hun aard en hun functie in

het opsporingsonderzoek, niet als processtukken te beschouwen die aan het dossier dienen te worden toegevoegd (5.10). De Hoge Raad maakt in dit verband onderscheid tussen de fotoboeken die door de politie bij de opsporing van mogelijke verdachten zijn gebruikt en het resultaat daarvan in het voor de bewezenverklaring gebruikte proces-verbaal. In het eerste geval gaat het om een opsporingsmiddel en in het tweede geval om een bewijsmiddel. De Hoge Raad sluit zich aan bij het oordeel van het hof dat de fotoboeken als opsporingsmiddel dienen te worden gekwalificeerd en dat zij daarom niet aan het dossier behoeften te worden toegevoegd.

3

Niettemin kan zich, vervolgt de Hoge Raad, de situatie voordoen dat de verdediging de betrouwbaarheid of rechtmatigheid van de bewijsverkrijging aanvecht. Kennisneming van documenten (niet zijnde processtukken) die voor de beoordeling van een dergelijk verweer van belang zijn, mag de verdediging niet worden onthouden (5.11). Beginnen van een behoorlijke procesorde nopen daartoe. Dat betekent echter nog niet dat de verdachte of zijn raadsman 'zonder meer' aanspraak kan maken op een afschrift of kennisneming van een hulpmiddel als hier door de politie is gebruikt. In casu woog het opsporingsbelang (dat gediend was met geheimhouding van de identiteit van de overige gefotografeerde personen in relatie tot toekomstige onderzoeken naar afpersingspraktijken van Dev Sol) zwaarder dan het verdedigingsbelang (dat erop gericht was de eerlijkheid en de betrouwbaarheid van de herkenning te controleren en te betwisten). Daarom kon de verdachte geen inzage worden toegestaan, maar werd zijn raadvrouw ter zitting in de gelegenheid gesteld van de inhoud van de fotoboeken kennis te nemen, hetgeen zij zowel in eerste als in tweede aanleg heeft geweigerd.

4

Het arrest van de Hoge Raad zet na de spaarzame jurisprudentie over het inzagerecht enkele hoofdlijnen uit. Die liggen in het verlengde van de Straatsburgse rechtspraak. De wettelijke regeling en de daarop gebaseerde praktijk waren reeds in grote trekken met het EVRM in overeenstemming. De beperkingen van het inzagerecht zijn toelaatbaar, omdat zij tijdelijk zijn en met de nodige waarborgen omgeven. Het werkelijke probleem is niet de volledigheid van het inzagerecht, maar de volledigheid van het dossier. Daarover uitvoeriger K. Peters in NJCM-bulletin 1987, p. 509–524. P.A.M. Mevis in DD 1991, p. 28–40 en T. Prakken in NJB 1995/40, p. 1451–1458. De kernvraag luidt dan ook: hebben de opsporende en vervolgende autoriteiten een serieuze verplichting om de verdachte actief in kennis te stellen van zowel belastend als ontlastend bewijsmateriaal, en heeft de verdediging voldoende mogelijkheden om de volledigheid van die informatie te controleren en te betwisten? Beide vragen heeft de Hoge Raad in algemene termen beantwoord. Dat laat onverlet dat politie en justitie in de praktijk een zekere ruimte hebben (of zich zullen toeëigenen) om de mate waarin en het moment waarop informatie aan het

dossier behoort te worden toegevoegd, te beïnvloeden. Weliswaar moeten de bevoegde autoriteiten 'all relevant elements' aan de verdachte ter beschikking stellen (Jespers/België, ECRM 14 december 1981, D&R 27), dienen de vervolgende instanties de verdediging te informeren over 'all material evidence' (Edwards/Verenigd Koninkrijk, EHRM 16 december 1992, NJCM 18-4 (1993), p. 449), soms zelfs wanneer het documenten betreft waarop de vervolging zich niet beroept (Bendenoun/Italië, EHRM 24 februari 1994, NJCM 19-6 (1994), p. 723), dat neemt niet weg dat de verdediging een adequate mogelijkheid moet hebben op de naleving van deze publiekrechtelijke verplichting toe te zien. Het zal dus altijd een zaak van professionele alertheid van de raadsman blijven ervoor te waken dat de essentie van de informatieverstrekking gerespecteerd wordt: het recht om van de stukken kennis te nemen en daarop commentaar te leveren, vloeit rechtstreeks voort uit het recht op een contradictoir proces, dat weer een onderdeel is van het recht op een fair trial. Het inzagerecht is bovendien nauw verweven met het equality of arms-beginsel dat eveneens deel uitmaakt van het recht op een eerlijk proces. Hierover in het bijzonder Unterpertinger/Oostenrijk, EHRM 24 november 1986, NJ 1988, 745 (inzagerecht als uitvloeisel van een fair trial), Lamy/België, EHRM 30 maart 1989, NJCM 14-4 (1989), p. 467 (inzagerecht als onderdeel van een contradictoir proces), Ruiz Mateos/Spanje, EHRM 23 juni 1993, NJCM 19-2 (1994), p. 162 (nadere uitwerking van het contradictoir proces), Brandstetter/Oostenrijk, EHRM 28 augustus 1991, NJCM 17-2 (1992), p. 173 (het inzagerecht als element van het equality of arms-principe), Mulders/Nederland, ECRM 6 april 1995, NJCM 20-6 (1995), p. 830 (de vervolging mag niet boven de verdediging bevoordeeld worden).

5

Als ik het goed zie, is de regeling van de Hoge Raad ruimer dan die van het Europese Hof. De Hoge Raad staat immers de verdediging, na een daartoe strekkend verweer, ook inzage toe van documenten die niet tot het procesdossier behoren. Deze mogelijkheid geldt evenwel niet ongeclausuleerd. De uitkomst van een belangenafweging bepaalt hier de omvang van het inzagerecht. De Hoge Raad bediende zich al eerder, mede in het voetspoor van het Europese Hof, van de methode van de belangenafweging (bij de redelijke termijn, het oproepen van getuigen en het beletten van vragen). Het recht strekt er toe in die afweging van belangen structuur aan te brengen. Dit betekent dat de machtigste partijen in het strafgeding deze structuur moeten eerbiedigen en de belangenafweging niet mogen reduceren tot een toverformule waarmee 'lastige' verweren van de verdediging buiten de rechtszaal worden gehouden. Wanneer het opsporings- en het vervolgingsbelang wordt aangevoerd om een fundamenteel recht als het recht op informatie te beperken, rust de bewijslast bij de vervolgende overheid. Het OM zal concrete feiten en zwaarwegende argumenten in het geding moeten brengen om aannemelijk te

maken dat de opsporing een hoger belang vertegenwoordigt dan waarop de verdediging zich beroept. De recente IRT-geschiedenis heeft laten zien dat politie en justitie soms wel erg gemakkelijk in hogere belangen een rechtvaardiging vonden voor wat beter niet aan het daglicht kon worden blootgesteld. Het algemeen belang is niet vanzelfsprekend. Bovendien kent elke afweging van belangen een benedengrens. Die ligt daar waar ernstige twijfel over de betrouwbaarheid van het bewijs aanwezig is. Het algemeen belang kan nimmer opwegen tegen het reële risico dat een verdachte ten onrechte of op grond van onbetrouwbaar bewijs wordt veroordeeld. Daarmee zou een ander algemeen belang worden aangetast.

6

De afweging van belangen is pas aan de orde wanneer het *niet* om processtukken gaat, maar om andere documenten die voor de bespreking van een verweer van belang zijn. Dit impliceert dat de voeging van processtukken in het dossier niet van een belangenafweging afhankelijk mag worden gesteld. Dat is de consequentie van het arrest van de Hoge Raad. In principe vallen de plicht tot voeging en het recht op inzage hier samen.

Doordat bij de samenstelling van het dossier het afwegen van belangen niet als criterium mag worden aangelegd, zal de discussie zich in de praktijk toespitsen op de vraag welke informatie als processtuk dient te worden aangemerkt. Het door de Hoge Raad gemaakte onderscheid tussen opsporings- en bewijsmiddel heeft in dit

opzicht selectieve betekenis. Een opsporingsmiddel kan buiten het dossier blijven. Het onderscheid doet echter kunstmatig aan in situaties waarin de verdediging de rechtmatigheid van de opsporing en de betrouwbaarheid van het opgespoorde bewijsmateriaal aan de kaak wil stellen. De status van een processtuk is onverbrekkelijk verbonden met het recht op kennisneming. Opsporingsmiddelen zullen, reeds om tal van praktische bezwaren, niet altijd aan het dossier kunnen worden toegevoegd. Maar als het gehanteerde opsporingsmiddel een document is en de verdediging de bewijsrechtelijke zuiverheid daarvan wil controleren, zal haar de 'access to that document' (Jespers/België) bezwaarlijk kunnen worden onthouden. Dit laat de mogelijkheid open dat praktische hindernissen op andere wijze, bijv. via het horen van een opsporingsambtenaar, kunnen worden gecompenseerd. Maatstaf is of de ontlastende aspecten bij de opsporing niet zijn verwaarloosd.

7

Ter zitting werd de raadsvrouw maar niet de verdachte in de gelegenheid gesteld van het fotomateriaal kennis te nemen. Zij weigerde. In hoeverre kan zo'n weigering eraan meewerken dat geen schending van het fair trial-principe wordt aangenomen? Dat hangt ervan af. Soms doet kennisneming op de zitting er niet zoveel meer toe. Het recht op inzage geldt immers tot op zekere hoogte ook al in het vooronderzoek, in elk geval bij vitale momenten, zoals bij beslissingen omtrent de voorlopige hechtenis (Lamy/België). Het kan ook zijn dat er onvoldoende tijd voor kennisneming wordt gegund. Te beperkte inzage kan in strijd komen met het recht op voldoende tijd en faciliteiten voor de voorbereiding van de verdediging (art. 6 lid 3 sub b). Dat de verdediging wel en de verdachte niet de gelegenheid tot inzage krijgt, lijkt niet steekhoudend. Straatsburg doet daar in elk geval niet moeilijk over (Kamasinski/Oostenrijk, EHRM 19 december 1989, NJ 1994, 26 en Kremzow/Oostenrijk, EHRM 21 september 1993, NJCM 19–3 (1994), p. 258). Het betekent wel een verdere doorbreking van het in Nederland nog steeds zwaarwegende principe dat al hetgeen aan de verdediging wordt toevertrouwd, ook ter kennis van de verdachte moet kunnen komen. Dat is met name ook dan van belang als het alleen de verdachte is die bepaalde informatie op waarde weet te schatten.

8

Toch casseerde de Hoge Raad na een voorzet daartoe van advocaat-generaal Fokkens. Ondanks herhaalde verzoeken is de raadsvrouw niet in de gelegenheid geweest de enige getuige die de verdachte uit het fotomateriaal herkende, te ondervragen. Dat telt extra zwaar als er ook nog, zoals in dit geval, onvoldoende steunbewijs is. Dus deed zich hier (voor het eerst meen ik) de uitzonderingssituatie voor als bedoeld in HR 1 februari 1994, NJ 1994, 427. Wat de verdediging via uitbreiding van het inzagerecht niet lukte, slaagde wel langs de weg van het ondervragingsrecht.

Sch

Voetnoten

[1]

Vgl. De Duitse rechtspraak die dezelfde eis stelt. Zie Beck'sche Kurz-Kommentare, Strafprozessordnung, 42e Auflage, par. 250; Roxin, Strafverfahrensrecht, 24e Auflage, p. 69–71.

NJ 1996, 687

Police photo albums no procedural documents / not without further inspection / issuing of such documents by defense concerning reliability / legality be...

HR 07-05-1996, ECLI: NL: PHR: 1996: AB9820, with note by TM Schalken (Dev Sol)

Institution

Supreme Court Authority (Criminal Chamber)

Date

7 May 1996

Magistrates

Hermans, Davids, Bleichrodt, Schipper, Corstens, Fokkens

Case number

101910

Note

TM Schalken

LJN

AB9820

Name

Dev Sol

Subject area (s)

Provisional (V)

International tax law / General

Criminal Procedure Law / Pre-Phase

Unknown (V)

International public law / Human rights

Source documents

ECLI: NL: HR: 1996: AB9820, Judgment, Supreme Court (Criminal Chamber), 07-05-1996

ECLI: NL: PHR: 1996: AB9820, Statement, Supreme Court (Advocate-General), 07-05-1996

Legislation considered

Sv art. 33; Sv art. 51; ECHR art. 6 paragraph 3 under b; ECHR art. 6 paragraph 3 under d

Essence

1. Police photo albums are not procedural documents. The defense may not be denied access if it is relevant to the evaluation of the defense. It is possible to limit the inspection by the suspect. 2. Immediate involvement of the suspect in the proven facts is only apparent from the witness testimony in the official report. Since the defense has not questioned the witness and his statement is insufficiently supported by other evidence, its use is in violation of art. 6 paragraph 3 sub d of ECHR.

Previous ruling

Ruling on the further appeal of AA, in Rotterdam, who at the time of the contested judgment was being detained in the 'De Koepel' prison in Haarlem, Adv. Mr. E. Prakken in Amsterdam.

District Court and Court:

Statement of evidence and evidence

Proved that

1

Alternatively (etc.)

he, on 9 September 1993 in The Hague together with others, with the intention of unlawful appropriation, removed personal documents belonging to A. Ay and D. Kayahan, which theft was preceded and accompanied by violence and threats of violence against said Ay and said Kayahan, committed with the intention of preparing and facilitating the theft. This violence and threats of violence consisted of him, the suspect, together with his co-perpetrator (s) - rendered concisely - acting as follows:

- he, the suspect, and his perpetrator (s) told said Ay and Kayahan to raise their hands, or at least spoke words of the same threatening nature or meaning and

- he, the suspect, and his perpetrator (s) repeatedly shoved said Ay and said Kayahan in the back with (a) firearm and

- he, the suspect, and his co perpetrator(s) shoved said Ay and said Kayahan against (the steps of) a portico and

- he, the suspect, and his co-perpetrator (s) stated to said Ay and Kayahan: 'we are from Dev Sol' and 'if you go to the police, we will shoot you dead', or at least words of the same threatening nature or meaning.

Fact 3

7.

The statement of the suspect at the appeal hearing, containing - concisely rendered - the following:

'It may be that at the time of my arrest I had in my possession a business card of Hans Leysen from Noroma BV.'

8.

The record of 15 February 1994 of the examining magistrate, charged with hearing criminal cases in the district court of The Hague, containing - concisely rendered - the statement made by Durak Kayahan before the examining magistrate on 15 February 1994:

"On 9 September 1993 I was in The Hague with Ahmet Ay. We encountered Celal. Celal walked away. I was still on the street with Ahmet when certain men approached us. They told us to raise our hands. I then raised my hands. We walked to a portico. They then took a folder with my driver's license and other papers from me."

9.

The official record from the municipal police of The Hague, (...), containing - concisely rendered -: 9.1. as the statement made by Ahmet Ay against reporting officer Rimmelzwaan on 16 September 1993 (numbered as p. 76 et. seq.): '

'On September 9, 1993, I was approached telephonically by an acquaintance of mine named Celal (Note for reporting officer: this is intended to refer to I. Kaya). Celal asked me if I wanted to go to cafe Deniz at the Hoefkade because he had an appointment with some people there. This was for some kind of protection. I then went there and waited outside. I was with Durak Kayahan. I saw Celal driving away. Near the corner of Hoefkade / De Heemstraat I was pushed in the direction of a portico in Heemstraat by three of a total of six people. When the six people came running up to us, I saw that all of them were pulling guns. In my opinion, they were real firearms. I felt these three people shoving me in the direction of a portico shoving their guns firmly against my back. I also saw Durak being threatened by three people with guns. I saw him also being shoved in the back with the barrels of the guns that the men were holding. We were led to the portico under threat of firearms. I was threatened by, among other things, a man with glasses. I heard the man with the glasses say, "We are from Dev Sol." I was shoved up against the stairs of the portico. I saw the man with the glasses take away my driving license, my identity card, my monthly HTM

subscription, as well as a number of pieces of paper with addresses on them. I saw Durak also being shoved against the steps of the portico and being searched by the other three. I later heard that they had taken a driver's license from Durak. The man with the glasses said to me: 'If you go to the police, we will shoot you'. I did not give anyone the right or permission to take for themselves my driver's license, HTM card, or ID card, all of which fully belong to me.

9.2.

as the statement made by Durak Kayahan to reporting officer Rimmelzwaan on 17 September 1993 (numbered p. 82 et seq.):

"I saw six people coming from café Deniz. All these persons had a gun in their hand. They walked up to Ahmet Ay and me. "

10.

The official report of the municipal police in The Hague number 16.718 / 1993, dated 9 December 1993, drawn up and signed by SL van der Linden, brigadier-detective of the municipal police, and other authorized investigating officers, containing - concisely rendered -:

10.1.

as an account of reporting officers Rimmelzwaan and Holtslag (numbered page 32):

"On December 7, 1993 we, the aforementioned reporting officers, confronted declarant Ahmet Ay through a one-way mirror with, among others, suspect A. At the sight of suspect A. Ahmet Ay stated: 'This is the man with the glasses that threatened me with a gun on 9 September 1993. I'm sure of this.'"

10.2.

as an account of the reporting officer Van der Linden (numbered p. 19):

"During the course of searching suspect AA, I, reporting officer, Van der Linden, seized the following items: (...)

4.

A business card of Hans Leysen from Noroma BV, located at Heeswijkplein 95, The Hague. This is the associate of the declarant I. Kaya."

Application and ruling

In the appeal, the following facts must be assumed. In the criminal investigation into the present facts, in respect of which there was a suspicion that they had been committed by persons that were part of 'Dev Sol', the police have, based on the statements made, made available one or more photo albums previously prepared by the police, containing photographs of persons in respect of whom the police had indications that they were involved in 'Dev Sol'. A report was prepared on the basis thereof. The report contained copies of the photographs of the suspect in the book, which were used to identify the suspect.

According to the record of the court hearing in first instance of 17 March 1994, the lawyer, also on behalf of the lawyers of the co-suspects, then requested that all photo albums / photo series used in the investigation be included in the file, so that both the lawyers and the suspects could have access to it.

This was based on the presumption - in summary - that the investigation, detention, and investigation were wholly or to a large extent based on witnesses' / declarants' recognitions from these photo albums. Because the photo albums in the investigation had been made available to the investigating and prosecuting authorities, and played an extremely important role in that investigation, these must - as per the lawyer - undoubtedly be regarded as procedural documents. Based on art. 33 Sv the suspect may not be denied access thereto. According to the aforementioned record, the district court denied the request for the photo albums to be added to the file, having deliberated as follows:

"It is in conflict with the overall interest of the investigation, while the right of the defense to monitor the use of the photo albums is sufficiently guaranteed by the inspection on the part of the lawyers, and they invite the lawyers to inspect such. In addition, reporting officer Van der Linden will be able to explain the composition and use of the photo albums. ' The lawyer then contested, both in the first instance as well as on appeal, that the Public Prosecutor should be declared inadmissible in the prosecution. The grounds put forward for this purpose have been summarized by the district court in its judgment under 3a - under the heading 'Appeal as to the inadmissibility of the Public Prosecutor' - as follows:

"Essential procedural documents such as the various photo albums were not provided to the defense and suspects for inspection in advance of the hearing. During the court session, the lawyers but not the suspect, were offered such access to two of the photo albums that were used. This was therefore also in violation of the fair trial principle provided for in art. 6 ECHR."

The District Court rejected the argument in defense thereof on the basis of the following ruling: The district court denied the request that the photo albums be added to the file at the hearing on 17 March 1994.

The suspect and the lawyers have an interest in inspecting the photo albums, in order to be able to determine whether these books were put together in a balanced manner which would ensure reliable recognition. The Public Prosecutor has an interest in keeping secret the identity of the other persons, whose photographs are in the photo albums, and of whom, according to the statements made by the public prosecutor, there are indications that they are involved in Dev Sol, for example with a view to future investigations into extortion activities of this organization.

In the opinion of the district court, the interests of the suspect in this case do not outweigh the general investigative interest of the Public Prosecutor. The district court furthermore deliberated that the privacy of the other persons depicted in the photographs should be respected as much as possible.

At the hearing, the district court verified the contents of the photo albums and also gave the lawyer the opportunity to do so at the hearing on 17 March 1994. The lawyer did not take advantage of this opportunity.

In view of the above, the district court does not consider the suspect's defense to have been affected and is of the opinion that the denying of access to the suspect cannot result in a declaration of inadmissibility of the Public Prosecutor.

The Court deliberated and ruled as follows:

At the hearing, the defense, on the same grounds as those at first instance, argued that the Public Prosecutor should be declared inadmissible. There are no new grounds on which this proposition is based. The court agrees with the district court's rejection of that appeal as well as the grounds used to justify it, albeit with a single exception, amendment, and addition to the grounds to be discussed below. In this respect, the court refers to the deliberations of the district court in its verdict under the chapter 'Appeal to the inadmissibility of the Public Prosecutor'.

(...)

ad grounds for decision 3a

As part of this deliberation, the court prefaced the verdict with the idea that, contrary to what was stated by the lawyers, the photo albums in question are not procedural documents within the meaning of the law. These books must be regarded as means of investigation on the basis of which procedural documents - as included in statements of witnesses and copies of photographs of the accused which led to recognition - are created. The defense cannot therefore claim any right to copies of that photographic material. The court also notes that the lawyers at the hearing - with the court - had the opportunity to verify the composition of the photo albums, but refused to do so.

Grounds for cassation:

Means I

The law has been violated and procedural requirements have been omitted, the non-performance of which entails nullity. In particular, Article 6 (1) and (3) (b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the principles of good criminal procedure, and Articles 33, 137, 309 and 338, 359, paragraph 3 jo. 415 Sv have been violated, because the court

a.

. has failed to specify the photo albums that play an important role in the investigation and the evidence as procedural documents;

b.

. failed to declare the Public Prosecutor inadmissible in its prosecution even though the prosecution relied heavily on recognitions from photo albums that the Public Prosecutor refused to add to the file in both instances;

c.

. wrongly weighed up the interests of the defense in having the photo albums in the file (to the detriment of the declarant) against the general investigative interest of the public prosecutor in terms of the 'confidentiality of the identity of the other persons whose photographs appear in the photo albums and of whom, according to the public prosecutor, there are indications that they are involved in Dev Sol, for example, among other things, with a view to future investigations into extortion activities of this organization';

(...)

e. the evidence for the facts sub 1 alternatively and sub 3 alternatively of the charge, directly or indirectly relied on recognitions on the part of declarant's witnesses' in one or more photo albums that contained their pictures without those photo albums having been included in the file.

Insofar as the right is not violated through the above-mentioned decisions, they are in any case incomprehensibly or otherwise inadequately motivated.

This has seriously harmed the legitimate interests of the defense, which has repeatedly requested that the photo albums be included in the file.

Explanation

(...)

2

Ad section a.: The Plaintiff was not taken into custody (with the exception of firearm possession under 4) until months after tertiary parties had reported various offenses. His arrest was possible because the police possessed a large number of photographs, grouped into various photographic albums that were modified and supplemented in the course of the investigation, identified by witnesses and declarants from the Turkish-Kurdish community in The Hague, and some witnesses identified the Plaintiff as co-perpetrator of the act on which they had made a statement or filed a complaint. The Plaintiff therefore has a legal interest in timely and uninterrupted inspection, both in person and by his counsel, of the photographic album(s) in order to ascertain to what extent the allegations of the prosecuting authorities are true, that the persons appearing therein are presumably at Dev Sol are involved and to be able to check whether recognition of his photograph identified by witnesses, incidentally, was also fair and reliable. From the very beginning of the criminal case, up to and including the court hearing, the Plaintiff's request to be included in the archive of relevant photographic albums has been unsuccessful.

3

The photographic albums are not solely a means of investigation as the court states, as they were not only used by the police during the exploratory phase of the investigation, but those albums were also used for identification by witnesses and are obviously the basis of the arrest aside from the act of the Plaintiff; they are co-defendants and also play a significant role in the evidence. The evidence of act 1 in the alternative (threat) was collected through recognition of the Plaintiff as shown in picture 7 by witness Hikmet Gündüz. The involvement of the Plaintiff in act 3 (theft with violence) was (practically) exclusively proved by a statement from the witness Rimmelzwaan (numbered official report p. 91), in which reference is made to the recognition of the Plaintiff from one of the photographic albums by the witness Ahmet Ay on November 19, 1994. Under these circumstances fair trial was required on appeal that the Plaintiff had (proper copies of) the photographic albums, in order to be able to check the fairness and reliability of that recognition and to challenge it with incentive. In this complaint, the Plaintiff also has an interest in reversal of judgement, although the court has declared act 3 from the later mirrored recognition, *inter alia* in connection with the purport of section II.

4

The fact that these photographic albums must legally be regarded as procedural documents follows, for example, from the general legal principle that one should not be condemned on the basis of evidence that is unknown. The reasoning of the court that the albums are only a means of investigation on the basis on which procedural documents are discovered, fails to recognize that the task of the defense is not limited to the assessment of the final means of proof, but that in principle the defense must also submit to an assessment of the creation of these means of proof. The fact that this assessment of the establishment of the evidence ultimately contains a limit does not detract from the fact that the direct material from which witnesses have identified a suspect falls within that limit. The term 'investigative means', whatever that means, cannot serve as criteria for what should and should not be counted among the procedural documents. The criteria for this can only be found in the standards for a fair trial, including that the defense is permitted to check the procedural actions of the public prosecution and the evidence presented on the basis of the information gathered by the public prosecution on their regularity and to challenge the material used if necessary.

5

With regard to the documents to which the defense should have access pursuant to Article 6, paragraph 1 and/or paragraph 3 (b), ECRM (European Convention on Human Rights) December 14, 1981, D&R 27 (Jespers/Belgium) is relevant:

"Article 6, par. 3 (b) recognizes the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary 'facility' if, as in the present case, it concerns acts of which the defendant is accused, the credibility of testimony etc.'

I.c.¹ it concerns material from which the credibility of the recognizing witnesses can be assessed. The European Court of Human Rights (ECHR) in the case of Edwards/UK (ECHR December 16, 1992, A 247-B, NJCM 18-3 (1993), pp. 315-316 and NJCM 18-4 (1993)), pp. 449-453) determined that the prosecuting authorities should open

¹ I.C. ACRONYM NOT FOUND

all material evidence for the defense in order to comply with the requirements of 'fair trial'. The photographic albums from which the identifications are established that are so important for this case are certainly part of the 'material evidence'. Precisely the use of the term 'material' opposes the formal approach of the court in which only the results of the use of the photographic albums would yield procedural documents. (The distinction made by the court is somewhat reminiscent of the view previously held in Dutch case law of the requirement that a registered testimony is not opposed does not preclude the use of an anonymous statement in which 'the audit' has been included in an

proof of validity by an investigating officer. It was the case that the ECHR, in the well-known Kostovski case, found this reasoning to be too formalistic and oriented towards the substantive testimony for the assessment of its acceptability in the light of ECHR Article 6.)

Finally, the ECRM has recently been in a Dutch case in which recourse to violation of Article 6 was declared inadmissible; however, it does provide a few criteria for the requirements that a file must meet in connection with the standards for a fair trial (ECRM April 6, 1995, no. 23231/94, Mulders/The Netherlands, NJCM 20-6 (1995), pp. 830-836):

"(...) The documents submitted by the applicant disclose no appearance of a violation of the principle of equality of arms. It has not been alleged that the prosecution has used material which the applicant was unaware of, nor that the applicant's conviction was based on evidence that he could not challenge. It had furthermore not been argued that during the proceedings the domestic courts placed the prosecution in a more advantageous position than the applicant."

This means that due to the lack of relevant procedural documents, a complaint does stand a good chance if it is based on (1) *use by the Public Prosecutor's Office of material that is unknown to the defense*, (2) *a conviction on the basis of evidence that could not be controlled by the defense* (3) *the provision by the judge of an advantaged position of the Public Prosecutor's Office above the defense*.

It appears to the Plaintiff, as it concerns all three cases referred to in the present proceedings: the prosecuting authorities have extensively used (in situations that have led directly to evidence) the photographic albums, to which the defense does not have access, the evidence as a result of these photographic albums cannot be checked by the defense and the judge so far has used and withheld the photographic albums that the public prosecutor has used from the defense. The court should therefore have designated the photographic albums as procedural documents.

6

Ad section b.: The Public Prosecutor's Office has always refused to add the photographic albums to the file, despite repeated requests from the defense to do so. On the basis of the foregoing, and in particular on the grounds that the Public Prosecutor's Office used the photographic albums in the meaning from the European Commission for Human Rights (ECRM) ruling in the Mulders case and subsequently refused to add them in the file, the tribunal and the court had to declare the Public Prosecutor's office inadmissible instead of going along with the Public Prosecutor's arguments (see next point of the explanation).

7

Ad section c.: On p. 2 of the minutes of the Court's hearing of January 27, it states that the judge has communicated the short content of prior correspondence between the lawyer and the attorney general, of which the correspondence was, among other things, about the photographic albums. In his letter of January 12, 1995 to the counselor, the Prosecutor General states that the court (which had commented on the balance between the general investigative interest and the defense interest in favor of the first) with respect to the photographic albums correctly weighed up. He had argued that the inclusion in the file from the point of view of privacy protection of the other persons appearing in the photographic albums was undesirable, and:

"In the present case, the photographic album, as I have been assured, is composed of photographs of people who have evidence that they are involved at Dev Sol. Their photographs may include, among other things, unexpected investigations into violent fundraising activities in the future. However much to the knowledge of your client these photographs may possibly have a preventive effect in relation to the persons depicted therein, also for technical reasons it is important that the content is not known to the acquaintances of the people depicted in those pictures."

More than the privacy of those involved, the future investigative interest with regard to the yet to be committed (!) facts seems to inspire the public prosecutor to publish the photographic albums in question at all costs to the Plaintiff and his fellow suspects for inspection.

The court has explicitly accepted this reasoning, the court has made the tribunal's considerations its own, adding the decision that the photographic albums are not procedural documents.

The recognition, when assessing whether the photographic albums should be in the file, of 'the general investigative interest', i.e. the interest of the police and the Public Prosecutor's Office to further investigate with the photographic albums of presumed parties involved in an act deemed to commit criminal offenses in the future, fails to recognize that the consideration of such interests should have been made by the police at the time they decided to show the photographic albums of suspected parties at Dev Sol to witnesses and declarants of criminal offenses with the intention of establishing proof of those acts. When the police limited itself to showing that collection to a single witness of the offenses to find out whether the investigation was on the right track, there might have been something to say about the statement that the albums are not procedural documents. The police would then have had to keep the albums with them and use photographic albums that are suitable for ethical identification (pictures of people who all comply with the signs provided by witnesses).

Then the evidence would have been considerably less suggestive, and the Dev Sol could have kept albums for what they apparently want to keep them for. Now that the police have chosen to use these albums to systematically get witness identifications with an intent to collect evidence in this case, the decision has been taken that the albums will in any case no longer be concealed as future suspects' detecting means can be used. 'You cannot eat your cake and have it' also applies to the police and the Public Prosecutor's Office. The privacy argument for not adding the photographic albums to the file is not very convincing: photographic albums that have been used for recognition without the police having other plans are, despite the respect to privacy, on request in the files, and furthermore, if the instructions from the police indicate that the persons whose photographs appear in the albums were affiliated with those of Dev Sol, they would be the photos of the political friends of the Plaintiff in the photographic albums. These people undoubtedly feel significantly more protected in their privacy by the police showing those albums to the witnesses who have now seen the albums than by showing the photographs to the Plaintiff and his counselor. (...)

10

Ad section e.: For proof of act 1, the Tribunal had a subsidiary statement from the witnesses Linssen and Barnas that the witness Hikmet Gündüz recognized the Plaintiff from the 'Dev Sol show' on January 19, 1994 as one of the men who aimed a weapon at him (Exhibit 6). For the proof of act 3, the Tribunal uses the statement of verbal witnesses Rimmelzwaan and Holtslag that witness Ahmet Ay recognizes the Plaintiff through a confrontation mirror on December 7, 1993 (Exhibit 10.1). Now this Ahmet Ay according to p. 91 of the numbered minutes already on November 19, 1993 identifies to witness Rimmelzwaan, the Plaintiff from the photographic album as one of the perpetrators; the Tribunal was also not allowed to use this mirror identification as direct identification from the photo recognition for evidence now that the photographic albums are not part of the procedural documents.

Plea II

The law has been violated and forms have been omitted, the non-performance of which entails nullity. In particular, Article 6, paragraph 1 and paragraph 3 (d) of the ECHR have been infringed, Articles 338, 344, 350 and 359 in conjunction with 415 see below and the principles of proper criminal justice, because the Tribunal used a passage from the official report of statements made by witnesses Rimmelzwaan and Holtslag (numbered official report p.32) for proof of act 3 of the charge; "On December 7, 1993, we confronted, the aforementioned, witness Ahmet Ay through a confrontation mirror with, among others, defendant A. At the sight of defendant A, Ahmet Ay stated:" This is the man with glasses that on September 9, 1993 threatened me a gun. I am certain of this '. Although: (...)

c Ay's statement is the only evidence from which the Plaintiff's involvement in act 3 is apparent, while the defense has not had the opportunity at any stage of the trial to interrogate this witness whose interrogation has been requested by the defense both in the first trial and in the appeal; although the Tribunal, for understandable reasons, found further appeal from the witness useless, it should not have accepted Ay's statement to the police under this circumstance;

(...)

Explanation

(...)

3

Ad section c.: The Plaintiff is of the opinion that the identification by Ay is the only means of proof from which his involvement with act 3 could be accepted by the court. It is noted here that there is one means of proof with regard to this part of the charge constitution, Exhibit 10.2, of which the Plaintiff does not understand what contributes to the proof of the act. It concerns the discovery in his search of a business card of the companion of witness Kaya,

who reported another offense, namely extortion. Insofar as this evidence, the use of which is not further substantiated, the purport of also having to give an indication of the Plaintiff's involvement in the theft committed by force, Ay's statement is not the only proof of the Plaintiff's involvement. The Plaintiff makes this observation in order not to cast doubt on the lack of a factual basis for the plea.

4

The Plaintiff initially requested the examining magistrate to hear Ay as a witness, but he did not appear at that time. In

the appeal it was requested of the Plaintiff's counsel to summon Ay in the session as a witness, which happened, but he did not appear there either. The police then reported that he was being searched for. The Plaintiff was unable to challenge this with reasons, and he resigned to the judgment of the court that further appeals were pointless. However, all this does not alter the fact that the Plaintiff was unable to question this witness, which is of crucial importance, at any stage of the investigation. The jurisprudence, viewed in conjunction with each other, in the opinion of the Plaintiff in these circumstances opposes the use of Ay's statement as proof, as it was made with the police.

In the first place, there is the ECHR ruling on Artner/Austria (A 242-A), in which the Court was prepared to accept an exception to the rule formulated in the Unterpertinger-arrest, on the one hand because it contributed to the defendant that so much time had passed that the witness was untraceable, and on the other hand because the testimony of the witness was not the only one demonstrating Artner's fault. In any case, there are no such circumstances: there has been litigation on the part of the defense and the Plaintiff's involvement can only be deduced from Ay's statement (subject to the provisions under 3). In that sense there is therefore no reason to deviate from the main standard set by the Strasbourg judges that the defense must have had at least an opportunity to question important witnesses (see, for example, AG Fokkens in his opinion in HR² October 29, 1991, NJ³ 1992, 481). More important, because the case Saïdi/France (EHRM 20 September 1993, A 261-C, NJ 1994, 358, m.n. Kn.) is positively formulated. In that case everything revolved around witness statements, including recognitions of the suspect, but only there were more than just a single one. The only difference which may be relevant to the present case is that the French judges refused to call witnesses while the witness was the only one who was the only person in charge. The ECHR ruled in that case:

"The testimony therefore constituted the sole basis for the applicant's conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial."

This formulation leaves no room for making a distinction between a witness who cannot be heard and a witness who is refused. Ay's statement cannot be used for the proof under the current circumstances. The following circumstances also add to this conclusion, which is important in the light of the jurisprudence cited: there are also no other indirect ways for the Plaintiff to test the evidence supplied by Ay (HR October 29, 1991, NJ). 1992, 481, cited above); the proof of the Plaintiff's involvement rests, if not exclusively, then at least 'mainly' on the statement of Ay (HR October 12, 1993, NJ 1994, 159); the witness has not been questioned by the defense at any stage, although the defense has insisted on it, and has never been questioned by a judge (contrary to HR November 30, 1993, NJ 1994, 247).

Of course, it is also important to test the guiding judgment of your council HR February 1, 1994, NJ 1994, 427: in this case, the defense or the examining prosecutor has taken sufficient initiative to get the witness at the hearing, but without success; although the opportunity for interrogation was lacking, Ay's statement to the police was used as the only recognizing explanation for the evidence; there is therefore no question of any of the situations referred to under (ii) of this judgment and in the absence of appearance before any judge, nor of a situation as referred to under (iii-2) or (iii-3). Nor is the statement by Ay to the police, containing his identification of the Plaintiff, confirmed or supported by any other witness, let alone reinforced (HR May 10, 1994, NJ 1994, 643). The conclusion can therefore only be that in this case the main rule, as formulated by the ECHR, that testimony statements, made elsewhere than at the hearing, can only serve as the predominant evidence when the defense has had the opportunity to interrogate the witness, without prejudice to application.

(...)

² HR-acronym not found (possibly hearing/court case)

³ NJ-acronym not found (related to name of court case)

Supreme Court:**5. Assessment of the first plea**

(...)

5.7

In the Court's judgment and decision, as stated above under 5.6 (see under Court and Tribunal), it is decided that the decision of the tribunal to reject the request to include the photographic albums in the file and the grounds on which that decision is based has been accepted.

5.8

Part a of the grounds for appeal disputes the rejection of the request to include the photographic albums in the file. It argues to this end, that those photographic albums are to be regarded as procedural documents.

5.9

The concept of procedural documents is not defined in the law, nor is it regulated which officer decides on the composition of the file. Insofar as it concerns documents that may have an influence on the evidence, it must be assumed that - subject to the authority of the defense to submit documents to the court and the provisions of Art. 414 SV - the public prosecutor includes the documents containing the results of the criminal investigation to the file. If a preliminary investigation has been instituted, the examining prosecutor has a similar task with regard to the results of the judicial preliminary investigation. Documents must be included in the file that may reasonably be of relevance either in a manner liable to the suspect or in a way that may relieve him more. The foregoing does not detract from the fact that the judge can, either ex officio or at the request of the defense or at the request of the public prosecution, order the addition of certain documents to the file. Inspection of the procedural documents may not be withheld from the suspect and his counsel, except in the case of limited exceptions. Copies of the procedural documents are also provided.

5.10

In light of what has been considered above under 5.1 (see Court and Tribunal) regarding the nature of the photographic albums and their function in the criminal investigation, the Tribunal states that these photographic albums - in addition to the relevant documents belonging to the documents. The official report on the results of its use is related and adding the official report of the relevant photos of the suspect is justified – and not in and of itself should be regarded as procedural documents to be added to the file, no evidence of a wrong legal opinion. It is also not incomprehensible.

5.11

The case may arise that the defense challenges the reliability or legality of the acquisition of any means of proof. Such a defense must be examined. Principles of a proper procedural order entail that the defense should in principle not be denied access to documents that are of importance for the assessment of those questions, documents that are not part of the file. This does not mean that both the legal counsel and the defendant are automatically entitled to a copy or access to a legal plea as used by the police or other documentation.

5.12

The Court has ruled that in the present case, when considering the interests of the investigating authorities in future investigations into Dev Sol's extortion practices and the legitimate interests of the persons depicted in the aforementioned photographic albums, on the one hand, and the interests of the defense in the case of those albums, on the other hand, the interests referred to above are more important insofar as the accused cannot be permitted to view these albums; but the counselor will be given the opportunity to view the contents of those albums, however the counselor has refused to use them. That judgment does not show an error in law, in particular the Treaty provisions mentioned in the plea and this is not incomprehensible.

5.13

The foregoing means that the Court has been allowed to use the evidence provided in the submission as evidence and that the appeal to the Public Prosecutor has been dismissed on sufficient grounds. The parts a, b, c and e of the means thus fail.

5.14

The same applies to part d of the plea. This is necessary in view of Art. 101a RO⁴, no further justification needed, now that the complaint contained in that section does not call for legal questions to be answered in the interests of the unity of law or in the development of law.

6. Assessment of part c of the second submission

6.1

It follows from the above under 4 (see under Court and Tribunal) that the direct involvement of the accused in the proven claim 3 only appears from the findings in the official report from the municipal police in The Hague, which includes the statement of witness Ay, as shown above under 4.2 sub 10. Now that the documents do not contain anything from which it can be concluded that at any stage of the proceedings the defense had the opportunity to test and challenge this statement on its reliability by interviewing the person who made the statement as a witness, there is insufficient support in other means of proof, is the use of that statement in violation of the provisions of Art. 6 of the ECHR.

6.2

Consequently, the complaint contained in the second plea under (c) is substantiated.

7. Assessment

From the foregoing under 6 it is assumed - now that the Supreme Court finds no ground, on which the contested judgment should of itself be annulled - that the contested judgment, insofar as it is subject to the judgment of the Supreme Court, concerning the decisions given in respect to the offenses counted under 3 and the imposition of the sentence cannot be maintained, the second submission for the remainder as well as the third and fourth submission should not be discussed and reference must be made.

8. Decision

The Supreme Court:

Annuls the disputed judgment, insofar as it is subject to its judgment, but only with regard to the decisions made in connection to the offenses counted under 3 and the punishment; Refers the case to the Amsterdam Tribunal in order to be tried and dismissed again in the existing appeal; Rejects the appeal for the remainder.

Conclusion

Conclusion

A-G mr. Fokkens

1

In a judgment on February 6, 1995, the Tribunal in The Hague ordered the defendant on appeal - with acquittal of the offense under 1 – to serve up to three years and six months imprisonment due to threats of violence, theft and the gun possession on the public highway along with drawing a pistol with matching cartridge holder and cartridges and with forfeiture of a business card. The Plaintiff, who denies the facts in question, would have been guilty of violence and theft in the context of acquiring funds for the benefit of the Turkish human rights organization Dev Sol.

2

Mr E. Prakken, a lawyer in Amsterdam, presented four grounds of appeal by letter on behalf of the Plaintiff.

3

⁴ RO acronym not found

The first plea raises the question whether the photographic albums used by the police in the criminal investigation should be regarded as procedural documents, in that the Plaintiff could have been permitted to view those photographic albums.

4

It appears from the minutes of the hearing on appeal that the council asked to include the photo albums in the procedural documents in order to be able to check those photo albums for legitimate composition. When the judge suggested to the counselor that she would check the existing photographic albums at the hearing, she refused to make use of that opportunity (because of the principle nature of her request). The court then rejected the request, whereas: (etc.; see under Court and Court, ed.)

7

The plea contains various complaints. The essence of the complaint is formulated under (a): the Tribunal in error did not classify the photographic albums as procedural documents. The documents to be considered as such are determined by the requirements for a fair trial: the defense must be permitted to check and to contest the legality of the public prosecutor's actions and the evidence based on the material collected in the preliminary investigation. The photographic albums have not solely been used as means of investigation, because identification on the basis of these albums are the basis for the arrest of the Plaintiff and play an important role in the evidence. It is therefore 'material evidence' as referred to in ECHR December 16, 1992, Series A 247-B

And this means — considering ECRM 6 April 1995, NJCM bulletin 1995, p. 830–836 (Mulders/Netherlands) — that there has been a violation of the right to a fair trial safeguarded in Art. 6 ECHR as: (i) the Public Prosecutor has used material which was not available to the defense and this led directly to evidence, (ii) the defense was unable to verify the evidence, and (iii) the Public Prosecutor has an unreasonable advantage over the defense.

8

The remedy is based on the argument that the defense based on Art. 6(3)(b) ECHR — which provides the right ‘to have adequate facilities for the preparation of his defense’ — had to have access to the photo books.

9

In its report in the Jespers case (report of 14 December 1981, D&R 27, p. 87-88), the ECRM ruled that a person who has been convicted of a crime must be given the opportunity ‘to acquaint himself, for the purposes of preparing his defense, with the results of investigations carried out throughout the proceedings’ and that, even though this has not been set out as such by the ECHR, the right to access the file can be derived from the mentioned treaty provision (par.

56). The Commission also considered (par. 58) that this provision:

“recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction of his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary ‘facility’ (...) if (...) it concerns acts of which the defendant is accused, the credibility of testimony etc.’

10

The ECHR has in its judgement in the Edwards case specified what documents must be available to the defense. It considered (par. 36):

“The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (...) that the prosecution authorities disclose to the defense all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings.’

11

And in its report in the Mulders case, the ECRM considered (1(b), fifth paragraph):

“The documents submitted by the applicant disclose no appearance of a violation of the principle of equality of arms. It has not been alleged that the prosecution had used material which the applicant was unaware of, nor that the applicant's conviction was based on evidence that he could not challenge. It had furthermore not been argued that during the proceedings the domestic courts placed the prosecution in a more advantageous position than the applicant.

12

The suspect has, in his preparations for the defense, the right to study the results of the investigation concerning his case. If a document relates to the facts of which he is accused or the reliability of statements by witnesses, the suspect must have access to that document. It can be considered material evidence and the failure of the prosecuting authorities to inform him of the existence thereof leads to a violation of Art. 6 ECHR.

13

This means that in the case of the applicant, the right to information is not limited to studying the reports in which the (results of) the use of the photo books is set out. The photo books — material evidence in respect of the reliability of the recognition of the applicant serving as evidence — may not be kept from the defense as it wishes to study the reliability of the recognition.

14

The last sentence deliberately states that it cannot be kept from the ‘defence’ rather than the ‘applicant’. It is not certain whether the above right to study evidence means that the suspect always has the right to personally study the materials, in this case the photo books. This question must be answered in the negative, in my opinion. Since the right to interrogation by the lawyer can also be exercised without the presence of the suspect, the studying of certain documents by the lawyer can be sufficient to meet the requirements of a fair trial.

15

I want to immediately admit to the lawyer that such limitation to the right of studying materials can handicap the defense in certain circumstances. Whether this limitation is acceptable depends on the extent to which the defense is restricted in conjunction with the reasons why this restriction is applied.

16

The Court of Appeal agrees with the Court that the interests of the applicant in studying the photo books must be considered based on a) the interest of the police that the applicant and others become aware who may be registered as persons involved in Dev Sol, and b) the interests of the privacy of the other subjects.

17

I can understand the opinion of the Court of Appeal that the interests that object against further studying of the photo books by the applicant prevail. The defense has not made it clear why it is important that the applicant can access the photo book to assess the reliability of the recognition.

18

In this context, I refer to the judgement of the Supreme Court on the consideration of the interests of the defense in relation to other interests: *NJ* 1993, 209 (obstructing questions about observation methods), *NJ* 1994, 745 (obstruction questions about origins of observation posts) and SC 5–12–1995, no. 100.055 (*NJ* 1996, 422; *ed.*) (with respect to the form in which observations by observers based on Art. 152 DCCP are recorded, the general interest of the continued existence of information sources for the investigation of serious crimes by safeguarding their anonymity to avoid the risk of retaliation may reasonably be considered, as well as the interest that the effectiveness of the investigation is not threatened).

19

I consider the complaint set out under a) to be unfounded as — discussing the three arguments in succession — (i) the defense also had access to the material but did not make use of this possibility, (ii) the defense was thus able to verify the evidence, and (iii) there was no unfair advantage given to the Public Prosecutor over the defense.

20

The complaint set out under (b) — the Court of Appeal should have declared to Public Prosecutor inadmissible as the prosecution was largely based on recognitions in the photo books, which it refused to add to the file — cannot be upheld for the same reason. The conduct of the Public Prosecutor does not result in a violation of the right to a fair trial.

21

Complaints (c) reads: The Court of Appeal has erroneously considered the interest of the defense in adding the photo books to the file against the general interests of the investigation that oppose this. This consideration had to be made by the police when it decided to show the photo books to witnesses and declarants. When it did this, the photo books could no longer be kept hidden as an ‘investigation instrument for future suspects’.

Additionally, the argument of the Court of Appeal that the privacy of persons whose photos are included in the photo books object to granting insight to the suspect is not convincing.

22

Section (c) fails because the Court must rule whether any limitations to the rights of the defense are such that the suspect no longer has a fair trial. I have explained above that there has not been an unacceptable limitation of the rights of the defense and that the result of the consideration of interests is not incomprehensible.

(...)

24

To the extent that complaint (e) does not coincide with remedy 2, the above also shows that this section of the first remedy can also not be upheld. All sections of the remedy fail.

25

The second remedy contains the complaint that the evidence for the charge under 3 the official report of the officers Rimmelzwaan and Holtslag (numbered report p. 32) is used and that the statement of Ahmet Ay means that he recognizes the applicant in a mirror confrontation.

26

When assessing the remedy, the complaint set out in (c) must first be considered. This states that the statement of Ay is the only evidence which shows the involvement of the applicant in the charge set out under 3, or that the evidence thereof is mainly based on this statement, and that the defense — even though requested in the RC and in the appeal — has not been given the opportunity to hear Ay, while the provided evidence can also not be verified indirectly.

27

The evidence of the charge set out under 3 is based on the following: (etc. see below Court and Court of Appeal; *ed.*)

28

Only Ay refers to six men of whom one — the person threatening him with a gun — was wearing glasses, who he recognizes as the applicant. The statement of Kayahan used as evidence does not show how many men threatened him and Ay, nor does Kayahan refer to a man wearing glasses. The seizure of a business bearing the name of the partner of Celal at the applicant cannot directly demonstrate his involvement in the charge set out under 3; even though Ay and Kayahan have declared that they met with Celal shortly before they were threatened by a number of men, the applicant has not disputed that he at the moment of his arrest — three months after the fact — was in the possession of the business card of his partner and Ay has declared that paper slips with addresses were taken from him by the man wearing glasses, which does not demonstrate that the applicant has taken the business card from Ay. Finding the business card is nothing more than an indication that the applicant was at the location of the crime. Evidence 10.1 is the only evidence which directly shows the involvement of the applicants in the charge set out under 3.

29

The file contains two letters of the judge commissioner to the lawyer of the applicant. In the first letter of 7 January 1994, the judge commissioner informs the lawyer of his intention to hear Ay on 19 January. In the second letter of 20 January 1994, the judge commissioner informs the lawyer of his intention to hear Ay on 27 January. Nothing shows that Ay has been heard by the judge commissioner on either of these dates.

30

The file also contains a letter of the lawyer to the attorney general of 13 January 1995 in which she requests to summon Ay to be heard as a witness in the appeal hearing. The attorney general responded in a letter of 18 January 1995 that it based on the request of the lawyer has contacted the police and was informed that Ay was not registered with the aliens police and his residence could not be determined otherwise. Nevertheless, the attorney general did summon Ay to the appeal hearing but he has failed to appear.

31

The lawyer repeated her request in the hearing but the Court of Appeal refused it. Since the letter of the attorney general showed that Ay did not have a known residence and no residence permit, the Court of Appeal considered it unlikely that Ay would appear within an acceptable period and considered new summons to be useless.

32

In its judgement of 1 February 1994, *NJ* 1994, 427, the Supreme Court ruled that the use of an official report as evidence to the extent it concerned an incriminating statement not made at the hearing is not unlawful and is particularly not incompatible with Art. 6(1)(3), preamble, and under d ECHR. There is no such incompatibility if the defense during any phase of the proceedings, either in the hearing (in first instance and/or in appeal); cf. *SC NJ* 1994, 159, or beforehand, has had the opportunity to verify the reliability of such statement and contest it by hearing the person making such statement in the capacity as a witness. The defense is generally expected to show the necessary initiative. Cf. (COM for) *SC NJ* 1992, 481. The Supreme Court also ruled that it is not unlawful to use a statement as above as evidence if there was no opportunity to verify this statement for reliability and contest this, but this statement is largely supported by other evidence.

33

In the case of the applicant, the defense has not had any opportunity to verify or contest the statement by Ay to the police that he recognizes the applicant by hearing Ay as witness: he failed to appear at the supervisory judge or in the appeal hearing. The defense did not have any other, adequate opportunities to contest the statement of Ay; cf. my conclusion in *HR NJ* 1992, 481. The hearing of Kayahan in particular cannot be used as such as he did not recognize the applicant when he was shown the photo book which was also shown to Ay. Since — based on my arguments under 28 — the statement of Ay is not largely supported by other evidence, no reference to *HR NJ* 1994, 427 can be made concerning a case in which there is certainly no violation of the right to a fair trial.

34

This does not mean that there has not been a fair trial. In the judgments of the ECHR, violation of this right due to the inability to hear witnesses is particularly accepted if the right to interrogation by the defense could not be exercised due to acts by judicial authorities (even though there were understandable grounds, refer for example to ECHR *NJ* 1993, 707, nt. EAA (Windish) and 1994, 358 nt. Kn (Saudi)). In cases in which the prosecuting authority was not involved, for example (*NJ* 1988, 745), *Asch* (*NJ* 1993, 710) and *Arntner* (Human Rights Law Journal 1992, p. 461–463), the Court of Appeal was much more cautious with the acceptance of a violation of Art. 6. In my opinion, in the *Unterperfinger* case the decisive factor was that the defense was also not given the opportunity to contest the reliability of the (unheard) witnesses by hearing other witnesses.

35

This does not detract from the fact that the *Asch* and *Arntner* cases show that substantial supporting evidence is needed^[1] — especially because this case depends on the recognition of the applicant as the culprit — and it must be stated this supporting evidence is not present in this case. Finding the business card, as used as evidence by the Court of Appeal, is not sufficient. I consider the second remedy to be grounded.

(...)

This conclusion leads to nullification of the contested judgement concerning the charge set out under 3 and the conviction, referring the case to an adjacent court to consider the existing appeal and rejecting the other charges.

Note

Author: T.M. Schalken

Note

1

The suspect in this case is convicted for involvement with extortion activities for the Turkish organization Dev Sol. He was recognized by the police because of photo albums. Those photo albums were not included in the procedural files, although the photo recognition was not only used for the investigation, but also for the furnishing of evidence. Because the defendant, according to the defense, was denied access to evidence, [because] they could not verify the realization of the evidence and [because] the Public Prosecutor thus was favored over the defense, the Public Prosecutor had to be declared inadmissible. According to the defendant, the photo albums are to be recognized as procedural materials, and therefore access cannot be denied.

2

The Supreme Court agrees with that view. The reasoning that led to this conclusion comes down to the following. It is a rule that access to procedural materials may not be denied (art. 30–34 Sv). Procedural materials are materials that are part of the file or have to be part of the file. This means that the answer to the question what we can understand procedural materials to be is both factual and normative. In the file belong, according to the Supreme Court, materials that, potentially damaging or not damaging, are reasonably of importance for evidence, which include results of the investigation and preliminary judicial investigation (5.9). Access to procedural materials cannot be denied to the suspect and his / her lawyer, except for exceptions for a limited amount of time. The photo albums are, however, based on their nature and function in the investigation, not procedural materials that have to be included in the file (5.10). The Supreme Court differentiates between the photo albums that were used by the police in the investigation of the suspects and the result thereof for the proven facts in the official report. In the first instance it is a method of investigation and in the second instance it is a part of evidence. The Supreme Court agrees with the ruling by the court of appeal that the photo albums have to be qualified as a method of investigation and that they therefore not needed to be included to the file.

3

Nevertheless, there is the possibility, the Supreme Court continues, that the defense argues the reliability or legality of the obtaining of evidence. Access to documents (not being procedural files) that are of importance for such a defense, cannot be denied to the defendant (5.11). The principle of due process guarantee this. This does not mean that the suspect or his / her lawyer can ‘without further inspection’ demand a copy or access to a resource that the Police used. In this case the value of the investigation (that was served with the confidentiality of the identity of the other photographed persons in relation to future investigations to extortion practices of Dev Sol) carried more weight than the value of the defense (that was aimed at challenging the honesty and reliability of the recognition). That is why the suspect could not be allowed access, but his lawyer was able to examine the content of the photo albums at the hearing, what she denied both in the first and second instance of appeal.

4

The ruling of the Supreme Court explains, after the scarce case law about the right to inspect, certain broad lines. These are an extension of the Strasbourg case law. The law and practice have been in broad lines in accordance with the ECHR. The limitations of the right to inspect are permissible, because they are temporary and accompanied by guarantees. The real problem is not the completeness of the right to inspect, but the completeness of the file. About this issue in further detail K. Peters in NJCM-bulletin 1987, p. 509–524. P.A.M. Mevis in DD 1991, p. 28–40 and T. Prakken in NJB 1995/40, p. 1451–1458. The main question is: do the investigating and prosecuting authorities have a serious obligation to actively grant the suspect access to both damaging and non-damaging evidence, and does the defendant have enough opportunities to examine the completeness and question it? The Supreme Court has answered both questions in general wordings. This is without prejudice that police and law enforcement have room (or will adopt) to influence the way in which and the moment when information will be added to the file. Although competent authorities have to grant the suspect access to ‘all relevant elements’ (Jespers/Belgium, ECHR 14 December 1981, D&R 27), prosecuting authorities have to inform the defendant about ‘all material evidence’ (Edwards/United Kingdom, ECHR 16 December 1992, NJCM 18–4 (1993), p. 449), sometimes even when it involves documents that the prosecution doesn’t invoke (Bendenoun/Italy, ECHR 24 February 1994, NJCM 19–6 (1994), p. 723), this does not eliminate the fact that the defense always needs to have an adequate opportunity to examine this obligation of public law. It will thus always remain a duty of professional responsiveness of the lawyer to guard that the substance of the provision of information is respected: the right to inspect material and provide comment, follows directly from the right to adversarial proceedings, that is in its turn part of the right to a fair trial. About this issue in further detail Unterpertinger/Austria, ECHR 24 November 1986, NJ 1988, 745 (right to inspect as a consequence of a fair trial), Lamy/Belgium, ECHR 30 March 1989, NJCM 14–4 (1989), p. 467 (right to inspect as a part of adversarial proceedings), Ruiz Mateos/Spain, ECHR 23 June 1993, NJCM 19–2 (1994), p. 162 (further elaboration on adversarial proceedings), Brandstetter/Austria, ECHR 28 August 1991, NJCM 17–2 (1992), p. 173 (right to inspect as an element of the equality of arms-principle), Mulders/The Netherlands, ECHR 6 April 1995, NJCM 20–6 (1995), p. 830 (the prosecution shall not be favored over the defense).

5

If I view this correctly, the ruling of the Supreme Court is broader than that of the European Court. Indeed, the Supreme Court also allows the defendant, after a defense to that end, to examine the documents that are not included in the procedural file. This opportunity is, however, also hedged. The result of the weighing of interest determines the extent of the right to inspect. The Supreme Court already served itself, partly following the footsteps of the European Court, of the method of the weighing of interests (with the reasonable term, the calling of witnesses and the preclusion of questioning). The right intends to bring structure to the weighing of interests. This means that the most powerful parties in the Criminal proceeding have to acknowledge this structure and cannot reduce the weighing of interests to a magic formula that could be used to keep ‘difficult’ defenses from defendants away from the courtroom. When investigation and prosecution interests are brought up to limit a fundamental right as the right to information, the burden of proof will be with the prosecuting authority. The Public Prosecutor will have to introduce facts and substantial arguments to make it plausible that the investigation interest carries more weight than the defense. The recent IRT-history showed that the police and law enforcement sometimes, in higher interests, very easily found a justification for what was better to not expose to daylight. The public interest is not obvious. Moreover, every weighing of interests has a lower end. That is where serious doubt about the reliability of the evidence exists. The public interest can never outweigh the realistic risk that a suspect is wrongly convicted or convicted based on unreliable evidence. With this, a different general interest would be affected.

6

The weighing of interests is of importance when procedural materials are *not* involved, but other documents are that are of importance to the discussion of the defense. This implicates that the inclusion of procedural materials in the file cannot depend on a weighing of interests. That is the consequence of the ruling of the Supreme Court. In principle this is where the obligation to include and the right to inspect come together. Because with the composition of the file the weighing of interests cannot be a criteria, the discussion in practice will aim at the question which information will be deemed a procedural material. The difference created by the Supreme Court between a method of investigation and evidence has a selective meaning in this instance. A method of investigation can remain outside

of the file. The difference, however, seems artificial in situations in which the defense wants to point out the legality of the investigation and the reliability of the detected evidence. The status of a procedural material is inextricably connected with the right to access. Investigation means will not always, because of many practical objections, be included to the file. But if the applied investigative tool is a document and the defense wants to examine its evidentiary cleanliness, it could be difficult to deny the 'access to that document' to her (Jespers/Belgium). This leaves room for the possibility that different practical obstacles, for example, hearing an investigating officer, could be compensated. The benchmark is if the exonerating aspects with the investigation aren't neglected.

7

At the trial the lawyer, but not the suspect, was given the opportunity to access the photo material. She denied. To what extent can such a denial facilitate the presumption that the fair trial-principle has not been violated? That depends. Sometimes access at the trial does not really matter anymore. The right to inspect indeed exists up to a certain point during the pre-investigation, at least at vital moment, such as decisions concerning temporary custody (Lamy/Belgium). It is also possible that there is insufficient time granted for access. Too limited access can violate the right to sufficient time and facilities to prepare the defense (art. 6(3)(b)). The defendant is and the suspect is not granted the opportunity to inspect, is not solid. Strasbourg does not make a big deal out of this (Kamaniski/Austria, ECHR 19 December 1989, NJ 1994, 26 and Kremzow/Austria, ECHR 21 September 1993, NJCM 19-3 (1994), p.258). This does mean a further breakthrough of the in the Netherlands substantial principle that everything that is trusted to the defense, also has to be trusted to the suspect. That is of importance specifically when it is only the suspect that is able to appreciate certain information.

8

Still, the Supreme Court sets aside [the decision of the Court of Appeal] after an assist to that end from Attorney General Fokkens. Despite repeated requests, the lawyer has not been able to question the only witness the suspect recognized from the photo material. That carries a lot of weight if, as in this instance, there isn't sufficient supporting evidence. That is why this qualifies (for the first time I believe) as the exception situation as mentioned in HR 1 February 1994, NJ 1994, 427. The defense succeeded via the right to interrogate and not via the right to inspect.

Sch

Footnotes

[1]

According to German case law that has the same requirement. See Beck'sche Kurz-Kommentare, Strafprozessordnung, 42e Auflage, par. 250; Roxin, Strafverfahrensrecht, 24e Auflage, p. 69-71.

Wetboek van Strafvordering (Code of Criminal Procedure) [SV] art. 30(1).

Wetboek van Strafvordering

Artikel 30

- 1 De kennisneming van de processtukken wordt de verdachte op diens verzoek tijdens het voorbereidende onderzoek verleend door de officier van justitie. De kennisneming wordt de verdachte in elk geval toegestaan vanaf het eerste verhoor na aanhouding.

Code of Criminal Procedure

Article 30

- 1 The Public Prosecutor will grant the suspect access to the procedural materials at his request during the preparatory investigation. The suspect is at least granted access from the first interrogation after arrest onward.

Russia (Russian)

Russian Criminal Procedural Code Art. 215, 217

Статья 215. Окончание предварительного следствия с обвинительным заключением

[Уголовно-процессуальный кодекс РФ] [Глава 30] [Статья 215]

1. Признав, что все следственные действия по уголовному делу произведены, а собранные доказательства достаточны для составления обвинительного заключения, следователь уведомляет об этом обвиняемого и разъясняет ему предусмотренное статьей 217 настоящего Кодекса право на ознакомление со всеми материалами уголовного дела как лично, так и с помощью защитника, законного представителя, о чем составляется протокол в соответствии со статьями 166 и 167 настоящего Кодекса.

Статья 217. Ознакомление обвиняемого и его защитника с материалами уголовного дела

[Уголовно-процессуальный кодекс РФ] [Глава 30] [Статья 217]

1. После выполнения требования статьи 216 настоящего Кодекса следователь предъявляет обвиняемому и его защитнику подшитые и пронумерованные материалы уголовного дела, за исключением случаев, предусмотренных частью девятой статьи 166 настоящего Кодекса. Для ознакомления предъявляются также вещественные доказательства и по просьбе обвиняемого или его защитника фотографии, материалы аудио- и (или) видеозаписи, киносъемки и иные приложения к протоколам следственных действий. В случае невозможности предъявления вещественных доказательств следователь выносит об этом постановление. По ходатайству обвиняемого и его защитника следователь предоставляет им возможность знакомиться с материалами уголовного дела отдельно. Если в производстве по уголовному делу участвуют несколько обвиняемых, то последовательность предоставления им и их защитникам материалов уголовного дела устанавливается следователем.

2. В процессе ознакомления с материалами уголовного дела, состоящего из нескольких томов, обвиняемый и его защитник вправе повторно обращаться к любому из томов уголовного дела, а также выписывать любые сведения и в любом объеме, снимать копии с документов, в том числе с помощью технических средств. Копии документов и выписки из уголовного дела, в котором содержатся сведения, составляющие государственную или иную охраняемую федеральным законом тайну, хранятся при уголовном деле и предоставляются обвиняемому и его защитнику во время судебного разбирательства.

3. Обвиняемый и его защитник не могут ограничиваться во времени, необходимом им для ознакомления с материалами уголовного дела. Если обвиняемый и его защитник, приступившие к ознакомлению с материалами уголовного дела, явно затягивают время ознакомления с указанными материалами, то на основании судебного решения, принимаемого в порядке, установленном статьей 125 настоящего Кодекса, устанавливается определенный срок для ознакомления с материалами уголовного дела. В случае, если обвиняемый и его защитник без уважительных причин не ознакомились с материалами уголовного дела в установленный судом срок, следователь вправе принять решение об окончании производства данного процессуального действия, о чем выносит соответствующее постановление и делает отметку в протоколе ознакомления обвиняемого и его защитника с материалами уголовного дела.

4. По окончании ознакомления обвиняемого и его защитника с материалами уголовного дела следователь выясняет, какие у них имеются ходатайства или иные заявления. При этом у обвиняемого и его защитника выясняется, какие свидетели, эксперты, специалисты подлежат вызову в судебное заседание для допроса и подтверждения позиции стороны защиты.

5. Следователь разъясняет обвиняемому его право ходатайствовать:

1) о рассмотрении уголовного дела судом с участием присяжных заседателей - в случаях, предусмотренных пунктом 1 части третьей статьи 31 настоящего Кодекса. При этом следователь разъясняет особенности рассмотрения уголовного дела этим судом, права обвиняемого в судебном разбирательстве

и порядок обжалования судебного решения. Если один или несколько обвиняемых отказываются от суда с участием присяжных заседателей, то следователь решает вопрос о выделении уголовных дел в отношении этих обвиняемых в отдельное производство. При невозможности выделения уголовного дела в отдельное производство уголовное дело в целом рассматривается судом с участием присяжных заседателей;

1.1) о рассмотрении уголовного дела коллегией из трех судей федерального суда общей юрисдикции - в случаях, предусмотренных пунктом 3 части второй статьи 30 настоящего Кодекса;

2) о применении особого порядка судебного разбирательства - в случаях, предусмотренных статьей 314 настоящего Кодекса;

3) о проведении предварительных слушаний - в случаях, предусмотренных статьей 229 настоящего Кодекса.

Article 215 The Conclusion of a Preliminary Investigation with an Indictment

[Code of Criminal Procedure] [Chapter 30] [Article 215]

1. Recognizing that all investigative actions in the criminal case have been carried out, and that the evidence collected is sufficient to draw up an indictment, the investigator shall notify the accused of this and informs him of the right to familiarize himself with all the materials of the criminal case as provided in Article 217 of this Code, both personally and with the help of his defense counsel, legal representative, in regards to which a protocol shall be drawn up in accordance with Articles 166 and 167 of this Code.

Article 217 The Familiarization of the Accused and his Defense Counsel with the Criminal Case File

[Code of Criminal Procedure] [Chapter 30] [Article 217]

1. After fulfilling the requirement of Article 216 of this Code, the investigator shall submit to the accused and his defense counsel the filed and indexed criminal case file, with the exception of cases provided for by Part 9 of Article 166 of this Code. Material evidence shall also be provided for familiarization, and at the request of the accused or his defense counsel, photographs, audio and/or visual recordings,

video recordings, films, and other annexes to protocols of investigative activities. If the provision of material evidence is not possible, the investigator shall issue a decision on this. At the request of the accused and his defense counsel, the investigator shall provide them with the opportunity to familiarize themselves with the case file separately. If several defendants are involved in the criminal proceedings, the sequence of the submission of the case file to them and their defense counsels shall be established by the investigator.

2. In the process of familiarization with a case file comprising several volumes, the accused and his defense counsel are entitled to repeatedly have recourse to any of the volumes of the criminal case, as well as to excerpt any information and in any amount, and to make copies of documents, including with the use of technology. Copies of documents and extracts from the criminal case containing information constituting a state or other secret protected by federal law shall be held during the criminal case, and shall be provided to the accused and his defense counsel during the trial.

3. The accused and his defense counsel shall not be limited in the time required for them to become familiar with the case file. If the accused and his defense counsel, who have begun to familiarize themselves with the case file, obviously drag out the time they take to familiarize themselves with the specified materials, then on the basis of a court decision adopted in accordance with the procedure established by Article 125 of this Code, a set term shall be established for familiarization with the case file. In the event that the accused and his defense counsel, without a clear reason, fail to familiarize themselves with the case files within the term established by the court, the investigator is entitled to render a decision on the termination of the conduction of this procedural action, about which he shall issue a corresponding decision and make a note in the protocol on the familiarization of the accused and his defense counsel with the case file.

4. After the accused and his defense counsel have familiarized themselves with the case file, the investigator shall ascertain what petitions or other requests they have. In this regard, he shall find out from the defendant and his defense attorney which witnesses, experts and specialists are to be summoned to the court session for interrogation and confirmation of the case for the defense.

5. The investigator shall explain to the accused his right to petition:

1) for the consideration of a criminal case by a court with the participation of jurors - in the cases provided for by Paragraph 1 of Part Three of Article 31 of this Code.

At the same time, the investigator shall explain the peculiarities of the consideration the criminal case by this court, the rights of the accused in the trial, and the procedure for appealing the judgment. If one or more of the accused refuses a trial with the participation of a jury, the investigator shall decide whether to assign the criminal cases against these accused to separate proceedings. If it is not possible to separate the criminal case into a separate proceeding, the criminal case is generally considered by a court with the participation of jurors;

1.1) on the consideration of a criminal case by a panel of three judges of a federal court of general jurisdiction - in cases provided for by Paragraph 3 of Part Two of Article 30 of this Code;

2) on the application of a special procedure for judicial proceedings - in cases provided for in Article 314 of this Code;

3) on the conduction of preliminary hearings - in cases provided for in Article 229 of this Code.

Switzerland (German)

Art. 101 Akteneinsicht bei hängigem Verfahren

Die Parteien können spätestens nach der ersten Einvernahme der beschuldigten Person und der Erhebung der übrigen wichtigsten Beweise durch die Staatsanwaltschaft die Akten des Strafverfahrens einsehen; Artikel 108 bleibt vorbehalten.

Andere Behörden können die Akten einsehen, wenn sie diese für die Bearbeitung hängiger Zivil-, Straf- oder Verwaltungsverfahren benötigen und der Einsichtnahme keine überwiegenden öffentlichen oder privaten Interessen entgegenstehen.

Dritte können die Akten einsehen, wenn sie dafür ein wissenschaftliches oder ein anderes schützenswertes Interesse geltend machen und der Einsichtnahme keine überwiegenden öffentlichen oder privaten Interessen entgegenstehen.

Article 101 File review in the case of pending proceedings

The parties may review the files of criminal proceedings at the latest following the initial examination of the accused and the collection of remaining significant evidence by the prosecutor's office; Article 108 is reserved.

Other authorities may review the files if they require them in connection with handling pending civil, criminal or administrative proceedings and such review does not conflict with any overriding public or private interests.

Third parties may review the files if they claim a scientific or other legitimate interest and such review does not conflict with any overriding public or private interests.

Spain (Spanish)

Ley De Enjuiciamiento Criminal

Artículo 118.

1. Toda persona a quien se atribuya un hecho punible podrá ejercitar el derecho de defensa, interviniendo en las actuaciones, desde que se le comunique su existencia, haya sido objeto de detención o de cualquier otra medida cautelar o se haya acordado su procesamiento, a cuyo efecto se le instruirá, sin demora injustificada, de los siguientes derechos:

a) Derecho a ser informado de los hechos que se le atribuyan, así como de cualquier cambio relevante en el objeto de la investigación y de los hechos imputados. Esta información será facilitada con el grado de detalle suficiente para permitir el ejercicio efectivo del derecho de defensa.

b) Derecho a examinar las actuaciones con la debida antelación para salvaguardar el derecho de defensa y en todo caso, con anterioridad a que se le tome declaración.

c) Derecho a actuar en el proceso penal para ejercer su derecho de defensa de acuerdo con lo dispuesto en la ley.

d) Derecho a designar libremente abogado, sin perjuicio de lo dispuesto en el apartado 1 a) del artículo 527.

e) Derecho a solicitar asistencia jurídica gratuita, procedimiento para hacerlo y condiciones para obtenerla.

f) Derecho a la traducción e interpretación gratuitas de conformidad con lo dispuesto en los artículos 123 y 127.

g) Derecho a guardar silencio y a no prestar declaración si no desea hacerlo, y a no contestar a alguna o algunas de las preguntas que se le formulen.

h) Derecho a no declarar contra sí mismo y a no confesarse culpable.

La información a que se refiere este apartado se facilitará en un lenguaje comprensible y que resulte accesible. A estos efectos se adaptará la información a

la edad del destinatario, su grado de madurez, discapacidad y cualquier otra circunstancia personal de la que pueda derivar una modificación de la capacidad para entender el alcance de la información que se le facilita.

2. El derecho de defensa se ejercerá sin más limitaciones que las expresamente previstas en la ley desde la atribución del hecho punible investigado hasta la extinción de la pena.

El derecho de defensa comprende la asistencia letrada de un abogado de libre designación o, en su defecto, de un abogado de oficio, con el que podrá comunicarse y entrevistarse reservadamente, incluso antes de que se le reciba declaración por la policía, el fiscal o la autoridad judicial, sin perjuicio de lo dispuesto en el artículo 527 y que estará presente en todas sus declaraciones así como en las diligencias de reconocimiento, careos y reconstrucción de hechos.

3. Para actuar en el proceso, las personas investigadas deberán ser representadas por procurador y defendidas por abogado, designándoseles de oficio cuando no los hubiesen nombrado por sí mismos y lo solicitaren, y en todo caso, cuando no tuvieran aptitud legal para hacerlo.

Si no hubiesen designado procurador o abogado, se les requerirá para que lo hagan o se les nombrará de oficio si, requeridos, no los nombrasen, cuando la causa llegue a estado en que se necesite el consejo de aquéllos o haya de intentar algún recurso que hiciese indispensable su actuación.

Artículo 118 bis.

Del mismo modo que en el artículo anterior se procederá cuando se impute un acto punible contra un Diputado o Senador, los cuales podrán ejercitar su derecho de defensa en los términos previstos en el artículo anterior, y todo ello sin perjuicio de lo previsto en el artículo 71.2 y 3 de la Constitución española.

Law of Criminal Procedure

Article 118.

1. All individuals to whom a punishable act has been attributed shall be able to exercise the right to defense, participating in proceedings from the moment that the existence of said proceedings is communicated to them, the moment that they are

detained or are subject to any other protective order, or the moment where their processing has been agreed upon, and for such purposes they will be instructed, without unjustified delay, that they have the following rights:

- a) Right to be informed of the acts that are attributed to them, as well as any relevant change in the purpose of the investigation or the acts that they are accused of. This information shall be provided in sufficient detail to allow them to effectively carry out their right of defense.
- b) Right to examine the proceedings with the appropriate advance notice in order to safeguard their right of defense and in all cases, before any statements are taken from them.
- c) Right to act in criminal proceedings in order to execute their right of defense in accordance with that which is established in the law.
- d) Right to freely appoint an attorney, notwithstanding what is established in section 1 a) of article 527.
- d) Right to request free legal assistance, the procedure for doing so, and conditions for obtaining it.
- f) Right to obtain translation and interpretation services free of charge in accordance with articles 123 and 127.
- g) Right to remain silent and not to provide any statement if they do not wish to do so, and to not answer one or more questions that are asked of them.
- h) Right not to incriminate themselves or confess guilt.

The information referred to in this section shall be provided in comprehensible and accessible language. For these purposes, the information will be adjusted to the age of the recipient, their level of maturity, disability, or any other personal circumstances that can result in a change in their capacity to understand the scope of the information provided to them.

2. The right of defense is exercised without any limitations other than those expressly established in the law, from the attribution of the punishable act being investigated until the termination of the penalty.

The right of defense consists of the legal assistance of a freely designated attorney, or in his or her absence, a court-appointed attorney, with whom they shall be able to communicate and conduct interviews in private, even prior to a statement being taken by the police, the prosecuting attorney, or the judicial authority, notwithstanding what is established in article 527; and who will be present at all of their statements as well as in the recognition investigations, confrontation, and reconstructions of criminal acts.

3. In order to act in proceedings, investigated individuals must be represented and defended by an attorney, and when the parties themselves do not appoint one and they request it, and in all cases, when they do not have legal capacity to do so, the court shall appoint an attorney for them.

If no attorney has been appointed, they will be asked to appoint one, or one will be appointed by the court if once requested they do not do so when the case reaches a state in which their advice is needed or a legal action is attempted that requires their action.

Article 118 bis.

The way to proceed will be the same as in the previous article when the person accused of a punishable act is a Congressman or Senator, who shall be able to exercise their right of defense in the terms established in the previous article, all of which, notwithstanding what is established in article 71.2 and 3 of the Spanish Constitution.

Switzerland (German)

Art. 3 Achtung der Menschenwürde und Fairnessgebot

Die Strafbehörden achten in allen Verfahrensstadien die Würde der vom Verfahren betroffenen Menschen.

Sie beachten namentlich:

- a. den Grundsatz von Treu und Glauben;
- b. das Verbot des Rechtsmissbrauchs;
- c. das Gebot, alle Verfahrensbeteiligten gleich und gerecht zu behandeln und ihnen rechtliches Gehör zu gewähren;
- d. das Verbot, bei der Beweiserhebung Methoden anzuwenden, welche die Menschenwürde verletzen.

Art. 6 Untersuchungsgrundsatz

Die Strafbehörden klären von Amtes wegen alle für die Beurteilung der Tat und der beschuldigten Person bedeutsamen Tatsachen ab.

Sie untersuchen die belastenden und entlastenden Umstände mit gleicher Sorgfalt.

Article 3 Respect for human dignity and the requirement of fairness

The prosecuting authorities shall respect the dignity of all persons involved in the proceedings at all stages of such proceedings.

In particular, they respect:

- a. The principle of good faith;
- b. The ban on abuse of law;
- c. The requirement to treat all parties to the proceedings equally and justly and to grant them the right to be heard;
- d. The ban on the use of methods in the collection of evidence violating human dignity.

Article 6 Inquisitorial principle

The prosecuting authorities shall investigate ex officio all facts relevant to the assessment of the criminal offense and the accused.

They shall investigate incriminating and exculpating circumstances with equal care.

CERTIFICATIONS



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City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, “**(Code of Criminal Procedure) Section 3 para 2, and 51 para 1**” is, to the best of my knowledge and belief, a true and accurate translation from German into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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File Name(s): CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.]
art. 21bis (Belg.)
Source Language(s) French
Target Language(s) English

Authorized Signature:

Claire Skrabutenas

Project Manager

January 10, 2018

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State of California }

County of San Francisco }

On Jan 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)

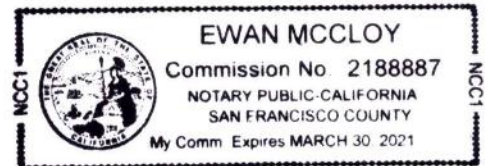
personally appeared Claire Skrabutenas,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public Signature

(Notary Public Seal)



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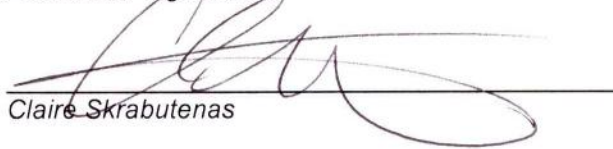
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CERTIFICATION

TransPerfect is globally certified under the standards ISO 9001:2015 and ISO 17100:2015. This Translation Certificate confirms the included documents are, to the best knowledge and belief and within the given parameters, of all TransPerfect employees engaged on the project, full and accurate translations of the source material.

File Name(s): CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.]
art. 28bis (Belg.)
Source Language(s) French
Target Language(s) English

Authorized Signature:



Claire Skrabutenas

Project Manager

January 10, 2018

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State of California }

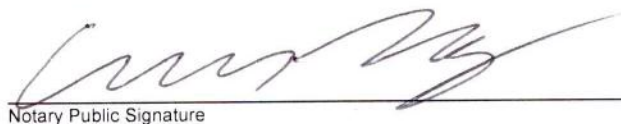
County of San Francisco }

On Jun 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)

personally appeared Claire Skrabutenas,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

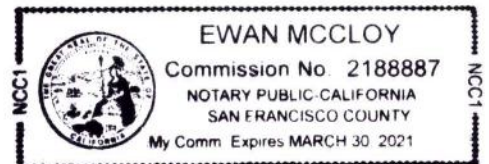
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Notary Public Signature

(Notary Public Seal)



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File Name(s): CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.]
art. 56, (Belg.)
Source Language(s) French
Target Language(s) English

Authorized Signature:

Claire Skrabutenas

Project Manager

January 10, 2018

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State of California }

County of San Francisco }

On Jan. 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)

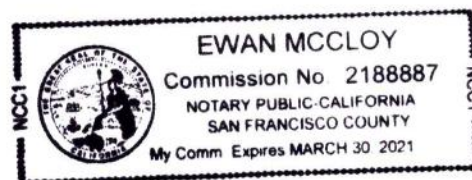
personally appeared Claire Skrabutenas,
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I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public Signature

(Notary Public Seal)



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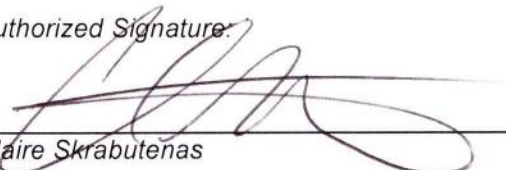
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File Name(s): CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.]
art. 61ter (Belg.)
Source Language(s) French
Target Language(s) English

Authorized Signature:



Claire Skrabutenas

Project Management

January 10, 2018

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State of California }

County of San Francisco }

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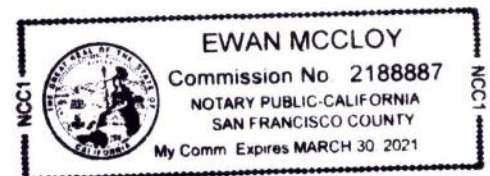
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Notary Public Signature

(Notary Public Seal)



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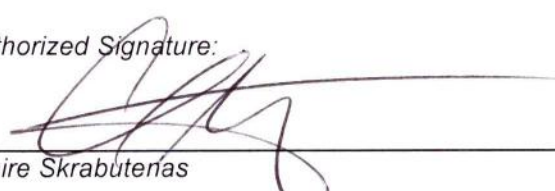
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File Name(s): LOI RELATIVE A LA DETENTION PREVENTIVE [Law of Pretrial Detention] art. 21 § 3
(Belg.)
Source Language(s) French
Target Language(s) English

Authorized Signature:



Claire Skrabuterias

Project Manager

January 10, 2018

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State of California }

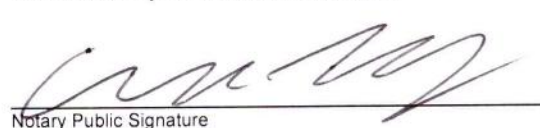
County of San Francisco }

On Jan 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)

personally appeared Claire Skrabuterias
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

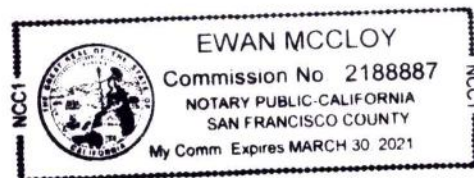
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



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File Name(s): LOI RELATIVE A LA DETENTION PREVENTIVE [Law of Pretrial Detention] art. 22
(Belg.)
Source Language(s) French
Target Language(s) English

Authorized Signature:

Claire Skrabutenas

Project Manager

January 10, 2018

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State of California }

County of San Francisco }

On Jan. 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)

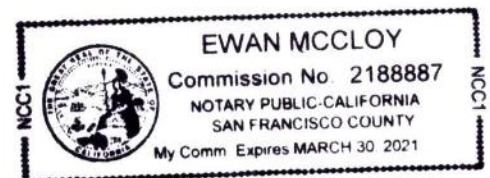
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Notary Public Signature

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CERTIFICATION OF TRANSLATION

State of New York)
)ss
County of New York)

Elena Hadjimichael, being duly sworn, deposes and says:

I, Elena Hadjimichael, have reviewed "**Hof van Cassatie [Cass.] [Court of Cassation], Dec. 19, 2012, Arr.Cass. 2012, 1310 (Belg.)**," and based on my fluency in both English and French, consultation with a colleague also fluent in both English and French, and supplemental research, I hereby certify that the document, "**Hof van Cassatie [Cass.] [Court of Cassation], Dec. 19, 2012, Arr.Cass. 2012, 1310 (Belg.)**", is, to the best of my knowledge and belief, a true and accurate translation from French to English.

Elena Hadjimichael
Elena Hadjimichael

Sworn to before me this 10th day of
January ~~10~~, 2018

Suzanne Chalpin Alenick
Notary Public

SUZANNE CHALPIN ALENICK
Notary Public State of New York
No. 02AL4920942
Qualified in New York County
My Commission Expires January 25, 2018



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File Name(s): CODE D'INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [C.I.CR./SV.]
art. 216 (Belg.)
Source Language(s) French
Target Language(s) English

Authorized Signature:



Claire Skrabutenas

Project Manager

January 10, 2018

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State of California }

County of San Francisco }

On Jan. 10, 2018 before me, Ewan McCloy, Notary Public
(Here insert name and title of officer)

personally appeared Claire Skrabutenas
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

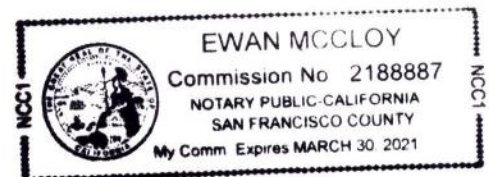
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Notary Public Signature

(Notary Public Seal)



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I, Aurora Landman, hereby certify that the document, **“PENAL PROCEDURE CODE OF THE REPUBLIC OF BULGARIA, art. 227(8).”** is, to the best of my knowledge and belief, a true and accurate translation from Bulgarian into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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I, Aurora Landman, hereby certify that the document, "**CRIMINAL PROCEDURE CODE OF CHILE, art. 77, 93; ACT OF PUBLIC PROSECUTION OFFICE, art. 1, 3**" is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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I, Aurora Landman, hereby certify that the document, **“ZAKON O KAZNENOM POSTUPKU [CRIMINAL PROCEDURE CODE], art. 184(2)(1) (Croat.)”** is, to the best of my knowledge and belief, a true and accurate translation from Croatian into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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I, Aurora Landman, hereby certify that the document, **“ZAKON O KAZNENOM POSTUPKU [CRIMINAL PROCEDURE CODE], art. 1(1) (Croat.)”** is, to the best of my knowledge and belief, a true and accurate translation from Croatian into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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File Name(s): Kriminaalmenetluse seadustik [Code of Criminal Procedure] art. 34
 Source Language(s) Estonian
 Target Language(s) English

Authorized Signature:

Claire Skrabutenas

Project Manager

January 10, 2018

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California }

County of San Francisco }

On Jan. 10, 2018 before me, Ewan McCloy, Notary Public
(Here insert name and title of officer)

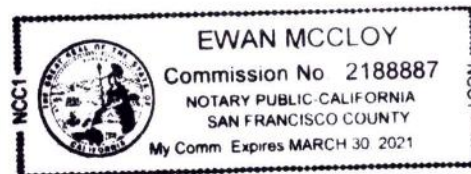
personally appeared Claire Skrabutenas
 who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public Signature

(Notary Public Seal)



LANGUAGE AND TECHNOLOGY SOLUTIONS FOR GLOBAL BUSINESS



City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, “**Finland Criminal Procedure Act Chapter 5(b) Section 3**” is, to the best of my knowledge and belief, a true and accurate translation from Finnish into English (US).

A handwritten signature in black ink, appearing to be 'Aurora Landman', written over a horizontal line.

Aurora Landman

Sworn to before me this
January 10, 2018

A handwritten signature in black ink, appearing to be 'Wendy Poon', written over a horizontal line.

Signature, Notary Public



Stamp, Notary Public

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CERTIFICATION

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File Name(s): Code de procédure pénale [C. pr. pén.] art. 81, 82-1.

Source Language(s) French

Target Language(s) English

Authorized Signature:

Claire Skrabutenas

Project Manager

January 10, 2018

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California }

County of San Francisco }

On Jan. 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)

personally appeared Claire Skrabutenas,
 who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public Signature

(Notary Public Seal)



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I, Aurora Landman, hereby certify that the document, “**CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 495-8 (Fr.)**” is, to the best of my knowledge and belief, a true and accurate translation from French into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, "**STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] § 147(1) (Ger.)**" is, to the best of my knowledge and belief, a true and accurate translation from Germany into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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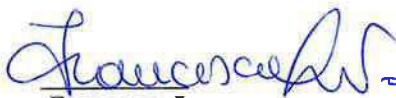
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601 Lexington Avenue
31st Floor
New York, NY 10022
www.freshfields.com

CERTIFICATION OF TRANSLATION

State of New York)
)ss
County of New York)

Francesca Loreto, being duly sworn, deposes and says:

I, Francesca Loreto, hereby certify that the document,
“Codice di procedura penal [C.p.p] art. 358, 415bis
(It.),” is, to the best of my knowledge and belief, a true
and accurate translation from Italian into English (US).



Francesca Loreto

Sworn to before me this ^{7th}~~10~~ day of
January ~~10~~, 2018



Notary Public

SUZANNE CHALPIN ALENICK
Notary Public State of New York
No. 02AL4920942
Qualified in New York County
My Commission Expires January 25, 2018



Freshfields Bruckhaus Deringer US LLP

New York
601 Lexington Avenue
31st Floor
New York, NY 10022
www.freshfields.com

CERTIFICATION OF TRANSLATION

State of New York)
)ss
County of New York)

Francesca Loreto being duly sworn, deposes and says:

I, Francesca Loreto, hereby certify that the document,
“Corte Cost., 16 April 2002, n. 120 (It.),” is, to the best
of my knowledge and belief, a true and accurate
translation from Italian to English (US).


Francesca Loreto

Sworn to before me this 10th day of
January ~~10~~, 2018


Notary Public

SUZANNE CHALPIN ALENICK
Notary Public State of New York
No. 02AL4920942
Qualified in New York County
My Commission Expires January 25, 2018



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TransPerfect is globally certified under the standards ISO 9001:2015 and ISO 17100:2015. This Translation Certificate confirms the included documents are, to the best knowledge and belief and within the given parameters, of all TransPerfect employees engaged on the project, full and accurate translations of the source material.

File Name(s): Baudžiamojo Proceso Kodekso Patvirtinimo [Code of Criminal Procedure] art. 181 .
 Source Language(s) Lithuanian
 Target Language(s) English

Authorized Signature:


 Claire

Project Manager

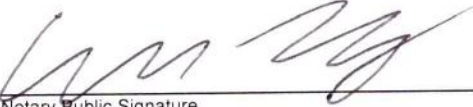
January 10 2018

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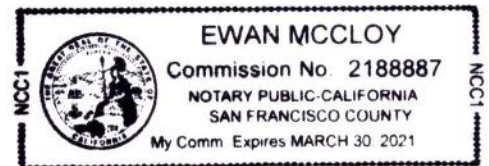
State of California }
 County of San Francisco }
 On Jan- 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)
 personally appeared Claire Skrabutenas,
 who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.


 Notary Public Signature

(Notary Public Seal)



LANGUAGE AND TECHNOLOGY SOLUTIONS FOR GLOBAL BUSINESS



City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, “**CODE D'INSTRUCTION
CRIMINELLE ART. 564 [Lux.]**” is, to the best of my knowledge and belief, a true and
accurate translation from French into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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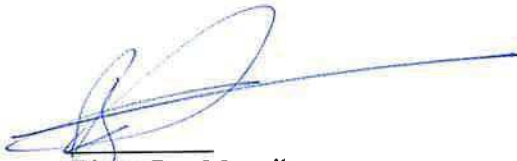
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31st Floor
New York, NY 10022
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CERTIFICATION OF TRANSLATION

State of New York)
)ss
County of New York)

Pieter Bas Munnik being duly sworn, deposes and says:

I, Pieter Bas Munnik, have reviewed "**Wetboek van Strafvordering (Code of Criminal Procedure) [SV] art. 30(1) (Neth.)**," and based on my fluency in both English and Dutch and assistance from a professional translation service, I hereby certify that the document, "**Wetboek van Strafvordering (Code of Criminal Procedure) [SV] art. 30(1) (Neth.)**", is, to the best of my knowledge and belief, a true and accurate translation from Dutch to English.


Pieter Bas Munnik

Sworn to before me this 10th day of
January 10, 2018

Guy G. Locksmith
Notary Public

GUY G. LOCKSMITH
Notary Public, State of New York
No. 4959713
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires February 3, 2018



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New York
601 Lexington Avenue
31st Floor
New York, NY 10022
www.freshfields.com

CERTIFICATION OF TRANSLATION

State of New York)
)ss
County of New York)

Pieter Bas Munnik, being duly sworn, deposes and says:

I, Pieter Bas Munnik, have reviewed “**HR 7 mei 1996, NJ 1996, 687 m.nt. T.M. Schalken (Dev Sol) (Neth.)**,” and based on my fluency in both English and Dutch and assistance from a professional translation service, I hereby certify that the document, “**HR 7 mei 1996, NJ 1996, 687 m.nt. T.M. Schalken (Dev Sol) (Neth.)**”, is, to the best of my knowledge and belief, a true and accurate translation from Dutch to English.


Pieter Bas Munnik

Sworn to before me this 10th day of
January 10, 2018


Notary Public

GUY G. LOCKSMITH
Notary Public, State of New York
No. 4959713
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires February 3, 2018



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City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, “**Russian Criminal Procedural Code Art. 215, 217**” is, to the best of my knowledge and belief, a true and accurate translation from Russian into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, "**Ley De Enjuiciamiento Criminal Artículo 118.**" is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English (US).

Aurora Landman

Sworn to before me this
January 10, 2018

Signature, Notary Public



Stamp, Notary Public

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File Name(s): Schweizerische Strafprozessordnung [StGB] [Criminal Code] Oct. 5, 2007, art. 101.
 Source Language(s) German
 Target Language(s) English

Authorized Signature:

Claire Skrabutenas

Project Manager

January 10, 2018

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California }

County of San Francisco }

On Jan. 10, 2018 before me, Ewan McCloy, Notary Public,
(Here insert name and title of officer)

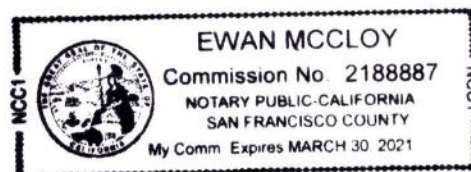
personally appeared Claire Skrabutenas,
 who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public Signature

(Notary Public Seal)



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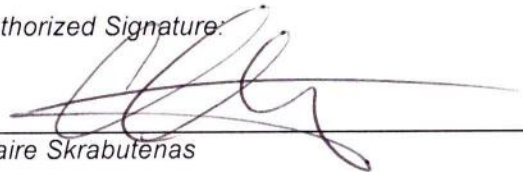
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File Name(s): Schweizerische Strafprozessordnung [StGB] [Criminal Code] Oct. 5, 2007, art. 3(c), 6.
 Source Language(s) German
 Target Language(s) English

Authorized Signature:


 Claire Skrabutenas

Project Manager

January 10, 2018

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State of California }

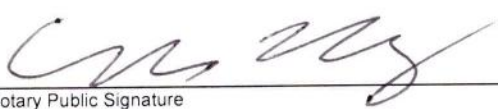
County of San Francisco }

On Jan. 10, 2018 before me, Ewan McCloy, Notary Public
(Here insert name and title of officer)

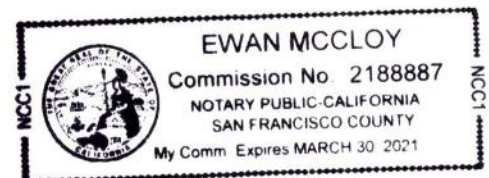
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