



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BRUNELL AND MCARDLE v. THE NETHERLANDS

(Applications nos. 30395/20 and 31220/20)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Overturning of the applicants' acquittal by the Court of Appeal, which reassessed the facts and their guilt while relying on a key witness's decisive testimony without hearing him in person, despite his credibility being central to the case and seriously called into question • Lack of a direct assessment of the witness's reliability • Failure to rehear the witness not remedied by the Supreme Court • Non-compliance with the principle of immediacy

Art 41 • Just satisfaction • Reopening of domestic proceedings most appropriate form of redress

Prepared by the Registry. Does not bind the Court.

STRASBOURG

1 September 2026

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Brunell and McArdle v. the Netherlands,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lado Chanturia, *President*,

Lorraine Schembri Orland,

Faris Vehabović,

Anja Seibert-Fohr,

Ana Maria Guerra Martins,

Anne Louise Bormann,

Corinna Wissels, *judges*,

and Simeon Petrovski, *Deputy Section Registrar*,

Having regard to:

the applications (nos. 30395/20 and 31220/20) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Irish nationals, Mr Kenneth Brunell (“the first applicant”) and Mr Barry McArdle (“the second applicant”), on 16 July 2020 and 17 July 2020;

the decision to give notice to the Government of the Kingdom of the Netherlands (“the Government”) of the complaints concerning Article 6 §§ 1 and 3 (d) of the Convention, and to declare the remainder of the applications inadmissible;

the parties’ observations;

Having deliberated in private on 2 and 30 June 2026,

Delivers the following judgment, which was adopted on that last-mentioned date:

INTRODUCTION

1. The case concerns the alleged unfairness of the criminal proceedings against the applicants. After being acquitted at first instance, they were convicted on appeal without the appellate court directly hearing witness X, whose evidence had not been heard by the court which ultimately convicted them. The applicants complained of a violation of Article 6 § 1 of the Convention.

THE FACTS

2. The first applicant was born in 1986 and is currently in detention in Alphen aan den Rijn. The second applicant was born in 1985 and is currently in detention in Westzaan. They are represented before the Court by Ms J. Kuijper, a lawyer practising in Amsterdam, and Mr N. van Schaik, a lawyer practising in Utrecht.

3. The Government are represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. MURDER INVESTIGATION AND STATEMENT BY WITNESS X

5. On 24 February 2009 the body of a man ("K.E.") was discovered on the bank of the dyke known as the Diemerzeedijk in Amsterdam. The victim's head and lower limbs had been separated from the torso and the separate body parts had been deposited in a suitcase and several plastic waste bags.

6. Following the discovery of the victim's body, a large-scale criminal investigation was launched. The forensic examination established that the victim had died as a result of one or more stab wounds. The police further established that the victim had been active in the criminal underworld and was wanted by the Irish authorities.

7. From the forensic findings, the police investigators determined that the victim had been killed in his apartment in Rotterdam. Based on an examination of the telephone traffic data for his number, they concluded that he had been killed in the evening of 17 February 2009. Telecommunications data further showed that X had been staying in that apartment during the relevant period. He was accordingly treated as a suspect.

8. X was arrested in Ireland and extradited to the Netherlands, where he was questioned on several occasions by both the police and the investigating judge (*rechter-commissaris*). X initially invoked his right to remain silent. However, after having been given access to the case file and the investigation results, he made a statement alleging that the applicants had been responsible for the killing. During interviews conducted between 9 May and 12 July 2011, X provided further details regarding his and the applicants' involvement in the manslaughter and disposal of the victim's body.

9. In particular, X stated that the applicants had been wanted by the Irish police and had therefore come to the Netherlands. He contended that he barely knew them, but that they had been staying in his Rotterdam apartment. He said that, on the evening of 17 February 2009, they had visited the second applicant's uncle and aunt and had had a few drinks. X had received a call from the victim, after which it was agreed that they would meet at the Rotterdam apartment to drink and play computer games. X said that, shortly after they had arrived, he had left to buy drinks. When he had returned about 20 minutes later, he had found the second applicant crying. The second applicant had told him that he had argued with the victim, that the victim had become angry, grabbed a knife and attacked him. X further stated that the first applicant had added that he had seen the victim attack and, in an attempt to protect the second applicant, had stabbed the victim in the back. The victim had dropped the knife, which the second applicant had then used to stab him in the neck.

10. X also maintained that the three men had then gone to the victim's apartment in Mijdrecht in his car and the victim's rental car. The next day, the first and second applicants had cut up the victim's body with a chainsaw and placed the remains in the rental car. He also asserted that, on 23 February 2009, they had returned to the Rotterdam apartment to clean it and had taken the victim's belongings to sell to a car dealer. That evening, they had driven to Amsterdam, where the first and second applicants had dumped the body in the water while he, X, had acted as lookout. They had then abandoned the rental car, left in X's vehicle and had driven to France to board a ferry to England.

11. Based on X's incriminating statements, the second applicant was arrested in Ireland on 27 July 2011 and the first applicant on 3 October 2011. They were charged with the intentional and premeditated killing of K.E., either together and in association with others or alone, and with participating in the unlawful disposal of the victim's body.

12. On 10 December 2015 X was examined by the investigating judge in the presence of the counsel for the applicants. He was questioned by the investigating judge, the applicants' counsel and the public prosecutor about his statements concerning the events he alleged had occurred on the day of the victim's death and in the days that followed.

II. PROCEEDINGS AT FIRST INSTANCE AND ACQUITTAL OF THE APPLICANTS

13. The Amsterdam Regional Court held hearings on 6, 10 and 12 April 2017 as well as on 1 May 2017. The first applicant attended the hearings on 6, 10 and 12 April 2017, where he answered questions from the Regional Court. He did not attend the hearing on 1 May 2017 but was represented by counsel. The second applicant was present at the hearing on 6 April 2017 and responded to the Regional Court's questions. In their statements, the applicants denied their involvement in the alleged offences.

14. The applicants stated that they had indeed been in the Netherlands and had been staying with X, but that they had had nothing to do with the victim's death. They maintained that they had never met the victim. They confirmed that they had met the second applicant's aunt in Amsterdam on 17 February 2009 and had then driven to Rotterdam. However, they stated that X had dropped them off at a strip club and picked them up several hours later. They added that they could not have returned to the apartment where they had been staying because, according to X, his friends had been busy with something there. X had brought their clothes with him, and they had driven with him to an apartment in Mijdrecht. According to their account, that apartment belonged to Z – a friend of X – and they had been allowed to stay there.

15. During the court hearing, the applicants further stated that they had been given the use of that same friend's car for several days. At the hearing,

the applicants added that the car had had to be returned either the day before or on the day they left for England *via* France. Z had allegedly driven the car away, and the applicants had later picked him up somewhere in X's own vehicle.

16. During the proceedings, X's statements were examined. As no decisive forensic evidence was available to prove the applicants' involvement in the murder or manslaughter, the Regional Court considered that the case was mainly about assessing the reliability of X's statements and the credibility of the applicants.

17. In a judgment of 15 May 2017, the Regional Court found the applicants guilty of jointly and unlawfully disposing of a body, but not guilty of murder or manslaughter. Each applicant was sentenced to two years' imprisonment. The Regional Court considered X's statements to be insufficiently reliable to establish beyond reasonable doubt the applicants' involvement in the murder or manslaughter of the victim. It reasoned as follows:

"Although [X]'s statement is corroborated in certain important respects by other evidence, this does not automatically mean that his statement is also correct as regards the role played by [the applicants] in [K.E.]'s death. [X] places himself outside the apartment at the time when [K.E.] was killed. He states, after all, that shortly after arriving at the apartment in Rotterdam he left to buy alcohol. He maintains that when he returned, he found [K.E.] dead in the apartment.

But this explanation – that during the period of only about 20 minutes when he was absent, a person was brutally killed by several stab wounds following a sudden argument about a poorly received remark – does not necessarily seem the most likely scenario. It should also be borne in mind that [X] did not immediately report this of his own volition, and that he made this statement only after it became clear to him that the police could establish, from mobile telephone tracking data, that he was one of those present at the crime scene around the time of death. It follows that a high standard must be applied to the verifiability of his statement, and especially this part of it. However, this high standard is not met in view of the following.

From the mobile telephone tracking data, it seems highly likely that it was not [X] – who, as noted above, used phone number *2759 – who left the apartment for a time during the evening of 17 February 2009. On the contrary, if anyone left the apartment at that time, it was probably [the first applicant]. After all, the number *6271, which was used by [the first applicant], was tracked from 9.59 p.m. to 10.28 p.m. not in Louise de Colignylaan (near [X]'s apartment) but elsewhere in Rotterdam and in Delft. In that period, that number had contact with number 35*8019 of the above-mentioned [O]. No mention is made by [X] in his statement of [the first applicant] temporarily leaving the apartment. Nor of telephone contact between [O] and himself.

In view of this, the court considers that [X]'s statement about just happening to be absent when [K.E.] was killed is not plausible.

Moreover, according to [X] there were two stab wounds: one in the back and one in the neck. As the victim was lying on his back when [X] saw him, he only observed the stab wound in the neck. However, it is apparent from the case file that the victim had several stab wounds on his head, the most noticeable being a large wound on his chin.

[X] made no mention whatsoever of this in his statement. It is unlikely that [X] failed to notice that serious wound and did not confront [the applicants] about it, who had allegedly told him a story just beforehand which, in view of that injury, was patently incorrect (or incomplete).

[X]’s statement therefore leaves too many questions unanswered to serve as a basis for determining the actual circumstances surrounding the death of [K.E.] In making this assessment, the court has taken into account the real possibility that [X] himself was responsible (or partly responsible) for the death of [K.E.] and that his statement incriminating [the applicants] was prompted by a desire to exonerate himself. Ultimately, the standard of proof that a person has committed a criminal offence is beyond any reasonable doubt. [X]’s statement simply does not satisfy that criterion.

Although it is plausible that [the applicants] know more than they have stated so far, the court considers that the evidence against these two suspects is not sufficiently convincing to warrant a finding, in the absence of a statement refuting that evidence, that the only possible conclusion is that they committed the murder or manslaughter of [K.E.].

In view of all these considerations, the court finds that the defendant, like his co-defendants, should be acquitted of the charges of murder and manslaughter.”

III. PROCEEDINGS BEFORE THE COURT OF APPEAL AND CONVICTION OF THE APPLICANTS

18. The public prosecutor appealed against the judgment concerning the applicants before the Amsterdam Court of Appeal.

19. The appeal hearings took place on 5 and 6 April, and again on 7 May 2018. The applicants did not attend, but were represented by counsel. During one of the hearings, the second applicant’s counsel submitted a conditional request to examine X and the first applicant, should the Court of Appeal assess the evidence against the applicant in a way that required him to provide a statement in response.

20. In a judgment of 17 May 2018, the Amsterdam Court of Appeal overturned the Amsterdam Regional Court’s judgment and convicted the applicants of jointly committing manslaughter and unlawfully disposing of a body. The court sentenced each applicant to 13 years’ imprisonment.

21. In its judgment it dismissed the conditional request made by the second applicant to re-examine X and the first applicant, holding that the request had not been sufficiently substantiated, and that re-examination was not necessary:

“At the appeal hearing, the defence requested that the case be adjourned in order to allow the defendant to be examined and in order to examine [the first applicant] and [X] (or have them examined) as witnesses if the Court of Appeal considered the evidence against the defendant in a way that required him to provide a statement refuting it. As regards the request to examine [X] (or have him examined), the defence counsel has argued that X’s situation is now different because he has been acquitted of the murder/ manslaughter of [the victim] by final and unappealable judgment and is not entitled in this regard to invoke his right to decline to give evidence.

The Court of Appeal holds as follows.

In view of what has been considered above with regard to the role of the defendant, the condition specified in the requests has been satisfied.

The Court of Appeal considers that the requests made by the defence have been insufficiently substantiated.

Moreover, in view of the timing of the defence counsel's request to examine witnesses, the Court of Appeal will apply the necessity criterion in deciding on the request. As regards the request to examine [X] as a witness, the Court of Appeal notes that he has already been examined by the investigating judge in the presence of the defence. The Court of Appeal does not consider it necessary for the co-defendants [X] and [the first applicant] to be examined as witnesses. This is not altered by the fact that the judgment in [X]'s case is final and unappealable. These requests are therefore denied."

22. As to the reliability of the statements made by X and those made by the applicants, the Court of Appeal observed that the applicants' account of having been absent from the apartment on the evening of the killing lacked credibility. Telephone tracking data showed that their mobile telephones had remained in or near the apartment throughout the relevant period. In view of that objective evidence, the applicants' assertion that they had not visited the apartment that night and had instead spent several hours in a strip club was considered implausible.

23. The Court of Appeal further held that X's statements were sufficiently corroborated in important aspects by other evidence, and could therefore be relied upon:

"Conclusive forensic evidence is not available in this case. It is mainly a matter of assessing the reliability of the statements made by [X] and the credibility of [the applicants] (and their statements). Moreover, [X]'s statements incriminating [the applicants], in which he said they were responsible for the death of [K.E.], were made only after he had become aware of the findings of the Dutch police known up to that time. For that reason, these statements should be treated with caution and it is necessary to examine whether they are sufficiently corroborated by other evidence. The following is important in this connection.

...

Not only is [X]'s statement regarding the presence of the defendants at the crime scene (in both Rotterdam and Amsterdam) confirmed by the mobile telephone tracking data but parts of the statement are also confirmed by other investigative findings. For example, the movements – after [K.E.]'s death – as described by [X] are corroborated by mobile telephone data, [...] witness [G] confirmed that he had been visited at his business by Englishmen (in an Audi) from whom he had purchased electronic equipment, and the plug of the chainsaw that was found contains [the second applicant's] DNA. Moreover, the report of the Netherlands Forensic Institute (NFI) relating to this match with [the second applicant's] DNA profile is dated 13 May 2015. That date was therefore long after the first statement made by [X] incriminating the [applicants].

...

Traces of [K.E.]’s DNA were found on the chainsaw. Traces of textiles that match the fabrics in which [K.E.]’s body parts were wrapped were also found on the chainsaw. [X] stated that he had heard [the second applicant] state that he had dismembered [K.E.]’s body with a chainsaw and that that chainsaw had been purchased for that purpose after [K.E.]’s death. That statement by [X] is (partly) corroborated by the trace matter found, as well as by the pathologist’s finding that the injuries to [K.E.]’s bones at the places where his body was dismembered were consistent with saw cuts.

In view of all this, the only possible conclusion is that the chainsaw concerned was used to dismember [K.E.]’s body and that in the process [the second applicant] left his DNA on the plug. Moreover, the fact that the DNA of both [K.E.] and [the second applicant] was found on this chainsaw means that the [the second applicant’s] repeated assertion that he had never met [K.E.] and had nothing to do with his death or with his corpse or its disposal is utterly implausible and indeed not credible.

...

The Court of Appeal therefore considers that the statements made by [X], which, as noted above, are corroborated in certain important respects by other objective evidence, can be regarded as reliable. For that reason, the Court of Appeal will use these statements incriminating the [applicants] as evidence.”

IV. PROCEEDINGS BEFORE THE SUPREME COURT

24. On 22 May 2018 and 2 April 2019, the applicants lodged appeals on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*). The second applicant argued that the Court of Appeal had provided insufficient reasons for refusing to examine witness X and the first applicant. Both applicants further submitted that, in breach of Article 6 of the Convention, the Court of Appeal had failed to summon X and ought to have decided of its own motion (*ex proprio motu*) to examine him as a witness, as his statement had been used as decisive evidence.

25. In an advisory opinion of 7 September 2019, the Advocate General (*Advocaat-Generaal*) at the Supreme Court recommended that the appeals on points of law be dismissed. He considered that the applicants’ request to hear the witnesses lacked substantiation, noting that they had not explained why it was necessary to examine X again, given that he had already been heard by the investigating judge in the presence of their counsel.

26. As to the complaint under Article 6 of the Convention regarding the examination of witness X *ex proprio motu*, he observed that, where the Regional Court had found a witness statement to be unreliable, the Court of Appeal was required to explain why it nevertheless relied on that statement and on what grounds it considered it reliable. The Advocate General noted that the Court of Appeal had extensively assessed the reliability of X’s incriminating statements and had provided reasons for including them in the evidence. He also found no circumstances that gave rise to a positive obligation to summon X. Although the Court of Appeal left open the accuracy of X’s account of how the victim died, it did not consider this to render the statement as a whole unreliable. Its interpretation of the statement was

therefore not fundamentally different from that of the Regional Court, and its reasoning made clear why it had reached a different conclusion on the evidence.

27. Lastly, the Advocate General noted that neither the Regional Court nor the Court of Appeal had heard X in person and that both courts had assessed the same written statement recorded by the investigating judge and that the applicants had benefitted from legal assistance.

28. On 26 and 30 September 2019 the applicants submitted written responses to the Advocate General's advisory opinion. They maintained that the Court of Appeal had failed to provide adequate reasons for relying on X's statements, particularly because those statements had contributed to a decisive extent to the evidence. They further submitted that, where elements of X's account lacked independent confirmation, the Court of Appeal had effectively supplied explanations rather than questioning X directly.

29. In its judgment of 28 January 2020, the Supreme Court upheld the Amsterdam Court of Appeal's judgment. It noted that the Court of Appeal had refused the request to re-examine witness X on the grounds that the second applicant had not sufficiently substantiated his request and that a further hearing was unnecessary, as X had already been examined by the investigating judge in the presence of the defence. The Supreme Court found that reasoning adequate and held that the refusal was sufficiently justified.

30. It further held that Article 6 of the Convention did not preclude the Court of Appeal from relying on X's statements as evidence. The Court of Appeal had been cautious when examining the credibility of X's statement, and by explaining that X's statements were corroborated by other objective evidence, in particular the telephone data – whereas the applicant's statements were refuted by that evidence – it had set out sufficient reasons for finding X's statements reliable, contrary to the conclusion reached by the Regional Court.

31. The remaining grounds of appeal on points of law were dismissed because the grievances could not lead to the annulment of the impugned judgment. On the basis of section 81(1) of the Judiciary Act (*Wet op de rechterlijke organisatie*), no further reasoning was required as the grievances did not give rise to the need for a determination of legal issues in the interest of legal uniformity or legal development.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. EXAMINATION OF WITNESSES BY AN INVESTIGATING JUDGE IN THE PRELIMINARY INVESTIGATION

32. Under Dutch criminal procedure, witnesses may be examined by an investigating judge during the preliminary investigation. Such an examination may take place at the request of the public prosecutor or at the

request of a person who has been questioned as a suspect or who is being prosecuted for a criminal offence. The investigating judge may also decide *ex proprio motu* to examine a witness where the accused is in pre-trial detention in respect of the offence in question, in accordance with Articles 181 and 182 of the Code of Criminal Procedure (*Wetboek van Strafvordering*).

33. Under Article 186 of the Code of Criminal Procedure, the public prosecutor is given the opportunity to attend the witness examination and to submit questions. The same applies to the defence counsel, unless his or her presence would be incompatible with the interests of the investigation. Pursuant to Article 186a of the Code, the investigating judge may also give the accused the opportunity to attend the examination of the witness if this is considered to be in the interests of the investigation. Furthermore, where there is reason to believe that a witness or expert may be unable to appear at trial, the investigating judge will invite the public prosecutor, defence counsel and – unless a delay would be incompatible with investigative needs – the accused to attend the examination under Article 187 of the Code.

34. Witnesses are subject to a statutory duty to tell the truth under Article 215 of the Code of Criminal Procedure. Pursuant to Articles 216 and 216a of the Code, they may be required to swear an oath where there is reason to believe that they will be unable to appear at trial or where the investigating judge otherwise considers this necessary. In other circumstances, witnesses may be examined without being placed under oath. Statements taken by the investigating judge and recorded in an official record may be used as evidence pursuant to Article 344 of the Code, and the same applies to statements made before an investigating officer.

II. EXAMINATION OF WITNESSES AT TRIAL

35. Once the trial stage has commenced, witnesses may be summoned to appear before the trial court. Under Article 260 of the Code of Criminal Procedure, the public prosecutor is responsible for issuing such summonses, and the accused is informed both of the witnesses called by the prosecution and of his or her right to request the summoning of witnesses. An accused who wishes to summon a witness must notify the public prosecutor in writing, providing the necessary identifying information. Prior to the opening of the trial, the presiding judge may also instruct the Public Prosecution Service to summon witnesses pursuant to Article 263 of the Code.

36. The Code of Criminal Procedure contains several statutory grounds on which both the prosecution and the trial court may refuse to summon a witness. Under Articles 288 and 418 of the Code, such a refusal may be made, for example, where it can reasonably be assumed that the absence of the witness will not prejudice either the prosecution or the defence. A refusal may also be justified where the witness has already been heard at first instance or

by the investigating judge and the appellate court does not consider it necessary to examine the witness anew.

37. Pursuant to Article 315 § 1, Article 346 §§ 1-2, Article 347 § 1 and Article 415 of the Code of Criminal Procedure, the domestic courts may, *ex proprio motu*, decide to call and examine one or more witnesses who have not yet been questioned before them, or have them examined before an investigating judge. The trial court may direct the investigating judge to carry out further investigative measures, including the examination of witnesses.

38. In addition, under Articles 328, 330 and 410 § 3 of the Code of Criminal Procedure, the defence or the public prosecutor may ask the trial court to exercise its *ex proprio motu* power, in which case the Regional Court or Court of Appeal is obliged to give a reasoned decision. The court may refuse a request to summon witnesses where it can reasonably be assumed that the defence will not be prejudiced by such a refusal. Where a request is only made at the trial stage rather than during the investigation, a stricter standard applies: the court will grant the request only if it considers the examination of the witness to be necessary. This “necessity criterion” may stem either from the court’s own need for additional information or from the need to safeguard defence rights, including the right to examine witnesses. During this assessment, a balancing of interests takes place.

39. There is no absolute obligation to summon witnesses *ex proprio motu*. However, in certain circumstances, a heightened duty to give reasons applies where an appellate court relies on a statement made during the preliminary investigation before an investigating judge in order to overturn an acquittal. In its judgment of 16 October 2018, the Dutch Supreme Court held:

“In a case such as this – which is characterised by the fact that the court of first instance made clear that it did not regard as reliable a witness statement made to an investigating officer that incriminated the defendant and therefore did not use that statement as evidence and, on that and other grounds, acquitted the defendant of the charges – the appellate court must, if it does use that statement as evidence, state the reasons for this in order to ensure that the decision on the evidence is sound. In particular, the appellate court must state on what grounds it considers the relevant statement to be reliable. Those grounds may (but need not) be derived from an examination of the witness in the appeal proceedings. Other factors that may be important in this connection are the extent to which the witness’s testimony is corroborated by other evidence, as well as the objections put forward by the Public Prosecution Service to the acquittal and the position taken by the defendant in relation to the proceedings.”

III. OTHER RELEVANT ARTICLES OF THE CODE OF CRIMINAL PROCEDURE AND THE CRIMINAL CODE

40. In Article 315 § 1 of the Code of Criminal Procedure the necessity criterion is laid down, which reads as follows:

“1. If the court considers it necessary to hear witnesses who have not yet been examined at the hearing, or to obtain documents or physical evidence that are not

present at the hearing, it shall order – if necessary, with an order for compulsory appearance – the summons or written notice of those witnesses, or the production of those documents or items of evidence, at a time to be determined by the court.”

41. Article 457 of the Code of Criminal Procedure, which governs the possible means of obtaining revision (*herziening*) of final domestic judgments, has been discussed in *X v. the Netherlands* (no. 72631/17, §§ 31-32, 27 July 2021).

42. Article 287 of the Criminal Code (*Wetboek van Strafrecht*) provides that anyone who intentionally takes the life of another person is guilty of manslaughter (*doodslag*) and liable to life imprisonment or to a term of imprisonment not exceeding 15 years or to a fifth-category fine.

43. Article 151 of the Criminal Code provides that anyone who buries, burns, destroys, conceals, removes or disposes of a corpse with a view to concealing the fact or the cause of the death or with a view to concealing a stillbirth (*onttrekking van een lijk aan nasporing*) is liable to a term of imprisonment not exceeding two years or to a fourth-category fine.

THE LAW

I. JOINDER OF THE APPLICATIONS

44. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

45. The applicants complained that they had been denied a fair hearing because, after being acquitted at first instance, they had been convicted on appeal without the appellate court directly hearing witness X. Article 6 § 1, in so far as relevant, reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

46. The Government contested that argument.

A. Admissibility

47. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

48. The applicants submitted that their trial had been unfair because, after their acquittal at first instance, the Court of Appeal had convicted them without directly hearing witness X, either of its own motion or at the request of the second applicant, despite reassessing the evidentiary weight of that witness's testimony. They argued that the credibility of witness X had been expressly contested by both applicants and that his statement had been used as the sole or, at the very least, the decisive basis for their conviction.

49. Regarding the statement made by witness X, the applicants argued that there had been no objective, corroborative evidence supporting witness X's allegations regarding their involvement in the victim's death. They claimed that witness X's testimony was unreliable, as he had only given it after he had had access to the case file and had learned that telephone data placed him in the apartment on the relevant date. They argued that this had enabled him to tailor his account to the existing evidence. They also contended that the Regional Court had previously found the statement unreliable, or at least of insufficient weight, and had not relied on it in reaching its decision. In those circumstances, the Court of Appeal could not have properly determined the issues before it without directly assessing the testimony of the applicants and/or witness X in person. Accordingly, they argued that there had been a violation of Article 6 of the Convention.

50. The Government submitted that the Dutch legal system attributed particular weight to evidence obtained during the preliminary investigation, which was supervised by an investigating judge responsible for ensuring the lawfulness of the proceedings and for examining witnesses at the request of the public prosecutor or the defence, or, where appropriate, on his or her own initiative. They emphasised that witnesses were frequently examined at that stage or on the instructions of the trial court, and that it was common for both the Regional Court and the Court of Appeal to assess such statements, taken before the investigating judge in the presence of the defence, without re-examining the witness at trial. In such circumstances, both courts based their findings on the same written evidence.

51. The Government further maintained that the applicants' defence rights had not been restricted in a manner capable of rendering the proceedings unfair. They argued that the Court of Appeal had been fully capable of determining the issues before it without examining witness X directly, as both the Regional Court and the appellate court had relied on the same written record of X's testimony taken by the investigating judge. Unlike in *Júlíus Þór Sigurþórsson v. Iceland* (no. 38797/17, 16 July 2019), witness X had never been heard in person at first instance, and the Court of Appeal's divergent assessment stemmed from a different evaluation of the reliability of that testimony rather than from any new or untested evidentiary source.

52. Referring to *Ignat v. Romania* (no. 17325/16, 9 November 2021) and *Kashlev v. Estonia* (no. 22574/08, 28 April 2016), the Government further submitted that the Court of Appeal had not relied on X's statements in isolation but had reassessed the objective evidence, including forensic findings and mobile telephone data, which it had considered corroborative of his account. The case thus concerned a legitimate difference of judicial assessment between the first-instance court and the Court of Appeal on the weight and coherence of the same evidentiary material. The appellate court had exercised caution and had provided detailed reasons for finding X's incriminating statements reliable. The Government further emphasised that the Supreme Court had reviewed the Court of Appeal's judgment for compliance with domestic and Convention standards, thereby providing an additional layer of protection for the applicants' defence rights.

2. *The Court's assessment*

(a) **General principles**

53. The Court notes that the essence of the applicants' complaint in the present case is that the appeal court overturned their acquittal based on the testimony of the sole witness, whose credibility had been expressly questioned by both the defence and the first-instance court, without hearing him, thereby violating the principle of immediacy.

54. In this connection, the Court observes that under Article 6 of the Convention the admissibility of evidence is primarily a matter for regulation by national law and the Court's task is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 139, 18 December 2018).

55. The Court reiterates that an important aspect of fairness in criminal proceedings is the possibility for the accused to confront witnesses in the presence of the judge who will decide on his or her case. This requirement is of particular importance where the credibility and reliability of a witness are in dispute. The principle of immediacy thus constitutes an important safeguard in any criminal proceedings where the court's observations on a witness's behaviour and credibility are likely to have significant consequences for the accused (see *Beraru v. Romania*, no. 40107/04, § 64, 18 March 2014, *Cutean v. Romania*, no. 53150/12, § 60, 2 December 2014; *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12 and 68949/12, § 43, 7 March 2017; *Orhan Şahin v. Türkiye*, no. 48309/17, § 48, 12 March 2024; and *Manolache v. Romania*, no. 7908/17, § 22, 3 June 2025).

56. Issues relating to the principle of immediacy may arise where an appellate court overturns a lower court's acquittal without conducting a fresh assessment of the evidence, including the rehearing of witnesses and allowing

the defence to cross-examine them (see *Dan v. the Republic of Moldova* (no. 2), no. 57575/14, § 52, 10 November 2020). The Court has held that where an appellate court is empowered to examine the case both in fact and in law and to review the applicant's guilt or innocence in its entirety, it may not, for reasons of fairness, determine those issues without directly assessing the evidence, including decisive testimony that it intends to interpret for the first time in a manner unfavourable to the accused (*idem*, § 30; see also *Lazu v. the Republic of Moldova*, no. 46182/08, § 40, 5 July 2016; and *Kashlev*, cited above, § 38).

57. Lastly, the Court's case-law draws a distinction between cases where an appellate court overturns an acquittal by reassessing the facts without hearing decisive testimony on which the acquittal was based, and situations where the appellate court merely disagrees with the lower court's interpretation of a legal question or its application of the law to facts that have already been established (see *Július Þór Sigurþórsson*, cited above, §§ 36-37, and the authorities cited therein).

(b) Application of those principles to the present case

58. The Court notes that in the present case, the second applicant expressly requested that the witness be examined and, as the first applicant was his co-defendant and they were affected in the same way by those proceedings, that request must be regarded as having been made on behalf of both accused (see *M.S. v. Croatia*, no. 36337/10, §§ 68-69, 25 April 2013; *Bilbija and Blažević v. Croatia*, no. 62870/13, § 94, 12 January 2016; and *Pavlov and Others v. Russia*, no. 31612/09, § 56, 11 October 2022). Since such a request was submitted, there is no need for the Court to consider whether the appellate court was otherwise required to hear the witness of its own motion.

59. In the present case, the Court notes that the applicants were acquitted by the Regional Court after that court had heard both of them in person. The Regional Court did not, however, examine witness X at trial. Instead, the written record of his testimony, given before the investigating judge, was used as evidence. That testimony was taken in the presence of the defence, and it is not disputed that the applicants had the opportunity to put questions to the witness at that stage. The Regional Court did not find the statements made by X sufficiently reliable to establish that the applicants were guilty of murder or manslaughter.

60. On appeal, the Court of Appeal had full jurisdiction to examine questions of facts as well as questions of law. The question before the Court is therefore whether, in those circumstances, the Court of Appeal could, as a matter of fair trial, properly examine the issues to be determined without a direct assessment of the evidence given by the witness in person.

61. During the proceedings before the Court of Appeal, the second applicant asked the court to hear witness X at an oral hearing. The Court of

Appeal dismissed that request on the grounds that it had not been sufficiently substantiated and that a further examination was not necessary, as the witness had already been questioned by the investigating judge in the presence of the defence (see paragraph 19 and 21 above).

62. The Court of Appeal nevertheless re-examined the question of the applicants' guilt (see paragraphs 22 and 23 above). In doing so, it relied on evidence provided by the applicants and witness X. The principal evidence supporting the suspicion of manslaughter consisted of the witness statement provided by X concerning the events that occurred on the premises leading to the victim's death.

63. The Court notes that, in its reasoning, the Court of Appeal stated that there was no conclusive forensic evidence available and that it was mainly a matter of assessing the reliability of the statements made by X and the credibility of the applicants. The Court of Appeal found that important aspects of X's statement were corroborated by objective material and could therefore be admitted in evidence. The Court of Appeal referred, in particular, to mobile telephone tracking data and information concerning travel movements which corresponded with X's description of events. It also relied on the fact that DNA belonging to the second applicant and the victim had been found on the chainsaw used to dismember the victim's body.

64. However, the Court considers that this corroborative material was of limited probative value as regards the decisive issues in this case. While it could, as found by the Regional Court, serve as corroborating evidence for the conviction for unlawfully disposing of a body, as regards the conviction for manslaughter it could only place the applicants inside the house. It did not provide direct insight into what had occurred inside the premises, it could not reconstruct the sequence of events leading to the victim's death or clarify the individual roles or responsibilities of those involved where the killing took place. By contrast, witness X's statements constituted the only evidence providing a detailed account of the events inside the apartment and attributing specific conduct to the applicants. In the absence of any other evidence capable of establishing those elements independently, the domestic court's assessment of guilt necessarily hinged on the credibility and reliability of X's version of events. In these circumstances, the Court considers that the statements of witness X, and the weight attached to them, were decisive for the determination of the case (see *Dan*, cited above, § 31; *Lazu*, cited above, § 36; and *Chernika v. Ukraine*, no. 53791/11, §§ 57-58, 12 March 2020).

65. Where a conviction is based solely or decisively on the evidence of a witness that is not present at trial, the Court must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is

sufficiently reliable given its importance in the case (see *Dan (no. 2)*, cited above, § 54).

66. In the present case, the Court of Appeal relied exclusively on the transcripts of X's testimony given before the investigating judge. None of the judges who convicted the applicants had heard the witness in person. The Court has previously accepted that the use of written transcripts may assist judges who have not observed a witness in person, so they have an appropriate understanding of the evidence. However, in those cases, the credibility of the witness concerned had not been contested (see, for example, *Mellors v. the United Kingdom* (dec.), no 57836/00, 30 January 2003, and *P.K. v. Finland* (dec.), no. 37442/97, 9 July 2002).

67. By contrast, in the present case the applicants' conviction rested to a decisive extent on the statements of witness X, whose credibility they had consistently challenged and whom the first-instance court had expressly found to be unreliable (compare with *Hanu v. Romania*, no. 10890/04, § 40, 4 June 2013; and contrast with *Ignat*, cited above, § 51). While the Court of Appeal undertook a detailed and comprehensive assessment of the available evidence and approached X's statements with certain caution, noting in particular that he had only come forward after it had become apparent that mobile telephone tracking data placed him at the crime scene around the time of death, it nonetheless proceeded to assess whether his statements were sufficiently corroborated by other evidence and ultimately relied on them as evidence, without ever hearing the witness directly. By relying on those statements and concluding that they were sufficiently corroborated, the Court of Appeal reassessed oral testimony central to the prosecution's case relying solely on the written record.

68. The Court reiterates that where an appellate court is vested with full jurisdiction in both fact and law and is called upon to conduct a comprehensive assessment of the accused's guilt, it is, in principle, incompatible with the requirements of a fair trial to determine those issues without directly assessing the testimony of a witness whose earlier statements the appellate court intends to interpret for the first time in a manner unfavourable to the accused (see and *Dan*, cited above, § 30; *Lazu*, cited above, § 40; *Kashlev*, cited above, § 38). In accordance with the principle of immediacy, a fair determination of guilt or innocence therefore requires that such testimony be heard in person.

69. In these circumstances, and having regard to what was at stake for the applicants and in the light of the principle of immediacy, the Court is not convinced that the issues to be determined by the Court of Appeal when convicting and sentencing the applicant – and, in doing so, overturning their acquittal by the first-instance court – could, as a matter of fair trial, have been properly examined without a direct assessment of the evidence given by the witness X. The Court reiterates that those who bear responsibility for determining an accused's guilt or innocence should, in principle, be able to

hear witnesses in person and assess their trustworthiness. The assessment of the trustworthiness of a witness is a complex task that involves an evaluation of a witness's demeanour and the manner in which testimony is given, elements which cannot be fully captured by a mere reading of his or her recorded words (see *Lazu*, cited above, § 40).

70. While there may be situations in which it is objectively impossible to hear a witness in person at the trial because, for example, he or she has died, or in order to protect the right of the witness not to incriminate himself or herself (see *Craxi v. Italy (no. 1)*, no. 34896/97, § 86, 5 December 2002, and *Dan*, cited above, § 33), no such circumstances have been identified in the present case.

71. In light of the above findings, the Court observes that decisive weight was attributed to the witness's testimony, which was central to the determination of the applicants' guilt, while his credibility had been expressly contested. At the same time, the appellate court exercised full jurisdiction over the facts and the applicants' guilt without complying with the principle of immediacy. In these circumstances, the Court concludes that the requirements of a fair trial under Article 6 § 1 necessitated the rehearing of the witness. The failure to do so cannot be remedied by a review limited to points of law, and the Supreme Court did not redress the situation by referring the case back to the Court of Appeal for a fresh examination of the witness. Such an appeal could therefore not be regarded as a sufficient safeguard to preserve the overall fairness of the proceedings.

(c) Conclusion

72. In the light of the foregoing, the Court considers that the proceedings before the Court of Appeal did not comply with the requirements of Article 6 § 1 of the Convention. In overturning the applicants' acquittal, the appellate court reassessed the facts and the applicants' guilt while relying on decisive testimony from a key witness whose credibility was central to the case, despite that credibility having been seriously called into question, without hearing him in person. This deprived the court of the opportunity to make a direct assessment of his reliability. This was incompatible with the principle of immediacy and undermined the fairness of the proceedings as a whole.

73. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

74. The second applicant further complained under Article 6 §§ 1 and 3 (d) of the Convention that he had been deprived of his right to examine

witness X in person before the appeal court that had ultimately convicted him. Article 6 § 3 (d) reads as follows:

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

75. Having regard to its conclusions under Article 6 § 1 of the Convention (see paragraphs 72 and 73 above), the Court does not consider it necessary to examine separately either the admissibility or the merits of the second applicant’s remaining complaint.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

77. The Court notes that the applicants have not put forward any claim in respect of pecuniary or non-pecuniary damage. They did, however, ask the Court to find a violation of Article 6 of the Convention so that they may seek a retrial or the reopening of the domestic proceedings.

78. The Government agreed with the applicants’ position that the mere finding of a violation would constitute sufficient just satisfaction.

79. The Court refers to its consistent case-law, according to which, where an individual has been convicted following proceedings marred by breaches of the requirements of Article 6 of the Convention, a retrial or a reopening of the proceedings, at the request of the person concerned, is in principle an appropriate means of redressing the violation found (see, among other authorities, *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Cabral v. the Netherlands*, no. 37617/10, §§ 42-43, 28 August 2018; and *Chernika v. Ukraine*, cited above, § 82). In this regard, it reiterates that Article 457 § 1 (b) of the Dutch Code of Criminal Procedure (see paragraph 41 above) provides a basis for reopening proceedings if the Court finds a violation of the Convention.

80. The Court is led to conclude in the present case that the reopening of the proceedings is the most appropriate form of redress for the established violation of the applicants’ rights, should they request it, given that it is

capable of providing *restitutio in integrum* as required under Article 41 of the Convention. That being so, the finding of a violation constitutes sufficient just satisfaction in the present case.

B. Costs and expenses

81. The applicants made no claim as regards the costs and expenses incurred before the Court. The Court therefore makes no award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the complaint concerning the principle of immediacy admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that it is not necessary to examine the second applicant's complaint under Article 6 § 3 (d) of the Convention.

Done in English, and notified in writing on 1 September 2026, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Simeon Petrovski
Deputy Registrar

Lado Chanturia
President