CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39973/98
by J.C.B.
against the Netherlands

The European Court of Human Rights (First Section) sitting on 30 March 1999 as a Chamber composed of

Mrs E. Palm, *President*,
Mr J. Casadevall,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr C. Bîrsan,
Mrs W. Thomassen, *Judges*,

with Mr M. O'Boyle, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 August 1997 by J.C.B. against the Netherlands and registered on 20 February 1998 under file no. 39973/98;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch national, born in 1952, and is currently detained in the Netherlands. He is represented by Ms T. Prakken, a lawyer practising in Amsterdam.

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

On 22 December 1993, the Drugs Enforcement Agency (DEA) of the United States of America informed the Netherlands customs authorities that the ship named N.N. had left the harbour of Santa Marta (Colombia) for Amsterdam, where it would arrive on 2 January 1994. According to this information, this ship was transporting about fifteen kilograms of cocaine which had been bought by two Dutchmen, who had also recruited the ship's crew. The two Dutchmen, possibly dressed as maintenance engineers, would take the cocaine from the ship in Amsterdam. The information, which the DEA classified as 99% certain, further contained a physical description of the two Dutchmen concerned.

On the basis of this information, the Dutch customs authorities, in consultation with the Fiscal Intelligence and Investigation Department (*Fiscale Inlichtingen en Opsporingsdienst* - "FIOD"), decided that the Customs Office of Amsterdam (*Douane Post Amsterdam Surveillance*), on the basis of its general powers of control under the General Customs and Excise Act (*Algemene Wet inzake Douane en Accijnzen*), would on 2 January 1994 place the ship N.N. under observation and would carry out an intensified control of the people leaving the ship and their possible vehicles.

On 2 January 1994, the ship N.N. was moored in the Amsterdam harbour area. Observation of that area revealed that around 8 p.m. a Peugeot personal car with two passengers arrived. These two persons, who were not carrying any luggage, shortly visited the ship and, still without luggage, left the ship and drove away in the Peugeot, which was then followed by customs officers in two cars.

When, at some point, a stop signal was given from one of the two cars which were following the Peugeot, the latter sped away. Shortly after, the two passengers of the Peugeot car abandoned the vehicle and were pursued on foot by four customs officers. One of the two persons got away and the other one, the applicant, was involved in a shoot-out with the customs officers. In the course of the shooting, one the customs officers, Mr H., was fatally injured. The applicant was slightly injured. On his arrest, the applicant was found to be wearing two jackets, containing in total about 10 kilograms of cocaine. The person who had escaped had left behind two jackets, which contained a similar quantity of cocaine.

By summons of 30 March 1994, the applicant was ordered to appear on 13 April 1994 before the Regional Court (*Arrondissementsrechtbank*) of Amsterdam on drug and manslaughter charges.

On 13 April 1994, the Regional Court rejected a request by the defence for a reconstruction of the shooting and granted their request an adjournment, as a certain forensic report had only recently been made available to the defence.

On 21 June 1994, the Regional Court ordered that evidence be taken by the investigating judge (*rechter-commissaris*) from the experts mentioned in a letter dated 9 June 1994 from the defence. It adjourned its further examination for a maximum period of three months and referred the case to the investigating judge.

On 1 September 1994, the Regional Court heard the applicant and considered a request by the defence for another adjournment in order to obtain further relevant forensic and other information. Having deliberated, the court partially granted the request by the defence and, consequently, adjourned its examination for a further three month period and referred the case to the investigating judge. It requested the latter to have the bullet tips R300 and R301 examined for deformations, to take evidence from the three persons who had seen the bullet tips fall from the clothes of Mr H., and to do whatever he considered useful and necessary in the interest of the examination of the applicant's case.

On 25 September 1994, the Regional Court resumed its examination and, following a request by the prosecution, adjourned its examination until 15 December 1994, when it heard the applicant and the parties' final pleas.

In its judgment of 28 December 1994, the Regional Court convicted the applicant of manslaughter and narcotics offences and sentenced him to twenty years' imprisonment. As regards the charge of manslaughter, the Regional Court did not find it established that the applicant had acted in self-defence. The applicant filed an appeal with the Court of Appeal (*Gerechtshof*) of Amsterdam.

On 8 May 1995, the Court of Appeal took oral evidence from the applicant, the customs officers E.B., F.d.B. and G.d.R. involved in the pursuit and shooting of 2 January 1994, the experts R.B. and H.M. of the Netherlands Forensic Laboratory concerning the forensic examination of the clothes of H. and the weapons and ammunition used in the shooting, and from the officers R.H., A.P. and J.P. of the forensic police (*technische recherche*) involved in the initial technical investigation.

After the hearing of these persons, the defence requested a further forensic examination in Germany, the necessary technical equipment only being available there, in order to examine whether the lead-free ammunition used had been in contact with a human body and the clothes, and a further examination of the traces of the ammunition. The Court of Appeal rejected this request, holding:

<Translation>

> "… the necessity <of the defence request> has not been established. In this respect the court has taken into consideration that the Forensic Laboratory at Rijswijk has extensively examined the clothes and other items, as appears from the report of 25 March 1994, in which it is stated, *inter alia*, that all micro-chemical test reactions for lead and copper at the bullet entry perforations have been positive. It further appears from the statement of the expert R.B. that such an examination can no longer be regarded as useful. The Court further finds not a single (factual) point of departure in the present case-file or in the trial proceedings so far conducted which might support the accused's contentions that, firstly, the victim H. would have been hit by a lead-free bullet from a weapon of one of his colleagues and, secondly, that a lead-content bullet has ended up in an improper way between the victim's clothes where it was <subsequently> found by staff of the Forensic Laboratory."

On 6 June 1995, the prosecution informed the Court of Appeal that the co-accused C. had been extradited from Spain to the Netherlands on 23 May 1995. The defence did not wish to react to this information. After having heard the parties' final pleadings, the Court of Appeal closed its examination.

In its judgment of 19 June 1995, the Court of Appeal quashed the judgment of 28 December 1994, convicted the applicant of manslaughter and of having acted contrary to the prohibition under Article 2 of the Opium Act (*Opiumwet*), and sentenced him to twenty years' imprisonment.

The Court of Appeal rejected the argument by the defence that the principle of proper intentions (*beginsel van zuiver oogmerk*) had been violated by the customs officers and that, on this basis, the prosecution should be declared inadmissible. The defence argued that the customs officers had used their powers for another purpose than that for which they are intended by following the Peugeot car, whereas the two passengers of this car had a different m*odus operandi* from that predicted by the DEA. According to the defence, there had thus not been a reasonable suspicion of guilt within the meaning of Article 27 of the Code of Criminal Procedure (*Wetboek van Strafvordering*). The pursuit at issue was only carried out in order to see whether or not the applicant and the other person had taken the cocaine from the ship.

After having considered the evidence before it, the Court of Appeal concluded that the customs officers involved in the events at issue had acted in accordance with, and had not exceeded, their powers under the relevant statutes, i.e. the General Customs and Excise Act and the Opium Act.

The defence had further argued that the applicant's right to a fair trial within the meaning of Article 6 of the Convention had been breached in that the Court of Appeal had failed to respect the principle of equality of arms when it refused

A. to order a counter-expertise in Germany in order to verify whether only lead-content bullets had been fired at H.;
B. to take evidence from the persons who, in the V. hospital, had handled the clothes of H.;
C. to take further oral evidence from the customs officers E.B., F.d.B. and G.d.R. after their testimony of 8 May 1995; and
D. to order a reconstruction of the events at issue.

On these points, the Court of Appeal held, *inter alia*:

<Translation>

> "In the course of the judicial investigation the accused has alleged that the police has committed fraud in its investigation and/or has manipulated the investigation by putting, after the shooting, one or more bullets shot by the accused, and which, in contrast to the bullets shot by the custom officers, contained lead, between the victim's clothes and/or in the body bag in which his body was placed and transported to the Forensic Medical Laboratory and/or by smearing lead on the victim's clothes on those places where that clothing was perforated by one or more bullet entries. The above contention has been repeated by the accused in his pleadings of 6 June 1995.

Taking this into account, the accused's requests, as set out under A-D, appear to be based on obtaining a further investigation into the correctness of this contention.

In his pleadings counsel has taken the position that it cannot be considered excluded that - what he calls - the fatal shot at the victim H. has been fired by one of his colleagues.

Taking this into account, the request by counsel appears to be based on obtaining a further investigation into the correctness of that contention …

The court considers the above requests as follows:

The expert R.B. of the Forensic Laboratory of Rijswijk has carried out a so-called shot-remains investigation of the coat and jeans of H., the results being given in the report of 25 March 1994, and a further investigation into soiling, spotted on the front side of the left sleeve of the coat, the results of which are stated in the additional report of 8 July 1994 (file II).

An expert-witness heard during the trial on appeal, the aforementioned R.B., has stated … that the shot-remains investigation … standard is aimed at searching for (traces of) lead-containing ammunition, that the clothes (coat and jeans) have not been tested for lead-free ammunition, that such tests can still be carried out, but that it has appeared during the tests already carried out that around the places in the clothes, where it concerned a bullet entry (by which the court understands the damage caused by shots at the clothing, in respect of which the conclusion in the report is probable bullet entry damage), so many traces of lead, characteristic for lead-containing ammunition, were present that these traces, if there would be traces of lead-free ammunition, would mask the latter traces, and further that when one rubs a lead object against another object, thus leaving behind lead traces, these would be friction traces (*veegsporen*), but the traces of lead found on the clothes of H. were not friction traces.

Further taking into consideration that the aforementioned R.B. has stated to the investigating judge … that the lead-free ammunition of the type Action III used by customs officials "does not really leave that many traces", the court is of the opinion that in all reasonability it is not to be expected that by a (yet to be ordered) investigation of <the> coat and/or jeans of H. for possible traces of lead-free ammunition, also if this investigation is to be entrusted to the Federal Forensic Institute (*Bundes Kriminaltechnisches Institut*) in Wiesbaden <Germany>, no facts or circumstances will appear, which (could) entail an indication that shots with one or more lead-free projectiles have been fired at the victim H.

Consequently, the court finds that the necessity of the investigation to be carried out by the <German> Federal Forensic Institute, requested by the suspect, has not been established; so that it will reject this request, in which <decision> the court further considers on the above grounds that such an investigation would not serve a useful purpose; so that it cannot be said that by rejecting this request the suspect's right to counter-expertise is violated. … ."

The applicant filed an appeal in cassation with the Supreme Court (*Hoge Raad*), complaining *inter alia* that the Court of Appeal had rejected his argument that the customs officers involved in the events of 2 January 1994 had exceeded their powers of investigation and that the Court of Appeal had failed to order a further examination of the clothes of the victim in Germany in order to verify whether or not lead-free bullets had been fired at him.

By judgment of 13 May 1997, the Supreme Court rejected the applicant's appeal in cassation.

Insofar as the applicant argued that the customs officers had exceeded their powers under the General Customs Act for the purpose of investigating acts contrary to the Opium Act, the Supreme Court held that the existence of "a reasonable suspicion" that acts contrary to the Opium Act are committed does not constitute a bar to the exercise by customs officers of their powers of control under the General Customs Act provided that the exercise of the latter powers respects the guarantees to which an accused is entitled. The Supreme Court concluded that the Court of Appeal had correctly rejected this argument.

As to the applicant's complaint that the Court of Appeal had rejected a request for a further examination of the victim's clothes, the Supreme Court held that this complaint could not lead to cassation and that this finding, in view of Article 101a of the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*), required no further reasons as the complaint did not prompt a determination of legal issues in the interests of legal unity and legal development.

COMPLAINTS

1. The applicant complains under Article 6 §§ 1 and 3 (d) of the Convention that the principle of a fair trial and the principle of equality of arms have been violated in that his reasonable request for a counter-expertise by a laboratory with better capabilities than the Forensic Laboratory of the Ministry of Justice was rejected. Moreover, the Court of Appeal reasoned this refusal on an assessment of the possible results of such a counter-expertise by an expert of the Forensic Laboratory who had performed a similar investigation to that requested for the counter-expertise.

2. The applicant further complains under Article 6 §§ 1 and 2 of the Convention that the principle of a fair trial has been violated in that the investigation of the narcotics offences at issue by the custom authorities was based on their general powers of search and verification, as a consequence of which the investigation bore the character of a "fishing expedition".

THE LAW

The applicant complains under Article 6 §§ 1, 2 and 3 (d) of the Convention that the principle of a fair trial and the principle of equality of arms have been violated in that his request for a counter-expertise was rejected and that the investigation by the customs authorities was based on the general powers of verification of the customs authorities rather than on "a reasonable suspicion".

Article 6 of the Convention, insofar 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 … .

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
…
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; …"

Insofar as the applicant alleges that the proceedings against him were not in conformity with Article 6 § 2 of the Convention and insofar as this complaint has been raised in the domestic proceedings, the Court finds that it is wholly unsubstantiated. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 1 of the Convention.

As to the remainder of the applicant's complaints, the Court will examine these under Article 6 §§ 1 and 3 (d) of the Convention taken together, as the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (cf. Eur. Court HR, Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III no. 36, p. 711, § 49).

As to the question whether or not the domestic courts correctly held that the customs officers acted in accordance with their powers under domestic law, the Court considers that it is not competent to examine alleged errors of fact or law committed by national courts, except where it finds that such errors might have involved a possible violation of the rights and freedoms set forth in the Convention (cf. Eur. Court HR. Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, § 45).

Insofar as the applicant's complaints relate to the lawfulness of the investigation at issue and the assessment of the evidence, the Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defence seeks to adduce. The Court's task under the Convention is not to give a ruling as to whether evidence was properly admitted, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (cf. Eur. Court HR, Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, p. 32, § 33; Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43; and Van Mechelen and Others judgment, loc.cit., § 50).

The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial. This implies that both the prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (cf. Eur. Court HR, Belziuk v. Poland judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II No. 67, p. 570, § 37).

The Court finds no indication in the case-file that the applicant's defence rights under Article 6 of the Convention have been breached as regards his argument that the customs officers exceeded their powers under the relevant statutory rules. Moreover, the domestic courts' conclusions on this point are not a matter which the Court can further review under the terms of Article 34 of the Convention.

As to the rejection of the applicant's request for a ballistic counter-expertise of the victim's clothes, the Court considers that the requirements of a fair trial do not impose an obligation on a trial court to order an expert opinion or any other investigative measure merely because a party has sought it. It remains for the court to judge whether such a measure would serve any useful purpose (cf. Eur Court HR, H. v. France judgment of 24 October 1989, Series A no. 162-A, p. 23, §§ 60-61).

Noting the grounds given by the Court of Appeal for rejecting the applicant's request for a counter-expertise, the Court does not find that this refusal can be regarded as unreasonable or arbitrary or that it, as such, deprived the applicant of a fair hearing within the meaning of Article 6 of the Convention.

Finally, noting that the applicant has been convicted following adversarial proceedings, in the course of which he has been provided with ample opportunity to state his case, to submit whatever he found relevant to the outcome and to challenge the evidence against him, the Court finds no indication that the proceedings at issue fell short of the requirements of Article 6 of the Convention.

It follows that this part of the application must also be rejected as manifestly ill-founded within the meaning of Article 35 § 1 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Elisabeth Palm
President