CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54789/00
by Martin BOCOS-CUESTA
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 11 March 2003 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 27 December 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Martin Bocos-Cuesta, is a Spanish national, who was born in 1976 and lives in Brians (Spain). He is represented before the Court by Mr G.P. Hamer, a lawyer practising in Amsterdam.

A. The circumstances of the case

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

On 3 May 1997, the mother of A., a then ten-year old boy, filed a criminal complaint with the police alleging that on 1 May 1997 A. had been sexually assaulted by an unknown man. On the same day Mr Z., an officer of the juvenile and vice police (*jeugd- en zedenpolitie*) took a statement from A. as well as from his mother.

On 11 May 1997, the mother of B., a then six year old boy, informed the police that on 10 May 1997 an unknown man had sexually assaulted her son.

On 12 May 1997, on the basis of descriptions given to the police, the applicant was arrested and detained on remand.

On 13 May 1997, A. was confronted with the applicant through a two-way mirror and identified him as the man who had assaulted him. According to the record of this confrontation drawn up by Ms X., an officer of the juvenile and vice police, A. had recoiled when he was confronted with the applicant, saying "That is him".

On the same day, Ms E. – an aunt of B. – gave a statement to the police in which she stated that on 10 May 1997, directly after having been told by her son W. that a man had touched the genitals of his cousin B., she had left her house in order to find this man, that she had found a man who matched the description given by her son and that this man had run away from her. When confronted with the applicant through a two-way mirror, she stated that she was 80% certain that he was the man whom she had seen on 10 May 1997.

Also on 13 May 1997, B.'s mother filed a criminal complaint with the police against an unknown man who had sexually assaulted her son. On the same day, Ms Y., an officer of the juvenile and vice police, took a statement from B. When confronted with the applicant through a two-way mirror, he identified the applicant as the man who had sexually assaulted him.

On 13 May 1997, the mother of C., a then nine-year old boy, filed a criminal complaint with the police against an unknown man who had sexually assaulted her son on 10 May 1997. In his statement to the police officer Ms Y., C. gave a description of the man. According to the record drawn up by Ms Y., C. visibly reacted in fright when he was confronted with the applicant through a two-way mirror, identified him as the man who

had sexually assaulted him and started crying. A statement was also taken from C.'s mother in which she stated that her son had told her on 10 May 1997 that a man had touched his private parts.

On 14 May 1997, the police took a statement of Ms F. who had seen, met and spoken with the applicant at a playground.

On 20 May 1997, the mother of D., a then eleven-year old boy, filed a criminal complaint against an unknown man who had sexually assaulted her son D. earlier that month. On 22 May 1997, the police took a statement from D. in which he described how a man had touched his private parts, that this man had stopped this when he had started to scream, that he had then gone to his mother and told her what had happened, that on the same day he had seen this man again, and that an angry woman had then approached this man who then ran away.

On 2 June 1997, D. was confronted with the applicant through a two-way mirror and identified him as the man who had assaulted him.

The applicant was subsequently summoned to appear before the Amsterdam Regional Court (*arrondissementsrechtbank*) on 2 July 1997 in order to stand trial on charges of sexual assault and acts of indecency with persons aged under sixteen.

On 24 June 1997 the applicant's lawyer requested the public prosecutor to summon the four boys, A.'s mother and Ms F. to appear before the Regional Court in order to be heard as witnesses. The public prosecutor rejected this request by letter of 13 June 1997, considering that it would be particularly difficult, given their young age, to hear the four boys and given that the defence had failed to indicate in any way – apart from a mere denial of the facts by the applicant – on what grounds it doubted the reliability of the confrontations and the statements given in the investigation phase.

At the hearing of 2 July 1997 before the Regional Court, at which the applicant was assisted by an interpreter, the defence reiterated its request – arguing that a mistaken identity could not be excluded – to hear the four boys, if appropriate *in camera*, as well as A.'s mother and Ms F. The prosecution opposed the request to hear the four boys, but not the request to hear the other two witnesses.

Having deliberated, the Regional Court rejected the request to hear the four victims, holding:

> "A one-to-one identification through a two-way mirror (*enkelvoudige spiegelconfrontatie*) has taken place at the police station, the value of which is now challenged by the defence. Now counsel asks again for a one-to-one confrontation (*enkelvoudige confrontatie*) of the victims with the accused at a court hearing. On this point, the court considers that such a confrontation between the witnesses and the accused cannot change or add anything to the prior confrontations that have taken place."

The Regional Court granted the request of the defence to hear A.'s mother and Ms F. In order to allow the prosecution to comply with a request

from Interpol to provide the latter with a photograph of the applicant as well as his fingerprints so as to compare these with materials held by the Spanish police, the Regional Court adjourned its further examination of the case for a maximum period of three months.

The Regional Court resumed its examination on 20 August 1997. The applicant was present and was assisted by an interpreter. The Regional Court noted that the following items had been added to the applicant's case-file: photographs of the applicant taken by the Spanish police, a fax message dated 14 July 1997 from Interpol Madrid concerning pending preliminary judicial investigations against the applicant in Barcelona in respect of, inter alia, exhibitionism and sexual provocation of minors, and a formal record dated 19 August 1997 of the forensic bureau of the Amsterdam-Amstelland police according to which the applicant's fingerprints matched those taken from him by the police in Barcelona on 31 May 1995.

The applicant accepted that he was the man in the police photographs, and confirmed that the Spanish police had taken his fingerprints on 31 May 1995. He further confirmed that, on 12 December 1995 in Tarragona (Spain), he had been convicted of sexual assault of minors for which he had been sentenced to six months' imprisonment. He further denied the charges brought against him in the Netherlands, as well as the facts on which these charges were based.

Upon request of the defence, the Regional Court then heard Mrs E. and Ms F. Although both witnesses identified the applicant at the hearing, he denied ever having seen them. After having given the prosecution and the defence the possibility to question both witnesses, the Regional Court then released these witnesses with the parties' consent.

After having heard the parties' final pleadings, the Regional Court closed the trial proceedings and set a date for judgment.

In its judgment of 3 September 1997, the Regional Court convicted the applicant of sexual assault and of acts of indecency with persons aged under sixteen and sentenced him to twenty-months' imprisonment. Both the applicant and the prosecution filed an appeal with the Amsterdam Court of Appeal (*gerechtshof*).

On 26 January 1998, a hearing was held before the Court of Appeal. The applicant, who was present, was assisted by an interpreter. The Court of Appeal heard the applicant. After the applicant had read out some pages of written pleadings prepared by himself in Spanish in which he challenged the reliability of his confrontation with the various witnesses and the latter's statements, the President informed him that he could submit this document to the court. The President ordered that this document be translated into Dutch and be added to the applicant's case-file.

The Court of Appeal also took note of a request filed by the defence to refer the case back to the investigating judge (r*echter-commissaris*) in order to hear the four boys as witnesses and for an identification of the applicant

by putting photographs of different persons to the witnesses (*meervoudige / keuze-foto-confrontatie*). In this connection, the lawyer acting for A. and his mother submitted that A. had been quite shocked by the events, that he no longer did certain things alone and asked at his own initiative to be accompanied, and that it was very difficult for him to come to terms with what had happened to him. After having heard the parties' pleadings, the Court of Appeal closed the trial proceedings, stated that it would determine the requests filed by the defence in its judgment and set a date for judgment.

In its interim judgment of 9 February 1998, the Court of Appeal stated that it had appeared during its deliberations that its investigation had been incomplete. It found it necessary to hear the police officers X., Y. and Z. in relation to the manner in which the victims had been questioned and confronted with the applicant. To this end, it fixed a hearing for 16 April 1998. It further ordered that the applicant was to be released from pre-trial detention on 10 February 1998.

On 16 April 1998, the Court of Appeal reopened the trial proceedings. The applicant, who had been released in the meantime, did not appear. His lawyer, who was present, informed the Court of Appeal that the applicant was detained in Spain, and that he had instructed his lawyer by telephone to request the Court of Appeal to proceed with the trial proceedings in his absence.

The Court of Appeal heard the police officers X., Y. and Z.. After having given the prosecution and the defence the possibility to question these witnesses, the Court of Appeal then released the witnesses with the parties' consent. After having heard the parties' final submissions, the Court of Appeal closed the proceedings and set a date for judgment.

In its judgment of 27 April 1998, the Court of Appeal quashed the Regional Court's judgment of 3 September 1997, convicted the applicant of sexual assault and acts of indecency involving persons under sixteen years old and sentenced him to fifteen-months' imprisonment of which five were made conditional on a probationary period of two years. It based the applicant's conviction on a statement made by the applicant before the Court of Appeal, police reports, statements made to the police by the victims, as well as on statements given by the victims' mothers, Ms E. and by Ms F.

Noting that the applicant's identification by each of the victims and other witnesses was corroborated by the separate identifications made by the other victims and witnesses, the Court of Appeal considered that a mistake in identity was excluded. In so far as the defence continued to press for it, the court rejected the defence's request to refer the case back to the investigating judge for a new identification of the applicant through photographs.

As regards the request of the defence to be provided with the possibility to question the four boys, the Court of Appeal considered, also noting the

evidence given by the three police officers involved, that it was not necessary to take further evidence from the boys. After having balanced the interests involved, it considered on this point that the applicant's interests were outweighed by those of the still very young children in not being forced to relive what was for them a possibly very traumatic experience.

As to the reliability and credibility of the boys' statements to the police, it considered, *inter alia*, that they had been questioned by experienced officers of the social juvenile and vice squad. It appeared from the police records and the evidence given by the officers involved, that the questioning had been conducted in an open, careful and non-suggestive manner. Further, finding that the individual statement of each child had sufficient support in the individual statements of the other three children as well as in the evidence given by Ms F. and Ms E., the Court of Appeal concluded that – subject to cautious assessment – the victims' statements could be used in evidence.

On 4 May 1998, the applicant's lawyer filed an appeal in cassation, which is limited to points of law and procedural conformity, with the Supreme Court (*Hoge Raad*). On 11 March 1999, the applicant's lawyer transmitted to the Supreme Court a letter written in Spanish by the applicant himself.

On 6 May 1999, the applicant's lawyer completed the applicant's appeal in cassation by submitting the grounds of the appeal and, on 25 June 1999, submitted a response to the advisory opinion of the Advocate General to the Supreme Court. In this response, the applicant's lawyer disputed, *inter alia*, the Advocate General's recommendation that, pursuant to Article 433 § 2 of the Code of Criminal Procedure (*Wetboek van Strafvordering* - "CCP") which governs direct submissions by appellants in cassation proceedings and in view of the Supreme Court's case-law (*Hoge Raad*, 1 May 1990, *Nederlandse Jurisprudentie* 1990, no. 800), the Supreme Court should disregard the applicant's letter submitted on 11 March 1999 as it was written in Spanish without being accompanied by a translation in Dutch. The applicant's lawyer argued that the applicant was indigent and was unable to have his letter translated into Dutch, and that translation costs were not covered by the Netherlands legal aid scheme.

In its judgment of 12 October 1999, the Supreme Court rejected the applicant's appeal in cassation subject to the correction of a clerical oversight in the Court of Appeal's judgment of 27 April 1998. The Supreme Court stated in its judgment that it had not taken into account the applicant's letter written in Spanish.

In so far as the applicant complained that the Court of Appeal had used in evidence the statements given by the four boys although they had never been heard by a judge and/or in the presence of the defence and despite a request thereto filed by the defence, the Supreme Court held that it was not necessarily contrary to Article 6 to use in evidence statements of such

witnesses where such evidence was sufficiently supported by other evidence. Having regard to the manner in which the Court of Appeal had set out in its judgment, as regards each separate fact on which the applicant had been convicted, the evidence given by each of the boys and other pertaining evidence, the Supreme Court noted that the other evidence related each time to the parts of the boys' statements that were disputed by the applicant. The Supreme Court concluded that it was implicit in the Court of Appeal's findings that it had found the supporting evidence to be sufficient and that this finding, in itself not incomprehensible, could not be examined further in cassation proceedings.

The Supreme Court also rejected the applicant's argument that the Court of Appeal had unjustly found that it was not necessary to hear the four minors as witnesses as the Court of Appeal should have applied the standard whether and, if so to what extent, a failure to hear them would have harmed the applicant's defence. The Supreme Court held that, in rejecting the request to hear the four victims, the Court of Appeal had applied the correct standard. Its refusal was not found incomprehensible as its conclusion as to the children's interests in not being forced to relive a possibly very traumatic experience for them implied that the Court of Appeal was of the opinion that any confrontation with that experience – regardless of the manner in which it was conducted – for the purposes of the investigation was to be avoided.

B. Relevant domestic law and practice

According to Article 264 § 1 (b) and (c) of the CCP, the public prosecutor may refuse the request of an accused to summon a witness in order to give evidence, where the prosecutor considers that there are well-founded reasons to believe that giving oral evidence in court would entail a serious risk for the health of that witness, or when a refusal of such a request, in all reasonability, cannot be regarded as harming the accused's defence. On the same grounds, a trial court may decide not to hear a witness proposed by the defence (Article 288 § 1 (b) and (c) of the CCP).

Only in very rare cases are young children heard as witnesses before a court. In most cases, such witnesses are heard before an investigating judge. Witnesses younger than sixteen, who are heard before an investigating judge, are exempted from the obligation to testify under oath, but are urged to speak the whole truth and nothing but the truth (Article 216 § 2 CCP).

When a trial court uses such a statement in evidence, it should give special reasons in its judgment for doing so (Article 360 § 1 CCP). This requirement does, however, not apply where it concerns a statement of a child set out *de auditu* in a record (*proces-verbaal*) drawn up by an officer with powers of investigation (*opsporingsambtenaar*) (Hoge Raad, 6 February 1990, *Nederlandse Jurisprudentie* 1990, no. 482).

COMPLAINTS

The applicant complains under Article 6 §§ 1 and 3 (d) of the Convention that, in the criminal proceedings against him, he was deprived of a fair trial in that the statements given by A., B., C. and D. to the police were used in evidence without the defence ever having had an opportunity to question them.

The applicant further complains under Article 6 §§ 1 and 3 (c) and (e) of the Convention that the Supreme Court, in its examination of his appeal in cassation, disregarded his letter written in Spanish.

THE LAW

The applicant complains under Article 6 §§ 1 and 3 (d) and (e) of the Convention that he was deprived of a fair hearing in that the statements of A., B., C. and D. to the police were used in evidence, whereas the defence was never provided with an opportunity to question these witnesses. Moreover, the Supreme Court disregarded a letter written by him in Spanish.

Article 6 of the Convention, in so far as relevant, reads:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (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;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

As to the applicant's complaint under Article 6 §§ 1 and 3 (d) of the Convention that he was deprived of a fair trial in that he was convicted on the basis of statements given by A., B., C. and D. to the police without the defence ever having had an opportunity to question them, the Court considers that it cannot, on the basis of the case-file, determine the admissibility of this complaint and that it is therefore necessary, in

accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

Insofar as the applicant alleges a violation of his rights under Article 6 §§ 1 and 3 (c) and (e) of the Convention in that the Supreme Court disregarded his letter written in Spanish, the Court reiterates that the guarantees contained in paragraph 3 of Article 6 are specific aspects of the general concept of a fair trial set forth in paragraph 1. It will therefore examine this complaint under those two provisions taken together.

The Court recalls that the manner in which Article 6 applies to courts of cassation depends on the special features of cassation proceedings and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them. Given the special nature of the role of a court of cassation such as the Netherlands Supreme Court, which is limited to reviewing whether the law – including procedural requirements – has been correctly applied, the Court accepts that the procedure followed in a court of cassation may be more formal (see, most recently, *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, 26 July 2002, § 41).

The Court considers that rules on the language to be used for submissions to a court of cassation are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. Those concerned must expect those rules to be applied. However, such rules or their application should not prevent litigants from making use of an available remedy (see, *Ivanova v. Finland* (dec.), no. 53054/99, 28 May 2002, unreported).

The Court notes that, during the proceedings before the Regional Court and the Court of Appeal, the applicant was assisted by an interpreter as long as he attended the trial proceedings. It further notes that the Court of Appeal ordered that a Dutch translation be made of the applicant's personal pleading notes in Spanish and that these notes were to be included in his case-file. Moreover, the applicant's appeal in cassation to the Supreme Court was filed after the applicants' arguments had been examined and determined by the Court of Appeal. The Court finally notes that, in the proceedings before the Supreme Court, the applicant was represented by a lawyer who did in fact submit grounds of appeal to the Supreme Court which were determined in its judgment of 12 October 1999.

In these circumstances, the Court cannot find that the fact that the Netherlands Supreme Court disregarded the applicant's letter because it was written in Spanish without being accompanied by a Dutch translation infringed the applicant's rights under Article 6 §§ 1 and 3 (c) and (e) of the Convention.

It follows that this part of the application must be rejected for being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning the use in evidence of the statements given by A., B., C. and D. to the police;

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President