CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38089/97
by Murray William GIBBS
against the Netherlands

The European Court of Human Rights (First Section) sitting on 31 August 1999 as a Chamber composed of

Mrs E. Palm, *President*,
Mr J. Casadevall,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr C. Bîrsan,
Mrs W. Thomassen,
Mr R. Maruste, *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 8 July 1997 by Murray William Gibbs against the Netherlands and registered on 8 October 1997 under file no. 38089/97;

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

Having regard to the observations submitted by the respondent Government on 15 February 1999 and the observations in reply submitted by the applicant on 10 March 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch national, born in 1974, and at the time of the introduction of the application was detained in the Koraal Specht penitentiary of Curaçao (Netherlands Antilles). He is represented by Mr G. Spong, a lawyer practising in The Hague.

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

A. Particular circumstances of the present case

On 13 June 1994, the applicant was placed in pre-trial detention on suspicion of having committed two armed robberies. By summons of 31 October 1994, he was ordered to appear on 9 November 1994 before the First Instance Court (*Gerecht in Eerste Aanleg*) of the Netherlands Antilles. On 8 December 1994, the First Instance Court of the Netherlands Antilles handed down its judgment. On 13 December 1994, the applicant filed an appeal with the Joint Court of Justice (*Gemeenschappelijk Hof van Justitie*) of the Netherlands Antilles and Aruba. The applicant's case-file was received at the Registry of the Joint Court of Justice on 10 May 1995.

The Joint Court of Justice started its examination of the applicant's case on 12 September 1995, when it adjourned its examination, as the applicant wished to be represented by a new lawyer who had not studied the case-file. On 19 October 1995, a second hearing was held before the Joint Court of Justice. It appeared that yet another lawyer had taken over the applicant's case. The new lawyer sought an adjournment of the proceedings with a view to hearing a number of witnesses before the court, whose names the lawyer would communicate at some further point in time. The Joint Court of Justice granted this request and adjourned its examination until 16 November 1995. By letter of 2 November 1995 the defence submitted the names of seven witnesses, including U.H., whom the defence wished to hear before the Joint Court of Justice.

On 16 November 1995, four witnesses appeared and were heard before the Joint Court of Justice. After these four witnesses had given evidence, the defence sought a further adjournment in order to hear two of the three witnesses who had not appeared, namely U.H. and J.F., and a further witness D.B. The Joint Court of Justice granted the request and adjourned its further examination until 29 November 1995.

On 27 November 1995, on the basis of an order of the Joint Court of Justice, the witness J.F. was heard before the investigating judge (*rechter-commissaris*). Although U.H. had also been summoned to give evidence before the investigating judge, this witness failed to appear before the investigating judge.

At the hearing of 29 November 1995, the President of the Joint Court of Justice stated that four witnesses had been heard on 16 November 1995 and that a further witness had been heard before the investigating judge. He further stated that it had been ordered that the witness U.H. be forcibly brought (*medebrenging*) before the Joint Court of Justice, but that this witness had not appeared. The defence persisted in its request that U.H. be heard. The prosecution objected to a further stay of the proceedings and argued that the applicant, who had been represented throughout the proceedings, had been provided with ample opportunity to have witnesses heard. After having deliberated, the Joint Court of Justice decided to reject the request by the defence to hear U.H.

In its judgment of 20 December 1995, the Joint Court of Justice convicted the applicant of theft involving threat to use violence and use of violence having caused death, extortion and unlawful possession of a fire-arm, and sentenced him to fifteen years' imprisonment with deduction of the time spent in pre-trial detention.

On 27 December 1995, the applicant filed an appeal in cassation with the Netherlands Supreme Court (*Hoge Raad*), including a complaint of the length of the proceedings. On 16 July 1996, the applicant's case-file was transmitted by the Joint Court of Justice to the Registry of the Supreme Court, where it arrived on 30 July 1996. The Supreme Court examined the applicant's case for the first time on 3 December 1996.

In his conclusions, the Procurator General (*Procureur-Generaal*) to the Supreme Court advised the Supreme Court, *inter alia*, to reject the applicant's complaint under Article 6 of the Convention in respect of the delay between 8 December 1994 and 10 May 1995. He noted that the applicant, who had been represented by a lawyer in the proceedings on appeal, had not raised this complaint in the proceedings before the Joint Court of Justice and considered that this complaint could not be raised for the first time in cassation proceedings before the Supreme Court. He further considered that the delay was not of such a nature that the Joint Court of Justice should *ex officio* have examined the compatibility of this delay with Article 6 of the Convention.

Insofar as the applicant complained of the delay between 20 December 1995 and the first examination of the applicant's appeal in cassation, the Procurator General advised the Supreme Court to reject this complaint on the basis of a finding that this delay was not so long that the applicant's right to a hearing within a reasonable time had been violated. The Procurator General further considered that the total length of the proceedings against the applicant, i.e. more than 2½ years, had also not exceeded a reasonable time.

The Supreme Court rejected the applicant's appeal in cassation by judgment of 25 March 1997. Referring to Article 101a of the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*), the Supreme Court further rejected the applicant's complaint of the length of proceedings as not prompting a determination of legal issues in the interest of legal unity and development.

B. **Relevant domestic law and practice**

30. Pursuant to Article 206 of the former Code of Criminal Procedure of the Netherlands Antilles (*Wetboek van Strafvordering*, hereinafter referred to as "former CCP")[1], as in force at the relevant time, a judgment must contain reasons and express the punishable fact including the circumstances which may lead to a mitigated or aggravated sentence. It must further contain findings on what facts have been found proven or not, the legal qualification of the facts found proven, the question of the accused person's guilt and the application of the statutory defined punishment. Pursuant to Article 211 former CCP, a judgment must be signed by the judge, who has decided the case, and the registrar within 48 hours after its delivery. Although the former CCP contains no explicit obligation that a judgment should contain the means of evidence on which a conviction is based, in practice such means were set out in judgments leading to a conviction.

1. On 1 October 1997 a new Code of Criminal Procedure of the Netherlands Antilles entered into force.

However, since – pursuant to Article 194 former CCP - the court has to deliver the judgment within three weeks following the closure of the trial, it was not unusual at the relevant time that initially an abridged judgment would be drafted in cases where the accused was convicted. Such a judgment does not account for the means of evidence on which the conviction is based. A complete version of the judgment was not prepared unless the convicted person or the public prosecutor lodged an appeal against the judgment. In that case the means of evidence were included in the judgment and the case-file, including the complete judgment, was transmitted to the appeal court.

In a judgment of 17 June 1997 (nr. 105.153 A), concerning an appeal in cassation against a judgment of 2 January 1996 of the Joint Court of Justice of the Netherlands Antilles and Aruba in which a complaint was raised that the period of time which had elapsed between the date on which the Joint Court of Justice had handed down its judgment and the first examination of the appeal in cassation constituted a delay contrary to the reasonable time requirement under Article 6 of the Convention, the Supreme Court noted that the appeal in cassation had been filed on 8 January 1996, that the pertaining case-file had been received by the Registry of the Supreme Court on 18 September 1996 and that the appeal in cassation had been examined for the first time on 14 January 1997.

The Supreme Court considered that no special circumstances had appeared which could justify the period of eight months and ten days that had elapsed between 8 January 1996 and 18 September 1996. It concluded that, therefore, the reasonable time requirement under Article 6 of the Convention had not been met and that, on this basis, the sentence imposed on the applicant should be mitigated. The Supreme Court quashed the determination of the applicant's sentence and referred the case back to the Joint Court of Justice of the Netherlands Antilles and Aruba for a new determination of the applicant's sentence.

COMPLAINT

The applicant complains under Article 6 of the Convention that the proceedings exceeded a reasonable time given the delays which occurred between the judgment of 8 December 1994 and the first examination of his appeal by the Joint Court of Justice and between the judgment of 20 December 1995 and the first examination of his appeal in cassation before the Supreme Court. He argues that the reasonable time requirement in his particular case should be applied even more strict than in normal circumstances as, pending the proceedings at issue, he was detained in the Koraal Specht penitentiary of Curaçao, where the conditions of detention have been found unacceptable in terms of both material aspects and available activities by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (96) 1, Report of 18 January 1996).

PROCEEDINGS BEFORE THE COURT

The application was introduced on 8 July 1997 and registered on 8 October 1997.

On 21 October 1998, the Commission decided to communicate the applicant's complaint concerning the length of proceedings to the respondent Government and to declare the remainder of the application inadmissible.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

The Government's written observations were submitted on 15 February 1999, after an extension of the time-limit fixed for that purpose. The applicant replied on 10 March 1999.

THE LAW

The applicant complains under Article 6 of the Convention that the criminal proceedings against him have exceeded a reasonable time in that there were two unacceptable delays.

Article 6 of the Convention, insofar as relevant, provides:

"1. In the determination of ...any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by a ... tribunal ...."

The Government submit that the proceedings at issue did not exceed a reasonable time within the meaning of Article 6 § 1 of the Convention. These proceedings at issue, which were dealt with in three instances, lasted in total two years, nine months and twelve days. The Government argue that it was an extremely big and complicated case involving four suspects and in which conflicting evidence was given by the suspects and witnesses, which resulted in a situation that it took more time than usual for the trial courts to formulate the full text of the judgments. The Government consider that, in the proceedings before the trial courts, there were no protracted periods of inactivity imputable to the State. The Joint Court of Justice did stay the proceedings three times on request of the applicant and rejected a request for a fourth stay sought by the applicant in order to take evidence from one witness who had failed to appear.

The Government are of the opinion that the Supreme Court dealt with the case with the special diligence required when an accused in detained. It started with its examination of the applicant's case four months after the arrival of the case-file and handed down its judgment four months after the first hearing in cassation. In this connection, the Government point out that, in his appeal in cassation, the applicant did not refer to the conditions of detention in the Koraal Specht penitentiary or rely on Article 3 of the Convention.

The applicant refutes the Government's arguments and maintains that the proceedings against him have exceeded a reasonable time.

The Court recalls that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of each case and having regard in particular to the following criteria: the complexity of the case, the conduct of the applicant and that of the competent authorities (see, *inter alia*, the Kemmache v. France judgment of 27 November 1991, Series A no. 218, p. 27, § 60). Persons held in detention are further entitled to special diligence (see the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 35, § 84).

In the present case, the proceedings started on 13 June 1994, when the applicant was taken into pre-trial detention, and ended on 25 March 1997, when the Supreme Court rejected the applicant's appeal in cassation. The applicant was detained pending these proceedings.

Insofar as the applicant submits that he was entitled to special diligence for being detained in the Koraal Specht penitentiary, the Court notes that this argument has not been raised in the domestic proceedings. Consequently, on this point, the applicant has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention (see, *inter alia*, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, §§ 65-66).

As regards the total length of the proceedings, i.e. slightly less than two years and ten months in the course of which the applicant's case was examined in three instances, the Court cannot find that the total duration of these proceedings exceeded a reasonable time within the meaning of Article 6 § 1 of the Convention.

Insofar as the applicant complains of the delay between 8 December 1994, when the First Instance Court handed down its judgment, and 12 September 1995, when the Joint Court of Appeal adjourned its examination in order to allow the applicant's new lawyer to study the case-file, the Court observes that the applicant has not raised this complaint in the proceedings before the Joint Court of Appeal. Consequently, this court did not address this issue. It is true that the applicant did raise a complaint of this delay in the subsequent proceedings in cassation. However, since the scope of these proceedings is limited to the proceedings before the Joint Court of Appeal, it follows that the applicant, as regards this delay, has failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention (see the Akdivar and Others judgment, *op. cit.*).

As to the complaint of the delay between 20 December 1995, when the Joint Court of Appeal handed down its judgment, and 3 December 1996, when the Supreme Court started its examination of the applicant's appeal in cassation, the Court notes that the major part of this delay appears to have been caused by the late transmission of the applicant's case-file from the Netherlands Antilles to the Supreme Court. Although this delay may appear rather long in relation to the total length of the proceedings, the Court finds, on balance and having regard in particular to the total duration of the proceedings, that this delay in itself is insufficient for concluding that the proceedings exceeded a reasonable time within the meaning of Article 6 § 1 of the Convention.

It follows that the application must be rejected as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Elisabeth Palm
President