CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43149/98
by Robert Mink KOK
against the Netherlands

The European Court of Human Rights (First Section), sitting on 4 July 2000 as a Chamber composed of

Mrs E. Palm, *President*,
Mrs W. Thomassen,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr C. Bîrsan,
Mr J. Casadevall,
Mr R. Maruste, *judges*,
and Mr M. O'Boyle, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 20 August 1998 and registered on 28 August 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Netherlands national, born in 1961 and, as far as the Court is aware, living in Amsterdam (Netherlands). He is represented before the Court by Ms T.N.M.B. Spronken, a lawyer practising in Maastricht (Netherlands), and Ms A.G. van der Plas, a lawyer practising in Amsterdam.

A. The circumstances of the case

1. Background to the case

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

On 22 July 1994 an Audi car belonging to one Blanker was searched by the police. Inside it were found a sum of money, mostly in foreign currency, to an amount equivalent to approximately 2,2 million NLG (Netherlands guilders), a baseball cap, a forged driving license bearing the applicant's picture but another person's name, an unopened letter addressed to the applicant, some keys and a mobile telephone.

In early August 1994, the exact date is not known, an informant whose identity was never disclosed stated to a police officer called Van Looijen, head of the Amsterdam section of the State Criminal Intelligence Department (*Rijks Criminele Inlichtingen Dienst*, "RCID"), that the applicant was using a house located at Newtonstraat No. 40 in Amsterdam to store firearms. A consignment of weapons had recently been delivered there by a four-wheel-drive off-road vehicle in which the applicant had been a passenger and another person the driver.

The Newtonstraat house was inhabited by one Belinfante, a close friend of the applicant from childhood; the applicant had at one time lived there too. At another period of his life he had lived in the house next door and his mother still lived there.

On 3 August 1994 the police raided the Newtonstraat house. According to the official report of the event later drawn up, they found ninety-three kilograms of cocaine, three sub-machine guns, a gun silencer, two bayonets, ten live hand grenades, fifty-six kilograms of Iremite high explosive, eight bolt-action rifles, nine automatic pistols, two revolvers, seven sawn-off shotguns and nearly twenty-seven thousand rounds of live ammunition. These items were packaged in sports bags and in dustbin liners wrapped with adhesive tape. A second mobile telephone was also found.

It appears from a police report dated 9 August 1994 that one of the keys found in the Audi car fitted the door of the Newtonstraat house. Another fitted the door of the applicant's residence.

The applicant was arrested on 27 April 1995 in an Amsterdam coffee shop. According to the official police report later drawn up of this event, he was carrying a pistol loaded with eighteen rounds of live ammunition.

In the case against Blanker, which had begun before the applicant's case, a hearing was held before Amsterdam Court of Appeal on 18 July 1995. Police Officer Van Looijen was heard as a witness with regard to the character and reliability of the anonymous informant. He stated that the informant was considered very reliable, having provided reliable

information in the past, but refused to give any other information at all – not even the precise date on which the weapons were delivered – so as not to place the informant's life in danger. The date of delivery was given as "after 7 July 1994". The official record of this hearing, including Police Officer Van Looijen's statement, made its way into the file of the applicant's case.

On 3 August 1995 Blanker's father was questioned by the Belgian police (*Rijkswacht*). He stated that he had been tricked by his son into unwittingly overseeing the transport by air of thirty-four kilograms of cocaine from Buenos Aires to Brussels, from there to Amsterdam and on to Germany. The cocaine had been intercepted at Zaventem (Brussels) Airport on 19 July 1994.

On 5 September 1995 police officers drew up a telephone metering report from which it appeared that the mobile telephone found in the Audi car had been used on several occasions to call the telephone found in the Newtonstraat house, most recently shortly before the Audi car was searched. Other information, such as the mention (in an address list belonging to another person) of the applicant's first name next to the number of the telephone found in the Audi car and a statement of a (named) informant that the applicant had used that car, suggested that the telephone found in the car had been used by the applicant.

2. Criminal proceedings against the applicant

Proceedings in the Regional Court

On 28 April 1995, the day following his arrest, the applicant was taken into police custody (*inverzekeringstelling*) on charges of taking part in a criminal organisation, possession of the ninety-three kilograms of cocaine and the arms, ammunition and high explosive found in the Newtonstraat house, and possession of the pistol and ammunition he had been carrying at the time of his arrest.

On 1 May 1995 the Investigating Judge (*rechter-commissaris*) ordered the applicant taken into initial detention on remand (*inbewaringstelling*).

On 4 May 1995, after a hearing *in camera*, the Regional Court (*Arrondissementsrechtbank*) of Amsterdam ordered the applicant taken into extended detention on remand (*gevangenhouding*).

The applicant appealed against the decision of the Regional Court. On 31 May 1995, after a hearing *in camera*, the Court of Appel (*Gerechtshof*) of Amsterdam overturned the decision of the Regional Court and ordered the applicant's release.

The trial hearing opened on 25 July 1995. The applicant denied all charges.

The occupant of the Newtonstreet house, Belinfante, was heard as a witness. He stated that it was incorrect that the applicant had delivered weapons to his house using a Toyota Land Cruiser. The applicant had nothing to do with the weapons. Two other individuals, whom he refused to name (being himself accused in connection with these

dealings), had delivered the weapons, using a delivery van (*bestelbus*). The applicant had visited the house to retrieve some diving equipment, which he had left there, before going on holiday; it was possible that he might have touched some other items in the process, leaving his fingerprints.

The owner of the Audi car, Blanker, was also heard as a witness. He stated that his wife owned a Toyota Land Cruiser, registered in her name since 7 July 1994, and denied that it had been lent to anyone after that date. He denied knowing the applicant and denied having seen him in the aeroplane on the way to the United States.

At the request of the Public Prosecutor the Regional Court drew up a separate record of the statements of Belinfante and Blanker to support a possible later prosecution on perjury charges. The Court has not been informed of any further proceedings in this matter.

Also at the request of the Public Prosecutor the Regional Court ordered the applicant arrested in court and detained on remand. The reasons given were that it appeared from information which had come to light since 31 May 1995, when the Court of Appeal ordered his release, that there was a *prima facie* case against the applicant, that he was likely to abscond and that he might reoffend.

The Regional Court then referred the case back to the Investigating Judge in order to have the anonymous informant heard as a witness.

On 28 July 1995 the Public Prosecutor lodged an application to the Investigating Judge to interrogate a threatened witness and keep his/her identity concealed. A copy of this document, which refers in general terms to Articles 226a – 226f of the Code of Criminal Procedure (*Wetboek van Strafvordering*) but does not give any indication concerning the witness him/herself, was made available to the defence.

On 10 August the Investigating Judge, Judge Faber, heard the applicant and the Public Prosecutor before coming to a decision. The applicant's counsel was invited to be heard but did not turn up. The applicant himself submitted a handwritten statement. He denied that there was any threat to the witness, stating that he had not threatened anyone and that he had never been convicted of any crimes involving violence.

The same day Investigating Judge Faber ordered that the witness's identity remain concealed. Her finding that the witness was in fact threatened was phrased as follows:

> "Considering that in view of the statements made by the witness to [the police], as related to the Investigating Judge by [Police Officer] J.C. van Looijen, and the statement made by the witness to the Investigating Judge, as related in my ... official record of my findings (*proces-verbaal van bevindingen*), it is not unlikely that the witness has reason to fear for the life, the health or the safety of the witness or his/her immediate surroundings;"

Investigating Judge Faber's official record of her findings, referred to in her decision, includes the following:

> "I informed this person of the matters on which I wished to interrogate him/her and asked him/her why he/she wished to remain anonymous.
>
> The person answered that he/she has heard stories about the accused [i.e. the applicant] and his circle of friends, from which it would appear that the accused and his circle of friends are involved in shady business (*duistere praktijken*). The accused reportedly moves in criminal circles. These things

> which the person has heard, in combination with what he/she has seen and will make a statement about, namely persons including the accused carrying a large number of large firearms, puts the person in great fear. In addition, the person also gave an explanation of his/her situation, in which he/she feels vulnerable. The person is afraid of a drastic interference with his/her personal life if his/her identity becomes known to the accused and his circle of friends.
>
> The person informed me that he/she definitely did not want to testify under his/her own name.
>
> I, Investigating Judge, have discussed with the person whether he/she has a criminal record (*strafrechtelijke antecedenten*) and whether there was any relationship between the person and the accused, and also the person's reputation and family situation.
>
> The person made a reliable and balanced impression on me, Investigating Judge. When asked, the registrar expressed the same opinion.
>
> After my conversation with the above-mentioned person [police officer] J.C. van Looijen ... informed me of the above-mentioned person's situation. What I was told by Mr van Looijen corresponds to what the person told me him/herself and confirmed the vulnerability of the person's situation."

The applicant's counsel appealed against the Investigating Judge's decision on 21 August 1995, as did the applicant himself the following day.

Also on 21 August 1995 Investigating Judge Faber wrote to the applicant's counsel informing him of her intention to interrogate the anonymous witness on 26 August. The actual interrogation would be held in a room in which the registrar and Police Officer Van Looijen would be present in addition to the witness and herself; Police Officer Van Looijen would be able to help her decide which questions to prevent in the interest of the witness's safety.

On 24 August 1995 the applicant's counsel wrote to the Investigating Judge objecting against the presence of Police Officer Van Looijen in the same room as the anonymous witness and asked her not to allow any other person into the presence of the witness, the registrar and herself.

A three-judge chamber of the Regional Court held a hearing *in camera* on 25 August 1995. The applicant was present in person, assisted by his counsel. He asked for an adjournment, as he had only been informed of the date of the hearing the previous day and had had no time to discuss matters with his counsel. This was denied on the ground that the applicant had had the time since lodging his appeal, three days before, to consult his counsel; the hearing then proceeded.

The same day the Regional Court dismissed the appeal. Its reasoning included the following:

> "Counsel argued *in camera* that, contrary to decisions in similar cases of this Regional Court and the Court of Appeal of Amsterdam, not only the reasonableness, but also the merits of the decision of the Investigating Judge should be examined (*niet alleen marginaal, doch ook inhoudelijk dient te worden getoetst*).
>
> In the present case the Regional Court does not consider it necessary to go into the merits of the decision of the Investigating Judge. In the opinion of the Regional Court the Investigating Judge has sufficiently checked the reasons for granting the witness anonymity. The Regional Court considers in this regard that it appears from the Investigating Judge's official report of her findings that the witness's situation is one of vulnerability, a circumstance for which the Investigating Judge has accounted by obtaining information from [Police Officer] J.C. van Looijen. Counsel's request will therefore be refused.
>
> The Regional Court considers it credible (*aannemelijk*) on the basis of the Investigating Judge's official report of her findings, the content of the statement of J.C. van Looijen made at the public hearing of the Court of Appeal of Amsterdam on 18 July 1995, and the nature and importance of

> the crimes with which the accused is charged, that the witness has reason to fear for the life, health and safety of the witness him/herself and his/her direct surroundings.
>
> The witness has therefore rightly been granted the status of threatened witness, which means that the appeal against the decision of the Investigating Judge must be dismissed."

The interrogation of the anonymous witness took place the following day. The witness was sworn in. It appears from the Investigating Judge's official record of the occasion that, in addition to the Investigating Judge, the registrar, a police officer called Van Es (operating the sound link) and another police officer, called De Waart (as listener-in, *toehoorder*), were present in the same room as the witness. The Public Prosecutor, the applicant's counsel, a police officer operating the sound link and the Procurator General of the Amsterdam Court of Appeal as listener-in were in another room. The sound link involved voice distortion. The witness's answers were first heard by the Investigating Judge with the sound link switched off, then, if the Investigating Judge found that the answer did not jeopardise the witness's safety, repeated through the sound link so that the persons in the other room could hear.

The Investigating Judge's official record includes the following:

> "I, Investigating Judge, have spoken with the witness both within the framework of the proceedings under Article 226a § 2 of the Code of Criminal Procedure and prior to the interrogation, the registrar, M.D. Jansen, being present. On these occasions the reasons why the witness wished to make a statement were discussed. On the first occasion the witness appeared worried about the risk of his/heir identity being disclosed. Prior to the interrogation the witness appeared reassured about the measures taken to prevent this from happening.
>
> The witness made on us, Investigating Judge and registrar, a direct, frank and sober impression.
>
> In view of the witness's answers during the two above-mentioned conversations, the way the witness behaved and the way the subsequent interrogation went, we, Investigating Judge and Registrar, come to the conclusion that the witness gives us an impression of reliability."

The applicant's counsel had previously submitted 90 questions by fax. The Investigating Judge's official record lists the questions which were not allowed, giving the reasons why not (mostly irrelevance or concern for the witness's safety).

The witness described the applicant as "a tall man, with fair, slightly curly hair, thin, about thirty years old, normal hair, slightly balding above the temples (*een beetje inhammen*), no spectacles or moustache". He/she had positively recognised the applicant when he was unloading weapons wrapped in dustbin liners, sports bags and a heavy box. The question whether the witness knew the applicant, put by the prosecution, was not allowed in the interests of ensuring the witness's safety. The question, put by the defence, on what day of the week the witness saw the applicant unload the weapons was not allowed either, for the same reason. The interrogation took from 12 noon until 4.10 p.m. During the interrogation the witness made an outline drawing of the vehicle used to transport the weapons, which was transmitted by fax to the room where the applicant's counsel and the prosecutor were. The vehicle was a delivery van with an outline apparently different from that of a Toyota Land Cruiser: it had a sloping front instead of a protruding bonnet, and no spare wheel at the back.

On 20 September 1995 Blanker's counsel wrote to the applicant's counsel stating that the anonymous witness, when interrogated by the police in the presence of the Procurator General and the Public Prosecutor in addition to himself, had specified the date on which the

weapons were delivered as “between 1 and 7 July [1994]”. He/she had given this information after it had been pointed out that, according to the calendar, “the first week of July” in 1994 was from 1 until 3 July.

On 5 October 1995 the applicant's counsel wrote to the Public Prosecutor asking for further witnesses to be brought forward. These included the wife of Blanker, who was the owner of the Toyota Land Cruiser allegedly used to transport the weapons, and Investigating Judge Faber. The applicant's counsel made it clear that it was intended to determine with greater precision the date on which the delivery had taken place so as to establish the applicant's alibi.

The hearing before Amsterdam Regional Court resumed on 10 October 1995. Investigating Judge Faber was heard as a witness. She persisted in her refusal to mention the date on which the weapons were stated by the anonymous witness to have been delivered (Article 219a Code of Criminal Procedure – *Wetboek van Strafvordering*). This was accepted by the Regional Court on the ground that it was in the nature of things that only the Investigating Judge could decide whether such a refusal was necessary.

Blanker was heard as a witness about the vehicle used for the delivery, which he stated to have been a Toyota Land Cruiser. It had come into his wife's possession no earlier than 7 July 1994.

Police Officer Van Looijen was heard as a witness. He stated that he was aware that the anonymous witness had stated before the Investigating Judge that the weapons were delivered at the beginning of July 1994, but that the anonymous witness was mistaken as to the date. The President of the Regional Court blocked a question relating to the day of the week on which the weapons were delivered. The registration number of the vehicle used was given by the anonymous witness to an unidentified RCID police officer, who gave it to Police Officer Van Looijen; Police Officer Van Looijen refused to say who this police officer was, and was dispensed from so doing by the President of the Regional Court.

The Regional Court viewed a video tape compiled from several tapes found in the house of Donald Groen. These showed a group of persons on various locations in the Netherlands, in the south of Spain and on a trip to Detroit to attend the football world championship. Weapons were occasionally shown. Members of the group were frequently shown brandishing a pistol. The applicant appeared in some of the scenes wearing a baseball cap; he was shown in the company of Blanker on the trip to Detroit, and Blanker was at one point shown laughing at a remark made by the applicant.

The applicant stated, *inter alia*, that he had been in Spain at the end of June 1994, but had returned to the Netherlands by 9 or 10 July. He further admitted that he had been carrying a pistol and ammunition when he was arrested on 27 April 1995. However, he denied having had anything to do with the delivery of weapons at the Newtonstraat house. He had left some diving equipment with Belinfante, which he had gone to pick up in the summer of 1994 before going on holiday; this explained the presence of his fingerprints on dustbin liners. He denied knowing Blanker.

Witnesses were heard about the Toyota Land Cruiser.

Addressing the Regional Court in the applicant's defence, the applicant's counsel stated that the only real indication that the anonymous witness was reliable was the statement of Police Officer Van Looijen and the subjective assessment of the Investigating Judge. He also protested against the refusal to allow the anonymous witness to give the date on which the weapons were delivered, which made it impossible to verify the applicants's alibi. Much was made of the applicant's alibi; of the Toyota Land Cruiser, which in counsel's submission could not have been the vehicle used for delivering the weapons; and of the description of the appearance of the man identified by the anonymous witness as the applicant – the description, counsel said, did not fit because the applicant was in fact quite bald. It was also denied that the applicant had anything to do with the cocaine or with the large sum of money found in the Audi.

On 24 October 1995 the Regional Court gave judgment finding the applicant guilty of all the crimes charged. It sentenced him to six years' imprisonment. The pistol and ammunition found in his possession when he was arrested was withdrawn from circulation (*onttrokken aan het verkeer*) and the money found in the Audi car was declared forfeit (*verbeurd*).

Proceedings in the Court of Appeal

The applicant appealed to the Court of Appeal of Amsterdam.

On 14 April 1996 Dr W.A. Wagenaar, professor of experimental psychology (*psychologische functieleer*) at the university of Leiden, transmitted to the applicant's counsel a report which he had prepared after studying the video tape. He came to the conclusion that the interactions between the applicant and Blanker, as recorded, suggested that they might have known each other by sight; however, it was also possible that they might have had no lasting memory of each other as the applicant claimed.

The hearing of the Court of Appeal opened on 3 May 1996. The used-car dealer who had sold the Toyota Land Cruiser to Blanker's wife was heard as a witness: he gave a date for its sale (6 July 1994). The applicant again denied having known Blanker before the trial. He also denied having had anything to do with the delivery of the weapons and the cocaine: on 22 July 1994 he had visited Belinfante's house in the Newtonstraat to retrieve his diving equipment, after which he had gone on holiday. Police Officer Van Looijen, heard as a witness, confirmed the statement he had made earlier. When the defence protested against the absence from the case-file of the fingerprint report of the Toyota Land Cruiser, the Procurator General stated that no usable fingerprints had been found. Parts of the compilation video tape were shown in open court. The defence also asked for *inter alios* Investigating Judge Faber to be heard as a witness. The Court of Appeal so ordered, adjourning the hearing until 28 May 1996.

The Court of Appeal ordered the applicant's release, overturning the decision of the Regional Court of 25 July 1995, on the ground that the new information relied on by the Regional Court was not such as to justify the second order for his detention on remand.

The hearing, having been adjourned, resumed on 28 May 1996. Investigating Judge Faber did not appear. An Army explosives expert was heard as a technical witness. A police officer, who had been present when the cocaine and the weapons were seized at the Newtonstraat house on 3 August 1994, showed some of the dustbin liners. These, according

to the official record of the hearing as dictated by the President of the Court of Appeal, were made of grey plastic. Three of them had borne the applicant's fingerprints. Some still bore traces of adhesive tape. The police expert stated that the dustbin liners had all been wrapped around firearms, and that all objects that might have carried fingerprints had been checked for them. Diving equipment had also been found.

The hearing was continued on 15 October 1996. Investigating Judge Faber gave evidence. Her statement, as taken down in the official record of the hearing, included the following:

> "You ask me how I came to the finding that this anonymous witness was reliable, as I indicated in the official record of the interrogation on 26 August 1995.
>
> I spoke with the witness at some length. The way in which the witness reacted showed integrity. I asked some control questions to check reliability.
>
> I noted during the interrogation that there is a certain amount of discrepancy between a delivery van and an "all-terrain vehicle" but this has not caused me to doubt the reliability of the witness. After all, I do not know in what terms a witness describes things.
>
> ...
>
> I reply as follows to questions put by counsel for the accused:
>
> At the beginning of the interrogation session the witness did not know exactly when the delivery had taken place. Later that day he/she was able to indicate that it had been during the period from 1 July until 7 July 1994. On one single day the interrogations took place first in the case of the co-accused Blanker and then in the case of the present accused [i.e. the applicant]. I cannot now remember exactly all the differences in nuance between the two interrogations. Later that day the witness remembered a number of things more distinctly.
>
> Things happened the way I described them in the official record. I have tried to take everything down with as much precision as possible.
>
> ...
>
> The witness was in my opinion reasonably positive on the date of the delivery. I cannot remember having heard the date. The date has not been taken down in my handwritten notes (*klad*).
>
> The reliability of the witness was assessed before the beginning of the interrogation.
>
> You now ask me why I stopped the question of [the applicant's counsel] as to the date of the delivery for reasons of protecting the source. I decline to answer that question.
>
> ..."

In their final address, counsel for the applicant referred in general terms to all the submissions made in the course of the first-instance proceedings. More specifically, they contested the veracity and accuracy of the statements made by the anonymous witness to the police and before the Investigating Judge. Reference was made to what the defence argued were inconsistencies, such as that between the vehicle described by the anonymous witness as a delivery van and the Toyota Land Cruiser identified as the vehicle used, and that between the physical appearance of the applicant as described by the anonymous witness and the applicant's actual physical appearance. Inconsistencies such as these ought, in the submission of the defence, to have inspired the Investigating Judge to greater caution when expressing herself on the subject of the witness's reliability. Moreover, one of a set of photographs taken in the Newtonstraat house showed a gun-shaped object wrapped in blue dustbin liners – the grey ones shown in open court were not shown in the photographs at all. The Court of Appeal was invited to express itself on these points. The defence also protested against the decision of the Investigating Judge to block certain questions, for example, that concerning the day of the week on which the anonymous witness had allegedly witnessed the events in question, which prevented the applicant from establishing his alibi.

Although admittedly the applicant's fingerprints had been found on some of the dustbin liners, they were, in the submission of the defence, capable of another explanation than the applicant's involvement in the crimes charged: the applicant and Belinfante were friends from childhood; the applicant had lived in the same house with Belinfante, his mother lived next door; and he was still a frequent visitor there, so that his fingerprints were to be found all over the place; the applicant had at some point had to shift some bags to get at some diving equipment; the weapons could have been repackaged in different dustbin liners between 1-7 July and 3 August 1994.

It was denied that the applicant had had anything to do with the items found in the Audi car on 22 July 1994. The letters addressed to the applicant had been unopened and had not yet been seen by the applicant. The mobile telephone found in the car was not traceable to the applicant: it had been used by Donald Groen.

Finally, the video showing both Blanker and the applicant did not admit of the conclusion that these two knew each other at all well.

The Court of Appeal gave judgment on 29 October 1996. It overturned the judgment of the Regional Court on the formal ground that the defence had wrongly been prevented from putting any questions to Investigating Judge Faber. It then found the applicant guilty as charged. The evidence relied on included, *inter alia*, the statement of the anonymous witness; the findings of Investigating Judge Faber as to the witness's reliability; the statement made on 19 September 1995 by Police Officer Van Looijen; the applicant's fingerprints on the dustbin liners; the fact that keys found in the Audi car fitted the doors of both the Newtonstraat house and the applicant's residence; metering reports from which it appeared that the mobile telephone had been used to make a call to the Newtonstraat house; and the official police reports from which it appeared that the mobile telephone in question had been used by the applicant. The applicant's statement that he did not know Blanker was dismissed as a transparent lie, in view of the video tape which showed Blanker laughing at a remark made by the applicant, and as such was considered corroborative of his guilt.

With regard to the reliability of the anonymous witness, the Court of Appeal's considerations included the following:

> "Counsel for the accused has argued that [Investigating Judge Faber], on the occasion of the interrogation of the anonymous witness, has insufficiently discharged her duty as laid down by Article 226e of the Code of Criminal Procedure to check the reliability of the threatened witness interrogated by her, so that this statement cannot be used in evidence that the accused has committed the acts charged under 1, 2, 3 and 4.
>
> The Court of Appeal does not share this opinion of counsel, in view of what the Investigating Judge has recorded in her official record of the interrogation of 26 August 1995 and the statement she made at the appeal hearing on 15 October 1996.
>
> In so far as counsel may have meant to argue that the Court of Appeal is competent to judge whether the anonymous witness was properly granted the status of threatened witness, this argument must be rejected. In accordance with the procedure provided for in Articles 226a and following of the Code of Criminal Procedure the anonymous witness was considered to be a threatened witness and interrogated. Any renewed investigation by the trial court in light of the preconditions for granting the status of threatened witness is contrary to the procedure laid down by law and the closed system of legal remedies.
>
> The Court of Appeal finds that the statement of the anonymous/threatened witness, which does not support the conviction to a decisive extent (*in overwegende mate*) and which the Court of Appeal has used with due caution, is reliable and credible. The information of the witness as rendered by the [police] only differs on nonessential details from the statement made by the witness on oath

more than a year later before the Investigating Judge, on which occasion the witness affirmed the accuracy of the statement made before the [police]. On that occasion also, the witness was interrogated by counsel for the accused. The statement is detailed and consistent and in accordance with what was found, based on the information supplied, in the house situated at Newtonstraat no. 40 in Amsterdam. The Court of Appeal bases this finding also on the statements of the Investigating Judge referred to [above]. This finding is not affected by the fact that the anonymous witness was dispensed from answering certain questions put by the defence, nor by the fact that the Investigating Judge, when heard as a witness, did not answer certain questions. The failure to answer these questions was, after all, legally permissible (*rechtens geoorloofd*) in each case and connected with, in particular, ensuring that the identity of the threatened witness was kept concealed.

In so far as, during the interrogation before the Investigating Judge on 26 August 1995, the threatened witness did not answer certain questions, the Court of Appeal finds that the answers to the questions concerned could disclose the identity of the threatened witness. The Investigating Judge therefore acted properly in blocking these questions.

In so far as the witness [Investigating Judge Faber] failed to answer certain questions at the hearing before the Court of Appeal on 15 October 1996, she stated her reasons for so doing and relied on her right to excuse herself from so doing. The defence has argued that she did not have such a right to excuse herself, but wrongly so. After all, the Investigating Judge has a right to excuse herself from answering questions under Article 219a, taken together with Article 284 § 4 of the Code of Criminal Procedure. It is in principle for the person claiming such a right to decide whether or not to excuse herself in this respect. From the nature of the questions in respect of which this witness excused herself it appears incontrovertibly that the questions relate to the subject matter – the identity of the threatened witness – in relation to which the right to excuse herself from answering was provided for. The Court is of the opinion that the Investigating Judge, when appearing as a witness at the hearing of 15 October 1996, properly relied on her right to excuse herself.

In so far as the Investigating Judge, at the interrogation of the threatened witness, blocked certain questions because the answers were irrelevant to the case, the Court of Appeal finds that these questions were in fact irrelevant to the case in which the witness was being interrogated. The Investigating Judge therefore acted properly in blocking these questions.

...

The Court of Appeal further finds that the statement of the anonymous/threatened witness may be used as evidence that the accused has committed the acts charged under 1, 2, 3 and 4, since it concerns the statement of a witness with respect to whom a court has ordered that on the occasion of his/her interrogation his/her identity shall remain concealed and the witness has been interrogated as such by the Investigating Judge in the way provided for by Articles 226c – 226f of the Code of Criminal Procedure, the facts charged and held proven concerning crimes as referred to in Article 67 § 1 of the Code of Criminal Procedure which, given their nature and the organised context in which they were committed, constitute a serious violation of the legal order. ...”

The Court of Appeal sentenced the applicant to, *inter alia*, a term of imprisonment of six years and eight months, withdrew the pistol and ammunition found in the applicant's possession when he was arrested from circulation and declared the money found in the Audi car forfeit. It did not, however, order the applicant arrested and detained there and then.

Proceedings in the Supreme Court

The applicant lodged an appeal on points of law to the Supreme Court (*Hoge Raad*), submitting an extensive statement of grounds of appeal.

The Supreme Court gave judgment on 30 June 1998. It dismissed the appeal in its entirety. Its reasoning, in so far as relevant to the case before the European Court, was as follows.

In response to a complaint that the Court of Appeal had failed itself to evaluate the alleged risk to the anonymous witness, the Supreme Court referred to the Explanatory Memorandum (*Memorie van Toelichting*) to the Bill enacting the relevant provisions of the

Code of Criminal Procedure (see below), from which it appeared that it had been the intention of the legislature to remove this responsibility from the trial court; the Court of Appeal had therefore properly refused to go into this question anew. It was noted *obiter dictum* that no circumstances were apparent in the present case from which it would follow that the fairness of the proceedings had been adversely affected.

In response to a complaint that the defence had had insufficient opportunity adequately to question the witness and assess his/her reliability, it was noted that not only the defence but also the Public Prosecutor had been in a different room when the witness was interrogated; that the Investigating Judge had based the interrogation on, amongst other things, a list of questions submitted beforehand by the defence; that the applicant's counsel had asked additional questions and that questions had been blocked only in order to ensure the anonymity of the witness or because of irrelevance; and that the witness was apparently (*kennelijk*) not a police officer.

In response to a complaint that the applicant's conviction was based "to a decisive extent" on the results of the interrogation of the anonymous witness, the Supreme Court held that in view of the alternative evidence this was not the case.

In response to a complaint that the Investigating Judge had wrongly blocked certain questions asked by the defence, the Supreme Court held that the Investigating Judge had been entitled to do so in order to prevent the witness's identity from being disclosed or to prevent the asking of questions that were irrelevant to establishing the truth of the matter or the propriety of the criminal investigation.

In response to a complaint that police officers had been present in the same room as the Investigating Judge and the anonymous witness, it was held that although it must be assumed that it was generally not permissible for police officers to be present (except in so far as their presence was required for the purpose of technical assistance), no defence of this nature had been put forward before the Court of Appeal. The latter court had therefore not been required to go into this question.

Nine complaints, including one to the effect that the Court of Appeal ought not to have held what it considered the applicant's apparent lie that he did not know Blanker to be *per se* corroborative of his guilt and another relating to the difference in colour between the dustbin liners shown in court and that appearing on the photograph, were dismissed collectively on the following summary reasoning:

> "These points of appeal do not provide ground to overturn the judgment of the Court of Appeal (*kunnen niet tot cassatie leiden*). In light of Article 101a of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), no further reasoning is called for, since these points of appeal do not require answers to questions of law in the interests of the unity or development of the law."

However, as the mere possession (as distinct from carrying) of bayonets had in the meanwhile been decriminalised, the Supreme Court reduced the applicant's prison sentence by two months, to six years and six months.

B. Relevant domestic law and practice

The Code of Criminal Procedure

The relevant provisions of the Code of Criminal Procedure were enacted by the Act of 11 November 1993, *Staatsblad* 1993, no. 603, which entered into force on 1 February 1994. They provide as follows:

Article 219a

A witness who has been involved in his official or professional capacity in the interrogation of a threatened witness or an earlier interrogation of that witness during the preparatory investigation may decline to answer a question put to him in so far as such is necessary in order to keep the identity of the threatened witness concealed.

Article 226a

1. The Investigating Judge shall, either of his own motion or on the application of the Public Prosecutor or at the request of the accused or his counsel or of the witness, order that on the occasion of the interrogation of that witness his identity shall remain concealed, if:
(a) the witness or another person may, in view of the statement to be made by the witness, consider himself under such threat that it must in reason be assumed that there is legitimate reason to fear for the life, the health or the safety of the witness or other person, or to fear disruption of his family life or socio-economic existence; and
(b) the witness has made it clear that due to this threat he is unwilling to make a statement. If these requirements are not met he shall reject the application or the request.
2. The Public Prosecutor, the accused and his counsel, and the witness shall be offered the opportunity to be heard in this regard.
3. The Investigating Judge shall not proceed to the interrogation of the witness as long as an appeal lies against his decision and, if an appeal has been lodged, as long as it has not been withdrawn or decided on, unless the interests involved in the investigation do not admit of any delay. In that case the Investigating Judge shall retain the official record of the interrogation of the witness until the appeal has been decided on.

Article 226b

1. The decision given by the Investigating Judge under Article 226a, first paragraph, shall be reasoned, dated and signed and shall promptly be communicated in writing to the Public Prosecutor and notified to the accused and the witness, setting out the time-limit and the way in which the legal remedy available against the decision should be used.
2. An appeal lies to the trial court (*gerecht in feitelijke aanleg*) before which the case is being prosecuted, for the Public Prosecutor, within fourteen days from the date of the decision, and for the accused and the witness, within fourteen days after the notification thereof.
3. The trial court shall decide as soon as possible. If the appeal against a decision given under Article 226a, first paragraph, is held to be well-founded and the Investigating Judge has already interrogated the witness having due regard to Articles 226c-226f, the Investigating Judge shall see to it that the official record of the interrogation is destroyed. The Investigating Judge shall make an official record of this event. Article 226f shall apply by analogy.
4. No appeal on points of law (*cassatie*) shall be permitted against the trial court's decision.
5. If a final decision has been given on appeal that the witness is a threatened witness, the judges of the trial court shall not, on pain of nullity, take part in the public hearing of the case. Article 21, third paragraph, shall not apply.

Article 226c

1. Before proceeding to interrogate a threatened witness, the Investigating Judge shall verify his identity and mention in the official record that he has done so.
2. The witness shall be put on oath or affirmed as provided for in Article 216.
3. The Investigating Judge shall interrogate the threatened witness in such a way that his identity remains concealed.

Article 226d

1. If this is necessary in the interests of keeping the identity of the threatened witness concealed, the Investigating Judge can decide that the accused or his counsel or both shall not be allowed to attend the interrogation of the threatened witness. In that case the Public Prosecutor shall not be allowed to attend either.
2. As soon as possible the Investigating Judge shall make known to the Public Prosecutor, the accused or his counsel, if he has not attended the interrogation of the witness, the content of the statement made by the witness, offering him the opportunity to submit by means of telecommunication or, if the interest of keeping the identity of the threatened witness concealed does not admit of this, in writing, the questions he wishes to have asked. Questions may be submitted already before the start of the interrogation unless the interests of the investigation do not allow the interrogation to be delayed.
3. If the Investigating Judge prevents an answer given by the threatened witness from coming to the knowledge of the Public Prosecutor, the accused or his counsel, the Investigating Judge shall have it noted in the official record that the question asked was answered by the threatened witness.

Article 226e

During the interrogation the Investigating Judge shall investigate the reliability of the threatened witness and report his findings in the official record.

Article 226f

1. The Investigating Judge shall take, in consultation with the Public Prosecutor as far as possible, the measures reasonably required to keep concealed the identity of the threatened witness and also of any witness regarding whom an application or a request as referred to in Article 226a, first paragraph, has been made as long as no final decision has been taken in this respect.
2. He is empowered for that purpose to leave unmentioned in documents contained in the case-file (*processtukken*) information concerning the identity of the witness or to anonymise such documents.
3. Anonymisations shall be signed or certified by the Investigating Judge and the registrar.

Article 342

1. ...
2. A statement made by a witness whose identity is not apparent may only be used as evidence that the accused has committed the act charged, if the following minimum requirements have been met:
(a) the witness is a threatened witness and has been interrogated as such, in the way provided for in Articles 226a-226f;
(b) the act charged, in so far as it is held to have been proven, concerns a serious criminal act (*misdrijf*) as set out in Article 67, first paragraph [i.e. a crime in respect of which it is permissible to place the accused in detention on remand], and constitutes, in view of its nature, the organised context in which it has been committed, or its connection with other serious crimes committed by the accused, a serious violation of the legal order (*een ernstige inbreuk op de rechtsorde*).
3. ...

Article 344

1. ...
2. ...
3. A document containing a statement of a person whose identity is not apparent may only be used as evidence that the accused has committed the act charged, if the following minimum requirements have been met:
(a) the assessment of the available evidence (*bewijsbeslissing*) is supported to a considerable extent by evidence different type; and
(b) no request has at any time in the course of the proceedings been made by or on behalf of the accused to question the above-mentioned person or have him questioned.

Article 344a

The trial court shall not assume solely on the basis of statements or threatened witnesses or documents containing statements of persons whose identity is not apparent that it is proved that the accused has committed the acts charged.

Article 360

1. If a statement of
– ...
– a threatened witness ...
– ...
... or documents as referred to in Article 344, third paragraph, are used as evidence, the judgment shall give specific reasons.
2. ...
3. All on pain of nullity.

The Explanatory Memorandum to the Bill which later became the Act enacting the above provisions makes it clear that the intention was to provide a procedure complying with the requirements set out by the Court in its Kostovski v. the Netherlands judgment of 20 November 1989 (Series A no. 166) and its Windisch v. Austria judgment of 27 September 1990 (Series A no. 186). Vide the Explanatory Memorandum, Lower House of Parliament 1991-92, 22 483, no. 3, pp. 7-13.

In addition, it contains the following passages (ibidem, p. 18):

"A threatened witness is not every witness who is threatened. A threatened witness in the sense of the provision proposed is only the witness who has been recognised as such by the court in accordance with the legal provisions. ...

If it has been ordered in respect of a particular witness by the Investigating Judge or, on appeal, by the Regional Court of the Court of Appeal *in camera*, that on the occasion of the interrogation the witness's identity shall be kept concealed, this witness has the status of threatened witness. See in this connection the proposed Article 226a § 1. In this connection only a purely formal criterion is applied in order to primped the possibility that in the further proceedings the reasons led to the witness's identity being concealed may be called into question. Once the competent court has decided that the identity of that witness must be kept concealed, this question must not be reconsidered in the further course of the proceedings. It would severely complicate the implementation of the proposal to have the well-foundedness of the anonymity established in separate proceedings if the courts were compelled to re-examine each time whether in light of the conditions set by the proposed Article 226a § 1 the witness has properly invoked anonymity on the occasion of his interrogation. The witness in respect of whom such an order has been given should therefore be considered to be a threatened witness in the further course of the criminal proceedings.

..."

and (ibidem, pp. 24-25):

> "In [choosing] the method of interrogation the Investigating Judge must be able to respect the principles of proportionality and subsidiarity, which underlie our criminal procedure. If a method of interrogation is available which can be used by the Investigating Judge without risking the disclosure of the identity of the threatened witness, then it is to be preferred. The future will have to show whether this method will be much used in practice. It cannot be excluded that the questions asked by the defence by means of telecommunication are of such a nature that the way in which they are answered, for instance the time which elapses between the question and the answer, provides indications as to the identity of the witness. The Investigating Judge will have to be aware of this danger and will possibly have to prevent the asking of such questions immediately. ..."

and (ibidem, p. 36):

> "... The nature [of the right to refuse to answer questions, as provided for in Article 219a] implies that the question asked need not be answered as long as the court entertains reasonable doubts as to whether it can be answered without disclosing the identity of the threatened witness."

The Judiciary (Organisation) Act

Article 101a of the Judiciary (Organisation) Act provides as follows:

> "If the Supreme court considers that a complaint does not provide ground to overturn the judgment appealed against and does not require answers to questions of law in the interests of the unity or development of the law, it may, in giving reasons for its decision on such point, limit itself to that finding."

COMPLAINTS

1. Firstly, the applicant complains under Article 6 §§ 1 and 3 (d) of the Convention about the procedure followed with regard to the interrogation of the anonymous witness and the use of his/her statement as evidence of the applicant's guilt.

He claims that the need for keeping the identity of the witness concealed was never established, no facts or circumstances having become known from which it would appear that the anonymous witness had reason to fear reprisals.

Nor had the defence had adequate opportunity to question the witness. The method used had been the same as that which the Court had found, in its Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, pp. 691 et seq., to be in violation of Article 6 §§ 1 and 3 (d).

Furthermore, questions put by the defence had been blocked without any apparent need in the interest of keeping the witness's identity concealed. These included, in particular, questions about the date on which the weapons had allegedly been delivered, by the blocking of which the applicant had been prevented from establishing an alibi.

Finally, and even assuming that a violation could not be found on the above grounds, the applicant's conviction had been based "to a decisive extent" on the evidence of the anonymous witness: the only other evidence allegedly linking the applicant to the delivery of the weapons had been the fingerprints found on some of the dustbin liners in which they had been found wrapped, which were capable of an alternative explanation.

In a separate but related complaint, the applicant alleges a violation of the principle of "equality of arms" enshrined in Article 6 § 1 of the Convention in that police officers had been present in the same room as the Investigating Judge and the anonymous witness when the latter was interrogated. He argues that the prosecution was thereby in a position to obtain information not available to the defence about the actual interrogation, or even to give instructions to the police officers and thus influence the interrogation. Moreover, it appeared that the Investigating Judge had initially intended to have Police Officer Van Looijen attend with a view to obtaining his advice as to which questions to prevent.

2. Secondly, the applicant complains of a violation of Article 6 § 1 in that nine of his points of appeal were dismissed by the Supreme Court without reasoning. He submitted that several of these points, including one coinciding with his third complaint before the European Court of Human Rights, had addressed matters of considerable importance to the question of establishing his guilt or innocence.

3. Thirdly, the applicant complains of a violation of Article 6 §§ 1 and 2 in that the Court of Appeal, having (in spite of the expert opinion of Professor Wagenaar) dismissed his statement that he did not know Blanker as a lie, then went on to use this finding against him to ground the conviction. He argues that it effectively negates the right of an accused not to incriminate himself if a statement in support of his claim of innocence is used instead as proof of his guilt.

THE LAW

Article 6 of the Convention, in so far as it is relevant to the present case, provides 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;
>
> ..."

1. In its Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, pp. 691 et seq., the Court stated the applicable principles as follows:

"50. 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. The Court's task under the Convention 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, among other authorities, the above-mentioned Doorson judgment [Doorson v. the Netherlands, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II], p. 470, § 67).

51. In addition, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

52. As the Court had occasion to state in its Doorson judgment (ibid., p. 470, § 69), the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention.

53. In that same judgment the Court noted the following:

> "It is true that Article 6 does not explicitly require the interests of witnesses to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." (see the above-mentioned Doorson judgment, p. 470, § 70)

54. However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities (ibid., p. 471, § 72).

55. Finally, it should be recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements (ibid., p. 472, § 76)."

The Court has also had regard to its holdings in a series of cases concerning reliance on witness testimony which was not adduced before the trial court that Aricle 6 § 3 (d) only required the possibility to cross-examine such witnesses in situations where this testimony played a main or decisive role in securing the conviction (see the Delta v. France judgment of 19 December 1990, Series A no. 191-A, § 37; the Asch v. Austria judgment of 26 April 1991, Series A no. 203, § 28; the Artner v. Austria judgment of 28 August 1992, Series A no. 242-A, §§ 22-24; and the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, § 44).

It will first examine whether the use of anonymous testimony was justified in the circumstances of the case.

Although it is true that the precise grounds of the anonymous witness's fears were never made known to the defence or the public, the seriousness and well-foundedness of his/her apprehensions were investigated by the Investigating Judge, who did not rely solely on the information provided by the witness him/herself but also on background information obtained from a police source. Her decision on this point was therefore not based solely on

the seriousness of the crimes charged. Moreover, her decision was reviewed and subsequently upheld on appeal by a chamber of the Regional Court composed of three judges.

It would appear from the judgment of the Supreme Court that the anonymous witness was not a police officer whose identity was kept concealed essentially for operational reasons but a person who needed to be protected and whose evidence could not be obtained if sufficient protection was not forthcoming.

In the circumstances of the present case, which include the fact that the applicant was reasonably suspected (and later convicted) of membership of a criminal organisation involving itself in very serious drugs and firearms offences and the fact that the applicant was armed with a loaded pistol at the time of his arrest, the Court considers that the applicant could reasonably have expected to be perceived as a threat by persons aware of his dealings. It cannot therefore be said that the Netherlands courts acted unreasonably by refusing to release any further information to him, or that their refusal was arbitrary. Accordingly there were sufficient reasons for keeping secret the identity of the informant.

The Court also observes that in the Van Mechelen and Others case the only evidence relied on which provided positive identification of the applicants in that case as the perpetrators of the crimes charged were the statements of the anonymous police officers. It went on to hold for that reason that the applicants' conviction was based “to a decisive extent” on the statement of the anonymous police officers (loc. cit., § 63).

The present case, however, is different. The Court of Appeal had regard to the following items, in addition to the statement of the anonymous witness:

- The official police report of the applicant's arrest in an Amsterdam coffee shop, on which occasion the applicant had been armed with a loaded pistol;

- The official police report of the finding, in the house in the Newtonstraat indicated by the anonymous informant (who was later heard as a witness), of ninety-three kilograms of cocaine, a large number of weapons and a large quantity of live ammunition and high explosive;

- The official police report of the finding, in the Audi car, of an unusually large sum of money in cash, letters addressed to the applicant, a forged driving license bearing the applicant's likeness, keys later found to fit the door of the Newtonstraat house and the door of the applicant's residence, and a portable telephone later found to have been in use by the applicant and used to call the Newtonstraat house shortly before the above illegal materials were found there;

- The official police report identifying fingerprints found on dustbin liners used to package weapons found in the Newtonstraat as the applicant's;

- The finding that the applicant's statement that he did not know the accused Blanker, to whom the Audi car belonged, who was also linked to another attempt to import a quantity of cocaine, was a transparent lie.

There was thus considerable alternative evidence before the trial court indicating that the applicant was guilty of the crimes charged, which was subsequently corroborated by the statement of the anonymous witness.

As cited above, the admissibility of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to assess the evidence before them. It is thus not the Court's role to examine whether the evidence in the present case was correctly assessed by the national courts.

The Court therefore concludes that in the present case the applicant's conviction was not based exclusively or to a decisive extent on the evidence of the anonymous witness.

In the Court's view, in assessing whether the procedures involved in the questioning of the anonymous witness were sufficient to counterbalance the difficulties caused to the defence due weight must be given to the above conclusion that the anonymous testimony was not in any respect decisive for the conviction of the applicant. The defence was thus handicapped to a much lesser degree.

Bearing this in mind the Court has next examined whether the specific procedures followed were sufficient to satisfy the rights of the defence.

In the first place it cannot be said that insufficient care was taken to make sure of the reliability of the anonymous witness. The Investigating Judge tested it, and gave a reasoned opinion in her official record of the interrogation of the witness. She relied not only on her own impression, but also on that of the registrar who was present at the interrogation and on information obtained from Police Officer Van Looijen. In addition, the defence was given the opportunity to question the Investigating Judge on this point in open court, of which in fact it availed itself.

As to the way in which the interrogation was conducted, it should be noted that the procedure prescribed by Article 226d of the Code of Criminal Procedure was followed. The interrogation took place in a room from which not only the defence but also the prosecuting authorities were absent. The questions asked included a large number submitted in writing beforehand by the defence; in addition, the defence were able to submit further questions and they were able to follow the interrogation through a sound link. Although answers to questions were first made to the Investigating Judge with the sound link turned off, they were afterwards repeated by the witness after it had been determined by the Investigating Judge that this could safely be done without jeopardising the witness's anonymity. Each one of the questions prevented by the Investigating Judge was recorded, and the Investigating Judge gave account in her official record of her reasons for so doing. Moreover, the witness was put on oath – a guarantee additional to those provided for in Article 226d of the Code of Criminal Procedure.

The Court concludes that the procedure followed approximated, as closely as was possible in the circumstances, the hearing of a witness in open court. The rights of the defence were thus sufficiently respected.

2. In so far as the applicant complains that the defence was prevented from asking certain specific questions, the Court observes that it is not within its province to review errors of fact or of law allegedly committed by national courts (see, among other authorities, the

Court's judgment of 21 January 1999 in the case of García Ruiz v. Spain, to be published in Decisions and Reports 1999, § 28). It is in the nature of things that only a domestic court can decide on the relevance of a particular question – or, as in the present case, the need to prevent a question being asked that might, if answered, jeopardise the safety of an anonymous witness.

It follows from the above that the applicant's complaints in (1) and (2) fall to be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. As to the complaint that police officers were present in the same room as the Investigating Judge and the anonymous witness when the latter was interrogated, the Court refers to the finding of the Supreme Court that no defence of this nature was before the Court of Appeal.

According to the Court's consistent case-law in the matter, it is not sufficient that the available procedures should have been pursued. It is also required that the complaints intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, the Court's Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, § 66).

It is true that the applicant's counsel referred in general terms to the submissions made in the course of the first-instance proceedings, which include the complaint in question. However, the defence might reasonably have been expected to reiterate specifically before the Court of Appeal the complaint about the presence of the police officers in the same room as the Investigating Judge and the witness. The Court is of the opinion that the mere reference, in general terms, to the entirety of the submissions made at first instance was too vague to draw the Court of Appeal's attention directly to this matter (cf. the Cardot v. France judgment of 19 March 1991, Series A no. 200, § 35).

That being so, the Court finds that with regard to this complaint domestic remedies have not been exhausted.

4. As to the applicant's complaint that the Supreme Court, applying Article 101a of the Judiciary (Organisation) Act, dismissed nine of his points of appeal with summary reasoning, the following is noted.

Article 6 requires judgments of tribunals adequately to state the reasons on which they are based, but it does not go so far as to require a detailed answer to every argument put forward; nor is the European Court called upon to examine whether arguments are adequately met (see for example the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, § 61). The Court has even accepted that in dismissing an appeal an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see, among other authorities, the Court's judgment of 21 January 1999 in the case of García Ruiz v. Spain, to be published in *Reports* 1999, § 28).

Accordingly, this complaint is manifestly ill-founded.

5. The applicant's final complaint appears to be based on the assumption that in light of the expert opinion of Professor Wagenaar the applicant's statement that he did not know Blanker was plausible and credible, or at least had not been disproved. The Court of Appeal, however, held otherwise.

The Court reiterates that is it not its role to assess the evidence admitted by the national courts. It will therefore not go into the question whether or not the Court of Appeal was wrong to disbelieve the applicant's statement.

In its John Murray v. the United Kingdom judgment of 8 February 1996, *Reports* 1996-I, § 45, the Court recognised that the privilege against self-incrimination is encompassed in the guarantees provided by Article 6 of the Convention. However, the Court also recognised that this immunity could not and should not prevent that the accused's silence, in situations which clearly called for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution (ibidem, § 47).

In the Court's opinion it follows *a fortiori* that the drawing of adverse inferences from a statement by an accused which is found to be untrue cannot be excluded either.

In the circumstances of the present case, the Court cannot find that the drawing of inferences from the statement in question raises any issue under Article 6 §§ 1 and 2. This complaint is therefore manifestly ill-founded also.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Elisabeth Palm
President