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. 35253/97
by Pedro VERDAM
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 6 November 1996 by Pedro Verdam against the Netherlands and registered on 11 March 1997 under file no. 35253/97;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch national, born in 1965 and currently serving a prison sentence in the Netherlands.

He is represented before the Court by Ms E. Prakken, a lawyer practising in Amsterdam.

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

On 24 December 1993 the applicant was arrested on suspicion of having raped three prostitutes ("Ms A", "Ms B" and "Ms C"). In a statement made to police after this arrest, a fourth prostitute ("Ms D") reported that she had also been raped. The applicant's lawyer was notified by the police and, without having had the opportunity to discuss the matter with the applicant, attended Ms D's making of this statement, at which occasion the lawyer was able to question Ms D. Ms B, Ms C and Ms D subsequently recognised the applicant as the man who had raped them from a series of photographs; in the case of Ms B and Ms D this identification took place in the presence of the applicant's lawyer.

A DNA-examination was carried out on sperm found in a swab taken from Ms B. According to the results of the examination it could not be excluded that the sperm was the applicant's - the lowest possible degree of probability to be attached to such results.

The applicant was convicted of attempted rape of Ms A and of rape of Ms B, Ms C and Ms D by the Regional Court (*Arrondissementsrechtbank*) of Amsterdam on 29 June 1994. He was sentenced to six years' imprisonment.

The applicant lodged an appeal with the Court of Appeal (*Gerechtshof*) of Amsterdam. He requested that Ms B, Ms C and Ms D be heard as witnesses by the Court of Appeal and the court granted this request. However, at the hearing on 21 December 1994 none of these witnesses appeared. It transpired that, although properly summoned, Ms B and Ms D did not have a known place of residence or abode (*zonder bekende woon- of verblijfplaats*). An address was known for Ms C but the summons had not been sent there. The Court of Appeal adjourned the proceedings in order for Ms B, Ms C and Ms D to be summoned again.

At the hearing on 1 March 1995 the witnesses again failed to appear, although all three had been properly summoned. The proceedings were once more adjourned and the witnesses summoned again. This time, the Court of Appeal also issued an order to have Ms C brought before it.

At the hearing on 28 April 1995 none of the witnesses appeared. A police officer told the Court of Appeal that none of the three witnesses had been seen at the local community centre for prostitutes (*"huiskamerproject"*) since 1 March 1995. Ms C had not been seen near the Central Station since December 1994. The police had let other prostitutes in that area

know that they were looking for Ms C. An address was known for her but when police went there on the morning of the hearing she was not there. The officer had furthermore been told that Ms B had gone to Germany where she was said to be staying at a drug rehabilitation centre but her address in Germany was not known. Ms B was said not to want to have anything to do with the case anymore. Ms D, finally, could not be found and her address was not known.

Hereupon the Court of Appeal decided to dispense with a further summoning of Ms B, Ms C and Ms D as in the circumstances it considered it unlikely that they would appear before it within an acceptable time.

Before the Court of Appeal the applicant acknowledged that he had had intercourse with Ms A, saying that she had screamed and that he had not paid her, but he denied having raped her. He further denied the charges against him in relation to Ms B, Ms C and Ms D, submitting that he had been elsewhere when the alleged offences had supposedly been committed. Counsel for the applicant argued that in violation of Article 6 §§ 1 and 3 (d) of the Convention the defence had not had sufficient opportunity to test the statements of Ms B, Ms C and Ms D. Counsel further complained of the manner in which the collection of photographs from which Ms B, Ms C and Ms D had recognised the applicant had been compiled. Regardless of the fact that the witnesses had described the perpetrator as having long or shoulder-length hair, only two photographs in the collection shown to them had featured a person with such a hair style. Finally, counsel requested that the proceedings be adjourned so that a second DNA-examination could be carried out.

By judgment of 12 May 1995 the Court of Appeal convicted the applicant of attempted rape of Ms A and of rape of Ms B, Ms C and Ms D, and sentenced him to six years' imprisonment. The Court of Appeal found that the use in evidence of the statements made to the police by Ms B, Ms C and Ms D without the defence having been able to examine these witnesses was not contrary to Article 6 of the Convention. In this respect it took into account that considerable effort had been made to procure the appearance of the witnesses before the Court of Appeal, that a further summoning of those witnesses appeared to serve no useful purpose, that the statements made by the witnesses were supported by other evidence, and that, as regards Ms D, the applicant's lawyer had been present both when she had been questioned and when she had identified the applicant from a photograph.

In respect of the series of photographs shown to Ms B, Ms C and Ms D, the Court of Appeal referred to the testimony given by an expert witness according to whom a computerised system had been used to select photographs of persons of a similar appearance. The Court of Appeal also examined the photographs itself. It found that the fact that only two of the nine photographs featured men with long hair could not detract from its opinion that the collection had been compiled with the requisite care, since a hair style was only of relative importance in this respect. The Court of Appeal further noted that each witness had, separately and with certainty, recognised the applicant.

The Court of Appeal further noted that the applicant had not disputed the findings of the DNA-examination, but that he had rather expressed the hope that a second such examination might exonerate him completely. However, as the Court of Appeal did not use the findings of this examination in evidence against him, it considered that to refuse a second examination would not be prejudicial to the applicant's interests.

The Court of Appeal based its conviction of the applicant of the rape of Ms B, Ms C and Ms D on the following means of evidence, in respect of the particular charge to which each of them related only:

- the applicant's statement before the Court of Appeal that he wore tattoos, that he used to drive a blue-grey Buick which was registered in the name of a Mr H, and that he had subsequently obtained a Chevrolet van;
- Ms B's statement to the police in which she related, *inter alia*, that the perpetrator had been driving a big, metallic-blue coloured American car, and in which she described him as having long blond hair, tattoos on both arms and wearing a number of chains;
- Ms B's recognition of the applicant as her assailant from nine photographs shown to her, at which occasion she stated, "That is Peter the rapist. He told me himself that he was called Peter";
- a procès verbal drawn up by a police officer to the effect that the applicant's girlfriend had told this police officer that the applicant was generally known as 'Peter';
- Ms C's statement to the police in which she related, *inter alia*, that the perpetrator had been driving a big, silver-blue coloured American-style car and that he had pulled a chain around her neck. She further stated that the man had long blond hair worn in a pony tail and a tattoo on his upper arm;
- a procès verbal drawn up by a police officer to the effect that the registration number of the car indicated by Ms C as the car driven by her assailant had proved incorrect;
- a procès verbal drawn up by a police officer to the effect that Mr H used to have a Buick registered in his name with a registration number that differed one digit from the number indicated by Ms C;
- Ms C's recognition of the applicant as her assailant from a number of photographs shown to her;
- Ms C's confirmation that the chain featured on a photograph shown to her was of the kind that she had mentioned in her statement;
- a procès verbal drawn up by two police officers to the effect that a silver-coloured chain had been found in the Chevrolet van which they had investigated in relation to the suspicion that a number of rapes had taken place inside the vehicle;
- Ms D's statement to the police in which she related, *inter alia*, that the perpetrator had been driving a large silver-grey car and that he had long hair;
- Ms D's recognition of the applicant as her assailant from nine photographs shown to her;
- a procès verbal drawn up by a police officer to the effect that the owner of a breaker's yard had recognised the applicant from a photograph shown to him as the man whom he had given a purple-blue Chevrolet in exchange for a metallic-grey Buick.

The applicant filed an appeal in cassation with the Supreme Court (*Hoge Raad*), raising the same arguments as he had before the Court of Appeal.

In a judgment of 7 May 1996, the Supreme Court found that Article 6 of the Convention did not prevent the use in evidence of Ms C's statement to the police despite the fact that counsel had not been able to question her as a witness. In this respect the Supreme Court did not find unreasonable the conclusion that further attempts to make Ms C appear before the Court of Appeal would serve no useful purpose. The Supreme Court noted, moreover, that counsel had taken no initiative to examine the police officers who had taken Ms C's statement. It also considered that Ms C's statement was corroborated by other means of evidence used in respect of this charge, in particular concerning the physical appearance of the applicant and the car he used.

As regards the use in evidence of Ms D's statement, the Supreme Court observed that counsel had attended Ms D's interview with the police and that the applicant had thus had the opportunity to have this witness questioned on his behalf.

The Supreme Court found no issue with the manner in which the Court of Appeal had rejected the complaint concerning the compilation of the series of photographs from which the applicant had been recognised.

The Supreme Court quashed the judgment of the Court of Appeal in so far as it concerned the charge of rape of Ms B and the determination of the sentence. The Supreme Court held that a second DNA-examination could not be refused for the sole reason that the examination already carried out had been complete and that the results were not used in evidence. The Supreme Court referred this part of the case to the Court of Appeal of The Hague, which court was also to impose a sentence relating to the other offences of which the applicant had been found guilty.

On 24 December 1996 the Court of Appeal of The Hague convicted the applicant of the rape of Ms B. It sentenced the applicant to six years' imprisonment with deduction of the time spent in pre-trial detention. In these proceedings the applicant again complained of his not having been able to question Ms B. The applicant filed an appeal in cassation against the judgment of the Court of Appeal, which proceedings are currently still pending before the Supreme Court.

COMPLAINTS

The applicant, invoking Article 6 §§ 1 and 3 (d) of the Convention, complains that he did not have a fair trial and that the principle of equality of arms was infringed in that he or his counsel were unable, through no fault of their own, to question the witnesses Ms B and Ms C. Although counsel was present when Ms D made a statement to police, there had been no opportunity for the applicant and his lawyer to discuss the new allegations, rendering counsel's presence devoid of practical and effective use. Moreover, the supporting evidence used by the trial courts, relating to the applicant's physical appearance and the car he was driving, could also be traced back to the statements made to the police so that his conviction was based mainly on those statements. In addition, the compilation of the photographs shown to the witnesses was unbalanced and therefore suggestive.

THE LAW

The applicant complains that the criminal proceedings against him lacked the fairness required by Article 6 §§ 1 and 3 (d) of the Convention, which provide, in so far as relevant:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> 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. The Court notes in the first place that the criminal proceedings relating to the charge of rape of Ms B are currently still pending before the Supreme Court. It thus appears that the final decision in respect of this charge has not yet been taken and that, consequently, the applicant has not complied with the obligation to exhaust domestic remedies.

It follows that this part of the application is inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

2. As the guarantees of paragraph 3 (d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of this Article, the Court will consider the complaints of the proceedings relating to the charges of rape of Ms C and Ms D under the two provisions taken together (see the Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

The Court reiterates that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Court is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see the Asch judgment mentioned above, p. 10, § 26; the Edwards judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34).

All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 of the Convention, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings (see the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43).

As to the notion of witness, the Court considers that, although neither Ms C nor Ms D testified at a court hearing, they should, for the purposes of Article 6 § 3 (d) of the Convention, be regarded as witnesses - a term to be given its autonomous interpretation - because their statements, as taken down by the police, were used in evidence by the domestic courts (see the aforementioned Asch judgment, p. 10, § 25).

Turning to the facts of the instant case, the Court notes that the applicant's conviction of rape of Ms C and Ms D was based, *inter alia*, on their statements before the police and that neither of these witnesses appeared before the trial courts. Ms D, however, had been heard by police in the presence of counsel and the latter had been able to question her on that occasion. Even though the lawyer may not have had the opportunity to confer with the applicant prior to Ms D's statement being taken, the Court considers that this in itself did not prejudice the interests of the applicant's defence to an extent incompatible with the requirements of paragraphs 1 and 3 (d) of Article 6. Moreover, the applicant's lawyer was present when Ms D identified the applicant as the perpetrator from a series of photographs.

In any event, the Court of Appeal adjourned the trial on a number of occasions and several attempts were made to ensure the presence of Ms C and Ms D in order that they be heard as witnesses. Both were summoned and on one occasion an order was issued to have Ms C brought before the court. However, all these attempts were to no avail. The Court of Appeal also examined a police officer about the efforts that had been made in this respect.

The Court readily agrees with the applicant that it would have been preferable if Ms C and Ms D could have testified in court. However, the judicial authorities were not negligent in their efforts to bring these witnesses before the Court of Appeal. In view of these efforts, their failure to appear did not make it necessary to halt the prosecution (see the Artner v. Austria judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21). Since it proved impossible to secure the attendance of Ms C and Ms D at the court hearings, it was open to the national courts, subject to the rights of the defence being respected, to have regard to Ms C's and Ms D's statements before the police especially since they could consider those statements to be corroborated by other evidence before it (see the Artner judgment mentioned above, p. 10, § 22, and the Doorson v. the Netherlands judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 473, § 80).

The Court observes, moreover, that the applicant's conviction of the rape of Ms C and Ms D did not rest solely on their statements. A number of leads, with which Ms C and Ms D had provided the police, had been followed up and had resulted in supporting evidence being available to the trial courts which corroborated the accounts of Ms C and Ms D. It is true, as the applicant submits, that the origins of this supporting evidence lay in the statements of Ms C and Ms D. The Court cannot accept, however, that for this reason a trial court should be precluded from taking into account such corroborating evidence (see the aforementioned Doorson judgment, *loc. cit.*). This being so, and having regard to all the material used in evidence against the applicant, the Court is of the opinion that the applicant's conviction cannot be said to have been based "to a decisive extent" on the statements made by Ms C and Ms D to the police (see the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports* 1997-III, p. 713, § 63).

In addition, the Court observes that although the applicant sought to challenge the reliability of the witnesses Ms C and Ms D he did not request the examination before the trial courts of the police officers who had interviewed them.

As regards the complaint concerning the manner in which the collection of photographs, from which Ms C and Ms D recognised the applicant, had been compiled, the Court notes that the Court of Appeal examined the photographs as well as the manner in

which they had been selected. It thus appears that the applicant was able to challenge this evidence against him and that the Court of Appeal entertained his complaint. Finding no indication that grossly unfair or arbitrary conclusions were drawn, and recalling that the admissibility and assessment of evidence are matters that fall to be decided primarily at the domestic level, the Court considers that there has been no infringements of the requirements of Article 6 § 1.

In the light of the foregoing the Court is satisfied that the criminal proceedings at issue, taken as a whole, were fair.

It follows that this part of 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