

Application No. 4771/71

by

Jacob KAMMA

against

THE NETHERLANDS

REPORT OF THE COMMISSION

(Adopted on 14 July 1974)

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INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The applicant is a Netherlands citizen born in 1949. On 27 July 1970 he had been arrested and remanded in police custody (verzekering) on suspicion of having committed two offences of extortion and of having attempted to commit robbery with violence. On 31 July the investigating judge opened the preliminary investigations against the applicant. He also made an order that the applicant should be remanded in custody (bevel tot bewaring) at Leeuwarden for a period of six days on the grounds that there was a danger of his absconding and of his committing further offences as well as a danger of collusion (Arts. 63 to 65 and 78 of the Netherlands Code of Criminal Procedure).

On 6 August 1970 the District Court at Leeuwarden made a further order, under Arts. 64 and 66 to 68 of the Code of Criminal Procedure, that the applicant's detention should continue during a period of thirty days (bevel gevangenhouding) at the remand prison of Groningen. This order was renewed (bevel verlenging gevangenhouding) for further periods of thirty days' detention on 3 September, 1 October, 29 October, 3 December and 24 December 1970, 28 January, 25 February and 1 April 1971. On 29 April 1971 the Court decided that the applicant's detention should continue only during a period of fourteen days but on 13 May 1971 it again ordered his detention for a further period of thirty days. In each case the Court found that the grounds for detention stated in its order of 6 August 1970 continued to exist.

As regards the place of his detention the Court confirmed in its order of 3 September 1970 that the applicant should be detained at remand prison at Groningen but added, in its order of 1 October 1970, that his detention was also authorised in any other lawful place of detention in the Netherlands. Furthermore, in its order of 29 October 1970, and in the subsequent orders, the Court decided that the applicant should be detained at remand prison at Leeuwarden or, in any event, at any other lawful place of detention in the Netherlands.

As from 4 June 1971 onwards, being the opening date of the applicant's trial, the detention order remained valid for an indefinite duration, in accordance with Art. 67 (3) of the Code of Criminal Procedure.

In the meanwhile, on 29 September 1970, the public prosecutor at Leeuwarden submitted to the investigating judge a more detailed request for a preliminary judicial investigation. This request, which included several further offences of which the applicant was suspected, was granted by the investigating judge on the same day.

At the same time the police at Leeuwarden were investigating the murder of Mrs. H. Ijsselstein-van der Velde committed on 19 July 1970 and the applicant was suspected of having committed this crime or at least of having participated therein.

On 2 November 1970 the applicant was transferred from remand prison at Groningen to police headquarters at Leeuwarden in order to be interrogated in connection with the murder case, and on 2 December 1970 the public prosecutor submitted a request to the investigating judge for a preliminary judicial investigation into that case. On the same day the applicant was returned to remand prison at Groningen.

On 14 December 1970 the applicant petitioned the District Court requesting the closure of the investigations opened against him. He pointed out that the investigation for extortion had been completed several months ago and that, although he also appeared to be suspected of another crime, he had not been informed of this formally. He further submitted that, although he was being held in detention on remand, the investigation for this crime was not conducted, as the law requires, by the investigating judge, but by the police.

On 22 December 1970 the Court refused his petition on the ground that a judicial investigation for murder had in the meantime been opened against the applicant and that the original investigation for extortion was not being unduly delayed.

On 5 May 1971 the investigating judge closed the investigations in the cases submitted on 31 July 1970 and this decision was communicated to the applicant on 21 May 1971. Nevertheless, on 28 May 1971 the applicant lodged a second request with the District Court to close the investigation. On 3 June 1971 the investigating judge thereupon closed the investigations in the cases submitted on 29 September 1970 and the applicant was so informed on the same day.

The trial against the applicant started on 4 June before the District Court at Leeuwarden and terminated on 18 June 1971 with the applicant's conviction for robbery with violence, attempted robbery with violence and on two charges of breaking and entering. He was sentenced to two years' and ten months' imprisonment. The Court further decided that the period spent in detention on remand should be credited towards the applicant's sentence.

On 2 July 1971 the applicant appealed against this decision to the Court of Appeal (Gerechtshof) at Leeuwarden which heard the appeal on 18 November 1971 and, on 2 December 1971, confirmed the conviction but reduced the sentence to two years' and six months' imprisonment. The Court also confirmed the decision to credit towards sentence the period spent in detention on remand.

In the meanwhile, the applicant had received on 6 July 1971 a decision of the investigating judge dated 18 June 1971, closing the preliminary investigations into the cases submitted by the Public Prosecutor on "29-9-71 (wh. no. 3053a/70)".

The respondent Government have stated in the present proceedings (observations of 13 March 1972) that the above decision contained a "regrettable error", in that it referred to a request of "29-9-71" instead of 2 December 1970, i.e. the date of the Public Prosecutor's request for a preliminary judicial investigation concerning the murder of Mrs. H. Ijsselstein-van der Velde; the decision did, however, bear the file number of that case.

2. The present application was lodged with the Commission on 13 January 1971 and registered on 28 January 1971.

By partial decision of 30 May 1972 the Commission rejected certain parts of the application as being inadmissible (1). On 21 July 1972, after having obtained written and subsequently oral submissions from the parties, the Commission rejected further parts of the application as being inadmissible and declared admissible the applicant's only remaining complaint, namely that Art. 18 in conjunction with Art. 5 of the Convention had been violated in that the police had allegedly taken advantage of his detention on remand in order to conduct for one month investigations against him as regards a murder charge although at that time he was neither detained in connection with that crime nor had judicial investigations been authorised (2).

Written observations on the merits were submitted by the applicant on 10 November 1972 and by the respondent Government on 24 January 1973. The Government raised as a preliminary issue a question of admissibility: they suggested that the applicant's admitted complaint should be declared inadmissible under Arts. 26 and 27 (3) in conjunction with Art. 29 of the Convention. At the Commission's invitation the applicant filed on 12 March 1973 supplementary observations with regard to the latter request. On 29 May 1973 the Commission decided not to reject the remaining part of the application under Art. 29 of the Convention (3).

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- (1) Appendix I of this Report
 - (2) Appendix II of this Report
 - (3) Appendix III of this Report

The applicant has been represented before the Commission by Dr. A. D. van Leeuwen, a member of the Bar practising at Leeuwarden. Free legal aid has been granted for his representation in accordance with the Addendum to the Commission's Rules of Procedure.

The respondent Government has been represented by Mr. C. W. van Santen, Ministry of Foreign Affairs, as Agent, and by Mr. P. J. Hustinx, Ministry of Justice, as Adviser.

The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and is now transmitted to the Committee of Ministers in accordance with para. (2) of that Article. It was unanimously adopted on 14 July 1974 the following members of the Commission being present:

MM. J. E. S. FAWCETT, President
G. SPERDUTI, Vice President
M. A. TRIANTAFYLIDIS
F. WELTER
E. BUSUTTIL
L. KELLBERG
B. DAVER
K. MANGAN
J. CUSTERS
C. NØRGAARD
C. H. F. POLAK
J. A. FROWEIN

A schedule setting out the history of the proceedings before the Commission is attached as Appendix IV.

A friendly settlement of the case has not been reached (1) and the purpose of the Commission in the present report, as provided in para. (1) of Art. 31, is accordingly to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

The full text of the oral and written pleadings of the parties together with further documents handed in as exhibits are held in the archives of the Commission and are available if required.

(1) An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document - see Appendix V.

A. POINT AT ISSUE

After the final decision on admissibility of 21 July 1972 the only point at issue remaining in the present case is the question whether Art. 18, read in conjunction with Art. 5 of the Convention, has been violated by the fact that the police conducted investigations against the applicant on a murder charge although at that time he was neither detained in connection with that crime nor had judicial investigations been authorised.

Art. 5 (1) guarantees "the right to liberty and security of person" and Art. 18 states: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

B. SUBMISSIONS OF THE PARTIES

I. As to the facts

1. The applicant denied that there were any circumstances which might have given rise to the suspicion of his being involved in the murder case and necessitated police inquiries against him. He alleged that the police based their suspicions solely on the obviously wrong and contradictory statement of an accomplice (Dijkstra) in the extortion case. His alibi witnesses were allegedly not heard.

The Government stated that the applicant only began to be seriously suspected of being involved in the murder case when he had already been in detention on remand in connection with other offences. While detained at Groningen, the applicant allegedly told various people that he was involved in the murder case. According to the Government the applicant was interrogated at police headquarters on 2, 3, 5, 6, 9, 18 and 19 November 1970. On 3 November, as well as on 5 and 6 November, he confessed to the murder, giving each time a different account of the events.

In this connection the Government also stated that the interrogations were of short or normal duration, except for the last which took all day. The applicant's alibi was checked and found to be defective.

2. The applicant alleged that the Court was completely ignorant of the fact that for a month he was detained at police headquarters at Leeuwarden and questioned about the murder case.

The Government did not clearly refute this. Although they rejected the suggestion that the Public Prosecutor misled the Court, they did not expressly state that the Public Prosecutor informed the Court of the interrogation which was to be carried out. They only pointed out that the specification of the place of detention (the remand prison at Groningen or any other lawful place of detention in the Netherlands) was given by the Court as early as 1 October 1970 and maintained in the successive orders made after the Leeuwarden period.

Furthermore, they stated that the applicant's transfer to police headquarters was effected with the consent of the investigating Judge who was conducting the preliminary judicial investigation which was the result of applications by the Public Prosecutor on 31 July 1970 and 29 September 1970 which did not concern the murder case.

The Government explained that it was not possible to accommodate the applicant in the House of Detention at Leeuwarden because Fierstra, also suspected in the other cases, was detained there. The applicant was therefore placed in police headquarters.

II. Legal arguments advanced by the parties

1. The applicant: Preliminary police inquiries have to respect certain rules provided for under Netherlands' law. These rules cover limited powers of arrest, place and duration of detention and of compulsory examination (maximum of two periods of two days in a police office), searching of suspect, seizure of objects, etc. (Arts. 57 - 59 and others of the Netherlands Code of Criminal Procedure = NCCP). These rules were deliberately ignored in his case. (1).

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(1) THE RELEVANT PROVISIONS OF THE NETHERLANDS CODE OF CRIMINAL PROCEDURE (WETBOEK VAN STRAFVORDERING)

ON

ARREST, POLICE CUSTODY AND DETENTION ON REMAND

Arrest (Aanhouding)

Every investigating officer is authorised to stop a person suspected of having committed a criminal offence, and to ask his name and address. [Art. 52]

A suspect can be arrested by order of the public prosecutor, (officer van justitie). When a suspect is caught in the act, anyone is authorised to arrest him.

The public prosecutor, or deputy public prosecutor, has the suspect taken to the place of interrogation. If the suspect is arrested by an investigating officer, or by another person, he is to be brought as soon as possible before the public prosecutor or his deputy. [Arts. 53, 54]

Police Custody (Verzekering)

After interrogation, the public prosecutor, or deputy, can order the suspect to be taken into custody (verzekering), with a view to the investigation of his case. Police custody can be ordered only in cases for which detention on remand is permitted.

An order for police custody is valid for at most two days. In case of urgent necessity, the public prosecutor can renew it for another two days. [Arts. 57, 58]

If the public prosecutor deems further detention necessary, he sees to it that the suspect is promptly brought before the investigating judge (rechter-commissaris).

Should the suspect be neither taken into police custody (Art 57), nor brought before the investigating judge he is immediately set free, after a hearing. In no case may he be kept for an interrogation longer than six hours (the time between midnight and 9 a.m. not being counted.) [Arts 60, 61]

Detention on Remand (Voorlopige hechténis)

At the request of the public prosecutor, the investigating

The restrictions, namely the detention on remand, permitted under Art. 5 (1)(c) with regard to investigation carried out in the extortion and accompanying cases, were thereby aggravated in two ways:

- by making the conditions of his detention harsher
- by prolonging his detention.

If one accepted the position of the defendant Government, this would mean that a person already in detention on the basis of a court order would be less protected against police inquiries than persons at liberty, since the latter are protected by Arts. 57 - 59 NCCP and the former are not.

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(1) Cont'd. from previous page

judge can order detention (bevel tot bewaring) of a suspect. Unless the investigating judge dismisses the public prosecutor's request forthwith, he will give the suspect a hearing. [Art. 63]

Detention can be ordered only when there are serious objections against the suspect and when there is a danger that he will abscond or when reasons of public security require his immediate detention. Generally, it is only possible with regard to crimes punishable by 4 years in prison.

The detention order is valid for a six-day period from the moment of execution. It can be renewed once, for another six-day period. The suspect must be granted a hearing on the extension. [Arts. 64, 65]

At the request of the public prosecutor, the District Court (Rechtbank) can order that a suspect, detained by virtue of a detention order issued by the investigating judge, will remain in remand prison (bevel tot gevangenhouding) after having given him a hearing.

After the beginning of the public trial, or with a view to obtaining a person's extradition, the Court can order a person not yet detained to be arrested on remand (bevel tot gevangenneming). The grounds for these orders are the same as those listed for detention ordered by the investigating judge. [Art. 66]

The order to keep the suspect in remand, given after, or less than thirty days before the opening of the public trial, is valid indefinitely. The same holds true for the order of arrest on remand.

An order of detention on remand (i.e. detention, remaining in remand, arrest on remand) can be terminated by the Court. The suspect who petitions for the first time that he be released from detention on remand, shall be granted a hearing upon his request. [Arts. 67, 68, 69]

At the request of the suspect, the judge can order a suspension of detention on remand, if necessary against bail. [Art 80]

2. The Government: Arts. 57 - 59 NCCP are irrelevant in the context in which the applicant refers to them. They do not apply to interrogation by the police or to the duration of police investigation or interrogation, but concern a form of deprivation of liberty which takes place at an early stage of the investigation and which is used to assist such investigation. Police questioning should be seen independently of the detention in police custody.

Of course, all stages of detention on remand are governed by Art. 5 of the Convention, the most important function of which is to ensure continuous judicial supervision over detention. The applicant was in no way removed from the supervision of the Court during the time he was kept at police headquarters.

In its decision of 21 July 1972 the Commission has already decided that the period and place of detention were not contrary to Art. 5.

As regards the questioning of a suspect by the police, the NCCP (Art. 29) contains, in principle, only one rule, namely that the questioning officer shall refrain from obtaining a statement in circumstances which show that it was not made voluntarily and, moreover, that the suspect shall not be obliged to answer questions.

It cannot be suggested that there is an infringement of Dutch law if a suspect, who is held in detention on remand, is further questioned by the police. In practice, the necessity for such questioning arises by no means infrequently. It would be a most undesirable situation if investigation officers were obliged to refrain from questioning, in respect of certain offences, a suspect who was already lawfully held in detention on remand for other reasons.

It might be conceivable, in connection with Article 5 of the Convention, that a formally valid detention on remand, ordered in respect of criminal offences which have been committed, served as a legal cover for depriving the person in question of his liberty when the real purpose for doing so was unlawful. Such circumstances, however, which would involve mala fides on the part of the prosecuting authorities, were far from being present in the case under discussion.

Detention on remand was never applied in the case of the applicant for an improper purpose nor was its purpose at any time impermissible in the sense just mentioned.

The guarantees provided by the NCCP applied with undiminished force to the applicant during the time he was held in Leeuwarden.

C. THE RELEVANT FACTS

The circumstances in which the applicant was transferred from Groningen prison to the police headquarters at Leeuwarden are as follows:

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On 27 July 1970 the applicant was arrested and remanded in police custody on suspicion of having committed two offences of extortion and of having attempted to commit robbery with violence.

On 31 July 1970 the investigating judge opened the preliminary investigations in accordance with the public prosecutor's application and also made an order that the applicant should be remanded in custody at Leeuwarden for a period of six days.

On 6 August 1970 the District Court at Leeuwarden made a further order that the applicant's detention should continue for a period of 30 days in the remand prison at Groningen. In accordance with the relevant provisions of the Netherlands Code of Criminal Procedure this order was renewed by the same Court for further successive periods of 30 days for the reason that the grounds for detention stated in its order of 6 August 1970 continued to exist.

During the same period the police at Leeuwarden were investigating the murder of Mrs. Ijsselstein-Van der Velde committed on 19 July 1970 and the applicant was suspected of having committed this crime or at least of having participated therein. He had, for one thing, allegedly said so to various people.

On 2 November 1970, the applicant was transferred from the remand prison at Groningen to police headquarters at Leeuwarden in order to be interrogated in connection with the murder case.

On 2 December 1970 the public prosecutor submitted an application to the investigating judge for a preliminary judicial investigation into that case and on the same day the applicant was returned to the remand prison at Groningen.

D. OPINION OF THE COMMISSION

Art. 18, like Art. 14 of the Convention, does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention. There may, however, be a violation of Art. 18 in connection with another Article, although there is no violation of that Article taken alone.

It follows further from the terms of Art. 18 that a violation can only arise where the right or freedom concerned is subject to "restrictions permitted under this Convention".

Art. 5 (1) guarantees "the right to liberty and security of person".

The "right of security" of person is guaranteed in absolute terms. This means that there can be no violation of Art. 18 in conjunction with this right.

The "right to liberty" may be restricted in accordance with sub-paras. (a) to (f) of Art. 5 (1). There may, therefore, have been violation of Art. 18 in conjunction with the applicant's right to liberty under Art. 5.

The applicant's liberty was restricted in accordance with Art. 5 (1)(c) which permits a deprivation of liberty "for the purpose of bringing the person concerned before the competent legal authority on reasonable suspicion of his having committed an offence, or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so".

The Commission has, in its decision of 21 July 1972, found that the applicant's detention, as such, was lawful within the meaning of this provision.

The question before the Commission is whether this detention was contrary to Art. 18 in that it was applied, while the applicant was detained at police headquarters, for any other purpose than as provided for in Art. 5 (1)(c).

In this respect the applicant has complained that the police took advantage of his detention on remand in order to conduct for one month investigations against him as regards the murder of Mrs. Ijsselstein-Van der Velde, although at that time he was neither detained in connection with that crime nor had judicial investigations been authorised in this respect.

In proceeding in this manner, the Netherlands police made their investigations regarding the murder, with which they then had to deal, coincide with the applicant's detention on remand in respect of other charges.

The applicant appears to contest that the police were right in acting in this manner.

However, it does not seem that it can seriously be claimed that this fact by itself could constitute the abuse which the applicant has to establish.

Neither the Convention nor the Netherlands Code of Criminal Procedure contains any express provision precluding the police from proceeding in this manner.

The applicant then complains that the police did not respect certain rules provided for by Arts. 57 to 59 of the Netherlands Code of Criminal Procedure in respect of preliminary police inquiries into criminal charges.

These rules cover limited powers of arrest, place and duration of detention and of compulsory examination (maximum of two terms of two days in a police office), searching of suspects, seizure of objects, etc. These powers are limited with regard both to suspected persons and to the witnesses (who may refuse to testify before the police), in comparison with the more extensive competence of the judiciary.

It has to be noted that this system of guaranteeing applies to interrogations by the police of persons who are at liberty and whose temporary arrest is necessitated for the purpose of such interrogation.

It is obvious that in the present case the application of this system was not possible. Besides, the applicant throughout his interrogation continued to benefit from the guarantees relating to detention on remand. In this connection it is necessary to emphasise that the most important function of Art. 5 of the Convention is to ensure continuous judicial supervision over these detentions.

In this respect, it does not clearly follow from the Government's observations that the District Court at Leeuwarden was aware of the police investigations into the murder case. Thus, it may be concluded that the Court only exercised supervision over the applicant's detention but did not control the police investigations or interrogations.

On the other hand it appears from the Government's statements that the investigating judge was informed of the police investigations concerning the murder case. The applicant had at a previous stage of the proceedings before the Commission (counsel's letter of 17 March 1972) himself admitted that the investigating judge gave a free hand to the public prosecutor as regards the investigation into the murder case.

It is therefore important to note that the investigating judge can, in the preliminary phase of criminal investigation, order the detention of a suspect, who is held in police custody, for two periods of six days. At the beginning police custody can be ordered by the public prosecutor for a maximum period of two periods of two days (Arts. 57, 58, NCCP). Altogether a suspect can, therefore, during the preliminary phase of criminal investigation, be held 16 days in detention before the Court acts (Arts. 64, 65, NCCP).

The applicant was interrogated, according to the Government's submissions, on eight occasions between 2 and 19 November 1970, namely on 18 days, which is only two days longer than the period just mentioned.

Had the applicant not already been in detention, he could consequently have been remanded in prison for 16 days on the ground that there was strong suspicion of his being involved in the murder case. The Commission does not doubt that the investigating authorities had in fact reason strongly to suspect the applicant and even if it were only from the statements of Dijkstra an accomplice, as well as some other persons, let alone the Government's allegation that the applicant had himself told some people that he was involved in the murder, it can, therefore, not be found that, in these circumstances, the police took advantage of the applicant's detention in a manner contrary to the Convention.

As regards the place of his detention, the Court confirmed in its order of 3 September 1970 that the applicant should be detained at the remand prison at Groningen but added, in its order of 1 October 1970, that his detention was also authorised in any other lawful place of detention in the Netherlands.

In its order of 29 October 1970, and in the subsequent orders, the Court decided that the applicant should be detained at the remand prison at Leeuwarden or, in any event, at any other lawful place of detention in the Netherlands.

As to his transfer to the police headquarters in Leeuwarden, the Government justify it as follows:

It was not possible to accommodate him in the House of Detention of that city, since Fierstra, who was a fellow suspect in the other cases as well, was being held there. The applicant was therefore placed in police headquarters. The Court order of 29 October covered this possibility.

The transfer was effected with the consent of the investigating judge who was conducting the preliminary judicial investigation which were the result of applications by the Public Prosecutor on 31 July and 29 September 1970. The presence of the applicant in Leeuwarden had the advantage that the various persons involved were for a time closer together in the Leeuwarden area, where in the second half of July 1970 the series of offences concerned had been committed and where the team of investigators was operating.

This explanation seems perfectly plausible especially as there is nowhere in the Convention any provision concerning the place where detention is to be undergone.

Finally, the applicant alleged that the restrictions on his liberty which were permissible under the Convention with regard to the extortion and accompanying cases were, for the purpose of obtaining his confession in the murder case, aggravated in two ways: firstly, by prolonging his detention (by at least one month); secondly, by making the restrictions more severe (police headquarters instead of remand prison), although the extortion and accompanying cases were already ready for trial.

In this respect the Commission considers of importance the facts that the applicant had himself given reason to believe that he was involved in the murder case by making statements to that effect to certain people and, secondly, that the applicant confessed to the murder on the second day of his interrogation by the police.

There is nothing to indicate, and the applicant does not allege, that he was intimidated at any moment of his detention at police headquarters to such an extent as to feel compelled to confess. There is no further ground in the opinion of the Commission to question the validity of his detention at police headquarters. The applicant has apparently been convicted several times and is consequently used to undergoing interrogation. If the police did not take him at his word, but went on with the interrogation despite his confessions in order to find out the true facts objectively, it can hardly be argued that the interrogation was, for this reason, longer or more severe. Finally, the authorities came to the conclusion that there was not sufficient evidence to convict the applicant of the murder or participation in the murder.

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Having thus considered all the elements in the case, the Commission concludes that there has been no breach of Art. 18 read in conjunction with Art. 5 of the Convention.

The Commission has, however, duly noted that the respondent Government concluded their observations on the merits with an indication that they intend to examine the question as to whether a reform of the relevant legislation is necessary in order to avoid ambiguous situations which may, as in the present case, arise under the existing provisions concerning interrogation by the police of persons already in detention on remand.

Secretary to the Commission

President of the Commission

(A. B. McNULTY)

(J. E. S. FAWCETT)