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

COURT (CHAMBER)

CASE OF DOORSON v. THE NETHERLANDS

(Application no. 20524/92)

JUDGMENT

STRASBOURG

26 March 1996

In the case of Doorson v. the Netherlands [1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr THÓR VILHJÁLMSSON,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mr F. BIGI,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr D. GOTCHEV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 October 1995 and 20 February 1996,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 December 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 20524/92) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Netherlands national, Mr Désiré Wilfried Doorson, on 27 June 1992. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (art. 6-1, art. 6-3) of the Convention.

---

[1] The case is numbered 54/1994/501/583. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9)

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31). The lawyer was given leave by the President to use the Dutch language (Rule 28 para. 3).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 January 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr J. De Meyer, Mr N. Valticos, Mr F. Bigi, Mr A.B. Baka, Mr L. Wildhaber and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 26 June 1995 and the Government's memorial on 27 July. The Delegate did not submit any observations in writing.

5. On 25 August 1995 the Commission produced certain documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 October 1995.

The Court had held a preparatory meeting beforehand. There appeared before the Court:

(a) for the Government

Mr K. de VEY MESTDAGH,
Ministry of Foreign Affairs, *Agent*,
Mrs I.M. ABELS,
Ministry of Justice,
Mrs M.J.T.M. VIJGHEN,
Ministry of Justice, *Advisers*;

(b) for the Commission

Mr H.G. Schermers, *Delegate*;

(c) for the applicant

Mr G.P. Hamer, advocaat en procureur, *Counsel*.

The Court heard addresses by Mr Schermers, Mr Hamer and Mr de Vey Mestdagh.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. The police investigation

7. The applicant is a Netherlands citizen born in 1958 and resident in Amsterdam.

8. In August 1987 the prosecuting authorities decided to take action against the nuisance caused by drug trafficking in Amsterdam. The police had compiled sets of photographs of persons suspected of being drug dealers. These were shown to about 150 drug addicts in order to collect statements from them. However, following a similar action in 1986 when drug addicts who had made statements to the police had been threatened, it turned out that most of those to whom photographs were shown were only prepared to make statements on condition that their identity was not disclosed to the drug dealers whom they identified. In each set of photographs shown there was one of a person known to be innocent. Statements made by persons who identified this photograph as that of a drug dealer were regarded as unreliable and discounted.

9. In September 1987 the police received information from a person referred to by the police under the code number GH.021/87 that the applicant was engaged in drug trafficking. The applicant's identification photograph, which had been taken in 1985, was thereupon included by the police in the collection of photographs shown to drug addicts.

10. A number of drug addicts subsequently stated to the police that they recognised the applicant from his photograph and that he had sold drugs. Six of these drug addicts remained anonymous; they were referred to by the police under the code names Y.05, Y.06, Y.13, Y.14, Y.15 and Y.16. The identity of two others was disclosed, namely R. and N.

B. Proceedings before the Regional Court

11. On 12 April 1988 the applicant was arrested on suspicion of having committed drug offences. It appears that he was subsequently taken into detention on remand.

12. On 13 April 1988 the applicant was shown the photograph made of him by the police and recognised it as a photograph of himself.

13. A preliminary judicial investigation (gerechtelijk vooronderzoek) was opened, during which the applicant's lawyer submitted a request for an examination of the witnesses referred to in the police report in the

applicant's case. The investigating judge (rechter-commissaris) accordingly ordered the police to bring these witnesses before him on 30 May 1988 between 9.30 a.m. and 4 p.m. The applicant's lawyer was notified and invited to attend the questioning of these witnesses before the investigating judge.

14. On 30 May 1988 the applicant's lawyer arrived at the investigating judge's chambers at 9.30 a.m. However, after an hour and a half had elapsed and none of the witnesses had appeared, he concluded that no questioning would take place. He therefore left for another appointment. According to the lawyer he did so with the consent of the investigating judge, Judge M., who had promised him that if the witnesses should turn up later that day, they would not be heard but would be required to appear for questioning at a later date so that he would be able to attend. After the lawyer had left, two of the eight witnesses referred to in the police report turned up and were heard by the investigating judge in the absence of the lawyer, witness Y.15 at about 11.15 a.m. and witness Y.16 at about 3 p.m. From an official record of his findings (proces-verbaal van bevindingen) drawn up by Judge M. on 17 June 1988, it appears that Y.15 and Y.16 did not keep a promise to return for further questioning on 3 June.

15. On 19 July 1988 the applicant appeared before the Amsterdam Regional Court (arrondissementsrechtbank) on charges of drug trafficking. At the prosecutor's request, the court decided to adjourn its examination until 25 August 1988.

16. On 25 August 1988 the Regional Court resumed the hearing. As the Regional Court was differently composed, it recommenced its examination of the case. The applicant's lawyer requested the court to refer the case back to the investigating judge for an examination of the six anonymous witnesses and to hear the two named witnesses R. and N. itself. The court refused the first request but ordered the witnesses R. and N. to be brought before it and adjourned the hearing until 4 October 1988. The Regional Court also refused a request made by the defence for the applicant's detention on remand to be terminated or else suspended, being of the opinion that the applicant was still under suspicion and that the reasons for which the detention on remand had been ordered were still valid. One of the judges sitting on this occasion was a certain Judge Sm.

17. On 29 September 1988 the applicant's lawyer submitted to the Regional Court a number of documents including the judgment of the European Court of Human Rights in the case of Unterpertinger v. Austria (judgment of 24 November 1986, Series A no. 110) and the report of the European Commission of Human Rights in the case of Kostovski v. the Netherlands (report of 12 May 1988, application no. 11454/85).

18. On 4 October 1988 the Regional Court resumed the proceedings. In view of the fact that all three judges of the Regional Court had been replaced, the court again recommenced its examination. The defence again

made a request to have the six anonymous witnesses examined, which was refused. The named witness N. appeared, R. did not. Both the prosecution and the defence were given the opportunity to put questions to N. Asked to identify the applicant, N. stated that he did not recognise him. On being shown the applicant's photograph, he said that he recognised it as that of a man who had given him heroin when he was ill. However, towards the end of his examination he stated that he was no longer quite sure of recognising the man on the photograph; it might be that the man who had given him the heroin only resembled that man. He further alleged that when shown the photographs by the police, he had only identified the applicant's photograph as that of a person from whom he had bought drugs because at the time he had felt very ill and had been afraid that the police might not give him back the drugs which they had found in his possession. The court adjourned its further examination until 29 November 1988, ordering the appearance of the witnesses R. and N., and - on a motion of the defence - of L., an expert in the field of problems related to drug trafficking and abuse. It ordered the witness R. to be brought before it by the police.

19. On 29 November 1988 the Regional Court resumed its hearing.

The expert L. appeared and was questioned before the court. He doubted whether statements such as that made by the drug addicts in the present case could be qualified as voluntarily made. In any event such statements were in his opinion highly unreliable because before photographs were shown all kinds of promises were made so that when it came to identifying individuals the persons concerned knew exactly what was expected of them by the interrogator, whether police officer or judge.

The witnesses N. and R. did not appear, the latter despite the order that he be brought before the court by the police. The defence thereupon withdrew its request to have R. and N. examined before the court in order to avoid a further adjournment of the hearing which would mean prolonging the applicant's detention on remand.

The applicant's lawyer gave a critical analysis of the statements made by the anonymous witnesses. He remarked moreover that there were no valid reasons for preserving their anonymity as it had not been demonstrated that the applicant had ever taken reprisal action or was of a violent disposition.

20. On 13 December 1988 the Regional Court convicted the applicant of drug trafficking and sentenced him to fifteen months' imprisonment. In so doing it took into consideration the fact that the applicant had previously been convicted of similar offences.

C. Proceedings before the Court of Appeal

21. The applicant appealed to the Amsterdam Court of Appeal (gerechtshof).

22. By letter of 6 November 1989 the applicant's lawyer requested the procurator general (procureur-generaal) of the Court of Appeal to summon the anonymous witnesses, the named witnesses N. and R. and the expert L. for questioning at that court's hearing, which was scheduled on 30 November.

The procurator general replied by letter of 22 November that he would summon N., R. and L. but not the anonymous witnesses as he wished to preserve their anonymity. If necessary, the Court of Appeal could decide at the hearing to order these witnesses to be heard in camera by the investigating judge.

23. On 24 November 1989 the applicant's lawyer wrote to the president of the Court of Appeal requesting that the six anonymous witnesses be summoned. In support of this request he pointed out that neither his client nor he had ever had the opportunity to question these witnesses. In this context he referred to the judgment of the European Court of Human Rights in the case of Kostovski v. the Netherlands, which had been delivered four days earlier (judgment of 20 November 1989, Series A no. 166).

24. The hearing of the Court of Appeal on 30 November 1989 was attended by the expert L. but none of the witnesses appeared. The applicant therefore requested that the hearing be adjourned so that they might be summoned for questioning in open court at a later date or, in the alternative, by the investigating judge. The Court of Appeal decided to verify the necessity of maintaining the anonymity of the witnesses and referred the case back to the investigating judge for this purpose. The Court of Appeal also requested the investigating judge to examine the witnesses - after deciding whether their anonymity should be preserved or not - with respect to the facts imputed to the applicant, and to offer his lawyer the opportunity both to attend this examination in the room in which it would take place and to put questions to the witnesses. The court also expressed the wish that the series of photographs used by the police should, if still available, be added to the file. Finally, it ordered the appearance of the witnesses R. and N. and the expert L. before it and adjourned the hearing sine die.

25. On 14 February 1990 the investigating judge heard the witnesses Y.15 and Y.16 in the presence of the applicant's lawyer. The investigating judge was Judge Sm. of the Amsterdam Regional Court, who had taken part in the hearing on 25 August 1988 as a member of the trial court and in the decisions taken on that occasion (see paragraph 16 above).

The lawyer was given the opportunity to put questions to the witnesses but was not informed of their identity. The identity of both witnesses was known to the investigating judge.

Both witnesses expressed the wish to remain anonymous and not to appear in court. Witness Y.16 stated that he had in the past suffered injuries at the hands of another drug dealer after he had "talked" and feared similar reprisals from the applicant. Witness Y.15 stated that he had in the past been

threatened by drug dealers if he were to talk. He further stated that the applicant was aggressive. The investigating judge concluded from the reasons given that both witnesses had sufficient reason to wish to maintain their anonymity and not to appear in open court.

Y.15 and Y.16 were extensively questioned, both by the investigating judge and by the applicant's lawyer. The latter inquired, inter alia, into their reasons for testifying against a dealer who they both said sold good quality drugs and asked them whether they were being paid for giving evidence. Neither Y.15 nor Y.16 refused to answer any of the questions put by the applicant's lawyer. They both stated that they had bought drugs from the applicant and that they had seen him selling drugs to others. They again identified him from the police photograph and gave descriptions of his appearance and dress.

Y.16 stated in addition that the police had rehearsed his previous statement with him before taking him to see the investigating judge.

The official record of the examination of Y.15 mentions that the investigating judge, having come to the conclusion that Y.15 had good reasons for not wishing to have his identity revealed or to be heard in open court, placed him on oath; a similar statement is lacking in the official record of the examination of Y.16.

26. On 20 March 1990 Judge Sm. drew up an official record of her findings containing information obtained from the police with regard to witnesses Y.05, Y.06, Y.13 and Y.14. Y.06, who was a foreign national, had been expelled from the Netherlands. Y.13's place of residence was unknown. Y.05 and Y.14 had been seen but attempts to trace them so as to bring them before the investigating judge had not been successful. She added that the sets of photographs could not be spared by the police; however, should the Court of Appeal so order, the police could produce them at the trial.

On the same day Judge Sm. returned the file to the Court of Appeal.

27. After notice had been given to the defence that the hearing of the Court of Appeal would resume on 10 May 1990, the applicant's lawyer requested the procurator general by letter of 17 April 1990 to summon all six anonymous witnesses, Y.05, Y.06, Y.13, Y.14, Y.15 and Y.16, to attend.

On 2 May 1990 the procurator general refused this request on the ground that Y.15 and Y.16 had been heard for a second time in the presence of the applicant's lawyer by the investigating judge, who had been aware of their identity and had found that they had valid reasons for their wish to remain anonymous. He further found that in view of the findings of the investigating judge it would serve no useful purpose to attempt to call the other anonymous witnesses. It was also necessary to take into account the desirability of bringing proceedings to an end as expeditiously as possible (lites finiri oportet).

28. On 10 May 1990 the Court of Appeal recommenced its examination, having changed composition.

The defence again asked the court to hear R. and N. and the six anonymous witnesses. The court, however, further considering the wish of the witnesses Y.15 and Y.16 to remain anonymous, concluded that it had been decided on sufficiently convincing grounds that these two witnesses had good reasons to feel seriously threatened, in view, inter alia, of police records contained in the case file from which it appeared that there was a real possibility that drug dealers might threaten potential witnesses. Accordingly, it did not order them to be summoned. As to the witnesses Y.05, Y.06, Y.13 and Y.14, the court accepted the findings of the investigating judge that it would be pointless to summon them.

On the other hand, the Court of Appeal ordered that the witnesses R. and N. be brought before it by force and adjourned its hearing until 28 August 1990.

29. By letter of 15 August 1990 the defence again requested the procurator general to produce the six anonymous witnesses. By letter of 17 August 1990 they also asked him to call K., a university lecturer in criminology who had done a great deal of research on drug addicts in Amsterdam, and V., a former drug addict who had personal experience of interrogation by the police.

30. The procurator general refused both requests on 22 August 1990.

As regards the six anonymous witnesses, he referred to his earlier decisions of 22 November 1989 and 2 May 1990 and reiterated the finding of the Court of Appeal of 10 May 1990. He based his decision not to call K. and V. on the fact that K. had published a book which rendered his views sufficiently clear and which the defence could quote at the hearing if desired, and on the assumption that V. would not be able to make statements about anything other than his own experiences as a person suspected of drug offences. It was also unnecessary to call either of them in view of the fact that the expert L. would appear at the hearing on 28 August.

31. On 28 August 1990, the Court of Appeal resumed its hearing. The witness V., who was in prison, did not appear. The defence withdrew its request to have him heard but maintained its request that the Court of Appeal should hear the six anonymous witnesses and the expert K. Referring to its decision of 10 May, the Court of Appeal refused to accede to the request of the defence to hear the six anonymous witnesses. However, in view of the judgment of the Supreme Court of 2 July 1990 (see paragraph 46 below), it decided to refer the case back to the investigating judge, requesting her to record her findings as to the reliability of the witnesses Y.15 and Y.16, adding that if in order to appraise their reliability the investigating judge found it necessary to hear them again she should do so. Although the expert K. was present at the hearing on 28 August 1990, having been convened by the defence, the Court of Appeal decided not to

hear him. The reason given was that as an expert rather than a witness he could not be expected to contribute to the elucidation of the facts of the case. The witness N. was heard by the Court of Appeal in the applicant's presence and the applicant's lawyer was given the opportunity to question him. N. said that his statement to the police had been untrue and that he did not in fact know the applicant. In pursuance of the court's order of 10 May 1990 that he be brought by force, the named witness R. was present initially. It appears that before he was heard, he asked the court usher who was guarding him for permission to leave for a minute; this being allowed him, he then disappeared and could not be found again. The court subsequently ordered that he be brought before it by force at its next hearing on 22 November 1990. The Court of Appeal heard the expert L., who stated that drug addicts often made unreliable statements concerning alleged drug dealers to the police. He understood from drug addicts that police officers made promises to them and that they made statements only in order to be allowed to leave as soon as possible. Such statements were, in his view, "somewhere between the truth and a lie".

32. On 19 November 1990 the investigating judge, Judge Sm., drew up a record of her findings regarding the reliability of the statements made to her by Y.15 and Y.16 on 14 February 1990. She stated in this document that she could not remember the faces of the two witnesses, but having re-read the records of the interrogations could recall more or less what had happened. She had the impression that both witnesses knew whom they were talking about and had identified the applicant's photograph without hesitation. With regard to the facts of which the applicant stood accused, her impression had been that the witnesses themselves believed their statements to be true. As far as she remembered, both witnesses had answered all questions readily and without hesitating although they had made a "somewhat sleepy impression".

33. At the Court of Appeal's hearing on 22 November 1990, the witness R. did not appear, the police having been unable to find him. The court thereupon decided that a new order for R.'s appearance would be pointless. The procurator general brought forward a police officer, I., who had been involved in the investigation and asked that he be heard. The applicant's lawyer protested that the expert K. had not been heard and that the defence had no opportunity to prepare for the questioning of I.; to agree to hear I. now would prejudice the rights of the defence. The Court of Appeal nonetheless acceded to the request, and I. was heard concerning the way in which the investigation had been conducted. I. explained that from 1982 until 1988 he had been a member of a police team set up to fight drug trafficking in the centre of Amsterdam. Over the years that team had built up a good understanding with many of the drug addicts living in that area; making use of that relationship, they had asked them for information on drug dealers. Their cooperation was wholly voluntary. I. denied that the

police made promises to drug addicts or put pressure on them; nor were photographs shown to addicts who had been arrested. In his assessment the statements made by drug addicts were therefore highly reliable. Moreover, action was only taken against alleged drug dealers if there were at least eight statements incriminating them. He further confirmed that it had happened in the past that convicted drug dealers, after serving their sentence, had threatened and assaulted drug addicts who had made incriminating statements against them. Although he had never known the applicant to resort to violence or threats, he did not rule out the possibility that he might do so. The defence challenged the reliability of the statements made by the various witnesses, both named and anonymous, pointing to what they considered to be inconsistencies among them. They objected particularly to the admission as evidence of the statements made by Y.15 and Y.16, on the grounds, inter alia, that both were drug addicts and that the investigating judge's record of her findings of 20 March 1990 did not contain a statement that she believed that the witnesses had been telling the truth. Relying on the Hauschildt v. Denmark judgment of the European Court of Human Rights of 24 May 1989 (Series A no. 154), they moreover expressed doubts as to the impartiality of the investigating judge, Judge Sm., in that as a member of the Regional Court she had taken part in the hearing of the Regional Court of 25 August 1988 and in the decisions then made. They protested against the refusal to hear K.

34. On 6 December 1990, the Court of Appeal quashed the Regional Court's judgment of 13 December 1988, as it was adopting a different approach with regard to the evidence. It found the applicant guilty of the deliberate sale of quantities of heroin and cocaine. This finding was based on the following evidence:

(a) the fact, as appeared from the police records, that upon information that the applicant was engaged in drug trafficking his photograph was added to the collection of photographs of persons suspected of that offence;

(b) the statements made before the investigating judge on 14 February 1990 by Y.15 and Y.16 (see paragraph 25 above);

(c) the fact that on 13 April 1988 the applicant had recognised himself on the police photograph (see paragraph 12 above);

(d) the statements made to the police by the named witnesses N. and R. (see paragraph 10 above).

As regards the applicant's complaint that the majority of the witnesses had not been heard in the presence of the applicant or his lawyer, the court stated that it had based its conviction on evidence given by the witnesses N., R., Y.15 and Y.16.

The latter two had been questioned by the investigating judge in the presence of the applicant's lawyer. The Court of Appeal added that it had used their statements "with the necessary caution and circumspection". It held that these statements could be used in evidence, in view, inter alia, of

the consistency between them and the testimony of the police officer I. It also found that the reliability of the witnesses and the well-foundedness of their wish to remain anonymous had been sufficiently verified by the investigating judge. The witness N. had been heard in open court both at first instance and on appeal. Although he had retracted his earlier statement to the police, that was the statement which the Court of Appeal chose to believe in light of the testimony of the police officer I. Finally, the mere fact that the defence had not had the opportunity to question R. did not mean that his statement could not be used in evidence. The Court of Appeal rejected the applicant's complaint based on the alleged lack of impartiality of Judge Sm. It noted that the hearing on 25 August 1988 had been summary; the Regional Court had only considered the applicant's request to have the six anonymous witnesses examined and his request for release. During that hearing the Regional Court had not examined the substance of the applicant's case. It did not appear, nor had it been argued, that Judge Sm. had had any dealings with Y.15 and Y.16 before questioning them. An investigating judge in any case did not have to provide the same safeguards as a member of a trial court. Furthermore, no particular facts or circumstances had been suggested or had come to light warranting the conclusion that she had not been able to form an unprejudiced opinion as to the reliability of the witnesses she had examined, or that she had been biased in her examination of those witnesses. The applicant was sentenced to fifteen months' imprisonment. The time which he had spent in police custody and detention on remand was deducted from the sentence.

D. Proceedings before the Supreme Court

35. The applicant filed an appeal on points of law to the Supreme Court (Hoge Raad).

Counsel for the applicant submitted a statement of grounds of appeal on 29 November 1991. The complaints put forward, in so far as relevant, were the following.

In the first place, the Court of Appeal ought not to have refused to hear the expert K. The fact that the court had chosen to hear I. at the behest of the prosecution, which had brought him forward at the last moment, meant that the applicant had not had the possibility to obtain the attendance of a witness on his behalf under the same conditions as a witness against him. In addition, the court had failed to give sufficient reasons as to why the statement of K. could not serve the purpose of elucidating the facts, the court not having set out anything either in the record of the hearing or in its judgment with regard to the testimony that K. intended to give.

In the second place, the Court of Appeal ought not to have relied on the statements made by Y.15 and Y.16. It had ignored the wish of the defence to have them brought before the trial court in order that that court might

itself see how unreliable they were and in order that the applicant might put questions to them in person.

In the third place, the Court of Appeal ought not to have taken account of the statement of R., whom the defence had not had the opportunity to question; nor should it have decided after he had been allowed to abscond that there was no further point in attempting to obtain his attendance.

In the fourth place, given the fact that the prosecution had brought forward the witness I. at the very last moment and without the defence having had any opportunity to prepare itself, the Court of Appeal should have either declined to hear him or deferred his examination to a later date.

In the fifth place, the Court of Appeal ought not to have relied on witness statements taken by an investigating judge (Judge Sm.) who had previously, as a member of a trial court and on the basis of the evidence then contained in the case file (which included statements of all eight witnesses), taken part in a decision to prolong the applicant's detention on remand. Judge Sm. had, in his view, failed to preserve an appearance of impartiality.

36. In accordance with the advisory opinion of the advocate general (advocaat-generaal), Mr Fokkens, the applicant's appeal was rejected by the Supreme Court on 24 March 1992.

As to the first complaint, the Supreme Court held that the Court of Appeal had given sufficient reasons for not hearing K., especially since the defence had not indicated in what way his statement might be relevant to any decision regarding the charges proffered. Nor had the applicant been denied a "fair hearing" in this respect; it made no difference that, in spite of the protests made by the defence, the Court of Appeal had given the prosecution the opportunity to have a witness heard without previously announcing its intention to bring him forward.

As to the second complaint, it was held that the mere fact that a defendant in a criminal case was not able to question an anonymous witness himself but had to do so through his counsel did not constitute a violation of the right to a "fair trial", guaranteed by Article 6 para. 1 (art. 6-1) of the Convention, or of the right protected by Article 6 para. 3 (d) (art. 6-3-d).

As to the third complaint, the Supreme Court found that the reasoning on which the Court of Appeal had based its decision to make no further attempts to have R. brought before it was not unintelligible; in any case, it could not assess the validity of that reasoning since this was mainly a question of appreciation of facts. In view of the fact that it had proved pointless to repeat attempts to have R. brought before the Court of Appeal by force and of the fact that his statement was sufficiently corroborated by other evidence, in particular the statement made by N. to the police, the Court of Appeal had been entitled to use his statement in evidence.

As to the fourth complaint, it was held that the Court of Appeal had not been bound to construe the protests put forward by the defence either as a

request for an adjournment or as a defence plea requiring a reasoned decision.

As to the fifth complaint, the Supreme Court concurred with the Court of Appeal that there was no reason to assume that Judge Sm. had lacked the required impartiality or that the applicant could have had any cause for so fearing. It continued:

> "The mere fact that a judge who has been involved in adecision at first instance refusing requests made by thedefence to adjourn the hearing and to refer the case backto the investigating judge for the hearing of anonymouswitnesses and in decisions refusing requests for thetermination or suspension of detention on remand, hasafterwards, pursuant to an order of the Court of Appeal,heard the said witnesses and given an opinion on thereliability of their testimony and on their reasons forremaining anonymous as a rule does not imply that onappeal the requirement of trial by an `impartialtribunal' in the sense of Article 6 para. 1 (art. 6-1)has not been met. It does not appear from the case filethat there are any special circumstances which in thepresent case should lead to a different conclusion."

II. RELEVANT DOMESTIC LAW AND PRACTICE

37. Except for the differences noted below (see paragraphs 45 and following), relevant domestic law and practice at the time of the criminal proceedings complained of were as set out in the Court's above-mentioned Kostovski judgment of 20 November 1989. Reference is therefore made to that judgment, especially pp. 13-17, paras. 22-32. In so far as legal provisions relating to detention on remand are of relevance, reference is made to the Court's Nortier v. the Netherlands judgment of 24 August 1993 (Series A no. 267), pp. 13-14, para. 27.

A. The Code of Criminal Procedure (Wetboek vanStrafvordering - CCP)

38. The public prosecutor has the power to call witnesses and experts to the hearing (Article 260 CCP). In his summons to the accused he gives a list of the witnesses and experts to be brought forward by the prosecution. If the accused wishes to call witnesses, he can - according to Article 263 - submit a request to the public prosecutor no later than three days before the court hearing to summon a witness before the court. As a rule, the public prosecutor should summon the witness, but - according to Article 263 para. 4 - he may refuse to do so if it is to be reasonably assumed that no prejudice to the rights of the defence will be caused if the witness is not heard in open court ("Indien redelijkerwijs moet worden aangenomen, dat de verdachte niet in zijn verdediging kan worden geschaad wanneer een door hem opgegeven getuige ... niet ter terechtzitting wordt gehoord"). He has to give a reasoned decision in writing and must at the same time inform the defence

of its right under Article 280 para. 3 (see paragraph 40 below) to renew the request to the trial court at the hearing.

39. At the opening of the trial hearing the prosecutor hands to the court a list of all the witnesses called, which is then read out by the registrar (griffier) (Article 280 para. 2).

40. If the public prosecutor has failed to summon a witness at the request of the accused, or declined to do so, the defence may ask the court to have that witness summoned (Article 280 para. 3). The court so orders, unless it finds that the non-appearance of this witness cannot reasonably be considered prejudicial to the rights of the defence ("De rechtbank beveelt dat de ... getuige ... zal worden gedagvaard of schriftelijk opgeroepen, tenzij zij ... van oordeel is dat door het achterwege blijven daarvan de verdachte redelijkerwijs niet in zijn verdediging kan worden geschaad" - Article 280 para. 4).

41. A request by the defence to hear a witness who has not been placed on the list of witnesses, who has not been convened to attend the trial and whose summons the defence has not sought in accordance with Article 280 falls under Article 315 CCP (see paragraph 42 below). It appears from the judgment of 23 December 1986 by the Supreme Court that the trial court needs only accede to a request of this nature if it finds it necessary to do so.

42. Under Article 315 CCP the trial court has the power to order of its own accord the production of evidence, including the summoning of witnesses whom it has not yet heard.

43. If it finds that there is occasion to do so, the trial court may order that a witness be brought to its hearing by the police (Articles 282 para. 1 and 315 CCP).

44. If at the trial the trial court finds it necessary to have any factual question examined by the investigating judge, it must suspend the hearing and refer the question to the investigating judge along with the case file. The investigation carried out by the investigating judge in these cases is deemed to be a preliminary judicial investigation and is subject to the same rules (Article 316 CCP).

45. Appeal proceedings against the conviction or sentence at first instance involve a complete rehearing of the case. Both the prosecution and the defence may ask for witnesses already heard at first instance to be heard again; they may also produce new evidence and request the hearing of witnesses not heard at first instance (Article 414 CCP). The defence enjoys the same rights as it does at first instance (Article 415 CCP).

B.Case-law relating to anonymous witnesses

46. In its judgment of 2 July 1990, Nederlandse Jurisprudentie (Netherlands Law Reports, "NJ") 1990, no. 692, the Supreme Court considered that it had to be assumed in light of the European Court's

Kostovski judgment that the use of statements by anonymous witnesses was subject to stricter requirements than those defined in its case-law until then. It defined these stricter requirements in the following rule: such a statement must have been taken down by a judge who (a) is aware of the identity of the witness, and (b) has expressed, in the official record of the hearing of such a witness, his reasoned opinion as to the reliability of the witness and as to the reasons for the wish of the witness to remain anonymous, and (c) has provided the defence with some opportunity to put questions or have questions put to the witness. This rule is subject to exceptions; thus, according to the same judgment, the statement of an anonymous witness may be used in evidence if

(a) the defence have not at any stage of the proceedings asked to be allowed to question the witness concerned, and

(b) the conviction is based to a significant extent on other evidence not derived from anonymous sources, and

(c) the trial court makes it clear that it has made use of the statement of the anonymous witness with caution and circumspection.

C. Law reform

47. The Act of 11 November 1993, Staatsblad (Official Gazette) 1993, no. 603, has added to the CCP a number of detailed provisions relating to the "protection of witnesses". It entered into force on 1 February 1994. The additions include the following. Article 226a now provides that the identity of a witness may remain secret if there is reason to believe that the disclosure of his identity may threaten his life, health, safety, family life or socio-economic existence and if the witness has made it clear that he does not wish to make any statement because of this. The decision is made by the investigating judge, who must first hear the prosecution, the defence and the witness himself. An appeal against the decision of the investigating judge lies to the trial court (Article 226b). The investigating judge may order that a threatened witness be heard in the absence of the accused, or of counsel, or of both, so as not to disclose the identity of the threatened witness; in that event, the prosecution authorities may not attend the questioning of the witness either. The investigating judge must then allow the defence to put questions of its own to the witness, either through the use of telecommunication or in writing (Article 226d). Article 264 now lays down that the prosecution may refuse to summon a threatened witness. If the trial court has ordered that a witness be heard and that witness turns out to be under threat, he must be heard in camera by the investigating judge (Article 280 para. 5). The statement of an anonymous witness taken in accordance with the above-mentioned provisions may only be used in evidence against a person accused of crimes in respect of which his detention on remand is permitted (Article 342 para. 2 (b)). A new paragraph

has been added to Article 344 to the effect that a statement of a person whose identity is not apparent may only be used in evidence if the conviction is based to a significant degree on other evidence and if the defence has not at any time during the trial sought to question that person or have him questioned.

PROCEEDINGS BEFORE THE COMMISSION

48. Mr Doorson applied to the Commission on 27 June 1992. He claimed that he had been a victim of violations of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention in that he had been convicted on the evidence of witnesses who had not been heard in his presence and whom he had not had the opportunity to question, in that the Court of Appeal had accepted the evidence of the anonymous witnesses on the basis of the statement of an investigating judge who at a previous stage of the proceedings had participated in a decision to prolong his detention on remand, and in that the Court of Appeal had refused to hear an expert brought forward by the defence but had agreed to hear an expert brought forward by the prosecution. He also alleged a lack of respect for his private life, in violation of Article 8 (art. 8) of the Convention, in that his photograph had been shown to third parties without any basis in law.

49. On 29 November 1993 the Commission declared the application (no. 20524/92) admissible in so far as it concerned Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) and inadmissible for the remainder. In its report of 11 October 1994 (Article 31) (art. 31), it expressed the opinion, by fifteen votes to twelve, that there had been no violation of those provisions (art. 6-1, art. 6-3-d). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment [3].

FINAL SUBMISSIONS TO THE COURT

50. The applicant concluded his memorial by expressing the opinion that the Commission ought to have declared his complaint to be well-founded. In their memorial, the Government expressed the opinion that there had been no violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

[3] For practical reasons this annex will appear only with the printed version of this judgment (in Reports of Judgments and Decisions - 1996-II), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

51. In his memorial and again at the hearing, the applicant complained that of the approximately 150 statements of persons to whom the photographs of suspected drug dealers were shown, only eight were included in the case file (see paragraphs 8 and 10 above); the other 142 were not made available to the defence. He also raised various claims about the use made of the statements of the anonymous witnesses Y.05, Y.06, Y.13 and Y.14, about the procedure for confronting witnesses and informants with photographs of suspected drug dealers and about the fact (admitted by Y.16 himself - see paragraph 25 above) that the police had rehearsed his statement with him while taking him to see the investigating judge. These are new complaints. They were not raised as such in the proceedings before the Commission; nor were they encompassed by the Commission's decision on admissibility. They go beyond mere legal submissions put forward in support of the complaints declared admissible. That being so, the Court has no jurisdiction to entertain them (see the Erkner and Hofauer v. Austria judgment of 23 April 1987, Series A no. 117, p. 61, para. 63).

52. Before the Commission the applicant alleged that his case had not been decided by an "impartial tribunal". He referred to the fact that the anonymous witnesses Y.15 and Y.16 had been heard by an investigating judge of the Regional Court, Judge Sm., who had also recorded her finding that Y.15 and Y.16 believed their statements to be the truth (see paragraphs 25 and 32 above). The Court of Appeal had based its opinion that these witnesses were reliable on that finding (see paragraph 34 above). Judge Sm. had previously, as a member of the trial court hearing the case at first instance, participated in a decision to prolong the applicant's detention on remand (see paragraph 16 above). None of the parties referred to this issue in the proceedings before the Court, whether in their memorials or at the hearing. The Court sees no reason to address the matter of its own motion.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 TAKEN TOGETHER WITH ARTICLE 6 PARA. 3 (d) (art. 6-1+art. 6-3-d) OF THE CONVENTION

53. The applicant alleged that the taking of, hearing of and reliance on evidence from certain witnesses during the criminal proceedings against him infringed the rights of the defence, in violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention, which provide as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing... by an ... impartial tribunal ...

...

3. Everyone charged with a criminal offence has thefollowing minimum rights:

...

(d) to examine or have examined witnesses against himand to obtain the attendance and examination of witnesseson his behalf under the same conditions as witnesses against him; ..."

Neither the Commission nor the Government endorsed this view.

A. Arguments before the Court

1. The applicant

54. The applicant claimed in the first place that in obtaining the statements of the anonymous witnesses Y.15 and Y.16 the rights of the defence had been infringed to such an extent that the reliance on those statements by the Amsterdam Court of Appeal was incompatible with the standards of a "fair" trial. He emphasised, first of all, that during the first-instance proceedings Y.15 and Y.16 were questioned by an investigating judge, Judge M., in the absence of his counsel. He claimed that this was in violation of an agreement between his counsel and Judge M. (see paragraph 14 above). Although he conceded that in the course of the appeal proceedings Y.15 and Y.16 had been questioned by Investigating Judge Sm. in the presence of his counsel and had identified him from a photograph taken several years previously (see paragraph 25 above), that was not a proper substitute for a confrontation with him in person. Not knowing the identity of the persons concerned, he could not himself cross-examine them to test their credibility. Nor could the possibility of mistakes be ruled out. It would, in his submission, have been possible to examine the witnesses in his presence, protecting them, if need be, by the use of disguise, voice-distorting equipment or a two-way mirror. In fact, he questioned the need for maintaining the anonymity of Y.15 and Y.16 at all. Both had stated before the investigating judge that they feared reprisals (see paragraph 25 above) but there was nothing to suggest that they were ever subjected to, or for that matter threatened with, violence at the hands of the applicant. Moreover, the basis of the investigating judge's assessment of the need for anonymity was not made clear to the defence. He further submitted that it was inappropriate that the trial court should have accepted unquestioningly the assessment of the reliability of the evidence given by Y.15 and Y.16 to the investigating judge (see paragraphs 32 and 34 above). In this

connection the applicant pointed out that both Y.15 and Y.16 were drug addicts. Y.16, on his own admission, had been an addict for no less than seventeen years. Statements by drug addicts were notoriously unreliable, as appeared from, inter alia, the statement made by the expert witness L. (see paragraph 31 above). The investigating judge had not herself carried out the complete investigation of the case, so that she could not assess the credibility of the witnesses in the light of the complete case file; furthermore, an important safeguard - namely, a complete assessment by the full trial court, which consisted of three judges of the Court of Appeal - had been lacking.

55. In the second place, the applicant complained about the reliance on the evidence of the named witness R. Although R. had been brought to the hearing of the Court of Appeal for questioning, he had - in the applicant's submission - been allowed to abscond under circumstances which engaged the Court of Appeal's responsibility; that court had afterwards abandoned its attempts to have R. brought before it anew and nonetheless relied on the statement which he had made to the police (see paragraphs 31, 33 and 34 above). Since he - the applicant - had not been able to cross-examine R., his statement to the police should not have been admitted as evidence.

56. In the third place, the applicant alleged that the Court of Appeal had been wrong to rely on the statement made by the named witness N. to the police. N. had stated on oath to both the Regional Court during the first-instance proceedings and the Court of Appeal that his statement to the police had been untrue (see paragraphs 18 and 31 above). In the applicant's submission, this meant at the very least that his statement to the police was suspect.

57. Finally, he submitted that the Court of Appeal should not have refused to hear a defence witness, the expert K. whom he had brought along to the court's hearing, while agreeing to hear the evidence of a prosecution witness, the police officer I. (see paragraphs 31 and 33 above).

2. The Commission

58. The Commission pointed out that the named witness N. had been heard by the trial courts both at first instance and on appeal (see paragraphs 18 and 31 above). Both the prosecution and the defence had had the opportunity to put questions to him and the courts had been able to form an opinion as to the value of his statements. In the circumstances, therefore, and also given the nature of N.'s statement to the police - he had identified the applicant's photograph as that of a drug dealer - use of that statement in evidence could not affect the fairness of the proceedings.

59. Both the Regional Court and the Court of Appeal had made repeated attempts to hear the named witness R. in open court. These, however, had proved unsuccessful (see paragraphs 31 and 33 above). It could not therefore, in the Commission's view, be considered unfair to rely on R.'s

statement to the police to some extent. At the Court's hearing, the Commission's Delegate expressed the opinion that although R.'s statement would not be sufficient on its own to justify a conviction, it could be used to corroborate other evidence.

60. With regard to the anonymous witnesses Y.15 and Y.16, the Commission observed that their identity was known to the investigating judge (see paragraph 25 above). There was, in its view, no reason to doubt that their wish to remain anonymous was well-founded. In addition, they had been heard in the presence of the applicant's counsel who had had the opportunity to put questions of his own (see paragraph 25 above). While it would have been preferable to confront them with the applicant in person, there were, in its opinion, valid reasons not to do so. Moreover, various persons had independently identified the applicant from a photograph and the value of this and other evidence was extensively discussed in adversarial proceedings. Viewed as a whole, therefore, the proceedings had not been unfair.

61. Finally, it had been within the discretion of the Court of Appeal to decide whether or not hearing the defence witness K. could contribute to the proper administration of justice (see paragraph 31 above).

3. The Government

62. The Government contended that it had not been necessary to hear the witnesses Y.15 and Y.16 in open court as the hearing of witnesses by the investigating judge offered sufficient safeguards. The involvement of the investigating judge afforded the suspect the guarantee that the investigation would be impartial and objective. It was the duty of the investigating judge to collect not only evidence that tended to incriminate the suspect, but also evidence that might disculpate him. In addition, the investigating judge had the power to hear witnesses on oath, and the prosecution and the defence had the right to attend and ask questions of their own or to submit questions in writing (see paragraph 37 above and the Court's Kostovski judgment cited therein, p. 14, para. 23). They noted in addition that the applicant's counsel had twice had the opportunity to question the witnesses Y.15 and Y.16 in the presence of an investigating judge. The first such opportunity was on 30 May 1988, during the preliminary judicial investigation; on that occasion the lawyer had left, for reasons of his own, before these witnesses appeared (see paragraph 14 above). The second was during the appeal proceedings, on 14 February 1990 (see paragraph 25 above). On that occasion counsel had been present and had in fact put direct questions to the witnesses. Given that counsel had in fact been able to question Y.15 and Y.16 face to face, the lack of any confrontation with the applicant in person had not materially restricted the ability of the defence to cast doubt on their credibility or that of their statements or to counter their statements as it saw fit. Moreover, the

investigating judge, Judge Sm., had been aware of the identity of the anonymous witnesses. She had also examined their reasons for wishing to remain anonymous - namely, fear of reprisals - and considered them well-founded. Her decision had been upheld by the Court of Appeal, which had found it established that potential witnesses in drug-using circles were in fact frequently threatened by drug dealers (see paragraph 28 above). The Court of Appeal had been entitled to consider the reliability of the statements of Y.15 and Y.16 sufficiently corroborated by the findings of the investigating judge, as officially recorded on 19 November 1990, and by the statement in open court of the police officer I. that the witnesses in the case had been under no constraint. In any case, the Court of Appeal had noted in its judgment that it had made use of the anonymous statements "with the necessary caution and circumspection" (see paragraph 34 above). They noted generally that the procedure followed had been in accordance with the case-law of the Netherlands Supreme Court in which rules had been laid down for the implementation in domestic law of the Court's judgment in the Kostovski case (see paragraph 46 above).

63. It had likewise been within the discretion of the Court of Appeal to make use of the statement which the named witness N. had made to the police, rather than the statements which he had later made before the Regional Court and the Court of Appeal retracting it. The defence had sufficient opportunity to cross-examine N. and to challenge his evidence in open court (see paragraphs 18 and 31 above). In any case, the selection and assessment of evidence was the responsibility of the national courts.

64. Given the freedom of the trial courts to assess the available evidence, the Court of Appeal had also been entitled to make use of the statement made by the named witness R. to the police. In this connection they drew attention to the fact that several attempts had been made to bring him before the court, all of which had proved unsuccessful (see paragraphs 28 and 31 above).

65. In the view of the Government no issue could be taken with the refusal of the Court of Appeal to hear the expert witness K. (see paragraph 31 above). The defence had supplied no information from which it appeared that his evidence would have differed from, or added to, that of the expert L., who had already been heard.

B. The Court's assessment

1. The Court's general approach

66. As the requirements of Article 6 para. 3 (art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 para. 1 (art. 6-1), the Court will examine the complaints under Article 6 paras. 1 and 3 (d) (art. 6-1+art. 6-3-d) taken together (see, among many other

authorities, the Delta v. France judgment of 19 December 1990, Series A no. 191-A, p. 15, para. 34).

67. 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 Kostovski judgment, p. 19, para. 39).

2. the anonymous witnesses Y.15 and Y.16

68. The Court agrees with the Commission's Delegate that no issue arises in relation to the fact that Investigating Judge M. heard Y.15 and Y.16 in the absence of the applicant's counsel in the course of the preliminary judicial investigation, since in the course of the subsequent appeal proceedings these two witnesses were heard in counsel's presence (see paragraph 25 above).

69. As the Court has held on previous occasions, the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. The subsequent use of their statements by the trial court to found a conviction is however capable of raising issues under the Convention (see the above-mentioned Kostovski judgment, p. 21, para. 44, and the Windisch v. Austria judgment of 27 September 1990, Series A no. 186, p. 11, para. 30). As was already implicit in paragraphs 42 and 43 of the above-mentioned Kostovski judgment (loc. cit., pp. 20-21), such use is not under all circumstances incompatible with the Convention.

70. It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, 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 (art. 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.

71. As the Amsterdam Court of Appeal made clear, its decision not to disclose the identity of Y.15 and Y.16 to the defence was inspired by the need, as assessed by it, to obtain evidence from them while at the same time protecting them against the possibility of reprisals by the applicant (see paragraph 28 above). This is certainly a relevant reason to allow them anonymity. It remains to be seen whether it was sufficient. Although, as the

applicant has stated, there has been no suggestion that Y.15 and Y.16 were ever threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them (see paragraph 28 above). Furthermore, the statements made by the witnesses concerned to the investigating judge show that one of them had apparently on a previous occasion suffered violence at the hands of a drug dealer against whom he had testified, while the other had been threatened (see paragraph 25 above). In sum, there was sufficient reason for maintaining the anonymity of Y.15 and Y.16.

72. The maintenance of the anonymity of the witnesses Y.15 and Y.16 presented the defence with difficulties which criminal proceedings should not normally involve. Nevertheless, no violation of Article 6 para. 1 taken together with Article 6 para. 3 (d) (art. 6-1+art. 6-3-d) of the Convention can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities (see, mutatis mutandis, the above-mentioned Kostovski judgment, p. 21, para. 43).

73. In the instant case the anonymous witnesses were questioned at the appeals stage in the presence of counsel by an investigating judge who was aware of their identity (see paragraph 25 above), even if the defence was not. She noted, in the official record of her findings dated 19 November 1990, circumstances on the basis of which the Court of Appeal was able to draw conclusions as to the reliability of their evidence (see paragraphs 32 and 34 above). In this respect the present case is to be distinguished from that of Kostovski (loc. cit., p. 21, para. 43). Counsel was not only present, but he was put in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity, and these questions were all answered (see paragraph 25 above). In this respect also the present case differs from that of Kostovski (loc. cit., p. 20, para. 42).

74. While it would clearly have been preferable for the applicant to have attended the questioning of the witnesses, the Court considers, on balance, that the Amsterdam Court of Appeal was entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses. More generally, the Convention does not preclude identification - for the purposes of Article 6 para. 3 (d) (art. 6-3-d) - of an accused with his counsel (see, mutatis mutandis, the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 40, para. 91).

75. In addition, although it is normally desirable that witnesses should identify a person suspected of serious crimes in person if there is any doubt about his identity, it should be noted in the present case that Y.15 and Y.16

identified the applicant from a photograph which he himself had acknowledged to be of himself (see paragraph 12 above); moreover, both gave descriptions of his appearance and dress (see paragraph 25 above). It follows from the above considerations that in the circumstances the "counterbalancing" procedure followed by the judicial authorities in obtaining the evidence of witnesses Y.15 and Y.16 must be considered sufficient to have enabled the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements, which it did in open court by, amongst other things, drawing attention to the fact that both were drug addicts (see paragraph 33 above).

76. Finally, it should be recalled that even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements. That, however, is not the case here: it is sufficiently clear that the national court did not base its finding of guilt solely or to a decisive extent on the evidence of Y.15 and Y.16 (see paragraph 34 above). Furthermore, evidence obtained from witnesses under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care. The Court is satisfied that this was done in the criminal proceedings leading to the applicant's conviction, as is reflected in the express declaration by the Court of Appeal that it had treated the statements of Y.15 and Y.16 "with the necessary caution and circumspection" (see paragraph 34 above).

3. The witness N.

77. The witness N. made a statement to the police inculpating the applicant but retracted it when questioned on oath in open court in the presence of the applicant, both before the Regional Court and the Court of Appeal. The Court of Appeal nonetheless decided to attach some credence to N.'s statement to the police.

78. As stated in paragraph 67 above, the Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence; this is for the domestic courts, the task of the European Court being to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. The Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict. The Court, therefore, does not find that the decision taken by the Court of Appeal with regard to the evidence given by N., whether considered on its own or together with the other matters complained of, rendered the applicant's trial unfair.

4. The witness R.

79. Repeated but unsuccessful attempts were made to bring the named witness R. before the Regional Court, following which the applicant withdrew his request to have him heard (see paragraph 19 above). In the appeal proceedings R. was brought before the court by force, but absconded before he could be questioned (see paragraph 31 above). A subsequent attempt to have him brought before the Court of Appeal was likewise unsuccessful, after which no further attempt was made (see paragraph 33 above).

80. Despite the Court of Appeal's efforts it was impossible to secure R.'s attendance at the hearing. In the circumstances it was open to the Court of Appeal to have regard to the statement obtained by the police, especially since it could consider that statement to be corroborated by other evidence before it (see the Artner v. Austria judgment of 28 August 1992, Series A no. 242-A, p. 10, para. 22). Accordingly, no unfairness can be found in this respect either.

5. The defence expert K. and the prosecution witness I.

81. The Court of Appeal refused to hear the expert K. while agreeing to hear the police officer I. Both had been brought to the hearing, K. by the defence and I. by the prosecution (see paragraphs 31 and 33 above). The Court of Appeal refused to hear K. for the reason that as an expert rather than a witness he would not be able to contribute to the elucidation of the facts of the case. According to the defence, K. would have been able to testify generally to the effect that statements made to the police by drug addicts were often unreliable. The evidence of the police officer I., on the other hand, concerned the way in which the police went about obtaining statements from drug addicts and ensuring that these were as reliable as possible.

82. As was pointed out earlier (at paragraphs 67 and 78 above), decisions whether to allow evidence and what reliance to place on admitted evidence are primarily the responsibility of the domestic courts. The Court of Appeal could consider that the evidence offered by K. would not have contributed to the assessment which it was required to make, especially since in any case a similar statement had already been made by the expert L., and it was open to the Court of Appeal to draw from I.'s evidence the inferences which it did. The Court therefore does not find that the fairness of the criminal proceedings against the applicant was adversely affected by the Court of Appeal's decision to hear I. but not K.

C. Conclusion

83. None of the alleged shortcomings considered on their own lead the Court to conclude that the applicant did not receive a fair trial. Moreover, it cannot find, even if the alleged shortcomings are considered together, that the proceedings as a whole were unfair. In arriving at this conclusion the Court has taken into account the fact that the domestic courts were entitled to consider the various items of evidence before them as corroborative of each other. Accordingly, there has been no violation of Article 6 para. 1 taken together with Article 6 para. 3 (d) (art. 6-1+art. 6-3-d) of the Convention.

FOR THESE REASONS, THE COURT

Holds, by seven votes to two, that there has been noviolation of Article 6 para. 1 taken together with Article 6 para. 3 (d) (art. 6-1+art. 6-3-d) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 March 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 55 para. 2 of Rules of Court B, the joint dissenting opinion of Mr Ryssdal and Mr De Meyer is annexed to this judgment.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL AND DE MEYER

In this case, we agree in substance with the opinion of Mr Danelius and the other eleven members of the Commission who shared his view that there had been a breach of the applicant's defence rights. It is not only in drugs cases that problems may arise in relation to the safety of witnesses.

It is not permissible to resolve such problems by departing from such a fundamental principle as the one that witness evidence challenged by the accused cannot be admitted against him if he has not had an opportunity to examine or have examined, in his presence, the witness in question. In the instant case the applicant had this opportunity in respect of the witness N., who withdrew his earlier statement. The applicant did not have such an opportunity in relation to the witness R., who "disappeared", or the witnesses Y.15 and Y.16, who were heard only in the presence of his lawyer. Moreover, Y.15 and Y.16 were anonymous witnesses whose identity was only known to the investigating judge but not to the applicant and his lawyer, nor to the Regional Court and the Court of Appeal.