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The law of evidence in criminal cases (the Netherlands)

Abstract

In this paper a brief overview is given about the law of evidence in criminal cases. Generally speaking the factfinding process is carried out before the trial. The trial itself tends toward an evaluative phase in respect to the evidence, mainly provided in written form, included in the files *(het dossier)*. The trial is dominated by the court. The court is always sitting without lay participants; there is no jury in Dutch criminal procedure. The whole structure of the process is based on the position of the court. The law of evidence is perceived as a set of decision rules (applicable to the court's decisionmaking) rather than a set of presentation rules.

1. Prosecutor and judge

In Dutch criminal procedure there is a strict division between the functions of the prosecutor and those of the judge. Although the role of the investigative judge or investigating magistrate in the pre-trial stage includes a kind of mix between investigation and judging, it is clear that the responsibility for the whole case in the pre-trial stage is in the hands of the prosecutor. If the prosecutor decides to drop the charges, the investigative judge has to halt all proceedings. Furthermore, the investigative judge can never take part in any other decision in a case after the pre-trial stage. That means, for example, that if a person who once was the investigative judge in a case were after some years to be in the appellate panel adjudicating that case, he would be required to excuse himself from that panel.

There is also a firm division between the pre-trial stage and the trial stage. Whenever the prosecutor calls the defendant to the trial by way of a summons, the responsibility for the case shifts from the prosecutor to the court. As long as the trial itself has not started the prosecutor still is entitled to withdraw the case and drop the charges. He can no longer do so after the beginning of the trial.

Moreover, as soon as the defendant is summoned, the indictment that is included in that summons essentially becomes a fixed text. The indictment consists of a narrow description of the alleged facts in rather concrete terms and includes an account of many particularities of the case. After the trial begins opportunities to correct omissions or other mistakes in the indictment are very limited. In Dutch we call this aspect the 'tyrannie van de tenlastelegging', meaning the tyranny of the indictment. Recently a debate has started about relaxation of this stringent system.

A relatively unique aspect of Dutch criminal procedure[1] is that once the prosecutor has summoned the defendant the judge may not substantially modify the indictment. A judge may only find the defendant guilty if the evidence proves the facts alleged in the indictment as the prosecutor has written it. The summons, including the indictment, must be sent to the defendant at least ten days before the trial, thus enabling the defendant to prepare his defense. In practice, most defendants receive the summons about a month before the trial.

Two key provisions of the Code of Criminal

[1] The text itself is a statement that goes into the details of the case. The prosecutor cannot describe the charge in the words of the law, since they are considered to be too abstract, too far away from the world of common people.

Procedure (1926) state that the court must base all decisions about the merits of the case on the indictment, and can only consider information that has been presented during the trial.

2. The trial

According to the Code of Criminal Procedure, trials in the Netherlands are oral, public and concentrated. In practice, most trials consist of a discussion among the judge, the defendant, the prosecutor and the counsel for the defense, evaluating all written materials included in the files of the case. The files play an important role throughout the adjudication. In light of Dutch law's acceptance, of most forms of hearsay evidence, most cases are, in practice, tried without calling witnesses or experts to the court room. In practice the emphasis lies on the evaluation of written materials. During the trial the judge informs himself about the merits of the case and all relevant aspects. Upon the information given, exchanged and discussed during the trial, the court must make, roughly nine decisions after the trial. Some of these decisions are on rather formal points, such as the jurisdiction of the court itself. Other issues are rather substantial; especially the decision on proof, *i.e.* the decision whether or not it has been proven that the defendant committed the alleged act, and if the answer is affirmative, the decision whether the facts that have been proven indeed fit the legal definition of a specified crime. The latter decision is called the decision on qualification *('kwalificatie beslissing')*. That decision has derived from the French Code d'Instruction Criminelle 1808, although its roots are much older. In theory and according to the Code, the distinction between decisions about the adequate proof and decisions about the qualification of the proven fact is sharp. In practice there is a certain overlap between the decisions.

In practice, single sitting judges decide the issues in the majority of the cases, being only the serious cases brought before a panel of judges *(meervoudige kamer)*. In principle, however, a panel of judges makes all decisions. (This is not the place to explain extensively the way cases are tried if the case itself is a simple one in respect to the evidence. A single judge may resolve many issues especially when the defendant, in a relatively light case, admits that he/she indeed committed the alleged act). In the rest of this paper I will restrict myself to cases tried by a panel of judges.

All decisions on the merits of the case must be written down in the *'vonnis'* (written decision of the case). The court should not only record the result of its decision, but it should also explain its reasoning from the evidence and relevant statutes. When the court decides, e.g., whether it has been proven that the defendant committed the act alleged, the *'vonnis'* should contain a written version of all the sources the court used to reach its decision. Thus, the court is required to give very precise reasons for the acceptance of the evidence which appeared in the file(s) or the trial. I remind you that the court may only use information in the 'vonnis' if it indeed evaluated and discussed the information during the trial. This aspect of Dutch procedure relates to the defendant's rights to defend himself to the allegations against him.

3. Beyond reasonable doubt

The code instructs the court to decide that the act alleged has been proven only if the court is convinced that the defendant indeed committed the act. The code also restricts and defines the sources on which the court must base its decision. The Code of Criminal Procedure only permits five so-called means of proof. These authorized sources are:

1. the court's own observation during the trial;

2. the defendant's statements in court or out of court;
3. witnesses' statements during the trial;
4. an expert's statement during the trial;
5. written materials, for which the code gives a number of specifications. One of the specifications, however, says that all written materials can in principle be used, if related to other means of proof (i.e., other authorized sources).

The system of sources itself has been designed to fit into a broader system of criminal procedure that the code describes as an oral and direct kind of procedure. However, a famous decision in 1926 of the Supreme Court of the Netherlands held that most forms of hearsay evidence, especially hearsay in statements of the witness during the trial or in written police reports, are acceptable as means of proof. It goes without saying that the Supreme Court of the Netherlands' interpretation of the Code's provisions regulating the use of eye witness testimony, and of written materials, holding that such means of proof may contain information in the form of statements given by other people, has dramatically affected the conduct of trials during the last sixty-five years. Since 1926, witnesses and experts have only been called to the courtroom to give their testimony in a minority of cases. The Court on Human Rights in Strasbourg has criticized this practical avoidance of confrontations between defendant and witnesses during the trial in a number of cases. The Strasbourg Court, in so doing, stressed the importance of confrontation among the defendant, the prosecutor, the decision making body, and the witness in person.

The Code of Criminal Procedure of 1926 maintains one criterion for the deciding whether defendant's commission of the act alleged has been proven: the requirement that the court should be *convinced* that the defendant committed the offense described in the indictment. The court's conviction must rest on statutorily accepted means of evidence. In essence, the requirement that the court should be convinced of the defendant's guilt is the equivalent of the Anglo-American requirement that the court or the jury should be convinced *beyond a reasonable doubt.*

4. Acceptance instead of admissibility

From the earlier discussion it will be clear that the rules of evidence in the Dutch Code of Criminal Procedure of 1926 are *decision* rules rather than rules that regulate the admission of evidence (which are basicly *presentation* rules: regulating whether or not information can be presented to the jury). Such a classification is, of course, mainly of scholarly interest. However, comparatively speaking, in a non-jury system where all trials are bench trials, it seems to be logical that the regulation of evidence takes the form of regulation of the decision rather than of the admissibility of the evidence.

On other occasions I have stated that, although in Dutch criminal procedure the emphasis is put on decision making rather than on the form of the trial and the examination of witnesses and experts, this does not mean that the goal of the Dutch system differs markedly from the goal of evidence rules in the Anglo-American legal system. In general most regulation of evidence is an endeavour to exclude unreliable evidence. Furthermore, rules of evidence can exclude illegally or improperly obtained evidence. Whether systems focus on decisions about the adequacy of proof or on the presentation of evidence, these objectives explain why there are rules of evidence. This may be illustrated with the definition of the statement of a witness in the Dutch system: a witness's statement (in the meaning of the rules of evidence) can only include a statement about the facts and circumstances that the witness observed, thus indeed excluding the witnesses's own opinions and conclusions.

5. Closing remarks

In addition to rules concerning the permiss-

ible means of proof (sources), the rules of evidence in the Dutch Code of Criminal Procedure prohibit convictions on certain minimal sorts of evidence. The first so-called 'bewijsminimum' says that the court may not convict a defendant on his own confessions only. This means that, by implication of the right to remain silent and the guarantees of a fair trial for the defendant, the rules discourage the police from putting the defendant under pressure to confess all allegations against him. Of course, police will nevertheless exert some pressure in that direction, but a mere confession (or confessions) without any corroborative evidence will not suffice to convict the defendant. The second so-called 'bewijsminimum' is the rule that prohibits convictions that are only based on the statements of one witness. In effect, this means that there must always be a plurality of sources to support a conviction. The third so-called 'bewijsminimum' is related to my remarks (supra ad 3) about written materials: the code treats four categories of written materials as independent means of proof. This does not apply to the residual category: 'all other writings'. Writings in the residual category can only be used in combination and in relation with other means of evidence.

It is important for foreign lawyers to bear in mind that a Dutch court must always record its decision in the 'vonnis' and give very precise reasons for that decision. This means that the Supreme Court of the Netherlands, to a certain extent, can review the lower courts' decision to see whether its decision relies on legally accepted means of proof, offered in the case under litigation.

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