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Silent witnesses. The right to examine prosecution witnesses in criminal cases (Article 6 § 3(d) ECHR)

Research question

Witness statements are not always truthful. For the accused, the opportunity to question witnesses who have made incriminating statements may, therefore, be important. Article 6 § 3(d) of the European Convention on Human Rights (ECHR) gives them the right to do so. This right to examine witnesses is one of the rights protected by the more general right to a fair trial. Its meaning can be derived from case law of the European Court of Human Rights (ECtHR). This book considers whether the right to examine witnesses for the prosecution under Dutch law is in accordance with the ECHR requirements. The research disregarded anonymous witnesses. It was completed on 1 January 2015.

Chapters 1 and 2: Outline of the right to examine witnesses

Chapters 1 and 2 describe the conditions applying to the right to examine witnesses, the way in which the ECtHR and the Dutch Supreme Court assess claims that the right to examine witness has been violated and how the right to examine witnesses relates to other rights enshrined in Article 6 ECHR.

According to the ECtHR, a witness for the prosecution as meant in Article 6 § 3(d) ECHR is a person who has provided information used as evidence. The question of whether experts, too, must be considered to be witnesses cannot be answered unequivocally on the basis of ECtHR case law. Most people regarded as witnesses under ECHR law are also considered witnesses for the purposes of applying the Dutch rules on the right to examine witnesses. Experts and victims with a right to speak during trial do not fall within the scope of the Dutch use of the term ‘witness’ [getuige]. This is not a critical issue, however, given that the Dutch Code of Criminal Procedure allows the defence a separate right to examine experts, while statements given by victims with a right to speak during trial can contribute to the judge’s decision only if they are of subsidiary importance.
Dutch courts have ruled that information mentioned by a witness in a covertly recorded conversation does not have to be regarded as a witness statement for the purposes of applying the rules of evidence. Consequently, the rules regarding the use in evidence of statements by witnesses who could not be questioned by the defence do not apply. The ECtHR, however, may believe that the right to examine witnesses does have to apply to information from covertly recorded conversations.

The sole fact that an accused was unable to question a witness does not justify claiming that the right to examine witnesses has been violated. Both the ECtHR and the Supreme Court apply a decision-making model in order to examine whether this right has been violated. Since the judgment in the cases of Al-Khawaja and Tahery the following decision-making model can be derived from ECtHR case law:

1. Did the defence have an adequate and proper opportunity to question the witness?
   - Yes: no violation
   - No: go to question 2

2. Was the absence of an adequate and proper opportunity to question the witness justified by a good reason?
   - Yes: go to question 3
   - No: violation

3. Was the conviction based solely or to a decisive degree on the statement by a witness who could not be questioned adequately and properly by the defence?
   - Yes: go to question 4
   - No: no violation

4. Was the lack of an adequate and proper opportunity to question the witness sufficiently counterbalanced?
   - Yes: no violation
   - No: violation

Although the decision-making model suggests otherwise, the ECtHR does not always follow the steps in the model in the same order as outlined above. As the model shows, there are two grounds on which the right to examine witness can be found to have been violated in situations in which a witness could not be questioned adequately and properly: either no good reason existed for the absence of an adequate and proper opportunity to question
the witness or, alternatively, the conviction was based to a decisive degree on the witness statement and the lack of an adequate and proper opportunity to question the witness was insufficiently counterbalanced. In addition, the ECHR will not find a violation if the accused has waived his right to question the witness. Almost every case in which the applicant at the ECHR claimed that his right to examine witnesses had been violated was able to be decided by application of the decision-making model. Only highly exceptionally has the ECHR found this right to have been violated after seeking recourse to another method of assessment.

Dutch law distinguishes between two types of rules: rules concerning decisions on requests to question witnesses, and rules concerning the use in evidence of statements by witnesses who could not be questioned by the defence. In appeal in cassation, claims can be filed under both types of rules. The Supreme Court, too, applies a decision-making model. In view of the above distinction, this model considers only whether the statement of the witness whose reliability could not be tested by the defence is admissible in evidence. This decision-making model is constructed as follows:

1. Did the defence take sufficient initiative?
   No: no violation
   Yes: go to question 2

2. Was the defence offered an opportunity to question the witness?
   Yes: no violation (unless the witness failed to answer the questions)
   No: go to question 3

3. Is there sufficient supporting evidence for the parts of the witness statement contested by the accused?
   Yes: no violation
   No: go to question 4

4. Has the accused been offered sufficient counterbalance?
   Yes: no violation
   No: usually violation

The question regarding the good reason for the absence of an adequate and proper opportunity to question a witness is not included in the decision-making model applied by the Supreme Court. This could prove problematic if the accused did not complain in the appeal in cassation about the refusal to have a witness called, while no good reason for rejecting such request
existed. The ECtHR could then find the right to examine witnesses to have been violated. It is not inconceivable, however, that the ECtHR would rule that the applicant had not exhausted all national remedies as he had failed to use the opportunity to contest the rejection of his request to have a witness called in the appeal in cassation. The decision-making model used by the Supreme Court includes an assessment of the defence’s efforts to obtain the opportunity to question a witness, whereas this aspect is not part of the ECtHR decision-making model. However, no significant difference can be detected here since the initiative displayed by the defence is also an important factor in deciding cases at the ECtHR. Given the different nature of the proceedings, the ECtHR applies a different framework in its assessment. If the defence failed to adequately request that a witness be called, the application will usually be declared inadmissible due to non-exhaustion of the national remedies.

The right to examine witnesses is an aspect of the right to a fair trial, as the ECtHR has often emphasized in general considerations. Criminal proceeding must meet the standard of overall fairness; in other words, a court must take all interests and circumstances into consideration when deciding whether the right to examine witnesses has been respected. The ECtHR has regularly considered that a claim regarding the violation of the right to examine witnesses would be examined under Article 6 § 3(d) in conjunction with Article 6 § 1 ECHR. The extent to which other rights falling within the scope of Article 6 ECHR were able to be exercised can influence whether the right to examine witnesses is regarded as having been complied with. Nevertheless, almost every case involving the right to examine witnesses is examined by application of the above decision-making model. Overall fairness is also expressed in other ways in ECtHR case law. It has been used, for example, as an argument for including counterbalancing factors in the decision-making model. In answering the questions in the decision-making model the ECtHR sometimes also explicitly pays attention to certain interests or circumstances. Lastly, in a few cases in which the applicant claimed that more than one right protected by Article 6 ECHR had been violated and none of these rights was found to have been violated separately, the right to a fair trial was nevertheless found to have been violated because of a cumulation of unfairness.

Chapter 1 discusses several rights closely related to the right to examine witnesses and indicates how the exercising of those rights can affect the assessment of whether the right to examine witnesses has been complied with. These rights are the right to equality of arms, the right to adversarial proceedings, the right to produce evidence, the right to defend oneself and prepare one’s defence, the right to reasoned judgments and the right to be tried within a reasonable period of time.
CHAPTER 3: ACTIVITY BY THE DEFENCE IN NATIONAL PROCEEDINGS

The ECtHR will find a violation only if the applicant has made use of all the effective remedies available in national law to have the judge call a witness or exclude previously given witness statements as evidence. If the applicant has failed to use these opportunities, the application will generally be inadmissible because the national remedies have not been exhausted. The Supreme Court adopts a similar approach, albeit using a different assessment framework. If the defence has made insufficient efforts to obtain an opportunity to question a witness, the statement previously made by the witness, for example to the police, will be allowed to be used in evidence.

As a rule, the defence has to request that the witness be called. This request must be made to the appropriate domestic court in a clear and sufficiently reasoned manner and must meet the conditions set in national law. In exceptional cases the ECtHR will assess the merits of the case even though the defence did not submit a request to have the witness called that fulfils these conditions. In those cases the witness was usually called by the national authorities of their own motion or a request to have the witness called would have been futile. In some such situations Dutch courts have ruled that the defence demonstrated insufficient initiative and that, for that reason, the previously given witness statement was admissible in evidence.

In certain situations it can be assumed that the accused has waived his right to examine a witness. The accused may do this explicitly by indicating that he does not wish to exercise this right. An implicit waiver, too, can be enough to prevent a court from finding that the right to examine witnesses has been violated. This could apply if, for example, the witness does not dare to make a statement because the accused has threatened him. Consent given by the accused for a statement to be read out during trial can also be accepted as an implicit waiver, although a waiver is highly unlikely to be assumed in such circumstances in Dutch criminal law.

Sometimes an opportunity to question a witness is offered, but the defence does not avail itself of this opportunity. My research found that the ECtHR gave various reasons for declaring such applications to be inadmissible. The Supreme Court found the previous witness statement to be admissible on the ground that the defence had been given an opportunity to question the witness.

In some cases a judge will have to call a witness of his own motion. Dutch criminal law imposes this obligation only on first-instance judges and then only if the accused’s involvement appears solely from the statement that a witness made to the police, while the same witness later gave an exculpatory statement to an investigating judge or refused to make a statement. Although the ECtHR has not yet ruled on whether witnesses must then be called of the judge’s own motion, ECtHR case law makes it clear that judges
in such situations must explain why they consider the original witness statement to be reliable. No similar obligation is recognized in Dutch criminal law. Even the appeal judge, who is not obliged to call witnesses of his own motion, is not required under Dutch law to give a reasoned decision on the reliability of the witness statement.

It can be concluded from ECtHR case law that there are two different situations in which witnesses can be required to be called of the judge’s own motion: firstly if the accused has been acquitted by the first-instance judge and is subsequently convicted in an appeal based on the same evidence, including a decisive witness statement, and secondly if the witness has been questioned during trial and the composition of the court subsequently changes. In neither of these situations does Dutch law require judges to order that a witness be called.

CHAPTER 4: ADEQUATE AND PROPER OPPORTUNITY TO QUESTION A WITNESS

The accused is entitled to examine witnesses or to have them examined on his behalf. This requirement is considered to be met even if only the accused’s counsel questions the witness. The decisive factor is whether the defence – the accused and his counsel together – were able to subject the witness to questioning. The criterion applied by the ECtHR for determining the quality of the opportunity to question a witness is that this opportunity must be adequate and proper. This implies that it must be an opportunity that allows the defence to put its own questions to the witness.

The ECtHR’s view is that, as a rule, questioning should take place during trial. However, pre-trial questioning has sometimes also been regarded as an adequate and proper opportunity. ECtHR case law does not specify which facts and circumstances are relevant in determining whether questioning during trial is required or whether pre-trial questioning can suffice. In my opinion, the opportunity to question a witness during trial is not inherently preferable to the opportunity to question a witness outside the courtroom. Moreover, as I also explain, the ECtHR’s two-track policy – sometimes pre-trial questioning is sufficient, but sometimes questioning during trial is required – has the undesirable consequence of requiring the decision-making model to be applied in different ways, even though the facts of cases may be virtually identical. This creates an unnecessarily complex system, which is hard for national judges to understand and which, moreover, does not ultimately lead to significantly different decisions by the ECtHR. The ECtHR has also regarded questioning by video link during trial as an adequate and proper opportunity to question a witness. The Supreme Court regards the opportunity of pre-trial questioning by the defence as an opportunity to question a witness that sufficiently respects the right to examine the witness.
The ECtHR takes the view that, as a rule, the presence of the defence during the questioning of a witness implies an adequate and proper opportunity to question the witness, with the specific circumstances of the case determining the ECtHR’s ultimate decision on the matter. There must have been a real opportunity to ask the witness questions and the witness must have answered those questions. If the witness made his contested statement only after questioning in the presence of the defence, this will not be regarded as an adequate and proper opportunity to question the witness. An opportunity for the accused to question the witness without legal assistance will not always be accepted as an adequate and proper opportunity. The fact that the witness testified in favour of the accused during questioning does not prevent a judge from using a previous incriminating statement by the witness in evidence. Until 2013, the Supreme Court took the view that questioning during which the witness refused to answer the defence’s questions was sufficient to constitute respect of the right to examine witnesses. Since then, however, everything stated in this paragraph regarding the ECtHR has also been applicable to the Supreme Court’s case law, although the Supreme Court has admittedly not expressed views on every situation mentioned.

CHAPTER 5: GOOD REASON FOR LIMITING THE EXERCISING OF THE RIGHT TO EXAMINE WITNESSES

The ECtHR requires any failure to offer an adequate and proper opportunity to question a witness to be justified by a good reason. It accepts certain reasons as justification in general for the absence of an adequate and proper opportunity. Whether a reason is ultimately accepted depends on the facts and circumstances of the specific case and on the judge’s reasons for regarding the failure to offer an adequate and proper opportunity as justified. National authorities are generally required to make reasonable efforts to create an opportunity for the defence to question a witness, particularly if the witness statement is significant, the accused risks a long-term prison sentence or there is reason to presume an increased likelihood of a witness statement being unreliable.

The ECtHR has accepted many reasons for the absence of an opportunity for the defence to question a witness, including the death of the witness and situations in which the health or wellbeing of the witness did not allow examination, the witness could not be traced or a traceable witness could not be made available for questioning. If the ECtHR accepted the reason, the national authorities were considered to have done everything reasonably possible. The ECtHR’s assessment takes account not only of the efforts undertaken by the national authorities, but also of the reasons given by the national courts for rejecting a request to have a witness called.
Sometimes a witness could be questioned, but only subject to certain restrictions; more specifically, the fact that the defence was not able to put its questions to the witness directly, the witness could only be questioned via a video link, a judge prohibited the witness from answering a question, answers were withheld from the defence or the witness refused to answer questions. The ECtHR seems also to require good reason for any such restrictions. In my view, this good reason should be required only if the restrictions mean that no adequate and proper opportunity existed.

The Dutch Code of Criminal Procedure provides several reasons to justify rejecting requests for witnesses to be called. If properly applied, these reasons can be considered good reasons for the absence of an adequate and proper opportunity to question a witness. The exact grounds for rejecting a request to have a witness called depend, in part, on the moment in the proceedings at which the request is made. In appeal in cassation, the accused can claim that the grounds for rejection were wrongly applied. Although these grounds are formulated differently from the good reasons accepted in ECtHR case law, no significant differences exist between the Dutch grounds for rejecting requests to have witnesses called and situations in which the ECtHR has accepted there to be good reason for doing so. Many of the cases in which the ECtHR has accepted there to be good reason fall into the Dutch category of situations in which the witness cannot be expected to appear in court within a reasonable time.

In some situations the ECtHR seems to require national authorities to take the initiative to invite the defence to attend a pre-trial examination of a witness or to offer an opportunity to respond to questions that will be put to a foreign-resident witness. National courts will sometimes, of their own motion, have to examine alternative ways in which a witness could be questioned. If the police or court did not take the initiative in such situations, the Supreme Court usually takes the view that there is sufficient reason to reject a request to question a witness. The ECtHR could potentially find a claim directed at the failure of the national authorities to take action in such situations to be well founded, especially if the relevant witness is important and the accused risks long-term imprisonment. In general, however, application of the grounds to reject a request for a witness to be called will not violate the right to examine witnesses. The imposition of restrictions during the examination of a witness will in general also pass the ECtHR test since the Code of Criminal Procedure contains specific reasons allowing restrictions and these reasons are also accepted by the ECtHR.

**CHAPTER 6: IMPORTANCE OF THE WITNESS STATEMENT**

If a witness could not be questioned adequately and properly by the defence, a previous statement by the witness cannot generally be used in evidence
if the conviction would rely to a decisive degree on that statement. Although
the ECtHR has not provided a clear definition for assessing whether a witness
statement is of decisive importance, its importance will be considered to be
decisive if, without the witness statement, the chance of a conviction would
decrease significantly.

ECtHR case law shows two factors to be important when assessing the
decisiveness of witness statements. Firstly, the witness statement must have
influenced both the legal characterization of the proven facts and the penalty
imposed on the accused. In the absence of this influence, the statement will
not be considered decisive. Secondly, the statement must be a crucial element
in the reaching of a guilty verdict. Usually the ECtHR assesses this by examin-
ing corroborating evidence. If an accused has contested a specific aspect of
a witness statement, the supporting evidence will have to cover that aspect.
The fact, however, that corroborating evidence is used to substantiate a
conviction does not in itself mean that the witness statement is no longer
decisive. This is because the quality of the corroborating evidence is im-
portant and some types of evidence may not be accepted as corroborating
evidence, or only in conjunction with other supporting evidence. These types
of evidence include, for example, a second witness statement originating
from the same source, a statement made by a co-accused or a statement made
by a witness who could not be examined by the defence either. Whether
the ECtHR finds the witness statement to be of decisive importance depends
very much on the facts and circumstances of the case. The decision as to
whether a statement was decisive is not always easy to understand because
the ECtHR uses a wide variety of terms in this respect and the extent of
decisiveness intended to be indicated by each term is not entirely clear.

The question of whether the witness statement is of decisive importance
is not expressly included in the decision-making model used by the Supreme
Court. However the Supreme Court does in effect examine this aspect by
assessing whether the accused’s involvement is corroborated by other evid-
ence, especially with regard to the contested aspects of the witness statement.
As the ECtHR usually assesses decisiveness by examining corroborating
evidence, no significant difference can be found in this respect. Like the
ECtHR, the Supreme Court takes account of the quality of the corroborating
evidence. Most evidence that is considered insufficient as corroborating
evidence in ECtHR case law is also not accepted as supporting evidence by
the Supreme Court. Statements by co-accused and by other witnesses whom
the defence could not question may, however, be accepted by the Supreme
Court as corroborating evidence.
CHAPTER 7: COUNTERBALANCING PROCEDURE

If a statement by a witness who could not be adequately questioned by the
defence is of decisive importance, only a counterbalancing procedure can
prevent the finding that the right to examine witnesses has been violated.
Although such a procedure may also be required if the witness statement
is not decisive, this is not apparent from ECtHR case law. The availability
of a sufficient counterbalance means that the reliability of a witness statement
was able to be assessed other than by questioning the witness.

In examining whether sufficient counterbalance has been provided,
the ECtHR primarily assesses which factors in a case have a counterbalancing
effect. These can be very diverse and include inadequate questioning of the
decisive witness, questioning of other witnesses, playing the video recording
of a police interview of the witness in court, expert assessment of the reliabil-
ity of the witness statement and an assessment by the judge who ruled on
the case of the reliability of this statement. In some cases, the ECtHR has also
taken note of indications that the witness statement would be unreliable.
Also on occasions it took into consideration the national authorities’ failure
to undertake sufficient efforts to provide an opportunity for questioning of
a witness during the pre-trial investigation. The defence could have been
invited, for example, to attend a police interview of the witness, but no use
was made of that opportunity. Failure to take other measures that would
have had a counterbalancing effect has also been held against national
authorities. Examples of such failures include failure to record a witness
interview on video and failure to use a video link to question a witness.
Lastly, the attitude of the defence has in some cases been taken into con-
sideration in order to determine whether sufficient counterbalancing was
offered, such as when the defence waited until a late stage of the proceedings
before requesting that the witness should be called. The question of whether
the ECtHR believes that the defence itself should propose counterbalancing
measures remains unclear.

Some general principles are applied in determining whether obstacles
facing the defence have been sufficiently counterbalanced. The more decisive
a witness statement is, for example, and probably the higher the possible
sentence that could be imposed on the accused, the more counterbalancing
will be required. Although this to some extent defines the scope of the
decision as to whether sufficient counterbalancing has been provided, the
facts and circumstances of a case are ultimately decisive, and it is hard to
predict whether the ECtHR will find counterbalancing measures to be suffi-
cient.

According to Supreme Court case law, a decisive statement made by
a witness who could not be questioned by the defence can be used in evid-
ence, provided that sufficient counterbalancing measures have been taken.
So far, there have only been a few cases in which the Supreme Court assessed whether counterbalancing measures taken were sufficient. The measures recognized by the Supreme Court as constituting sufficient counterbalance are also recognized as sufficient in ECtHR case law.

CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

Dutch rules on the right to examine witnesses generally accord with ECtHR case law. Correct application of the rules provided in the Code of Criminal Procedure and the rules set by the Supreme Court will generally lead to judgments that are Strasbourg-proof. In specific situations, however, the ECtHR may find a violation in a Dutch case because of differences relating to the application of the rules. According to case law of the Supreme Court, for example, a Dutch judge is not required to consider alternative ways of questioning a witness if the defence has not proposed them, while the ECtHR requires the court, of its own motion, to consider alternative ways to conduct an examination. Dutch judgments may also differ from the ECtHR’s view on whether a witness statement is of decisive importance and whether sufficient counterbalance has been offered. The Supreme Court may, for example, accept a statement by a co-accused as sufficient corroborating evidence for the statement of a witness who could not be questioned by the defence, while the ECtHR does not allow such a statement by a co-accused to be the sole corroborating evidence.

This book concludes with a number of recommendations, the most important of which are summarized here. In my view, ECtHR case law should become more consistent and clearer. The ECtHR uses several different frameworks to assess situations in which the defence failed to use an opportunity to question a witness, without any substantive justification for these differences. The issue of why the ECtHR requires an opportunity to question a witness at trial in some cases, whereas in other cases it accepts pre-trial questioning also remains unclear.

With regard to Dutch law I recommend reformulating the rules on the use of untested witness statements in evidence in a clearer and more general way. In my opinion these rules should be embedded in the Code of Criminal Procedure. The Supreme Court could meanwhile issue a new judgment that provides a clearer outline of the rules currently applying. I have made some suggestions for amending the rules regarding the rejection of requests to have witnesses called. Finally, the defence should in some situations be invited, in my opinion, to attend the pre-trial hearing of a witness, while the accused should be allocated a counsel for this purpose if he does not have already one. In these situations I also recommend ensuring that hearings are recorded audio-visually.