REPORT ON ANONYMOUS WITNESSES IN THE NETHERLANDS

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1 Introduction

1.1 The nature of criminal proceedings in the Netherlands

To a large extent, Dutch criminal proceedings take the form of an official inquiry rather than a contest between two parties who are responsible for bringing out the evidence. These proceedings can be characterized as investigations into the material facts by state officials. The inquisitorial nature of such proceedings is expressed in particular by the position of the state officials involved in criminal justice. These officials are responsible for discovering the truth and must therefore remain objective and make an effort to find out whether the accused is guilty of a criminal offence. The trial judge has a central and active role in the process of finding the facts. It should be added that the trial judge not only conducts the investigation at the trial, but also decides on the guilt or innocence of the accused. The Dutch criminal justice system, contrary to a few other *civil law* countries and the *common law* countries, has no trial by jury.

The rules on the examination of witnesses at the trial are the most tangible expression of the inquisitorial nature of the Dutch criminal proceedings. The legislature has chosen a system in which the examination of witnesses is conducted by the judge. The parties' right to ask questions is of a supplementary nature. The public prosecutor is charged with summoning the witnesses, including those the defence wishes to examine. In addition, the judge has the power to summon witnesses *ex officio* for additional evidence.[1] Thus, in order to prevent important evidence from being withheld from the judge, he has been given a high degree of control over the furnishing of evidence.

1. The Witness Protection Act infringes this principle. If the witness is granted the status of an threatened witness, the trial judge is no longer able to summon or call him to give evidence in court. See Sec. 264 CCP [WvSv].

The idea that a personal confrontation between the accused and the witness is an essential requirement to a fair trial traditionally plays a secondary role in the Dutch criminal justice system. In 1926, the Supreme Court [*Hoge Raad*] decided that hearsay evidence was admissible.[2] This means that out-of-court statements can be used in evidence regardless of whether the witness is available to be called. As a result the significance of the investigation at the trial has been greatly reduced. Guilt or innocence can be decided on the basis of out-of-court statements and written documents resulting from preliminary investigations. Direct contact between the court and the sources of information is no longer necessary. Written statements can be used in evidence even if they emanate from a person who could have been called. As long as the judges of fact observe caution in evaluating these statements, the use of hearsay evidence is permitted. In most cases a Dutch trial is therefore more of a verification of the results obtained in the pretrial stage than an active inquiry by the judge who examines all witnesses himself. Instead of relying on live testimony given at trial, Dutch courts base their judgments in a large majority of cases mainly on the *dossier*, which contains the results of the pre-trial investigation.

The Dutch Code of Criminal Procedure grants a defendant the right to request the examining of witnesses at the trial.[3] Normally the court will allow a request to hear witnesses: however, the court has the power to refuse to call a witness if it finds that the non-appearance of this witness cannot reasonably be considered prejudicial to the rights of the defence.[4] If there is no apparent reason to call a witness, the court will refuse the defendant's or prosecutor's request. According to the Supreme Court, lower courts have the discretion to refuse to call a witness if the witness has been heard by an examining magistrate or the police and his appearance is not necessary to establish the facts. The witness's statement can be used at the trial even if the defendant was not present when the statement was taken.

From the witness's point of view the Dutch practice has many advantages. In most cases a witness does not have to appear in court, which means he does not have to travel or spend many hours in a waiting room, while victims of violent crimes such as rape or robbery are spared the trauma of being compelled to testify in the presence of the accused. It can be argued, however, that the court's refusal to call a witness at the defendant's request is a serious infringement of the principle of open justice, since the witness is not heard in open court and the defendant is not given the opportunity to openly probe the veracity of the witness's statement.

2. HR 20 December 1926, NJ 1927, p. 85.
3. Section 263 CCP.
4. Section 280 (4) CCP.

At the end of the eighties the case law of the European Court of Justice effected a slight turnabout in the Dutch administration of justice. Now more than ever, the trial judge seems to be convinced of the need to examine important witnesses at the trial. However, the influence of the Strasbourg Court on the Supreme Court's case law has not been so strong as to cause a break with existing trial traditions.

Before we proceed to discuss the problem of the endangered witness, we would briefly like to focus upon the examining magistrate, since he plays an important role in the examination of (anonymous) witnesses. The examining magistrate is generally considered to be in charge of the preliminary judicial inquiry. Among other things, it is his task to institute an independent inquiry into the facts as an extension of the initial criminal investigation. An important part of his task is the examination of witnesses.[5] The examining magistrate is a judicial authority.[6] As such, his role is characterized by independence with respect to the executive and the parties to the proceedings.[7] The European Court of Human Rights also deems him to be a judicial authority.[8]

1.2 Nature and scope of witness intimidation

In the Netherlands the intimidation of witnesses was first identified as a serious problem in the early eighties. Police circles referred to it as an increasing problem.[9] But no one knows how often it occurs that witnesses state that they do not wish to testify for fear of reprisals, how realistic their fear is, and in how many cases people have actually been harmed in connection with their role as a witness. There is no empirical evidence on the nature and scope of witness intimidation. The nature of the phenomenon means that its scope is also difficult to determine. On the one hand, witnesses

5. Moreover, the trial judge can have the examining magistrate conduct a supplementary investigation outside the trial, a power which he gladly makes use of in practice.
6. Officially, an examining magistrate is appointed for two years.
7. There are some doubts as to whether the examining magistrate is really as independent and objective as the legislature would like us to believe. During the preliminary inquiry he often deals with the public prosecutor in particular. See for example U. van de Pol, Schending van vormvoorschriften tijdens het gerechtelijk vooronderzoek, in: T.M. Schalken en E.J. Hofstee (ed.), In zijn verdediging geschaad. Over vormverzuimen en het belang van de verdachte, Gouda Quint, Arnhem 1989, p. 64 and A.J.M. Machielse, Een requiem voor het gerechtelijk vooronderzoek, Gouda Quint, Arnhem 1989, p. 13.
8. See ECHR 20 November 1989, Series A, vol. 166 (Kostovski).
9. See W.K.F. Hangelbroek, Bedreigde getuigen, Nederlands Juristenblad 1984, p. 550.

who have successfully been intimidated will not inform the police, but will either keep silent, withdraw, or alter their incriminating statements. On the other hand, there are witnesses who feel threatened while it is difficult to determine whether their fear is justified. The starting point of all reports on the subject of witness intimidation is that this is a serious problem against which measures need to be taken.[10] The credibility of the criminal justice system would be at stake if witnesses were no longer willing to cooperate in criminal investigations for fear of reprisals. The question is how intimidated witnesses should be protected.

In 1981 the Dutch Supreme Court accepted anonymity as a means of protection.[11] Shortly thereafter, in 1984, the Remmelink Commission also concluded that hearing witnesses with full anonymity was an unavoidable solution to the problem of the intimidated witness. When it became clear that in legal practice anonymous statements were accepted as means of evidence without much restriction, an intense debate ensued over the acceptability of anonymity, particularly in the second half of the eighties. The European Court of Human Rights ultimately compelled the legislature to reconsider its position. In its judgment in the Kostovski case, the Court decided that there had been a violation of the defendant's right to a fair trial by basing the convicton of Kostovski to a decisive extent on anonymous statements.[12] This judgment ultimately led to the introduction of the Witness Protection Act (*Wet getuigenbescherming*).[13] This Act places restrictions on the use of anonymous testimony and contains more procedural safeguards for the defendant than was formerly the case. In Sections 3 and 4 we will describe the cases and the manner in which anonymous witnesses are examined in the Netherlands.

Anonymity is not the only way to protect intimidated witnesses. Particularly if the witness feels threatened by friends or family of the accused, he may well feel more free to give testimony if the hearing does not take place in public. Dutch case law allows the trial court to conduct a hearing in chambers in the interest of the witness's safety.[14] In addition, the Code of

10. See Bedreigde getuige [Threatened witness] report of the working group 'de bedreigde getuige', Trema exclusief 7. The Hague 1983; Bedreigde getuigen, report of the Commissie Bedreigde getuigen (Remmelink Commission), Staatsuitgeverij, The Hague, 1986.
11. HR 4 May 1981, NJ 1982, 268.
12. ECHR 20 November 1989, Series A, vol. 166.
13. Act of 1 February 1994 (Staatsblad 1993, 603).
14. Nor is this measure in conflict with Article 6 paragraph 1 ECHR. See ECHR 10 July 1985, Decisions and Reports, 42, p. 287 (Kurup v. Denmark).

Criminal Procedure gives the judge the power to order the accused to leave the courtroom while the witness is being heard.[15] If counsel for the accused is given the opportunity to examine the witness, this practice does not contravene Article 6 of the European Convention on Human Rights.[16]

2 The position of the intimidated witness

2.1 Rights and duties of the intimidated witness

In establishing the facts, witnesses have long been viewed as an important instrument. It is therefore not surprising that the Dutch Code of Criminal Procedure emphasises the duties of witnesses. Officially, witnesses must appear before the trial court. If they fail to appear without valid reason, or if they refuse to answer questions without being able to rely on the right to remain silent, they commit a punishable act.[17] A witness who appears at trial is obliged to swear or solemnly promise that he 'will tell the whole truth and nothing but the truth'. If he lies, he commits perjury.[18] Coercive measures may be used against witnesses who refuse to cooperate in the judicial inquiry. Both the examining magistrate and the trial judge are authorized to issue an order to bring the witness before the court if he has not appeared after being summoned.[19] Witnesses who refuse to answer questions without any legal grounds to rely on can be committed,[20] which happens rarely (if ever) in practice.

Generally speaking, the rights of witnesses are hardly defined at all. The Witness Protection Act makes an exeption for the (seriously) intimidated witness. Under the Act, witnesses themselves may request to be examined anonymously.[21] If the examining magistrate allows this request, the obligation to publicly testify no longer applies. If a witness has not been granted the status of a threatened witness, he is to be treated as an 'ordinary' witness. This may be different if the public prosecutor has granted him anonymity. According to the principle of legitimate expectations, the public

15. See Article 292 CCP.
16. See ECHR 10 July 1985, Decisions and Reports, 42, p. 287 (Kurup v. Denmark).
17. See Section 192 CC. The punishment is up to six months' imprisonment.
18. See Section 207 CC. The punishment is up to six years' imprisonment.
19. See Sections 213 and 282 CCP.
20. See Sections 221 and 289 CCP.
21. See also Section 4.1.

prosecutor may refuse to summon the witness.[22] If the prosecutor refuses to summon, he deprives the accused (unjustly) of the opportunity to make full use of his right to ask questions. By refusing to do so as ordered by the court the public prosecutor loses his right to prosecute the defendant;[23] the case is then closed without judgment being pronounced upon the defendant.

If the witness is not recognized as an threatened witness, in principle he is treated as an ordinary witness. This means that, if called, he must appear at trial. If he refuses to appear, he is guilty of an offence. Moreover, the judge can order him to be brought before the court.

Whether a witness may refuse to testify even if he has been granted anonymity was not discussed when the Witness Protection Bill was being laid before Parliament, nor has it been dealt with in the cases that have been decided since. However, it seems reasonable to assume that examining magistrates will not grant anonymity to a witness if they feel that this measure insufficiently protects the witness.[24] Theoretically, coercive measures can be used against a witness who refuses to cooperate in the investigation despite having been granted anonymity. In our opinion, it is doubtful whether this will ever happen in practice. The Dutch courts are very reluctant to apply coercive measures to witnesses who feel seriously endangered.

Another issue that has arisen is what measures the authorities can take if the identity of the anonymous witness becomes known to the defendent or to other persons who have threatened the witness in the past. Up to now the rule has been that the police and judicial authorities will have to take ad hoc measures if such a situation arises. They could, for example, help the witness to go temporarily into hiding. In the meantime, the government has agreed to the introduction of a witness protection programme in order to protect seriously endangered witnesses.[25] This programme could also function as a kind of ‘safety net’ in case the identity of a witness who has been granted anonymity is unexpectedly revealed.

22. The Act, however, does not oblige the Public Prosecutor to keep his promise.
23. See Section 349 (3) CCP. This does not rule out a new prosecution if the Public Prosecutions Department succeeds in gathering other evidence or if the witness is prepared to waive his right to anonymity.
24. See A.M. van Hoorn, De Wet getuigenbescherming – een uitzonderlijke regeling, Leyden 1996, p. 90-91.
25. See the report of the Craemer working group, Getuigenbescherming in Nederland, 1995.

2.2 Do intimidated witnesses have a right to protection?

In the Explanatory Memorandum to the Witness Protection Act, the Dutch legislature took the position that witnesses obliged by the authorities to testify are entitled to protection. This position is based on Articles 2 and 8 of the European Convention. These articles guarantee everyone the right to life and the right to respect for privacy.

Arguments for a duty to provide protection can indeed be derived from the Convention. According to the European Commission, Article 2 ECHR contains a general obligation on the part of the authorities to take appropriate measures in order to protect citizens' lives, although this does not mean that the state is obliged to rule out all possible violence.[26] It is also apparent from the case of Doorson v. the Netherlands that witnesses may rely on rights under the Convention.[27] According to the European Court, this implies 'that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled'. The Dutch legislature has endorsed this standpoint. It also finds that in principle the government has the discretion to choose the protective measures, provided that they are effective.[28] In the Witness Protection Act, the choice was made to enact a criminal provision that prohibits the intimidation of witnesses and ensures (complete) anonymity.

3 The statutory rules

3.1 Court decisions before the effective date of the Witness Protection Act

The Witness Protection Act took effect on 1 February 1994 (Act of 11 November 1993, Stb. 603). This Act codified and supplemented parts of already established case law on anonymous witnesses in criminal proceedings. The Witness Protection Act was incorperated in already existing Acts,

26. See for example W. v. United Kingdom, ECRM 28 February 1983, Decisions and Reports 32, p. 190.
27. ECHR 26 March 1996 (Doorson v. the Netherlands).
28. We should like to add here that the manner of protection chosen may not be in violation of the rights of the accused to defend himself which are guaranteed under Article 6 of the European Convention.

the most important of which is the Code of Criminal Procedure (*Wetboek van Strafvordering*).[29]

Prior to the Witness Protection Act, the Supreme Court formulated the conditions under which anonymous witness statements could be used in evidence in criminal cases. In its opinion the use of such statements was still possible even after judgment was given against the Netherlands by the European Court of Human Rights in the Kostovski case.[30] However, more requirements than before had to be set for such use. The Supreme Court was in search of a judicial solution that would adequately counterbalance the handicaps confronting the defence in the examination of anonymous witnesses. This meant that the witness's statement had to be taken down by a judge who was aware of the identity of the witness and has expressed, in the official record of the hearing of the anonymous witness, his reasoned opinion as to the reliability of the witness and as to the reasons for the witness's wish to remain anonymous. Furthermore, the judge had to give the defence some opportunity to put questions (or have questions put) to the witness.[31] At the same time, the Supreme Court allowed an exception to these basic rules. The aforementioned conditions did not have to be met if the defence did not contest the reliability of the anonymous witness or if it did not want to question the anonymous witness. Nor did the rules formulated above have to be observed if the conviction was based to a significant extent on other evidence not derived from anonymous sources, and the trial court made it clear that it has made use of the anonymous statement with caution and circumspection.[32]

3.2 The Witness Protection Act in brief

Many of the conditions outlined by the Supreme Court for the use of anonymous witness statements in criminal proceedings can be found in the Witness Protection Act that entered into force in 1994.

29. The introduction of the Witness Protection Act also resulted in amendments and supplements to the Criminal Code [Wetboek van Strafrecht] (Sec. 285a CC: penalizing the intimidation of witnesses), the Extradition Act and the Act on the transfer of the enforcement of criminal judgments.
30. ECHR 20 November 1989, Series A, vol. 166, NJ 1990, 245.
31. HR 2 July 1990, NJ 1990, 692.
32. HR 2 July 1990, NJ 1990, 692 and HR 2 October 1991, 130. See for example also HR 2 October 1990, NJ 1991, 130, HR 16 oktober 1990, NJ 1991, 442 and HR 26 March 1991, NJ 1991, 614 and HR 25 June 1991, NJ 1991, 807.

The legislature roughly distinguishes three different categories of anonymous witnesses. The first category comprises witnesses with respect to whom there is a well-founded assumption that they will incur problems in connection with their testimony[33] or that they will be hindered in the – further – exercise of their profession. These are mainly, but not exclusively,[34] police officers who have met the accused while working undercover. In the legislature's view, it should also be possible to hear members of a surveillance team or team of arresting officers in this manner. These witnesses are granted *limited anonymity* and are heard either by the examining magistrate or by the trial court.[35] This means that the judge does not disclose the witness's identity and, where necessary, takes measures to prevent his identity from being disclosed, such as making the witness unrecognizable by means of make-up or a disguise, or making eye contact impossible between the accused and the witness.[36] These measures do not prevent direct questioning of the witness or an appearance at the trial.[37]

The second category of anonymous witnesses are those who fear for their lives, health or safety, or the disruption of their family life or socio-economic existence. If the witness has indicated that he does not want to testify because of this danger, the examining magistrate may grant him *complete anonymity*. This means the examining magistrate takes the witness's statement in such a way that the identity of the witness is concealed (Section 226c CCP). This may mean that the defendant, his counsel or both are denied access to the hearing. For reasons of fairness the legislature has stipulated that the Public Prosecutor may not be present either when the defence is denied access. The examining magistrate gives the absent defendant, counsel and public prosecutor the opportunity to present the questions they wish to ask by telecommunication or – alternatively – in writing (Section 226d CCP). A characteristic feature of the examination under complete anonymity is that it

33. According to the Minister of Justice, this would apply, for example, to a witness whose windows have been broken; Explanatory Memorandum, op. cit., p. 37.

34. A well-known case in which a citizen was heard anonymously as a witness for reasons related to the exercise of a profession was the psychotherapist of the suspect in the Leyden ballpen case. The (former) suspect had confessed to his therapist, after which she took this information to the police. At the subsequent trial she was heard as an anonymous witness.

35. See Sections 190 (2) and 284 (1) CCP.

36. Explanatory Memorandum, op. cit., p. 17.

37. Explanatory Memorandum, op. cit., p. 37.

is conducted by the examining magistrate (in the privacy of his office).[38] The witness does not have to appear during the investigation at the trial: his statement taken by the examining magistrate can be used in evidence. In evaluating the witness statement, the judge deciding the case will accept the examining magistrate's assessment of the reliability of the witness (Section 226e CCP). The trial judge cannot form an independent judgment, as he has not examined the witness himself or even seen him.

Finally, the Act distinguishes a third category of anonymous 'witnesses': those persons appearing in police reports without listing their identity (cf. Section 344 (3) CCP). These might be persons who are not specifically examined as witnesses but have provided the police with some kind of information, such as anonymous informants or people who happened to pass by. Their personal data are not known to the police, and therefore they cannot be traced. Their statements may only be used on condition that the defence does not wish to examine the person as a witness and provided there is other corroborative evidence. If it is desirable and actually possible to call the anonymous person as a witness, there are three possibilities. The person concerned may be examined (1)'in his own name' or – if the statutory requirements are met – with (2) limited or (3) full anonymity. In other words, if the defence so desires, the person who appears anonymously in a police report may be transformed into an ordinary witness, a witness with limited anonymity or a completely anonymous witness within the meaning of the Act.

Having briefly outlined the rules which have applied since the Witness Protection Act came into force, we will now focus our attention (almost) exclusively upon the second category of witnesses: the completely anonymous witness.[39]

38. Or elsewhere, for example in a hotel room, where the examination takes place in some cases for the sake of the witness's safety and to keep his identity hidden.

39. The phenomenon of the witness with limited anonymity will only be discussed as a side issue. The reason for this is that, in the opinion of the Dutch judicial authorities, the examination with limited anonymity is hardly if any solution to the problem of the intimidated witness and has little relevance in practice.

3.3 The nature of the cases in which witnesses can be examined anonymously

The legislature has set three cumulative requirements for the use of statements from *completely anonymous* witnesses in evidence. Firstly, the witness must be recognized by the examining magistrate as an 'threatened' witness (in other words: the examining magistrate must be convinced that the witness has indeed been intimidated and will not testify without the guarantee of anonymity) while the witness must be examined in conformity with the statutory rules.[40] Secondly, the case must involve a serious crime for which detention on remand is permitted (this means an offence punishable by at least four years' imprisonment)[41] while its nature or the organized manner in which it was committed, or the connection with other offences committed by the suspect constitutes a serious infringement of the legal order (Section 342 (2) CCP). According to the legislature, offences such as murder, manslaughter, hostage taking, extortion, robbery and (hard) drugs trafficking constitute serious infringements of the legal order. Thirdly, Section 344a CCP stipulates that the judge cannot decide that the defendent is guilty as charged solely on the basis of the statements of completely anonymous witnesses. In view of the judgment given against the Netherlands by the European Court of Human Rights in the Van Mechelen case, it is however questionable whether the criterion set by the Dutch legislature is strict enough. From Strasbourg case law it can be inferred that proof of the defendant's guilt may not be based solely or *to a decisive extent* on anonymous statements.[42]

The aforementioned conditions do not apply to the use of statements by witnesses with *limited anonymity* as evidence. Such statements may thus play a role in establishing the facts in all types of offences, while the minimum evidence rule of Section 344a CCP does not apply to witnesses who have been granted limited anonymity. From the point of view of the Dutch legislature, witnesses with limited anonymity are witnesses who can be examined in an 'ordinary' manner in the presence of the defence and the Public Prosecutor, albeit that their personal details are unknown to these parties.

40. See Section 4.
41. See Section 67 CCP. Criminal offences for which pre-trial detention is allowed include intentional arson with danger to property or life, forgery of documents, trafficking in persons, crimes of violence and certain sexual offences.
42. ECHR 23 April 1997, Van Mechelen et al. v. the Netherlands. The same criterion was used earlier in the case of Doorson v. the Netherlands, ECHR 26 March 1996. At that time the Netherlands was able to withstand the review of the European Court.

4 The procedure for the endangered witness

In this section the procedural rules for examining witnesses with complete anonymity are examined in more detail. In addition, it is indicated how the Act is applied in practice. For this purpose, use is made of the results of an evaluation study on the effectiveness of the Witness Protection Act,[43] carried out in 1995.

4.1 The initiative of the completely anonymous examination of a witness

The examination of witnesses may take place at the request of the Public Prosecutor (Sec. 210 and 260 CCP), the defence (Sec. 208 and 263 CCP), or *ex officio* by the examining magistrate (Sec. 210 and 315 CCP). A court order to conceal the identity of the witness during that examination may be elicited by the Public Prosecutor, the defence, or by the witness himself. The examining magistrate may also give such an order *ex officio* (Sec. 226a (1) CCP). The decision to conceal the identity of the witness is reserved to the examining magistrate.[44] The trial judge may order the examining magistrate to conduct an inquiry into the need for anonymity, but it is the examining magistrate (*not* the trial judge) who decides whether the examination of the witness will take place in such a manner.

In practice, an anonymous witness (usually a witness for the prosecution) is first heard by the police. The anonymous report of that examination is then added to the dossier, which is made available to the defence. As a rule, the defendant's counsel will request the judge to examine this witness (see Section 3.2 above). In other words, the first step towards examination of the witness is usually taken by the defence. In response to this request, the Public Prosecutor will request the examining magistrate to have the examination take place under the guarantee of complete anonymity. The initiative to conceal the witness's identity during the examination thus usually rests with the Public Prosecutor. In some cases, the Public Prosecutor takes the initiative for both the examination of the witness and keeping the witness's identity concealed. This path is taken if the Public Prosecutor, with a view to establishing the facts, wishes to have a sworn witness statement, taken before a judge, at his disposal.

43. The study was carried out by the University of Leyden by order of the Ministry of Justice. The results of the study are set out in the report by A.M. van Hoorn, De Wet getuigenbescherming – een uitzonderlijke regeling, Leyden, 1996.

44. However, the decision of the examining magistrate is subject to appeal, see Section 4.3.

4.2 The judge's decision to examine a witness with complete anonymity

4.2.1 Hearing the parties

As mentioned earlier, it is the examining magistrate who determines whether or not a witness will be granted complete anonymity. Before taking his decision pursuant to the statutory rules, the examining magistrate, the defendant, his counsel and the witness must be given the opportunity to be heard with respect to granting anonymity to the witness (Section 226a (2) CCP). Although theoretically correct, the application of this provision meets with several objections.

In practice, the police often play an important role as intermediary between the judicial authorities and the witness who – because of his fear of retaliation – wishes to remain anonymous. For the application of the aforementioned statutory provision, this means that in many cases the police, by order of the examining magistrate, must invite the witness for a hearing in which he is offered the opportunity to explain his reasons for his wish to remain anonymous. This discussion must be distinguished from the substantive examination of the witness, but for various reasons this is not always possible in practice. For security reasons, the substantive examination of the witness often takes place immediately following the 'preliminary discussion', so that the discussion and the examination overlap each other. But even if the initial discussion and the examination take place at different times, it is sometimes difficult for the witness to make a distinction between these hearings. During the preliminary discussion the examining magistrate will attempt to gain some insight into what the witness is able to declare. It is then difficult for the witness to understand why he must appear once again before the examining magistrate. Furthermore, not all witnesses make use of the opportunity to express their feelings on the granting of complete anonymity, as they assume that their position is sufficiently clear to the examining magistrate.

Since in most cases it is the public prosecutor who requests the witness to be heard with complete anonymity, his position is clear to the examining magistrate in advance. For this reason, some examining magistrates feel there is little need to hear the Public Prosecutor expressly as regards his position.

The rule that they have to be given the opportunity to express themselves on granting complete anonymity does not make much sense to defence lawyers, either, albeit for different reasons. The lawyers involved state that it is very difficult for them to give reasons for contesting the granting of anonymity, because they are in the dark as to the (personality of the) witness as well as the nature of the threat. If such information was known to the

defence, this would almost inevitably lead to revealing the identity of the witness in question. The defence can only make general objections. Because they are of a general nature, these objections are usually ignored by examining magistrates.

4.2.2 The decision of the examining magistrate

Whenever an order or a request is issued to grant a witness complete anonymity, the examining magistrate must decide whether the statutory conditions for this have been met: does the witness feel that he is so threatened that – in brief – his life, health or safety is at stake, and is this the witness's reason for not wanting to testify in open court? Several factors play a part in this decision. One important factor is the nature of the offence. In addition, the personality of the accused and his criminal record are important considerations. The examining magistrates themselves state that both the nature and background of the offence and the personality of the accused often form an indication of the dangers facing the witness. Other facts and circumstances may also play a role. Considering the judgment of the European Court of Human Rights in the Van Mechelen case, the decision of the examining magistrate to examine a witness with (complete) anonymity may not be based exclusively on the seriousness of the offences committed, but must also take other facts and circumstances into account. The Court particularly had in mind the question whether the accused would have been in a position to carry out any such threats or to incite others to do so on their behalf.[45] In interviews held with examining magistrates on this subject, the (im)possibility of the accused to take retaliatory measures (or have them taken) was not mentioned even once as a factor in determining the examining magistrate's decision.

Most of the time the examining magistrate decides to grant anonymity. Refusal is rare. The most important reason for this is that Public Prosecutors are very reluctant to request anonymous examination of witnesses. This only happens in exceptional cases, when the witness's statement is really necessary as evidence and the anonymity of the witness can also be guaranteed. The latter is often a serious problem. If the defendant and the witness know each other (which is often the case), the contents of the statement will enable the defendant to recognize the witness, making it rather pointless to anonymously examine the witness.

When the examining magistrate has reached his decision, he writes a report thereon. With a view to the possibility of appealing against this decision (see

45. ECHR 23 April 1997, paragraph 61.

Section 4.3 below), the decision must be justified by reasoned argument. In practice the examining magistrate encounters substantial problems in this regard: for the sake of protecting the witness, the examining magistrate cannot thoroughly substantiate his decision, for the inclusion of details with respect to the intimidation may well lead to disclosure of the witness's identity.

4.3 Appeal against the examining magistrate's decision

A decision on granting complete anonymity to the witness concerned, can be appealed. Section 226b CCP gives the Public Prosecutor, the defendant and the witness concerned the right to appeal against an unwelcome decision by the examining magistrate. A panel of three judges sitting in chambers, decides on the appeal.[46] The law is silent as to the manner in which they must review the contested decision of the examining magistrate. This lacuna results in different interpretations of this task among the courts.

Two variations emerged from the evaluation study regarding the way the appeal procedure is interpreted. The first variation is a thorough review, which means that the court in chambers not only hears the relevant examining magistrate, the Public Prosecutor and the defence, but also the witness himself. In this view, the court in chambers must form its own opinion on the nature and plausibility of the danger. The second variation is marginal review of the examining magistrate's decision. The court decides on the basis of the file, including the examining magistrate's report, whether or not the granting or refusal of complete anonymity was well-founded. The witness in question is not heard at all by the court in chambers. In practice, both variations are used almost equally often.

Both methods have their drawbacks. The witness runs an extra risk of losing his anonymity if he is not only heard by the police and the examining magistrate, but also by the court in chambers. This risk can be reduced by a sensible approach to the logistic aspect of the appeal procedure. This means, for example, that the time and place of the examination and the transport of the witness as well as the members of the court must be kept secret. The police can play an important role in this.

The disadvantage of marginal review is that the court in chambers renders its decision almost completely on the basis of the examining magistrate's report, in which he states his reasoned decision on granting anonymity to the

46. This panel does not include any of the trial judges.

witness. As mentioned earlier in Section 4.2, these reasons are often summarized for the sake of protecting the witness. As a result, there is a real possibility that the court may not consider the witness to be in danger, while in reality there are good grounds for granting the witness full anonymity. Since the court in chambers is also further removed from the case, it might make an incorrect assessment of the danger. However, these remarks must be viewed in perspective. The court in chambers will usually choose to be safe rather than sorry. In case of doubt, moreover, the court can obtain information, formally or informally, from the examining magistrate who took the decision or from others involved, such as the police who investigated the case. In the great majority cases, the court in chambers dismisses the appeal and thereby confirms the (usually positive) decision of the examining magistrate.

The advantage of marginal review is its efficiency. Appeals can be quickly handled and can therefore be placed sooner on the cause list of the court in chambers. On the other hand, a thorough review does more justice to the party who brought the appeal (usually the defence) than marginal review. This is more pressing when the examining magistrate has only briefly outlined the reasons for his decision. The appellant cannot derive many arguments from the examining magistrate's report to contest the decision to grant anonymity. In fact, only procedural arguments can be put forward. In such cases, lawyers appreciate the fact that the court in chambers itself examines the witness and independently forms an opinion as to whether or not full anonymity is justified.

One of the difficulties of the appeal procedure is the fact that during the session of the court in chambers care must be taken not to inadvertently reveal the identity of the witness. One slip could be fatal. This means that the case cannot be examined thoroughly. The Public Prosecutor, since he is usually the one who has requested the witness to be heard with complete anonymity, will often give as little information as possible to protect the identity of the witness. The same applies to the examining magistrate if he is heard by the court in chambers in the presence of the defence.

The court in chambers has the last word on the question whether the witness will be granted full anonymity. Its decision is not open to appeal and therefore cannot be set aside by the trial judge. If the court in chambers has decided on appeal that the witness has no legitimate reasons for being examined anonymously, the witness will have to testify under his own name. At the discretion of the trial judge, the witness will be examined either during the investigation at the trial or by the examining magistrate. Should the

Public Prosecutor refuse to call the witness in order to protect him, pursuant to Section 349 (3) CCP, the court must decide that the prosecutor loses the right to prosecute the defendant. Up to now, such a situation has not occurred.[47]

After the examining magistrate takes a positive decision on granting the witness complete anonymity and the appeal procedure has also ended, or the period in which appeal may be brought has elapsed, the examining magistrate will proceed with the substantive examination of the witness.

4.4 The examination with complete anonymity

4.4.1 How the examination is conducted

The examination of a completely anonymous witness is conducted by the examining magistrate. Prior to the examination the examining magistrate learns the witness's identity, for example from the latter's passport or relevant statements by the police officers involved. In practice, identification usually takes place earlier, namely prior to the 'preliminary hearing', as described above. The examining magistrate, as well as the police and sometimes also the Public Prosecutor, are thus aware of the witness's personal information.[48] However, he does not mention this information in the report of the examination.[49] Since the witness will not be examined at

47. In a small number of cases a bar on the prosecution was nevertheless pronounced, due to the fact that, for safety reasons, the Public Prosecutor pertinently refused to call a witness (who had acted as either an informant or an infiltrator). The procedure for granting complete anonymity was not initiated because – in the opinion of the Public Prosecutor – this procedure could not sufficiently guarantee the witness's safety. The court pronounced a bar on the prosecution because the court was unable to review independently whether the informant's opposing party had been entrapped by the informer, and whether the offences for which the defendants were being tried could also be viewed as a result of such entrapment. Because so many questions were left unanswered, the court could not conduct a thorough review. The principles of due process were therefore violated, and for that reason the prosecution was barred. See inter alia NJCM-bulletin, ed. 20 (1995), pp. 547-584.

48. Those who were present *ex officio* during the examination of the endangered witness or were involved in the discussion prior to it during the preliminary inquiry and were heard as witnesses themselves, have the statutory right not to testify (Sec. 219a CCP). They have the right to refuse to answer questions that might reveal the identity of the witness.

49. There is no national guideline indicating how the personal information of the threatened, anonymous witness must be recorded and kept, which sometimes leads to practical quandaries. During an interview with an examining magistrate, the latter stated that he writes down the personal information of the witness on paper and keeps it in a locked

the trial, prior to being heard by the examining magistrate he must take an oath. Pursuant to the statutory provisions, the examining magistrate must examine the witness in such a way that his identity remains concealed (Section 226c CCP). The examining magistrate may determine that the defendant or his counsel, or both of them, may not be present at the examination. If the defence is not allowed to be present, the Public Prosecutor may not attend the examination either. The examining magistrate informs the Public Prosecutor, the defendant or his counsel of the contents of the witness's statement and gives them the opportunity to list questions they wish to have answered. If possible, the Public Prosecutor and the defence ask their questions via an audio link or – if this would result in disclosing the witness's identity – in writing. The legislature has indicated that in principle the least far-reaching manner of protection must be chosen. In other words, the examining magistrate must choose the method of examination that least violates the rights of the defence.

In order to safeguard the anonymity of the witness, in practice he is usually separated optically and sometimes also acoustically, from the defence and the public prosecutor. In some cases very radical protective measures are taken, in which the police usually play an important role. Examination of the witness may take place at a secret location and at a time that is kept secret from the defence until the last minute. In exceptional cases even the examining magistrate is kept in the dark about the location. The witness, and sometimes also the examining magistrate, is brought to the location in question by the police, which may be a hotel or a police station. During the examination the examining magistrate, the witness and the court clerk, are separated from the defence and the Public Prosecutor. Communication takes place via an audio link, whereby a voice distortion device is generally used.

All sorts of problems are involved in the use of an audio link and voice distortion devices. A foreign accent, a dialect or the sex of the witness cannot be concealed by a voice distortion device. With direct audio links, the examining magistrate must anticipate the answer the witness might give, because some answers could result in the disclosure of the latter's identity. He must then prevent the answers from being made known by the defence and the Public Prosecutor. This sometimes causes the examining magistrate to break off the audio connection after the question has been asked in order to find out what the answer will be, before deciding whether to pass on the answer to the defence. If any police officers are present, they can advise him on this, because they are usually better acquainted with the 'ins' and 'outs'

safe at the courthouse in a sealed envelope. The only question is how to indicate which documents the envelope contains: "secret personal information of anonymous witness"?

of the case than the examining magistrate. In order to avoid these difficulties, some examining magistrates automatically choose to have the questions put by the defence, and therefore also the Public Prosecutor, in writing. A telephone and fax connection is sometimes used. The examining magistrate sends the witness's statement by fax, after which the defence can respond by telephone.

4.4.2 The right to ask questions

The examining magistrate is legally obliged to prevent questions that could lead to the disclosure of the witness's identity. (Section 226d (3) CCP). The restrictions on the possibility to ask questions are felt by the defence in particular. As has been argued, the examination of the witness often takes place at the request of the defence. The Public Prosecutor does not always need to ask the witness questions and therefore he is not always present at the examination (at a distance). For that reason alone, the Public Prosecutor's right to ask questions is not affected to the same extent as that of the defence by the way in which the completely anonymous witness is examined. In this section, the right to ask questions is approached from the perspective of the defence.

As described in the preceding section, the defence is not informed of all the answers to the questions they have asked. The number of 'unanswered' questions differs sharply from one case to another. Interviews have shown that in one case the defence listed 53 questions, of which 42 were not answered. These unanswered questions varied from asking the sex of the witness to asking whether there was enough light at the scene of the crime to be able to identify the perpetrator. This is not the only way in which the defence are restricted in the exercise of their rights. In connection with the existing tendency to provide the threatened witness with maximum protection, any confrontation with other witnesses is virtually ruled out.

Various lawyers have indicated that the restriction of the defence's right to ask questions results in insufficient information to determine the reliability of the witness and his statement. A consequence of this may be the conviction of an innocent person.

4.4.3 The report of the examination

Since the trial judge does not examine the completely anonymous witness himself, the examining magistrate's report of the examination is his most important source of information.[50] A problem in reporting is to preserve the

50. However, the possibility exists of hearing the examining magistrate as a witness at the trial in order to gain more insight into the reliability of the witness.

witness's anonymity. The report is, after all, not only drawn up for the benefit of the trial judge, but is also made available to the Public Prosecutor[51] and the defence. This means that in order to maintain anonymity, the examining magistrates sometimes resorts to standard sentences or veiled language. Particularly when the witness and the defendant are acquainted or related, the reasons for the witness's knowledge and details of his statement cannot be included in the report, because they could result in the loss of anonymity. Consequently, sometimes little remains of his statement on paper, and has therefore very little probative value.

5 The effectiveness of the Witness Protection Act

The statutory procedure for the threatened witness is used sparingly, only a few dozen times a year. The procedure is used particularly in criminal cases involving crimes of violence, illicit drugs and robberies. No clear assessment can be made of the effectiveness of the Act with respect to the furnishing of evidence. At the time of the evaluation study, judgment had not yet been passed in most criminal cases. In those cases in which the court had pronounced judgment, there was often no complete written judgment available on the basis of which it could be determined whether and in what way the statement of the threatened witness had played a part in the court's decision.

One reason the Act is used sparingly is its complexity. Its implementation is time-consuming and laborious. This is mostly due to the provisions on hearing the parties with regard to granting complete anonymity (Sec. 226a (2) CCP) and the appeal procedure (Sec. 226b CCP). Furthermore, in applying the Act one is confronted with a dilemma: safeguarding the anonymity of the witness means that certain (crucial) parts of his statement cannot be included in the report, making the statement less valuable in evidence, whereas reporting the complete statement of the witness will almost inevitably result in disclosing his identity.

51. The public prosecutor is usually, but not always, aware of the identity of the witness.

6 The possibility of keeping an informant's identity concealed

This section centres on the question whether police officers may keep the identity of informants concealed.[52] If a police officer appears before the court, he is obliged to answer questions asked by the judge or the parties. The Code of Criminal Procedure, however, grants the court the authority to keep the defence or the Public Prosecutor from asking superfluous or unnecessarily painful questions.[53]

In practice, this section is also used to assist police officials who wish to protect their informants. The Supreme Court has accepted the prevention of disclosing the informant's identity as a reason for barring certain questions. Where drug trafficking or other forms of serious crime are involved, courts quickly assume the informant would be in danger if his identity were to be revealed.[54] It is apparent from case law that when the safety of the informant is at risk, the police are entitled to keep his identity secret. In combating serious crime the general interests of the investigation are also at stake. If the police were forced to reveal the identity of their source of information, this would damage the confidence of informants in the police. The Supreme Court allows courts to take these interests into account. This case law has been criticised, as it makes it rather difficult for the defence and the court to effectively check the reliability of the informant's testimony, as well as the lawfulness of the manner in which the evidence was gathered.[55]

7 The views of the judiciary and legal literature doctrine

The standpoint that threatened witnesses need to be protected by the state is generally endorsed in the Netherlands.[56] An important question is whether anonymity is an acceptable method of providing witnesses with such protection. In the eighties and nineties several 'camps' with different approaches could be distinguished in the debate on witness intimidation. In

52. We define an informant as a person who supplies information from the underworld about offences that have been or will be committed. The informant's testimony is not used in evidence, but it provides the police with information on the basis of which evidence can be gathered. The informants' names are not mentioned in the dossier.
53. See Section 288 CCP.
54. The courts do not require the police official to substantiate that the informant is in danger. See for example HR 17 March 1981, NJ 1981, 382.
55. See for example the annotation by 't Hart under HR 17 March 1981, NJ 1981, 382.
56. See A. Beijer, Bedreigde getuigen in het strafproces, Gouda Quint, Deventer 1997, p. 324-326.

the eighties legal practice accepted anonymity without much ceremony.[57] This protective measure was cheap and relatively easy to realize, because few procedural rules existed before the enactment of the Witness Protection Act.

The proponents of anonymity find that the rule of law is jeopardized when witnesses refuse to testify for fear of reprisals.[58] They accept the need for a different type of proceedings and agree restricting the rights of the defence, where important government interests are at stake. For that reason the legislature and the judiciary consider the use of anonymous statements legitimate in cases of serious crime, provided that several conditions are met.[59] In the legislature's view, the problems of the threatened witness centre around two interests essential to criminal procedure. On the one hand, the interest of establishing the facts; on the other, the interest of due process in criminal proceedings, requiring that fairness must be observed in arriving at the truth. In addition to those two general interests, the legislature also had to take into account the individual interests of the threatened witness. The results of this 'balancing of interests' process can be found in the Witness Protection Act. Anonymous statements may be submitted by the Public Prosecutor as evidence provided that this is strictly necessary to prove his case and the defendant has been accused of a serious offence. Furthermore, the defendant must be offered an opportunity to question the witness, while the evidence may not be based solely on testimony from anonymous witnesses.[60]

The choice made in the Netherlands was undoubtedly influenced by the (inquisitorial) structure of criminal proceedings and the principles underlying this type of proceedings.[61] A number of factors can be mentioned as having had a positive influence on the choice for anonymity. The first is that relatively little importance is traditionally attached to a 'face-to-face' confrontation between the defendant and the witness. Secondly, the practice of having (vulnerable) witnesses examined in the privacy of the preliminary inquiry by the examining magistrate had already developed in the Netherlands. Thirdly, the view was taken that evidence which is not easy to check should not be categorically ruled out. The Dutch legislature stated that the minimum evidence rules and rules on the substantiation of evidence can reduce the risk involved in the use of anonymous evidence. Fourthly, we

57. This applies to both the Dutch Supreme Court and the lower courts.

58. See for example Bedreigde getuigen, report by the Commissie bedreigde getuigen [Endangered Witnesses Committee], Staatsuitgeverij The Hague 1986.

59. These conditions are laid down in the Witness Protection Act. See Sections 3 and 4.

60. See Sections 3 and 4.

61. See A. Beijer, op. cit., p. 323 ff.

should mention the circumstance that criminal investigations are conducted by an official judge. Both the legislature and the Supreme Court have great confidence in a cautious judge of fact who will be able to make a critical evaluation of anonymous testimony.[62]

In addition to legal policy and pragmatic arguments, the idea of forfeiture of rights has most likely played a role in the acceptance of completely anonymous evidence. In the Dutch literature, the question has been raised as to whether the accused, if he has brought about the situation in which witnesses do not dare to testify freely in public, may still claim the right to question witnesses 'face-to-face'. This could be considered a forfeiture of rights: by acting unlawfully towards the witness, the accused has lost his procedural rights. Swart has remarked that this idea was of decisive importance to many in their acceptance of the anonymous witness.[63]

The opponents of the use of anonymous testimony are mainly found in academic circles. They object to the use of completely anonymous testimony as a means of evidence. There is little debate in the Netherlands on the use of partly anonymous evidence, probably because this form of protection is less of an infringement of the rights of the defence than complete anonymity and because it is not often used in practice.

Those who oppose complete anonymity point to the importance of open and immediate justice.[64] They consider the use of anonymous testimony to be in conflict with several fundamental principles of the criminal trial and therefore reject it. Above all, the acceptance of anonymous evidence eliminates the key moment of the trial: the direct oral confrontation between

62. For criticism of this standpoint, see for example A.H.J. Swart, Anonieme getuigen en eerlijk proces. In: Recht als norm en aspiratie, J.B.J.M. ten Berge et al. (ed.), Ars Aequi, Nijmegen 1986, pp. 376 and 377.

63. A.H.J. Swart, Recht op ondervraging van getuigen, Ars Aequi, 1987, p. 98 ff. The forfeiture of rights is based on the idea that the accused may not profit from his unlawful acts. The problem, however, is that it is often difficult to prove that the accused is the one who has tried to intimidate the witness. But what if it has been established that the accused did indeed threaten the witness? The proponents of the idea of forfeiture of rights may perhaps view the intimidation of witnesses as solid proof that the accused is guilty. However, the problem is that the fact that the witness is being threatened has little – if anything – to do with the correctness and completeness of his testimony.

64. See for example A.H.J. Swart, Anonieme getuigen en eerlijk proces. In: Recht als norm en als aspiratie, J.B.J.M. ten Berge et al. (ed.), Ars Aequi, Nijmegen 1986, p. 348-387; Ties Prakken, Chronique scandaleuse van het strafprocesrecht, Nederlands Juristenblad, 1990, p. 1815-1822; A. Beijer, Bedreigde getuigen in het strafproces, Gouda Quint, Deventer 1997.

the defendant and those who accuse him in the presence of the deciding judge.[65]

In the literature, anonymous testimony is considered to be an important potential source of miscarriages of justice. If the witness has been examined anonymously, then any information that could reveal his identity is surpressed. In other words, information that is of essential importance in assessing the reliability of the statement (could) be missing. Questions that the defence could have asked if the identity of the witness was known cannot be raised. Often, the questions which the defence is able to ask are left unanswered, so that continued questioning is difficult. The lack of response on the part of the defence also makes it easier for the witness to distort the facts or present the information as more certain than it actually is. In short, the acceptance of anonymous evidence can considerably limit the defendant's possibilities to defend himself. In the worst scenario, this could result in the defendant being convicted unjustly or punished too severely.

Another point that has attracted much criticism is the difficult position in which the decision-making authority – the trial judge – is placed. He is deprived of the possibility to independently probe the reliability of the witness at the trial. The trial judge cannot see with his own eyes how the witness responds to questions from the defence and he is not able to question the witness personally. The judge is compelled to accept the opinion of the examining magistrate,[66] even if, for the purpose of establishing the facts, he would prefer to examine the witness in open court. The acceptance of anonymous evidence thus puts great pressure on the autonomous position of the trial judge.

In our opinion, the (few) advantages of the use of anonymous witness statements do not outweigh their disadvantages. Complete anonymity is not a very effective means of protection. Virtually the only case in which complete anonymity can effectively protect the witness is when the defendant and the intimidated witness do not know each other.[67] In addition, important objections as to principle can be made against the use of anonymous evidence. Granting anonymity makes it more difficult for the defendant to check the evidence. This is all the more pressing because the statement of the anonymous witness is almost always a vital link in the prosecutor's argument. Furthermore, cases in which such testimony is used are often those in which the public prosecutor and the defendant disagree on essential points. This

65. A.H.J. Swart, op. cit. 1986, p. 353.

66. In the Dutch system, checking the reliability of the witness is always the task of the examining magistrate.

67. A.M. van Hoorn, op. cit. 1996, p. 83-84.

makes it necessary for the judge to conduct a thorough investigation. The foregoing indicates that the problems regarding anonymous witnesses are practically unsolvable. No matter how the procedure is organized and whatever the guarantees may be, it is nonetheless difficult to bring the rules in line with the principles of due process.

The observation that examining witnesses under full anonymity during the preliminary inquiry impinges upon the autonomous position of the trial judge is a fundamental criticism, given the inquisitorial character of Dutch criminal proceedings. One of the most important pillars of the inquisitorial system is the trial judge's crucial role. In order to fulfil his tasks properly, he must be able to independently investigate the cases brought before him. In cases involving anonymous witnesses, the trial judge is denied that possiblity.

8 Legal practice in the Netherlands in the light of the European Convention

Since the Kostovski judgment, the European Court has faced two more Dutch cases involving anonymous witnesses. In both these cases, the requirements set by the Witness Protection Act had been met. In the Doorson case, this review resulted in a favourable decision for the Dutch state. In the Van Mechelen case, however, the Court found against the Dutch state.[68] In the Doorson case the European Court for the first time expressed its opinion on the relationship between the right to a fair trial and the rights of the witness. For this reason alone this case is very important. Among other things the Court decided that principles of a 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.[69]

There are a number of important differences between the two cases mentioned above. The Doorson case involved two anonymous citizens who were directly questioned (face-to-face), without restriction by the defendant's lawyer. The case of Van Mechelen et al. involved the statements of eleven anonymous police officers. These officers were examined by means of telecommunications by the defence under the supervision of the examining magistrate. Another important difference is that in the Doorson case the conviction was also based on two non anonymous statements. In the Van Mechelen et al. case, on the contrary, the evidence was based 'to a decisive extent' on the anonymous testimony of the police officers. They were the

68. See ECHR 26 March 1996 (Doorson v. the Netherlands) and ECHR 23 April 1997 (Van Mechelen et al. v The Netherlands).

69. See ECHR 26 March 1996 (Doorson v. the Netherlands), par. 70.

only ones who had positively identified the accused as the perpetrators of the crimes. The Doorson case was able to withstand the critical Strasbourg review, the Van Mechelen case, however, was not.

In the case of Van Mechelen et al. the European Court made it clear that police officers cannot automatically be equated with witnesses who are 'ordinary' citizens. The Court stated that: 'Although their interests – and indeed those of their families – also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or victim. They owe a general duty of obedience to the State's executive Authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted [to] only in exceptional circumstances'.[70]

According to the European Court, formally police officers must appear at the trial. If it is necessary to protect them from reprisals, the authorities must choose the method that least infringes the rights of the defence. The Court prefers the use of disguises and the avoidance of eye contact to examining witnesses in the (physical) absence of the defence and the judge.[71]

The judgment against the Netherlands in the Van Mechelen case resulted in much commotion.[72] The European Court made it clear that even after the enactment of the Witness Protection Act, Dutch legal practice still does not always fulfil the due process requirements set by the European Court. The Dutch Act does not rule out convictions be based 'to a decisive extent' on anonymous testimony. Furthermore, the manner in which police officers who feel threatened are examined will have to change. In our view the case law of the European Court compels making amendments to the Witness Protection Act. Whether or not the legislature will actually proceed to do so cannot be foreseen at this time.[73]

70. See ECHR 23 April 1997, (Van Mechelen et al. v. the Netherlands), par. 56.

71. ECHR 23 April 1997 (Van Mechelen et al. v. the Netherlands), par. 60.

72. With regard to this case see for example A.M. van Hoorn and H. Nijboer, Nog steeds onder de maat, Nederlands Juristenblad 1997, pp. 892 and 893; B.E.P. Myjer, Getuigende dienders en Straatsburgse rechtsbescherming, Nederlands Juristenblad 1997, p. 883-889; T. Schalken and K. Rozemond, Nieuwe Europese verrassingen in Hollandse strafzaken, Nederlands Juristenblad 1997, p. 894; D. Garé and T. Spronken, Wet bedreigde getuigen niet 'Straatsburg-proof': de zaak Van Mechelen e.a. tegen Nederland, Advocatenblad, 13 juni 1997, p. 545-550.

73. This report was completed on 1 July 1997.