

## **Miscarriages of Justice in the Netherlands and in Aruba**

By dr Nico Jörg, Attorney-General for Aruba  
at the Joint Court of Justice for the Dutch Antilles and Aruba

(on furlough from the function of: Advocate-General at the Supreme Court of the  
Netherlands, The Hague)

### *Three possibilities for review*

1. The Dutch Code of Criminal Procedure (CCP) provides in article 576 ff for the review of criminal verdicts that have become final and irrevocable. The Attorney-General<sup>1</sup> at the Supreme Court may request, or the convicted person (or his lawyer) may petition a review of the conviction for (one of) the following three possibilities:
  - a) contradictory judicial findings of fact, irreconcilable findings of guilty;
  - b) a factual novum;<sup>2</sup>
  - c) a ruling by the European Court of Human Rights declaring a violation of the European Convention HR or one of its Protocols in a procedure.<sup>3</sup>
2. The wording of article 453 of the Aruban Code of Criminal Procedure is literally the same as to the possibility a) and b). The c)-possibility exists from January 2003 only in the Netherlands.<sup>4</sup>

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<sup>1</sup> Procureur-Generaal in Dutch.

<sup>2</sup> According to art. 457 (1)(2) CCP a novum is some new fact which did not emerge before the judge at the previous trial and which in itself or in relation to the evidence adduced at that trial seems incompatible with the verdict so as to a serious surmise that - if that fact had been known to the trier of facts - the trial would have ended in:

- an acquittal on the facts or
- on the ground of a defence;
- in a dismissal of the case or
- in the application of a less severe penal provision.

<sup>3</sup> A serious surmise is more than a mere possibility. Resulting in the finding of guilty in the case before the European Court. The provision is equally applicable in a parallel case which is not brought before the European Court but contains a conviction for the same offence resting upon the same evidence. An additional condition is that reparation, as meant in art. 41 ECHR, requires review.

<sup>4</sup> The case of Mathew v. the Netherlands (ECHR 29 September 2005, appl. 24919/03, EHRC 2005, 111) was an Aruban case in which

*Procedure.*

3. The request or petition is addressed to the Supreme Court (Cour de cassation) of the Netherlands. In the case of Aruba the Joint Court of Justice for the Dutch Antilles and Aruba is authorized to decide on review applications. The request or petition has to indicate the exact legal possibility for review underlying the application and has to state the evidence needed to successfully invoke that possibility (art. 459 CCP; art. 455 CCP Aruba). The petition is then screened by the court on the issue whether the requirements behind one of the three legal possibilities are met. If the legal requirements are not met the application is refused;<sup>5</sup> if they are met, but manifestly ill founded, the application is denied.<sup>6</sup> Otherwise the Supreme Court either -

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the applicant claimed maltreatment because of the prison conditions. The Joint Court of Justice took these conditions into account at the sanctioning decision, but did not rule that those conditions violated art. 3 of the European Convention on Human Rights. The European Court ruled in favor of the applicant that the same conditions that had been taken into account by the Joint Court meant a violation of art. 3 and awarded him a compensation of € 10.000. Then Mathew moved for review of the verdict by the Joint Court, stating that the decision of the Joint Court could not stand as the European Court had found a violation. The Joint Court dismissed the petition on the most formal, available ground: the European Court ruling was not a novum as meant in art. 453 CCP (19 December 2006, HAR 205/06). The Advocate-General had found also many material grounds for a dismissal of the petition. It turned out that Mathew, who had entered the U.S. on the false declaration that he did not have a criminal record and was therefore detained, pretended that the initial verdict by the Joint Court was not a final and irrevocable one, as he had lodged a petition for review; he called this a direct appeal, which clearly was not the case.

<sup>5</sup> Is the verdict final and irrevocable? Is the petition made by the right person? Does the petition refer to one of the three legal possibilities? Is evidence adduced? Is the petition a copy of an unsuccessful previous petition? Is it contradictory to an unsuccessful previous petition?

<sup>6</sup> The establishment of a novum does not necessarily imply an impact on the finding of guilty. For instance: a burglar has been convicted of stealing a number of jewels an owner is missing after the burglary. Later on, the owner remembers a hiding place, discovers one item and reports it (to the insurance company, which in turn lowers its claim on the convict). This novum does not cause a serious surmise that an acquittal would have resulted if the judge had known this fact at the trial. It may indeed be different if this one jewel had been the only item reported as stolen: then the attempt-provision in the Penal Code could have been applicable, which is a less

agreeing as to the irreconcilability of findings of guilty (possibility a) - refers the case to one of the five courts of appeal, not previously involved in the case, or - in the case of possibilities b) en c) - orders a public hearing on the petition, eventually after having been informed by the Procurator-General of additional data. The convicted person or his lawyer may explain the petition *in writing* before the public hearing takes place and *orally* at the public hearing. At the end of it the Procurator-General recommends the Court as to the merits of the petition (art. 462-463 CCP).

4. Before deciding on the petition the Supreme Court may order a judicial inquest (art. 465 CCP).

Basically the same procedure applies to Aruba (art. 457-463), with the peculiar exception of an additional judicial inquest before a different investigating judge, if the court is not satisfied by the first one (art. 464).

If the result of the inquest provides enough grounds for a retrial, a normal retrial on the facts will take place before one of the courts of appeal (art. 461 CCP). In Aruba the Joint Court of Justice refers the case for a retrial on the facts to one of the judicial panels of the court itself (art. 457 CCP Aruba).

5. In case the European Court of Human Rights found a violation of the Treaty's fundamental rights and freedoms, or of one of its Protocols, the Supreme Court may rule on the case itself or may refer the case to one of the courts of appeal (art. 467, section 2, CCP).

6. At the retrial hearing new evidence may be adduced by the prosecution. The retrial in itself is not different from a regular appeal hearing on the facts, as is common in continental Europe. This implies that the prosecution may supplement the case

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severe penal provision (two-third of the maximum penalty for the full offence, art. 45 Penal Code; art. 47 PC Aruba). In this factual situation the same novum does cause a serious surmise that the trier of facts would have applied a less severe penal provision, regardless of the actual sentence, which may already be far below the maximum for attempted burglary.

A famous case is the premeditated murder of a woman of 72 years old by her butler who had married her six weeks before her death. The exact cause of her death could not be established. In the review procedure a pathologist stated that it was *likely* that the victim had died as a result of heart rhythm irregularities, in stead of *possibly*, as the lower court had found. This did not alter the culpability of the convict, as those irregularities could still be attributed to the victim's being intoxicated by preparing for her soup with 90% rum, while the convict new of the bad physical condition of the victim, and to his lack of calling medical help once the victim's condition deteriorated drastically (HR 19 December 2006, LJN: AY9718, DD 2007 33.3, ann. T. Kooijmans).

file with new evidence; the defence may use all powers it has in a regular appeal hearing. The only statutory limit is the sentence imposed by the previous court: a more severe sentence cannot be imposed. In practice there are more legal limits: the new court may not exceed the exact subject for the retrial, formulated by the Supreme Court, but may equally not limit itself by refusing to hear new arguments made by the prosecution or the defence and take into consideration only whether the previous court would have acquitted the defendant or dismissed the case if it had been informed about the novum.<sup>7</sup> It is the new court that has to rule de novo.

### *Categories of review cases*

7. Which kind of cases is dominant in the review of wrongful convictions procedure? It is the false identity issue. Until rather recently, Dutch citizens were not required to carry an identification document. So suspects could state a false identity. If a suspect could not prove his identity by a driver's licence or something, it was not common practice for the police to check identities always with fingerprints, photographs etc. As a suspect can be set free after having been served a summons to appear in court, the result will be that the real person will be convicted and sentenced on default while the false person will equally not show up: it is not in his interest to appear. And as the rule is that someone who has received the summons personally has only fourteen days for lodging an appeal (art. 508, section 1 CCP), the verdict becomes final and irrevocable after those fourteen days if such an appeal has not been made. Subsequently the person carrying the real name will be informed that he has to pay a fine or has to report to jail. Then of course the whole circus of denial of having been the offender starts. The proper way is to apply for a review by the Supreme Court and to evidence the mistake that has taken place. Often

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<sup>7</sup> For instance: HR 16 Februari 1997, NJ 1998, 35 m.nt. Kn. In this case the previous court of appeal (Amsterdam) had been misled by the police who had not reported the illegality of some obtained evidence. When this got around and the Supreme Court - on review - ordered a retrial, the new court of appeal (The Hague) ruled that it would be unacceptable if such misleading behavior before the previous court did not have consequences for the outcome of the trial and dismissed the case. But the Supreme Court ruled again on the case - a normal 'cassation' procedure - and said that the new court should have taken into account which influence the illegal act by the police had in the totality of circumstances leading to the suspicion against the defendant and whether that suspicion was legal, and legally sufficient. A third court of appeal (Arnhem) found that the illegal part had not contaminated the overall legal and legally sufficient suspicion against the defendant. Again an appeal was lodged with the Supreme Court, but this was unsuccessful.

the real person has to go to the police station to be confronted with the officer who handled the case of the false offender.

8. Quantitatively second in line of review cases refer to lack of insurance for motor vehicles. As the insurance companies have to report changes in coverage for registration with a central body and are not always energetic in doing so, the register is not always up-to-date. So owners of motor vehicles can be fined on the basis of not being correctly registered at the central body notwithstanding the owners' assertion that they have valid insurance for their car. When finally the insurance company submits the proper documents and the register has been corrected, the request for a review by the Supreme Court may be well founded and lead to a retrial with considerable chance of success.

#### *Notorious novum cases*

9. Both categories of cases are legally unimportant, but the numbers are. In both categories the novum issue is the core issue, as it is in the cases that attracted and attract lots of media attention. What a novum legally is has been explained in footnote 1.

A classic case in this respect is the 1929 "Giessen-Nieuwkerk" murder-case,<sup>8</sup> where, due to an overzealous police officer and laxity of the investigating judge an innocent person had been convicted of murder.<sup>9</sup>

#### *"Putten" murder-case*

10. More recently the Supreme Court ordered a retrial of two convicts for the rape and murder of a young woman, to which the two defendants had at first confessed after (too) long police questioning (and even before the investigating judge) and about which two witnesses had given details. At a later moment the defendants denied any involvement with the crime. No body fluid of both of them had been found on the body of the victim; on the contrary: semen of an unknown person had been found on the thigh of the victim. According to an expert this could be the semen of a previous consensual act, which had been pulled out by the rape acts.

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<sup>8</sup> Privacy-rules result in giving names to cases in which the name of the defendant/convict does normally not appear. There seems to be a preference to call a case after the name of the town or the place where the offence took place.

<sup>9</sup> Hof Amsterdam 1 Oktober 1929, W 12028; cf. Simons in: (1929) W(eekblad van het Recht) 12022, W 12039 and W 12057; L.G. van Dam in: W 12048; E. Nieuwenhuis in: W 12131; D.G. Kortebout van der Sluis in: W 12053.

11. The novum was: the change of the expert's opinion. Normally such a change is immaterial: it is quite normal that experts change their opinion! But in this special case the expert stated that he was – at the time of his statement before the trial court – unaware of the place on the victim's thigh where the semen had been found. Now that he was informed about that place, he was of the opinion that it was unlikely that the semen was from another person than the rapist. So it turned out that there was a serious surmise that the trial court would have come to a different decision if it had been informed by the latest statement of the expert: that the possibility he had mentioned first, was in reality unlikely. This (third) petition for review was granted and after a new trial the two defendants who had served almost all of their prison term, were acquitted (and afterwards granted compensation of some million guilders).<sup>10</sup>

*“Schiedam Park” murder-case*

12. In September 2005 much public and parliamentary outrage emerged as it turned out in a rape and murder of small children-case that the Public Ministry in first instance as well as on appeal had withheld from the case file and from the judge the doubts expressed by some researchers of the Dutch Forensic Laboratory (NFI) - because DNA-research on traces under the nails of the victim and on her shoelaces did not meet the DNA of the defendant. The innocence of the convicted paedophile – who, being a suggestible person, had confessed after severe, not illegal police questioning, but withdrew his confession at a later moment – turned out when another person, equally paedophile, confessed voluntarily as to his crimes. The case demonstrates the risk of tunnelvision once a confession has been obtained. Previous review petitions – on the basis of a reconstruction by a psychologist of law - had been unsuccessful: no novum was involved, only doubt.

*“Deventer” murder-case*

13. In another case with still massive media coverage the petition for review had been successful, but the retrial was not: new evidence emerged which contributed to a reconviction of the defendant. The basis for the petition was the results of new research on a knife allegedly used in a second degree murder of a widow. The NFI was able to employ new techniques on already researched objects. But the problem faced by the defence was that the applicant had to state the *outcome* of such research as evidence that the knife (part of the evidence used by the court) could *not* contribute to that evidence. The need for new research is not a legal possibility for review. That very research had to be ordered first, which could not be done by the applicant nor by the public prosecutor: the case was closed! It was an advocate-

<sup>10</sup> HR 26 juni 2001, NJ 2001, 564. Hof Leeuwarden 24 april 2002, LJN: AE1877.

general at the Supreme Court who – without any legal authority - asked the NFI to perform such research. The result was that no traces of body material of the victim nor that of the convict was found on the knife.

14. This result in itself casted doubt on the finding of guilty, but also the fact that because no link could now be established between the knife and the murder, it was contrary to the rules to employ a sniffing dog, which had implicated the convict as the person who had touched the knife. As said, the retrial was unsuccessful as new research on the victims blouse showed many skin cells near her throat and a blood-stain. DNA-research resulted in the defendant as the person who left those DNA-traces. The defendant received the same prison sentence.

15. Later on a – from TV – well-known public opinion researcher pretended to know who was the real culprit. As a result of massive public pressure the Public Ministry ordered a new investigation to check the allegations. The results were devastating for the popular TV-person as still newer research on the deceased's blouse evidenced even more DNA-traces of the defendant. For the NFI increasingly smaller particles, human cells, are researchable. The public opinion researcher had been court ordered to stop his accusations and had to pay damages for defamation of the person he accused to be the real perpetrator. The review case is still pending as there is an allegation of perpetrator-knowledge before the death of the victim becoming public, which was not reported in the case file.

#### *Repeat petitions and the need to end criminal litigation*

16. It is not abnormal to have repeat petitions for a review. In some of the cases mentioned above, several petitions were denied before the right one had been formulated. On the one hand the law does not forbid repeat petitions; on the other hand the Supreme Court does not help the applicant in any aspect. The rules are very strict, emerging from the idea that with two full trials on the facts and one on points of law, mistakes as to the outcome of a case will be redressed. Only factual errors are subject of the review procedure; not legal errors. The normal appeal powers suffice for the redress of legal errors. It is also the idea that litigation has to stop somewhere, that the legal rules on review are so strict. Repeat petitions show sometimes the need for such strict rules. Some convicts cannot live with the idea that they have been found guilty of an offence they deny to have committed although the evidence is overwhelming. One is a case in which the applicant tries to show repeatedly that the cocktail of medicins by which the victim had been killed could impossibly kill the victim. The recent rejection of an application for cassation in the case of a female nurse, convicted for having committed in a hospital seven murders and three attempted murders (the case was referred back only for reasons of defect sentenc-

ing)<sup>11</sup> will inevitably cause repeat petitions for review as the conviction is partially based on statistics.

*A Baron Von Münchhausen problem: how to present results of research if the necessary research cannot be demanded?*

17. The Supreme Court sticks to the principle that a petition to order the Public Ministry to have research done or to reopen the case file (for instance with the purpose of checking the contents of all tapped telephone conversation) is contrary to the rules of the review procedure. The outcome of such research can become a novum; but the requested research is not.<sup>12</sup> It is a kind of Baron Von Münchhausen-problem, which is being addressed recently in a different way, which will be discussed now.

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<sup>11</sup> Lucia de B: HR 14 maart 2006, nr 03431/04.

<sup>12</sup> HR 23 mei 2006, nr. 00877/05.

### *A pre-review screening committee*

18. In the aftermath of the “Schiedam Park” murder-case a team of experts, headed by an advocate-general (at the level of a court of appeal), researched the case: what went wrong? It resulted in a report showing quite a number of flaws during investigation and prosecution.<sup>13</sup> Also the District Court and the Court of Appeal have performed self-analysis how they could have missed crucial clues. Their results have been made public partially.<sup>14</sup> One of the results of this miscarriage of justice-report is the establishment of a permanent committee<sup>15</sup> - headed by a criminal law professor and consisting of former police-officers, lawyers, scientists and advocates-general - that can be addressed by experts from the field, if they have – remaining, or afterwards - doubts about the truth of a conviction. Only the most serious crimes can be brought to the attention of the Committee, because in those cases the dangers of tunnel vision and urge to score (because of public, political and media pressure) are high. Seriousness of crimes means the applicability of criteria like a minimum punishment of 12 years and/or a shaken legal order. The address has to be in person and in writing; must refer to a individualized case which has to be decided finally and irrevocably and for which the convict is still serving his prison term; the reporter has to state his involvement in the case with a specific description of what went wrong in that case, according to the opinion of the reporter. A pre-pre-screening committee – also headed by a (different) criminal law professor – will examine the address whether it is worthwhile or is beyond the Committee’s competence. Police officers, prosecutors, NFI-researchers, all involved in the case, and scientists who researched the case and published about their research belong to the group of persons who may address the Committee. It cannot be addressed by convicts themselves or their lawyers. The reason is to prevent the development of a procedure that is alternative to the court review procedure.

19. If the address is serious enough, a method to approach the problem is decided upon as well as the manning of the ad hoc Committee research group: an advocate-general will be commissioned with the research and will be advised by an expert in police matters and a criminal law scientist or a lawyer. The advocate-general draws up the report, but the advisers may draw up their dissenting opinions. The ultimate report will be made public and submitted with the Board of Prosecutors-General – the highest body of the Public Ministry – who has to decide upon: what next? A new investigation? A letter to the Procurator-General at the Supreme Court to have him request review proceedings by the Supreme Court on the basis of an existing novum? Or an advice to the trial court to pardon the convict? The Board has to pay

<sup>13</sup> F. Posthumus: Evaluatieonderzoek in de Schiedammer Parkmoord. Rapportage in opdracht van het College van procureurs-generaal, augustus 2005.

<sup>14</sup> Trema 2005, p. 294-295 and 296-297.

<sup>15</sup> Commissie afgesloten strafzaken (CAS), also called Posthumus-II.

specific attention to dissenting opinions by the advisers. The outcome of the new investigation can result in a novum, not yet found by the CAS' ad hoc group. It is totally up to the Supreme Court to decide in the traditional way whether the novum is strong enough as to accept a surmise of a wrongful conviction.<sup>16</sup> The Minister of Justice will evaluate CAS medio 2007; the current review possibilities, especially the novum requirement will also be evaluated.<sup>17</sup>

20. In some way this committee resembles the Criminal Cases Review Committee in England, Wales and Northern Ireland. One difference is that the CCRC is quite accessible, in order to take away public disaffection and lack of trust in the criminal justice system. CAS is not that accessible. Another is that the CCRC can oblige the judge to start review proceedings.<sup>18</sup> CAS cannot. As far as I know three cases are being seriously researched by CAS.

21. At this moment two law schools (Maastricht and Amsterdam-VU) have review research groups in which various scientists cooperate with law students. According to their information they are overwhelmed by cases in which innocence and a miscarriage of justice are claimed. That is the price of lowering the standard for having a case accepted for review. Out of such research an application at CAS can result.

22. Last year an alternative route for the Baron von Münchhausen problem has been found: a district court<sup>19</sup> order to give the convict access to the case file in the possession of the public prosecutor in order to see whether there are bits of paper sustaining the claim of a false conviction. The president of the Court ruled that it would be unlawful for the DPP to deny access.

*Is the Supreme Court the right court to handle applications for review?*

23. Within the Supreme Court there is debate whether the Court itself is the proper body to handle a request or petition for review. After all, the Supreme Court is not a judicial body ruling on the facts; while a review application is pre-eminently a petition to research the facts. Be it that the facts before the Supreme Court are partly procedural facts: did the case file already contain that piece of exculpatory evidence which is now alleged to be a novum? And: if it is a novum, what is the decisive value of it? Does it make the conviction unsafe? It requires the Supreme Court justices to put themselves in the position of the trier of facts; while they are selected because of

<sup>16</sup> Evaluatie afgesloten strafzaken van start (red.), NJB 2006, 489 (p. 679).

<sup>17</sup> Justitiële dwalingen (red.), NJB 369 (p. 461).

<sup>18</sup> TK 2006 303000 VI, nr 114; Justitiële dwalingen (red.), NJB 369 (p. 461).

<sup>19</sup> The Hague, May 2006.

their knowledge of the law!<sup>20</sup> On the other hand it is important to be aware of the exceptional character of the review procedure as laid down in the CCP. If one, it is the Supreme Court to watch over the propriety of a petition for review in a uniform way.

24. It not unthinkable that in the end the courts of appeal will be commissioned with the handling of review applications. That result has already been reached in Aruba: it is the Joint Court of Justice that decides upon applications for review.<sup>21</sup>

Aruba, 17.6.2007

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<sup>20</sup> See Th. Schalken, annotation under HR 26 juni 2001, NJ 2001, 564.

<sup>21</sup> Academic dissertations on the review requirements and procedure (with translated summaries): J. de Hullu, *Over rechtsmiddelen in strafzaken*, Arnhem: Gouda Quint, 1989; R.E.P. de Ranitz, *Herziening van arresten en vonnissen*, Alphen a/d Rijn: H.D. Tjeenk Willink, 1977; G.A.M. Strijards, *Revisie*, Arnhem: Gouda Quint, 1989. See also the commentary on the CCP by A.L.Melai and M. Groenhuijsen: *Het Wetboek van Strafrecht (loose leaf)*, Boek III, Titel VIII; A.J.A. van Dorst, *Herziening*, *Handboek Straffzaken*, Deventer: Gouda Quint, Ch. 47.