Getuigenbewijs en het recht op een eerlijk proces

EVRM en art. 14 BUPO.
Ook de vaste Commissie voor Financiën heeft zich afgevraagd of deze regeling de vrijheid van de rechter om binnen wettelijke grenzen tot boeteoplegging te komen beperkt. De gedachte is geopperd om over deze kwestie opnieuw advies te vragen aan de Hoge Raad. Een wijziging van het stelstel wordt thans overwogen. De Staatssecretaris van Financiën heeft bij brief van 16 november 1990 doen weten dat men erover denkt de uitwerking van het nieuwe boetestelsel niet op te nemen in een AMVB maar in een ministeriële regeling, vergelijkbaar met de huidige Leidraad administratieve boeten. Daarmee zal de rechter op dit terrein de vrijheid houden die in de jurisprudentie sedert het arrest van 19 juni 1985 tot ontwikkeling is gekomen.

Mr M.L.B. van der Lande
Caron & Stevens, Amsterdam

Strafrecht

Getuigenbewijs en het recht op een eerlijk proces

Europese Commissie voor de Rechten van de Mens

Rapport d.d. 3 april 1990 in de zaak Cardot tegen Frankrijk (Appl. No. 11069/84)

De rapporten van de Europese Commissie voor de Rechten van de Mens worden pas openbaar nadat de zaak wordt voorgelegd aan het Europese Hof voor de Rechten van de Mens en zo dit niet gebeurt indien het Comité van Ministers van de Raad van Europa daartoe besluit.
Zo werd afgelopen zomer openbaar het Rapport van de Europese Commissie in de zaak Cardot tegen Frankrijk, die inmiddels is voorgelegd aan het Europese Hof.
Hierna volgen de belangrijkste passages van het Rapport van de Europese Commissie en een korte bespreking van de implicaties van deze zaak voor het Nederlandse strafproces.

II. Establishment of the facts

11. In August 1979, an investigation opened by the Valence Criminal Investigation Department (Frnce) uncovered an international organisation specialising since 1978 in drug trafficking between the Middle East and Europe. This organisation consisted of Iranian suppliers, French haulage contractors and Dutch organisers. On 2 August 1979,' the Valence public prosecutor applied to the investigating judge of the Valence Regional Court to open an investigation against a person or persons unnamed. Some 15 persons, including the applicant, were charged with drug trafficking. On 30 November 1979 the investigating judge was informed that the applicant had been arrested in Italy.

12. Arrested on 27 November 1979 in Verona and charged with possessing 455 kg of hashish, the applicant was tried and sentenced at final instance to three years and seven months in prison by the Venice Court of Appeal on 6 February 1981. He served his sentence until 21 December 1981, when he was pardoned under an amnesty granted on 18 December 1981.

13. He was not released, however, as a first international arrest warrant had in the meantime been issued against him by the Valence investigating judge on 26 June 1980. On 3 July 1980 an application for his extradition was sent to the Italian authorities through diplomatic channels. On 14 August 1980 a further extradition warrant was served on the applicant for

a. acting as accessory to the attempted import of 1,080 kg of hashish, an attempt frustrated only by circumstances beyond his control, namely the arrest of the main culprit in Tehran,
b. attempting to import 650 kg of hashish into France, an attempt foiled only by his arrest in Verona at the end of November 1979.

Extradition was authorised on 24 March 1981 by the Venice Court of Appeal on three charges of drug trafficking in 1978. The Italian Minister of Pardons and Justice agreed to the extradition of the applicant in an order dated 23 February 1982.

14. By an order on 5 February 1981, while the applicant was still imprisoned in Italy, the Valence investigating judge committed the applicant for

trial before the Valence Criminal Court on charges of having organised an association or made arrangements with the other accused to import and export narcotics, of having imported and transported narcotics, and also of conspiring with the other accused and attempting to import, export and transport narcotics on two specific occasions.

15. In a judgment dated 7 May 1981, the Valence Criminal Court imposed on the accused prison sentences ranging from three to twenty years and ordered them to pay customs fines of between 12 and 26 million French francs.

The applicant was not tried on that occasion, however, the Court having decided to separate the proceedings against him in view of his imprisonment in Italy on other charges.

16. In a judgment dated 18 February 1982, the Grenoble Court of Appeal gave two of the accused the benefit of the doubt and acquitted them, reducing the prison sentences imposed on three others from sixteen to twelve years and from eight to six years. In the judgment, the applicant's name was repeatedly mentioned in connection with various offences laid to his charge by the other accused, all of whom stated that they had received their instructions from him.

Parts of the judgment read as follows:

"Whereas the file on the proceedings and the hearings indicates that in March 1978, G.R. put Jean-Claude Cardot in touch with the Dutchman E.S., known as C., who proposed to Jean-Claude Cardot, then engaged in haulage to the Middle East, that he transports hashish against payment of 100 000 French francs per tonne; whereas Jean-Claude Cardot accepted this proposal; whereas in late March or early April 1978, on Cardot's instructions, a convoy of 8 lorries including Cardot . . .";

"Whereas two days after the arrival of Cardot's lorry at J.M.'s depot in C. (Ardèche), Cardot and M. dismantled the petrol tank . . .";

"Whereas Cardot subsequently asked J.M. and M., who agreed, to bring back a quantity of hashish on the occasion of a haulage operation . . .";

"Whereas Cardot having made arrangements to meet . . .";

"Whereas on returning from a trip to Afghanistan, Cardot proposed to J.C.H. that he engage in smuggling . . .";

". . . whereas H., on Cardot's instructions, again contacted an Iranian . . .";

"Whereas on Cardot's instructions and in his company, he took an empty lorry to Holland . . .";

"Whereas at that same time and again on Cardot's instructions, J.M. went to Iran in his lorry for the purpose of bringing back a quantity of hashish";

". . . he had taken from Valence to Holland a consignment of hashish which had just been brought from Iran by Jean-Claude Cardot";

"Whereas at Cardot's instigation, he returned to Tehran by air . . .".

17. The applicant was extradited from Italy to France on 24 March 1982.

18. On 2 April 1982, he was summoned to appear before the Valence Criminal Court. In a judgment dated 2 April 1982 the Court recalled that, by an order dated 5 February 1981, he had been committed for trial for drug trafficking, that, in a judgment dated 7 May 1981, the Court had separated the proceedings against him in view of his imprisonment in Italy, and that he had been arrested under an international arrest warrant issued on 26 June 1980.

Noting that the Public Prosecutor's Office had applied for a supplementary investigation and the accused's continued detention on remand, the Court ordered the investigation and the applicant's continued detention on remand. This decision was upheld by the Grenoble Court of Appeal on 19 May 1982, the applicant having appealed against the decision to continue his detention.

19. On 17 June 1982 the Valence Regional Court formally requested an investigating judge to undertake the supplementary investigation.

On 28 June 1982 the applicant was questioned on the charges against him and seals placed on two exhibits in Italy in November and December 1979 were removed in his presence. He requested that all the objects placed under seal be returned to him. He was again briefly questioned on 30 July 1982.

20. On 12, 13, 16 and 26 July 1982 the applicant was confronted with each of the three persons who had been his co-accused and who had been convicted by the Grenoble Court of Appeal on 18 February 1982, and with another former co-accused who had been acquitted. At these four confrontations the investigating judge reminded each of the convicted persons of the statements they had made to the police on 21 October 1979, 23 October 1979 and 19 February 1980 respectively, and asked them whether they confirmed or maintained those statements.

The applicant formally contested all the incriminating statements by his former co-accused, but all except one fully confirmed their statements to the police in the proceedings that had led to their convictions.

21. It appears from the file that the public prosecutor did not consider it necessary to cite the four persons with whom the applicant had been confronted during the supplementary investigations for the trial hearing, which took place on 1 September 1982. Nor did the applicant cite them.

On 1 September 1982, following the hearing, the case was adjourned until 17 September 1982, so that the National Directorate of Customs Investigations could be cited as the civil party.

22. At the hearing on 17 September 1982, the applicant gave his own account of the facts in respect of which he had been charged and again contested the statements made to the police in 1979 and 1980 by his former co-accused, emphasising that these had been inconsistent.

23. In a judgment of 17 September 1982, the Valence Criminal Court sentenced the applicant to six years' imprisonment, finding him guilty as charged, with the exception of the charges on which he had been convicted in Venice. It referred in particular and at length to the various statements made by his former co-accused.

24. On 17 March 1983, the Grenoble Court of Appeal upheld this judgment in respect of the applicant's guilt, but increased the prison sentence from six to seven years.

On page 4 of the judgment, the Grenoble Court of Appeal states under "The facts" that "it emerges from the preliminary inquiries, the investigation and the partially confirmatory judgment of the Grenoble Court of Appeal of 18 February 1982 [delivered

against the other accused] that the facts are as follows . . .".

"[The group] of hauliers consisting of F.M., J.M. and J.P.H., who later formally incriminated Jean-Claude Cardot, whom they identified as the intermediary between the Dutch and themselves . . .".

It is also specified on page 5 of the judgment:

> "H. for his part states that on that occasion Cardot introduced two Dutch persons 'T' and 'C' to him . . .".
>
> [J.M. and F.M.] "state that they undertook the journey, at Cardot's request, for the purpose of bringing back a consignment of hashish . . .".
>
> "M. states that Cardot helped to load the lorry with . . .".
>
> "It is also stated on page 6 of the judgment:
>
> "According to statements made by [V] confirming those made by H. and by J.M., Cardot helped V.V. and W. to make petrol tanks with hidden compartments, which Cardot denies . . .".

It is also noted on page 8 of the judgment that:

"Furthermore, during the proceedings before the Grenoble Court of Appeal on 18 February 1982, M. stated that . . . he had, on that trip, taken from Valence to Holland a consignment of hashish which Jean-Claude Cardot had just brought from Iran. He also stated that, having run into Cardot in Ankara, he took his vehicle to Tehran and returned to France, subsequently flying back to Tehran, at Cardot's instigation, on 30 September 1978 to pick up his lorry which Cardot told him was 'ready'."

On page 9 of the judgment, the Court further notes that "the various French lorry drivers involved in this traffic . . . and convicted on 18 February 1982 unanimously stated that they had received their instructions from Jean-Claude Cardot".

The Public Prosecutor's Office for its part concluded "that the facts [were] fully established by the material in the file and the corroborating statements" made by the other accused both during the investigation and in the proceedings before the Court of Appeal that led to their being convicted on 18 February 1982.

The applicant contested everything in the file which incriminated him, dismissed the statements of F.M. and J.M. as malicious lies, designed solely to minimise their own responsibility, and argued that the Court of Appeal's judgment of 18 February 1982 could not be used against him.

25. He appealed against the judgment of 17 March 1983 to the Court of Cassation on the ground that, in finding him guilty, the Criminal court had referred to a judgment given by the Grenoble Court of Appeal on 18 February 1982 in proceedings brought by the Public Prosecutor's Office against other parties and to the discussions preceding that judgment, whereas a court should base its judgment on the specific circumstances of the case and not on cases already tried.

He claimed that the judgment complained of clearly showed that he had been judged, not on the evidence produced by the investigation or adduced in the hearings preceding his own conviction, but with reference to parts of a decision given in proceedings to which he had not been a party and after a hearing at which he had been unable to defend himself.

He claimed that his defence rights had been violated.

He further complained that, by failing fully to specify the offences for which he could not be tried in France, having already been convicted in Italy, the Court of Appeal had unlawfully placed the Court of Cassation in a position in which it had no means of checking whether he had not in fact been convicted twice for the same offences.

He also complained that he had been convicted as accessory to an offence for which the main culprit had, he claimed, been amnestied in Iran and could therefore no longer be prosecuted in France.

26. The Court of Cassation dismissed his appeal on 13 February 1984.

With regard to the first ground of appeal, the Court of Cassation noted that the texts of the judgments of 18 February 1982 and 7 May 1981 had been included in the file of the case brought against the applicant, and ruled that the Court of Appeal had not violated the rights of the defence. It held that the Court's assessment of the value of evidence is conclusive when, as in the present case, that evidence has been produced at a hearing of the parties; there is therefore no reason why evidence from other proceedings should not be considered.

The other two grounds relied on by the applicant were also dismissed.

III. Opinion of the Commission

A. *Point at issue*

27. The Commission is required to decide on the following question:

Did the applicant benefit from the rights accorded to him by Article 6 para. 1 and para. 3 (d) of the Convention in so far as he was convicted on the basis of evidence produced in proceedings to which he was not a party, and was unable, at first instance or on appeal, to examine or have examined the persons who had given evidence against him?

B. *General considerations*

28. Article 6 para. 1 of the Convention states that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

Article 6 para. 3 (d) provides that:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> . . .
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

29. The Commission recalls its constant case-law that the guarantees of paragraph 3 of Article 6 of the Convention are specific aspects of the concept of a fair trial set forth in the first paragraph.

The term "minimum" clearly shows that the list of rights in paragraph 3 is not exhaustive and that a trial may well fail to satisfy the general requirements of a fair trial even if the minimum rights guaranteed by paragraph 3 are respected (Bricmont v. Belgium, Comm. Report. 15.10.87, para. 125, Eur. Court H.R., Series A no. 158, p. 40).

30. Given the nature of the problems arising in this case, the Commission will consider the complaint that the applicant was unable to examine or have examined the persons who had testified against him with reference to

the fair trial requirement of paragraph 1 of Article 6 of the Convention, having due regard to the principles laid down in paragraph 3 (d) of that Article.

C. *As to the alleged violation of Article 6 of the Convention*

31. The applicant complains, firstly, that he was convicted solely on the basis of evidence obtained in proceedings to which he had not been a party and, secondly, that he was unable to examine or have examined the persons who had testified against him and who had been convicted during the first proceedings.

32. It is therefore necessary to establish whether the reference to other proceedings and the fact that the applicant was not confronted with the witnesses against him violated the right to a fair trial and the defence rights deriving from the concept of a fair trial.

33. In this particular case, the applicant was charged and committed for trial at the same time as other persons, but was not tried in the proceedings brought against his co-accused because he was imprisoned in Italy on other charges at the time when those proceedings took place, In fact, the Valence Criminal Court separated the proceedings against him.

However, as the above-quoted extracts show (cf. paragraph 16), the Court of Appeal referred very largely, in its judgment of 18 February 1982, to the important role played, according to the persons accused, by the applicant.

34. The applicant was confronted with those persons on 12, 13, 16 and 26 July 1982 in the investigating judge's chambers, and formally contested their statements.

35. He was tried on 17 September 1982 by the Valence Criminal Court, which did not hear those persons, but referred extensively to their statements in establishing the facts.

36. Similarly, those persons were not heard by the Court of Appeal, which considered that the facts had been established by the preliminary enquiries, the investigation and the partially confirmatory judgment of the Grenoble Court of Appeal of 18 February 1982 (cf. paragraph 24, above).

37. The Government maintain, firstly, that the applicant was tried in the same proceedings as his co-accused, since the charges brought against him and the other accused were the subject of a single investigation, entrusted to a single investigating judge. Similarly, he was committed for trial by the same order as the other accused.

38. The Government argue that the Criminal Court decided to separate the proceedings, firstly, so that the applicant could be heard by the courts and put forward his grounds of defence inter partes and, secondly, so that his co-accused could be tried within a reasonable time.

39. The Government also argue that there is nothing either in French law or in the Convention to prevent a person charged with an offence from being convicted on the basis of evidence obtained and assessed at an earlier stage in the proceedings when the defence has been able to discuss that evidence in the presence of the parties. They point out that it has not been disputed that the evidence and judgments concerning the co-accused convicted before the applicant were made available to him. Similarly, once he had been extradited a supplementary investigation was ordered so that he could be confronted with his former co-accused in the presence of an investigating judge.

The Government conclude from this that he was able to contest those parts of the proceedings of which he was aware and to say what he thought of the judgment passed on his co-accused on 18 February 1982 by the Grenoble Court of Appeal.

40. The Government therefore consider that the adversarial principle and the rights of the defence were respected at all times during the proceedings against the applicant.

41. With regard to the statements of the applicant's co-accused, the Government refer to Articles 427 and 435 et seq. of the Code of Criminal Procedure (CCP), and consider that the principle of reasonable certainty of the judge makes it unnecessary to summon witnesses to the hearing when the facts are deemed to be sufficiently established, as in this case. They point out that the applicant was confronted with those persons in the investigating judge's chambers and could have contested their statements and had questions put to them through the judge and through his lawyer.

42. The Government further note that the applicant did not ask for those persons to be cited in the Criminal Court or the Court of Appeal although he could have cited them himself or requested the Public Prosecutor's Office to have them cited.

43. They add that neither the Convention nor the Court's case-law requires witnesses to be heard at all stages in the proceedings or the confrontation of witnesses with the accused to take place at a public hearing.

44. They further note that the two decisions complained of refer to the preliminary police enquiries, to the first investigation, to the supplementary investigation and to the first judgment concerning the co-accused, but also to the applicant's statements. They conclude from this that the courts' decisions were not based on the co-accused's statements before the investigating judge or the tribunals concerned with them.

45. The applicant points out that the statements giving him major responsibility for transmitting the orders of the organisers of the drug trafficking were made before the investigating judge, or in the proceedings before the Criminal Court, which gave judgment on 7 May 1981, and the Court of Appeal, which gave judgment on 18 February 1982. He emphasises that, being imprisoned at the time in Italy, he could not be heard in those proceedings.

46. He further notes that it was not for him to have witnesses against him, who were his former co-accused, cited at his own expense. On the contrary, the prosecution, on which the burden of proof rested, should have cited them, especially since the persons concerned had been convicted and imprisoned. The Public Prosecutor's Office had decided not to cite them, however, considering that the incriminating facts had been sufficiently established by the proceedings brought against those persons, which he had been unable to attend, either at the investigation or the trial stage.

47. As for respecting the adversarial principle, the applicant also refers to Article 427 CCP, and amphasises that this case illustrates the purely formal way in which this provision is interpreted in French judicial practice. Article 427 CCP states that the judge must base his decision only on the evidence produced in the proceedings and discussed before him by the par-

ties. In this case, however, adversarial discussion of the evidence against him was confined to the communication to him of evidence from other proceedings and to his being confronted, in the secrecy of an investigating judge's chambers, with previously convicted persons who had implicated him at the time on their own trial. In these circumstances, he was unable, at the public hearings either at first instance or on appeal, to contest inter partes, in the presence of his accusers, the charges against him, which were based almost exclusively on statements made in other proceedings by his former co-accused. He accordingly considers that he did not receive a fair trial.

48. The Commission points out, firstly, that it is for the domestic courts, and particularly courts of first instance, to assess the evidence produced before them both by the prosecution and by the accused (cf. W. v. Austria, Comm. Report 12.7.89, para. 30). This being so, the Commission's task is not to decide whether the domestic courts have properly assessed the evidence, but whether the evidence for and against has been given in a way which guarantees a fair trial in the general conduct of the proceedings (cf. Eur. Court H.R., Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). In this connection, it is essential that the defence be given an opportunity to challenge any evidence produced before the Court and on which the Court bases its judgment. In addition, all the evidence must in principle be produced in the presence of the accused at a public hearing, so that it can be discussed by the parties (see Barberà and Others judgment, loc. cit., p. 33, para. 78).

49. Regarding the bringing of evidence, the Court stated in its Kostovski judgment that:

> "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the rights of the defence have been respected."

It added however that "as a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings" (Eur. Court H.R., Kostovski judgment of 20 November 1989, Series A no. 166, para. 41).

50. In the light of this case-law, the Commission considers that the requirements of a fair trial and equality of arms generally make it necessary for all prosecution witnesses to be heard before the trial courts and during adversarial proceedings (cf. Barberà and Others judgment, loc. cit., p. 13, para. 78).

It is also of the utmost importance that those courts should be able to observe the witnesses' demeanour under questioning and to form their own impression of their reliability (cf., mutatis mutandis, Kostovski judgment, loc. cit., para. 43).

51. The Commission notes that the persons who made statements incriminating the applicant were not, in French law, witnesses in the strict sense of the word, since they were his former co-accused. It considers, however, that these persons, who had already been convicted and did not have the status of accused in the proceedings against the applicant, should in this case be regarded as witnesses against him within the meaning of Article 6 para. 3 (d) of the Convention.

52. In the present case, the Commission notes firstly that the applicant was not present during the proceedings which led to the conviction of his co-accused. He was on remand in Italy on other charges when the case was being investigated, and was extradited only after the Court of Appeal had given its judgment, in which he was largely implicated. He was therefore unable to participate in those proceedings, during which he was not examined.

53. The Commission further notes that, in the proceedings concerning him, the applicant was confronted at the supplementary investigation stage with the persons who had incriminated him. In the presence of the investigating judge, he disputed the statements made in 1979 and 1980 by his former co-accused.

54. The Commission notes, however, that those persons were not called to give evidence before the trial courts and at a public hearing.

Nevertheless, the Grenoble Court of Appeal, in its judgment of 17 March 1983, established the facts of the case and considered that "it emerges from the preliminary enquiries, the investigation and the partially confirmatory judgment of the Grenoble Court of Appeal of 18 February 1982 . . . that the facts are as follows".

55. The Commission further notes that the text of the judgment contains numerous references to the statements of the applicant's former co-accused, which the Court used to establish the facts, without calling those persons to repeat their statements at a public hearing of the parties in the presence of the accused.

56. Although the statements made by the applicant's former co-accused were not the only evidence produced before the trial court, the Commission notes that it is nonetheless true that the applicant was convicted essentially on the basis of those statements and of the evidence relied on by the trial court in convicting his former co-accused (Isgro v. Italy, Comm. Report 14.12.89, para. 54).

57. The Commission accordingly finds that the applicant was tried and convicted largely on the basis of evidence from other proceedings to which he had not been a party, and was given no opportunity of discussing in adversarial proceedings at a public hearing the statements made against him by his former co-accused. This procedure did not therefore guarantee the applicant a fair trial within the meaning of Article 6 para. 1 in conjunction with para. 3 (d) of the Convention.

Conclusion

58. The Commission unanimously concludes that there has been a violation of Article 6 para. 1 in conjunction with Article 6 para. 3 (d) of the Convention.

Secretary to the Commission (H.C. Krüger)
President of the Commission (C.A. Nørgaard)

Noot

Het rapport van de Europese Commissie in onderhavige zaak kan worden geplaatst in een reeks arresten van het Europese Hof die betrekking hebben op de bewijsvoering in strafzaken: Unterpertinger (EHRM 24 november 1986, NJ 1988, 745); Barberà, Messiguè en Jabardo (EHRM 6 december 1988, Series A no. 146) en Kostovski (EHRM 20 november 1989, NJ 1990, 245). De Kostovski-zaak heeft uiteenlopende commentaren opgeleverd over de vraag hoe ernstig het Europese Hof het onmiddellijkheidsbeginsel neemt (zie Advocatenblad 1990, mijn noot bij HR 2 juli 1990, p. 426-429). Het discussiepunt blijft welke uitzonderingen mogelijk zijn op het in het Kostovski-arrest door het Hof herhaalde beginsel dat met het oog op tegenspraak over en weer, in principe alle bewijs behoort te worden gepresenteerd in aanwezigheid van de verdachte op een openbare terechtzitting. Onder de voorwaarde dat de verdachte een behoorlijke en adequate gelegenheid krijgt (of heeft gehad) de getuige te ondervragen en op de proef te stellen, hetzij op het moment dat de getuige zijn verklaring aflegt, hetzij in een later stadium van de procedure, acht het Hof het toelaatbaar dat verklaringen van getuigen die niet op de openbare terechtzitting zijn afgelegd als bewijs worden gebruikt. Het Rapport van de Europese Commissie in de zaak Cardot is voor de Nederlandse strafrechtspleging interessant omdat de gang van zaken in de strafzaak tegen Cardot (afgezien van de duur van de opgelegde gevangenisstraffen en gigantische douaneboetes) veel overeenkomsten vertoont met de doorsnee strafzaak in Nederland. In Nederland worden getuigen meestal in het kader van het opsporingsonderzoek en gerechtelijk vooronderzoek gehoord. Niet zelden zijn de belastende verklaringen afkomstig van medeverdachten. Na de toelating van de de auditu verklaring voor het bewijs is het vooral het bewijs op papier, dat de rechter op de terechtzitting ziet. Zo constateert de Commissie Moons in haar rapport "De herziening van het gerechtelijk vooronderzoek" van afgelopen jaar op p. 30: "Het voorbereidend onderzoek in het Nederlandse recht is in veel mindere mate dan b.v. in het Duitse recht preparatoir. De meeste onderzoekshandelingen worden in het voorbereidend onderzoek verricht. Het onderzoek ter terechtzitting heeft daardoor een evaluerend en toetsend karakter." De commissie Moons vervolgt op p. 31: "Een afschaffing van het gerechtelijk vooronderzoek kan daarom niet plaatsvinden zonder een diepgaande bezinning op de structuur van ons hele strafproces. De commissie acht het onwaarschijnlijk dat een dergelijke bezinning ertoe zal leiden dat het zwaartepunt in ons strafproces voor wat betreft het feiten- en persoonsonderzoek dient te verschuiven naar het onderzoek ter terechtzitting. De commissie zou een dergelijke verschuiving in elk geval ongewenst achten. In dit verband constateert de commissie dat uit de rechtspraak van het EVRM met betrekking tot art. 6 EVRM valt waar te nemen dat het aan de nationale autoriteiten is overgelaten te bepalen of in het strafproces het zwaartepunt ligt bij het voorbereidend onderzoek dan wel bij het onderzoek ter terechtzitting. Zo heeft het EHRM in de zaak Kostovski onderzocht of "the handicaps under which the defence laboured were counterbalanced by the procedures followed by the judicial authorities" en kwam het EHRM in de zaak Barberà, Messiguè en Jabardo tot de slotsom dat "the deficiencies at the trial stage were not compensated by procedural safeguards during the investigation stage". Gebreken in het voorbereidend onderzoek kunnen door het onderzoek ter terechtzitting worden gecompenseerd en vice versa." In mijn noot bij HR 2 juli 1990 in het Advocatenblad voormeld heb ik al betoogd dat deze interpretatie van de jurisprudentie van het Europese Hof zeer discutabel is. Het Hof staat zeker uitzonderingen toe op de door hem geformuleerde hoofdregel dat het bewijs ter terechtzitting gepresenteerd moet worden, maar of deze uitzonderingen tot regel gemaakt kunnen worden is maar zeer de vraag. In de zaak van Cardot tegen Frankrijk wordt duidelijk welke richting de uitleg van de Europese Commissie van voornoemde arresten van het Europese Hof uitgaat. Van belang is dat Cardot op verzoek van de rechtbank in Valence in het kader van een nader onderzoek door de Rechter Commissaris is geconfronteerd met de inmiddels berechte medeverdachten welke belastende verklaringen tegen hem hadden afgelegd. Drie van de vier medeverdachten persisteerden bij hun verklaringen. Volgens de Franse regering had Cardot hierbij voldoende gelegenheid de verklaringen van deze getuigen te betwisten en was het ook mogelijk via de Rechter Commissaris en zijn advocaat de getuigen vragen te stellen. Cardot had echter volstaan met het betwisten van de verklaringen en deze als leugenachtig betiteld en had evenmin gebruik gemaakt van zijn recht deze getuigen voor de terechtzitting op te (laten) roepen. Desondanks overweegt de Europese Commissie "In this connection, it is essential that the defence be given an opportunity to challange *any* (cursivering TS) evidence produced before the Court and on which the Court bases its judgement. *In addition* (cursivering TS), all the evidence must in principle be produced in the presence of the accused at a public hearing, so that it can be discussed by the parties . . ." (§ 48). Vervolgens haalt de Europese Commissie een aantal passages uit de Kostovskizaak aan en vervolgt dan in § 50: "In the light of this case-law, the Commision considers that the requirements of a fair trial and equality of arms *generally make it necessary for all prosecution witnesses* (cursivering TS) to be heard before the trial courts and during adversarial proceedings . . . It is also of *the utmost importance* (cursivering TS) that those courts should be able to observe the witnesses' demeanour under questioning and to form *their own* (cursivering TS) impression of their reliability."

Opmerkelijk is dat de Europese Commissie aan het in § 50 genoemde uitgangspunt vasthoudt en unaniem van mening is dat art. 6 EVRM geschonden is, ook al zijn de getuigen in de aanwezigheid van Cardot door de Rechter Commissaris gehoord en heeft Cardot kennelijk de gelegenheid gehad deze getuigen vragen te (laten) stellen. Niet minder belangrijk is, dat het er voor de Commissie kennelijk niet toe doet dat Cardot de getuigen niet zelf ter zitting heeft opgeroepen, waartoe hij de gelegenheid had. De Commissie constateert slechts dat desbetreffende personen niet op de openbare terechtzitting zijn opgeroepen om te getuigen, waarmee impliciet wordt aangegeven dat dit door de Officier van Justitie of de Rechtbank zelf had moeten worden gedaan. De

Commissie kiest hierbij voor het primaat van de openbare terechtzitting boven de onderzoeken die plaats vinden in de beslotenheid van het kabinet van de rechter-commissaris. Hiermee komt tevens de vanzelfsprekendheid waarmee de de auditu verklaring als bewijs gebruikt wordt op de helling te staan. Bovendien wordt de verantwoordelijkheid voor een eerlijk proces niet alleen op de schouders van de verdediging gelegd, hetgeen de Hoge Raad in toenemende mate doet, maar ook op die van de staande en zittende magistratuur. Indien het Europese Hof dit standpunt overneemt is een diepgaande bezinning op de struktuur van ons gehele strafproces, ook al acht de Commissie Moons dit onwenselijk, wel degelijk nodig wil Nederland nog in de pas blijven lopen met de Straatsburgse Jurisprudentie. Ik ben benieuwd wat het Europese Hof gaat doen, en ik zal wel niet de enige zijn.

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