

LJN: AO7287, Rechtbank Rotterdam , 10/000050-03 Translation in English

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Soort procedure: Eerste aanleg - meervoudig

Inhoudsindicatie: Torture Convention Implementation

## Uitspraak

Public Prosecutor's office no. (of the tried case): 10/000050-03

Date of judgment: 7 April 2004

Judgment in a defended action

## JUDGMENT

of the ROTTERDAM DISTRICT COURT, three-judge section for criminal cases, against:

S. N,

born in ..... (Congo) in 1952,

registered in the municipal personal records database at the address .....,

at the time of the hearing held in pre-trial detention in the penitentiaries Rijnmond, remand prison "De Schie", in Rotterdam.

This judgment was rendered further to the hearing of 24 March 2004.

## CHARGES

The accused is charged with what is stated in the demand "further description of the charges", under Public Prosecutor's office no 10/000050-03. Copy of this demand is attached to this judgment (pages 1A through 1H ).

## THE DEMAND OF THE PUBLIC PROSECUTOR

The Public Prosecutor, Mr. Polescuk, demands - in brief:

- acquittal of the charges mentioned under 2;
- judicial finding of fact regarding the principal charge mentioned under 1 and the charge mentioned

under 3;

- that the accused be sentenced to a five-year term in prison less the period spent in pre-trial detention

## PUBLIC PROSECUTOR ALLOWED TO PROSECUTE

It was put forward on behalf of the accused that the Public Prosecutor is not allowed to prosecute because the right to bring criminal proceedings has lapsed. Counsel for the defence submitted in this regard that on 6 May 1997 the accused was sentenced in Congo to ten years imprisonment, for abuse of authority, extortion, other embezzlement of government funds, customs fraud, threats to kill and random arrests, which punishable offences arose from the charges formulated by J.M. N. Counsel argued that other reported crimes, including those with respect to extortion and rape, formed part of the case file, as part of the evidence, and that these no doubt had had an impact on the severity of the punishment imposed on the accused,

The Court rejects this defence, on the basis of the following considerations.

Neither from the underlying documents, nor from the statement of the accused during trial has it appeared that he was previously tried for the facts that were committed towards X, Y and Z, or that the facts that were submitted to the Court formed part of the facts for which the accused was sentenced in the Democratic Republic of Congo, formerly Zaire, in 1997.

The persons who reported the crimes in the case in suite, X, Y, and Z, apparently decided at the time, although they were aware of the call on the public to report crimes, not to do so. The argument, as the Court understands it, that by refraining from doing so, they forfeited their rights to still report crimes against the accused at a later stage, finds no support in law.

Counsel for the defence furthermore argued that with respect to fact 3, the public prosecutor's office must be barred from prosecution. The Torture Convention Implementation Act was revoked as per 1 October 2003 and replaced by the International Crimes Act (W.i.m.). In the W.i.m., the legislator dropped the link with the term of grievous bodily harm in the (Dutch) Criminal Code. The W.i.m. lists several crimes against humanity separately, including the crime of rape.

In fact 3 of the charge, the Public Prosecutor decided on a description of the offence, but although it would seem to fit with the Torture Convention Implementation Act, the imputed acts as mentioned in the description of the offence form part of the crime of rape, and not of grievous bodily harm within the meaning of the Criminal Code, with which the legislator sought harmonization at the time.

The Court understands this defence of Counsel to be a defence regarding the statement and the particulars of the offence, which may not result, in the event it is considered well-founded, in the public prosecutor's office being barred from prosecution. This means that this is not the place to discuss this defence.

Since no other facts or circumstances are in evidence that would have to lead in the Public Prosecutor

being barred from the prosecution, it is decided that the Public Prosecutor is allowed to prosecute.

## NOT PROVED

The charges mentioned in 2 and 3 are not legally and convincingly proved, so that the accused will have to be acquitted. With respect to the charge mentioned in 3, the Court remarks that as regards the part of the charge that deals with the rape, the case file contains only one statement, that of the person who reported the crime, and that no other evidence has come forward from either the case documents or the hearing.

## PROVED

The Court deems that it is legally and convincingly proved that the accused has committed what he is principally charged with in 1, in the manner as set forth below.

That he, the accused, at some time in or around October 1996, in Matadi, jointly and in conjunction with others, as civil servant, i.e. as member of the Garde Civile (specifically as head of the Garde Civile for the province of Bas-Zaïre) and in the performance of his duties, repeatedly and intentionally inflicted (grievous) bodily harm to someone who was deprived of his freedom, i.e. X, with the object to punish him and to force him to do something, whereas these acts were of such a nature that they were conducive to the intended object, which was that the accused, in the performance of his duties as member of the Garde Civile (specifically as head of the Garde Civile for the province of Bas-Zaïre), jointly and in conjunction with his co-perpetrators, there and then, each time with the said object in mind, intentionally inflicted grievous bodily harm each time on X, who was deprived of his freedom and who was held imprisoned as a civilian on the (fenced off) grounds of the Garde Civile in Matadi, by repeatedly hitting the said X on the body with a closed fist and/or with a cordelette, a kind of closely woven cloth that is used as a belt, and/or by repeatedly kicking against or on the head and/or body and/or repeatedly hitting him against or on the head and/or the body, whereas X suffered injury and severe pain, and intentionally installing a state of extreme fear in X, among other things by making threats, using such terms as: "The country is ours, we are untouchable" and/or: "you will suffer".

What was otherwise charged is not proved. The accused must therefore be acquitted of those charges as well.

Insofar as the charge that is declared proved includes apparent typing errors, they are corrected in the charges proved. According to the proceedings during the hearing, the accused's defence has not been harmed by these errors.

## EVIDENCE

The Court bases its conviction that the accused has committed the proved charges on the facts and circumstances that are mentioned in the legal evidence. In those instances in which the law requires

an addition to the judgment, the evidence will be included in a supplement to this judgment.

## PUNISHABILITY OF THE FACTS

The Court concludes that the facts mentioned under 1 that are declared proved were committed prior to 1 October 2003, which means that the proved facts must be qualified under the Torture Convention Implementation Act.

The charged and proved facts are also punishable facts pursuant to Section 8 of the International Crimes Act as from 1 October 2003. The Court considers that the amendment as per 1 October 2003 does not signify an altered insight of the legislator in the punishability of the facts, on the basis whereof Section 1(2) of the Criminal Code would have to be applied.

The proved facts constitute:

Complicity in torture, repeatedly committed,  
made punishable by Section 1(1) of the Torture Convention Implementation Act, in conjunction with Section 47 of the Criminal Code.

No facts or circumstances are in evidence that exclude the punishability of the facts. The facts are punishable.

## PUNISHABILITY OF THE ACCUSED

No facts or circumstances are in evidence that exclude the punishability of the accused. The accused is punishable.

## SUBSTANTIATION OF THE PUNISHMENT

The punishment that is imposed on the accused is based on the seriousness of the facts, the circumstances under which the facts were committed and the person and the personal circumstances of the accused, as they have appeared during the hearing. The following is specifically considered in this regard.

During the reign of president Mobutu , in 1996, the accused was commander of the Garde Civile, stationed in Matadi. Among the population and within the Garde Civile, the accused was known under the alias "Roi des bêtes" (King of the beasts). As commander of the Garde Civile, the accused had the victim, who was employed as clearer in the port of Matadi, arrested by his subordinates / bodyguards. These bodyguards moved the victim to the premises of the Garde Civile, locked him up in one of the cells and systematically inflicted grievous bodily harm on the victim for a number of days, on the orders of the accused. The victim was beaten, in a state of virtual undress, with a cordelette (a closely woven belt), and was used, in his own words, as a punching bag by the bodyguards. The accused watched all this from his balcony. The purpose of inflicting this grievous bodily harm was to punish the victim because he had refused to clear the car of one of the accused's friends, who did not want to pay the shipping costs due, and to force the victim to release the car as

yet. After having been abused for a number of days, the victim was brought before the accused, who ordered him to ensure that the car was cleared within 48 hours as yet. In order to do so, the victim was forced, in the end, to pay the shipping costs himself.

It must have been a terrifying experience for the victim to be at the whims of the accused. It is expected that he will suffer the psychological consequences of these experiences for years to come.

Torture is a very serious offence, which creates widespread indignation and unease, not only in Congo, but internationally as well. The seriousness of the torture is to be found in the fact that it was carried out by the authorities, or by a civil servant, causing the victim to believe, whether or not justified, that there was nothing he could do about it, because if he wanted to file a complaint or report a crime, he would have to turn to those same authorities. In addition to the emotional and physical pain he has suffered, this caused feeling of powerlessness and a feeling that one is completely in the power of his torturer.

The acts that are proved in respect of the accused also touches on the Dutch legal order, since the accused has taken up residence in this country, and especially since he has expressed a desire, by submitting an application for asylum, that he wants to (continue to) be a part of Dutch society. The acts of the accused, whereby he abused his position, and seriously affected the physical and mental integrity of the victim, acting in violation of the universal respect for human rights and the fundamental freedoms, show a complete lack of respect for the dignity of a fellow human being. Notwithstanding the amount of time that has passed since the facts were committed, this justifies the imposing of a nonsuspended prison sentence of considerable length.

In determining the length of the punishment, the Court also considers that the alias "Roi des bêtes" (King of the beasts), under which the accused was generally known in the former Zaire, as well as the fact that the accused was sentenced in that country on 6 May 1997, as previously mentioned, would seem to indicate that the facts that are now proved were not isolated facts.

Taking all this into consideration, the Court deems the below-mentioned punishment as fitting and necessary.

## OBJECTS SEIZED

During trial, the Public Prosecutor has limited the list of objects seized to the objects mentioned under 1 and 2 and demanded that the piece of paper and the envelope in the possession of the accused that were seized be returned to the accused.

In this regard, the Court considers the following:

Since the piece of paper and the envelope were seized from the accused and since he may reasonably be regarded as an interested party, the Court will order that these objects be returned to him.

## APPLICABLE STATUTORY REGULATIONS

The punishment to be imposed is based, in addition to the previously mentioned Sections, on Section 57 of the Criminal Code.

## DECISION

The Court:

- rules that the Public Prosecutor is allowed to prosecute;
- rules that it has not been proved that the accused has committed the facts with which he is charged as mentioned under 2 and 3 and acquits the accused of these charges;
- rules that it is proved that the accused has committed the facts with which he is principally charged as mentioned under 1, as described above;
- rules that all other facts with which the accused is charged are not proved, other than those ruled to be proved above, and acquits the accused of these charges as well;
- decides that the proved principal facts mentioned under 1 constitute the previously mentioned punishable facts ;
- rules that the accused is punishable with respect to the facts;
- sentences the accused with respect to the proved principal facts mentioned under 1 to a term of imprisonment of two (2) years and six (6) months;
- orders that the time the convicted person has spent in custody and pre-trial detention before the execution of this judgment be deducted from the imposed prison sentence, insofar as this period has not already been deducted from another custodial sentence;
- decides with respect to the objects that are included on the list of seized objects and that have not yet been returned, as follows:  
orders that a piece of paper and an envelope be returned to the accused.

This judgment was rendered by:  
Mr Buchner, chairman,  
and Messrs Pit and Jofriet, judges,  
in the presence of Mr Van der Veer, clerk of the Court,  
and pronounced in open session of this Court on 7 April 2004.