COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF BOCOS-CUESTA v. THE NETHERLANDS

(Application no. 54789/00)

JUDGMENT

STRASBOURG

10 November 2005

FINAL

10/02/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bocos-Cuesta v. the Netherlands,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mr DAVID THÓR BJÖRGVINSSON,
Ms I. ZIEMELE, *judges*,
Mrs W. THOMASSEN, ad hoc *judge,*
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 October 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 54789/00) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Mr Martin Bocos-Cuesta ("the applicant"), on 27 December 1999.

2. The applicant was represented by Mr G.P. Hamer, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that he had not had a fair trial under Article 6 §§ 1 and 3 (d) of the Convention in criminal proceedings taken against him in that statements given by four minors were used in evidence whereas the defence had never been provided with an opportunity to question them.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 11 March 2003, the Court declared the application partly inadmissible and communicated the above complaint to the respondent Government. By a decision of 5 October 2004, the Court declared the remainder of the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

7. Mr Myjer, the judge elected in respect of the Netherlands, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mrs W. Thomassen to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1976 and lives in Barcelona.

10. On 3 May 1997, the mother of A., a then ten-year old boy, filed a criminal complaint with the police alleging that on 1 May 1997 A. had been sexually assaulted by an unknown man at a playground. On the same day Mr Z., an officer of the Juvenile and Vice Police (*jeugd- en zedenpolitie*), took a statement from A., as well as from his mother.

11. On 11 May 1997, the mother of B., a then six-year old boy, informed the police that on 10 May 1997 an unknown man had sexually assaulted B.

12. On 12 May 1997, on the basis of descriptions given to the police by A. and B., the applicant was arrested in Amsterdam and detained on remand.

13. On 13 May 1997, A. was confronted with the applicant through a two-way mirror and identified him as the man who had assaulted him. According to the record of this confrontation drawn up by Mrs X., an officer of the Juvenile and Vice Police, A. had slightly recoiled when he saw the applicant, saying “That is him”. A. was also shown a rucksack, which he identified as belonging to the applicant. A. further declared that a woman from the neighbourhood had spoken with the man and that she had told him that the man spoke Spanish.

14. On the same day, Mrs E. – a maternal aunt of B. – gave a statement to the police in which she stated that on 10 May 1997, directly after having been told by her son W. that a man had touched the genitals of his cousin B., she had left her house in order to find this man, that she had found a man who matched the description given by her son and who was identified by B. and W. who had accompanied her, that he was sitting with some children and that this man had run away from her. One of these children, C., had told her that the man had stuck his hand into C.'s pants and that C. had then slapped the man's hand. When confronted with the applicant through a two-way mirror, she stated that she believed that he was the man whom she had seen on 10 May 1997. However, as he no longer had a beard and was

looking neater and cleaner, she did not dare to say that she recognised him with 100%, rather with 80% certainty.

15. Also on 13 May 1997, B.'s mother filed a criminal complaint with the police against the unknown man who had sexually assaulted her son. On the same day, Mrs Y., an officer of the Juvenile and Vice Police, took a statement from B. When subsequently confronted with the applicant through a two-way mirror, he identified the applicant as the man who had sexually assaulted him. B. was further shown a rucksack, which he identified as belonging to the applicant.

16. On 13 May 1997, the mother of C., a then nine-year old boy, filed a criminal complaint with the police against an unknown man who had sexually assaulted her son on 10 May 1997. In his statement to the police officer Mrs Y., C. gave a description of the man. According to the record drawn up by Mrs Y., C. visibly reacted in fright when he was subsequently confronted with the applicant through a two-way mirror, identified him as the man who had sexually assaulted him and started crying. C. was further shown a rucksack, which he identified as belonging to the applicant. According to the police record drawn up on 14 May 1997, the description given by C. of the pants worn by the perpetrator corresponded to pants found in the applicant's possession.

17. A statement was also taken from C.'s mother, who declared that her son had told her on 10 May 1997 that a man had touched his private parts.

18. On 14 May 1997, the police took a statement of Mrs F. who was living on a houseboat near to a playground where, on 1 May 1997, she had seen, met and spoken with the applicant. When subsequently confronted with the applicant through a two-way mirror, she stated:

> "That is the boy with whom I have spoken. I am fully, 100 %, certain; no mistake is possible. I recognise the boy's face."

19. On 22 May 1997, the mother of D., a then eleven-year old boy, filed a criminal complaint with the police against an unknown man who had sexually assaulted her son D. earlier that month. On the same day, the police took a statement from D. in which he described how a man had touched his private parts, that this man had stopped this when he had started to scream, that he had then gone to his mother and told her what had happened, that later on the same day he had seen this man again, and that an angry woman had then approached this man who then ran away.

20. On 2 June 1997, D. was confronted with the applicant through a two-way mirror. According to the record drawn up by Mrs Y., D. identified the applicant as the man who had sexually assaulted him.

21. The applicant was subsequently summoned to appear before the Amsterdam Regional Court (*arrondissementsrechtbank*) on 2 July 1997 in order to stand trial on charges of sexual assault and acts of indecency with persons younger than sixteen.

22. On 24 June 1997 the applicant's lawyer requested the public prosecutor to summon the four boys, Mrs E. and Mrs F. to appear before the Regional Court in order to be heard as witnesses, stating:

> "In his conversations with me, my client has repeatedly and with force indicated that he is innocent of the facts he has been charged with. Under these circumstances my client has the right and has an interest in being confronted in court with [these six] witnesses and to be given the opportunity to put (or have put) questions to them. My client and I have no objections to that hearing being held in camera."

The public prosecutor rejected this request by letter of 13 June 1997, considering that it would be particularly difficult, given their young age, to hear the four boys. Moreover, the defence had failed to indicate in any way – apart from a mere denial of the facts by the applicant – on what grounds it doubted the reliability of the confrontations which had taken place and the statements which had been given at the investigation phase.

23. At the hearing of 2 July 1997 before the Regional Court, the defence reiterated its request to hear the four boys, if appropriate in camera, as well as Mrs E. and Mrs F., stating:

> "My client denies wholeheartedly the charges against him. Therefore I wish to hear the victims [A., B., C. and D.] in court, as a mistake in identity is possible. It is very well possible that the four victims, under the stress that reigns at a police station, identified my client as the perpetrator because they have only been confronted with him. It is therefore in my client's interest to be confronted again [and] in court with the victims. ... Mrs F has only seen my client talking and has seen nothing punishable. Yet in the records she is presented as an important witness. I would therefore like to hear her, in particular about the impression my client made on her while he [roller]skated away. I finally wish to hear [Mrs E.] in court. Although she is an indirect witness, as she has no own knowledge of the perpetrator's physical features, she can contribute to exculpating my client. During the mirror-confrontation she has not recognised my client for the full hundred percent as the person she had seen."

24. The prosecution opposed the request to hear the four boys, but not the request to hear the other two witnesses.

25. Having deliberated, the Regional Court rejected the request to hear the four victims, holding:

> "A one-to-one identification through a two-way mirror (*enkelvoudige spiegelconfrontatie*) has taken place at the police station, the value of which is now challenged by the defence. Now counsel asks for a new one-to-one confrontation (*enkelvoudige confrontatie*) in court between the victims and the accused. On this point, the court considers that such a confrontation between the witnesses and the accused cannot change or add anything to the confrontations that have taken place previously."

26. The Regional Court granted the request of the defence to hear Mrs E. and Mrs F. In order to allow the prosecution to comply with a request from Interpol to provide the latter with a photograph of the applicant as well as his fingerprints so as to compare these with materials held by the Spanish

police, the Regional Court adjourned its further examination of the case for a maximum period of three months.

27. The Regional Court resumed its examination on 20 August 1997. The applicant was present. The Regional Court noted that the following items had been added to the applicant's case file: photographs of the applicant taken by the Spanish police, a fax message dated 14 July 1997 from Interpol Madrid concerning pending preliminary judicial investigations against the applicant in Barcelona in respect of, *inter alia*, exhibitionism and the sexual provocation of minors, and a formal record dated 19 August 1997 of the forensic bureau of the Amsterdam-Amstelland police, according to which the applicant's fingerprints matched those taken from him by the police in Barcelona on 31 May 1995.

28. The applicant accepted that he was the man in the police photographs, and confirmed that the Spanish police had taken his fingerprints on 31 May 1995. He further confirmed that, on 12 December 1995 in Tarragona (Spain), he had been convicted for the sexual assault of minors and sentenced to six months' imprisonment. He further denied the facts with which he had been charged in the Netherlands.

29. Upon the request of the defence, the Regional Court then heard Mrs E. and Mrs F. Although both witnesses identified the applicant as the man they had seen at the material time, the applicant denied ever having seen the two women.

30. After having heard the parties' final pleadings, the Regional Court closed the trial proceedings and set a date for judgment.

31. In its judgment of 3 September 1997, the Regional Court convicted the applicant of sexual assault and of acts of indecency with persons younger than sixteen and sentenced him to twenty months' imprisonment. The applicant filed an appeal with the Amsterdam Court of Appeal (*gerechtshof*).

32. On 26 January 1998, a hearing was held before the Court of Appeal in the course of which the applicant made both oral and written submissions in which, *inter alia*, he denied the charges against him and challenged the reliability of his confrontation with the various witnesses and the credibility and reliability of the latter's statements. The Court of Appeal further took note of a request filed by the defence to refer the case back to the investigating judge (*rechter-commissaris*) in order to hear the four boys as witnesses and for an identification of the applicant by putting a selection of photographs of different persons to the witnesses (*meervoudige / keuze-foto-confrontatie*). In this connection, the lawyer acting for A. and his mother submitted that A. had been quite shocked by the events, that he no longer did certain things alone, asking to be accompanied, and that it was very difficult for him to come to terms with what had happened to him.

33. The applicant also submitted written pleadings prepared by himself in Spanish in which, *inter alia*, he challenged the reliability of his

confrontation with the various witnesses and the latter's statements, and in which he stated that a second confrontation in the form of an identity parade would be pointless as the victims had already seen and identified him as the perpetrator in the course of a one-to-one identification through a two-way mirror. The President of the Court of Appeal ordered that this document be translated into Dutch and be added to the applicant's case-file.

34. After having heard the parties' pleadings, the Court of Appeal closed the trial proceedings, stated that it would determine the requests made by the defence in its judgment and set a date for judgment.

35. In its interim judgment of 9 February 1998, the Court of Appeal stated that it had appeared during its deliberations that its investigation was incomplete. It found it necessary, therefore, to take evidence from the police officers X., Y. and Z. in relation to the manner in which the victims had been questioned and confronted with the applicant. To this end, it fixed a hearing for 16 April 1998. It further ordered that the applicant was to be released from pre-trial detention on 10 February 1998.

36. On 16 April 1998, the Court of Appeal reopened the trial proceedings. The applicant, who had been released in the meantime, did not appear. His lawyer, who was present, informed the Court of Appeal that the applicant was being detained in Spain, and that he had instructed his lawyer by telephone to request the Court of Appeal to proceed with the trial proceedings in his absence.

37. The Court of Appeal heard the police officers X., Y. and Z. After having heard the parties' final submissions, the Court of Appeal closed the proceedings and set a date for judgment.

38. In its judgment of 27 April 1998, the Court of Appeal quashed the Regional Court's judgment of 3 September 1997, convicted the applicant of sexual assault and acts of indecency involving persons under sixteen years of age and sentenced him to fifteen months' imprisonment of which five months suspended pending a two years' probationary period, and less the time spent in pre-trial detention. It also ordered the applicant to pay A., who had joined the criminal proceedings as a civil injured party (*benadeelde partij*) and who had filed a claim for compensation, an amount of 500 Netherlands Guilders (“NLG”; i.e. 226.89 euros; “EUR”) for non-pecuniary damage.

39. It based the applicant's conviction on a statement he had made before the Court of Appeal, the criminal complaints filed containing a description of the perpetrator given by the four victims, the statements made by the four victims to the police, the record of the two police officers who arrested the applicant and considered that the applicant corresponded to the description of the perpetrator, the records on the mirror-confrontations between the applicant and the four victims, and the statements given by Mrs E. and by Mrs F.

40. As regards the evidence the Court of Appeal held, in so far as relevant, as follows:

"2. ... during the hearing of 26 January 1998 ... the accused requested to be allowed, relying on [the Convention] to question the four minor children.

3. In its interim judgment of 9 February 1998, the court [of appeal] has lifted the pre-trial detention of the accused. It also reopened the trial proceedings, which had been closed on 26 January 1998, in order to hear the reporting police officers [X., Y. and Z.] on the manner in which the minor children had been questioned and the manner in which the confrontations had been conducted. These reporting police officers were heard as witnesses during the hearing of 16 April 1998. The accused did not appear at this hearing. His lawyer has indicated that he had had a contact by telephone with his client who was in Barcelona. [The applicant] had told [his lawyer] that he did not object to the further continuation of the trial proceedings in his case in his absence.

4. It follows from the above that the court, in its interim judgment of 9 February 1998, has not as yet granted the accused's request to hear the four minor children. The court heard the above-cited reporting police officers during the hearing of 16 April 1998 in order to obtain additional information about the manner in which the four children have been questioned and confronted with the accused. Also noting what has been stated by the reporting police officers [X., Y. and Z. at the hearing of 16 April 1998], the court considers that there is no necessity to hear the four children as witnesses. In so far as the request [to hear the four children] made by the defence is maintained – the applicant's lawyer having indicated at the hearing of 16 April 1998 that he did not wish to hear any further witnesses – the court rejects it. In balancing all interests involved, the court is of the opinion that the interests of the four still very young children in not being forced to relive a, for them, possibly very traumatic experience must be given priority over the interests of the suspect in hearing these children.

5. The court must now address the question whether the statements of the four children, having regard to the manner in which they have been questioned and confronted with the suspect, are sufficiently reliable to be used in evidence ... It must also be examined whether their statements may be used in evidence although the suspect has never been given the opportunity to question them.

6.1. In relation to the first question the court considers as follows: Although in general it is preferable for a witness to be given a choice between various options in a confrontation for identification purposes (*meervoudige keuzeconfrontatie*) instead of being confronted with only one person (*enkelvoudige confrontatie*), it cannot be said as a rule that the result of [the latter method] can only be used in evidence when it has appeared that the [former method] could not be used. There may be cause to exclude such a result when the manner in which a confrontation with only one person has taken place is incompatible with the fair conduct of proceedings or where the result finds insufficient support in other evidence.

6.2. Altogether six persons have been confronted with the suspect via a two-way mirror. Apart from the minor witnesses [A., B., C. and D.], adult witnesses [Mrs E. and Mrs F.] were involved here. A reading of the records of questioning and confrontation makes it clear that, in five of the six cases, a questioning in which the witness was asked to give a description of the suspect preceded the confrontation. ...

Only in the case of Mrs E. this sequence was apparently different. In five of the six cases the most important procedural condition for obtaining reliable results in carrying out a confrontation has thus been complied with. In addition, it does not appear from the [police] records or from the reporting officers' oral evidence in court that these officers would have acted in a leading manner in the confrontations at issue.

6.3. The descriptions given by the six witnesses to the police show a high level of similarity. It transpires from the totality of the descriptions given that the person described was a young man, that he spoke another language than Dutch, had particular eyes, wore a cap and carried a (black-and-white) rucksack. The different witnesses each time mentioned three or more of these features ... In the [witnesses'] description of the suspect there are no points of contradiction. In the confrontation, five witnesses recognised the suspect on the basis of the features previously indicated by them. In their recognition of the suspect the witnesses demonstrated either as, in the case of Mrs E., little doubt, or a definite certainty.

6.4. On grounds of the above, the court does not doubt that the witnesses have wished to indicate the suspect as the person who has committed the facts [at issue] and that a mistake in identity cannot have arisen. The recognition by each separate witness each time finds support in the recognition by the five other witnesses. This entails that, from the point of view of reliability, the result of the confrontations carried out can be used in evidence.

6.5. Also noting the above the court finds no necessity to have an identification of the perpetrator by putting a selection of photographs of different persons to the witnesses (*meervoudige fotoconfrontatie*) carried out. The accused himself has – not incomprehensibly– indicated [during the appeal trial proceedings] that, after the mirror-confrontations already carried out, he did not consider this now useful anymore. In so far as the defence would maintain this request – the applicant's lawyer having indicated at the hearing of 19 April 1998 that he had no objection to the closure of the trial proceedings – the court rejects this request.

7.1. The remaining question is whether the statements of the four children can be used in evidence although the suspect has not had the opportunity to question them himself. The court's first consideration is the fact that Article 6 [of the Convention], particularly in the light of some recent [Strasbourg] decisions given on applications brought against the Netherlands, does not unconditionally oppose the use in evidence of statements given by witnesses whom a suspect has not been able to question. There is room for the balancing of interests. In its judgment of 26 March 1996 in the case of *Doorson v. the Netherlands*, the European Court [of Human Rights] considered in this respect that the principles of a fair trial also require that, in appropriate cases, the interests of the suspect in questioning [witnesses] are to be balanced against the interests of witnesses and victims in the adequate protection of their rights guaranteed by Article 8 [of the Convention]. In the opinion of the European Court, briefly summarised, in balancing these interests much weight must be given to the question whether the handicaps under which the defence labours on account of the inability to questioning a witness in an indirect manner are compensated, and whether a conviction is based either solely or to a decisive extent on the statement of this witness. In its report of 17 May 1995 [in the case of *Finkensieper v. the Netherlands*, no. 19525/92], the European Commission [of Human Rights] adopted an essentially similar opinion.

7.2. In the light of these decisions, the following can be said. As already found by the court, the interests of the four children in not being exposed to reliving a possibly traumatic experience weighs heavily. With that, as also already found by the court, stands the fact that the confrontations of these four witnesses with the suspect have been carried out with the required care, and that the results thereof, as already found earlier, are particularly reliable. As regards the acts themselves of which the suspect stands accused, the court finds it established that the four children have all been questioned by (or assisted by) investigation officers of the Amsterdam Juvenile and Vice Police Bureau with extensive experience in questioning very young persons. It has become plausible from the records drawn up by them and from the oral evidence given in court by these civil servants that the four children have been questioned in an open, careful and non-suggestive manner. What these children have stated, independently of each other, finds corroboration ... in what the other children have declared. In addition, important support for the veracity of their accounts is also to be found in the statements of the witnesses Mrs E. and Mrs F., witnesses whom the defence has been able to question at the hearing held before the Regional Court on 20 August 1997. It does not appear from the record of this hearing that their statements were challenged by the defence, only that the suspect did not recognise these witnesses. [The court further notes that] no request for their appearance in the proceedings on appeal has been made. Taking into account these circumstances as a whole, the court does not find a violation of the suspect's right to question witnesses in using as evidence ... the statements of the four children.

8. On the above grounds, the court is of the opinion – with the required cautiousness – that the statements of the children, as set out in the means of evidence, are reliable and credible and, furthermore, eligible to be used in evidence."

41. On 4 May 1998, the applicant's lawyer filed an appeal in cassation, which is limited to points of law and procedural conformity, with the Supreme Court (*Hoge Raad*).

42. On 6 May 1999, the applicant's lawyer completed the applicant's appeal in cassation by submitting the grounds of the appeal, in which it was denied that the applicant had dropped his request to hear the four children. In this connection it was, *inter alia*, pointed out that, in its ruling of 27 April 1998, also the Court of Appeal had assumed that this request had not been withdrawn.

43. On 25 June 1999, the applicant's lawyer further submitted a response to the advisory opinion of the Advocate General to the Supreme Court who, in that opinion, did not address the question whether or not the applicant had withdrawn or maintained his request to hear the four children but who did find that the reason given by the Court of Appeal for rejecting the applicant's request to hear the four children was insufficient in that it had failed to establish or consider whether and why an adapted manner of questioning was not possible. In this respect, the Advocate General referred to the possibility to question the witnesses in the absence of the accused, the latter being in another room where he could follow the questioning on a television screen and, from there, have questions put to the witnesses.

44. In its judgment of 12 October 1999, the Supreme Court rejected the applicant's appeal, subject to the correction of a clerical oversight in the

Court of Appeal's judgment of 27 April 1998. In so far as the applicant complained that the Court of Appeal had used in evidence the statements given by the four boys, although they had never been heard by a judge and/or in the presence of the defence, and despite a request thereto filed by the defence, the Supreme Court held that it was not necessarily contrary to Article 6 to use in evidence statements of such witnesses where such evidence was sufficiently supported by other evidence. Having regard to the manner in which the Court of Appeal had set out in its judgment, as regards each separate offence of which the applicant had been convicted, the evidence given by each of the boys and other pertinent evidence, the Supreme Court noted that the other evidence related each time to those parts of the boys' statements that were disputed by the applicant. The Supreme Court concluded that it was implicit in the Court of Appeal's findings that it had found the supporting evidence to be sufficient and that this finding, in itself not incomprehensible, could not be examined further in cassation proceedings.

45. The Supreme Court also rejected the applicant's argument that the Court of Appeal had unjustly found that it was not necessary to hear the four minors as witnesses. It did not deal with the question whether or not the applicant had withdrawn or maintained his request to hear the four children. As regards the reasons given by the Court of Appeal for not acceding to this request, the Supreme Court held:

> "In rejecting the request to hear the four minors as witnesses, the Court of Appeal ... has applied the correct standard. Nor is this decision [of the Court of Appeal] incomprehensible, since it follows logically from the establishment of the interest of the four still very young children in not being forced to relive a, for them, possibly very traumatic experience, that every confrontation with these experiences in pursuit of the criminal investigation, however organised, must be avoided."

II. RELEVANT DOMESTIC LAW AND PRACTICE

46. The finding that an accused has committed the act with which he or she is charged must be based on "legal means of evidence" ("*wettige bewijsmiddelen*") within the meaning of Article 338 of the Code of Criminal Procedure (*Wetboek van Strafvordering*; "CCP"). "Legal means of evidence" include, *inter alia*, the personal observations of the judge, the statements of the accused, the statements of witnesses relating to facts or circumstances which they themselves have witnessed, the formal minutes and records and other written documents (Article 339 § 1 and Article 344 §§ 1 and 2 of the CCP).

47. The public prosecutor has the power to call witnesses and experts to the trial court hearing (Article 260 § 2 of the CCP). In the summons to the accused the public prosecutor gives a list of the witnesses and experts to be brought forward by the prosecution. If the accused wishes to call witnesses,

he or she can submit a request to the public prosecutor to summon a witness before the court. Such a request must be filed no later than three days before the court hearing (Article 263 § 2 of the CCP).

48. As a rule, the public prosecutor should summon the witness, but – according to Article 263 § 4 of the CCP as in force until 1 February 1998 – the public prosecutor could refuse to do so if it could be reasonably assumed that no prejudice to the rights of the defence would be caused if the witness was not heard in court. The public prosecutor had to give a reasoned decision in writing and at the same time inform the defence of its right under Article 280 § 3 of the CCP – as in force until 1 February 1998 – to renew the request to the trial court at the hearing.

49. If the public prosecutor had failed to summon a witness at the request of the accused, or declined to do so, the defence could, at the opening of the trial court proceedings, ask the court to have that witness summoned (Article 280 § 3 of the CCP). The trial court would accept such a request, unless it considered that the non-appearance of the witness could not reasonably be considered prejudicial to the rights of the defence (Article 280 § 4 of the CCP as in force until 1 February 1998).

50. A request by the defence to hear a witness who has not been placed on the list of witnesses, who has not been convened to attend the trial and whose summons the defence has not sought in accordance with (former) Article 280, fell under Article 315 of the CCP. Under this provision the trial court has the power to order, of its own accord, where it finds this to be necessary for the determination of the charges, the production of evidence, including the summoning of witnesses whom it has not yet heard.

51. If the trial court finds it necessary to have any factual question examined by the investigating judge, it must suspend the hearing and refer the question to the investigating judge along with the case file. The investigation carried out by the investigating judge in these cases is deemed to be a preliminary judicial investigation and is subject to the same rules (Article 316 of the CCP).

52. Appeal proceedings against the conviction or sentence at first instance involve a complete rehearing of the case. Both the prosecution and the defence may ask for witnesses already heard at first instance to be heard again; they may also produce new evidence and request the hearing of witnesses not heard at first instance (Article 414 of the CCP). The defence enjoys the same rights as it does at first instance (Article 415 of the CCP).

53. Although the provisions of the CCP, as in force until 1 February 1998, in respect of witnesses did not provide for a possibility to take account of their interests, it was accepted in the case law that a trial court, in its determination of a request by the defence to hear a witness, could take into account, to a certain extent, the latter's interests. In a judgment given on 9 February 1993, the Supreme Court accepted the reasons given by the Court of Appeal to refuse a request under Article 280 §

3 of the CCP by the defence to take (further) evidence from the victim of a sexual offence, a 22 year old woman with Down's syndrome. The Court of Appeal had considered that, given her mental condition and her clear distress in response to questioning, followed by an inability to provide any further answers to the investigating judge, it could not reasonably be expected of her to be exposed to the stress of a hearing. Moreover, the failure to take further evidence from her would not harm the accused in his defence to such a degree that – after having balanced the interests of the defence against those of the witness – the proceedings could not longer be considered as fair within the meaning of Article 6 of the Convention. However, the Supreme Court did take into account the fact that the defence had been given an opportunity to provide the investigating judge with written questions and that these questions had in fact been put to the witness (*Nederlandse Jurisprudentie* (Netherlands Law Reports) 1993, no. 603).

54. On 1 February 1998, an amendment to a number of provisions of the CCP entered into force. According to the amended Article 264 § 1 (b) and (c) of the CCP, the public prosecutor may refuse the request of an accused to summon a witness in order to give evidence in court, where the prosecutor considers that there are well-founded reasons to believe that such oral testimony would entail a serious risk for the witness's health, or when the refusal of such a request, in all reasonableness, cannot be regarded as harming the accused's defence. On the same grounds, a trial court may decide not to hear a witness proposed by the defence (Article 288 § 1 (b) and (c) of the CCP).

55. Only in very rare cases are young children heard as witnesses before a court. In most cases, such witnesses are heard by an investigating judge. Witnesses younger than sixteen years of age – when heard before an investigating judge – are exempted from the obligation to testify under oath, but are urged to speak the whole truth and nothing but the truth (Article 216 § 2 of the CCP).

56. When a trial court uses such a statement in evidence, it should give special reasons in its judgment for doing so (Article 360 § 1 of the CCP). This requirement does, however, not apply where it concerns a statement of a child set out *de auditu* in a written record (*proces-verbaal*) drawn up by an officer with powers of investigation (*opsporingsambtenaar*) (*Hoge Raad*, 6 February 1990, *Nederlandse Jurisprudentie* 1990, no. 482).

57. On 1 January 2003, an amendment to Article 457 of the CCP, which provision governs the possibilities to obtain revision (*herziening*) of final judgments, entered into force. This amendment extended the existing grounds on which a revision of a final conviction can be sought by including as a ground for revision a ruling by the Court that the criminal proceedings having led to that conviction had been in violation of the Convention. The amended text of Article 457 of the CCP reads, in so far as relevant, as follows:

"1. An application for revision of a final ruling (*eindbeslissing*) entailing a conviction which has obtained the force of *res iudicata* can be filed: ...

3°. on grounds of a ruling of the European Court of Human Rights in which has been established that [the Convention or one of its Protocols] has been violated in the proceedings having led to the conviction ... if revision is necessary with a view to reparation within the meaning of Article 41 of [the Convention]."

A request for revision can be filed with the Supreme Court by the Procurator-General, the convicted person or the latter's lawyer within a period of three months after the convicted person has become aware of the Court's ruling referred to in Article 457 § 1 under 3 (Article 458 of the CCP).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

58. The applicant complained that, in the criminal proceedings against him, he was deprived of a fair trial in that the statements given by A., B., C. and D. to the police were used in evidence without the defence ever having had an opportunity to question them. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which in its relevant part reads:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal...

3. 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;

..."

A. The parties' submissions

1. The Government

59. The Government submitted that, although the applicant had not been given the opportunity to follow the interviews of the four victims by the police and had not been able to have questions put to them, the use in evidence of these four victims' statements was not contrary to his rights under Article 6 of the Convention. In the first place, the applicant had

consistently disputed the victims' identification of him as the perpetrator, but not the facts of the case. Secondly, the public prosecutor had refused the applicant's request to take further evidence from the victims considering that this would be extremely distressing for the children. Moreover, the applicant had failed to indicate on what grounds he wished to query the identification procedure and the statements taken from the four boys during the initial investigation. Thirdly, the Court of Appeal did grant his request to take further evidence from the adult witnesses, Mrs E. and Mrs F., whose statements corroborated the children's statements, and from the police officers X., Y. and Z. The Government further pointed out that, after X., Y. and Z. had been heard before the Court of Appeal on 16 April 1998, the applicant's lawyer had indicated that the defence did not wish to take further evidence from them or any other witnesses and did not explicitly persist in its request to hear the four children.

60. The Government distinguished the present case from that of *P.S. v. Germany* (no. 33900/96, 20 December 2001), the four victims having given statements independently of each other concerning the same suspect and similar acts, which statements corroborated one another. In the opinion of the domestic judicial authorities, there was sufficient evidence to corroborate the victims' statements, including the statements given by Mrs E. and Mrs F. The Government argued that, in balancing the respective interests of the applicant and the victims, the judicial authorities could conclude in all reasonableness that there was no need to summon the latter to give further evidence in court. On this point, the Government further emphasised that the defence had an opportunity at every stage of the proceedings to challenge the reliability of the statements given by the four boys and, relying on the Court's considerations in the case of *Asch v. Austria* (judgment of 26 April 1991, Series A no. 203, p. 10, § 27), that Article 6 of the Convention does not require a direct confrontation with witnesses in all circumstances.

2. The applicant

61. The applicant submitted that, in the criminal proceedings against him, he had not only challenged his identification as the perpetrator but also consistently denied having committed acts of indecency. He further submitted that his conviction was based to a decisive degree on the statements given to the police by A., B., C. and D., and that his attempts to obtain further evidence from the four victims were invariably refused by the domestic judicial authorities who, in so doing, paid no attention whatsoever to the interests of the defence. The applicant further submitted that in the proceedings before the Court of Appeal, he himself had requested – both orally and in writing – to hear the four children and he had persisted in this request throughout the entire proceedings. According to the applicant there is no rule compelling the defence to repeat requests, which have not yet

been determined. Moreover, it does not emerge from the official record (*proces-verbaal*) of the hearing of 16 April 1998 that the defence withdrew the request to hear the four victims. The fact that his lawyer indicated at the end of this hearing that he did not wish to hear any further witnesses can, according to the applicant, only be taken as referring to witnesses other than the four boys. Any other interpretation would defy logic. Moreover, it is clear from its judgment that the Court of Appeal acted on the basis of the supposition that the request to hear the four victims had been maintained and had never been waived, and also the Supreme Court considered the applicant's complaint relating to the trial courts' failure to hear the four victims during the trial proceedings on the basis of the assumption that the request to this effect by the defence had been maintained throughout.

62. According to the applicant, it would have been feasible to give the defence an opportunity to test the reliability of the four boys in a less invasive manner than by hearing them in court, for instance, by having them heard by an investigating judge on questions put in writing by the defence, or in a studio enabling the applicant and/or his lawyer to be present, at least indirectly via a video-link. Nor had he been provided with any other way of offsetting the violation of his right to cross-examine the four victims, for instance, by having video recordings of the hearings of the victims by the police played in court. The domestic courts only heard the reporting police officers, which cannot be regarded as satisfactory for the assessment of the reliability of the four witnesses.

63. The applicant further refuted the Government's argument that his defence rights under Article 6 were not violated because it had been possible for him throughout the proceedings to challenge the statements given by the four victims. In the applicant's opinion, the possibility to challenge evidence given by a witness cannot be considered on a par with the possibility to put questions to a witness. In the present case, no involvement of the applicant or his lawyer was possible when the four victims were heard by the police, and at no point in the proceedings against him was he given an opportunity to question the four victims, to have them questioned, to see or hear what exactly they had said and, thus, to observe their demeanour under direct questioning in order to assess their reliability.

B. The Court's assessment

64. The Court first notes that the guarantees in Article 6 § 3 (d) of the Convention are specific aspects of the right to a fair trial set forth in the first paragraph of this Article. Consequently, the complaint will be examined under the two provisions taken together (see, for instance, *Yavuz v. Austria*, no. 46549/99, § 44 with further references, 27 May 2004).

65. As regards the question whether the applicant or his lawyer had dropped the request to hear the four children at the closure of the trial

proceedings before the Court of Appeal, the Court reiterates that the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner (see, among other authorities, *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 26).

66. The Court notes in the present case that, throughout the entire trial proceedings, the applicant clearly and repeatedly requested the courts to allow the defence to question the four children. The Court further notes that, in its judgment of 27 April 1998, the Court of Appeal rejected this request, giving reasons for so doing. Although it noted that the remark by the applicant's lawyer after the hearing of witnesses on 16 April 1998 that he did not wish to hear any further witnesses could be interpreted as also referring to the four children, it did not base its decision on such an interpretation but on other substantive grounds. Moreover, the Supreme Court did not reject the applicant's complaint about the refusal of his request to hear the children on the basis that he had withdrawn it, but assessed and accepted as correct the reasons given by the Court of Appeal for its refusal of that request. The Court, therefore, finds that the applicant cannot be regarded as having waived his rights under Article 6 as to the hearing of these witnesses.

67. As regards the evidence given by the four victims and the manner in which it was used in the criminal proceedings at issue, the Court reiterates at the outset that the admissibility of evidence is primarily a matter for regulation by national law. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. In particular, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (see *Perna v. Italy* [GC], no. 48898/99, § 29 with further references, ECHR 2003-V).

68. The Court further reiterates that the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A

no. 194-A, p. 12, § 34; and *Lucà v. Italy*, no. 33354/96, §§ 40-43, ECHR 2001-II). However, Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see *S.N. v. Sweden*, no. 34209/96, § 44, ECHR 2002-V).

69. In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify. In this respect, the Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, the victim's interest must be taken into account. The Court, therefore, accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (see *S.N. v. Sweden*, cited above, § 47 with further references).

70. Turning to the facts of the instant case, the Court notes that the witnesses Mrs E. and Mrs F., who were heard before the courts, had both seen the applicant at the material time but had not seen the alleged acts. Mrs E. further gave evidence on the accounts of her son and nephew of the events on 10 May 1997. The other witnesses heard before the courts, the police officers X., Y. and Z., gave evidence on the manner in which statements had been taken from the four victims and on the manner in which the latter had been confronted with the applicant for identification purposes. In these circumstances, the Court considers that the statements given by A., B., C. and D. to the police, which was the only direct evidence of the facts held against the applicant, must be regarded as having been of a decisive importance for the courts' finding of the applicant's guilt, whereas neither at the stage of the investigation nor during the trial was the applicant given the opportunity to examine or have these victims examined. It must therefore be examined whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 in respect of the evidence given by A., B., C. and D.

71. On this point, the Court notes that the applicant was not provided with an opportunity to follow the manner in which the children were heard by the police, for instance by watching this in another room via technical devices, nor was he then or later provided with an opportunity to have questions put to them. Furthermore, as the children's statements to the police were not recorded on videotape, neither the applicant nor the trial court

judges were able to observe their demeanour under questioning and thus form their own impression of their reliability (see, *a contrario*, *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-...). It is true that the trial courts undertook a careful examination of the statements taken from the children and gave the applicant ample opportunity to contest them, but this can scarcely be regarded as a proper substitute for a personal observation of a witness giving oral evidence.

72. As regards the reason given by the domestic courts for dismissing the applicant's request to hear the victims, namely that the applicant's interests in hearing them were outweighed by the interests of the four still very young children in not being forced to relive a possibly very traumatic experience, the Court has found no indication in the case file that this reason was based on any concrete evidence such as, for instance, an expert opinion. The Court appreciates that organising criminal proceedings in such a way as to protect the interests of very young witnesses, in particular in trial proceedings involving sexual offences, is a relevant consideration, to be taken into account for the purposes of Article 6. However, the reason given by the trial courts for refusing the applicant's request to hear the four victims cannot but be regarded as insufficiently substantiated and thus, to a certain extent, speculative.

73. In these circumstances, the Court finds that the applicant cannot be regarded as having had a proper and adequate opportunity to challenge the witness statements which were of a decisive importance for his conviction and, consequently, he did not have a fair trial.

74. There has thus been a violation of Article 6 § 1 taken together with Article 6 § 3 (d).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

76. The applicant submitted that, in the domestic proceedings, he had been ordered to pay NLG 500 for damages to A., which he had not yet done. He felt that it would be wrong and unreasonable that he should have to pay this amount and therefore – if A. were to attempt to recover this amount – considered that the respondent State should compensate him for that sum, as pecuniary damage incurred by him.

77. The applicant further claimed an amount of EUR 19,160 for non-pecuniary damage on account of his nine months' detention in the Netherlands. He submitted that he had been detained in pre-trial detention on account of a very humiliating offence, for which reason he had been treated with contempt by his co-detainees. The fact that he is Spanish speaking, does not speak Dutch and was detained far from his country of origin entailed that his detention in the Netherlands caused him additional distress.

78. The Government submitted that the applicant apparently took it for granted that, if the alleged violation had not taken place, he would not have been held in pre-trial detention and would not have been convicted which conclusion, according to the Government, was highly speculative. Moreover, the Government emphasised that it is open for the applicant to apply for revision (*herziening*) under Article 457 § 1 of the CCP. They therefore considered that the finding of a violation of the Convention would constitute in itself sufficient just satisfaction under this heading.

79. The Court reiterates that, where it has found a breach of the Convention in a judgment, the respondent State is under a legal obligation to put an end to that breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI).

80. The respondent Government are, in principle, free to choose the means whereby they will comply with the judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows for *restitutio in integrum*, it is for the respondent Government to effect it, the Court having neither the power nor the practical possibility of doing so itself. However, if national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34, and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I).

81. The Court considers that it cannot speculate what the outcome of the proceedings would have been if they had been in conformity with Article 6 of the Convention. However, as the Court has now found that, in the proceedings resulting in the applicant's conviction, the applicant's rights under Article 6 § 1 and 3(d) were violated, Article 457 § 1 of the Netherlands Code of Criminal Procedure entitles the applicant to a fresh trial.

82. In these circumstances, the Court considers that national law allows for adequate reparation by entitling the applicant to a fresh determination of

the criminal charges against him (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; and *Halis v. Turkey*, no. 30007/96, § 49, 11 January 2005). Accordingly, the Court dismisses the applicant's claim for pecuniary and non-pecuniary damage.

B. Costs and expenses

83. The applicant claimed reimbursement of the costs and expenses incurred by him in the proceedings before the Court. He submitted that he was liable to pay his representative EUR 3,299.91 for 24.20 hours' work in respect of his application, plus EUR 949.65 for translation costs and EUR 197.99 for office expenses; value-added tax came to EUR 854.03. The total amount claimed was thus EUR 5,292.58.

84. Pointing out that the applicant had received State-financed legal aid in the domestic proceedings, the Government did not dispute the applicant's claim for costs and expenses.

85. According to its settled case-law, the Court will award costs and expenses in so far as these relate to the violation found and to the extent to which they have been actually and necessarily incurred and are reasonable as to quantum (see, among other authorities, *Serghides and Christoforou v. Cyprus* (just satisfaction), no. 44730/98, § 38, 12 June 2003).

86. Taking into account that one of the applicant's two complaints has been rejected in the Court's partial decision on admissibility of 11 March 2003 and making an assessment on an equitable basis, the Court awards the applicant EUR 4,190 including value-added tax for costs and expenses.

C. Default interest

87. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,190 (four thousand one

hundred and ninety euros) in respect of costs and expenses including value-added tax, plus any other tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President