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Witness protection in the Netherlands

The witness deposition is one of the most important means of evidence.Therefor a witness according to the Dutch Code of Criminal Procedure has the obligation to give his deposition before the investigating judge in the pre-trail investigation phase or to the court during the public court session. A refusal to appear before the investigating judge or the court after being summoned constitutes a crime. A refusal to give evidence may lead to an arrest and a deprivation of liberty until the witness statement has been given (sects 221 and 289 CCP).Witnesses are heard under oath that they will tell the truth and nothing but the truth. Giving a false witness deposition constitutes a crime(sect.207 PC,perjury)A false deposition in favour of the defendant may be sentenced with deprivation of liberty of six years maximum or a fine. A false deposition against the defendant may be sentenced wit a deprivation of liberty of nine years maximum or a fine. This all shows the importance of reliable and trustful witness depositions.

For a good and fair administration of criminal justice it is of major importance that witnesses scan give evidence free from fear and pressure and without being intimidated.

It is however daily reality that quite often witnesses are threatened or at least feel so when considering to give their witness statements before the investigating judge or at the court trial. Their fear for reprisals might reduce their willingness to give evidence.

Although the incidence of cases with intimidated witnesses is unknown and no empirical data on this topic is available, since the early eighties the intimidation of witnesses was identified as a serious problem in the Netherlands.

Intimidated or threatened witnesses exist not only in relation to organised or professional criminality like the trafficking of drugs, firearms or human beings but also in relation to regular serious criminality like murder cases, robbery, gang rapes etc.

A number of cases are know in which a witness prefers to keep silent to the police or the judge or to withdraw his incriminating statement after having been intimidated by the defendant or people around him. Sometimes even very serious crimes couldn't properly be investigated because witnesses due to intimidation stated that they couldn't give evidence since they didn't observe any irregularity although it was virtually impossible not to observe any irregularity

In order to avoid cases that witnesses were due to a threat unwilling to give evidence, investigating judges in the Netherlands allowed witnesses to give their witness deposition without disclosing their identity.

In 1981 the Dutch Supreme Court approved this policy. The court ruled that the investigating judge may question a witness without the disclosure of his identity in the interrogation files and without allowing the defence lawyer and the public prosecutor being present during the interrogation. Furthermore the Court ruled that this anonymous witness deposition may be use as evidence.

This obviously was in conflict with the wording of the than Code of Criminal Procedure and sect 6 of the European Convention on Human Rights which guarantees the defendant the right to examine or have examined witnesses against him as the spin-off of the equality of arms and fair hearing principle .

There are at least four major objections against the use of the anonymous witness without an explicit statutory footing:

-experiences in the Netherlands have shown that anonymous witnesses initially only have been used in serious cases but gradually also in less serious cases, sometimes even in hit and run cases;

-the defendant is not in the position to fully check the truth of the witness deposition. He is not allowed to be present during the hearing and although he may put questions which will be answered-if accepted by the judge-he is not able to observed the primary reactions of the witness or his body language while answering the questions;

-the third objection is that there exists uncertainty as to whether the witness really exists. Cases are known that one and the same witness have given a deposition both as anonymous witness as well as under his full identity. Both witness depositions have separately been used as evidence;

-finally the appropriateness of evidence gathering is at stake and there is a lack of control by the court on this method of evidence gathering.

The increasing use of anonymous witnesses in the Dutch courts gave rise to a case before the European Court on Human Rights. In the Kostovski judgement-a case against the Netherlands and dealing with the use of anonymous witness depositions as evidence- the European human Rights Court ruled that a conviction based to an extensive extent on anonymous witness depositions violates the defendant's right to a fair trial (ECHR 20-11-1989 Series A vol 166).
The Kostovski case was reason to introduce legislation dealing with witness protection.
As of the 1 rst February 1994 the Dutch Witness Protection Act(sects.226a – 226f CCP) came into force.
In the explanatory Memorandum to the Act- which literally translated is called the Threatened Witness Act-three categories of witnesses in need of protection are distinguished:
-the first category comprises witnesses who have reason to assume that their deposition may cause themselves problems or may have a negative impact on the future exercise of their profession. Examples of this category are undercover police officers like those who under disguise have operated and have infiltrated in criminal organisations. Their witness deposition is sometimes indispensable for the conviction of the defendant. Had they to give their statement under their real names and had they to be present during the hearing in a recognisable way, they might expect reprisals from the criminal circles and would furthermore be unable to serve as undercover agent anymore. That would lead to a serious waste of resources.
-the second category consists of persons who gave information on crimes or suspects to the police without disclosing their own identity. They are not considered as witnesses. The information they provide the police with can only be used as evidence when the defendant refrains from his right to examine the person and there is further corroborative evidence (sect 344,3 CCP).This information therefore is of a very limited value as evidence. When the public prosecutor really needs the information as evidence in order to have the defendant convicted he has to transform the person into a witness.
-the third category are witnesses who, by giving their witness deposition have well founded reasons to fear that they themselves or their relatives will run a disproportionate risk to their life health or safety, or a disruption of their family life or socio-economic existence. In the Explanatory Memorandum the following examples of fear for the disruption of family life are given: the treat related to destruction of or serious vandalism against one's dwelling, the disclosure of information which might be shocking for family members such as incestuous or extramarital relations or homosexuality. Examples of disruption of socio-economic existence are destruction or serious vandalism aginst one's company ,office or shop, consequent intimidation of customers or the disclosure of information that may lead to dismissal.
The witness protection Act provides all categories with some protection.
The broadest protection is for the witnesses of the third category. The investigating judge may grant the status of anonymous witness to them who refuses to testify due to fear for reprisals. As a rule the public prosecutor will request the investigating judge to order that the witness will be permitted to give his deposition without his identity being disclosed. The public prosecutor is the first one to know that the witness will refuse to testify and very often will have promised that his anonymity will be respected.
The order of the investigating judge may also be issued ex officio or at the request of the defendant for a witness in his favour.
When the investigating judge issues such an order the witness gets the legal status of protected witness. This status lasts as long as the whole criminal procedure including the appeal procedure and the Supreme Court procedure. This status can't be denied by the court. The investigating judge must inform himself on the identity of the witness. This judicial control is a guarantee that the witness is not testifying twice, both as anonymous and under his full name. The investigating judge may rule that the defendant, his counsel and the public prosecutor may not attend the hearing of the witness in the privacy of his office. When they are allowed to be present the investigating judge take measures that the identity is not disclosed(disguise, voice deformer ,screen etc).In any case the defendant, his counsel and the public prosecutor have the right to put questions and to react on the witness deposition. The investigating judge may refuse questions which may disclose the identity of the witness. The investigating judge writes a report including the witness deposition and his statement on the reliability of the witness. The witness will not be summoned to the public trial. The report of his anonymous deposition may be used by the court as evidence.

The first and second category of witnesses-those who have reasons to assume that their deposition may cause problems are not considered as threatened witnesses and these categories are not granted full anonymity, but a limited anonymity (sects.190,2 and 284,1 CCP).Limited anonymity means that their identity will not be disclosed to the defendant and his counsel but that they will be summoned to be interrogated at the public trial as a regular witness. The court have to take measures to prevent the disclosure of his identity disguising the witness e.g. through a motor helmet or by making eye contact between the defendant/counsel and the witness impossible whether or not in combination with voice transformation.

The initial reason to adopt the Witness protection Act was the Kostovski case in which the Netherlands was criticized by the Human Rights Court for the use of anonymous witnesses without a statutory footing. That raises the question whether the Witness Protection Act is ECHR-proof? Since Kostovski the ECHR has dealt with two more Dutch anonymous witness cases,the Doorson case and the van Mechelen case.In the Doorson case the Court ruled that under certain circumstances, use may be made of statements for the evidence by witnesses because their life,liberty or security is at stake, provided this handicap for the defendant is sufficiently counterbalanced by the procedures followed by the judicial authority(para.72).In the Doorson case there was no violation of the fair trial principle in this respect.
In the van Mechelen case however where the evidence was to a decisive extent based on evidence provided by anonymous police officers. In that case the ECRH ruled that there was a violation of Sect 6 .If the threatened witnesses are police officers ,they may only give evidence anonymously in very exceptional cases. Although their interests, and indeed those of their families, also deserve protection under the Convention, it must be recognised that their position to some extent differ from that of a witness. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. In addition, it is in the nature of things that their duties, particularly in the case of arresting officers ,may involve giving evidence in open court.

In addition to witness protection by means of guaranteeing the witness's anonymity,a witness may need further protection in the sense that he will be admitted to a witness protection programme.Such a programme creates conditions by which witnesses who are actually threatened can be taken care of in such a way that the threat can be reversed and that they can continue to act as a witness in the trial.
The concrete contents of a witness protection programme may be quite diverse and may even imply the change of identity of the witness and the transfer for a longer period abroad,sometimes together with his family.

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