

22 October, 1996
Criminal Court
N° 3491 Decision
JM

Supreme Court of the Netherlands

Decision

in the matter of the appeal against
a decision of the Arnhem District Court,
military chamber, dated
21 February, 1996, in the penal case against:

1. The disputed decision

In a higher appeal -- with the nullification of the decision of the Deputy Presiding Judge dated 1 December 1995 -- the Officer of Justice in the District of Arnhem initially explained in his original request that the Deputy Presiding Judge will institute a preliminary judicial inquiry concerning the consideration of legal authority and the competence of the military chamber in the Arnhem District Court concerning the fact described in greater detail in the request. In addition, the Court understood that the Dutch judge has legal authority concerning the facts described in the aforementioned request and declared the military judge under the provisions of art. 12 of the Wartime Offences Act competent to take account of the facts. Subsequently the Court dismissed the request of the Officer of Justice dated 1 November 1995, for the institution of a preliminary legal examination into the declaration of legal competence and authority of the military chamber of the Arnhem District Court.

2. The nullity appeal

The appeal was lodged by the Officer of Justice in the District of Arnhem. He entered written pleas for nullity. The document is attached to and forms part of this decision.

3. The Public Ministry's conclusion

The Solicitor-General Van Dorst primarily ruled the Officer of Justice's appeal non-receivable. In his supplementary decision he ruled subsidiarily that the Court of Appeal shall deal further with the plea for nullity by a time determined by it in order to summon the accused in order to give him an opportunity to counter the Officer of Justice's nullity appeal.

4. Procedure

4.1.1 On 1 November 1995, the Officer of Justice conducted a preliminary legal inquiry concerning on suspicion that:

1.
on or about 14 June, 1992, or at least in June, 1992, in Sivci, district of Prijedor, in Bosnia-Herzegovina, then in the former Yugoslavia, he did deliberately and with malice aforethought deprive of his life, in that the accused did purposely and after calm consideration, at least following a decision taken (shortly) before, fire a number of bullets from a firearm into back from a distance of about 15 metres, as a result of

which was mortally wounded;

2.

on or about 14th June, 1992, or at least in June, 1992, in Sivci, district of Prijedor, in Bosnia-Herzegovina, then in the former Yugoslavia, he did deliberately and with malice aforethought deprive (first name NN) of his life, in that the accused did purposely and after calm consideration, at least following a decision taken (shortly) before, fire a number of bullets from a firearm into back, as a result of which was mortally wounded;

3.

on or about 14th June, 1992, or at least in June, 1992, in the district of Prijedor, in Bosnia-Herzegovina, then in the former Yugoslavia, he, together with another or others, or at least alone, took a group of citizens taken prisoner from the sub-district of Sivci, in the district of Prijedor, under threat from firearms to the Keraterm concentration camp with the intention of illegally putting them in the power of the guards of the aforementioned concentration camp and/or render them helpless;

4.

in or around the period from 15th June, 1992, to 30th June, 1992, in the district of Prijedor, in Bosnia-Herzegovina, then in the former Yugoslavia, to implement the offence committed by the accused in order by force or other means and/or the threat of force or other means to compel and her sister to undergo treatments consisting fully or partly of the sexual penetration of and her sister, he did deliberately threaten the mother of with a firearm, while the commission of the aforementioned offence was not completed solely as a result of the circumstance, against the accused's will, that intervened, and in any case solely as a result of a circumstance independent of the accused's will.

4.1.2 The action also includes:

By acting as set out in items I, II, III and IV, the accused has been guilty of infringements of the laws and customs of war as set out in article 8 of the Wartime Offences Act, as:

1. the acts were performed by the accused while, as a soldier, or at least an armed person, he formed part of an armed group under the command of Colonel Arsic, or under some responsible command, said armed group belonging to the (Bosnian) Serb military units which were involved on the territory of the former Yugoslavia with groups belonging, among others, to the Muslim community;
2. the armed conflict referred to under 1 above is to be regarded as an armed conflict within the meaning of the Geneva Convention concerning the protection of citizens in wartime, dated 12th August, 1949, in view of, among others, the factual findings of, among others, the "UN Committee of Experts" set up following Security Council resolution 780/1992;
3. the victims named in I/II/III/IV belonged to the Muslim community specified in 1;
4. -the facts described in I and II may be regarded as violations of article 3, introduction, and 1a) of the Convention referred to under 2;
- the fact set out in III may be regarded as a violation of article 3, introduction, and under 1b) and/or 1c) of the Convention referred to under 2; - the fact set out in IV may be regarded as a violation of article 3, introduction, and in 1c) of the Convention referred to under 2.

4.1.3 The request is that the Deputy Presiding Judge set up without delay a legal investigation concerning:

"the assessment of legal authority and competence of the military chamber of the Arnhem district court".

4.1.4 A supplementary notice from the Officer of Justice, attached to the appeal, to the Deputy Presiding Judge includes:

"In the context of the request you are not yet being asked to conduct investigations attached to the matter. I am initially asking you to take a decision concerning the 'plain' request. The reason for this is that it is desirable for a reasoned decision be first taken concerning the question whether the Arnhem Military Chamber is competent to hear the facts as set out in the request and whether the Military Chamber has legal authority with respect to the facts (all this also in connection with the decisions of the Military Chamber and the (military) Deputy Presiding Judge to be taken during the preliminary inquiry concerning the provisional arrest)."

4.2 In a decision dated 1 December 1995, the Deputy Presiding Judge, on the grounds of the consideration, in short, that the Netherlands has no legal competence concerning the facts alleged in the request, declared the request by the Office of Justice non-receivable.

4.3 The Officer of Justice appealed to higher authority against the above decision by the Deputy Presiding Judge. The Court took the decision thereon set out above under 1.

4.4 The disputed decision includes:

"During the procedure in the court chamber on 19 January 1996, the officer of justice explained his appeal in greater detail.

"The person named as the accused in the request did not appear at the procedure in the council chamber, nor was he heard since he had not been summoned thereto.

"According to the provisions of articles 21 et seq. of the Criminal Code, an accused must be heard in the consideration of his case by the court chamber or at least summoned thereto.

"According to article 200 et seq. of the Criminal Code and in view of the relevant jurisprudence and literature, the accused must be heard by the deputy presiding judge before the preliminary judicial examination is closed, while it is only at that hearing that a copy of the WCA request must be given to the accused. Detection tactics reasons may be the basis for having this hearing held at as late a stage as possible.

"The question in the present procedure is whether, in the view of the court chamber, a preliminary legal examination should be instituted while the person named as the accused in the request should not be involved at this stage and thus not called, in view of the fact that involving the accused at this stage of the court chamber procedure could possibly prejudice the discovery of the truth in the course of any further detection or legal investigation.

"For these reasons the court did not have the person concerned called before the procedure in the court chamber."

5. Official assessment of the disputed decision

5.1 In the relevant art. 23, section 2 Sv it is stated among other things that the court chamber shall hear the accused or at least summon him before it. From the considerations under 4.4 it appears that this was not done.

5.2 From the passage from the supplementary note, the intention of the current procedure intended to obtain an answer to the questions concerning the Netherlands' legal authority and the competence of the military or ordinary judge. It is clear that the Public Ministry wishes to avoid the Dutch criminal judge's having to deal with the basis of the matter before it has been

established by the highest authority that the Netherlands are legally competent and that the case is brought before the competent judge.

5.3 The decisions to be expressed in the context of such a procedure do not bind the judge that after this procedure has shown that the Netherlands are legally competent and that he is entitled to take a decision on the main matter. He is in fact required independently to take a decision on the answers to the questions of art. 348 and 350 Sv.

5.4 The considerations under 5.3 do not prejudice the fact that the accused who has not been able to defend himself in a procedure like this one, if it is decided therein that the Netherlands are legally competent and which judge is competent, is to be faced with those decisions in the main case. Then, although the decisions have been taken in his case, he has been able to take no part in the relevant debates. He is then unacceptably placed at a disadvantage by the public ministry.

5.5 The above considerations entail the fact that the form prescribed in art. 23, section 2 Sv in a case like this one is of such importance that the failure to observe it leads to the nullity of the procedure and the concomitant decision.

6. Summary

The above considerations mean that the disputed decision cannot be maintained, the means cannot be discussed and the decision must be the following.

7. Decision

The High Court:

Annuls the disputed decision;

Refers the case to the Arnhem Court of Justice (military chamber) for the current appeal to be dealt with and decided.

This decision is issued by vice-president Hermans as chairman and councillors Davids, Keijzer, Corstens and Aaftink, in the presence of the clerk Bogaert, in the council chamber and pronounced at the open judicial session on 22 October 1996.