



LJN BD3241, Rechtbank 's-Gravenhage, 09/750006-06 (English translation)

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Rechtsgebied: Straf

Soort procedure: Raadkamer

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Inhoudsindicatie:

Decision on the letter of objection against the notice of further prosecution of the defendant for involvement in, among other matters, a number of murders committed in the Philippines in 2003 and 2004. The case file still holds insufficient concrete indications that would justify the establishment of the defendant's liability under criminal law for the murders. During the proceedings with regard to the defendant's objection, the Public Prosecution Service announced that the investigation was still ongoing at that moment. It is the opinion of the District Court that the Public Prosecution Service should be allowed sufficient time to continue and finalize the investigation. It is the Court's opinion that it is not already an accomplished fact that it would be highly unlikely that the Criminal Court, later and based on the eventual evidence, would consider the charges wholly or partly proven. It is for this reason that the District Court has dismissed the objection as unfounded.

Uitspraak

[Translation from Dutch]

DISTRICT COURT OF THE HAGUE
CRIMINAL LAW SECTION

Prosecutor's Office number: 09/750006-06
Criminal Chamber reference number: 08/241

Decision given by the three-judge Criminal Chamber of the District Court of The Hague on the letter of objection, pursuant to article 250 of the Code of Criminal Procedure, submitted by:

[the defendant],
born on [date of birth] 1939 in [place of birth] (Philippines),
living at [address],

as appears from a deed drawn up by the Court Registry on 25 January 2008, against the notice from the Public Prosecution Service that it will continue to prosecute the defendant, addressed to him on 17 January 2008.

The District Court has taken due note of the criminal file with the above mentioned Prosecutor's Office number.

On 20 May 2008 the Criminal Chamber of the District Court dealt with this letter of objection. The defendant, assisted by his defence counsel mr. M. Pestman, lawyer in Amsterdam, was heard in chambers.

The Public Prosecutors, mr. J.S. de Vries and mr. I.C.M.E. Meissen, claimed before the Criminal Chamber of the District Court that this objection should be declared unfounded.

The competence of the Court and the admissibility of the defendant

The Criminal Chamber of the District Court is entitled to deal with the letter of objection. The notice of further prosecution was served on the defendant on 18 January 2008. The letter of objection was submitted on time, so therefore the defendant's objection is admissible.

The progress of the criminal proceedings against the defendant

On 28 August 2007 the defendant was taken into police custody and a preliminary inquiry was opened in the criminal case under the afore mentioned Prosecutor's Office number.

On 31 August 2007 the defendant was remanded in custody on suspicion of (stated briefly):

- count 1: complicity in and/or complicity in the incitement of wilfully and with premeditation taking the life of [R.K.];
- count 2: attempted complicity in and/or attempted complicity in the incitement of wilfully and with premeditation taking the life of [R.M.] and/or [E.R.M.] and/or one or more other persons who have remained unknown;
- count 3: complicity in and/or complicity in the incitement of wilfully and with premeditation taking the life of [A.G.T.] and/or [S.A.O.]. These offences were allegedly committed in Utrecht, at least in the Netherlands and/or Philippines, in or around the period from 1 January 1987 to 23 January 2003 inclusive, 26 September 2004 respectively.

By order of 13 September 2007, the Criminal Chamber of this District Court dismissed the Public Prosecutor's demand for detention in custody of the defendant. The Public Prosecutor lodged an appeal against this decision.

By order of 3 October 2007, the Court of Appeal of The Hague also dismissed the Public Prosecution Service's demand for detention of the defendant.

By order of 21 November 2007, the Examining Magistrate closed the preliminary inquiry.

In a letter dated 17 January 2008, the Public Prosecutor gave notice that the prosecution of the defendant would be continued. In this notice of further prosecution the following alternative charges were included in the original charges under counts 1, 2 and 3, as mentioned in the demand for remand in custody (stated briefly):

- count 1: complicity in committing an offence which includes a violation of the laws and customs of war, being the killing of [R.K.] (or cause him to be killed), and/or deliberately allowing the offence to be committed by one or more of the defendant's subordinates;
- count 2: complicity in committing an offence which includes a violation of the laws and customs of war, being the offence of committing an attempt on the life of [the Court understands 'the afore mentioned persons' as follows] [R.M.] and/or [E.R.M.] and/or one or more other persons who have remained unknown, and/or deliberately allowing the offence to be committed by one or more of the defendant's subordinates;
- count 3: complicity in the violation of several stipulations of the International Crimes Act by killing [A.G.T.] and/or [S.A.O.] (or cause them to be killed) and/or allowing the offence to be committed by one or more of the defendant's subordinates and/or the deliberate omission by the defendant to take measures while his subordinates committed these offences.

As for the alternative count 3, the Public Prosecutor has determined the period when these offences were committed as being from 1 October 2003 to 26 September 2004 inclusive.

The judgment of the letter of objection

The letter of objection mainly requeststo drop the charges against the defendant.

Alternatively it is requested to set a term for the Public Prosecutor to send a notice that he will refrain from prosecution or to serve a summons. During the court hearing in the Criminal Chamber the defence counsel withdrew his alternative request to set a the term referred to in the above, and for that reason the Court shall not take any decision on that subject.

During the hearing, on behalf on the defendant, the defence counsel requested the Criminal Chamber of the District Court to order the Public Prosecution Service in case it would decide to forgo further prosecution to continue the criminal investigation under another name and against another defendant. According to the judgment of the Court, it does not have the competence to issue such an order.

The District Court should base its judgment upon the facts that are stated on the notice for further prosecution.

In as far as relevant to this case, the fourth paragraph of article 250 of the Dutch Code of Criminal Procedure stipulates that in relation to the writ of summons, the Court may dismiss a case against a defendant if it finds insufficient evidence of guilt. By order of 29 September 1951 (NJ 1952, 58 m. nt. WP), the Supreme Court ruled that the lack of sufficient evidence of guilt is limited to the circumstance, when rendering judgment at a later date, that it is highly unlikely that based on the submitted evidence the Criminal Court will find the charges proven, either completely or partially. Furthermore, the Supreme Court considered - in as far as relevant - that this will be true in case there is a continued lack of legal evidence.

Partly with reference to this Supreme Court ruling, when taking a decision the District Court will have to keep in mind the possible results that can be expected from the criminal investigation that is still being conducted.

Based on the available documents in this case it has been established that [R.K.], [A.G.T.] and [S.A.O.] were killed in the Philippines andthat an attempt was committed on the lives of [R.M.], [E.R.M.] and other persons. The case file also contains witness testimonies and documents that the orders were allegedly executed by the National People's Army (NPA), the military section of the Central Committee of the Communist Party of the Philippines (CPP).

The file also included statements from witnesses who claim that the defendant, when the offences charged in the writ of summons were committed, had (close) contacts with these organisations. The file also includes testimonies from witnesses who claim that the defendant, seen his position within the CPP, must have been involved with the offences as charged.

The District Court has reviewed the contents of the case file in relation to the criterion phrased by the Supreme Court.

So far, the contents of the case file do not offer sufficient concrete evidence to demonstrate the defendant's direct involvement in the imputed facts, which is needed to establish his liability under criminal law. Forthat reason the District Court deems that the afore mentioned review principally should have led to the conclusion that based on the evidence gathered up to now by the Public Prosecution Service, it must be considered highly unlikely that the Criminal Court in its later judgment would come to a conviction of the defendant.

In addition, the Court needs to include in its judgment the results that are still to be expected from the ongoing criminal investigation.

The Court takes into consideration that because of the closing of the preliminary inquiry, pursuant to the first paragraph of article 244 of the Code of Criminal Procedure, the Public Prosecution Service had to take a decision within a period of two months about the fact whether or not it would continue to prosecute the defendant. The investigation into the involvement of the defendant in the offences as charged was still going on at the time of the closing of the preliminary inquiry. By then the Examining

Magistrate had already allowed the Public Prosecutor's request to interview a number of witnesses for the prosecution.

During the hearing, the Public Prosecution Service informed the Criminal Chamber of the District Court that the criminal investigation had not yet been concluded. It was pointed out in concrete terms that at present they are investigating the contents of (the large amount of) seized computer files and that they are considering to take (further) testimony from a number of witnesses for the prosecution or have others take their testimony.

The Court believes that the Public Prosecution Service should be given more time to continue and complete the criminal investigation, so that a balanced decision can be taken concerning the question whether the defendant should be summoned to appear before the Court to account for his actions. It cannot be excluded that the inquiry referred to in the above and any other investigative activities should produce new relevant information. This leads the Court to the conclusion that at this moment it can not be decided, that when judgment is rendered at a later date, it is highly unlikely that based on the submitted evidence the Criminal Court will find the charges proven, either completely or partially.

Therefore, the District Court will declare the letter of objection unfounded.

Decision

The District Court considers the letter of objection unfounded.

This order was issued by the Criminal Chamber of the District Court in The Hague on 5 June 2008 by mr. H.P.M. Mesker, Chairman, mr. M.I. Veldt-Foglia and mr. R.J.A. Schaaf, Judges, in the presence of mr. M. Gest, Clerk of the Court, and was signed by the Chairman and the Clerk.