

## **Court of Appeals**

The Hague

Session 26 September at 15:00 hrs

Parquetnummer 09/750006-06

### **Pleading of**

**mr Michiel Pestman**

**in the case of**

**JOSE MARIA SISON**

### **Model decision**

1. I am seldom so heartily in agreement with a decision of a court of appeals. I will no longer easily complain about judges who do not know the dossier and about insufficiently substantiated decisions. The court has produced a model decision.

2. Sison thus supports the arguments and conclusions of the court. The serious objections to the continuation of the temporary custody are missing for precisely those reasons which the court has brought forward. To which can be added today that the supplementary court of appeals dossier in this case has not presented anything new; the new pieces are above all merely more of the same.

3. Although the court has no longer touched on this, it is still valid, or better stated: more than ever, the grounds are absent for the continuation of the temporary detention.

4. But let me begin with a few observations about the legal framework of this case. This is on the instance of the truly surprising appellant's motion of the prosecutor.

### **Legal Context**

5. The public prosecutor's office wrestles with this case; so it appeared clearly in the appeal motion.

6. From the fact that the lion's part of the motion is devoted to a juridical treatment about different forms of participation it can be inferred that the prosecutor has little new to present, in which an attempt is made to widen the criminal liability under art. 47 Sr. by using an appeal to the textbook lesson on functional or accessory offense.

7. That this functional offense now reappears is not surprising because the defense in the first place has stood still on this.

8. The implicit view of the public prosecutor in this case is that Sison must be held criminally responsible for the murder of Kintanar and Tabara, because the murders were carried out by persons connected with the organization of which Sison would be or would have been the leader. There is indeed not any shred of evidence, like the court has correctly remarked, of direct connection of Sison to the death of Kintanar and Tabara. In fact the public prosecutor here chooses for the construction of art. 51 Sr., in which Sison, moreover wrongfully, is seen as the actual leader of a legal entity which would have committed the criminal act.

9. The problem with this view or construction of evidence is that the CPP and the NPA

cannot really be considered a legal entity in the sense of art. 51 Sr., but especially also that art. 51 is not charged as an offence. Hence also the prosecutor in her appeal motion supposes that the functional offence in the accusation must be “read into” the charge, a judicial novelty, as far as I know.

10. Moreover, it surprises us that the prosecutor does not suppose that also the *command responsibility* in the accusation must be read into the charge, an idea that we know especially from the jurisprudence of the different international tribunals and is suspiciously broader than the Dutch eliciting of art. 47 Sr. and also the actual leadership of art. 51 Sr. It would not surprise me if the public prosecutor’s office shortly will magically produce this textbook lesson in the hope to catch Sison in its judicial net.

11. But anyway: we are concerned here today with co-committing or incitement, and not about actual leadership or *command responsibility*.

12. The discussion about functional offence, to which the prosecutor has tried to infuse new life, is academic. De Hullu observes correctly that this concept is disputed and that its acceptance should not lead to the broadening of the criminal liability under art. 47 Sr. According to him there is no case of changing the border [grensverlegging] (Mr. J. de Hullu, *Materieel strafrecht*, third printing, 2006, p. 156). In fact functional offence is a *specialis* (special case) of co-committing, more than of incitement, whereby the function of the co-commiter plays a role in judging the guilt.

13. But from the thin jurisprudence regarding this concept, which is also quoted by De Hullu, it appears that also with functional offence there must always be a case of close relationship between the functional and actual perpetrator.

14. De Hullu discusses in his book the case against a gynecologist who was convicted for an illegal abortion, despite the fact that he himself did not carry out the abortion. But he had examined the future mother, given the order for confinement and also had ordered a co-assistant to administer medicine to induce abortion. The gynecologist was convicted as a perpetrator.

15. Also De Hullu picks out a decision about the owner of a ship, who was prosecuted for an oil spill. This owner was acquitted because the single fact that she was the owner of the ship did not mean that she *therefore* could also be held criminally liable for the criminal acts committed by the captain of the ship or the crew (De Hullu, p. 156; hoge raad, 24 May 2005, NJ 2005, 434).

16. This is about the thin jurisprudence with a “functional aspect”, from which it appears that there is nothing new under the sun. Just as in ordinary co-committing, a close connection and cooperation is also necessary in order to be able to come to a judgment in “functional acts”.

### **Serious Accusations: new wine in old bottles**

17. This brings me to the serious accusation; which in our opinion is still fully missing.

18. I assume, moreover on good grounds, that you are familiar with the appeal that on behalf of Sison was presented on 7 September 2007. For this reason I will not repeat.

19. I will only once again repeat our central argument and that is Sison in this case on the basis of the present dossier can never be convicted, not even if we assume for *argument's sake* that Sison is indeed Armando Liwanag, which moreover Sison explicitly denies. There is as it is no shred of evidence, not in the form of statement of witnesses or a recovered document, from which it can be inferred that Sison has carried out a relevant act which is criminally punishable in connection with the death of Tabara and Kintanar. The dossier consists on this point exclusively of suggestions, suspicions and suppositions; not out of indications, not to speak of hard evidences.

20. The new supplementary dossier is certainly disappointing on this point; it is nothing more than old wine in new cases.

21. There is a new witness presented, a certain Grace Cabactulan, who can report nothing more than that she thinks Sison is Armando Liwanag and that he has claimed during a meeting in 1992 the authorship of an ideologically tinted piece. Interesting, if it is all true, but for the alleged actions not relevant, whereby she observes that for this witness is true, just like for Nathan Quimpo moreover, that their acquaintance with Sison and the Philippine communists is very dated and stopped more than ten years before the death of Tabara and Kintanar.

22. Further it is remarkable that the officer in the appeal motion points to the statements of the three supposed shooters, which on the crucial point in this case make statements which contradict each other. It is as if the public prosecutor disregards this again and again.

23. Rafael Y Glemao Cruz, indeed the key witness in this case, points to a certain Vicente Cayetano as the one who would have received the order from the Central Committee to shoot dead Kintanar. Cayetano would also be chosen, by the same Central Committee, as the leader of the *Special Operations Group* which is tasked with the implementation of the order given by the Central Committee. The other important witness of the public prosecutor, Maico Pabalan, points to another "contact person". Not Cayetano, but a certain Leo Velasco would have received the order for the murder of Kintanar from the Central Committee and had set up the aforementioned *Special Operations Group*.

24. What is the worth of these two statements, in the light of these accusations, if they contradict each other on the most important point?

25. In all this let us not forget that Sison, compelled by necessity, has been in the Netherlands already twenty years, and during that period has never visited the Philippines. He fears for his life there, the reason why he cannot be expelled by the Dutch authorities, even if they would very much like to do that. It is thus impossible that he attends meetings of the Central Committee in the Philippines, meetings in which Cayetano would have been present to receive the order for the murder of Kintanar.

26. Sison has never given the order for the murder of Kintanar, but when Kintanar was shot dead that news naturally reached the Netherlands.

27. Shortly after the death of Kintanar Sison issued a public statement, a statement which is not found in the dossier and so I attach a copy of it to the plea (Prof. Jose Ma. Sison, Romulo Kintanar Had Too Many Rivals and Enemies in the Criminal World of Military and Police Operatives, 24 January 2003, *annex 1*).

28. This statement was distributed shortly after the death of Kintanar, but before the attack was claimed by the NPA. The article is especially important, you don't have to read all of it, because at that moment Sison did not know who should be held responsible for the death of Kintanar. He presents three possible scenarios, of which later the last one would be the only correct one. This is a statement written by someone who knows well the political situation in the Philippines; not by someone who has given the order for the murder of Kintanar.

29. What was valid on 7 September 2007, is in other words still valid today. There is not any evidence of any criminally relevant act by Sison. There is, in other words, not any evidence of conscious cooperation between Sison and the persons who would have carried out the murders of Kintanar and Tabara; and there is also not any evidence that Sison had made use of one of the means to incite that is necessary for an indictment for incitement, not to speak of the required intent.

30. Even if we assumed that all witnesses speak the truth, that all statements are trustworthy and thus may be used as evidence, then we do not come further than the arguments and conclusion of the court. *For the sake of argument*: it is possible that Sison in the past has made use of the pseudonym Armando Liwanag and that he until 1992, 1993 probably played a leading role in the central committee of the communist party of the Philippines. For the necessary serious accusation is this supposition however totally insufficient.

31. Of any *concrete* involvement of Sison in the supposed murders of Kintanar and Tabara, even in whatever form of participation, there is no evidence at all in the dossier (presented by the public prosecutor)

### **No Grounds**

32. In connection with the grounds, it is remarkable that the prosecutor in the appeal motion) only refers to the interest of investigation.

33. The other grounds, earlier presented to support the temporary detention, we do not hear any more: the flight risk, the 12 year basis and the chance of recidivism. Like so often is the case in the lifting of temporary detention it appears in retrospect to turn out better than expected with the danger of flight, it appears that the public order is totally not disturbed and the next crime has still to be committed. I shall thus limit myself today, just like the prosecutor, to the interest of investigation.

34. The officer states, after the release of Sison, that witnesses out of fear do not want anymore to talk to the police. It is unfortunate that this view is not substantiated in any manner, on the contrary I would say: from the supplementary dossier it appears that after the release of Sison there were interviews with witnesses, in the Netherlands as well as in the Philippines.

35. Sison must have swallowed when he read this passage about witnesses who are afraid. From this it appears that the public prosecutor's office has very little knowledge of the real situation and problematic in the Philippines. If there are people there who are at risk, these are the sympathizers of Sison: not the persons who would like to bear witness *against* him, but exactly those who would like to do so in his favor.

36. On the occasion of the arrest I have submitted a report of Human Rights Watch. I assume that this is found among the evidences and that you have had the occasion to study it.

37. From the report published in June 2007 by Human Rights Watch it appears that in the Philippines in the past years hundreds of people have disappeared or have been extrajudicially executed, almost without exception persons who in one way or another have been connected with the left opposition in the country. Although the Philippine government has by choice pointed to the NPA or the CPP as guilty of these disappearance and murders, Human Rights Watch has come to the conclusion after wide investigation in the country that not the opposition but precisely the Philippine military must be held responsible for these human rights violations (Human Rights Watch, *Scared Silent, Impunity for Extrajudicial Killings in the Philippines*, June 2007, pp. 2-4).

38. It may then also not surprise us that the Philippine police has never succeeded in solving a single disappearance or extrajudicial execution (Human Rights Watch, p. 48 e.v.).

39. In particular, in the light of these last conclusion of Human Rights Watch it may at the very least elicit wonder that the Philippine authorities are now successful in “solving” the murder of Tabara and Kintanar. They have never been so close to success in closing a dossier in the Philippines, reason why Sison puts a big question mark on the trustworthiness of the statements given by the three shooters in this case; witnesses which the Dutch police have indeed interviewed but were offered by the Philippine authorities. I look forward to the *cross-examination* of these key witnesses .

40. Moreover it appears from our initial investigation in the Philippines that none of the three shooters in the dossier have been identified in the cases of Tabara and Kintanar. There was indeed an investigation in the case of Kintanar and there is in that case also a suspect identified, but that is not Cruz, Alonzo or Pabalan.

41. There appeared also last year still an important report, with conclusions which support the discoveries of Human Rights Watch.

42. It concerns an English report of our own Lawyers for Lawyers Foundation; a copy of which I have attached to my plea notes (Dutch Lawyers for Lawyers Foundation, IFFM, *From Fact to Action: Report on the Attacks against Filipino Lawyers and Judges*, 24 July 2006, *annex 2*). Part of the so-called *International Fact Finding Mission*, responsible for the composition of the report, were also two of your colleagues, Jan Bless from Haarlem and Nol Vermolen of Amsterdam.

43. From this report it appears that lawyers and judges also have to fear for their lives. Also lawyers and judges who are concerned with human rights, then you are in the Philippines evidently suspected, made to disappear with some regularity or simply eliminated out of the way. The *Fact Finding Mission* has counted since 2001 25 disappearances and murders; fifteen lawyers and ten judges. And here also the writers of the report come to the conclusion that the regime can not be free of blame.

44. The assumption of the public prosecutor’s office that the police can no longer do its work because the potential witnesses will be scared by the release of Sison is proof of a certain brutality. I am curious what Romeo Capulong, the lawyer of Sison in the Philippines, would think of this assumption. Capulong is not only *ad-litem* judge at the Yugoslavia tribunal but

also the most famous human rights lawyer in the country. Two attacks have already been committed against him, without the desired result, and he has already been underground a long time, which does not prevent him from offering again his services in this case.

45. It is people like Capulong who must fear for their lives, not the Cruzes, Alonzo's and Pabalans, who in contrast to Capulong can count on the sympathy and also the protection of the Philippine authorities, not least the army.

46. Quite apart from the problem of human rights, which obstructs especially the defense and not the justice ministry, it must of course also be observed that Sison totally does not know all whom the justice ministry wants to interview in this case who have not yet been interviewed. For this reason also it is difficult to speak of a danger of collusion.

47. In conclusion, undoubtedly needless to say: that the police must still investigate the confiscated materials and goods can naturally never be a reason to resume the temporary detention on the basis of the interest of the investigation.

48. In short: also the basis for the temporary detention does not exist.

### **Suspension of Detention**

49. Anyhow there is every reason to suspend the detention of Sison, should you still decide to allow the demand of the of the public prosecutor's office.

50. Regarding the health of Sison much has already been said before the judge-commissioner the Court of Appeals. I will not repeat that. Clearly Sison has become older and suffers from serious health problems, partly caused by the tortures undergone in detention under Marcos. He is also under treatment by a cardiologist, as you know, reason why today he would have been absent. Out of respect for you and also for the Dutch legal system, against the express advice of his doctor, he has cancelled his appointment today with the cardiologist.

51. If you therefore decide to change the demand, I therefore request you to suspend the temporary detention of Sison, in expectation of the substantive treatment of his case.

### **Final consideration**

52. Then I must say something from the heart. It is with great concern that I must observe that the Netherlands again involves itself and chooses side in a conflict that is not ours.

53. Sison is now persecuted for and is threatened with temporary detention in a case for which without any doubt we would not extradite.

54. By persecuting Sison in the Netherlands nonetheless, the public prosecutor's office chooses the side of a regime that, it appears among others from the reports I have mentioned, to state it carefully, does not have a spotless reputation in the area of human rights. It is actually crazy that the justice ministry in this case lets itself be led by the Philippine authorities, who themselves are not able to solve even one disappearance or murder and, it appears from independent investigation, even has blood on their hands.

55. Have we indeever prosecuted opponents of Saddam Hussein, or the ANC during the

apartheid regime? Also even if they stayed in the Netherlands. But why Sison now?

56. This case will be a long one and for the defense not without danger. The defense will have to do an intensive investigation in the Philippines, fortunately not without the assistance of people like the Capulong I have mentioned. We have already expressed our expectation to the court that the substantive treatment will just have to wait for a while; it will take months if not years before this case can be really discussed in court. I do not see why Sison should wait for this while in temporary detention. ###