

ECLI:NL:HR:2018:2349

Instantie	Hoge Raad
Datum uitspraak	18-12-2018
Datum publicatie	18-12-2018
Zaaknummer	17/02109 (English)
Formele relaties	Conclusie: ECLI:NL:PHR:2018:1394 In cassatie op : ECLI:NL:GHSHE:2017:2650
Rechtsgebieden	Strafrecht
Bijzondere kenmerken	Cassatie
Inhoudsindicatie	-
Vindplaatsen	Rechtspraak.nl

Uitspraak

18 December 2018

Criminal Division

No. S 17/02109

Supreme Court of the Netherlands

Judgment

on the appeal in cassation against a judgment of 's-Hertogenbosch Court of Appeal of 21 April 2017, number 20/001906-10, in the criminal case against:

[defendant]

1 Cassation proceedings

The appeal has been lodged by the defendant. On behalf of the defendant, R.J. Baumgardt and I.N. Weski, both of whom are attorneys-at-law in Rotterdam, have lodged a statement of grounds of appeal in cassation. The statement is attached to this judgment and forms part of it.

The Advocate General E.J. Hofstee has recommended dismissal of the appeal in cassation.

Counsel for the defendant have responded to this in writing.

2 What this case is about

2.1. In paragraphs 7 to 9 of his advisory opinion the Advocate General summarised the essence of this case as follows:

"The defendant is a Dutch national who, by his own account, has carried on business in Liberia on the west coast of Africa since the early 1980s. (...) His company [B] was later, from 1997 or 1998, named [C]. In 1999 the defendant, together with his Indonesian business partners, also established a logging business known as [D]. The defendant was president of [D]. (...) As the owner or president of two large logging companies in which Charles Taylor had a financial interest, the defendant had fairly close ties with Taylor and his regime.

1999 saw the outbreak of the second Liberian civil war, about which the Court of Appeal found, *inter alia*, as follows. For some five years there was an almost continuous armed struggle between Liberian combined armed forces led by Charles Taylor and a rebel group known as Liberians United for Reconciliation and Democracy (LURD). This latter group was supported by another rebel group known as the Movement for Democracy in Liberia (MODEL). LURD is thought to have also received support from the government of Guinea, which borders Liberia to the north. Fighting also took place in Sierra Leone, which borders Liberia to the north-west. The second Liberian civil war followed a cyclical pattern, with mixed results on both sides. According to the evidence on which the Court of Appeal based its judgment, the Liberian combined armed forces committed war crimes at various places between 2000 and 2002 during this second Liberian civil war. Count 1 relates to war crimes committed in Guéckédou, a town in Guinea near the border with Liberia. Count 2, namely involvement in war crimes, relates to offences committed in or near Voinjama. Count 3 relates to war crimes committed in or near Kolahun. Voinjama and Kolahun are towns in northern Liberia, situated in Lofa County near the border with Guinea. The Court of Appeal explained at length in its appealed judgment (at J.1 to J.4) what atrocities had been committed in these towns and the neighbouring villages. The war crimes committed (on multiple occasions) by Liberian combined armed forces, which were held to have been proven by the Court of Appeal, consisted (*inter alia*) of:

- intentionally shooting and killing civilians;
- subjecting civilians to a barrage of fire;
- setting fire to houses in which civilians were present;
- decapitating civilians;
- smashing babies' skulls;
- throwing live babies into a well;
- driving civilians from their homes, locking them up and then throwing a hand grenade inside;
- raping women and children;
- torturing civilians; and
- plundering the possessions of citizens.

An investigation was started against the defendant in the Netherlands in the spring of 2004. This was in response to a report issued in December 2000 by a Panel of Experts set up by the Security Council of the United Nations (...) and a 2003 report by Global Witness. These reports indicated that the defendant and [D] had been heavily involved in illegal arms trading in the region. (...)"

2.2. The Court of Appeal's evidentiary considerations as set out in the appealed judgment have been published at www.rechtspraak.nl, reference ECLI:NL:GHSHE:2017:1760, under the heading 'Bijzondere overwegingen (omtrent het bewijs)'. An English translation of the judgment has been published, reference ECLI:NL:GHSHE:2017:2650, under the heading 'Special considerations (regarding the evidence)'.

2.3. On appeal the defence argued, among other things, that the case brought by the Public Prosecution Service against the defendant was not admissible on account of a Liberian amnesty scheme. The Court of Appeal held that, even if it is assumed that the amnesty scheme approved by the then president C. Taylor a few days before he left Liberia was in force at some point, that scheme did not prevent prosecution of the defendant in the Netherlands.

3 Charges

Summarised, the charges against the defendant included the following:

- at counts 1A, 2A and 3A – at times in the years 2000 and 2001 (count 1A) and 2001 and 2002 (counts 2A and 3A) – on each occasion:

having aided and abetted the joint perpetration of violations of the laws and customs of war which resulted in death or inhuman treatment and/or plundering and/or rape, committed on multiple occasions,

which aiding and abetting consisted of intentionally:

- supplying arms and ammunition to C. Taylor and/or his armed forces;
- making available lorries and pick-up trucks as well as an [C] camp or meeting place to Taylor and/or his armed forces;
- making available his own personnel to take part in the fighting;
- threatening his own personnel with dismissal if they refused to take part in the fighting.

- at 4:

joint perpetration of an intentional breach of a requirement set pursuant to section 2 in conjunction with section 3 of the Sanctions Act 1977, on multiple occasions in the period from 21 July 2001 to 8 May 2002;

- at 5:

joint perpetration of an intentional breach of a requirement set pursuant to section 2 of the Sanctions Act 1977, on multiple occasions in the period from 26 September 2002 to 7 May 2003.

4 Admissibility of the case brought by the Public Prosecution Service

The Court of Appeal held as follows in connection with the admissibility of the case brought by the Public Prosecution Service:

"Admissibility of the case brought by the Public Prosecution Service

A. Liberian amnesty scheme

Defence counsel has argued – in brief – that the case brought by the Public Prosecution Service should be declared inadmissible in respect of all charges, since an "Act to grant immunity from both civil and criminal proceedings against all persons within the jurisdiction of the Republic of Liberia for acts and crimes committed during the civil war from December 1989 to August 2003" dated 7 August 2003 (below: the Liberian amnesty scheme) is in force. As this amnesty scheme is directly applicable to the crimes with which the defendant has been charged, defence counsel argues that the defendant should not have been prosecuted (or that his prosecution should have been discontinued) by the Public Prosecution Service, or in any event that the same conclusion can be drawn on the basis of the principle of equality of treatment, the principle of protection of legitimate expectations and/or the absence of jurisdiction.

A.1 The Liberian amnesty scheme and the right to prosecute

The Court of Appeal notes as follows in relation to the Liberian amnesty scheme.

During her oral pleadings, defence counsel submitted the above-mentioned Liberian amnesty scheme. Defence counsel attached to it an affidavit of attestation dated 14 February 2017. These documents show that the Liberian amnesty scheme was approved by the then President of Liberia on 7 August

2003 and published by the Liberian Ministry of Foreign Affairs on 8 August 2003. The affidavit was attached to demonstrate that the Liberian amnesty scheme is valid under Liberian law and has not been formally revoked in the intervening period.

As Charles Taylor resigned as President of Liberia on 11 August 2003, he approved this amnesty scheme shortly before leaving office.

The Comprehensive Peace Agreement (CPA) took effect soon after the publication of the Liberian amnesty scheme, namely on 18 August 2003, following negotiations in Ghana between the government (GOL) and its opponents (LURD and MODEL). This peace agreement also recommended the creation of the National Transitional Government of Liberia (NTGL). This transitional government was broadly composed of representatives of the parties to the conflict, political parties, civil society organisations and the 15 counties (districts) of Liberia.

Article XXXIV of the CPA provides that the NTGL:

"Shall give consideration to a recommendation for general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict that is the subject of this Agreement."

Article XXXV (c) of the CPA provides that:

"For the avoidance of doubt, relevant provisions of the Constitution, statutes and other laws of Liberia which are inconsistent with the provisions of this Agreement are also hereby suspended."

Article XXXV (e) of the CPA provides that:

"All suspended provisions of the Constitution, statutes and other laws of Liberia, affected as a result of this agreement, shall be deemed to be restored with the inauguration of the elected Government by January 2006. All legal obligations of the transitional government shall be inherited by the elected government."

Article XIII of the CPA of 18 August 2003 provided for the establishment of a Truth and Reconciliation Commission to address issues of impunity.

The Truth and Reconciliation Commission (TRC) was established by Act of 10 June 2005. Point (g) of Article VII (Functions and Powers) of the Truth and Reconciliation Commission Act (TRC Act) stated as follows:

"(...) provided that amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards." (all underlining above added by the Court of Appeal)

Article II of the TRC Act contains definitions of "human rights violations" and "violations of international humanitarian law".

From the provisions of article VII of the TRC Act quoted above, the Court of Appeal infers that the

Transitional Government (NTGL) apparently decided not to introduce a general amnesty.

In 2009, the Truth and Reconciliation Commission published a report containing recommendations on amnesty and prosecution of offences committed during the civil war. These were offences to which the Liberian amnesty scheme cited by the defence would also apply.

A.1.1

On the basis of the facts and circumstances described above at A.1. the Court of Appeal concludes as follows.

The Liberian amnesty scheme was approved by Charles Taylor, the then President of Liberia, on 7 August 2003, which was one of the last days of his presidency. On 11 August 2003, i.e. four days after giving his approval, Taylor transferred power to the then Vice President Moses Blah and left or fled from Liberia.

When the amnesty scheme was introduced during the then rule of Charles Taylor, peace talks were already being held in Ghana and all parties involved were thus discussing how and in what circumstances amnesty would be granted.

It is apparent from the Comprehensive Peace Agreement (CPA), which came into force several days later, that the parties agreed that the Transitional Government (NTGL) should consider introducing a general amnesty scheme. It also explicitly provided for the establishment of a Truth and Reconciliation Commission (TRC), which would be expressly authorised to make recommendations regarding amnesty or prosecution.

Article VII, section 26, point g of the TRC Act explicitly provides that recommendations for amnesty would not apply to "international crimes", such as the war crimes with which the defendant is charged.

No reference is made to the Liberian amnesty scheme mentioned by the defence either in the CPA or the TRC Act or in a subsequently published TRC report.

A.1.2

The Court of Appeal notes first of all that there is nothing in the case file or the proceedings at the court hearings to suggest that the Liberian amnesty scheme was invalid or was formally withdrawn or formally rendered inoperative at some point.

However, from the manner in which the Liberian amnesty scheme was established and the choices subsequently made and steps taken by (among others) the Transitional Government (NTGL) and the Truth and Reconciliation Commission (TRC), the Court of Appeal concludes, together with the Advocates General, that although the scheme may have been in force at a certain time, it did not have (or no longer had) formal legal force owing to the conclusion of the CPA and the establishment of the Truth and Reconciliation Commission (TRC). After all, the power to make recommendations to the government about prosecution or amnesty with regard to crimes committed during the second civil war passed to the Truth and Reconciliation Commission (TRC). Moreover, recommendations to grant amnesty for war crimes or crimes against humanity were expressly excluded in the TRC Act.

These findings are not changed by defence counsel's submissions that the Supreme Court of Liberia held in a judgment that the TRC had exceeded its powers in certain respects, that a commission member of the TRC had explicitly mentioned the Liberian amnesty scheme in a dissenting opinion on that judgment, that there had been (or was still) a debate about the scope of the TRC's powers and that two commission members did not sign the TRC report dated 30 June 2009, whatever the merits of these submissions may be.

A.1.3

The Court of Appeal also notes, for the record, that even if it has to be assumed that the Liberian amnesty scheme had formal legal force (for a short period) and applied to the defendant as well, amnesty or entitlement to amnesty for war crimes would be contrary to international law and should

therefore be excluded.

The Court of Appeal believes that under international law, for example articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), there is a positive obligation to institute an effective (criminal) investigation in cases where there is a suspicion of war crimes or crimes against humanity and, if necessary, to prosecute such crimes. Granting amnesty for war crimes and crimes against humanity is therefore not compatible with international law. An amnesty such as this one, which would exclude a prosecution brought in consequence of the above-mentioned positive obligations, would therefore constitute a violation of the ECHR (except in special circumstances, of which the Court of Appeal has not seen any evidence in this case). Accordingly, the Court of Appeal considers that, on the basis of international law, a national amnesty scheme which excludes prosecution for war crimes or crimes against humanity is incompatible with the obligation under international law to institute prosecution for such crimes.

Any such amnesty scheme is therefore not applicable.

Indeed, this is also a direct consequence of UN Security Council Resolution 1674 (2006), which emphasises the responsibility of States to comply with their obligation to end impunity and to prosecute those responsible for war crimes and crimes against humanity.

In reaching this finding, the Court of Appeal has taken into consideration that the amnesty scheme in question was not created as part of the peace process, but was instead drawn up by the then government of Charles Taylor, under whose rule the crimes with which the defendant has been charged occurred, namely shortly before Mr Taylor's more or less forced departure from Liberia.

This is why the Court of Appeal believes that, even if it has to be assumed that the Liberian amnesty scheme had formal legal force (whether for a short period or otherwise) and also that the scheme is (or would have been) applicable to the defendant in Liberia, this does not mean that the Public Prosecution Service in the Netherlands has lost the right to prosecute or continue to prosecute the defendant.

A.2 The Liberian amnesty scheme and the principles of equality of treatment and protection of legitimate expectations

As regards the argument based on the principles of equality of treatment and protection of legitimate expectations, the Court of Appeal holds as follows.

Under the discretionary principle laid down in article 167, paragraph 1 of the Code of Criminal Procedure, it is up to the Public Prosecution Service to decide independently whether prosecution should take place following a criminal investigation. According to current case law, the decision to prosecute lends itself to substantive judicial review only to a very limited extent, since the sole ground on which a prosecution brought by the Public Prosecution Service can be declared inadmissible is that instituting or continuing the prosecution would be incompatible with the principles of due process (in so far as relevant here, the principles of equality of treatment and protection of legitimate expectations) as no member of the Public Prosecution Service could reasonably have concluded that prosecution or continued prosecution would serve any interest protected by enforcement under the criminal law. As this criterion necessitates judicial restraint, the reasoning given for any decision to hold that the case brought by the Public Prosecution Service is inadmissible must meet stringent requirements. This involves weighing the Public Prosecution Service's position on the interest served by the present criminal prosecution against the circumstances submitted by the defence, which are intended to show that the decision to prosecute is contrary to the principles of equality of treatment and protection of legitimate expectations, as argued in this case.

A.2.1

Violation of the principle of equality of treatment occurs only where equal cases are treated unequally

and there is no reasonable and objective justification for this unequal treatment.

The Court of Appeal considers that it has not been argued or proven that Dutch citizens accused of crimes such as those with which the defendant has been charged have not been prosecuted on account of an amnesty granted under the Liberian amnesty scheme (or an entitlement to such an amnesty). The Court of Appeal therefore considers that the existence of equal cases involving the defendant and one or more unidentified third parties has not been demonstrated.

A.2.2

As regards the submission based on the principle of protection of legitimate expectations, the Court of Appeal holds that such a submission can succeed only if the prosecution has been instituted or continued after statements (or comparable acts) by or attributable to the Public Prosecution Service have given the defendant a legitimate expectation that he will not be prosecuted or that the prosecution will be dropped. However, as a general rule a legitimate expectation cannot be founded on statements made or acts performed by officials in the Netherlands who have no authority regarding the decision on whether or not to prosecute (or continue a prosecution).

In the Court of Appeal's opinion, it has not been shown that definite undertakings were at some point given to the defendant that he would not be prosecuted for the offences with which he was charged. The Court of Appeal also considers, in view of what has been held above at A to A.1.3, that the defendant could not have derived a legitimate expectation from the Liberian amnesty scheme that he would not be prosecuted by the Dutch Public Prosecution Service or that any prosecution would be dropped.

(...)

A.7 Conclusion

In view of everything that has been held above, the Court of Appeal dismisses the defences put forward by defence counsel that are based on the Liberian amnesty scheme and intended to obtain a declaration that the case brought by the Public Prosecution Service is inadmissible."

5 Assessment of the thirtieth ground of appeal in cassation

5.1. This ground of appeal takes issue with the rejection of the defence that prosecution of the defendant by the Public Prosecution Service is not admissible on account of an amnesty granted in Liberia. This defence is based on the argument that an Amnesty Act was approved in Liberia on 7 August 2003 under which all persons were granted amnesty in respect of both civil and criminal proceedings for acts and crimes committed by them during the Liberian civil war and that this Amnesty Act prevents prosecution of the defendant in the Netherlands for the offences with which he has been charged.

5.2. The question raised in the ground of appeal of whether the Liberian amnesty scheme prevents prosecution of the defendant in the Netherlands should be viewed in part against the background of the positive obligations upon States to protect the right to life and prevent inhuman treatment, for example under articles 2 and 3 of the Convention for the Protection of Human Rights and

Fundamental Freedoms (below: ECHR). These treaty obligations entail, among other things, carrying out an effective and independent investigation and providing for the possibility of criminal prosecution and punishment.

It can be inferred from the case law of the European Court of Human Rights (below: ECtHR) that the possibility cannot be excluded that in exceptional circumstances it may be permissible to grant an amnesty for war crimes despite the treaty obligations referred to above, for example where there is or has been a reconciliation process and/or a form of compensation for victims. (See, for example, the judgment of the ECtHR of 27 May 2014, no. 4455/10 (*Marguš v. Croatia*), paragraph 139 in conjunction with paragraph 127). As is also evident from that case law, however, under international law it cannot be lightly assumed that prosecution can be dispensed with on account of an amnesty (see, for example, paragraphs 124-140 of the above-mentioned judgment and the decision of the ECtHR of 17 March 2009, no. 13113/03 (*Ould Dah v. France*)).

5.3. According to its considerations as set out at 4 above, the Court of Appeal found, *inter alia* and unchallenged on appeal in cassation, as follows. On 7 August 2003 the then President of Liberia, C. Taylor, approved an amnesty scheme. This concerned an 'Act to grant immunity from both civil and criminal proceedings against all persons within the jurisdiction of the Republic of Liberia from acts and crimes committed during the civil war from December 1989 to August 2003' (the Liberian amnesty scheme).

Shortly afterwards, on 11 August 2003, Taylor resigned as President and left Liberia. On 18 August 2003 a peace agreement was concluded in Liberia which provided for the establishment of a transitional government, which was required to give consideration to a recommendation for a general amnesty. In the peace agreement it was also expressly decided to establish a Truth and Reconciliation Commission (TRC). The TRC Act of 10 June 2005, by which the TRC was established, provided that the TRC was not competent to make recommendations for amnesty in respect of war crimes such as those with which the defendant has been charged. The Court of Appeal also found that the Transitional Government had evidently decided not to introduce a general amnesty and that no mention was made of the Liberian amnesty scheme in the peace agreement or the TRC Act or in a subsequently published TRC report.

5.4. At A.1.2, the Court of Appeal rejected the defence's submission that under Liberian law the amnesty scheme of 7 August 2003 remained valid even after the peace agreement and the establishment of the Truth and Reconciliation Commission. The ground of appeal fails in so far as it alleges that the Court of Appeal thus misinterpreted Liberian law. The correctness of that finding cannot be tested on appeal in cassation since, under section 79 of the Judiciary Organisation Act, the Supreme Court is not competent to interpret the law of foreign States.

5.5.1. Basically, the Court of Appeal held at A.1.3, as reproduced above at 4, that the mere fact, as alleged by the defence, that suspects in Liberia were granted amnesty under the Liberian amnesty scheme of 7 August 2003, cannot prevent prosecution of the defendant in the Netherlands for the present grave international crimes. In arriving at this finding the Court of Appeal took into account the treaty obligations resulting from articles 2 and 3 of the ECHR, under which there is an obligation to institute an effective (criminal) investigation in cases where there is a suspicion of war crimes or crimes against humanity and, if necessary, to prosecute such crimes.

5.5.2. Taking into account, among other things, the Court of Appeal's findings regarding the circumstances in which the amnesty scheme was introduced, as set out at 5.3, and in view of the considerations set out above at 5.2, the Court of Appeal rejected the defence on adequate grounds without erring in law.

5.6. The ground of appeal therefore also fails to this extent.

6 Assessment of the other grounds of appeal

The grounds of appeal cannot result in cassation. In view of section 81, subsection 1 of the Judiciary Organisation Act, no further reasons need to be given for this finding since the grounds of appeal that have been filed do not warrant the answering of questions of law in the interests of the uniform application of the law or the development of the law.

This is because the grounds of appeal concern objections raised on appeal in cassation to matters on which the Court of Appeal gave a clear and correct answer, or submissions which, in essence, simply repeat what was said before the Court of Appeal and on which the Court of Appeal gave a factual decision which is not manifestly unsound and has been adequately reasoned. In his advisory opinion the Advocate General has also explained at length and in detail why all these submissions by the defence do not warrant setting aside the judgment of the Court of Appeal.

7 Decision

The Supreme Court dismisses the appeal.

This judgment has been given by the Vice President of the Supreme Court W.A.M. van Schendel as presiding judge, and by Justices A.J.A. van Dorst, V. van den Brink, A.L.J. van Strien and M.T. Boerlage, in the presence of H.J.S. Kea, Acting Clerk of the Court, and pronounced in open court on 18 December 2018.