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Onderzoek – Advies – Management

Anonymity in criminal proceedings

Practice of the regulation witness with limited anonymity and the regulation threatened anonymous witness in criminal proceedings

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Summary

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Summary

Introduction

Statements made by witnesses are often of vital importance for the evidence in criminal proceedings. In some cases however, witnesses are reluctant to make a statement. Reason for this can be that they are afraid that their statement may have consequences for them in one way or another. For instance witnesses might fear reprisals from the side of the suspect. Or witnesses might fear that they will be hindered in exercising their profession after having made a statement. The possibility of making a statement while remaining (partially) anonymous can in such cases be an instrument used to persuade witnesses to make a statement while the process of establishing the truth in criminal proceedings is not hampered. On the other hand, anonymous statements are subject to objections especially in view of truth-finding; the possibility to effectively verify the correctness and liability of the statements is limited because the source is unknown. This does not only apply to the suspect and his legal advisor, but also to the court judge. It applies in a lesser degree to the Public Prosecution Service because the Public Prosecution Service is often aware of the identity of the witness.

The Code of Criminal Procedure (in Dutch: Wetboek van strafvordering) includes three forms of anonymous evidence; the statement of the threatened witness made before the examining judge, the written statement of the otherwise anonymous witness and the statement of the witness with limited anonymity. Subject to certain conditions, these statements can be used as evidence. At request of the House of Representatives (Tweede Kamer) the Minister of Security and Justice has promised to provide insight into the use of possibilities within criminal proceedings related to the regulation witness with limited anonymity (under article 190 paragraph 3 Code of Criminal Procedure and article 290 paragraph 1 Code of Criminal Procedure) and the regulation threatened anonymous witness (under article 226a et seq. Code of Criminal Procedure). Furthering to this promise the Research and Documentation Centre (WODC) has asked DSP-group to carry out a study with the purpose of answering the following two key questions:

1 What does the legal framework of both regulations look like and what are the legal possibilities and limitations of the regulations for the furnishing of proof during criminal proceedings?
2 How often and in what manner are the regulations related to the witness with limited anonymity and the threatened anonymous witness used in practice?

Comments on the study results

Two comments should be made in relation to the study results. Firstly, the use of the regulations in practice is insufficiently documented. This means that within the judicial sphere there is no unambiguous and uniform registration of the application of both regulations. As figures are lacking, the separate offices of the examining judges (in Dutch: rechter-commisaris) were asked to estimate the use of both regulations over the year 2011. Even though most offices indicated that the final estimation was approximately correct or accurate, the figures are certainly not absolute facts and can therefore deviate from reality.

Secondly, it should be noted that the regulations are not often used. Experience in the field is therefore limited and often fragmentary. Within the study respondents were sought who had a relatively considerable amount of experience with the application of the regulations. Because their experiences were not representative in relation to the subject matter of this study it has to be taken for granted that not all experiences described in this report can be generalized for the Dutch legal practice.

The legal frame

The legal regulation related to the use of anonymous evidence in criminal proceedings is based on European jurisprudence. Immediate reason for this was the Kostovski case against the Netherlands, in which the European Court of Human Rights (ECHR) judged in 1989 that the use of anonymous statements in that case was contrary to the right to a *fair trial.* More specifically, it involved the violation of the suspect's right to be able to question witnesses who have made an incriminating statement.

The right to examine a witness is not absolute according to the jurisprudence of the ECHR. The fight against specific types of (organized) crime can however involve that this right may be restricted. Whether the restriction is justified has to be determined in each specific case and will, as appears from European jurisprudence, depend on the outcome of the weighing of the following criteria:

- The necessity of keeping the identity of the witness concealed and the degree into which this is a realistic option. For this, it is not the manner in which the witness concerned experiences threat that is decisive, but there have to be concrete and objective indications which cause that fear to be realistic.
- The degree into which what the court finds is based on the statement of the anonymous witness. As far as this is only or into a major degree based on the statement of the anonymous witness, it has to be examined into which degree the defence has had the opportunity to test the correctness and reliability of this statement.
- The degree into which the suspect has had an adequate opportunity to be able to test the correctness and reliability of the statements made against him at any time during the proceedings for instant by interrogating the witness or have the witness interrogated.

The Protection of Witnesses Act of 1 February 1994 (in Dutch: Wet getuigenbescherming) serves to meet the conditions which the ECRM attaches to the use of statements of persons of whom the identity cannot be established by the defence. In this respect the Act provides three types of statements:

- The statement of the threatened witness made before the examining judge;
- The written statement of an anonymous witness made at the police station or elsewhere;
- The statement of the witness with limited anonymity.

The first statement concerns the threatened witness. In order to meet the three criteria of the ECHR with this legal witness the examining judge is charged with judgment of the question whether a witness can be regarded as 'threatened witness'. If according to his opinion this condition is met, he orders that the identity of the witness remains concealed during the hearing. He can proceed to this on initiative of the Public Prosecution service, the defence or the witness him- or herself. As appropriate he can also decide on his own initiative to regard the witness as 'threatened witness'.

Once the examining judge has deemed the witness as threatened witness then the defence is given the opportunity to question the witness. Starting point of the examination of the threatened witness is that the examination is carried out in such a manner that the identity of the witness remains concealed. This can imply that the examining judge may prevent specific questions or may even prevent direct questioning. According to Dutch jurisprudence, statements of a threatened witness can be used as evidence, albeit these statements are not crucial to the judicial finding.

The second statement concerns the written statement of an anonymous witness made at the police station or elsewhere. For this type of anonymous proof the law does not provide a separate test procedure or possibilities for exercising the right to examine the witness. Reason for this is that the identity of the witness is neither known to the parties involved in the proceedings nor to the judge. Therefore it cannot be tested whether an anonymous statement was indeed necessary and the anonymous witness who has made the statement cannot be questioned any further. As this course of affairs is problematic in view of the first and third criteria set by the ECHR, the law stipulates that such a statement can only be used as evidence if the judicial finding is for the most part build on alternative evidence. The statement of the anonymous person can therefore only serve as supporting evidence. As far as the statement is used as evidence the judge should in the verdict substantiate ex proprio motu the reliability of that statement. Furthermore the defence has the opportunity to block the use of such an anonymous statement by filing a request for hearing the witness.[1]

The third statement concerns the statement of the witness with limited anonymity. Based on article 190 paragraph 1 and 290 paragraph 1 Code of Criminal Procedure the interrogating judge – the examining judge or session judge respectively – is obliged to establish the identity of the witness to be interrogated. He does so by requesting he personal data of the witness. The judge can decide however not to request these data if there is reason to suspect that the witness will experience nuisance or will be hindered in exercising his profession when he/she provides these data.

That protection is carried out ex officio, as ordered by the public prosecutor or at the request of the suspect or his legal advisor, or of the witness. No specific appeal procedures are provided. Except that the witness is not obliged to answer any questions concerning his identity, there is no further limitation to the hearing. The lack of these personal data should not form an impediment for the defence's right to interrogate. Moreover, the law includes a further obligation for justification when adopting a witness statement where anonymity is restricted (art. 360 Code of Procedure). Apart from this justification, no further limitations are imposed on the use of such witness statements as evidence.

Note 1 This however does not mean that a 'written statement of an anonymous witness made at the police or elsewhere' is not useful for the administration of justice. The statement can indeed provide valuable information for the criminal investigations.

Anonymous witness in practice

The study demonstrates that both regulations are used only in extremely rare exceptions (see table 1). Before 2011 the number of times that the status of threatened witness was granted was estimated at 9, while the number of times that the status of witness with limited anonymity was granted in 2011 was estimated at 83. When comparing this amount with the total amount of criminal court proceedings which were recorded at the Public Prosecutor (In Dutch: Openbaar Ministerie) in 2011, it appears that there was approximately 1 case of the regulation threatened witness in 25,000 criminal proceedings. The regulation witness with limited anonymity is relevant in approximately 1 of 2,700 criminal court proceedings. In cases in which the regulation was applied the basic fact was usually a crime of violence and/or drugs.

Table 1 Use regulation threatened witness and witness with limited anonymity compared to the number of criminal court proceedings (2011)

Area of jurisdiction	Number of registered criminal court cases[2]	Threatened anonymous witness	Witness with limited anonymity
Amsterdam		4	30
Arnhem		0	12
The Hague		1	9
Leeuwarden		1	4
Den Bosch		3	28
Total amount	**225,500**	**9**	**83**

The cautious use of the regulation threatened witness is, as far as we know, explained by two factors. Firstly the status of threatened witness involves a lot of extra work and increases the risk of failure in a case: not only do criminal proceedings become more complex because an appeal can be filed against the status decision, but also the actual hearing situation requires many logistic efforts. Secondly the evidential value of the a statement made by a threatened witness is relatively low, so that the Public Prosecutor only uses this legal possibility if no alternatives are available.

The minimal use of the regulation for witness with limited anonymity is explained by the fact that the law provides a possibility for a witness to leave parts of its identity out of a police file and instead makes a statement 'per address'. This is usually the address of an official who can identify the witness when asked by the judiciary (this legal provision is called Domicilie choice). This provision prevents the person reporting from hindrance caused by his report. Especially when the choice of address for service does not only involve a different address but when instead of a report with one's name also a personal identification number is included (which can be traced down to the person's identity by the judiciary but not by the defence). An explicit decision of the examining judge ex article 190 Code of Criminal Procedure is then no longer required and saves him work.

Demand for status decision and hearing situation

The request for the status of threatened witness is in practice nearly always submitted by the public prosecutor. As far as known, the most important reason for denying the status is that the examining

Note 2http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLNL&PA=37340&LA=NL

judge is not able to guarantee protection of the identity. If the examining judge does not grant the status for that reason, then the statement will not be used for the furnishing of proof or in the extreme case the witness is placed in a witness protection program. The demand is preceded by a tentative process in which the Public Prosecution Service and the examining judge search for the most appropriate solution for the noted risks. This course of affairs ensures presumably that in practice a formal status demanded by the public prosecution will often be granted.

The Witness Protection Team (In Dutch: Team getuigenbescherming (TGB)) of the National Police services Agency (KLPD) plays a major role in the examination of the threatened witness. Prior to each examination they advise the examining judge on the necessary protection measures to be taken for such an examination. In principle the examining judge follows this advice. Measures strongly differ from one case to another and vary from concealment of the face and concealment of the witness in the witness box to restriction of the hearing by allowing the defence only to submit written questions via the examining judge who presents them to the witness after screening.

From a formal point of view the demand of the status of a witness with limited anonymity nearly always originates from the Public Prosecution Service. In cases where the witness with limited anonymity is a civilian, it appears that the police is often the one who has informed the witness of this possibility.
Investigation officers working undercover, and who are asked to give evidence in a specific case, usually ask for a form of anonymity so that they will not be hindered in exercising their profession.

In practice the request of the status witness with limited anonymity is granted in most cases. The reason mentioned in the study is the lacking of objective assessment criterion as a result of which many situations are applicable.

The situation during the examination of a witness with limited anonymity varies considerably. In one case the consequences of granting the status might be that the examining judge prevents the defence from asking specific questions, while in another case the examining might involve disguise and voice scrambling. For taking the necessary protection measures often the TGB is brought into the examining of witnesses with limited anonymity. Judges rarely summon a witness with limited anonymity for making statements during the session.

Evidential value

As noted above the law sets clear restrictions to the use of a statement of a threatened witness. For instance, the judicial finding has to be supported by strong evidence other than the statement of a threatened witness. Furthermore it appears that statements made by threatened witnesses generally contain little useful information in practice. Therefore its use for the judicial finding is limited. In order to prevent the identity from being revealed during a later stage it is often not possible for the witness to make a detailed statement.

The law attaches hardly any conditions to the use of the statement of a witness with limited anonymity. However, there were indications in the study that the judge handles these pieces of evidence with more care than regular statements. The use of statements of witnesses with limited anonymity is very clearly motivated in practice and the defence is often provided with ample

opportunities to test the reliability of such a statement. As opposed to the statement of a threatened witness, the statements of a witness with limited anonymity are usually as informative as a statement made by a non-anonymous witness.

Bottlenecks in practical implementation

The study has not provided indications which refer to inconsistencies and imperfections in the applicable legal stipulations or the practical implementation of both regulations. However, the respondents do name three points for attention.

Firstly, the defence experiences the protective measures taken for a witness with limited anonymity sometimes as a limitation of the right to examine a witness. By granting the status of witness with limited anonymity the examining judge is free to take all the necessary measures for concealing the identity of the witness. Far-reaching measures however may lead to the defence no longer being able to view the non-verbal communication of the witness. Attorneys experience this as a limitation because non-verbal communication can also give reason to test the reliability of the witness. This issue can weigh heavily for the defence because the law does not require compensation for such protective measures.

Secondly, the respondents say that the police does not always handle personal data of persons who wish to remain anonymous with enough care. Witnesses who indicate even at the first examination that they do not want their names mentioned in any criminal file, have apparently been named in the procedural documents because the reporting officer appears to have inadvertently entered the name into the official report. If that is the case, then the examining judge can no longer use one of both regulations as the witness's identity has already been disclosed.

Finally, the availability of an appropriate examination room for threatened witnesses is limited. There is one secure courtroom in Rotterdam. In Amsterdam is the extra secured court Osdorp situated (de Bunker). Both locations are generally fully booked far in advance. The set-up of a witness box is often not possible because the security measures for witness protection can only be realized at very few locations. These circumstances may lead to a delay in the criminal proceedings.

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DSP-groep, opgericht in 1984, is een onafhankelijk landelijk bureau voor onderzoek, advies en management, met zestig medewerkers. We werken in opdracht van de overheid (ministeries, provincies en gemeenten), maar ook van maatschappelijke organisaties op landelijk, regionaal en lokaal niveau.

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