Pre-trial detention of juveniles in practice

An explorative and quantitative research of judicial decisions and population characteristics

S U M M A R Y

Y.N. van den Brink
H.T. Wermink
K.G.A. Bolscher
C.M.M. van Leeuwen
M.R. Bruning
T. Liefaard

Leiden University, *Leiden Law School*

Summary

Introduction

This explorative and quantitative research sketches the practice of pre-trial detention (*voorlopige hechtenis*) of juveniles in juvenile criminal cases in the Netherlands, and the characteristics of the concerned juvenile suspects. Through this research, necessary knowledge is gained to develop suitable alternatives to pre-trial detention of juveniles in juvenile institutions. This research may add to the contemplations of and give further structure to a possible new policy on the deprivation of liberty of juveniles in Dutch juvenile criminal law, as clarified in the report 'Exploration Deprivation of Liberty of Juvenile Suspects' (*Verkenning Invulling Vrijheidsbeneming Justitiële Jeugd*) which was presented to the Dutch parliament on 13 November 2015.

Central research questions

The central research questions are:

I Under what circumstances and for what reasons is pre-trial detention of juveniles requested and ordered, the enforcement of an order for pre-trial detention suspended or the order implemented in an alternative way?

II What are the characteristics of these juvenile suspects?

III How does the imposition of pre-trial detention relate to the sentence in juvenile criminal cases and does it have any 'preliminary judicial effects'?

IV Can – based on the findings related to the questions under I, II and III – statements be made about the development of alternatives to pre-trial detention of juveniles in juvenile institutions and, if answered in the affirmative, what statements?

Research Methods

In this research, 250 randomly selected case files of juveniles (i.e. <18 years old when they allegedly committed the offence) were scrutinised. This concerned juveniles that were – within the timeframe of 1 April 2014 until 1 April 2015 – brought before an investigating judge by the public prosecutor aiming to request an order for remand in custody (*inbewaringstelling*, Art. 63 Dutch

Criminal Procedural Code). The case files that were scrutinised were held by the District Court Rotterdam, the District Court Midden-Nederland and the District Court Gelderland. Given the amount of files and the random character of the selection of files, as well as the involvement of multiple Dutch district courts, it is safe to assume that the data that were collected and analysed provide a good indication of the practice of pre-trial detention of juveniles in the Netherlands.

With help of a code book, information related to decisions about (1) remand in custody, (2) remand detention (*gevangenhouding*, Art. 65 Dutch Criminal Procedural Code), (3) the extension of remand detention (*verlenging van gevangenhouding*, Art. 66 (3) Dutch Criminal Procedural Code) and (4) the verdict in first instance was extracted from the files. The collected data have been analysed with help of SPSS. The research questions have been answered through descriptive analyses and multivariable (regression)analyses. This usage of quantitative research methods- and techniques has not been deployed before to analyse decisions regarding pre-trial detention of juveniles in the Netherlands.

Characteristics of juveniles brought before an investigative judge

The report encompasses an extensive description of the characteristics of the criminal offences and personal traits of the 250 juvenile suspects (see chapter 5). The results show that property crimes, combined with assault, are the most common type of criminal offence for which these juveniles were brought before an investigative judge (*rechter-commissaris*). The results indicate, moreover, that a substantial number of the studied juveniles concerns juveniles whose adolescence runs a far from an ideal course. The vast majority of the juveniles were, despite their young age, known by the police and had already been in contact with judicial authorities (75%). The Dutch Council for Child Protection (*Raad voor de Kinderbescherming*; i.e. 'the Council') reports that many of these juveniles have problems in one or multiple areas, such as at home, at school or in their pastime. Not seldom these juveniles have a low IQ and/or psychological problems (resp. 31% and 38%). The majority of the studied juveniles was already on the radar of social services at the moment they were brought before the investigative judge.

Decisions about pre-trial detention of juveniles

The results of the research exhibit that requests for remand in custody (N=250), remand detention (N=104) and extension of remand detention (N=55) were granted in the vast majority of cases (resp. 87%, 97% and 98%), by the investigative judge or the pre-trial chamber (*raadkamer*). At the same time the results

show a frequent use of conditional suspensions, due to which many approved requests for pre-trial detention have not resulted in an actual placement of the juvenile in a juvenile institution. This occurred most frequently when remand in custody was ordered, where 55% of the orders have been suspended. The orders to use remand detention or to extend it were suspended to a lesser degree (resp. 25% and 35%). Night detention and home detention were only sporadically used as alternative means to execute an order for pre-trial detention in a juvenile institution.

The research shows that in most of the cases the decision whether or not to suspend a pre-trial detention order determined whether or not a juvenile was allowed to await his or her trial in liberty. For this reason, this research further analysed the decisions whether or not to suspend the orders for remand in custody, remand detention or extension of remand detention.

Suspension of remand in custody of juveniles

The decision of the investigative judge to suspend an order for remand in custody was scrutinised according to multivariable regression analyses. These analyses made clear that some characteristics of the juvenile suspects and/or their cases significantly align with the result of the decision of the investigative judge on the suspension (see para. 6.4.2.2 and para. 10.3). Some of these characteristics seem to play a significant role in an earlier stage, i.e. at the stage of the *advice of the Council for Child Protection* about suspension, which subsequently seems to permeate the decision of the investigative judge on the suspension. The analyses show a strong connection between the advice of the Council and the final decision on the suspension of the investigative judge.

The analyses also indicate that the Council seems more reluctant to advice against the suspension of placement of a juvenile in a juvenile institution when it concerns *a very young suspect* (i.e. under the age of 15), rather than a suspect who is older, which permeates the decision of the investigative judge on the suspension. An explanation for this may be found in the (assumed) vulnerability of young suspects and the possible detrimental effects of time spent in a juvenile institution.

The analyses furthermore show that *first offenders* have a reduced chance to an advice of the Council in favour of a suspension of remand in custody – and consequently have a reduced chance for an actual suspension – than juveniles with a criminal record (i.e. who are not a first offender). A clarification for this could possibly lie in a lack of information about these suspects in the early stages of the criminal proceedings. It is also imaginable that *first offenders* are in principle only brought before an investigative judge when the serious nature of the case so requires (see for further clarifications: para. 10.3).

The results of the research show also that juvenile suspects *from non-native Dutch descent*, irrespective of different characteristics related to the criminal

offence and proceedings and personal traits, seem to have a smaller chance to a positive advice by the Council on a suspension, which seems to be upheld in the decision of the investigative judge. Further research is needed to clarify this (see para. 10.3).

What further follows from the analyses is that juveniles with a *(possible) mental disability* seem to have a smaller chance for an affirmative advice on a suspension by the Council and (because of this) seem to have a smaller change to get the order suspended by the investigative judge. An explanation for this could be that the communication, and participation of juvenile suspects with a mental disability in their contact with professionals (such as employees of the Council and the investigative judge) in the early stages of the proceedings, may be difficult, which may lead to a less clear or even distorted picture of the juvenile concerned. A different explanation may be that the drafting of a suspension plan by the Council or juvenile probation services is more complex (and requires more time). Further research into possible explanations is, however, needed (see para. 10.3).

There are characteristics of the juvenile suspects that significantly connect to the outcome of judicial decision on the suspension, independently from the Council's advice on the suspension. These characteristics possibly played a role in the advice of the Council, but also in the decision on the suspension (in criminological literature this is called "cumulative (dis)advantage"). Juveniles that do not attend school for instance – irrespective of the advice of the Council – have a smaller chance to a suspension of remand in custody than juveniles that do attend school and do well at school. Moreover, juveniles that – according to the report of the Council – have a negative attitude towards social services and the support of juvenile probation services, stand a reduced chance to a suspension of remand in custody.

A strong and significant connection has been found between the investigative ground (also known as risk for collusion) as ground for remand in custody, and the decision of the investigative judge not to suspend the remand in custody. If the investigation is the ground for the remand in custody order, the chances for a suspension are scant. A negative connection between the *recidivism ground* and the decision on the suspension has also been established. If a risk for recidivism is one of the grounds upon which the custody in remand order is based, the chances for a suspension are smaller than in cases where such an order is not (partly) based on this ground.

Finally, it must be concluded that the nature or context of the criminal charges, such as the 'maximum statutory sanction possible for the gravest criminal offence as charged' or the 'number of criminal offences as charged' do not significantly connect with the decision whether or not to suspend. This seems to indicate that juvenile suspects' – different from adult suspects – personal traits, such as dropping out from school, and procedural characteristics, such as a pending investigation by the police, play a more important role in decisions on pre-trial detention than the nature or context of the crim-

inal charges. This does however not necessarily mean that the charges may not play a role in investigative judges' decisions on the suspension of custody in remand in particular cases.

Suspension of remand detention of juveniles

The decision of the pre-trial chamber on the suspension of remand detention has also been scrutinised according to a multivariable regression analysis, through which possible connections between the request for a suspension by the legal counsel, the stance of the public prosecutor on the suspension and the advice of the Council on the suspension with the decision of the pre-trial chamber have been assessed (see para. 7.4.2.2 and para. 10.4).

The results show that in the sample the pre-trial chamber did not once order the suspension of remand detention without a legal counsel actually requesting it to do so. This may indicate that the pre-trial chamber, despite its statutory authority to decide on a suspension on its own motion (art. 493 lid 1 Dutch Criminal Procedural Code), perceives a request for a suspension by the suspect or his lawyer as a minimum condition for a suspension of remand detention. It may also imply that if the legal council does not find a request for a suspension feasible, the case evidently lacks eligibility to be granted a suspension.

It has further been established that a strong relation exists between the stance of the *public prosecutor on the suspension* and the decision of the pre-trial chamber on the suspension. When the public prosecutor states that remand detention can be suspended, the chances for an affirmative decision of the pre-trial chamber increase considerably. A similar relation can be found as far as the *advice of the Council* is concerned. When the Council advises to suspend remand detention, the chance that the pre-trial chamber suspends remand detention is significantly bigger than if the Council advises negatively on suspension.

These results suggest that the pre-trial chamber attaches great weight to the views of the public prosecutor and/or the Council. Vice versa could these results indicate that the awaited decision of the pre-trial chamber may influence the views of the public prosecutor and the Council, as far as they anticipate that decision. An alternative explanation is that the pre-trial chamber, the public prosecutor and the Council, in principle entirely independent from each other, often reach the same conclusions about the suspension of remand detention. It is, however, likely that these results tie in with the in the criminological literature developed notion that decision making in criminal proceedings is a 'collective process', in which the decision of one actor plays a role in the decisions of other actors in the process (see para. 10.4).

Suspension of the extension of remand detention of juveniles

The decision of the pre-trial chamber to suspend the extension of remand detention has only been analysed descriptively (see chapter 8). Due to the small numbers of juvenile suspects for which an extension of remand detention has been requested and ordered, one should be reluctant to draw general conclusions from the results of this analysis. Nevertheless, the finding stands out that some juvenile suspects who initially – i.e. at the moment they were brought before the investigative judge – were not involved in meaningful daytime activities and (partly because of that) did not seem to be eligible for a suspension, have later been granted a suspension after all. Juvenile probation services may have found a daytime activity for these juveniles in the meantime (see para. 10.5).

Pre-trial detention and the disposition of juvenile criminal cases

This research also pays attention to the relation between the imposition of pre-trial detention of juveniles and the disposition of juvenile criminal cases (i.e. after adjudication; see chapter 9). The following three findings can be mentioned (see para. 10.6).

The first finding is that 13 out of 108 juveniles, who have actually spent time in pre-trial detention, were acquitted or exempted from further prosecution (*sepot*). In other words, in this sample more than one out of ten juvenile suspects who have been in pre-trial detention, were not convicted.

A second finding is that the imposition of pre-trial detention in the pre-trial stage of the criminal proceedings can be strongly tied to the imposition of an unconditional youth imprisonment (*jeugddetentie*) as a final sentence. Vice versa, chances that a juvenile suspect who has not spent time in pre-trial detention will be sentenced to an unconditional youth imprisonment are slim.

A third finding is that the analyses show a strong relation between the duration of pre-trial detention and the duration of the imposed youth imprisonment. This could indicate that the investigative judge and the pre-trial chamber anticipate the expected duration of the youth detention. It could, however, also mean that judges, when they have to decide on a sentence, amend their sentencing – as far as the duration of unconditional youth detention is concerned – to the duration of the time already served in pre-trial detention.

In all, these findings suggest that pre-trial detention seems to have a so-called 'preliminary judicial effect' on the disposition in juvenile criminal cases. As a consequence, elements that play a role in the decision-making processes of the investigative judge and pre-trial chamber on the (suspension of) remand in custody and remand detention in the early stages of the criminal proceedings, possibly still play a role in the sentencing decision.

POINTS TO CONSIDER FOR ALTERNATIVES TO PRE-TRIAL DETENTION IN JUVENILE INSTITUTIONS

Based on the results of this research, it can be argued that in the current practice in the Netherlands alternatives to pre-trial detention of juveniles are being deployed on a regular basis, by means of a conditional suspension. Nevertheless, there is a group of juvenile suspects that does seem to be (directly) eligible for a suspension and subsequently does end up in a juvenile institution. This group of juveniles should be targeted for (possible) new alternatives to pre-trial detention in juvenile institutions. The results of this study encompass several clear specific points to consider for current and (the development of new) alternatives to pre-trial detention in juvenile institutions. This would not only apply to the decision-making process of different actors concerned with pre-trial detention, but also to decisions on a policy level (see para. 10.7).

POINTS TO CONSIDER RELATED TO THE DECISION-MAKING PROCESS IN THE PRACTICE OF PRE-TRIAL DETENTION

The first point to consider relates to the *interrelation between pre-trial detention and the final disposition of the case*. This interconnection could imply that the intended or expected sentence plays a role in the investigative judge's or pre-trial chamber's decision on the use of alternatives to pre-trail detention (see para. 10.7.3). It can be argued that contemplations on the development and usage of alternatives to pre-trial detention, must include a reflection on the connection between pre-trial detention and the imposition of youth imprisonment as a sentence, that seems to exist in practice.

The second consideration relates to the *found connection between the decision of the investigative judge (and pre-trial chamber) on the suspension of pre-trial detention and the advice of the Council.* Especially the finding that first offenders, juveniles from non-Dutch descent and juveniles with a (possible) mental disability seem to have a reduced chance to be supported by the Council with an affirmative advice on the suspension, and subsequently have a reduced chance to be granted with a suspension by the investigative judge, should spur extensive research on the underlying clarifications.

The third point to consider connects the shown *relation between the investigative ground (danger of collusion) as a ground for pre-trial detention and the decision on the suspension*. If remand in custody is (partially) based on this ground, the chances for suspension are usually slim. Despite the fact that this research does not clarify the way in which the public prosecutor and judges substantively deploy the investigative ground, the results of this research show that it is important that this ground is used as reluctant as possible (i.e. only if there

is a real danger of collusion) and that the investigation of juvenile criminal cases is executed in a speedy fashion.

Points to consider for policy makers

This research has identified five important points to consider for policy makers tasked with the development of alternatives to pre-trial detention of juveniles in juvenile institutions, also in light of the obligations under article 37 (b) of the UN Convention on the Rights of the Child (see para. 10.7.4).

The first point is that there seems to be a need for *directly available, suitable daytime activity programs* for juveniles that do not yet have a meaningful daytime activity. The results of this research indicate that these programs may increase the chances for a suspension of pre-trial detention, since a substantial number (around a quarter) of the juveniles concerned does not attend school and lacks other meaningful daytime activities.

The second point to consider is that the existing instruments for intervention that may serve as a condition to the suspension may not always suffice to take away the risk for collusion and/or recidivism; at least decision makers may not be sufficiently convinced. There seems to be a need for alternatives that provide the level of *oversight and security perceived necessary to forestall the risk for collusion and/or recidivism*, without placing the juvenile (fulltime) in a juvenile institution. A possible addition to the existing alternatives modes for execution of pre-trial detention, such as night detention and home detention, could be found in the placement of juvenile suspects in local, small scale facilities, which concept is currently being tested in different pilots in the Netherlands. Evening reporting centers could be considered as another alternative, which enables juveniles to attend these centers after school and during the weekends and to spend the night at home (see for a further elaboration on these centers: para. 10.7.4). The further investment in the development of alternative ways of monitoring juvenile suspects, such as electronic oversight, could also be considered.

The third point for consideration for the current and (possible) future alternatives to pre-trial detention in juvenile institutions is that a substantial number of the *target group consists of juveniles with limited mental capacities and psychological problems*. Alternatives to pre-trial detention in juvenile institutions have to be suitable for this group of children. This means among others that staff implementing the orders for these alternatives, has to be trained to be able to work with juveniles with such limitations and problems.

The fourth point to consider is that alternatives to pre-trial detention in juvenile institutions will only succeed if the *professionals involved know of their existence, have knowledge on the target group and have confidence in these alternatives* (see para. 10.7.4). It therefore is important that the concerned actors, among which judges, public prosecutors, legal counsels and professionals of the

Council and juvenile probation services, are being trained in the use of these alternatives to pre-trial detention in juvenile institutions.

The fifth point for consideration is that the use of a*lternatives to pre-trial detention in juvenile institutions should be monitored.*

Legal safeguards for alternatives

When suitable alternatives to pre-trial detention in juvenile institutions are being developed within the framework of Dutch juvenile criminal law, it is of utmost importance that the fundamental legal safeguards of juveniles are not lost out of sight. Relevant are not only the human rights and fundamental freedoms flowing from international law, but also the fundamental principles of Dutch (juvenile) criminal law, such as the principle of proportionality and subsidiarity (see par. 10.7.5). Given that possible alternatives should adhere to these fundamental safeguards, it is important that the legal bases for current and future alternatives to pre-trial detention in juvenile institutions are given attention (see also para. 10.7.1).

Conclusion

This research has mapped, for the first time, the population characteristics of juveniles brought before an investigative judge based on a request for remand in custody and has assessed how these characteristics relate to the judicial decision-making process on pre-trial detention. The results confirm the existing image of pre-trial detention of juveniles in the Netherlands, but also shed new light on the matter. This study not only supports better compliance with domestic and international obligations related to the pre-trial detention of juveniles. It also lays an important foundation for specific policy choices with the aim to develop suitable alternatives to pre-trial detention of juveniles suspected of being in conflict with the law.