

## #38: To proof or not to proof

Criminal judges are given a difficult task. They need to reconstruct what happened and decide whether they are convinced somebody committed a criminal offence. The Dutch system of proof gives a judge a free hand when taking this decision: he is free in the valuation of the evidence and needs to be convinced that the crime was committed by the suspect to come to a conviction. This freedom of a judge is just limited by the rules regarding the minimum of proof. The *unus testis nullus testis*-rule is one of the basic principles in this regard. However, this rule does not apply to police officers. If a police officer witnesses something and writes this down in an official report, this report has probative value and the *unus testis nullus testis*-rule does not apply. We wonder of the probative value given to an official report is legitimate and whether a decision of the court could be solely based on an official report. Before we get to that, we will first consider the decision scheme of the Court to know which questions the Court has to answer. Thereafter, we will pay special attention to the probative value of an official report.

In the Netherlands the criminal Court gives a judgement based on the so-called “decision scheme” of article 348 and 350 of the Code of Criminal Procedure (CCP). First, the court must investigate the validity of the summons, its jurisdiction to try the offence as charged in the indictment, the right of the public prosecutor to institute criminal proceedings and any reasons that might exist to suspend the prosecution (article 348 CCP). If these formal steps do not rise any issues, the court then must deliberate on the questions of article 350 CCP. These questions are:

1. Is there legal and convincing proof that the defendant committed the criminal offence? The court must base the

conviction on legal means of evidence and must acquit if the legal minimum of evidence has not been met.

2. If there is sufficient proof, can the proven finding of fact be qualified as a criminal offence under the law?
3. If so, is the offence punishable? (in other words: are there any grounds for exemption from criminal liability?)
4. If so, is the defendant punishable? (in other words: are there any grounds for exculpation?)

The indictment is the starting point for the court's deliberation. This means that judges may only decide upon the facts and the charged offences laid down in the indictment, and may not convict for other, noncharged facts or offences. However judges, are completely free in selecting the evidence to decide up on the first question whether there is legal and convincing proof that the defendant committed the criminal offence. The means of evidence on which a conviction can be based are included in the CCP.

The next step of question 1 is to determine whether the legal minimum of evidence has been met. As said, *the unus testis nullus testis*-rule applies in this regard. However, a special place in this system is given to official police reports. An official statement by a police officer has special probative value on the basis of Article 344 (2) of the CCP. The rule "one witness is no witness" does not apply to investigating officers. An offense can be proven on the basis of one official report drawn up by an investigating officer on the basis of Article 344, paragraph 2 of the CCP. A great deal of criticism has been made of this status of "official reports". After all, an investigating officer can also make mistakes. And sometimes that investigating officer is in good faith, but sometimes not.

In the Netherlands we have some recent examples in which police officers have tampered with an official report. A recent press statement, released by the Public Prosecution

Service (PPS), states that two investigating officers have been prosecuted for drawing up incorrect police reports. For these false reports community service orders have been demanded by the PPS. The cases are already relatively old, the facts date from 2009 and 2013. For that reason, the demanded penalties have been moderate by the PPS. Nevertheless, the PPS shows that investigators must also comply with the rules. According to the press release, the Court should have given its judgement on the 12<sup>th</sup> of February 2019 . However, the judgement hasn't been published yet.

Apparently the PPS believes that criminal prosecution is not always in place. In [Lawlunch #37](#) we already reported on the disciplinary measures taken by the PPS against the false official reports drawn up by the investigating officers involved. Although the Public Prosecution Service believed that criminal offenses had been committed, according to the press release issued by the Public Prosecution Service on 2 January 2019, criminal proceedings were not initiated. The media attention it generated and the fact that it was 'just' related to procedural irregularities led to that decision.

Unfortunately these mistakes are not incidents. However, it is very hard for the defense to indicate these mistakes. For this reason we wonder whether the special status given to police report is justified. We highly doubt this. For the defense reasons enough to question these given reports. But more importantly, judges should consider – taking into account the decision scheme – whether these official police report deserve the probative status as they are given by the law.

If you have any questions about the foregoing, please feel free to contact us via [boezelman@hertoghsadvocaten.nl](mailto:boezelman@hertoghsadvocaten.nl) and [boer@hertoghsadvocaten.nl](mailto:boer@hertoghsadvocaten.nl).