SR STRAFRECHT UPDATES

ANNOTATIE

Cassatie in het belang der wet: biometrische ontgrendeling van een in beslag genomen smartphone.

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Annotatie bij Hoge Raad, 09-02-2021, ECLI:NL:HR:2021:202 (SR-2021-0038)

Commentaar bij HR 9 februari 2021, ECLI:NL:HR:2021:202.

Advocaat-generaal F.W. Bleichrodt heeft beroep in cassatie in het belang van de wet ingesteld vanwege een biometrische ontgrendeling van een in beslag genomen smartphone van een verdachte om ten behoeve van het opsporingsonderzoek toegang te krijgen tot de inhoud daarvan. Daarbij is op de aangehouden verdachte dwang uitgeoefend door hem te boeien en zijn duim op de vingerafdrukscanner van die smartphone te plaatsen. De rechtbank heeft geoordeeld dat het verkrijgen van toegang tot de smartphone aldus op rechtmatige wijze heeft plaatsgevonden. De klacht klaagt over het oordeel van de rechtbank dat het samenstel van onder meer artikel 94, 95 en 96 Sv een voldoende wettelijke grondslag vormt voor het zich de toegang verschaffen tot een in beslag genomen voorwerp door dit tegen de wil van de verdachte met gebruikmaking van diens vingerafdruk biometrisch te ontgrendelen en over het oordeel van de rechtbank dat het onder dwang gebruikmaken van de vingerafdruk van de verdachte ter ontgrendeling van de bij hem in gebruik zijnde smartphone met het oog op bewijsgaring geen inbreuk op het onder meer in artikel 6 EVRM vervatte *nemo tenetur* -beginsel oplevert.

De Hoge Raad overweegt dat artikel 94 lid 1 Sv, artikel 95 lid 1 Sv en artikel 96 lid 1 Sv van belang zijn voor de beoordeling van het cassatieberoep en haalt deze aan. De Hoge Raad overweegt ten aanzien van eerstgenoemde klacht dat bij de beoordeling daarvan voorop moet worden gesteld dat in het samenstel van de bepalingen waarop de bevoegdheid tot inbeslagneming is gebaseerd tevens de wettelijke basis ligt voor de bevoegdheid om aan in

beslag genomen voorwerpen onderzoek te doen ten behoeve van de waarheidsvinding, teneinde gegevens voor het strafrechtelijk onderzoek ter beschikking te krijgen. In computers en andere in beslag genomen elektronische gegevensdragers en geautomatiseerde werken, waaronder smartphones, opgeslagen of beschikbare gegevens zijn daarvan niet uitgezonderd (vgl. ECLI:NL:HR:1994:AD2076 en ECLI:NL:HR:2017:584). De Hoge Raad overweegt dat voorts van belang is dat uitoefening van het dwangmiddel van inbeslagneming kan inhouden dat desnoods met toepassing van proportioneel geweld handelingen worden verricht die strekken tot het in de zin van artikel 134 lid 1 Sv onder zich nemen of gaan houden van voorwerpen ten behoeve van strafvordering (vgl. ECLI:NL:HR:2004:AO5819). Datzelfde heeft te gelden voor handelingen die strekken tot het verkrijgen van toegang tot de inhoud van die voorwerpen teneinde daaraan onderzoek te doen. De Hoge Raad oordeelt dat, gelet daarop, het oordeel van de rechtbank dat het samenstel van bepalingen waarop de bevoegdheid tot inbeslagneming is gebaseerd een wettelijke grondslag biedt voor het zich de toegang verschaffen tot een in beslag genomen smartphone van de verdachte door die tegen zijn wil met gebruikmaking van zijn vingerafdruk biometrisch te ontgrendelen, niet getuigt van een onjuiste rechtsopvatting.

Ten aanzien van laatstgenoemde klacht overweegt de Hoge Raad dat bij de beoordeling daarvan vooropgesteld moet worden dat in het Nederlandse recht niet een onvoorwaardelijk recht of beginsel is verankerd dat een verdachte op geen enkele wijze kan worden verplicht tot het verlenen van medewerking aan het verkrijgen van voor hem mogelijk bezwarend bewijsmateriaal. In artikel 6 EVRM ligt besloten dat, indien ten aanzien van een verdachte sprake is van een 'criminal charge' in de zin van die bepaling, deze het recht heeft 'to remain silent' en 'not to incriminate oneself'. Beslissend voor de vraag of in een strafrechtelijke procedure het *nemo tenetur*-beginsel is geschonden, is of het gebruik tot het bewijs van het onder dwang van de verdachte verkregen materiaal in een strafzaak zijn recht om te zwijgen en daarmee zijn recht om zichzelf niet te belasten van zijn betekenis zou ontdoen (vgl. ECLI:NL:HR:2011:BP6144). In ECLI:CE:ECHR:2006:0711JUD005481000 (*Jalloh/Duitsland*) heeft het EHRM in dit verband de volgende factoren benoemd:

'1. General principles established under the Court's case-law (...)

101. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put.

102. The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and

elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing.'

De Hoge Raad overweegt dat het EHRM in dezelfde uitspraak achtereenvolgens het volgende heeft overwogen over het uitoefenen van fysieke dwang bij de verkrijging van bewijs in strafzaken:

'2. Application of those principles to the present case

103. In determining whether in the light of these principles the criminal proceedings against the applicant can be considered fair, the Court notes at the outset that the evidence secured through the administration of emetics to the applicant was not obtained "unlawfully" in breach of domestic law. It recalls in this connection that the national courts found that Article 81a CCP permitted the impugned measure.

104. The Court held above that the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention.

105. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the Rochin case (see § 50 above), to "afford brutality the cloak of law". It notes in this connection that Article 15 UNCAT provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the

facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation.

108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

109. This finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6. However, the Court considers it appropriate to address also the applicant's argument that the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself. To that end, it will examine, firstly, whether this particular right was relevant to the circumstances of the applicant's case and, in the affirmative, whether it has been breached.

110. As regards the applicability of the principle against self-incrimination in this case, the Court observes that the use at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity is in issue. It notes that the privilege against self-incrimination is commonly understood in the Contracting States and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement.

111. However, the Court has on occasion given the principle of self-incrimination as protected

under Article 6 § 1 a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was in issue. In Funke v. France (ECLI:CE:ECHR:1993:0225JUD001082884), for instance, the Court found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself. Similarly, in J.B. v. Switzerland (§§ 63-71) the Court considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against selfincrimination (in its broader sense).

112. In Saunders (§ 69), the Court considered that the principle against self-incrimination did not cover "material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing".

113. In the Court's view, the evidence in issue in the present case, namely, drugs hidden in the applicant's body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in Saunders. Firstly, as with the impugned measures in Funke and J.B. v. Switzerland, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will. Conversely, the bodily material listed in Saunders concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the Saunders case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from Saunders that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health.

115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to

procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences.

116. Consequently, the principle against self-incrimination is applicable to the present proceedings.

117. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

118. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3.

119. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

120. Turning to the existence of relevant safeguards in the procedure, the Court observes that Article 81a CCP prescribed that bodily intrusions had to be carried out lege artis by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

121. As to the use to which the evidence obtained was put, the Court reiterates that the drugs

obtained following the administration of the emetics were the decisive evidence in his conviction for drug trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law.

122. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.'

De Hoge Raad overweegt dat de rechtbank vastgesteld heeft dat onder de verdachte een smartphone in beslag is genomen en dat teneinde deze smartphone biometrisch te ontgrendelen de verdachte tegen zijn wil is geboeid en zijn duim op de vingerafdrukscanner is geplaatst. Op deze wijze is de vingerafdruk van de verdachte gebruikt om de gegevens die op dat moment al in de smartphone waren vastgelegd, voor het bewijs van het strafbare feit waarvan hij werd verdacht veilig te stellen. De rechtbank heeft in de kern geoordeeld dat het op deze wijze toepassen van een zeer geringe mate van fysieke dwang met als doel het door middel van de vingerafdruk van de verdachte biometrisch ontgrendelen van de smartphone geen inbreuk op het door artikel 6 EVRM gewaarborgde *nemo tenetur*-beginsel oplevert. Daarin ligt tevens besloten dat het ondergaan van deze fysieke dwang slechts een geringe inbreuk op de lichamelijke integriteit van de verdachte opleverde. De Hoge Raad oordeelt dat dit oordeel – gelet op hetgeen is vooropgesteld – niet van een onjuiste rechtsopvatting getuigt en niet onbegrijpelijk is.