Avoiding a full criminal trial: Fair trial rights, diversions, and shortcuts in Dutch and international criminal proceedings

Vriend, K.C.J.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
In modern societies, full criminal trials are avoided on many occasions. This thesis is concerned with mechanisms that either divert from or speed up the proceedings. Koen Vriend argues that the fair trial rights as established by the European Court of Human Rights under Article 6 of the European Convention on Human Rights provide a normative framework that does not only apply in a full criminal trial, but that it can also be used for diverted and shortened proceedings. He shows that the concept of fairness - as derived from ECtHR case law - is a fundamental principle that underlies all criminal law enforcement. It provides for the appropriate framework to assess whether diverted or shortened proceedings are fair and legitimate.
Avoiding a Full Criminal Trial
A commercial edition of this thesis will be published in the International Criminal Justice Series of T.M.C. Asser Press in cooperation with Springer.
Avoiding a Full Criminal Trial

*Fair Trial Rights, Diversions, and Shortcuts in Dutch and International Criminal Proceedings*

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor

aan de Universiteit van Amsterdam

op gezag van de Rector Magnificus

prof. dr. D.C. van den Boom

ten overstaan van een door het College voor Promoties ingestelde commissie,

in het openbaar te verdedigen in de Agnietenkapel

op dinsdag 31 mei 2016, te 12:00 uur


door Koen Cornelis Johannes Vriend

geboren te Hoorn
Promotiecommissie:

Promotores: prof. mr. T. Blom Universiteit van Amsterdam
            prof. mr. G.K. Sluiter Universiteit van Amsterdam

Overige leden: prof. mr. J.H. Crijns Universiteit Leiden
                prof. mr. W.N. Ferdinandusse Rijksuniversiteit Groningen
                prof. mr. R.C.P. Haentjens Universiteit van Amsterdam
                prof. mr. A.J.C. de Moor-van Vught Universiteit van Amsterdam
                prof. mr. H.G. van der Wilt Universiteit van Amsterdam

Faculteit der Rechtsgeleerdheid
For my parents
For Tim
# Table of Contents

List of Abbreviations xi

1 Full Criminal Proceedings in Decline 13
   1.1 The Full Criminal Trial 13
   1.2 Purpose and Scope of the Study 15
   1.3 Terminology: Diversions, Shortcuts, and a Full Criminal Trial 18
   1.4 Research Question 19
   1.5 The Normative Framework 19
   1.6 Outline of the Book 20

2 Diversions, Shortcuts, and the Concept of Fairness 23
   2.1 Introduction 23
   2.2 Fairness and Evidence Law 25
   2.3 Principles and Rules 27
   2.4 Participation in Criminal Proceedings 30
      2.4.1 Non-compulsion 33
      2.4.2 Informed Involvement 35
      2.4.3 Challenging the Evidence 36
      2.4.4 Reasoned Judgement 38
   2.5 Diversions and the Concept of Fairness 40
   2.6 Conclusion 45
# Table of Contents

## 3 Diversions and Shortcuts in Dutch Law of Criminal Procedure

3.1 Introduction 47

3.1.1 Rules of Admissibility 50

3.1.2 Weighing the Evidence 55

3.1.3 Reasoned Judgements 61

3.1.3 Conclusion 63

3.2 Diversions in Dutch Law of Criminal Procedure 65

3.2.1 Introduction 65

3.2.2 The Punitive Order 65

3.2.3 The Transaction 71

3.2.4 The Conditional Dismissal 75

3.3 Shortcuts in Dutch Law of Criminal Procedure 77

3.3.1 Introduction 77

3.3.2 Facts of Common Knowledge and Contextual Facts 78

3.3.3 Chain Evidence 101

3.3.4 Confessions 107

3.3.5 Cases Ad informandum 112

3.3.6 Appeal Proceedings 115

## 4 Diversions and Shortcuts in the Law of International Criminal Procedure

4.1 Introduction 125

4.1.1 Preliminary Observations 126

4.1.2 Rules of Admissibility in International Criminal Proceedings 131

4.1.3 Weighing the Evidence 144

4.1.4 Reasoned Judgements 151

4.1.5 Conclusion 152

4.2 Diversions in the Law of International Criminal Procedure 153

4.2.1 Introduction 153

4.2.2 Guilty Pleas 153

4.2.3 Legal Framework of Guilty Pleas before the ad hoc Tribunals 154

4.2.4 Admissions of Guilt at the ICC 162

4.3 Shortcuts in the Law of International Criminal Procedure 164

4.3.1 Introduction 164

4.3.2 Agreed Facts 164

4.3.3 Judicial Notice of Facts of Common Knowledge 169

4.3.4 Judicial Notice of Adjudicated Facts and Documentary Evidence 183

4.3.5 Appeal Proceedings 215
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>5.1</td>
<td>Introduction</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>5.1.1</td>
<td>Waiving Rights</td>
<td>226</td>
</tr>
<tr>
<td></td>
<td>5.1.2</td>
<td>Outline</td>
<td>227</td>
</tr>
<tr>
<td>5.2</td>
<td></td>
<td>Diversions and Shortcuts in Dutch Law of Criminal Procedure</td>
<td>227</td>
</tr>
<tr>
<td></td>
<td>5.2.1</td>
<td>Diversions and the Participatory Model of Proof</td>
<td>227</td>
</tr>
<tr>
<td></td>
<td>5.2.2</td>
<td>Shortcuts and the Participatory Model of Proof</td>
<td>235</td>
</tr>
<tr>
<td>5.3</td>
<td></td>
<td>Diversions and Shortcuts in the Law of International Criminal Procedure</td>
<td>249</td>
</tr>
<tr>
<td></td>
<td>5.3.1</td>
<td>Introduction</td>
<td>249</td>
</tr>
<tr>
<td></td>
<td>5.3.2</td>
<td>Diversions and the Participatory Model of Proof</td>
<td>250</td>
</tr>
<tr>
<td></td>
<td>5.3.3</td>
<td>Shortcuts and the Participatory Model of Proof</td>
<td>253</td>
</tr>
<tr>
<td>5.4</td>
<td></td>
<td>Conclusion</td>
<td>269</td>
</tr>
<tr>
<td>6</td>
<td>6.1</td>
<td>Conclusion</td>
<td>271</td>
</tr>
<tr>
<td>6.2</td>
<td>A Case for Fairness</td>
<td>275</td>
<td></td>
</tr>
<tr>
<td>6.3</td>
<td>Recommendations</td>
<td>277</td>
<td></td>
</tr>
</tbody>
</table>

Acknowledgements

Summary

Samenvatting

Bibliography

Table of Cases
List of Abbreviations

A. Ch. Appeals Chamber
ACHR American Convention on Human Rights
AJ Appeals Chamber’s Judgement
BGH Bundesgerichtshof (German Federal Court of Justice)
C Constitution
CC Criminal Code
CCP Code of Criminal Procedure
ECHR European Convention on Human Rights
ECLD Extraordinary Criminal Law Decree
ECLI European Case Law Identifier
ECtHR European Court of Human Rights
ECtHR (GC) European Court of Human Rights, Grand Chamber
GVG Gerichtsverfassungsgesetz (German Code on the Organisation of the Judiciary)
HR Hoge Raad der Nederlanden (Dutch Supreme Court)
HRC Human Rights Committee
ICC International Criminal Court
ICCPR International Covenant on Civil and Political Rights
ICTY International Criminal Tribunal for the former Yugoslavia
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>LJN</td>
<td>Landelijk jurisprudentienummer (Dutch case law identifier)</td>
</tr>
<tr>
<td>NJ</td>
<td>Nederlandse Jurisprudentie (Dutch case law journal)</td>
</tr>
<tr>
<td>NOR</td>
<td>Naoorlogse Jurisprudentie (Dutch case law journal)</td>
</tr>
<tr>
<td>OM</td>
<td>Openbaar Ministerie (Dutch Public Prosecution Service)</td>
</tr>
<tr>
<td>par.</td>
<td>paragraph</td>
</tr>
<tr>
<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>Sr</td>
<td>Wetboek van Strafrecht (Dutch Criminal Code)</td>
</tr>
<tr>
<td>Stb.</td>
<td>Staatsblad (Dutch Official Bulletin of Acts and Decrees)</td>
</tr>
<tr>
<td>Stcrt.</td>
<td>Staatscourant (Dutch Government Gazette)</td>
</tr>
<tr>
<td>StPO</td>
<td>Strafprozessordnung (German Code of Criminal Procedure)</td>
</tr>
<tr>
<td>Sv</td>
<td>Wetboek van Strafvordering (Dutch Code of Criminal Procedure)</td>
</tr>
<tr>
<td>T. Ch.</td>
<td>Trial Chamber</td>
</tr>
<tr>
<td>TIC</td>
<td>taken into consideration</td>
</tr>
<tr>
<td>TJ</td>
<td>Trial Chamber's Judgement</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNICRI</td>
<td>United Nations Interregional Crime and Justice Research Institute</td>
</tr>
</tbody>
</table>