For the love of Adam: two sodomy trials at the Cape of Good Hope

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This paper rests upon a close examination of two contrasting cases tried before the Court of Justice at the Cape of Good Hope in the second decade of the eighteenth century. Both trials involved accusations of sodomy. The three suspects in the first case were charged with attempted sodomy, whereas four of the five accused in the second case were charged with full performance of the deed (*"het volbragte flagitium sodomia"*)[1]. The accused in the first case differed markedly in status: the chief accused was master of an outward bound Company ship, while his co-accused were cabin boys. In the second case, by contrast, all five accused were of similar and equally lowly status, three being soldiers quartered in the Nassau bastion of the Castle (the Dutch East India Company's headquarters at the Cape), while the other two were, respectively, a sailor on shore leave from a Company ship and a messenger of the court (*veldwagter*) in the employ of the Landdrost of Stellenbosch.[2]

Besides the contrast in the composition of the group of accused persons, there were other marked differences between the two cases. In the first place, although the evidence gathered by the prosecution appears (at first glance) to have been equally damaging in both cases, the Court rejected the prosecutor's claim and conclusion against *schipper* Pieter Berkman (though it granted his demand that the cabin boys be corporally punished), but endorsed every detail of his claim against the men involved in the second case. The Independent Fiscal (as public prosecutor) had asked that Berkman be stripped of his office, rank and wages, declared unfit ever to serve the Company again and banished ever more from its territories. He had also concluded that Berkman should be whipped together with the two boys and returned with them to the fatherland, "with the costs of the case."[3] The Court decided instead that Berkman should keep his job and be allowed to choose whether to return to Europe or continue on to Batavia

1. "Sodomy" in this context meant anal penetration of one man by another. The term has a long history and a complex etymology. For a discussion of its meaning in the courts of the Dutch Republic and a brief history of its origins, see Theo van der Meer, *Sodoms zaad in Nederland: Het ontstaan van homoseksualiteit in de vroegmoderne tijd* (Nijmegen, 1995), 27-31. For a fascinating account of the shifting meanings of the term in medieval penitentials and theological tracts, see also M.D.Jordan, *The invention of sodomy in Christian theology* (Chicago, 1997).
2. CJ 6, Minutes of the Court of Justice, Friday, 3 April 1716 and Wednesday, 15 December 1717. The *veldwagters* were mounted messengers under the command of the Landdrost of Stellenbosch. They held the rank of sergeant in the Company hierarchy. They were despised by the freeburghers on account of their duties, which included the pursuit and arrest of suspects, the collection of taxes and the delivery and posting of notices and summonses. (Dan Sleigh, personal communication, 8 January 2003).
3. CJ 320, no. 52, *Eijsch ende conclusie* of Fiscal Cornelis van Beaumont, *exhibitum in judicio* 3 April 1716. The Fiscal acted as public prosecutor in the colony. In 1685 his post was made independent of the Governor and the Council of Policy. He reported directly to the *Heeren* XVII.

at his present rank (*"in zijn qualitijt te vertrekken"*). It did, however, order him to pay the costs of his trial. The two boys were not so lucky. Hendrik Barentsz Swart, who had by his own account engaged in mutual masturbation with the *schipper* and had suffered several failed attempts at anal penetration, was condemned to be whipped by the Caffers, returned without wages to the fatherland and banished for six years from the Company's domains.[4] While awaiting deportation he was to be confined on Robben Island, where many convicts served out their sentences of hard labour. Eduard Pijlworm, who had reported that Berkman had grabbed his private parts and, on another occasion, forced him to sponge his naked body with brandy, was to be whipped on board ship and sent away from the Cape with the forfeit of 6 months' wages. The two boys were likewise to contribute to the costs of the case.[5]

In the second case, where the Fiscal had proved to his own satisfaction that "the sodomitical sin" had been "fully performed" by three of the five men, he demanded the death penalty. Adam Vigelaar of Delft, Jan Theunisz of Groningen, and Pieter Andrietz Frits of Haarlem were to be taken to a ship in the roads and drowned alive by the executioner (*"met genoegsaame swaarte leevendig over boord geset en in see verdronken"*).[6] Nicolaus Friderich Einfeld of Hannover, who had, when confronted by witnesses, admitted having consented to attempted sodomy, was to be severely whipped in secret. In the case of Jan de Breeker of Gorcum, the fifth accused, who had been implicated by Vigelaar in his second and further confession, but had firmly denied the accusations made against him, the Fiscal felt he could not proceed further and left it to the court to decide De Breeker's fate.[7] In finding for the plaintiff, the court determined that the crime was so "odious and enormous" that its sentence should not be made public. The minutes merely referred to page four in the sentence book.[8] There it was recorded that the first three accused should be drowned alive, just as the Fiscal had specified, that Nicolaus Einfeld (here he was "Eenvelt") should be severely flogged *"in 't donkergat"*, banished for ever from the Company's lands and confined in the *donkergat* until his departure for Europe, "with forfeit of all monthly wages due to him, and the costs." (The *donkergat* was a vaulted stone chamber built into the thick walls of the Nassau bastion, adjoining the torture chamber. It can still be seen today. It has one narrow air vent above the door, and no other light source.) Finally, the court freed Jan de Breeker from his detention.[9]

A further contrast between the two court cases, and one perhaps more interesting to social historians, lies in the nature of the interaction and the extent

4. CJ 6, Minutes, 3 April 1716. The *Caffers* were the backbone of the colony's police force. They were slaves and convicts of Asian origin and, together with the sergeant or *geweldiger*, who was of European origin, they fell under the direct control of the Fiscal. They lived in the Company's slave lodge but, unlike all other slaves, they were allowed to bear arms. They enforced the nightly curfew, effected arrests and served as the executioner's assistants. They were hated and feared by slaves and colonists alike and despised for their association with the scaffold. Infamy attached to those who fell into their hands. On this, see, for example, R.Ross, *Status and respectability in the Cape Colony 1750-1870* (Cambridge, 1999), 19 and R.C.-H. Shell, *Children of bondage: a social history of the slave society at the Cape of Good Hope*, 1652-1838 (Hanover, 1994), 189-194.
5. CJ 6, Minutes, 3 April 1716.
6. CJ 321, Documents in criminal cases, no.55, *Eisch ende conclusie, exhibitum in judicio* 15 December 1717.
7. CJ 321, Documents in criminal cases, no.55, *Eisch ende conclusie, exhibitum in judicio* 15 December 1717.
8. CJ 6, Minutes of the Court of Justice, 15 December 1717.
9. CJ 784, Criminal sentences, no. 4, 15 December 1717.

of social distance between the men accused in each case. In the first case, there was an obvious gap in status, age and power between Pieter Berkman and his two co-accused. Berkman was 48 years old and master of the ship *'t Huijs ter Boede*, on which the events described in court occurred.[10] He was a married man with a wife and one child at home in Amsterdam.[11] It is not clear how long he had been in the service of the Company, but this was at least his second visit to the roads of Table Bay. Some nine years earlier he had skippered a galliot named *de Nagel*, which had sailed from the Texel in December 1707 with the secret signals and instructions for the homeward bound fleet.[12] And in May 1708, after a stay of some three months at the Cape, he was appointed first mate on the *Duivenvoorde, "een singulier naschip"* (a lone hind-ship) on its homeward journey.[13] He was thus no stranger to sailing under dangerous conditions. His sexual partners, Hendrik Barentsz Swart and Eduard Pijlworm, were, by contrast, aged about nineteen years (they weren't quite sure of their age) and as *scheepsjongens* (ship's boys), occupied the very lowest rung in the hierarchy of seafarers aboard the ship.[14] Moreover, it is clear from the testimony of both skipper and boys that the relationship between them was extremely unequal. According to the boys, their sexual contacts with the skipper took place against their will and were accompanied by threats of violence. In Pijlworm's case, the skipper's first advances were preceded by a brutal whipping, which the skipper himself had ordered.

The social and sexual interaction between the men involved in the second case was completely different. They were all of similar rank and age. At thirty, Adam Vigelaar was the eldest (and the only married member of the group), but the age-gap between him and his sexual partners (of whom there were several) was never more than 10 years.[15] In his opening declaration (*"eijsch ende conclusie"*), the Fiscal portrayed Vigelaar as the chief ringleader and seducer of the other men: "through cunning", wrote the Fiscal "and a devilish inspiration, he had turned the other three accused [Frits, Theunisz and Einfeld] ... to his will in order to satisfy his wanton passions in an unnatural way ... and they allowed themselves to be used as tools."[16] But the truth, as it emerges from the documents before the court, seems to have been rather different. While it is true that Vigelaar was the common factor in each of the other men's confessions, it is clear that their involvement with him was consensual and not coerced. Moreover,

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10. *'t Huijs ter Boede* was a 642 ton yacht, built in Zeeland in 1702 for the Hoorn chamber of the Dutch East India Company. On this voyage she carried 99 seafarers, 34 soldiers and four passengers. (J.R.Bruijn, F.S.Gaastra and I.Schöffer, *Dutch-Asiatic shipping in the 17th and 18th centuries* (The Hague, 1979), vol. II, 328).
11. CJ 320, Documents in criminal cases, no. 55, interrogation of Pieter Berkman, 29 January 1716.
12. Bruijn,Gaastra and Schöffer, *Dutch Asiatic shipping*, vol. II, 328; A.J. Böeseken, ed., *Suid-Afrikaanse argiefstukke: Resolusies van die Politieke Raad, 1652-1732*, 8 vols (Cape Town: 1957-1975), vol. IV, 22 May 1708.
13. Böeseken, ed., *Resolusies*, vol. IV, 3 August 1708.
14. Skippers in the service of the VOC earned between 70 and 80 guilders per month; *matroosen* (ordinary seamen) between seven and 11 guilders and *jongens* (boys) just four to six guilders per month. (Bruijn, Gaastra and Schöffer, *Dutch-Asiatic shipping*, vol. I, 210-211). In the record of Pijlworm's confession his occupation was given as "*matroos*", whereas Swart was described as a *jongen*.
15. CJ 321, nos. 56-63, examination of Pieter Andrietz Frits, 7 October 1717; examination of Nicolaas Eenvelt, 11 October, 1717; examination of Adam Vigelaar, 15 October 1717; examination of Jan de Breeker, 30 October 1717; confession of Jan Theunisz, 19 November 1717.
16. CJ 321, no. 55, *Eijsch ende conclusie*, 15 December 1717.

there are suggestions that Vigelaar was not wedded to a role as the active partner in erotic exchanges and that on other occasions and with other men, he was the seduced rather than the seducer.[17]

In the mind of a modern reader, Adam Vigelaar's ebullient sexuality emerges vividly from the text of the documents before the court and it is not difficult to understand how, given the perceptions of his day, the Fiscal (and eventually Adam himself, after some time in detention) came to understand his behaviour as driven by demonic energy. With hindsight, however, it seems that the sexual encounters which took place in the barracks and guard house of the Nassau bastion and (on at least two occasions) in the shade of the Company's garden and along the path leading to the Castle gates, prefigured new forms of same-sex interaction and same-sex desire, forms which, as Theo van der Meer has convincingly argued, were for the first time homosexual in nature, that is, "related to sex and gender" rather than hierarchy and power.[18]

Berkman's acquittal: a question of rank?

I would like to return to this theme below. First, however, it seems necessary to address the prior question which arises from the contrasts between the two trials: why was Pieter Berkman acquitted while Adam Vigelaar and his sexual partners were put to death? Acquittals were rare in the Cape court, especially in criminal trials. Was this then a case of arbitrary justice, or of favour shown to a man who held an important position in the company's hierarchical structures? How important was the skipper's rank in determining the attitude of the court towards him?

Several writers, among them Theo van der Meer, have drawn attention to the legal inequality which was built into the administration of justice in the Netherlands in the early modern period.[19] Although the United Provinces had no unified judicial system, each province having its own judicial hierarchy and its own body of local customs and statutes, most courts took account of the social standing, as well as the age and health of defendants. The Criminal Ordinances of Philip II, which had been introduced by the Duke of Alva in 1570 in an attempt to bring order to the diverse criminal codes of Philip's Netherlandish territories, and which continued to shape criminal law and criminal procedure in the time of the Republic, specified that judges should consider these factors when framing their judgments.[20] "Legal inequality on the grounds of social status was a given, even legally prescribed," writes Van der Meer. But, he adds, "a closer look at the sentences - also in sodomy cases - demonstrates that they were not arbitrarily imposed."[21]

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17. See, for example, CJ 321, no. 59, *recollement* of Pieter Andriesz Frits; and no. 57, further confession of Adam Vigelaar, 28 October 1717.
18. Van der Meer, *Sodoms zaad in Nederland*, 215-224 and 280-283. Randolph Trumbach's research into the history of homosexuality in Britain has identified a similar change in the organisation of same-sex desire. He dates this change from the early eighteenth century. See for example, R.Trumbach, 'London', in D.Higgs, ed., *Queer sites: gay urban histories since 1600* (London, 1999), 89-91.
19. Van der Meer, *Sodoms zaad in Nederland*, 116-122 and 143-152.
20. M.van de Vrugt, *De Criminele Ordonnantiën van 1570* (Zutphen, 1978), 139.
21. Van der Meer, *Sodoms zaad in Nederland*, 144.

This paradox, I would suggest, was equally true of the Court of Justice at the Cape. Despite its members' lack of legal training[22] and despite its position as the supreme court of a slave-holding colony (though appeal could be made to the High Court of Justice at Batavia)[23] where there were profound inequalities between slave and free, black and white, freeburgher and Company servant, the Cape court followed set procedures in the conduct of criminal trials and applied the standard Roman-canon rules of proof. From the perspective of the modern South African law of evidence, which was Anglicized in 1830, many of these rules and procedures seem grotesque, but they were no different from those followed in Dutch courts at the time.

According to the third Ordinance issued in the name of Philip II in 1570, the *Ordonnantie op de Stijl*, in all cases where the crime was "evident" and the nature of the offence sufficiently serious to merit corporal punishment, the accused should be tried according to the "extraordinary mode of procedure".[24] This procedure (based on a combination of Roman and canon law and derived originally from the inquisitional methods of the medieval church) was inquisitorial in nature.[25] It was initiated *ex officio* by the Fiscal or public prosecutor, usually after a preliminary investigation, and it was designed to be speedy and final. It normally began with an application to the court for an order of arrest (a "vagabond" or a suspect caught *in flagrante delicto* could be arrested without such an order and a high-born suspect might be summonsed rather than arrested). Once the suspect was in custody, the formal inquiry began. The suspect (now "the prisoner") was examined, first informally, then formally, often upon a list of questions ("articles") drawn up by the prosecutor and put to the suspect by two commissioned members of the court. An imprisoned suspect had no right to remain silent. On the contrary, provided that the judges had sufficient evidence to pronounce him "vehemently suspect", he could be "put to a sharper examination", that is, tortured with the object of forcing him (or her) to confess.

What constituted "sufficient proof" to send a prisoner to the torture chamber?[26] It seems there was some confusion in the law with regard to the circumstances under which torture could be legally applied. Article 41 of the Criminal Ordinance of 5 July 1570 stated that "the use of torture was forbidden, except in the case sanctioned by Roman law, 'Namely, when the matter is so clear, and the proof so apparent that nothing seems to remain but the confession

22. From 1685 the Cape Court comprised nine members: the Governor, who presided, the *Secunde*, the two chief military officers, the oldest junior merchant, the "*winkelier*", the garrison book-keeper and two freeburghers. The secretary attended meetings but did not participate in the deliberations of the court. (G.G.Visagie, *Regspleging en reg aan die Kaap van 1652 tot 1806* (Cape Town, 1969), 43; H.R.Hahlo and E.Kahn, *The South African legal system and its background* (Cape Town, 1968), 538-539.
23. Hahlo and Kahn, *The South African legal system*, 543.
24. Van de Vrugt, *De Criminele Ordonnantiën*, 134-5. According to the Dutch jurist Simon van Leeuwen, the extraordinary procedure was not to be used "where the smallness of the offence does not incur corporal punishment", for in such a case, "the imprisonment, which is a kind of bodily constraint, and the disgrace resulting from it, would be heavier than the punishment of the act." (*Simon van Leeuwen's commentaries on Roman-Dutch law*, revised and edited by C.W. Decker, translated by J.G. Kotze, 2 vols (London, 1886), vol. II, 547 and 552.)
25. A detailed account of the origins of inquisitorial criminal procedure and of the growing opposition to it in English courts can be found in J.H.Wigmore, *Evidence in trials at common law*, revised by J.T.McNaughton, 10 vols. (Boston, 1961), vol. 8, chapter 80.
26. Sometimes he was already there: Theo van der Meer reports that prisoners of the Amsterdam court were interrogated in the torture chamber. (Van der Meer, *Sodoms zaad*, 182-183).

of the prisoner.'"[27] But article 61 expressly forbade the use of torture in cases where the court already had enough proof to convict the prisoner. "Torture with the sole purpose of obtaining a confession was expressly excluded by article 61 of the Criminal Ordinance and possibly also on the grounds of article 42 of the *Ordonnantie op de Stijl*."[28] In the view of Marijke van de Vrugt, who has made a special study of these ordinances, the lawmaker's intention was to permit torture in cases where the court was in possession of "a full half proof" of the guilt of the accused, but not in possession of full proof. The function of the torture would then be to "complete the proof" by means of his or her confession.

> The suspect should not be condemned to the rack if no full half proof was supplied, even less should a suspect be tortured if a complete proof was available. In the first case the suspect should be set free for lack of evidence, in the second case the suspect should be convicted without further ado. Only in cases where there was more evidence to hand than a full half proof and less evidence than a full proof, could the judge decide to use the rack.[29]

"Half proof" was defined by Simon van Leeuwen as

> ... evidence whereby the judge indeed obtains some knowledge of the case, but not complete, or such that judgment can be pronounced or justice done thereon. Such proof is for instance the evidence of one witness, whose evidence although he is a man of honour and credit, cannot be accepted as proof ...[30]

"Common report" or circumstantial evidence (*indicia* was the formal term) might also be considered half proof.[31] "Full proof", on the other hand, was constituted by "the testimony of two or more credible witnesses testifying of what they personally know ... so that it depends on the number of witnesses and the means of their knowledge. For if anything is proved by only one witness it cannot, without the aid of other corroboration, be received."[32]

The suspect's confession would, then, serve to "make the proof round".[33] The converse, however, did not apply. A confession was sufficient on its own to convict a suspect, without the need for further proof. "A thing may be fully proved without witnesses by confession, that is, admission by the parties themselves, which is in law considered to amount to the strongest proof."[34] Once the court had obtained a judicial confession, it could proceed without further ado to

27. Cited in Van de Vrugt, *De Criminele Ordonnantiën*, 145.
28. *Ibid*., 145.
29. *Ibid*., 146. My translation.
30. Decker, ed., *Van Leeuwen's Commentaries*, vol. II, 493.
31. *Ibid*., vol. II, 494.
32. *Ibid*., vol. II, 487.
33. This expression is used in Van der Meer, *Sodoms zaad in Nederland*, 148 and 150.
34. Decker, ed., *Van Leeuwen's commentaries*, vol. II, 490. It seems, though, that some corroborating evidence was required. Cf. Anonymous, 'The Roman-Dutch law of evidence', *The South African law journal*, vol. 19, 1902, 376.

judgment and sentence.[35] Indeed, such was the weight accorded by the courts to the confession of an accused person that the entire object of the extraordinary process seems to have been to obtain it. This was the case even where the court was in possession of full proof.[36]

As the legal historian J.H. Langbein has explained, the Roman-canon law's insistence upon the testimony of two eyewitnesses and its devaluation of circumstantial evidence, together with the weight accorded to a judicial confession, virtually ensured that torture would form an integral part of the law of proof under the *ancien regime*. Where the crime was covert, eyewitnesses were seldom available, and the pressure to extract a confession became intense:

> No society will long tolerate a legal system in which there is no prospect of convicting unrepentant persons who commit clandestine crimes. Something had to be done to extend the system to those cases. The two-eyewitness rule was hard to compromise or evade, but the confession rule invited "subterfuge". To go from accepting a voluntary confession to coercing a confession from someone against whom there was strong suspicion was a relatively small step, indeed, one which was probably taken almost from the inception of the system. There is considerable evidence of the use of torture in northern Italy already in the first half of the thirteenth century ... The two-eyewitness rule left the Roman-canon system dependent upon the use of torture.[37]

It is here, in particular, that English rules of criminal procedure, introduced at the Cape after the Second British Occupation, most clearly part company with Dutch practice. Circumstantial evidence had always been given more weight by English courts. Indeed, English juries could convict an accused person on the basis of such evidence alone. Hence there was less pressure to obtain a confession. From the mid-1600s onwards, English courts increasingly begun to treat the accused person as a "non-compellable witness". By the time of the Restoration, the privilege against self-incrimination had become firmly established in England.[38] In modern South African common law, "no statement by an accused person can be given in evidence against him unless the prosecution prove beyond reasonable doubt that it was freely and voluntarily made."[39] The purpose of this rule is, of course, to protect "persons in custody or charged with

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35. Decker, ed., *Van Leeuwen's commentaries*, vol. II, 490, 547 and 552. See also Van de Vrugt, *De Criminele Ordonnantiën*, 136 and Anonymous, 'The Roman-Dutch law of evidence', 376.
36. On this, see Van de Vrugt, *De Criminele Ordonnantiën*, 140-148. Despite the strictures of article 61 of the Ordinance of 5 July, it seems that courts in most jurisdictions were reluctant to impose the death penalty unless the accused had confessed to the crime.
37. J.H.Langbein, *Torture and the law of proof: Europe and England in the Ancien Régime* (Chicago, 1976), 7-8. Langbein goes on to argue that, with the introduction of "extraordinary" or discretionary penalties from the sixteenth century onwards, circumstantial evidence gradually acquired more weight in European courts, diminishing the emphasis upon confession and leading to a corresponding decline in the use of torture.
38. Wigmore, *Evidence*, vol. 8, 290.
39. L.H.Hoffman and D.Zeffert, *The South African law of evidence*, fourth edition (Cape Town, 1988), 200.

an offence" against "ill treatment or improper pressure".[40] By contrast, while the Roman-canon law of evidence in force in much of Europe did include certain safeguards against the torture of an innocent person, it evinced no such respect for the rights of a suspect.

An examination of the minutes of proceedings in criminal cases tried by the Cape Court of Justice leaves one in little doubt that the inquisitorial process and the extraordinary mode of procedure were imported lock, stock and barrel to the Dutch East India Company's overseas possessions. Unfortunately, however, neither the Company's Directors, nor their superiors, the States-General of the United Provinces, gave clear and unambiguous instructions regarding the law which was to be applied by their subordinates in Batavia and elsewhere, so that legal historians have had to engage in lengthy detective work in order to establish with certainty which elements of the complex and varied law and jurisprudence of the United Provinces were applied at the Cape.

The Company's charter gave it the right to appoint "officers of justice" in its territories but it did not specify which law they were to apply, neither did it grant the Directors the power to determine this.[41] The instructions sent by the Directors to their subordinates in Asia did little to clarify the matter. In 1621, for example, the Directors instructed Jan Pietersz Coen that, with respect to civil procedure and matters of succession, he should follow the Political Ordinance of 1 April 1580, and subsequent ordinances of the States of Holland. For the rest, the courts in Batavia were to follow *"de gemeene civile rechten, sooals die hier te lande worden gepractiseert."* In making new regulations, they were likewise to be guided by the Political Ordinance of the States of Holland, *"oft andersints de practicque van de civile Romeynse wetten."*[42]

The phrase *"de gemeene civile rechten"* (the common law) presumably referred to Roman law. The problem, of course, is that, although Roman law provided a common "conceptual framework" for most of the legal systems of western Europe, there was "no such thing as a 'common' law of the Netherlands."[43] Since the late Middle Ages, Roman law had been "received" by the different territories of the Low Countries to varying degrees. In Holland, as in Germany, "Roman law was applied as subsidiary common law,"[44] and, in practice, it seems, the Directors did have in mind the Roman-Dutch law of Holland when they referred to *"de gemeene civile rechten"*.[45] This is the conclusion reached by legal historians: the law of the Cape was Roman-Dutch law, that is, the law of the province of Holland. Hahlo and Kahn, authors of South Africa's most respected legal history textbook, explain the matter thus: "The reason why the law of Holland was adopted in preference to the laws of the other provinces was, simply, that as the wealthiest and most powerful of the provinces, Holland exercised

40. English judge Lord Hailsham in Wong Kam-ming versus R (1980), quoted in Hoffman and Zeffert, *The South African law of evidence*, 201. Many other more subtle reasons have also been advanced for the necessity of retaining this rule against all objections.
41. Visagie, *Regspleging*, 25.
42. *Ibid*., 29.
43. Hahlo and Kahn, *The South African legal system*', 572.
44. *Ibid*., 516.
45. Visagie, *Regspleging*; 36 and 69; Hahlo and Kahn, *The South African legal system*, 571-2.

the predominant influence in the affairs of the V.O.C. and supplied most of its directors, officers and servants."[46]

In practice, the adoption of Roman-Dutch law at the Cape meant that both the Fiscal and the judges (or perhaps sometimes only the Fiscal?) were guided in their practice and deliberations by the store of legal commentaries, dictionaries, treatises and opinions in the care of the secretary of the Court of Justice.[47] Most, but not all of these books were concerned with the laws and procedures of the courts of Holland. Among the most frequently used were Joost de Damhouder's *Praxis rerum criminalium* (Louvain, 1555) and *Praxis rerum civilium* (Antwerp, 1567), Paulus Merula's *Manier van procedeeren in de provintien van Holland, Zeeland ende West-Friesland, belangende civile zaaken* (Leiden, 1592), Grotius's *Inleiding tot de Hollandsche rechtsgeleertheyd* (The Hague, 1631), Anthonius Mattheus's *De Criminibus*, Simon à Groenewegen van der Made's *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (Leiden, 1649), Simon van Leeuwen's *Het Roomsch Hollandsch Recht* (1678) and Johannes Voet's *Commentarius ad pandectas* (Leiden and the Hague, 1698-1704), but other works, such as Ulrich Huber's *Heedendaegse rechtsgeleertheyt* (Leeuwaarden, 1686), which dealt with the law of Friesland, and the works of the Italian jurist Julius Clarus and the German Benedictus Carpzovius (died 1666) were also frequently consulted. The Cape court also seems to have had access to copies of Roman works such as the *Corpus Juris Militaris* and the *Corpus Juris Civilis*.[49]

None of these books was exclusively concerned with the Criminal Ordinances of Philip II, but most, one assumes, contained usable guides to the ordinary and the extraordinary modes of procedure in civil and criminal cases and to the circumstances under which each mode should be used. It may be that explicit instructions regarding the implementation of the Ordinances of 1570 exist elsewhere in the archives of the Cape Council of Policy or the Cape Court of Justice, but historians have yet to find them.[50] In the end, however, the most compelling evidence that the Cape court adopted the extraordinary mode of procedure in criminal cases lies in the records of these cases housed in the Cape Archives. The two cases under discussion here are no exception.

We can return now to the problem of Berkman's acquittal.

Pieter Berkman's allegedly sodomitical behaviour was drawn to the attention of Fiscal Cornelis van Beaumont in January 1716, just as Berkman's ship was about to leave Table Bay. *'t Huijs ter Boede* had sailed from Texel on 31 May 1715

46. Hahlo and Kahn, *The South African legal system*, 572.
47. Visagie gives a list of the books in the possession of the Court in 1793, when the collection was inventoried. (*Regspleging*, Bylae III, 120-122).
48. For further discussion of the legal writings in use at the Cape, see Hahlo and Kahn, *The South African legal system*, chapter XVI and Visagie, *Regspleging*, chapter V.
49. Visagie, *Regspleging*, Bylae III.
50. Visagie has drawn attention to at least one explicit reference to the Criminal Ordinances: in the instructions drawn up for the Landdrost and Heemraden of the new district of Graaff Reinet in 1786. (H.C.V. Leibrandt, *Precis of the archives of the Cape of Good Hope: requesten, 1715-1806*, 5 vols (Cape Town, Government Printers, 1905 and 1906; The South African Library, 1988-9), vol. II, 491.)

and reached the Cape on 16 December, having spent three weeks in September off the coast of Sâo Thomé.[51] Now she was ready to sail on to Batavia and the authorities at the Cape were anxious that she do so.[52] On Saturday 25 January 1716 the Fiscal addressed an extraordinary evening meeting of the Council of Policy, at which he explained the events of the day: that morning, he said, just before the crew of *'t Huijs ter Boede* were to pass muster, he had received a visit from the ship's steward. This person complained of the harsh treatment which he had daily had to endure at the hands of the ship's master, Pieter Berkman, "adding [information concerning] certain enormous and abominable matters", into which the Fiscal had made immediate inquiry ("*ilico enquesten gedaan*").[53]

The Fiscal had already obtained a written confession from a certain Hendrik Barentsz Swart, ship's boy on the aforesaid vessel, by means of which he demonstrated ("*aangetoont*") to the Council how Berkman had repeatedly attempted to commit "the horrible sodomitical sin" with the boy. He asked that the master, the boy and the steward, with their belongings, might be taken into custody ("*hier aangehouden mogten werden*") so that he could investigate the matter and institute an action against Berkman *ex officio*.[54]

"After careful deliberation and consultation", the Councillors acceded to this request. But they had no desire to see the ship detained. They appointed the first mate to act in Berkman's place and made the corresponding adjustments to the ranking of the crew. Within days, *'t Huijs ter Boede* was again under sail.[55]

Hendrik Barentsz Swart's confession was made in the Castle in the presence of two commissioned members of the Court of Justice. The secretary, Daniel Thibault, wrote it down and appended his signature, as did Swart and the two commissioners.[56] It was thus a properly witnessed judicial confession and, once it had been read back to the *confessant* and confirmed by him (in a process known as *recollement*), it was admissible as evidence in court.[57]

It appears that Swart had decided of his own accord to unburden himself to the authorities at the Cape. He seems to have made the decision in the week before the ship was to sail. According to the steward, Pieter Breek of Amsterdam, "now in the last week", he had come across the skipper's two boys, Swart and Pijlworm, in the skipper's room at his lodgings in the town. They were sorting spices for the voyage ahead. Both were crying as they told one another (apparently for the first time) of the "godless way in which the skipper had treated them during the voyage." Breek particularly recalled that Swart told Pijlworm in his presence how Berkman had on a certain occasion tried to satisfy "his lascivious and unnatural lust" with him, "that to this end the skipper had smeared his manly member (*zijn mannelijkheid*) and Hendrik's backside with candle grease, but that the skipper had not been able to carry out his intention."[58]

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51. Bruijn, Gaastra and Schöffer, *Dutch-Asiatic shipping*, vol. II, 328.
52. G.C.de Wet, ed., *Suid-Afrikaanse argiefstukke: Resolusies van die Politieke Raad*, Part V, (Cape Town, 1964), 8-9.
53. *Ibid*., 8.
54. *Ibid*., 9.
55. *Ibid*., 9 and 14.
56. CJ 320, Documents in criminal cases, no. 54, confession of Hendrik Barentsz Swart, 25 January 1716.
57. Did the law require that the *recollement* take place in the presence of the opposing party? Certainly this was the procedure in the two cases under discussion here.
58. CJ 320, no. 56, testimony of Pieter Breek of Amsterdam, 27 January 1716.

Eduard Pijlworm later confirmed that the two boys had discussed their experiences. He had, he said, "once" told Swart of what had happened to him when the ship was moored off Sâo Thomé and had asked him whether the skipper had made similar "unspeakable" proposals to him. "With tears in his eyes", Swart had told him

> of the terrible things the skipper had done with him and tried to do with him. Whereupon, both of them being inwardly moved, they resolved to be free of them in the journey ahead and to make them known, whereupon he [Pijlworm] had come ashore and made all the foregoing known to the requirant [the Fiscal].[59]

Eduard Pijlworm's experiences off the island of Sâo Thomé were indeed startling. When the ship was lying at anchor, he said, he was placed before the capstan on the orders of the skipper, and there received "at least three hundred lashes *met daggen* (pieces of rope)". Three or four days thereafter, "approximately in the middle of the night", when he was in the *galderij*, the skipper made him fetch a lantern, then called him to his room (where he slept) and said to him *"kom, laat ik jou hinderste eers sien of het al geneesen is"* ("come, let me see if your backside has healed yet"). He ordered him to take his trousers off, and when Pijlworm refused he undressed him himself. As Pijlworm screamed and struggled, the skipper "took him by his manly member and played with it, holding his arms and legs fast." When he tried to fend the skipper off, the skipper hit him.[60]

Apart from this incident, and the aforementioned dalliance with the brandy sponge, Pijlworm seems to have come under less pressure from Berkman than his co-accused Hendrik Barentsz Swart. Swart's trials began on the voyage between Sâo Thomé and the Cape. Like Pijlworm, Swart slept in the skipper's cabin.[61] One night the skipper called him to his bed and ordered him to scratch his body. When he had done this for a while (*"een glas gedaan hebbende"*) the skipper commanded him to loosen his trousers. There followed a pattern of events similar to what had transpired with Pijlworm, except that Swart appears not to have resisted as much and, by his own admission, engaged in mutual masturbation with the skipper, *"tot soo lange als het hem schipper behaagde"* ("as long as it pleased the skipper"). Thereafter, he said, he was obliged to repeat these actions "every other day", until eventually Berkman made his first attempt to engage in anal sex with him. "Here on land" at the house of the *baas smit* Bastiaan Sigismund, the skipper had made him continue with these practices and had made a second failed attempt at anal penetration. These demands for sexual services had, said Swart, been accompanied by threats of violence. Many times during the journey the skipper had said *"Hond, jij sult dood eer je op Batavia komt."* ("Dog, you'll be dead before you get to Batavia.")[62]

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59. CJ 320, no. 53, confession of Eduard Pijlworm, 31 January 1716.
60. CJ 320, no. 53, confession of Eduard Pijlworm, 31 January 1716.
61. CJ 320, no. 53, confession of Eduard Pijlworm, 31 January 1716 and CJ 320, no. 54, confession of Hendrik Barentsz Swart, 25 January 1716.
62. CJ 320, no. 54, confession of Hendrik Barentsz Swart.

It is not clear exactly when Berkman was arrested. The hearsay evidence of the steward Pieter Breek and a sailor named Gerrit Speel was taken on board *'t Huijs ter Boede* on 27 January 1716. Berkman was formally interrogated at the Castle on 29 January. He was by then "*in arrest*".[63] Whether he was arrested at his lodgings at Bastiaan Sigismund's house or whether he was taken from his ship in full view of the crew is not known. It is also not clear where he was held or whether he remained in custody until his trial, which took place only in April 1716.[64]

Berkman's strategy under interrogation was to admit only to those facts which were devoid of explicit sexual content and for the rest, to maintain a vehement denial. As was the norm in such cases, his interrogators led him through a detailed litany of his alleged sexual transgressions. What they were after were "punishable facts"[65]. The death sentence was imposed only where it could be proven that sodomy in the full sense - anal penetration with ejaculation inside the body - had occurred. Mutual masturbation was believed to lead to sodomy but was not in itself a capital crime.[66] In the Netherlands men convicted of mutual masturbation were whipped, imprisoned, or banished[67].

Berkman admitted that he had made the two ship's boys take turns to sleep in his room at night. He admitted that he had beaten them, but said he did this "only when they had doubly earned it." He agreed that he had made Pijlworm sponge him down with brandy but denied that he lay *"moeder naakt in de cooij"* ("mother naked in bed") at the time. He had been wearing underpants, he said, and it was untrue that he had forced the boy to wash his private parts or that he had made references to his own youthful sexual prowess *("doen ik soo jong was als jij, ontvloog het mij als een fontein"*) ("when I was as young as you it flowed from me like a fountain")[68] as he did so. When asked whether he had forcibly removed Pijlworm's trousers and played with his penis, he responded *"dat is de goddelootste leugen die bedagt kan worden"* ("that is the ungodliest lie which could be imagined").

He admitted too that Hendrik Barentsz Swart had scratched his body (deloused him) and had also once rubbed him down, but he denied that he had ordered Swart to undo his trousers, much less removed them himself. He had never in his life had such a thought, he said. He had, though, he said (gratuitously adding a detail that the boys had not mentioned) made Swart lift his shirt over his head so he could see whether the boy also had lice ("thereafter noticing them several times on his head").

As the questions became more insistent, Berkman resorted again and again to his stock answers: *" 't is mijn leeven niet geschied"* ("it never happened in my life"), *"ik hebt mijn leeven niet gedagt"* ("I never in my life thought of

63. CJ 320 no. 55, examination of Pieter Berkman, 29 January 1716.
64. In August 1716 Bastiaan Sigismund sued Berkman for payment of the sum of 43 rix dollars and 2 shillings, being the balance of moneys owed him for one month and five days board and lodging for Berkman "and his two boys". (CJ 1028, Documents in civil cases, 4 July 1716 and CJ 6, Minutes of the Court of Justice, 24 September 1716.)
65. Van der Meer, *Sodoms zaad in Nederland*, 185.
66. *Ibid*., 144, 148-9 and 187-8.
67. *Ibid*., 148-9.
68. CJ 320, no. 53, confession of Eduard Pijlworm, 31 January 1716.

it"), or simply "*mijn leeven niet*" ("never in my life"). Finally, asked whether he had tried again to penetrate Swart while on shore, and when this had happened, and whether he had succeeded in his intention, he responded: "I don't know when it happened because it didn't happen."[69]

Was it Berkman's ability to withstand his interrogators which saved him from a guilty verdict? Since the judges gave no reasons for their decisions we cannot know for sure, but it seems that, within the constraints of the extraordinary process, the court did have a number of options.[70]

The Fiscal had prepared his case carefully. The boys' confessions had been read back to them and confirmed by them in the presence of Berkman and two commissioners of the court. Despite having been two weeks in detention, they stood firm when confronted by the captain's denials. Swart (perhaps aware of the consequences if he said otherwise, for eighteenth century courts condemned passive and active partners alike) stressed that "the attempt the skipper had made upon him had not been completed," but for the rest he would "live and die by it".[71] On hearing Swart's confession (presumably for the first time), Berkman said he would prove him a liar and asked that he be made to leave the room. He then told the court that he had a small mole in his groin and that, if Swart had touched his penis he would have mentioned the mole. To what must have been the skipper's enormous chagrin, Swart, on being called back into the room and questioned, testified that he had indeed noticed a small mole on the skipper's genitals, "in the vicinity of the groin".[72]

It seems that Berkman made no further efforts to defend himself. He called no witnesses, though even under the extraordinary procedure he apparently had the right to do so, nor did he pose his own questions to the two boys.[73] Most surprisingly, while he did ask why the two boys had only now brought these matters to light, he seems to have made no effort to explain why they and the steward might have wanted to bring false accusations against him.

Besides the testimony of the two boys, the Fiscal could draw on the statements of the steward, Pieter Breek and the sailor, Gerrit Speel. But theirs was hearsay evidence, classified as *indicia*, and it was not decisive. Moreover, though their statements had been recorded aboard the *Huijs ter Boede* by Daniel Thibault, secretary of the court, and properly witnessed by the ship's bookkeeper and the Fiscal's assistant, they had not been reconfirmed (*gerecolleerd*). Breek and Speel had declared themselves ready to swear to what they had said but they did not do so before *'t Huijs ter Boede* sailed for Batavia.[74] However the Fiscal could use their statements to corroborate aspects of Pijlworm's confession and (since Breek testified that Pijlworm had confided in him while the ship was still off Sâo Thomé) to rebut the skipper's charge that the boys had made no effort to tell anyone of their experiences until their ship was about to leave Table Bay.

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69. CJ 320, no. 55, examination of Pieter Berkman.
70. On the absence of reasons, see Hahlo and Kahn, *The South African legal system*, 280 and 544.
71. CJ 320, no. 54, Hendrik Barentsz Swart, *recollement*, 14 February 1716.
72. CJ 320, no. 52, *Eijsch ende conclusie* of Fiscal van Beaumont.
73. See Huber, *Jurisprudence*, vol. II, 455 and Anonymous, 'The Roman-Dutch law of evidence', 377.
74. CJ 320, no. 56, testimony of Pieter Breek and Gerrit Speel, 27 January 1716.

The most serious defect in the Fiscal's case was that his two chief witnesses were "singular witnesses". While each testified to acts of a similar nature and "touching one matter", these acts had been performed on different occasions and in various places and only one witness had been present on each occasion. In such a case, the law counted such witnesses "as a single witness only".[75] Single witnesses could be added together, however, "when they very definitely and clearly depose to a number of various acts of one nature and character."[76] Huber gives an example of a conviction secured on this basis, though in that case there was corroborative evidence.

The Fiscal was clearly aware of this problem and was thus at pains to stress the consonance between the two boys' depositions. "Although both the witnesses are singular", he wrote in his claim, "they are however consonant in this fact" [as to "how far Berkman's wanton passions had stretched toward the commission of the sodomitical sin"].[77] Furthermore, the Fiscal added, "it must be considered that in such hidden crimes (of which no vestige remains) the proof can never be as clear as in those where the *corpore delicti* can be established."

The court should also consider, he continued, how certain admissions made by Berkman corroborated the boys' evidence and compensated for its deficiencies. Berkman had admitted having had Eduard Pijlworm sponge him down at night when he was naked and he had confessed to delousing Henrik Swart, also at night and after the boy had scratched his body and rubbed him down. These details, the Fiscal argued, were foolish excuses which he had made to disguise his embarrassment at the testimony of the two boys, but at the same time they pointed to his guilt.[78]

We know from the outcome of the case that the court was not persuaded by the Fiscal's arguments, but we can only speculate as to its reasons for rejecting his claim against Berkman. Was his claim denied on technical grounds - because the evidence before the court failed to meet the Roman-canon standard of proof - two eyewitnesses and/or a full confession? It would seem that the judges believed the statements made by the two boys: why else would they have sentenced them both to be whipped and Swart to be banished for six years from the Company's territories? But if they did believe the boys, but considered them as singular witnesses, why did they not impose an "extraordinary" or discretionary penalty upon the captain, such as had by then become common practice in European courts, where the evidence against a suspect was substantial but fell short of full proof?[79] The Fiscal had indeed called for the imposition of an extraordinary penalty, not on the grounds of insufficient proof but because, in his view, Berkman was guilty of attempted sodomy rather than the consummated deed.[80] The ordinary (i.e. statutory or customary) penalty for sodomy was death; citing several legal authorities, the Fiscal asked that an extraordinary and milder

75. Huber, *Jurisprudence*, vol. II, 295.
76. *Ibid*., 295.
77. CJ 320, no. 52, *Eijsch ende conclusie* of Fiscal van Beaumont.
78. CJ 320, no. 52, *Eijsch ende conclusie* of Fiscal van Beaumont.
79. On the imposition of extraordinary penalties, see Langbein, *Torture and the law of proof*, chapter 3.
80. CJ 320, no. 52, *Eijsch ende conclusie* of Fiscal van Beaumont.

penalty (whipping and dismissal) be imposed upon the captain. But the court ignored him.

A further question arises: if the judges believed the testimony of the two boys but could not convict Berkman because he had not confessed, why did they not order him "put to a sharper interrogation", that is, tortured in order to force him to confess? Other suspects had been tortured on lesser evidence than that presented in this case.[81] The most likely answer to this question, put to me by Theo van der Meer, is that Berkman was not tortured because the crime of which he was accused - attempted sodomy - was not a capital offence.[82] According to Langbein, "investigation under torture was restricted to cases of capital crime - crimes for which the guilty could be punished by death or maiming." Torture "could not be used to investigate petty crimes (*delicta levia*); otherwise the investigation would entail more suffering than the maximum permitted punishment."[83] But where on this continuum did attempted sodomy lie? In the opinion of most jurists, it was not a capital crime, but neither was it a petty offence. Petty offences were defined by Joost de Damhouder as "pulling someone's hair, or trampling or kicking them, or injuring them with words, and such like"; attempted sodomy was a far more serious offence.[84] Indeed, Damhouder thought that it did merit the death penalty.[85] Other jurists, however, felt that flogging was the appropriate punishment for attempted sodomy. The Fiscal, as we have seen, concurred. In that case, then, was flogging not available to the Cape court as a "milder" form of torture, the so-called "*kleine tortuur*" practised by the court in Amsterdam?[86] Had the Cape court ever ordered the flogging of suspects in other cases? We do not know, since research into the workings of the court is still in its early stages.

Knowing little of the court's decisions in similar cases and having no access to the deliberations of the judges, it is worth considering the role played by rank and status in their decision to let Berkman go without pressing him further. We should remember here the points made by Theo van der Meer in his careful examination of the operation of social and legal inequalities in the prosecution of "sodomites" in the Netherlands. Though the courts were bound by law to take account of social standing, their sentences, Van der Meer insisted, were not arbitrarily imposed. On the contrary, "judges were strikingly consistent in the imposition of sentences. They carefully considered the precise nature of the crime and the evidence which had been gathered." Inequalities were manifest "chiefly in those cases for which the law did not provide, such as in respect of youths, or where the drafters of the *plakkaat* of 1730 were at odds with one another ..."[87] Yet social position did affect certain aspects of the courts' behav-

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81. See, for example, the trial of Jacob of Coromandel in May 1705 (CJ 4, Minutes of the Court of Justice, 22 May 1705).
82. Theo van der Meer, personal communication, February 2002.
83. Langbein, *Torture and the law of proof*, 13 and 58. Compare Huber, *Jurisprudence*, 461: "As to the crime, it must at least be one which merits corporal punishment, more serious than the torture, which it is desired to employ."
84. Joost de Damhouder, *Practycke in criminele saecken* (Rotterdam, 1642), chapter 35.
85. *Ibid*., chapter 96.
86. S.Faber, *Strafrechtspleging en criminaliteit te Amsterdam, 1680-1811: de nieuwe menslievendheid* (Arnhem, 1983), 112. I am grateful to Theo van der Meer for making this source available to me.
87. Van der Meer, *Sodoms zaad in Nederland*, 152.

iour. In particular, the judges' reluctance to expose and humiliate persons of their own or higher rank was evinced in the tardiness with which they pursued high born suspects, their tendency to impose sentences of banishment rather than imprisonment or corporal punishment for lesser crimes such as mutual masturbation, and, most significant in relation to Berkman's case, their reluctance to subject high born or wealthy suspects to torture.[88] The Dutch judges' desire to tread carefully in this regard was supported by the writings of the most eminent jurists. Thus Damhouder advised that a judge contemplating subjecting a suspect to the rack should "consider the quality of the person" as well as the quality and quantity of his crimes and the nature of the evidence against him.[89] Damhouder's predecessor, Philips Wielant, wrote that "doctors, knights and all others of great dignity" should not be tortured unless suspected of treason.[90] And Ulric Huber noted that "the Imperial [Roman] laws also exempt from torture all who occupy positions of dignity, down to municipal councillors; but this rule is not observed nowadays, though a due discrimination of the families and dignities of persons is not excluded."[91]

Did the dignity of Berkman's office entitle him to special treatment? Probably not in the Netherlands, but what of colonial Cape Town, where life revolved around shipping and sea captains occupied a critical position in the hierarchy of Company personnel? Surprisingly little research has been done on the subject of rank and status in Dutch colonial Cape Town, Robert Ross's recent book and Nigel Worden's exciting essay in this volume being notable exceptions.[92] It is clear that status and honour were highly valued at the Cape, sometimes to an exaggerated degree. But this was an unsettled, changeable world, in which promotions could be rapid and disgrace just as sudden. There were few true members of the Dutch patriciate at the Cape; most of the colony's high officials had been promoted through the ranks. Thus it is hard to tell how the court and those who clustered around it would have viewed someone of Berkman's rank, background and experience. Perhaps they felt that the Company could ill afford to lose a person of Berkman's proven courage and experience. Perhaps they feared that the corporal punishment and public disgrace of a captain would undermine the discipline and morale of the Company's crews. Without access to the deliberations of the court, we can only guess. But a further intriguing possibility is suggested by the details of the case. Could it be that Berkman's behaviour was judged less harshly by his peers than the Fiscal's hostile and scandalised tone would suggest? Several historians of same sex behaviour in Renaissance and early modern Europe have argued that relations between men and boys were tolerated (much as they were in the ancient world) or at least punished less severely, because they did not upset contemporary notions of gender, virility and power. Boys reached puberty much later then than now and prepubescent boys were classed with women and social inferiors as legitimate, or at

88. *Ibid*., 116-122.
89. Damhouder, *Practycke*, chapter 34.
90. Philips Wielant, *Practijcke crimineele* (Ghent, 1872), chapter XL.
91. Huber, *Jurisprudence*, 461.
92. R.Ross, *Status and respectability in the Cape Colony, 1750-1870: a tragedy of manners* (Cambridge, 1999).

least not entirely taboo objects of male sexual desire.[93] Provided that the older man retained the dominant and active role in sex, his masculinity would not be compromised: "However dishonourable same-sex behaviour was, a man who committed active sodomy with a boy or a social inferior could, within these principles of order [where hierarchy rather than gender was the ordering principle] keep his manly status."[94]

In this pre-modern context, writes Van der Meer, "desires were complementary in the sense that they were focused upon social opposites." They were contained within "systems of hierarchy and dependency".[95] Even where accompanied by threats and intimidation, as in the Berkman case, this pattern was perhaps more familiar and more acceptable to the Cape court than the spontaneous, ebullient and consensual sexuality of Adam Vigelaar and his companions.

Sex between equals

In the Vigelaar case, which was tried in December 1717, the Fiscal was not faced with the same obstacles to full proof as he had been the year before in the case of Pieter Berkman. There were several eyewitnesses who would testify to personal knowledge of two of the five sexual encounters in which Vigelaar had allegedly participated. Moreover Vigelaar confessed freely and, it would seem, defiantly to the two sexual crimes of which he initially stood accused. He had, he said, "fornicated" ("*geboeleert*") with Nicolaus Einfeld on Einfeld's bed in the barracks of the punct Nassau (the Nassau bastion of the Castle), where the two men were stationed as soldiers. He gave this information without prompting: "the sodomitical deed" was completed he said, and Einfeld raised no objection. Pressed to admit that he had taken the initiative, he said he had, but repeated that Einfeld had agreed.[96] He also freely admitted that he had "acted out his desire" with the sailor Pieter Frits: "*Ja, 't is geschied*", he said, "*en den matroos heeft sulx vrijwillig toegestaan.*" ("Yes, it happened and the sailor freely allowed it.") "First I asked the sailor [to do the deed]", he said "to which he agreed. He asked me to do it too but I didn't want to allow him for I had long been tormented by piles." Thereafter they slept until morning.[97]

Frits and Einfeld were not as forthcoming under interrogation. Einfeld at first wholly denied having had any sexual congress with Vigelaar. The two men had gone to sleep in his (Einfeld's) bed, he said, when they came off the watch at midday. They had undressed down to their shirts and covered themselves with a blanket, but there was no sex: he was asleep, he said, and the sexual act ("*deese gruweldaad*") was never demanded of him. Ten days later, apparently after hearing the evidence against him, Einfeld made a further confession: Vigelaar had once tried to commit the sodomitical sin with him, he said, and had "been with

93. Van der Meer, *Sodoms zaad in Nederland*, 281-2. See also Trumbach, 'London', 90 and M.Rocke, *Forbidden friendships: homosexuality and male culture in Renaissance Florence* (New York, 1996).
94. Van der Meer, *Sodoms zaad in Nederland*.
95. *Ibid*., 283.
96. CJ 321, no. 56, examination of Adam Vigelaar, 15 October 1717.
97. CJ 321, no. 56, examination of Adam Vigelaar, 15 October 1717.

his manly member in his Eenveld's rear," but since he (Einfeld) had the clap he had not wanted to allow this and therefore the deed was not completed.[98] Finally, on 10 November 1717, Einfeld admitted that he had consented to attempted sodomy, but repeated his claim that the deed had not been completed. On 24 November Adam Vigelaar, facing certain death, along with Pieter Frits and Jan Theunisz, came to Einfeld's rescue. He wished, he said, when his answers were read back to him, to make some alterations: "he didn't believe the sodomitical act with Einfeld had been fully consummated and he also couldn't say precisely when it had occurred."[99]

The sailor Pieter Andrietz Frits, who was the first of the five accused to be formally interrogated, initially pretended to have been a reluctant partner in crime: he hadn't wanted to accompany Vigelaar to the Castle, he didn't want the gifts which Vigelaar pressed upon him, and he hadn't consented to sex. Vigelaar had tried to penetrate him while he was asleep, he said, but he (Frits) had told him that he "didn't do such things" and Vigelaar had given up.[100] Like Einfeld, Frits changed his story only after hearing the evidence against him: Adam Vigelaar had penetrated him twice, he said, the first time he had refused but the second time "this fornication, accompanied by kissing and licking ... had endured for at least one hour and was completed."[101]

In his opening plea, the Fiscal drew on the evidence of Frits and Einfeld and on the subsequent confession of Jan Theunisz (who said that Vigelaar had led him astray when he was drunk), to portray Vigelaar as the sole originator of these sexual encounters. He was a cunning seducer, wrote the Fiscal, who had bent the other men to his will, so as to use them as instruments of his unnatural passions.[102] By implication, then, the other men were unwilling and exploited partners. This view accorded with the pre-modern understanding of male same-sex relations and it did receive some support from the age difference between the men: Vigelaar was 30, Frits "about 23", Einfeld "about 20", Jan Theunisz 24 and Jan de Breeker (who was acquitted) "about 25" years old. However the Fiscal's interpretation of Vigelaar's relations with his sexual partners is not well supported by the details of the evidence which he himself had gathered. Though Adam Vigelaar was the older man in each of the sexual encounters of which he and his partners stood accused, the testimony of the eyewitnesses and the confessions of the accused suggest that their relations were entirely voluntary and their sexual desires mutual. Moreover the evidence suggests that Vigelaar's attitude towards his lovers was characterised by fondness and affection rather than the desire to dominate or assert superior power.

The eyewitnesses were seven fellow soldiers stationed in the Nassau bastion of the Castle. On Saturday 25 September 1717 they appeared at the Fiscal's request before Daniel Thibault, secretary of the Court of Justice. On the

98. CJ 321, no. 60, further confession of Nicolaas Eenvelt, 22 October 1717. Vigelaar's interrogation and a statement made by five eyewitnesses were "*gerecolleert*" on this day.
99. CJ 321, no. 56, examination of Adam Vigelaar, *recollement,* 24 November 1717.
100. CJ 321, no. 59, interrogation of Pieter Andrietz Frits, 7 October 1717.
101. CJ 321, interrogation of Pieter Andrietz Frits, *recollement,* 22 October 1717.
102. CJ 321, no. 55, *Eijsch ende conclusie* of Fiscal van Beaumont.

previous Monday, they said, "they had seen clearly and distinctly, between the bells of ten and twelve, that the fellow soldiers Adam Vigelaar and a certain Nicolaas Eenvelt had gone to lie on Eenvelt's bed in the aforesaid Nassouw bastion in broad daylight in their shirts (without having any other clothing on), and covered themselves with a blanket." They saw that the two men were "committing the unnatural sin of sodomy because the blanket rose up and down."[103] Einfeld was naked and Vigelaar lay with his leg over Einfeld's body. When Einfeld noticed the watchers, he pulled the blanket over their heads, but "they had already committed this odious crime."[104]

Four of the soldiers then testified to a second offence involving Adam Vigelaar. That same day, they said, he had brought a sailor (Frits) to the guard room on the *punct* Nassau. He had passed him off as a soldier and close comrade, who had served with him for three years "*in 't vaderland*" and shared his bed.[105] Cornelis de Wint and Albert Schoute particularly remembered that Vigelaar had addressed this person in the following terms: "*hontie wilje niet een schoon hembt aan hebben, kom trekt een schoon hembt aan.*" ("Puppy don't you want to have a clean shirt on? Come, put a clean shirt on.") Later he had said *"Komt hontie wilje nog niet een pootie koffij gaan drinken?"* ("Come puppy, won't you come and drink a little pot of coffee?") Later they saw the two men go to bed together.

In the middle of the night they heard them making love. According to Cornelis de Wint and Albert Schoute: *"omtrent de klocken thien en elf uuren des nagts neevens Jan de Breeker hebben gehoord dat deesen Adam Vigelaar sig uijtlied gelijk als of man en vrouw in gemeenschap waaren en ook gehoord dat hij Vigelaar differente reijsen gesoend heeft."* Jan de Breeker, who was sleeping below Vigelaar's bunk, said he was afraid the bed would fall on him.[106] Finally, Cornelis de Wint testified that, hearing the sighing and kissing sounds a second time, he had drawn aside the curtains around Vigelaar's bed and seen that Vigelaar and the aforementioned person were moving "as man and wife".[107] Later he heard them talking to one another in the silence of the night.

Under interrogation, Pieter Frits confessed that he had met Vigelaar for the first time in the inn known as *'t half aamtie*. They had danced and drunk wine together. Vigelaar had invited him back to his quarters in the Castle, and he had resolved to accompany him part of the way, though he had not wanted to stay the night. He conceded, however, that they had entered the Castle just as the gate was about to close. Once in the Nassau guard house, he had allowed Vigelaar to pass him off as a soldier and close comrade. As to the clean white shirt, he asked what he would do with it, but was eventually persuaded to wear it, along with a white cap. They had then gone to the sergeant's apartment to drink coffee and thereafter they had gone to bed.[108]

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103. CJ 321, no. 62, statement of Cornelis de Wint and others, 25 September 1717.
104. *Ibid.*
105. *Ibid.*
106. *Ibid.*
107. *Ibid.*
108. CJ 321, no. 59, interrogation of Pieter Andrietz Frits, 7 October 1717.

Both Vigelaar and Frits denied under interrogation that they had conversed in the dark after making love. They had slept until morning they said. But, confronted later by the evidence of Cornelis de Wint, Frits admitted to his interrogators that, while they were having sex a second time Vigelaar had said: *"Pietie lief, Pietie lief, jij hebt geen swaarigheid, ik neem het op mijn."* ("Sweet Pietie, sweet Pietie, you have no troubles, I take them all on me.")

Few details in the court record more clearly demonstrate the difference between the sexual behaviour of Adam Vigelaar and that of Pieter Berkman than Vigelaar's use of expressions such as "*hontie*" and "*Pietie lief*'". In the 1740s, the diminutives "*hontie*" (puppy) and "*poesje*" (kitten) were terms of endearment in common use among sodomites within the emerging homosexual subculture of the Hague.[109] Vigelaar told his interrogators that he habitually used the expression "*hontie*",[110] and in a further confession, made on 28 October, he recalled having addressed a previous lover, Andries van Ijser of Zwolle, in the following terms: *"Hontie lief komt op mijn kooij."*[111] ("Sweet puppy, come to my bed.") Though he and Van Ijser were "blind drunk" at the time, there is no mistaking the affectionate tone, so different from Berkman's threatening "*Hond , jij sult dood eer je op Batavia komt.*" ("Dog, you'll be dead before you reach Batavia.")

The evidence also suggests that Vigelaar was not always the active partner in sexual relations and neither was he always the one who initiated an amorous encounter. His affair with Van Ijser had begun, he said, one evening as they were walking back to the Castle, "just before the most recent journey into the interior."[112] "Andries van Ijser kissed him and stuck his tongue in his mouth." Van Ijser had shared his bed for about six months, he said, during which time "they committed the [sodomitical] sin together many times, yes, without being able to count the number of times, and ... Van Ijser was the first initiator in the commission of this sin." Vigelaar also confessed to a brief affair with Jan de Breeker, like Van Ijser one of the *punctsvolk* in the Nassau bastion. Jan de Breeker had himself proposed that he come and sleep in Vigelaar's bed; they had discussed it on the road to the Castle, and thereafter they had given their "detestable passions" free reign.[113]

Finally, some three weeks after having, as he said, "completely unburdened his heart", Vigelaar made a third and last confession. In this he implicated the *veldwagter*, Jan Theunisz, whom he had met "in the chestnut time" (March), just before Theunisz' boss, Landdrost van den Heuvel of Stellenbosch, was discharged from the Company's service. After drinking wine at the houses of two freeburghers, they had wandered through the Company's gardens towards the Landdrost's house. At the Landdrost's gate they had stopped and "kissed and caressed one another", before making love, "*over ende weeder*" ("back and forth") in the *voorhuijs* of the Landdrost's house.

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109. Van der Meer, *Sodoms zaad in Nederland*, 254.
110. CJ 321, no. 56, examination of Adam Vigelaar, 15 October 1717.
111. CJ 321, no. 56, further confession of Adam Vigelaar, 28 October 1717.
112. *Ibid*. On 14 September 1716 a livestock trading expedition had departed from the Castle for the country of the Little Namaqua, under the command of one W. Swartzenburg. The following year, in November, while Vigelaar was in detention and awaiting trial, Sergeant Maurik led a second expedition to the Little Namaqua. (D.Sleigh, *Die buiteposte* (Pretoria, 1993), 68.)
113. CJ 321, further confession of Adam Vigelaar, 28 October 1717.

Vigelaar's arrest

How did the events of 20 September 1717 first come to the knowledge of the Fiscal? Did Sergeant Maurik report them? On the morning of September 20 he had been with the men who had caught Vigelaar and Einfeld *in flagrante delicto* and he had ordered Vigelaar back to his own bed. Yet that same evening he had received Vigelaar and the sailor Frits in his apartment. Perhaps Vigelaar's comrades in arms were simply scandalised by the sight of two men having sex with one another. However, this seems unlikely, since, according to Vigelaar's own account, he had had sex with a man in the Nassau barracks many times before. A more likely explanation is that Vigelaar's fellow soldiers were stirred into action by the blatant and provocative nature of his behaviour on that particular day.

Adam Vigelaar's behaviour on that Monday in September had about it a quality of reckless bravado. He had stripped down to his shirt and climbed into bed with Einfeld in broad daylight. Later that same day, he had acted in a way calculated to rouse the ire of his comrades: he had brought a stranger into their midst - a sailor on shore leave - and shown this person exceptional favours. When confronted by Martinus Striegelaar (*"Wat doet die wolff hier?"* ["What's that wolf doing here?"]),[116] he had invented an implausible story. Sailors in the Netherlands had long had a reputation for unruliness, ill-discipline and violence. "On board Company ships", writes the Dutch social historian A.T. van Deursen, "the soldiers and sailors sometimes lived with each other as deadly enemies."[117] It seems the same was true, at least to a degree, of relations between members of the garrison and sailors on shore leave in Cape Town.[118] Vigelaar's courtship of the sailor Pieter Frits was unlikely to endear him to his fellows, especially perhaps to Andries van Ijser, who was among the men who testified against him on 25 September.

The circumstances under which Adam Vigelaar's relationship with Andries van Ijser came to an end may provide a clue to his state of mind on 20 September. In his further confession, Vigelaar told his interrogators how a soldier named Frans Gommers had overheard him saying to Van Ijser *"hontie lief komt op mijn kooij"* and had alerted Cornelis de Wint (*"Kees, hoorje dat wel?"*). Albert Schoute then warned Andries van Ijser that "*slegte praatjes*" ("bad talk") were circulating about him and that he should beware of "such things (referring to the sodomitical sin)". In consequence, said Vigelaar, Van Ijser's thoughts had turned to flight. "If there had been a foreign ship in the roadstead," he reportedly said, "I would have run away."[119] Subsequently, a soldier named Claas Roelofsz

114. CJ 321, no. 56, further confession of Adam Vigelaar, 19 November 1717. Landdrost Nicolaas van den Heuvel's request for an honourable discharge from the Company's service was granted on 11 May 1717. (A.J. Böeseken, ed., *Resolusies van die Politieke Raad* (Cape Town: 1957, 1962), part V, 168).
115. CJ 321, no. 56, examination of Adam Vigelaar, 15 October 1717.
116. CJ 321, no. 62, statement of Cornelis de Wint and others, 25 September 1717.
117. A.T.van Deursen, *Plain lives in a golden age: popular culture, religion and society in seventeenth-century Holland* (Cambridge, 1991), 26.
118. N.Worden, E.van Heyningen and V.Bickford-Smith, *Cape Town: the making of a city* (Cape Town, 1998), 54-56.
119. CJ 321, no. 56, further confession of Adam Vigelaar, 28 October 1717. Van Ijser did indeed take flight after Vigelaar's arrest.

(also a signatory to the statement against Vigelaar) had taken the young Nicolaus Einfeld aside and warned him to watch out for Adam Vigelaar, since "he mixed in that way" (*"sig op sodanige wijse vermengde"*).[120]

It seems to me, then, that Adam Vigelaar's reckless and provocative behaviour on 20 September can best be explained as that of a man driven by censure and gossip to a mood of defiant desperation. His relationship with Andries van Ijser had collapsed under the strain of public scrutiny, younger men were warned off him, and he may have felt a looming sense of doom. He himself told his interrogators that "a devilish inspiration" had driven him to bed with Einfeld. He felt, perhaps, that he had reached a point of no return. Did he now choose to court arrest by flaunting his sexuality before the very eyes and ears of his critics? Was this a form of suicide?

We shall never know for sure. But, despite his subsequent submission to his interrogators and the damage which he did to others "because he did not want his conscience troubled or defiled by any lies," would it not be fitting to remember him, unlike Pieter Berkman, as one of Cape Town's first gay men?

120. CJ 321, no. 60, interrogation of Nicolaas Eenvelt, 11 October 1717.