SUPREME COURT OF NORWAY

**J U D G M E N T**

given on 22 October 2024 by a division of the Supreme Court composed of

Justice Henrik Bull
Justice Cecilie Østensen Berglund
Justice Erik Thyness
Justice Are Stenvik
Justice Eyvin Sivertsen

**HR-2024-1936-A, (case no. 24-049309STR-HRET)**

Appeal against Borgarting Court of Appeal's judgment 7 February 2024

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|---|---|
| The Public Prosecution Authority | (Counsel Thomas Frøberg) |
| v. | |
| A | (Counsel Kristian Bodding Gjendemsjø) |
| B | (Counsel Anders Morten Brosveet) |
| C | |
| D | (Counsel Pål Sverre Hernæs) |

(1) Justice **Sivertsen:**

**Issues and background**

(2) The case concerns breaches of the conduct of business rules in the Securities Trading Act. The question is whether the defendants must be acquitted because a provision on criminal liability for natural persons was removed during a period between the time of the acts and the time of the judgment.

(3) A and B are founders of the financial group X, where Y AS was a subsidiary. A and B had central roles in the group, including as board members in Y AS. C and D were employed as brokers in this company.

(4) In 2017, the Financial Supervisory Authority (FSA) decided to revoke Y AS's authorisation under the Securities Trading Act. The FSA believed that the company had breached the conduct of business rules by, among other acts, offering customers to buy shares in the parent company X AS at prices far above the real market value, without informing the customers about the risk.

(5) Following a report from the FSA, the National Authority for Investigation and Prosecution of Economic and Environmental Crime (*Økokrim*) decided, on 18 February 2021, to file an indictment for the share sales in X AS. Count I in the indictment concerned aggravated fraud and was aimed at A and B.

(6) Count II in the indictment concerned breaches of the conduct of business rules under section 10-11 subsection 1, see subsections 2 to 5, see subsection 11, see section 17-3 subsection 2 (6) of the Securities Trading Act, as these provisions read at the time of the acts. This count in the indictment comprised all of A, B, C and D.

(7) The District Court split the criminal case and handed down separate judgments for counts I and II in the indictment in accordance with section 287 of the Criminal Procedure Act. The case in the Supreme Court only concerns count II on breaches of the conduct of business rules. The basis for count II read:

> "On several occasions, from 16 December 2015 for B's and A's part, and from 24 February 2016 for C's and D's part, until 8 September 2016, at locations as mentioned in count I, they offered the X share to a number of existing and potential customers of Y AS, presented them with positive future prospects for X and the X share, and referred to the X share as an interesting and good investment opportunity without adequately describing the risks associated with investing in X, without providing adequate information of existing conflicts of interest involving themselves, X and Y, and without advising against investing in the X share despite the high risk, the lack of an independent pricing of the share, the limited chances of reselling the share, the failure to provide continuing, correct and exhaustive information about X and the X share, and despite the existing and potential customers being non-professional investors.
>
> B and A acted in their capacity as board members of Y until 10 May 2016, and then as representatives of X, the owner of all the shares in Y. C and D acted in their capacity as brokers in Y."

(8) The Securities Trading Act was amended with effect from 1 January 2019. In this context, the provision in section 10-11 subsection 11 was removed. The provision regulated the obligation to comply with the conduct of business rules for natural persons affiliated with the investment firm. The provision was reintroduced by a new amendment that entered into force almost seven months later, on 21 July 2019.

(9) The defendants contended that they had to be acquitted under count II because the acts had been decriminalised with the removal of section 10-11 subsection 11 of the Securities Trading Act in January 2019.

(10) Oslo District Court, sitting as a strengthened court, disagreed and found that the legislation in force at the time of the acts had to be applied in the criminal case. By judgment of 13 September 2022, the four defendants were found guilty under count II in the indictment. A and B received an unconditional sentence of seven months of imprisonment. C and D received a suspended sentence of 90 days of imprisonment.

(11) On 7 February 2024, following an appeal from B and A, Borgarting Court of Appeal ruled as follows:

> "B:
>
> 1. B, born 00.00.1975, is acquitted under count II in the indictment.
> 2. B is not liable for costs either in the District Court or in the Court of Appeal.
>
> A:
>
> 1. A, 00.00.1974, is acquitted under count II in the indictment.
> 2. A is not liable for costs either in the District Court or in the Court of Appeal.
>
> …"

(12) In accordance with section 342 subsection 3 of the Criminal Procedure Act, the Court of Appeal also acquitted C and D, who had not appealed.

(13) The Court of Appeal justified the acquittals by stating that personal criminal liability for breaches of conduct of business rules had been removed with the amendment in January 2019. Therefore, convicting the defendants under the legislation at the time of the acts in 2015–2016 would conflict with the principle of the more lenient criminal law, the *lex mitior* principle, as this is expressed in Article 7 (1) of the European Convention on Human Rights (ECHR). Section 3 of the Penal Code had to be interpreted accordingly. The Court of Appeal found that the defendants could not be convicted directly under the main provision concerning conduct of business rules in section 10-11 subsection 1 of the Securities Trading Act, which has been continued in section 10-9 subsection 1, because the investment firm was the only duty-bearer. The defendants could also not be convicted of complicity in the firm's misconduct or of violations of any other provisions in the Securities Trading Act.

(14) The Public Prosecution Authority has appealed against the judgment to the Supreme Court, challenging the procedure and the application of the law in the determination of guilt. On 16 May 2024, the Supreme Court's Appeals Selection Committee granted leave to appeal only in respect of the application of section 3 subsection 1 of the Penal Code, see Article 7 (1) of the ECHR and Article 15 (1) of the International Covenant on Civil and Political Rights (ICCPR).

(15) The appellant – *the Public Prosecution Authority* – contends that the Court of Appeal's acquittal judgment is based on an error of law. It is the provisions of the Securities Trading Act in force at the time of the acts that must be applied in the criminal case.

(16) The provision from January 2019 that removed the personal criminal liability for an interim period, cannot be retroactively applied under section 3 subsection 1 of the Penal Code. Firstly, the more favourable provision was not available at the *time of the judgment*, since personal criminal liability had then been reintroduced through a new amendment. Secondly, the removal of personal criminal liability was not due to a *change in view* of the use of punishment, but was the result of a legislative error.

(17) The conditions in section 3 of the Penal Code are not in violation of Article 7 (1) of the ECHR or Article 15 (1) of the ICCPR. The Court of Appeal's interpretation of the obligations under international law has no basis in Convention case law. Article 97 of the Constitution does not prevent the defendants from being convicted under legislation in effect at the time of the acts.

(18) Against this background, the Public Prosecution Authority contends that the Court of Appeal's judgment must be set aside.

(19) The defendants – *A, B, C and D* – contend that the Court of Appeal's judgment is correct.

(20) The requirement in section 3 subsection 1 of the Penal Code that the more favourable legislation must be in effect at the time of the judgment to benefit the defendant, is not consistent with Article 7 (1) of the ECHR and Article 15 (1) of the ICCPR. The same applies to the requirement that the amended legislation must be due to a "change in view" of the punishability. In the light of the obligations under international law, section 3 of the Penal Code must be interpreted to mean that any legislation between the acts and the judgment that is favourable to the defendants, must be applied in the criminal case.

(21) Article 97 of the Constitution also precludes application of legislation at the time of the acts in this case. The interim legislation gave the defendants a legitimate expectation of acquittal, which the legislature cannot interfere with later.

(22) The defendants contend that the appeal must be dismissed.

## My opinion

### *The issues raised*

(23) The indictment concerns breaches of the conduct of business rules in the Securities Trading Act, as the provisions read at the time of the acts. The question in the Supreme Court is whether the defendants – as the Court of Appeal concluded – must be acquitted because the provision on personal criminal liability was removed during a period between the acts and the District Court's judgment. This depends on whether section 3 subsection 1 of the Penal Code, considered against Article 7 (1) of the ECHR and Article 15 (1) of the ICCPR, requires that the legislation in the interim period be applied in the criminal case.

(24) There is also a question whether Article 97 of the Constitution precludes conviction. This latter point is a new contention presented in the Supreme Court by the defendants.

(25) I will start by outlining the relevant provisions in the Securities Trading Act.

***The conduct of business rules in the Securities Trading Act***

(26) At the time of the acts in 2015–2016, section 10-11 subsection 1 first sentence of the Securities Trading Act stated that "an investment firm shall conduct its activities in accordance with the conduct of business rules". The following provisions in section 10-11 elaborated and specified the obligations arising from this overreaching principle.

(27) The duty-bearer under section 10-11 subsection 1 was "investment firms", but it followed from subsection 11 – until an amendment in January 2019 – that the obligation to comply with the conduct of business rules also applied to employees and individuals with decisive influence in the firm. The provision read:

> "This section … applies equally to the employees and employee representatives in the firm and to persons and undertakings that exercise such influence in the investment firm as mentioned in section 1-3 subsection 2 of the Private Limited Companies Act or section 1-3 subsection 2 of the Public Limited Companies Act."

(28) Intentional or negligent breach of the conduct of business rules was punishable by fines or a maximum of one year of imprisonment under section 17-3 subsection 2 (6). Both the investment firm and natural persons could be punished.

(29) By an amending Act of 15 June 2018 no. 35, which entered into force on 1 January 2019, chapters 9 and 10 of the Securities Trading Act were considerably revised. The aim was to improve the structure of the Act and make EEA-based rules previously found in Regulations more easily accessible, see Proposition to the Storting 77 L (2017–2018) page 7.

(30) As a step in the amendment process, provisions previously found in section 10-11 were incorporated into section 10-9. However, the provision in section 10-11 subsection 11 on criminal liability for natural persons affiliated with the firm was not upheld. This provision was reintroduced by a new amendment that entered into force on 21 July 2019, see amending Act of 21 June 2019 no. 41. Consequently, for almost seven months the Act contained no provision on personal criminal liability for breaches of conduct of business rules.

(31) A key question in the case is whether the removal of personal criminal liability expressed a "change in view" of the punishability, see section 3 subsection 1 of the Penal Code. I find that the answer is no, and that the removal was the result of a legislative error.

(32) I take as a starting point that section 10-11 of the Securities Trading Act is described as "an important provision" in the original preparatory works, see Proposition to the Odelsting no. 34 (2006–2007) page 104. Compliance with conduct of business rules is also referred to as a "fundamental principle" in the preparatory works to the amendment from January 2019, both under national law and relevant EEA law, see Norwegian Official Report 2017: 1 page 168 (the second partial report from the Securities Law Committee). It is also a central requirement in Directive 2014/65/EU on markets in financial instruments, where it is presented as a general principle in Article 24 (1) and subjected to detailed regulation.

(33) If the legislature had intended to remove the possibility of sanctioning breaches of this fundamental principle for employees and persons with decision-making authority in the firm, this ought to have been thoroughly discussed in the preparatory works. However, there is no mention of section 10-11 subsection 11 in either Norwegian Official Report 2017: 1 or Proposition to the Storting 77 L (2017–2018). Nor is the issue addressed in Norwegian Official Report 2017: 14 (the third partial report from the Securities Law Committee), despite

sanctions and punishment being a special topic in this report.

(34) The preparatory works do not express any *general* views on the use of sanctions that are consistent with the removal of personal criminal liability. On the contrary, the Securities Law Committee wanted to reinforce the sanctioning system by introducing administrative fines. Also, the Committee considered it important to maintain the threat of criminal liability for breaches of central provisions in the Act. Criminal liability was emphasised as instrumental to prevent breaches of, in particular, conduct of business rules, see Norwegian Official Report 2017: 1 on page 236:

> "The Committee observes that violations of certain provisions in the Securities Trading Act may have significant adverse effects. This is primarily the case for rules meant to protect the individual investor, particularly the conduct of business rules and rules on the requirement of authorisation to operate as an investment firm. In cases of severe breach, the acts in question may verge on violations the fraud provisions of the Penal Code. Strong considerations of general deterrence indicate that it should be possible to prosecute such violations."

(35) Against this background, the Committee proposed to maintain the applicable penal provision. This position was upheld in Norwegian Official Report 2017: 14 page 116.

(36) By the amendment in January 2019, the penal provision in section 17-3 subsection 2 (6) was continued in a new section 21-3 subsection 2 (6), in line with the Committee's proposal. However, as the conduct of business rules in section 10-9 were aimed at "investment firms", without it being specified – as previously – that the obligations applied equally to employees etc. in the firm, there was no longer a special legal basis for punishing natural persons for non-compliance.

(37) As I understand the legislative process as a whole, the intention was to maintain the possibility of punishing breaches of the conduct of business rules. The provisions were to be restructured, but there was no intention to alter the scope of obligated parties under the conduct of business rules.

(38) Against this background, I find it clear that the removal of criminal liability for natural persons in January 2019 was not intentional, but must be considered a legislative error.

(39) This is supported by the preparatory works to the amendment from the summer of 2019, where personal criminal liability was reintroduced by a new provision in section 10-9 subsection 4, which mainly corresponded to the previous section 10-11 subsection 11. In Proposition to the Storting 96 LS (2018–2019), submitted on 10 April 2019, it is emphasised on page 138 that the removal in January 2019 did not express a change in view as to the punishability:

> "The Ministry observes that a previous and almost identical provision on conduct of business rules was removed without discussion upon the implementation of the substantive rules in MiFID II [Directive 2014/65/EU] in new chapter in 10 in the Securities Trading Act based on Norwegian Official Report 2017: 1. The Ministry stresses that the previous removal of the provision was not based on any assessments of punishability. The Ministry believes that individual responsibility to comply with the conduct of business rules as mentioned, and effective criminal sanctions for serious breaches, are important to ensure good consumer protection and trust in the market".

(40) The question is whether the defendants are entitled to have the courts decide the criminal case

on the basis of the interim legislation from January 2019. In that case, they must be acquitted. I will first discuss, in isolation, what follows from section 3 of the Penal Code.

***Section 3 of the Penal Code***

(41) Section 3 of the Penal Code regulates the choice of penal provision where the law has been amended after the time of the act. The main rule under subsection 1 first sentence is that "the criminal legislation at the time of the act applies". This starting point corresponds with the prohibition in Article 97 of the Constitution of giving laws retroactive effect, a prohibition also enshrined in Article 7 (1) of the ECHR and Article 15 (1) of the ICCPR.

(42) When it comes to amendments that are *favourable* to the defendant, section 3 of the Penal Code subsection 1 second sentence makes the following exception:

> "However, the legislation at the time of the decision applies when this results in a more favourable outcome for the person charged and the legislative amendment is due to a change in view as to which acts should be punishable or as to the use of criminal sanctions."

(43) Here, section 3 of the Penal Code expresses a principle that the most lenient criminal law must be applied. This is referred to internationally as the *lex mitior* principle.

(44) Thus, section 3 of the Penal Code prescribes a comparison of legislation at two stages: the time of the act and "the time of the ruling". The legislation at either of these stages that is most favourable to the defendant after an individual assessment, must be applied in the criminal case.

(45) The wording does not allow for applying legislation that has been available only *between* the time of the act and the time of the judgment. On this point, section 3 of the Penal Code continues the former provision in section 3 of the Penal Code 1902. The preparatory works to that provision state that "there is no requirement of reasonableness" related to the application of such interim legislation, see the Criminal Law Commission's *Draft General Civil Penal Code for the Kingdom of Norway. II Motives* (1896) page 10.

(46) According to the wording, the amendment must also reflect a "change in view" of the use of punishment. Whether this requirement is met must be determined through an ordinary interpretation of the provision based on generally recognised sources of law. It appears from the preparatory works that the criterion particularly aims to preclude amendments that are due to changes in the factual situation and that, therefore, do not affect the punishability of breaches committed before the amendment, see Proposition to the Odelsting no. 90 (2003–2004) page 398:

> "The provision will primarily capture cases where norms of action have been established to regulate a specific situation, and where changes in the situation result in the norm being altered or repealed. This does not imply any change in view of the punishability. Regulations on pricing, wages and rationing are typical examples of such rules. Situational regulation of hunting and fishing is another example. …"

(47) In our case, the conclusion under section 3 subsection 1 of the Penal Code, assessed independently of international sources, is that the provisions of the Securities Trading Act at the *time of the acts* must be applied in the criminal case.

(48) There are two reasons for this. The first one is that the provision from January 2019, which removed personal criminal liability, only applied during an interim period. The legislation at the time of the judgment in the District Court was just as strict as at the time of the acts and would not have resulted in a more favourable outcome for the defendants. The second reason is that the removal of criminal liability in any case did not express a "change in view" of the punishability of breaches of conduct of business rules, but was the result of a legislative error.

(49) The question is whether Article 7 (1) of the ECHR and Article 15 (1) of the ICCPR may justify a different solution. Before I delve into that, I will examine the contentions related to Article 97 of the Constitution.

***Article 97 of the Constitution***

(50) The defendants argue that, in this case, Article 97 of the Constitution precludes application of the legislation at the time of the acts. They contend that the amendment in January 2019 decriminalised the acts in the indictment, and that this created an established legal position that the legislature cannot interfere with in subsequent legislation. In other words, the prohibition of retroactivity in the Constitution precludes the amendment from the summer of 2019, reintroducing the personal criminal liability, from applying to older acts that had been decriminalised with the amending Act from January the same year.

(51) I find it clear that this contention cannot succeed.

(52) Article 97 of the Constitution states that no laws can be given retroactive effect. This protects citizens from having new burdens attached to past acts. In criminal law, the provision implies that "an act that was non-punishable at the time it was committed, cannot be sanctioned by the legislature making it punishable later", see the grand chamber ruling in Rt-2009-1412 paragraph 24.

(53) In our case, it is not a question of attaching new burdens to past acts. The situation is virtually the opposite, as the type of acts in the indictment *were* in fact punishable at the time they were committed, while they became non-punishable *later*, and for a limited period of time.

(54) I cannot see that Article 97 of the Constitution in this situation precludes application of the legislation at the time of the act, as section 3 of the Penal Code prescribes. The starting point under the constitutional provision is, precisely, that the legislation at the time of the acts must be applied. This is also justified in considerations of legal certainty and foreseeability: Each individual must be able to foresee the legal consequences of an act, without fearing that a stricter law will be imposed in posterity.

(55) The defendants seem to presuppose that Article 97 of the Constitution not only protects against subsequent and stricter criminal legislation, but also requires application of subsequent and more lenient legislation. If so, a "positive" function is added to the provision next to the "negative" function as a barrier against subsequent unfavourable legislation. The reality of this will be that the *lex mitior* principle is interpreted into Article 97. In my opinion, there is no basis for that. I find it sufficient to mention the plenary judgment Rt-2010-1445 paragraph 93, where it is emphasised with reference to previous case law that Article 97 of the Constitution cannot be considered violated "unless the new provision is stricter than the older". I believe that must be the case also in our context.

(56) As I understand it, the defendants contend that the removal of personal criminal liability in January 2019 established a *legal position* for the defendants that the legislature cannot interfere with in subsequent legislation. Their position is that the amendment resulted in the defendants' criminal liability being permanently extinguished, as if the liability had become time-barred, and that it would then be contrary to Article 97 of the Constitution to "revive" the criminal liability by applying the subsequent amendment from the summer of 2019.

(57) This argument can also not succeed. The "established legal position" asserted by the defendants consists of a possible expectation that the more favourable legislation available in the interim period would apply. However, no concrete basis for this expectation has been demonstrated beyond the mere existence of the favourable legislation.

(58) It is inaccurate to compare this situation to cases where an offence is time-barred, as the defendants have done. When the limitation period for criminal liability has expired, a direct legal consequence is that the relevant act is no longer punishable, see section 85 of the Penal Code. Article 97 of the Constitution will thus prevent a "revival" of personal criminal liability through a retroactive extension of the limitation period.

(59) In the case at hand, the defendants' expectations that personal criminal liability had been extinguished did not have the same statutory protection. The defendants could not have had any legitimate expectations regarding the applicable law beyond what follows from section 3 subsection 1 of the Penal Code. Since this provision designates the legislation in force at *the time of the judgment* as an alternative, it clearly provides no basis for specific expectations in an interim phase such as that being considered.

(60) Against this background, I find it clear that Article 97 of the Constitution does not preclude application of the legislation in force at the time of the acts in the criminal case against the defendants, as prescribed by section 3 of the Penal Code.

(61) I add – for the sake of completeness – that the defendants, through their counsel, were in continuing contact with the Public Prosecution Authority. They were well aware that the Prosecution Authority did not share their view of the applicable law and even considered indicting them under other provisions in the Securities Trading Act. They must therefore have known that the outcome of the criminal case was uncertain.

### *Article 7 (1) of the ECHR*

*Overview*

(62) Article 7 (1) of the ECHR reads:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable that the time the criminal offence was committed."

(63) As it reads, the provision contains two rules. The first is a prohibition of giving laws retroactive effect. This corresponds to the prohibition of retroactivity in Article 97 of the Constitution, see Rt-2009-1412 paragraph 24. The second rule is the fundamental requirement of legality – that no one can be punished without a basis of law. In internal Norwegian law, this follows from Article 96 subsection 1 of the Constitution and section 14 of the Penal

Code, see HR-2020-2019-A paragraph 14. However, Article 7 has no express provision on retroactivity to the advantage of the accused, i.e. the *lex mitior* principle – the principle of the more lenient criminal law. As I will revert to, the European Court on Human Rights (ECtHR) has nonetheless interpreted such a principle into Article 7.

(64) Article 15 (1) of the ICCPR, in turn, has an explicit provision on this. I will return to this provision later.

(65) The precise scope of the principle under both the ECHR and the ICCPR is unclear. I will start with Article 7 (1) of the ECHR, as there is much more case law available on this provision. The first question is whether Article 7 (1) requires consideration also of *interim* legislation that is favourable to the defendant.

*Interim legislation*

(66) Fundamental in this regard is the ECtHR's Grand Chamber judgment of 17 September 2009 *Scoppola v. Italy (no. 2).* In this judgment, the ECtHR established for the first time that Article 7 (1) – as opposed to what had previously been held by the Court– contains a *lex mitior* principle. In paragraph 109, the principle is formulated as follows:

> "… the Court takes the view that it is necessary to depart from the case-law established by the Commission in the case of *X v. Germany* [the European Human Rights Commission's ruling of 6 March 1978] and affirm that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant."

(67) Before this, in paragraph 108, the ECtHR presented considerations in support of this principle. The first one highlighted is the consideration of *proportionality*, in that the courts should apply criminal laws that are in line with the legislature's current view of the punishability:

> "In the Court's opinion, it is consistent with the principle of the rule of law, of which Article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive."

(68) In the same paragraph, the consideration of *foreseeability* is mentioned:

> "The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties."

(69) In *Scoppola*, the relevant criminal legislation had been amended twice after the time of the acts. Therefore, there were in total three laws, among which the interim law – like in our case – was most favourable to the defendant. In the appeal case, the national appellate court applied legislation in force at the time of the judgment. The ECtHR notes in paragraph 119 that the applicant by this had been given a heavier sentence

> "… than the one prescribed by the law which, of all the laws in force during the period between the commission of the offence and delivery of the final judgment, was most favourable to him".

(70) The ECtHR concluded, in an 11–6 ruling, that the *lex mitior* principle in Article 7 (1) had been violated. The national appellate court should have applied the more favourable, interim provision. The ECtHR also found, unanimously, a violation of Article 6 on the right to fair trial.

(71) In our case, the Court of Appeal has interpreted *Scoppola* to mean that any subsequent legislation should benefit the defendant, even if it has been repealed before the criminal case is decided.

(72) In support of this interpretation of *Scoppola,* the defendants have noted that the judgment in some places discusses the relevant amendments in rather general terms. It refers to the more favourable provision among "several criminal laws" (paragraph 108) or among "subsequent criminal laws enacted before a final judgment" (paragraph 109). These formulations are repeated in subsequent ECtHR judgments, including in judgment of 18 February 2020 *Jidic v. Romania* (paragraph 80) and judgment of 24 May 2022 *Çetinkaya v. Turkey* (paragraph 36).

(73) The broadest formulation in *Scoppola* is found in paragraph 119 – "all the laws in force during the period between the commission of the offence and delivery of the final judgment". However, I cannot see any use of this formulation in later ECtHR case law.

(74) Read in isolation, I agree that these expressions may be interpreted to mean that any subsequent law must be considered, without regard to whether the law still applies when the criminal case is decided.

(75) However, caution must be exercised when drawing general conclusions from individual statements taken out of context. In my opinion, *Scoppola* does not clarify the question of when – and under what conditions – interim legislation must be considered. This is partly related to the special circumstances of the case. The background to the case can be summarised as follows:

(76) In 1999, Scoppola had murdered his wife and injured a son. At the time of the acts, the maximum penalty under Italian law was lifetime in prison. This is *the first law* in the national process. Four months after the acts, new legislation entered into force. This reduced the maximum penalty to thirty years of imprisonment if the criminal case was considered under a simplified procedure where the defendant waived important procedural rights. This is the *second law*.

(77) Scoppola was granted a simplified procedure and sentenced to 30 years of imprisonment in the national court of first instance, but in the appellate court, the sentence was increased to life imprisonment. This was because the law had been amended once again, with the effect that the 30-year limit was not available when several offenses were adjudicated concurrently. Then the sentence could be set to lifetime imprisonment after all, even in cases handled under

the simplified procedure. This is the *third law*. It came into effect on the same day as the first-instance judgment was handed down, but slightly later in the day.

(78) The situation in *Scoppola* was, in other words, that the defendant had taken concrete steps in reliance on the intermediate law, which had been applied in the court of first instance. It was only in the second instance – after an appeal from the prosecution authority – that the new law restoring the penalty of life imprisonment was introduced and used as the basis for the ruling.

(79) In my opinion, it is not surprising that the ECtHR, in this context, found that it violated the *lex mitior* principle not to apply the interim law. Due to the particular circumstances of the case, as the ECtHR discusses in paragraphs 114–117, considerations of legal certainty and foreseeability became prominent.

(80) In the light of the particular circumstances of the case, the scope of the position expressed in the judgment is, in my view, unclear.

(81) In this respect, I note that there is debate regarding the extent to which *lex mitior* is applicable to interim legislation, see for example the Advocate General's opinion of 13 July 2017, in the ECJ's Case C-574/15 *Scialdone* paragraphs 158 et seq, as well as the Canadian Supreme Court's judgment of 11 October 2019, *R v. Poulin*. If the opinion of the ECtHR had been that more lenient interim laws should always be applied, it would have been natural to state this explicitly. However, the ECtHR only discusses whether Article 7 (1) contains a *lex mitior* principle, without addressing the *scope* of the principle

(82) This is also emphasised in the UK Supreme Court's judgment of 14 December 2016 *R v. Docherty*. After having reviewed *Scoppola*, the Court stressed the following in paragraph 40:

> "There is a very clear difference between (1) a principle which prevents a court from imposing a penalty above and outside the range currently provided for by the State as appropriate to the crime and (2) a principle which requires the court to seek out and apply the most favourable rule which has existed at any intervening time since the offence was committed, even if it has since been abandoned. The first would fall within the rationale of confining the court to a range currently considered appropriate for the offence; the latter would not."

(83) Regarding the ECtHR's silence on the issue, the following is set out in the same paragraph:

> "The difference between the two is not adverted to, still less explored, in the judgment in *Scoppola.* It is, accordingly, by no means clear that the court intended to expand its incorporation of lex mitior into article 7 by including the latter proposition."

(84) I cannot see that the considerations forming the basis for the *lex mitior* principle imply that interim legislation in general must be applied to the advantage of the defendant. In my opinion, the principle stands stronger if – as under section 3 of the Penal Code – it is attached to more lenient legislation available at the *time of the judgment*, as this ensures that the judgment is based on legislation reflecting the legislature's current view of punishment. The ECtHR addresses this itself in paragraph 108 of *Scoppola*, highlighting, as a key consideration behind *lex mitior*, that the defendant should not be given a penalty that the legislature "now consider[s] excessive".

(85) The application of any subsequent law to the advantage of the defendant, although the legislature has later repealed and distanced itself from the law, may in many cases give the

defendant an arbitrary advantage. The solution cannot be justified by the notion that the judgment is to reflect an up-to-date legislative view. And I cannot see that it creates more foreseeability for the defendant. Section 3 of the Penal Code provides an equally clear and foreseeable solution by designating the legislation at a specific point in time as the basis for comparison, namely that in effect at the time of the judgment. It is, at any rate, primarily at the *time of the act* that there is a particular need for foreseeability with regard to which law will be applied.

(86) The defendants contend that the solution under section 3 of the Penal Code may create differential treatment, because the timing of the decision in the criminal case, which the defendant often cannot influence, may determine the nature and scope of the reaction.

(87) However, differential treatment may also be the result if interim legislation is applied. An example is when two offences are adjudicated at the same time, and where the legislation was the same both at the time of the acts and the time of the judgments. The cases may still have different outcomes if one of the offences is older than the other, and more lenient legislation applied for a short period between the two offences. Then, only the person who committed the older offence can demand to be sentenced under the more lenient legislation, although the cases are otherwise substantively the same.

*Interim legislation – summary*

(88) In my opinion, there are good reasons for precluding interim legislation from the scope of the *lex mitior* principle, as is the premise in section 3 of the Penal Code, but in the light of *Scoppola* it cannot be ruled out that Article 7 (1) of the ECHR will require a different solution in certain cases, see sections 2 and 3 of the Human Rights Act. The scope of this judgment is however unclear, and I will not conclude on the issue since it has no bearing on the outcome of the case at hand. I will now turn to the other disputed condition in section 3 of the Penal Code.

*The requirement of a "change in view" of the punishment*

(89) The question is whether Article 7 (1) of the ECHR requires that an amendment in favour of the defendant be applied, although the amendment is not the result of a "change in view" of the use of punishment, as prescribed by section 3 of the Penal Code.

(90) There are no rulings from the ECtHR that deal with this issue directly, but I find support particularly in two judgments for the consistency between the criterion in section 3 of the Penal Code and Article 7 (1) of the ECHR. In the criminal case against the defendants, it means that the provisions cited in the indictment – the legislation at the time of the acts – may form the basis for the judgment.

(91) The first judgment I would like to highlight, is *Ruban v. Ukraine* of 12 July 2016. At the time of the acts in this case, homicide was punishable by the death penalty in Ukraine, but the death penalty was later declared unconstitutional by the Ukrainian Constitutional Court. The only penalty available then was 15 years of imprisonment. Three months after the Constitutional Court's ruling, the death penalty was replaced with a new legislative provision of life imprisonment, but in the interim period, there was a "gap" in the legislation where the maximum penalty was 15 years of imprisonment. The national court applied the legislation

available at the time of the judgment and imposed a life sentence. The question in the ECtHR was whether the provision prescribing a maximum of 15 years imprisonment, which was available during the interim period, should have been applied.

(92) The ECtHR concluded to that the *lex mitior* principle in Article 7 (1) of the ECHR does not require this, stressing that it at no point had been the legislature's intent to have a maximum penalty of 15 years of imprisonment. In paragraph 45 of the judgment, this was derived from the overall amendment process: The ECtHR took notice of the "specific context" in which the abolition of the death penalty took place in Ukraine, and accepted that "the creation of the gap had been unintentional". Against this background, the ECtHR concluded as follows:

> "… In the light of the Court's case law under Article 7, the intention of the legislator to humanize the criminal law and to give retrospective effect to more lenient criminal law is an important factor … . From the cited domestic law and practice, the Court cannot detect any intention of the legislator in particular, and of the State in general, to mitigate the law to the extent claimed by the applicant."

(93) The defendants argue that *Ruban* only shows that court-created law is exempt from the *lex mitior* principle. In other words, the key question according to the defendants is *who* created the gap, and not the absence of a *legislative intent* in itself.

(94) I do not believe that this is a natural way to read the judgment. The ECtHR makes an overall assessment of the amendment process and refers to the absence of intent "of the State in general", and not only of the legislature. If the decisive factor were that court-created law was not subject to the *lex mitior* principle, one would expect that this was stated directly.

(95) In my view, *Ruban* supports the view that, in our case, the courts are not required under Article 7 (1) of the ECHR to base their ruling on the unintended removal of personal criminal liability in the Securities Trading Act.

(96) This is also supported by the ECtHR's judgment of 18 October 2022 *Mørck Jensen v. Denmark*. From 2016 to 2019, it was unlawful in Denmark to enter and stay in Raqqa, Syria, without permission. When the prohibition was lifted in 2019 due to changes in the situation in Syria, the question arose whether the lifting also had to be given effect for violations committed while the prohibition applied. The ECtHR answered this in the negative. In paragraph 52 of the judgment, the Court explains that the amendment

> "… only related to changed factual circumstances that had occurred after the time of the offence, resulting from specific changes in the situation in Syria. It was thus unrelated to the assessment of the criminal act committed in 2016/17."

(97) I cannot see any decisive reason why an unintentional removal of criminal liability during an interim period – which is the situation in our case – should be assessed any differently under the *lex mitior* principle. This amendment, too, was "unrelated to the assessment of the criminal act". While the amendment in *Mørck Jensen* was motivated by exterior conditions, the amendment in our case had no legal or political justification whatsoever; it was merely the result of an error.

(98) The Court of Appeal has placed great emphasis on the ECtHR judgment 24 January 2017 *Koprivnikar v. Slovenia*. The case concerned the imposition of a combined sentence for three offences under a national provision prescribing a maximum penalty of either 20 or 30 years. However, the wording was ambiguous and gave no answer to which alternative to apply in the

criminal case against the applicant. National courts had interpreted the provision such that the stricter maximum penalty of 30 years should be applied, referring to systemic and purposive considerations as well as the intent of the legislature. The ECtHR, in turn, found that the lower maximum sentence, which was most favourable to the defendant, should have been applied and consequently that Article 7 (1) of the ECHR had been violated. In its conclusion, the ECtHR referred to both the principle of legality in Article 7 and the *lex mitior* principle, see paragraph 59:

> "… the Court concludes that the domestic courts failed to ensure the observance of the principle of legality enshrined in Article 7 of the Convention. It further finds that the overall penalty imposed on the applicant was in violation of both the principle that only the law can prescribe a penalty and the principle of retrospectiveness of the more lenient criminal law."

(99) The Court of Appeal has interpreted the judgment such that Article 7 (1) of the ECHR precludes the establishment of "a general and common exemption" from the *lex mitior* principle for penal provisions that do not reflect a change in view of the punishment.

(100) I cannot see that the judgment gives any guidance on the scope of *lex mitior* in a case like ours.

(101) To me, it is significant that *Koprivnikar* did not concern "the rules on the succession of criminal laws", see *Scoppola* paragraph 108. The parties agreed on which national provision to apply in the case, and the ECtHR did not problematise this. The dispute related to the *interpretation* of the ambiguous national provision, see the ECtHR's description in paragraph 53. The way the provision was worded, the ECtHR found that national courts should have interpreted "the deficient provision restrictively, that is to say to the advantage of the applicant" (paragraph 56), instead of – the opposite – building on an "extensive judicial interpretation" to the applicant's disadvantage (paragraph 57).

(102) Since the case concerned a pure interpretative issue, the ECtHR linked its reasoning to *the requirements of legality and clarity* in Article 7 (1) of the ECHR, and not to the *lex mitior* principle. What can be derived from the judgment is that caution must be exercised in interpreting penal provisions extensively, see Jon Fridrik Kjølbro, *Den Europæiske Menneskerettighedskonvention for praktikere* [the European Convention on Human Rights for practitioners], 6th edition, 2023 page 830. It seems somewhat unclear why the ECtHR also mentions the principle of *lex mitior* in its summary.

(103) Against this background, I have concluded that the criterion of "change in view" in section 3 subsection 1 of the Penal Code is consistent with the obligations under Article 7 (1) of the ECHR. Therefore, it cannot be derived from Article 7 (1) of the ECHR that the interim legislation that removed criminal liability, must be applied in the criminal case against the defendants. Case law from the ECtHR provides no basis for concluding otherwise.

(104) I will now turn to the application of Article 15 (1) of the ICCPR.

***Article 15 (1) of the ICCPR***

(105) As opposed to Article 7 (1) of the ECHR, Article 15 (1) of the ICCPR contains an express provision on the principle of *lex mitior*. The first and second sentence present the traditional requirement of legality and the prohibition of retroactivity:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."

(106) The *lex mitior* principle is established in Article 15 (1) third sentence:

> "If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

(107) The general wording does not establish any requirement that the more lenient legislation must be in effect at the time of the judgment, see the first condition in section 3 subsection 1 of the Penal Code. Nor is it indicated that the legislation must be the result of a change in view of the punishability of acts, see the second condition in section 3.

(108) However, it is clearly consistent with the wording – *because* it is general – to operate with such national delimitations of the *lex mitior* principle as prescribed by section 3 of the Penal Code. In the preparatory works to section 3 of the Penal Code, it is assumed that the provision is compatible with Article 15 (1) of the ICCPR, see Proposition to the Odelsting no. 90 (2003–2004) page 172–173.

(109) As far as I can see, there is no case law from the UN Human Rights Committee of particular interest to the case. Its ruling of 20 October 2010 *Tofanyuk v. Ukraine* concerned the same provisions as *Ruban v. Ukraine* in the ECtHR. The outcome of the case was also the same, but with a shorter and more formal reasoning, which I find no need to discuss here.

(110) In the ruling of 21 October 2010 *Cochet v. France,* the Committee found that the lifting of sanctions for violating rules on the importation of peas had to be applied on previous violations of these rules. Sanctions were lifted as a step in the implementation of new EU rules. The key point in the ruling is that Article 15 (1) third sentence of the ICCPR covers not only provisions imposing a lighter penalty – as the wording suggests – but also decriminalisation – "a law abolishing a penalty for an act that no longer constitutes an offence". As far as I can see, the ruling is not significant to the case at hand.

(111) I will not consider the general relationship between Article 15 (1) third sentence of the ICCPR and section 3 of the Penal Code. To me, it is sufficient to establish that nothing suggests that the provision extends beyond Article 7 (1) of the ECHR in this context by requiring the application of an interim provision that does not express a change in view of the use of punishment.

(112) Against this background, my conclusion is that Article 15 (1) third sentence of the ICCPR – in the same way as Article 7 (1) of the ECHR – permits the application in our case of the legislation in force at the time of the acts.

***Summary and conclusion***

(113) I have found that the requirement in section 3 subsection 1 of the Penal Code that the amendment must reflect a "change in view" of the use of punishment, is consistent with Article 7 (1) of the ECHR and Article 15 (1) third sentence of the ICCPR. As the removal of personal criminal liability under section 10-11 subsection 11 of the Securities Trading Act

was the result of a legislative error that was corrected before the case was decided, this requirement is not met.

(114) In accordance with the main rule in section 3 subsection 1 of the Penal Code, the provisions of the Securities Trading Act *as they read at the time of the acts* must be applied in the hearing of count II of the indictment concerning breaches of conduct of business rules.

(115) The Court of Appeal's acquittal therefore builds on an error of law and must be set aside. In accordance with the main rule in section 347 subsection 1 of the Criminal Procedure Act, the setting aside must also cover the appeal hearing.

(116) I vote for this

J U D G M E N T :

The Court of Appeal's judgment and appeal proceedings are set aside.

(117) Justice **Stenvik:** In agree with Justice Sivertsen in all material respects and with his conclusion.

(118) Justice **Østensen Berglund:** Likewise.

(119) Justice **Thyness:** Likewise.

(120) Justice **Bull:** Likewise.

(121) Following the voting, the Supreme Court gave this

J U D G M E N T :

The Court of Appeal's judgment and appeal proceedings are set aside.