



# SUPREME COURT OF NORWAY

On 15 November 2024, the Supreme Court's Appeals Selection Committee with Justices Noer, Bull and Høgetveit Berg, made in

**HR-2024-2106-U, (case no. 24-137597STR-HRET), criminal case, appeal against judgment:**

|   |                                    |
|---|------------------------------------|
| A | (Counsel Abdelilah Saeme)          |
| B | (Counsel Reidar Morten Furuholmen) |
| C | (Counsel Vidar Lind Iversen)       |
| D | (Counsel Øystein Ola Storrvik)     |
| E | (Counsel Øyvind Bratlien)          |

v.

The Public Prosecution Authority

the following

## DECISION :

- (1) The case concerns five appeals against the Court of Appeal's conviction for illegal involvement with a very significant quantity of drugs within an organised criminal group.
- (2) On 20 January 2023, Oslo District Court handed down a judgment for D, born 00.00.1980. Item 1 a) and b) of the conclusion reads:

“1.

a) D, born 00.00.1980, is convicted of violation of section 232 subsection 2 first penal option, see section 231 subsection 1, see section 15 see section 79 (c) of the Penal code; section 232 subsection 2 first penal option, see section 231 subsection 1, see section 15 of the Penal Code; section 31 subsection 1, see section 22 subsection 1 of the Road Traffic Act, and section 31 subsection 1 see section 24 subsection 1 first sentence of the Road Traffic Act, applied in conjunction with section 79 (a) of the Penal Code, and is sentenced to 18 years and 6 months of imprisonment. A deduction of 830 days is granted for deprivation of liberty endured in connection with the case.

b) D is acquitted of count III b of the indictment.”

- (3) Count III b of the indictment, of which D was acquitted in the District Court, concerned an aggravated drug offence under section 232 subsection 2 first penal option, see section 231 subsection 1 of the Penal Code.
- (4) B, born 00.00.1974; E, born 00.00.1974; and C, born 00.00.1979, were convicted by the same judgment from Oslo District Court.
- (5) A, born 00.00.1978, was convicted by Oslo District Court's judgment of 20 December 2023.
- (6) D appealed. The appeal concerned the findings of fact on the question of guilt for all counts of which he was convicted, with the exception of two violations of the Road Traffic Act, the procedure, the sentencing, and the confiscation. The Public Prosecution Authority, in turn, appealed against the findings of fact on the question of guilt for count III b against D.
- (7) B, E and C also appealed. The same did A. His appeal case was consolidated with the cases of D, B, E and C.
- (8) By Borgarting Court of Appeal's judgment 31 May 2024, D was convicted of all counts of the indictment that were considered, including count III b, of which he was acquitted in the District Court. The penalty was set at 20 years of imprisonment. It covers the acts where the question of guilt was finally decided by the District Court's judgment.
- (9) B, E, C and A were also convicted in the Court of Appeal's judgment.
- (10) *D, B, E, C and A* have appealed to the Supreme Court.
- (11) The appeal from D is stated to concern the application of the law and the sentencing. The contention is that materials from EncroChat and SkyECC could not be presented as evidence, and that the sentence is too severe.
- (12) The appeal from B concerns the procedure, the application of the law and the sentencing.
- (13) The appeal from E concerns the procedure, the application of the law and the sentencing.
- (14) The appeal from C concerns the procedure, the sentencing and the confiscation.
- (15) The appeal from A concerns the procedure, the application of the law and the sentencing.
- (16) *The Public Prosecution Authority* has provided comments on the appeals.

## **The Appeals Selection Committee's opinion**

### ***Jurisdiction***

- (17) An appeal to the Supreme Court may generally not proceed without leave from the Appeals Selection Committee. Leave may only be granted when the appeal raises issues of significance beyond the present case, or it is for other reasons particularly important to have the case considered in the Supreme Court, see section 323 subsection 1 first and second sentence of the Criminal Procedure Act.

- (18) D was acquitted in the District Court of count III b of the indictment, but convicted of the same count in the Court of Appeal. Therefore, he has a right of appeal, meaning that under section 323 subsection 1 third sentence of the Criminal Procedure Act, his appeal on count III b can only be disallowed if the Appeals Selection Committee unanimously finds it obvious that it cannot succeed. A decision to disallow must state the reasons why this is so, see section 323 subsection 2 second sentence.

### *The appeal from D*

- (19) Count III b concerns the storage of 100 kilograms of amphetamine. The District Court acquitted him of this charge. The majority of the Court of Appeal found it proven that he had stored 40 kilograms. The minority believed the quantity was larger.
- (20) D argues primarily that using the decrypted materials from EncroChat and SkyECC as evidence is *contrary to the requirement of a fair trial* under Article 6 (1) of the European Convention on Human Rights (ECHR). It is particularly emphasised that counsel have not had access to the chain of evidence.
- (21) In HR-2022-1314-A paragraph 26, the Supreme Court set the requirements for when investigation materials acquired by foreign authorities can be used as evidence in a Norwegian criminal case. The adjudicating court in the criminal case must individually assess the significance of counsel not having full access to the chain of evidence, see HR-2022-2125-U paragraph 1612.
- (22) The Court of Appeal has made an individual assessment in this case, and concluded:
- “After an overall and individual assessment, the Court of Appeal finds that using the decrypted materials does not violate the right to a fair trial, as long as the messages are interpreted with caution, considering the incomplete chain of evidence and the missing parts of the messages. The specific impact of the missing messages must be assessed. The Court of Appeal must consider the scope, content, and context of the decrypted materials presented, along with other evidence. Where, after such an overall assessment, missing messages in a dialogue may cast doubt on the content of the dialogue, the Court of Appeal has considered this in the defendant’s favour. The same applies where the messages use coded language or incomplete sentences, and this, too, after an overall assessment, casts doubt on the content. However, the Court of Appeal notes that for many counts, longer message sequences have been presented, which provide a good basis for interpretation, even if messages from only one party in the conversation are presented.
- Against this background, the Court of Appeal, like the District Court, has concluded after an overall and individual assessment that Article 6 (1) and (3) of the ECHR does not prevent the court from emphasising the decrypted materials from EncroChat and SkyECC in the cases being handled by the Court of Appeal.”
- (23) The Court of Appeal has thus carried out its assessment on a correct legal basis, in line with the guidelines set out in case law. Also, during the assessment of the individual counts, it is clear that the Court of Appeal has considered the evidentiary value of the messages, among other things because they may be incomplete.

- (24) D further argues that the materials from EncroChat and SkyECC were inadmissible due to the *EU Court of Justice's judgment of 30 April 2024* in case C-670/22. The reasoning is that the EU Court's judgment indicates that one should not apply the standard in HR-2022-1314-A, but the general doctrine on illegally acquired evidence. It is also argued that the evidence cannot be used unless a notice is sent prior to the interception, giving the country of interception the opportunity to refuse if such interception would be prohibited in the country where the subject of the interception resides, see the EU Mutual Legal Assistance Convention (MLA 2000) Article 20 (2).
- (25) The Appeals Selection Committee notes, that according the EU Court's judgment in Case C-670/22 paragraph 128, it is up to national authorities to decide to what extent illegally acquired evidence is admissible:
- “Secondly, as EU law currently stands, it is, in principle, for national law alone to determine the rules relating to the admissibility and assessment in criminal proceedings of information and evidence obtained in a manner contrary to EU law...”
- (26) However, the evidence must be presented in accordance with the requirements for a fair trial, particularly the right of contradiction, see paragraphs 130-131. This also follows from HR-2022-1314-A paragraph 26. Thereby, the guidelines from this ruling remain decisive for the admissibility of the evidence in Norwegian courts.
- (27) It is further argued that the EU Court's ruling indicates that *the materials were not legally acquired under French law*. When the acquisition of evidence is based on rulings from a French court, extraordinary circumstances are required for Norwegian courts to consider whether the French rules have been followed, see HR-2022-1314-A paragraph 37. There is no information regarding such circumstances here.
- (28) Consequently, the Appeals Selection Committee cannot see that the Court of Appeal's admission of the materials from EncroChat and SkyECC as evidence in the case is based on an error of law.
- (29) D also contends that *the sentence is too severe* compared with the sentence imposed on B.
- (30) Since a combined sentence has been imposed that includes the count where D has a right to appeal, the review of the appeal against the sentencing must relate to the sentencing as a whole, see HR-2019-2064-U paragraph 9. It must be determined whether the sentence is obviously disproportionate to the criminal acts committed, see section 344 of the Criminal Procedure Act and HR-2018-1050-U paragraph 28.
- (31) D is sentenced to 20 years of imprisonment. The sentence is stipulated for in total seven aggravated drug offences, which all involve a significant quantity of drugs, see section 232 subsection 2 first penal option, see section 231 subsection 1, of the Penal Code. Four of the offences were committed as part of the activities of an organised criminal group, see section 79 (c) of the Penal Code. D was also found guilty in the District Court of two violations of the Road Traffic Act. The sentence is to include all these offences, and section 79 (a) of the Penal Code is applicable.
- (32) The Court of Appeal's basis was that the most serious offense, the involvement in the importation of 81 kilograms of amphetamine as part of the activities of an organised criminal group, where D played a central and leading role, alone qualifies for 13 to 14 years of

imprisonment. The Court of Appeal refers to Supreme Court rulings Rt-2010-1283, Rt-2009-868 and Rt-2010-436.

- (33) The importation also included 2 kilograms of methamphetamine, 8 kilograms of cocaine, 30 kilograms of MDMA, 15.5 kilograms of hashish, 4 kilograms of marijuana, 40,000 ecstasy tablets, and 230 litres of GBL. The Court of Appeal further found that the prison sentence should be increased, as D is also guilty of storing all the imported drugs, except for 10 kilograms of amphetamine, and of aiding in the delivery of a large portion of the shipment.
- (34) As a combined sentence for all of this, the Court of Appeal initially considered approximately 17 years and six months of imprisonment. This included the aggravation resulting from the offenses being committed as part of the activities of an organised criminal group, in which D played a central and leading role.
- (35) The 20-year prison sentence also covers several other instances of illegal involvement with very significant quantities of drugs. Specifically these counts concerned involvement with 72 kilograms of amphetamine.
- (36) The Court of Appeal's assessments are reasonable and based on case law from analogous cases. The Appeals Committee cannot see any obvious disproportion between the criminal acts and the sentence, see section 344 of the Criminal Procedure Act.
- (37) Against this background, the Appeals Selection Committee unanimously finds it clear that the appeal cannot succeed, see section 323 subsection 1 third sentence of the Criminal Procedure Act.
- (38) Furthermore, the appeal does not raise issues of significance beyond the present case, nor is it for other reasons particularly important to have the case considered in the Supreme Court, see section 323 subsection 1 second sentence of the Criminal Procedure Act. Therefore, the appeal is disallowed.

### ***The appeals from B, E, C and A***

- (39) The appeals from B, E, C and A do not raise issues of significance beyond the present case, nor is it for other reasons particularly important to have the cases tried in the Supreme Court, see section 323 subsection 1 second sentence of the Criminal Procedure Act. Therefore, leave to appeal is not granted.
- (40) The decision is unanimous.

### **CONCLUSION**

- 1. For D, the appeal is disallowed.
- 2. For B, E, C and A, leave to appeal is not granted.

Henrik Bull  
(sign.)

Ragnhild Noer  
(sign.)

Borgar Høgetveit Berg  
(sign.)