# SUPREME COURT OF NORWAY

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

given on 26 November 2024 by a division of the Supreme Court composed of

Justice Wilhelm Matheson
Justice Ingvald Falch
Justice Borgar Høgetveit Berg
Justice Knut Erik Sæther
Justice Thom Arne Hellerslia

**HR-2024-2167-A, (case no. 24-061646STR-HRET and case no. 24-061530STR-HRET)**
Appeal against Borgarting Court of Appeal's judgment 3 January 2024

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| A | (Counsel Ulf Martin Veel Larsen) |
| B | (Counsel Mette Yvonne Larsen) |
| v. | |
| The Public Prosecution Authority | (Counsel Johannes Næss) |

(1) Justice **Falch:**

**Issues and background**

(2) The case concerns two optional penalty writs[1] imposed for non-compliance with the police's order to leave the reception area of a Ministry. The question is whether the penalty is an interference with the right to participate in peaceful demonstrations.

(3) On 30 November 2021, *A* received an optional penalty writ for, in count II c, violation of section 30 (1) see section 5 of the Police Act, on the grounds that she, on 23 August 2021, refused to comply with the police's order to vacate the premises of the Ministry of Petroleum and Energy in Oslo city centre.

(4) The optional penalty writ also covered participation in three other demonstrations, on 21 September 2020, 3 May 2021 and 27 August 2021, respectively, where she on various locations in Oslo had chained herself to others and obstructed traffic. For these acts, the optional penalty writ also concerned violation of section 181 of the Penal Code – disturbance of the peace. The fine was set at NOK 28,000.

(5) A did not accept the optional penalty writ, and on 14 October 2022, Oslo District Court ruled as follows:

> "1. A, born 00.00.1999, is convicted of violation of section 181 subsection 1 of the Penal Code (three incidents) and section 30 (1) see section 5 of the Police Act (four incidents), compared with section 79 subsection 1 (a) of the Penal Code, and sentenced to a pay fine of NOK 34,000, alternatively 40 days of imprisonment.
>
> Six days are to be deducted from the alternative prison sentence for time spent in custody on remand, see section 83 of the Penal Code.
>
> 2. A is not liable for costs."

(6) A appealed against the conviction for count II (c) of the writ – the refusal to comply with the police's order on the Ministry's premises. The appeal challenged the findings of fact on the question of guilt.

(7) On 19 October 2022, *A and B* received optional penalty writs for violating section 30 (1) see section 5 of the Police Act, on the grounds that, on 20 September 2022, they refused to comply with the police's order to leave the reception area of the Ministry of Petroleum and Energy in Oslo city centre. For A, the fine was set at NOK 2,000 in conjunction with the judgment in Oslo District Court. For B, the fine was set at NOK 8,000.

(8) Neither A nor B accepted the optional penalty writ. Oslo District Court acquitted both of them by judgment of 18 April 2023.

[1] Translator's note: An optional penalty writ (*forelegg*) is an offer from the police to settle an offence by paying a fine. If the fine is not accepted, the case is forwarded to the court for prosecution.

(9) The Public Prosecution Authority appealed against the acquittals to the Court of Appeal, including the findings of fact.

(10) Borgarting Court of Appeal combined the appeals for a joint hearing and, on 3 January 2024, ruled as follows:

> "1. A, born 00.00.1999, is convicted of violation of section 30 (1) see section 5 of the Police Act (two incidents), and of the offences adjudicated by Oslo District Court's judgment 14 October 2022, see section 79 subsection 1 (a) of the Penal Code, and sentenced to pay a fine of NOK 36,400, alternatively 44 days of imprisonment.
>
> Eight days are to be deducted from the alternative prison sentence for time spent in custody on remand, see section 83 of the Penal Code.
>
> 2. B, born 00.00.1997, is convicted of violation of section 5 see section 30 (1) of the Police Act, and sentenced to pay a fine of NOK 9,600, alternatively nine days of imprisonment."

(11) A and B have appealed to the Supreme Court. The appeals challenge the application of the law on the question of guilt for the counts for which they were convicted in the Court of Appeal. They request to be acquitted.

(12) The Public Prosecution Authority asks that the appeals be dismissed.

## My opinion

### *The courses of events*

(13) Common for the two incidents that the Supreme Court is now considering, is that they arose during rallies and demonstrations initiated by the climate and environmental movement Extinction Rebellion inside and outside the reception area of the Ministry of Petroleum and Energy in Oslo city centre. In both cases, the movement protested against Norwegian climate and environmental policy.

(14) Based on the Court of Appeal's description, the course of events during the *demonstration on 20 September 2022* – in which both A and B participated – was, briefly, as follows:

(15) B had been in contact with the police before the demonstration and notified them that protests would be carried out that day. However, he had not specified the time and place.

(16) At 11:40 a.m., A and B entered the Ministry's reception area along with three other demonstrators. They informed the receptionist that they had come to carry out a "sit down" demonstration, and had brought banners that were rolled out on the floor and attached to a wall.

(17) The demonstration proceeded peacefully, and according to the Court of Appeal, "there were no indications that the demonstrators behaved in any manner other than politely". They were not unnecessarily disturbing, and they cleaned up after themselves after the demonstration had ended.

(18) At 15:45, the demonstrators were ordered by the police to leave by 16:25 at the latest, as the reception area would close at 16:30. The police said they were free to continue the demonstration on the outside.

(19) A few minutes before 16:25, A, B, and one other demonstrator sat down in front of the swing door used for entry and exit. They smeared glue on their hands, formed a chain, and glued one hand to the wall on each side of the entrance. As opposed to earlier, this created certain security challenges. However, the Department of Security and Service Organisation (DSS) opened the revolving door for exit, and the Court of Appeal concluded that the gluing "hardly created any genuine risk" in the event of an evacuation.

(20) When the deadline expired at 16:25 without the demonstrators having left the premises, the police decided to arrest them. They were carried out and into a waiting police car, taken to the central detention centre, and placed in separate cells around 17:30. In line with the defendants' statements, the Court of Appeal concluded that the demonstrators were treated respectfully, and that there was a positive rapport between them and the police. They were released later the same night. A was deprived of liberty for 4 hours and 2 minutes, and B for 3 hours and 37 minutes.

(21) As for *the demonstration on 23 August 2021* – in which A participated – the Court of Appeal emphasised that it was more extensive, as the police arrested 16 demonstrators inside the reception area and three outside. The demonstration was part of a week of action, during which Extinction Rebellion carried out several protests, including a simultaneous road blockade elsewhere in Oslo. The police had not been specifically notified of the demonstration at the Ministry.

(22) At 11:37, the demonstrators entered the reception area, and at 17:12, the police ordered them to leave the premises by 17:25. A was arrested at 17:30, taken to the central detention centre, and placed in a cell about two hours later. She was released later the same evening. A was deprived of liberty for 5 hours and 5 minutes.

***The freedom of association and assembly***

(23) It is not disputed, nor is it doubtful, that A – on both occasions – and B violated the duty under section 5 of the Police Act to comply with police orders. The violations were intentional, and therefore punishable under section 30 (1).

(24) The question is whether the persons charged are nonetheless exempt from punishment because the fines constitute unlawful interference with their right to participate in peaceful assemblies and demonstrations. This right follows from Article 101 subsection 2 of the Constitution, Article 11 of the European Convention on Human Rights (ECHR), and Article 21 of the International Covenant on Civil and Political Rights (ICCPR). They all take precedence over the rules of the Police Act.

(25) It is not disputed, nor is it doubtful, that the demonstrations in which the defendants participated were peaceful. The police's order to leave the reception area, the arrests, the detentions, and the optional penalty writs were all interferences with their right to participate in peaceful assemblies and demonstrations.

(26) However, this right is not absolute. Interference may be lawfully carried out to ensure public safety and to prevent disorder or crime. The mentioned rules in the Police Act fulfil these conditions. However, for interference to take place, it must also be necessary in a democratic society. This condition requires a *proportionality assessment*. Authorities may only interfere with peaceful demonstrations if the interference is reasonably proportionate to the legitimate aims pursued.

(27) In its judgments HR-2022-981-A *XR 1* and HR-2023-604-A *XR 2*, the Supreme Court describes how this assessment should be carried out. Both cases concerned demonstrations organised by Extinction Rebellion (XR). In *XR 1*, two demonstrators who participated in a traffic blockade were fined for disturbance of the peace and violations of the mentioned rules in the Police Act.

(28) In *XR 2*, the demonstrator was acquitted. She had participated in a demonstration in a Ministry's reception area without complying with the police order to leave. The fine penalty was disproportionate given that the demonstrator had been subjected to an unjustified arrest and deprivation of liberty. Consequently, it was unnecessary to consider whether she could have been fined if the police had only subjected her to a shorter and lawful detention, see paragraph 76.

(29) This means that an assessment must be carried out of the authorities' *overall measures* – before, during and after the demonstration – to determine whether it is proportionate to impose a fine penalty, see also paragraph 35 of *XR 2* with reference to paragraph 24 of *XR 1*. It must then be determined whether the authorities have made unjustified individual interferences with the freedom of assembly and demonstration.

(30) The requirements for the proportionality assessment to determine whether the interference is proportionate to the aims pursued are outlined based on the Grand Chamber judgment of the European Court of Human Rights (ECtHR) on 15 October 2015, *Kudrevičius and Others v. Lithuania*. As for the specific question of whether a demonstrator can be subjected to criminal sanctions, the following is set out in paragraph 146:

> "The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued … Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification … A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction ..., and notably to deprivation of liberty … Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence …"

(31) The starting point is thus that a peaceful demonstration should, in principle, not be rendered subject to any threat of criminal sanctions. Such a reaction requires particular justification.

(32) On this basis, I will first assess the police's measures against the defendants' step by step, in isolation. Then, I will carry out an overall assessment to determine whether there is a basis for criminal sanctions in this case.

***The police's order***

(33) The defendants do not dispute that the police had a legal basis to order them to leave the reception area. I agree that the orders could legally be given under section 7 (1) of the Police Act, and that they were not contrary to either Article 101 subsection 2 of the Constitution, Article 11 of the ECHR or Article 21 of the ICCPR.

(34) Here, I briefly mention that when the orders were given, the demonstrators had been allowed to express their messages in the reception area for many hours already, although the actions had not been notified as required by section 11 of the Police Act. Furthermore, the defendants were given sufficient time to leave on both occasions. During the demonstration on 20 September 2022, the police also informed them that they could continue outside. Finally, the timing of the orders was due to the reception area closing for the day.

***The arrests and deprivations of liberty***

*The content of section 173 subsection 1 of the Criminal Procedure Act*

(35) On both occasions, the arrests of the persons charged had their legal basis in section 173 subsection 1 of the Criminal Procedure Act:

> "The person caught in the act and who does not desist from the criminal activity can be arrested regardless of the severity of the punishment."

(36) A contends that the provision cannot be applied to violations of the Police Act, which has a separate rule in section 8 on detention for up to four hours. I disagree.

(37) The wording of section 173 subsection 1 provides no basis for such a restriction, and the preparatory works for the predecessor of section 8 of the Police Act indicate, on the contrary, that section 173 can be applied as an alternative to section 8 of the Police Act, see Proposition to the Odelsting no. 31 (1970–1971) page 19. The choice of legal basis will depend on the purpose of the interference, see Proposition to the Odelsting no. 22 (1994–1995) page 19, which the courts do not review. For the courts, the question is whether the legal basis chosen by the police authorises the specific intervention.

(38) A and B further contend that section 173 subsection 1 does not extend beyond bringing the criminal act to an end. In other words, there was only a legal basis for carrying the defendants out onto the sidewalk, where they could lawfully continue the demonstration.

(39) The purpose of an arrest under section 173 subsection 1 is "to bring the unlawful behaviour to an end", see Johs. Andenæs and Tor-Geir Myhrer, *Norsk straffeprosess* [Norwegian criminal procedure], 4th edition, 2009 page 292. The rule must also be read within the scope of Article 5 (1) (b) of the ECHR, which permits lawful detention to secure the fulfilment of any obligation prescribed by law. This includes obligations imposed by the police, when the order has a legal basis.

(40) Thus, the starting point must be that the grounds for the arrest ceases to exist when the criminal act has ceased. Here, I refer to Jon Fridrik Kjølbro, *Den Europæiske*

*Menneskerettighedskonvention – for praktikere* [The European Convention on Human Rights – for practitioners], 6th edition, 2023 page 441, with reference to the case law of the ECtHR.

(41) At the same time, it must be borne in mind that section 173 subsection 1 provides a legal basis for the use of force in emergency situations where the police, in operational service, must act swiftly, often during the initial phase of a criminal case. In my opinion, this means that the police are not always obliged to release the person immediately after the criminal act has ceased. In emergency situations, the police must have the opportunity to keep the person detained until the situation is clarified, and possibly also until certain initial investigative steps have been taken.

(42) As I see it, the *length of the arrest* is therefore primarily limited by the requirements of necessity and proportionality in section 170 a of the Criminal Procedure Act and Article 5 (1) (b) of the ECHR. This means that the police must continuously evaluate specifically what might be achieved by a further arrest, and then balance this against the consequences for the detainee.

(43) The consideration for the individual in question is strengthened once the criminal act has ceased. If the arrest is to be upheld, it must be assessed in the light of the investigative considerations outlined in section 226 of the Criminal Procedure Act. For instance, a concrete risk of recurrence may justify further arrest. The same holds true for any need to secure personal details and evidence. Also, purely practical and police operational considerations must, under the circumstances, be given weight, see paragraph 42 of *XR 1*.

(44) What cannot be given weight, however, is the consideration of effective enforcement of – i.e. reaction to – the offense. The punitive consideration is maintained by the punishment, which may be imposed later – after criminal liability is proven.

(45) The proportionality must therefore, as usual, be assessed on an individual basis. If the police cannot justify continued detention based on such considerations as I have mentioned, it will be deemed disproportionate. A standard justification that placing someone in a prison cell is the natural next step, is not tenable.

*Individual assessment*

(46) I agree with the Court of Appeal that the conditions in section 173 subsection 1 see section 170 a were met when the police arrested the persons charged. As they failed to comply with the police's order, they were "caught in the act" without terminating the criminal act.

(47) I also believe there was a basis for bringing them to the police detention centre. During both demonstrations, there was a need to clarify the situation and determine whether criminal proceedings should be instituted. The demonstration on 23 August 2021 was rather extensive and demanding for the police to handle on site. The demonstration on 20 September 2022 was smaller and more manageable, but the persons charged had obstructed the execution of the order by gluing themselves to the wall. This made the situation slightly more challenging.

(48) However, the police have not adequately justified the need and necessity of the further deprivation of liberty by placing the persons charged in prison cells where they remained for a few hours. As already mentioned, this must be based on concrete investigative considerations

that necessitate deprivation of liberty, which must then be balanced against the inconvenience for the detainees.

(49) The prosecutor has pointed out the risk of recurrence, which I disregard. The demonstrations were peaceful, and after the persons charged had been taken away, the entrance door to the reception was closed. Nor does the Court of Appeal's judgment provide grounds for establishing a risk of recurrence.

(50) The prosecutor has also pointed out the police's needs, particularly during the demonstration on 23 August 2021. Many demonstrators were detained simultaneously, also because another demonstration was taking place elsewhere in Oslo initiated by Extinction Rebellion. The registration work could therefore take some time. Yet, it remains unexplained why it was necessary and proportionate to imprison A for a few hours.

(51) Therefore, my view is that although the arrests of A and B were lawful when they occurred, they became disproportionate a while after A and B arrived at the detention centre and were eventually placed in prison cells where they remained until released. Consequently, the last part of the arrests lacked a sufficient legal basis, and thereby violating Article 5 (1) of the ECHR.

***The criminal sanctions***

(52) In assessing whether Article 101 subsection 2 of the Constitution, Article 11 of the ECHR, and Article 21 of the ICCPR allow for imposing criminal sanctions on A and B, it is significant that they have been subjected to unlawful deprivation of liberty. In the same way as in *XR 2*, I believe that they then cannot be fined for the violations of the Police Act. This applies even though there was initially a legal basis to arrest them.

(53) In *XR 2*, the result was acquittal. The prosecutor argues that the result should instead be a waiver of sentencing under section 61 of the Penal Code. The reasoning is that when criminal liability is proven, the unlawful detention should be compensated under Article 13 of the ECHR. It is sufficient, according to the prosecutor, to waive the sentencing, if a reduction of the fines is not sufficient.

(54) I do not disagree that the condition for imposing a waiver of sentencing under section 61 – "extraordinary circumstances" – may be met in our case. This applies even though the Ministry, in the preparatory works, "assume[s] that there will rarely be a great need to exempt someone from punishment in cases of civil disobedience", see Proposition to the Odelsting no. 90 (2003–2004) page 109.

(55) However, a waiver of sentencing is also a criminal sanction, see section 30 letter b of the Penal Code. Considering that criminal sanctions for participation in peaceful demonstrations require particular justification under Article 101 subsection 2 of the Constitution and Article 11 of the ECHR, I find that the unlawful detentions must lead to the acquittal of the persons charged. Although not significant, I mention that other participants in the demonstration on 23 August 2021 have been acquitted, see HR-2023-976-U, HR-2024-471-U, and HR-2024-1097-U.

***A's sentence***

(56) Next, a penalty must be set for the other demonstrations for which A was convicted in the District Court. These involve participation in three demonstrations that obstructed traffic, where she in all cases violated both section 181 subsection 1 of the Penal Code and section 30 (1) see section 5 of the Police Act.

(57) In accordance with paragraph 63 of *XR 1* (HR-2022-981-A), the starting point is a fine of NOK 20,000 for one such demonstration, when the optional penalty writ is not accepted. An additional amount must then be added for the other two demonstrations in accordance with the principle of increased penalties in section 79, subsection 1 (a) of the Penal Code. For the second demonstration, another half is added, and for the third, slightly less. The starting point is then a fine of NOK 37,000.

(58) However, a deduction must be made for the long processing time. The cases are from September 2020, May 2021 and August 2021, respectively. A cannot be blamed for the long time that has passed since then, which is partly due to the need for legal clarifications. Therefore, a deduction of NOK 8,000 is made.

(59) In addition, a deduction must be made in the fine for six days of deprivation of liberty amounting to NOK 6,000, see paragraph 67 of *XR 1*. Two of the eight days that the Court of Appeal deducted have been considered in the acquittals.

(60) The fine is therefore set at NOK 23,000. The alternative sentence of imprisonment is set at 29 days, see section 55 of the Penal Code. Six days of deprivation of liberty will be deducted from this.

***Conclusion***

(61) Consequently, the appeal against the application of the law has succeeded, which means that A and B are acquitted of the counts against which they have appealed.

(62) For that reason, A's fine must be reduced.

(63) I vote for this

J U D G M E N T :

1. A is acquitted of count II c in the optional penalty writ of 30 November 2021 and of the optional penalty writ of 19 October 2022.

2. For the other counts adjudicated by Oslo District Court's judgment on 14 October 2022, A is sentenced to a fine of NOK 23,000, alternatively 29 days of imprisonment. Six days of deprivation of liberty will be deducted from the sentence of imprisonment.

3. B is acquitted.

(64) Justice **Høgetveit Berg:** In agree with Justice Falch in all material respects and with his conclusion.

(65) Justice **Hellerslia:** Likewise.

(66) Justice **Sæther:** Likewise.

(67) Justice **Matheson:** Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

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