



SUPREME COURT OF NORWAY

J U D G M E N T

given on 6 March 2025 by a division of the Supreme Court composed of

Justice Bergljot Webster
Justice Henrik Bull
Justice Ingvald Falch
Justice Erik Thyness
Justice Eyvin Sivertsen

HR-2025-458-A, (case no. 24-170372STR-HRET)

Appeal against Hålogaland Court of Appeal's judgment 13 September 2024

A (Counsel John Christian Elden)

v.

The Public Prosecution Authority (Counsel Thomas Frøberg)

(1) Justice **Sivertsen**:

Issues and background

(2) The case concerns an appeal against a conviction in a case involving sexual activity with a person who was incapable of resisting the act – often referred to as sleep rape. The main issues are whether the Court of Appeal has misapplied the standard of proof and whether it has provided a flawed reasoning.

(3) On 11 January 2024, A was indicted for violating section 292 see section 291 of the Penal Code. The basis for count I of the indictment is described as follows:

“On the night of Saturday 12 February 2022 in ---road 00 in X, he inserted his penis into B’s (born 00.00.2005) vagina, despite her being incapable of resisting the act due to sleep and/or intoxication.”

(4) On count II, A was indicted for having taken two sexualised photos of B – who was 16 years and 11 months old – during the same event, see section 311 subsection 1 of the Penal Code. The basis reads as follows:

“At the time and place as described under count I, he took two photos of B’s exposed genitals.”

(5) The background to the case, as it is described in the Court of Appeal’s judgment, may be summarised as follows:

(6) A and B attended a party at a community hall with many others present. Both were intoxicated from alcohol. They did not know each other from before and had no contact before the party was ending. B needed transportation to where she was planning to stay. A had arranged to be picked up by car by an acquaintance. B was offered a ride in the car and went with A to stay overnight at his place. Both have stated that they lay down in A’s bed with their clothes on and fell asleep.

(7) B has stated that she woke up later during the night to the defendant moving with his penis inside her vagina. She was then lying naked on her belly. She felt scared and uncomfortable and pretended to be asleep. Apart from that, her recollection is limited. A has stated that he had a “blackout” from excessive drinking. He remembers little from the evening and night, but denies having sexually assaulted B.

(8) On 18 March 2024, Nord-Troms and Senja District Court ruled as follows:

“1. A, born 00.00.2003, is acquitted of violating section 292 see section 291 of the Penal Code.

2. A, born 00.00.2003, is convicted of violating section 311 of subsection 1 of the Penal Code. The sentence is set at a fine NOK 25,000, alternatively 10 days of imprisonment. In the event of imprisonment, one day is deducted for time spent in custody on remand, see section 83 of the Penal Code.

3. A, born 00.00.2003, is not liable for compensation and aggravated damages.”

- (9) The judgment was not unanimous. The District Court's majority, which consisted of the two lay judges, found that it could not be ruled out that the sexual activity had been consensual. There was also no basis to award compensation for economic loss and aggravated damages. The minority, the professional judge, found that guilt had been proven beyond reasonable doubt and voted for conviction.
- (10) The District Court unanimously convicted A on count II of the indictment of having taken one nude photo of the aggrieved person.
- (11) The Public Prosecution Authority appealed against the acquittal on count I to the Court of Appeal. The issue of guilt on count II was not appealed against and is conclusively decided by the District Court's judgment.
- (12) By Hålogaland Court of Appeal's judgment 13 September 2024, A was unanimously found guilty of sexual assault. The conclusion read:
- "1. A, born 00.00.2003, is convicted of violating section 292, see section 291 of the Penal Code and of the matter resolved by Nord-Troms and Senja District Court's judgment of 18 March 2024, and sentenced to three years and four months of imprisonment, see section 79 a of the Penal Code. A deduction of one day is granted for time spent in custody on remand, see section 83 of the Penal Code.
 2. A, born 00.00.2003, is to pay compensation for economic loss to B of NOK 5,961 within two weeks of the service of this judgment.
 3. A, born 00.00.2003, is to pay aggravated damages to B of NOK 280,000 within two weeks of the service of this judgment.
 4. Costs are not awarded."
- (13) A has appealed against the Court of Appeal's judgment to the Supreme Court. The appeal concerns the application of the law on the issue of guilt, and the procedure. Additionally, a new hearing of the compensation claims is requested.
- (14) The Supreme Court's Appeals Selection Committee has granted leave to appeal regarding the application of the law on the issue of guilt, and the procedure. Consent for a new hearing of the compensation claims is not granted.
- (15) The appeal against the application of the law relates to the standard of proof. Both the defendant and the Public Prosecution Authority argue that the Court of Appeal has misapplied the standard of proof by setting too low a threshold for proving guilt in the conviction of sexual assault.
- (16) The appeal against the procedure concerns the reasoning. Both parties argue that the Court of Appeal has not provided sufficient reasoning for ruling out that the sexual activity was consensual, which was the basis for the acquittal in the District Court.
- (17) Outside the appeal process, the Public Prosecution Authority has argued that, on one point, the Court of Appeal's reasoning violates the presumption of innocence. The defence counsel supports this.

- (18) The defence counsel and the prosecution authority have submitted coinciding requests that the Court of Appeal's judgment be set aside.

My opinion

The Supreme Court's jurisdiction

- (19) The Supreme Court has full jurisdiction to review the Court of Appeal's application of the law and procedure, but cannot review the findings of fact on the issue of guilt, see section 306 subsection 2 of the Criminal Procedure Act.

The application of the law to the findings of fact

Introduction

- (20) The defence counsel and the prosecutor have structured their arguments in the context of the appeal against the application of the law in a principled and broad manner, emphasising the strict standard of proof to prevent wrongful convictions. In support of this objective, the parties argue that specific requirements should be established for the *procedure* for the findings of fact.
- (21) The parties have also highlighted the need to specify the factors to be included in a *credibility assessment*, such as that conducted by the Court of Appeal in the determination of guilt in this case.
- (22) Before I turn to my individual assessment of the case, I will address these issues in more detail, starting with some basic principles for the findings of fact.

Requirements for the findings of fact

- (23) It is a fundamental principle that guilt must be proven beyond reasonable doubt. This standard of proof applies to the evidentiary result; that is, the facts forming the basis for the judgment after an overall assessment of the evidence. The requirement does not apply to individual elements in the assessment. In Rt-2005-1353 paragraph 14, it is stated:

“The findings of fact often rely on evaluating several factors, each of which may have varying degrees of evidentiary strength. It is not required that each individual factor be proven beyond reasonable doubt, as long as there is no reasonable doubt about the conclusion after an overall evaluation of the factors.”

- (24) The principle of *free evaluation of evidence*, as described here, means that it is up to the adjudicating court to determine the weight to be given to the evidence presented, and whether the evidence as a whole provides a sufficient basis for conviction. In other words, the court is not bound by legal rules regarding, for instance, the weight to be given to certain types of evidence. Nor is the court obliged to follow a specific procedure in its evaluation, but can adapt it to the individual evidentiary situation.

- (25) While the standard of proof is a strict norm, the procedure to ensure that the standard is enforced is initially left to the discretion of the court. This stems from the fundamental idea that the court may best uncover the truth in each case if the findings of fact are not constrained by rules, see Johs. Andenæs, *Norsk straffeprosess*, [Norwegian criminal procedure] 4th edition, 2009, page 165.
- (26) However, the findings of fact are not entirely unregulated. A basic requirement is that the court proceeds in a reassuring manner that, in light of the high standard of proof, is well-suited to ensure a correct result. Judges cannot rely on gut feeling, intuition or unreflected opinions, but must make a conscientious, sensible and rational evaluation of the evidence. In the Criminal Procedure Act of 1887, this was set out in section 349 second sentence, emphasising that the ruling must be made “on the basis of a conscientious examination of the evidence presented”. A similar provision is not found in the current Criminal Procedure Act, but it is still applicable law. The findings of fact must therefore be reason-based, not emotion-driven.
- (27) *The presumption of innocence* means that the defendant must be presumed innocent until proven guilty. The prosecution authority has the burden of proving guilt, see Article 96 subsection 2 of the Constitution and Article 6 (2) of the European Convention of Human Rights (ECHR), see also the Supreme Court judgment Rt-2014-1292 paragraphs 14 and 15. The presumption of innocence dictates how the court should approach the evidence in a case: The court should not seek confirmation of a preconceived idea that the defendant is guilty. In a plenary judgment of 6 December 1988 *Barberà and Others v. Spain* from the European Court of Human Rights (ECtHR), the following is set out in paragraph 77:
- “... the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.”
- (28) The court hears a criminal case based on the indictment, which presents the course of events from a perspective where the defendant is guilty. However, the court should also evaluate the facts from the opposite perspective by asking the following question: Is it possible to interpret the facts to indicate that the defendant is innocent? If this appears to be a realistic possibility based on the overall evidence, the defendant must be acquitted.
- (29) According to decision theory, such an approach reduces the risk of confirmation bias or “tunnel vision”. These theories emphasise that evaluating facts solely from the hypothesis that the defendant is guilty increases the risk of erroneous conclusions. Unconscious psychological mechanisms may cause neutral or ambiguous evidence, which could also fit a scenario where the defendant is innocent, to be interpreted as substantiating guilt. Meanwhile, facts that may argue against guilt when considered in isolation may be explained away or assigned little weight in the overall evaluation.
- (30) The court must nonetheless approach the facts in the individual case in the light of the specific evidentiary situation. There is no basis for expressing in general terms how the court should proceed.
- (31) I add that it is not required for *the reasoning* to show that the court has evaluated the evidence from various perspectives as I have mentioned. Only when the alternative interpretation of the facts constitutes a central point in the case that would otherwise remain unexplained, a

specific justification must be provided, see section 40 subsection 4 of the Criminal Procedure Act as the provision has been interpreted in case law. I will return to this in my individual assessment of the case at hand.

Credibility assessments

- (32) In this case, the conviction of sexual assault is largely based on the aggrieved person's account of the events. Since the defendant denies having sexually assaulted her, it is one person's word against another's. Regarding this evidentiary situation, the following is set out in Rt-2011-641 paragraph 28:
- “In cases involving sexual assault, it is not uncommon for the defendant and the aggrieved person to have conflicting accounts of the events. It is also not uncommon for there to be no other evidence in the case. In such situations, the court must, as a starting point, have the opportunity to convict based on a credibility assessment.”
- (33) The defence counsel argues that, as a general principle, a defendant should not be convicted solely based on the aggrieved person's statement. This is supported by research on challenges and sources of error in assessing “credibility”. In the defence counsel's view, credibility is an unclear concept in itself that may be misunderstood to allow for a more emotion-driven assessment of the truthfulness of a person's statement. Therefore, additional evidence should always be required to convict. If not, there is a risk that convictions may be based on a purely subjective perception of which party appears more trustworthy.
- (34) Here, I see reason to make certain clarifications.
- (35) Firstly: Credibility assessments are not conducted in isolation but as part of the determination of guilt, where the strict criminal standard of proof applies. It is not a matter of whom the court believes or trusts the most. For the court to conclude on guilt, the aggrieved person's statement must leave no reasonable doubt that the defendant is guilty. The judgment in Rt-2011-641 does not indicate otherwise.
- (36) Secondly: Research in witness psychology shows that external features of a person, such as appearance, body language and manner of speaking, provide an uncertain basis for assessing the truthfulness of a statement. Therefore, caution should be exercised when including such factors in the credibility assessment. The central aspect of the credibility assessment should be the contents of the statement, not the impression given by the person presenting it in court. This is also emphasised by the Swedish Supreme Court in its judgment included in NJA 2010 page 671, paragraph 81. I also reiterate that the findings of fact should be rational and not governed by gut feeling or intuition.
- (37) Another consideration is that there may be objective factors concerning the person giving his or her account, related for instance to mental state or intoxication, which may affect the reliability of the statements. Such factors must clearly be taken into account.
- (38) Thirdly, I emphasise that the aggrieved person's statement must, as far as possible, be verified by the court by assessing it in relation to other evidence that may be apt to weaken or strengthen it. The statement will rarely stand alone, even in “word against word” cases. It will nearly always be supplemented by other evidence, such as circumstances before and after the incident, even though there is no other evidence about the assault situation itself. This was

also the case in Rt-2011-641, where the Court of Appeal's judgment was set aside because the reasoning did not show that the aggrieved person's statement had been weighed against other key evidence.

- (39) In my opinion, however, it is not possible to establish general and specific requirements for additional evidence in this type of case, as the defence counsel has argued. Apart from the fact that it is impossible to universally determine the need for evidence because cases are different, such guidelines would be difficult to reconcile with the principle of free evaluation of evidence.

The individual assessment

- (40) In its findings of fact, the Court of Appeal has taken the position that any reasonable doubt should benefit the defendant. Therefore, the legal starting point for the Court's assessment of the case is correct.
- (41) Whether the Court of Appeal nonetheless set too low a standard of proof in its individual assessment of the case must be determined based on the court's reasoning, which is also a separate ground for appeal.
- (42) According to section 40 subsection 4 of the Criminal Procedure Act, the reasoning must "state the main points in the court's findings of fact". In other words, the court must explain "why a particular evidentiary result is adopted", see Rt-2011-172 paragraph 29. Primarily, the court is required to account for the central points in its findings of fact and briefly indicate what has been decisive, see the plenary judgment Rt-2009-750 paragraph 75 with reference to the legislative history.
- (43) A distinctive feature of this case is that both the defendant and the aggrieved person have stated that they remember little from the night in question. The Court of Appeal summarised the aggrieved person's statement as follows:
- "The aggrieved person stated that she remembers little of the car ride and believes she may have slept through most of it. She remembers lying down on the bed fully clothed. Sometime later, she woke up with the defendant on top of her with his penis inside her vagina. She was lying on her stomach. In her police statement shortly after the incident, she said she believed his penis was fully inside her and that the defendant was moving it in and out. The defendant then asked if she was awake, but because she was scared/uncomfortable in the situation, she did not respond. The defendant continued."
- (44) The Court of Appeal then writes that the aggrieved person only remembered "this one glimpse from the episode", and that she did not know "how it started or how it ended". She also had "no opinion of how her clothes came off".
- (45) Both the District Court and the Court of Appeal found it proven that the defendant and the aggrieved person had sexual activity that night. The Court of Appeal presents several facts to support this. The central point on which the dissent in the District Court was based, was whether the intercourse was initiated voluntarily, while the aggrieved person was awake and capable of resisting. In that case, the defendant cannot be convicted of sexual assault, even if the aggrieved person fell asleep during the activity, see Rt-2003-687.

- (46) *The District Court's majority* found that it could not be ruled out that the sexual activity was consensual. The judgment states:

“The court’s majority ... believes, based on the evidence presented and the limited amount of information about the true course of events, it cannot be ruled out that the defendant and the aggrieved person had mutual and consensual sexual contact with each other that night. After hearing both the aggrieved person’s and the defendant’s accounts, where both express very limited recollection because they were very drunk, it cannot be ruled out that both of them, after lying down in bed, wanted to have sex.

According to the court’s majority view, the aggrieved person’s account does not rule out such a course of events. It is noted that she only remembers glimpses of the incident and no details of what happened or how it ended, but that she may have fallen asleep during the intercourse. According to the majority’s view, this indicates that the aggrieved person, like the defendant, was very intoxicated.”

- (47) Overall, the majority concluded that the evidence was consistent with the sexual activity being initiated voluntarily, meaning that the defendant had to be acquitted. In other words, the majority could not rule out a scenario where the defendant is innocent.

- (48) *The Court of Appeal*, like the minority in the District Court, has concluded that the defendant is guilty on the count of sexual assault. The Court of Appeal has largely referred to the same pieces of evidence as the District Court’s majority, but has partially reached other conclusions from them and partially assigned different weight to them. The latter applies in particular to the aggrieved person’s account, which the Court of Appeal assessed as follows:

“In its findings of fact, the Court of Appeal has attached great importance to the aggrieved person’s account. Although she was intoxicated and only remembers brief glimpses from that night, she described the central course of events in a realistic and credible manner in her testimony in the District Court. She clearly described a violation of section 292 see section 291 of the Penal Code. The aggrieved person has maintained her account throughout the investigation and trial, from the time she first told her friends and father shortly after the incident. There is no basis to suspect her of giving false testimony to incriminate the defendant, whom she had not previously met.”

- (49) Here, the Court of Appeal describes what it believes can be derived from the statement, and explains why the statement is given great weight, as is required for central evidence. The Court of Appeal then accounts for other facts in the case – which were also part of the District Court’s evaluation – including the defendant’s testimony, witness statements and the aggrieved person’s conduct during the period after the incident. The Court of Appeal further describes how the various facts are balanced against each other in its overall assessment.

- (50) As this case stands, however, I find that the Court of Appeal’s reasoning is flawed in that it fails to address key elements of the acquitting scenario on which the District Court’s judgment is based. This includes the aggrieved person’s account, considering that she only remembers the incident in “glimpses”. Due to her limited recollection, the District Court’s majority found that her account did not rule out the possibility that the intercourse was initiated voluntarily before she fell asleep. The Court of Appeal points to several factors that support the aggrieved person’s account but does not explain how they substantiate that the intercourse could not have been initiated voluntarily.

- (51) In this regard, I note in particular the Court of Appeal’s statement that nude photos of the aggrieved person “substantially” support her account of the course of events. The Court emphasised:

“... that the relevant photos were not discovered by the police until an examination of the defendant’s phone in June 2023. Therefore, the aggrieved person has described the course of events without being aware of them. She has not mentioned the photos at any point before this.”

- (52) The District Court’s majority found that the defendant taking a nude photo of the aggrieved person did not rule out that the intercourse was *initiated* mutually. The Court of Appeal has not clarified how the photos may shed light on this initial part of the course of events.
- (53) Against this background, I believe that the Court of Appeal has not adequately clarified its findings of fact “regarding the circumstances on which the Court of Appeal has concluded differently than the District Court”, see HR-2024-1874-U paragraph 16 with further references.
- (54) I cannot rule out the possibility that the flawed reasoning has affected the result. In my view, the Court of Appeal’s judgment must therefore be set aside, see section 343 subsection 1 of the Criminal Procedure Act.

The presumption of innocence

- (55) As mentioned, the defendant was convicted in the District Court of having taken one sexualised photo of the aggrieved person, see section 311 subsection 1 of the Penal Code. The conviction does not cover the second photo in the indictment, as the District Court was in doubt about the identity of the woman in the photo, and whether she was a minor.
- (56) The Court of Appeal, in turn, has assumed that the aggrieved person is depicted in both nude photos and has used both photos in its findings of fact for the indictment of sexual assault.
- (57) I cannot see that there is initially anything wrong with considering an act for which the defendant has been acquitted, as substantiating that the conditions for punishment are met for another act, see Rt-2005-1353 paragraph 14. However, this must be done in a way that does not violate the presumption of innocence, see Article 96 subsection 2 of the Constitution and Article 6 (2) of the ECHR. The reasoning must not be formulated so as to leave doubt about the correctness of the acquittal, see HR-2018-1271-A paragraph 22 and HR-2018-1909-A paragraph 55 with further references.
- (58) The Court of Appeal has described the second photo as follows:

“Count II of the indictment covers two photos, but the District Court convicted the defendant of only one of them, as the aggrieved person was unsure whether she was depicted on the second photo. This photo shows a young woman’s vagina in a bed. The sheets are the same in both photos, and the defendant has not claimed that the second photo shows someone else. Both photos have the same timestamp for the last modification (which does not correspond to the time they were taken). According to the police investigation, this is because the defendant deleted the two photos, which later were retrieved from his phone. The aggrieved person’s position in the photos and the

camera angle rule out the possibility that she took the photo herself. The defendant states that he does not remember taking any of the photos.”

- (59) Both the prosecutor and the defence counsel believe that the Court of Appeal’s discussion of the second photo violates the presumption of innocence. I agree with this view. While the Court of Appeal emphasises that the defendant was not convicted in the District Court of taking this photo, its further deliberations strongly suggest that it believes that the aggrieved person is the one in the photo, and that the defendant took the photo intentionally. When the Court of Appeal fails to clarify that, by using the photo as evidence, it has applied a different and lower standard of proof, it creates doubt about the innocence. In my view, this amounts to a violation of the presumption of innocence.
- (60) In my opinion, it is not necessary for the violation to be expressly stated in the conclusion of the judgment.

Conclusion

- (61) Against this background, I find that the Court of Appeal’s judgment must be set aside due to flawed reasoning. In accordance with the main rule in section 347 subsection 1 of the Criminal Procedure Act, the setting aside must also include the appeal hearing. Upon rehearing the case, the Court of Appeal must reconsider the civil claims anew.
- (62) I vote for this

J U D G M E N T :

The Court of Appeal’s judgment and appeal hearing are set aside.

- | | | |
|------|-------------------------|--|
| (63) | Justice Thyness: | I agree with Justice Sivertsen in all material respects and with his conclusion. |
| (64) | Justice Bull: | Likewise. |
| (65) | Justice Falch: | Likewise. |
| (66) | Justice Webster: | Likewise. |
- (67) Following the voting, the Supreme Court gave this

J U D G M E N T :

The Court of Appeal’s judgment and appeal hearing are set aside.