SUPREME COURT OF NORWAY

J U D G M E N T

given on 22 May 2025 by a division of the Supreme Court composed of

Justice Aage Thor Falkanger
Justice Espen Bergh
Justice Erik Thyness
Justice Thom Arne Hellerslia
Justice Thomas Chr. Poulsen

HR-2025-974-A, (case no. 24-198602STR-HRET)
Appeal against Borgarting Court of Appeal's judgment 15 October 2024

A	(Counsel Omar Tashakori)
v.	
The Public Prosecution Authority	(Counsel Thomas Frøberg)

(1) Justice **Poulsen:**

Issues and background

(2) The case concerns the admissibility, in a criminal trial, of reading aloud the police statement of the aggrieved party, who appears as a witness at the main hearing but exercises his or her right to refuse to give evidence as a person closely related to the defendant. The case also raises the question of whether written evidence containing statements the witness has made to healthcare services and a crisis centre may be read aloud in court.

(3) On 7 November 2023, A was indicted for violation of section 271 of the Penal Code (bodily harm). The basis for the indictment was violence towards his spouse B on three occasions:

> "a)
> On one occasion in June 2021 at --- street 0 in Oslo, or elsewhere in Oslo, he struck B multiple times to the head and face with a clenched fist, and also placed both hands around her neck in a choking manner.
>
> b)
> On Friday 5 November 2021, at --- Street 0 in Oslo, or elsewhere in Oslo, he struck B five to six times to the head with a clenched fist, and several times to the nose.
>
> c) On Monday, 27 December 2021, in the area near Kirkeristen in Oslo, he struck B multiple times to the head and face with both a clenched and an open hand. He also kicked her in the shin."

(4) B was called as a witness and appeared at the main hearing in Oslo District Court, but exercised her right, as the defendant's spouse, not to testify under section 122 of the Criminal Procedure Act.

(5) Instead, the prosecutor sought to read aloud her police statement in the case, given on 28 December 2021. The prosecutor also sought to read aloud a medical record from Oslo University Hospital, the emergency room, dated 6 November 2021; a medical record from the Oslo Municipal Health Service, also dated 6 November 2021; and a record dated 27 December 2021 from the Oslo Crisis Centre.

(6) All of these medical records include accounts of statements made by B concerning the incidents of violence outlined in the indictment.

(7) During the main hearing, the District Court allowed the reading aloud of B's statements from the police interview and the medical records related to count C. The justification was that these statements did not constitute decisive evidence for that count.

(8) The District Court, on the other hand, disallowed the reading aloud of B's statements from the police interview and the medical records related to counts A and B, as these were deemed to constitute decisive evidence for those counts. Consequently, the prosecutor requested that the Court acquit the defendant on counts A and B.

(9) On 8 May 2024, Oslo District Court handed down a judgment, convicting A on count C, but acquitting him on counts A and B. The sentence imposed was a suspended term of imprisonment of 45 days.

(10) The Public Prosecution Authority appealed against the findings of fact concerning the issue of guilt in relation to the two counts of which A was acquitted.

(11) The aggrieved party appeared at the appeal hearing in Borgarting Court of Appeal, but once again refused to give evidence regarding offences set out in the indictment. As in the District Court, the prosecutor sought to read aloud her police statement dated 28 December 2021, along with the three medical records. The defence counsel once again objected to the reading aloud of these accounts.

(12) The Court of Appeal allowed the reading aloud of the *medical records*, noting that they constituted written evidence not produced for the purposes of the trial. The fact that the records conveyed the aggrieved party's statements regarding the counts in the indictment did not alter this conclusion.

(13) As for the *police statement*, the Court of Appeal proceeded on the basis that any account related to count A could not be read aloud, while the part relating to count B could. The distinction was due to the evidentiary context: in the Court of Appeal's view, reading the statement would constitute decisive evidence for count A, but not for count B. Consequently, the prosecutor requested that the defendant be acquitted on count A.

(14) By judgment of 15 October 2024, Borgarting Court of Appeal acquitted the defendant on count A but convicted him on count B. The sentence imposed – considered together with count C, of which he had been finally convicted in the District Court, was a suspended term of 60 days of imprisonment.

(15) A has appealed against the conviction on count B to the Supreme Court, challenging the procedure. He argues that the reading aloud of the police statement and the medical records constituted a violation of his rights under Article 6 of the European Convention on Human Rights (ECHR). A has requested that the Court of Appeal's conviction on count B be set aside.

(16) The Public Prosecution Authority objects and requests that the appeal be dismissed.

My opinion

The Supreme Court's jurisdiction

(17) The Supreme Court has full jurisdiction to review the Court of Appeal's procedure. This means that not only the interpretation of the law and its application to the facts may be fully reviewed, but also the findings of fact related to the procedure.

(18) As I will return to, the evidentiary value of a statement, considered against other evidence, is a key factor when assessing whether a witness's police statement may be read aloud. The Court of Appeal, partly due to the immediate presentation of evidence, is clearly in a better position than the Supreme Court to assess the evidentiary value of a statement. This suggests that the

Supreme Court exercises certain restraint in reviewing the Court of Appeal's findings of fact. However, in the present case, this issue is not critical.

Legal principles on the reading aloud of a witness's prior statement in the case

(19) The starting point in Norwegian procedural law is the principle of free presentation and free evaluation of evidence. Any exclusion of evidence requires a legal basis, see for example Rt-2013-323 paragraph 20.

(20) In a criminal trial, the principles of orality and immediacy of evidence apply, see section 278, first and second sentences, of the Criminal Procedure Act. As a general rule, witnesses must give oral evidence in the main hearing, see section 296 subsection 1 first sentence of the Criminal Procedure Act.

(21) It is permitted under section 296 subsection 2 and section 297 of the Criminal Procedure Act to read aloud a statement previously made by a witness in the case, typically a police statement. These provisions regulate two different situations. Section 296 subsection 2, which applies when a witness is present at the main hearing, reads:

> "At such examination any reproduction in the court record or a police report of any statement that the witness has previously made in the case may only be read aloud if the witness's statements are contradictory or relate to points on which he refuses to speak or declares that he does not remember. The same applies to any written statement that the witness has previously made in relation to the case."

(22) For example, a witness's refusal to give evidence may be due to the witness being closely related to the defendant and thus exempt from the duty to give evidence under section 122.

(23) Section 297 regulates the admissibility of reading aloud a witness statement where the witness is not present at the main hearing. The provision reads:

> "When a witness is not present at the main hearing, any reproduction in the court record or a police report of any statement that the witness has previously made in the case may only be read aloud if an oral examination is not possible or would entail disproportionate inconvenience or expense. A statement may always be read aloud when the person indicted fails to appear without lawful excuse in a case in which an optional penalty writ has been issued or which only concerns confiscation.
>
> A written statement that the witness has made in relation to the case may only be read aloud with the consent of both parties or if a judicial examination cannot be carried out."

(24) Both provisions must be read in the light of the limitations arising from Article 6 (3) (d) of the ECHR:

> "Everyone charged with a criminal offence has the following minimum rights:
> …
> d. to examine or have examined witnesses against him and to obtain the attendance at examination of witnesses on his behalf under the same conditions as witnesses against him. …"

(25) Article 6 (3) is a specification of the general principle of a fair trial in Article 6 (1). Subparagraph (d) grants the accused, firstly, the right to *cross-examine* – that is, to question – witnesses against him. In addition, the accused is entitled to call *witnesses on his behalf*. Both rights are manifestations of the principle of *adversarial proceedings*. Where the prosecution seeks to read aloud a statement previously made by a witness in the case, it is the right to cross-examine that imposes constraints.

(26) The admissibility of such reading aloud has been addressed in a number of cases before the Supreme Court and the European Court of Human Rights (ECtHR). One of the two fundamental judgments is the ECtHR's Grand Chamber judgment of 15 December 2011, in *Al-Khawaja and Tahery v. the United Kingdom*. As noted in Rt-2013-1412 paragraphs 17–22, the ECtHR established three criteria to be assessed: Firstly, whether there is a good reason to permit the reading aloud; that is, whether there is a valid reason why the witness was not present during the hearing, and in particular, whether all reasonable efforts have been made to secure the witness's attendance. Secondly, whether a possible conviction would be based solely or to a decisive extent on the police statement – the "sole or decisive rule". Thirdly, if that is the case, it must be assessed whether there are factors that sufficiently counterbalance the fact that the defendant has not had the opportunity to question the witness. These three criteria are commonly referred to as the *Al-Khawaja test*.

(27) The ECtHR clarified and further developed the Al-Khawaja test in its Grand Chamber judgment of 15 December 2015 in *Schatschaschwili v. Germany*. In its judgment of 2 May 2023 in *Strassenmeyer v. Germany* paragraph 70, the ECtHR summarised the developments brought about by *Schatschaschwili*:

> "70. Those principles [the Al-Khawaja test] were further clarified in *Schatschaschwili* (cited above, §§ 111-31), in which the Grand Chamber confirmed that the absence of a good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was the sole or decisive factor but was nevertheless satisfied that it carried significant weight and that its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair."

(28) *Schatschaschwili* thus clarifies two particular aspects of the Al-Khawaja test: First, *the significance of the absence of a good reason for reading the statement aloud* (step 1). The absence of a good reason is not, in itself, decisive for whether the trial was fair. However, if no good reason exists for the reading, this will carry significant weight in the overall assessment.

(29) Secondly, the judgment clarifies *the importance of the evidentiary value of the statement* (step 2). It is not only where a possible conviction would be *based solely or to a decisive extent* on the police statement that an assessment must be made of whether there factors sufficiently counterbalancing the fact that the accused was not given the opportunity to question the

witness (step 3 – "the counterbalancing test"). Also where the statement carries *significant weight*, such an overall assessment of whether the trial has been fair must be carried out. The extent to which *counterbalancing factors* are required to compensate for the defendant's lack of opportunity to question the witness is – as also noted in HR-2024-935-U, paragraph 20 – relative to the weight of the evidence. The greater the importance of the statement within the overall body of evidence, the more weight the counterbalancing factors must carry.

(30) As *Schatschaschwili* demonstrates, steps 2 and 3 are partially overlapping, in that the evidentiary value of the statement and the remaining evidence are relevant at both stages.

(31) In *Schatschaschwili*, the ECtHR presents examples of counterbalancing factors that, in the overall assessment required at step 3, may compensate for the lack of opportunity to cross-examine. These are summarised in paragraph 71 of *Strassenmeyer*. Among the factors mentioned is that the court approaches the evidence with caution, recognising that such evidence should be given less weight than immediate witness testimony, and that the court provides reasons for considering the evidence reliable. It is also relevant whether a video recording of the statement exists, as this allows the court and the parties to observe the witness's demeanour during questioning and thereby form an independent impression of the witness's credibility. Furthermore, weight may be afforded to the availability of other evidence supporting the witness's account, such as statements made by persons to whom the absent witness reported the events immediately after their occurrence. Finally, the defendant must be given the opportunity to present his or her own version of the events and to cast doubt on the credibility of the absent witness. Other opportunities to question the witness, whether in writing or during the investigation, are also of significance.

(32) In the overall assessment, consideration must also be given to the specific need for examination. For example, in paragraph 24 of Rt-2013-1412, the Supreme Court emphasised that the defence counsel found it necessary to ask the aggrieved party why she had withdrawn her complaint and changed her statement.

(33) My account thus far regarding ECtHR case law, which the Supreme Court has relied upon, has covered cases where the witness *is not present* at the main hearing, i.e. the scenario governed by section 297 of the Criminal Procedure Act. As for the situation where the witness appears at the main hearing, but *refuses to give evidence*, see section 296 subsection 2, Norwegian law previously held that the witness's preceding statement to the police or the court could normally be read aloud – even if it constituted the sole or decisive piece of evidence, see Rt-2004-1974 paragraph 13.

(34) However, in its judgment of 28 August 2018 in *Cabral v. the Netherlands*, the ECtHR applied the Al-Khawaja test even in a case where the witness was present but refused to give evidence, relying on his privilege against self-incrimination, see paragraph 33. Similarly, in its judgment of 26 July 2018 in *N.K. v. Germany,* paragraph 56, the test was applied in a case where the defendant's spouse was the aggrieved party. She appeared in court, but chose to exercise her right to remain silent.

(35) This means that, in principle, there is no longer a strong reason to distinguish between a scenario where the witness is absent from the main hearing and one where the witness appears but chooses to remain silent, for example because he or she is closely related to the accused, see section 122 of the Criminal Procedure Act. In both scenarios, the admissibility of reading aloud a prior statement depends on whether the Al-Khawaja test is satisfied.

(36) It may nonetheless be questioned whether the witness's attendance could be a relevant factor in the application of the test. In HR-2022-1703-A paragraph 28, after citing *Cabral* and *N.K.*, the reporting justice stated:

> "This suggests that a witness's attendance is now less significant for the admissibility of a police statement than it was under case law prevailing in 2004. However, I do not consider that the relatively case-specific ECtHR case law to date supports the conclusion that a witness's attendance is irrelevant. In this regard, I note that in several judgments, the ECtHR has emphasised that when a witness appears, the court has the opportunity to observe the witness in the box and 'assess his demeanour in response to cross-examination', see for example the Chamber judgment of 17 October 2019 in *Oddone and Pecci v. San Marino* paragraph 100, with references. That judgment was issued after *Cabral* and *N.K.* Ultimately, the Al-Khawaja test requires an overall assessment under Article 6 (1) of the ECHR, aimed at determining whether the trial as a whole is fair when the police statement is admitted. In that context, the specific circumstances surrounding the witness's attendance may still be relevant."

(37) The importance of the court having the opportunity to observe the witness's demeanour under examination was also highlighted by the ECtHR as a relevant factor under the Al-Khawaja test in *Seton v. the United Kingdom* of 31 March 2016, paragraph 62, and in *Breijer v. the Netherlands* of 3 July 2018, paragraph 35.

(38) Thus, it cannot be ruled out that the court's opportunity to observe the witness may be relevant in assessing whether the Al-Khawaja test has been satisfied. For instance, the witness – although unwilling to answer questions directly related to the indictment – may still respond to other, related questions. The witness may also answer questions about why he or she has chosen to remain silent regarding the offence. As mentioned, the ECtHR has identified, among the counterbalancing factors, the court's provision of reasons for finding the witness's prior statement reliable, as well as the opportunity given to the defendant to cast doubt on the witness's credibility. In this context, however, the core of the credibility assessment should be the content of the statement, rather than the physical impression the witness gives in court, see HR-2025-458-A, paragraph 36.

(39) I *summarise* my account thus far as follows: Where a witness does not appear at the main hearing or refuses to give evidence, a statement previously made to the police or the court may only be read aloud following an assessment of: (1) whether there are good reasons for the witness's absence or refusal to give evidence; (2) whether the statement constitutes the sole or decisive evidence, or carries significant weight; and (3) whether there are sufficient counterbalancing factors to compensate for the lack of opportunity for cross-examination, thereby ensuring that the trial, viewed as a whole, remains fair.

(40) The absence of a good reason for the witness's absence or refusal to give evidence is not, in itself, determinative of whether the trial was fair. However, such absence will weigh heavily in the overall assessment. In evaluating the fairness of the proceedings, the evidentiary value of the prior statement is central. The more significant the statement, the greater the weight that must be carried by the counterbalancing factors. The witness's presence in court, enabling the court to observe and evaluate his or her reactions to cross-examination, may, depending on the circumstances, be an important counterbalancing factor.

(41) I add that the court should generally wait to conclude whether the Al-Khawaja test is satisfied until the remaining evidence, or at least its most significant parts, has been presented.

Normally, only then will the court have a sufficient basis to assess the evidentiary value of the statement and whether sufficient counterbalancing factors exist.

The use of written evidence or other real evidence containing a reproduction of a witness's account

(42) This situation aimed at here is that where a witness either fails to appear in court or chooses to remain silent during the trial, but has previously made statements about the alleged offences independent of the trial, for instance to healthcare personnel. These statements have subsequently been written down in a medical record or report, and later been obtained by the police for use in the trial based on the witness's waiver of confidentiality.

(43) A argues that the use of the records conveying the witness's account of the alleged offences, in the same way as the reading aloud of police statements, triggers the right to cross-examine the witness. Accordingly, such records cannot be admitted as evidence unless the Al-Khawaja test is satisfied. No request has been made to cross-examine the individual who produced the records – that is, the person who documented the aggrieved party's account. It is also undisputed that the records that do not convey the aggrieved party's account, such as medical descriptions of physical injuries, may be read aloud without restriction.

(44) The Criminal Procedure Act distinguishes between two types of documents: those that have been produced and exist independently of the trial, and those that have been produced specifically to serve as evidence in the criminal trial – for example a police report concerning a search or seizure.

(45) Only the former category is considered "written evidence" in a procedural context. Such documents may generally be read aloud during the main hearing, see section 302 of the Criminal Procedure Act.

(46) The latter category is referred to in the Act as a "written statement" made by a witness "in relation to the case". Such documents may only be read aloud if the conditions under section 296 subsection 2 final sentence (the witness is present), or section 297 subsection 2 (the witness is not present) are met. Where the witness is present, the reading aloud of a written statement is treated in the same manner as the reading aloud of previous statements made to the police or the court. In cases where the witness is absent, a written statement may only be read aloud with the consent of both parties or if a judicial examination cannot be carried out.

(47) The issue raised in the present case is whether the reading aloud of documents produced independently of the trial – which are therefore *procedurally* considered written evidence – must be restricted in the light of the accused's right to cross-examination under Article 6 (3) (d) of the ECHR. This issue has been addressed in several earlier Supreme Court rulings.

(48) The ruling in Rt-2003-219 concerned the use of a medical certificate that the aggrieved party had allowed the police to obtain during the investigation of her cohabitant. The Supreme Court concluded in paragraph 19 that information in the certificate that was directly based on the medical record had not been provided in relation to the case, and that section 297 (2) did not prevent the reading aloud thereof. The record included the aggrieved party's account reported to the doctor.

(49) The Supreme Court then considered the application of the ECHR. In paragraph 21, the reporting justice stated:

> "When it comes to Article 6 (1), see Article 6 (3) (d), of the ECHR – the requirement of a fair trial and the defendant's right to examine the prosecution's witnesses – it is natural to consider the record from the medical examination of the aggrieved party as written evidence that has not been produced in relation to the case. I therefore assume that the record itself may be submitted in its entirety to the court, including hearsay of what the aggrieved party told the doctor, without affecting the defendant's right to cross-examine witnesses under Article 6 (3) (d). Similarly, record entries incorporated into a medical certificate for use in a subsequent criminal trial, as in the situation at hand, are unlikely to raise issues under Article 6. I refer to my comments on the corresponding issue in relation to section 297 (2) of the Criminal Procedure Act."

(50) The statement that written evidence may be presented without affecting the defendant's right to cross-examine witnesses appears to have been somewhat nuanced in HR-2020-2137-A. Among the issues raised in that ruling was whether the right to cross-examination prevented chat logs involving the defendant, and created before the investigation began, from being presented as evidence without the person with whom the defendant had communicated being called as a witness. The Supreme Court left open the question of whether the use of written evidence gives triggers the right to cross-examination, but noted that this would only be relevant if the content of the written evidence was disputed, which it was not, see paragraph 55.

(51) When it comes to ECtHR judgments, I first mention *Chap Ltd v. Armenia* of 4 May 2017, which concerned tax surcharges imposed on a television company. A report from the tax authorities was submitted, referring to documents provided by the head of the National Television and Radio Commission and statements from a number of other individuals. The company was not permitted to summon these individuals as witnesses. After noting that the term "witness" in Article 6 (3) (d) is autonomous and includes any statement that may serve to a material degree as the basis for a conviction, see paragraph 47, the ECtHR held that all of the businessmen in question had to be regarded as witnesses against the company within the meaning of the Convention, see paragraphs 48–49. The ECtHR believed that refusing to grant the company's application to summon those witnesses violated its rights under Article 6 (3) (d), as the evidence in question was decisive for the determination of the company's tax surcharges, and there were no counterbalancing factors to compensate for the lack of cross-examination, see paragraphs 50–51.

(52) In the *Seton* judgment, which I have previously mentioned, the question was whether the use of tape recordings triggered a right to cross-examination. A person indicted for murder had accused a third party, Mr. Pearman, of committing the murder. Mr. Pearman – who was serving a prison sentence for an unrelated offence – refused to give evidence, but had denied any involvement in the murder during telephone conversations. The prison's recordings of these calls were admitted as evidence. The ECtHR found that Mr. Pearman had to be considered a witness against the defendant, as his taped statement was used by the prosecution to rebut the defendant's sole ground for acquittal. As a result, the right to cross-examination arose, and the ECtHR applied the Al-Khawaja test to determine whether the playing of the recordings – without the defendant having the opportunity to question Mr. Pearman – violated the defendant's rights under Article 6 (3) (d).

(53) These judgments demonstrate that the ECtHR recognises that the right to cross-examination under Article 6 (3) (d) may also apply to the use of written evidence and other forms of real evidence, such as audio recordings. Where a piece of real evidence effectively contains a witness statement, the prosecution's use of that evidence may provide the opportunity to cross-examine the person who made the statement.

(54) However, the present case concerns a scenario where a written piece of evidence contains a *third party's account presented as hearsay*. This may occur when a doctor, in a medical record or certificate, documents not only his or her own clinical observations but also the aggrieved party's account of the offence. As far as I can see, there is nothing in the case law of the ECtHR to suggest that the use of written or other real evidence conveying, as *hearsay*, the account of a witness who has not testified at the main hearing, triggers a right for the accused to cross-examine that witness.

(55) In my view, that would imply that any statement conveying a third party's account – hearsay in the narrow sense – would trigger a right to cross-examine the third party. There is clearly no basis for this in ECtHR case law. On the contrary, as mentioned, the ECtHR has emphasised that where a witness fails to appear, statements from individuals to whom the witness reported the events shortly after they occurred may serve to *compensate* for the lack of cross-examination of the witness, see *Strassenmeyer v. Germany*, paragraph 71 (iii).

(56) Nonetheless, I do not rule out that there may be different scenarios, for example where hearsay conveyed in a piece of real evidence has been obtained as part of the authorities' gathering of information to uncover crime. However, the case at hand does not provide grounds for further consideration of this issue.

(57) In our case, as mentioned, no request has been made to cross-examine the individual who, in the written evidence, conveys the aggrieved party's account. Nor have the parties' contentions before the Supreme Court focused on this issue on a more general basis.

(58) The case, therefore, provides no reason for considering when or if a right to cross-examination arises in relation to an individual who, through a piece of real evidence, conveys a third party's account as hearsay, beyond the observation that, at a minimum, the content must be disputed, see HR-2020-2137-A paragraph 55. However, I do not rule out that, in certain circumstances, there may be a legitimate need to ask the individual who conveyed a third party's account how he or she assessed the reliability of that account and the context in which it was communicated. I reiterate the provision in section 294 of the Criminal Procedure Act on the court's duty to "ensure that the case is fully clarified", which may entail an obligation for the court to summon the witness. Also in this situation, the assessment under the ECHR will be whether the trial was fair overall, see Article 6 (1).

(59) Against this background, I conclude that where written evidence or other real evidence effectively conveys a witness's account, the prosecution's use of such evidence may trigger the right to cross-examine the witness in question. However, where that witness merely conveys, as *hearsay,* the account of a third party who has not testified at the main hearing, this will normally not trigger the right to cross-examine *the third party*. For example, if a doctor in a medical record conveys the account of a witness who has not given evidence in court, any right to cross-examination arising from the use of the record as evidence would apply to the doctor, not the witness.

Individual assessment

Was admitting the medical record as evidence a procedural error?

(60) As noted, the Court of Appeal concluded that although the aggrieved party exercised her right not to give evidence under section 122 of the Criminal Procedure Act, medical records from the emergency room, the Oslo Municipal Health Service and the Oslo Crisis Centre could be admitted in their entirety, including the parts conveying the aggrieved party's account of the alleged offences. The Court observed that these records had not been produced for the purposes of the trial. It found no grounds for applying the Al-Khawaja test to written evidence that is not produced in relation to the trial, which conveys the aggrieved party's account of the alleged offences.

(61) In the Court of Appeal's ruling not to exclude the medical records as evidence, the following is stated:

> "In the Court of Appeal's assessment, a key consideration is that the statements made by the aggrieved party to the doctor, the social worker and the crisis centre serves purposes other than those of a police interview. In the Court's view, excluding such evidence due to the lack of adversarial proceedings could lead to difficult distinctions. However, the manner in which the evidence was produced, and the accused's opportunity to challenge it, present counter-evidence and question the witness, will affect the weight afforded to the evidence."

(62) The Court of Appeal noted that since the defendant was given the opportunity to comment on the evidence and present counter-evidence in court, the trial was fair.

(63) Based on what I have said about when the right to cross-examination arises in cases where real evidence conveys the account of a witness who does not give evidence at the main hearing, the Court of Appeal's application of the law is correct. As the Court of Appeal points out, the statements the aggrieved party made to the doctor, the social worker and the crisis centre serve purposes different from those of a police interview.

(64) Although the aggrieved party's account of the alleged offences was found in the medical records, the use thereof does not trigger the right to cross-examine the aggrieved party. Any right to cross-examination in this context would have to apply to the individuals who produced the records and who have conveyed the aggrieved party's statements. As mentioned, no such request has been made by A, and I see nothing to suggest that the court had an independent duty to summon those individuals as witnesses, see section 294 of the Criminal Procedure Act. Accordingly, the Court of Appeal did not commit a procedural error by admitting the medical records as evidence.

Was the reading aloud of the aggrieved party's police statement a procedural error?

(65) In assessing whether the aggrieved party's police statement should be read aloud, the Court of Appeal correctly proceeded on the basis that the Al-Khawaja test also applies in situations where the witness is present but refuses to give evidence.

(66) At step one, the Court of Appeal found that the aggrieved party's exercise of her right under section 122 of the Criminal Procedure Act not to give evidence constituted a good reason for

reading the police statement aloud. There is no doubt, nor has it been disputed, that this is correct, see for example the *N.K.* judgment, paragraph 57.

(67) At step two, concerning the evidentiary value of the statement, the Court of Appeal, as noted, distinguished between counts A and B of the indictment. For count A, where reading aloud was not permitted, the Court of Appeal considered the police statement to be a decisive piece of evidence. Regarding the significance of the statement for count B, where reading aloud was permitted, the Court of Appeal stated in its ruling on exclusion of evidence:

> "The situation is different with respect to count B of the indictment. Here, there are multiple pieces of evidence that may form a basis for conviction. There are medical records from the emergency room and the municipal health service, as well as notes from the crisis centre, all of which support the conclusion that the aggrieved party was subjected to the violent incident described in count B. The description the aggrieved party gave to healthcare personnel corresponds with the doctor's clinical findings.
>
> The Court of Appeal also refers to the evidence presented under count C of the indictment, on which the defendant has been finally convicted. The Court of Appeal has heard witness descriptions of the incident and viewed parts of it on CCTV footage. The Court of Appeal finds that the accused's conduct during that incident, taken as a whole, demonstrates a modus operandi that supports the incident of 5 November 2021. The nature of the violence is very similar, and the incidents occurred close in time. The Court of Appeal has also heard that the relationship between the two was turbulent, marked by repeated violence.
>
> Against this background, the Court of Appeal finds that the aggrieved party's police statement does not constitute decisive evidence for a potential conviction on count B of the indictment."

(68) I find no reason to set aside the Court of Appeal's conclusion that the aggrieved party's police statement did not constitute decisive evidence in relation to count B of the indictment.

(69) I note in particular that the Court of Appeal cannot be criticised for emphasising the existence of other evidence in the form of the aggrieved party's statements documented in the medical records. I reiterate once more the ECtHR's acceptance that statements made to individuals to whom the witness reported the events shortly after they occurred may serve as relevant supporting evidence, see *Strassenmeyer* paragraph 71 (iii).

(70) Although the aggrieved party's police statement was not decisive, I consider it clear that the statement must be regarded as carrying significant weight, see *Strassenmeyer*, paragraph 70. The Court of Appeal does not appear to have explicitly addressed whether the police statement carried such weight. However, this does not affect the outcome, as the Court of Appeal in any event conducted a step-three assessment of whether sufficient counterbalancing factors were present.

(71) Regarding step three – whether the trial was fair overall despite the lack of opportunity for cross-examination – I note the following: In its order of exclusion of evidence, the Court of Appeal emphasised that the defendant had been given the opportunity to challenge the aggrieved party's account by giving evidence himself, which he chose not to, and to comment on her police statement after it was read aloud. These are relevant considerations, see *Strassenmeyer*, paragraph 71 (vi).

(72) When assessing guilt under count B, the Court of Appeal placed decisive weight on other pieces of evidence – particularly the medical records from the emergency clinic, the municipal health service and the crisis centre, see *Strassenmeyer,* paragraph 71 (iii).

(73) The Court of Appeal also exercised caution in assessing the evidentiary value of the police statement, both by being "particularly careful" in affording it weight and by providing reasons for considering the statement reliable, see *Strassenmeyer*, paragraph 71 (i).

(74) In the case at hand, weight should also be afforded to the presence of the aggrieved party at the main hearing. According to the District Court's judgment, she answered some questions, including about why she withdrew her police statement. The Court could thus use this information in its assessment of the reliability of the police statement. I also note that, according to the information provided, the defence counsel did not request to ask the aggrieved party any further questions.

(75) Finally, I note that the aggrieved party's police statement was secured by an audio recording. As mentioned, the availability of a video recording of the police interview is a relevant factor, see *Strassenmeyer*, paragraph 71 (ii). Although an audio recording does not provide as strong a basis as a video recording for independently assessing the witness's reliability, it still offers "a far more vivid and authentic picture of what took place" than a written record, see the Criminal Procedure Law Commission's report, NUT 1969: 3, page 306. However, the defence counsel did not request that the audio recording be played instead of reading the statement aloud, see section 300 of the Criminal Procedure Act.

(76) Given these factors, I find that there were sufficient counter-balancing factors to make up for the lack of opportunity to cross-examine the aggrieved party. Therefore, I have no doubt that the trial overall was fair, although the aggrieved party's police statement was read aloud without the defendant being able to cross-examine her.

Conclusion

(77) Against this background, I conclude that the Court of Appeal has not made any procedural errors, and that the appeal must be dismissed.

(78) I vote for this

J U D G M E N T :

The appeal is dismissed.

(79) Justice **Hellerslia:** I agree with Justice Poulsen in all material respects and with his conclusion.

(80) Justice **Bergh:** Likewise.

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

(82) Justice **Falkanger:** Likewise.

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

J U D G M E N T :

The appeal is dismissed.