

SUPREME COURT OF NORWAY

On 19 December 2008, the Supreme Court delivered the following interlocutory judgement in

HR-2000-02176-S, (case no. 2008/1265), criminal appeal against interlocutory decision

A (counsel Steinar Thomassen – for examination)

v.

The Public Prosecution (senior prosecuting counsel Lasse Qvigstad)

J U D G E M E N T :

- (1) **Justice Tønder:** This issue in this case is whether a court decision to deny an appeal against conviction pursuant to section 321 subsection 2, first sentence of the Criminal Procedure Act, where no reason for the denial was given except for a reference to the statutory condition that an appeal may be disallowed if the court finds it “obvious that the appeal will not succeed”, was in breach of article 14 paragraph 5 of the International Covenant on Civil and Political Rights.
- (2) On 17 June 2008, A was convicted by the Nedre Telemark District Court of one count of violence against a public servant, three counts of theft, of which one was gross theft, one count of receiving stolen property, two breaches of the drug legislation and one count of petty theft.
- (3) The judgement reads as follows:
 1. **A, d.o.b. 15 June 1957, is acquitted of item II (b) of the indictment.**
 2. **A, d.o.b. 15 June 1972 is convicted of**
 - one breach of the Penal Code section 127 subsection 1, first sentencing alternative**
 - one breach of the Penal Code section 162 subsection 1**
 - one breach of the Penal Code section 257**
 - one breach of the Penal Codes section 257 cf. section 258**
 - one breach of the Penal Codes section 317 subsection 1**
 - one breach of the Penal Code section 391 a subsections 1 and 2 cf. section 257, and**
 - one breach of the Drugs Act section 31 subsection 2 cf. section 24 subsection 1**

together with the Penal Code section 59 subsection 2 as regards items IV to VI of the indictment and the matters in the supplemental indictment, section 61 subsection 1 as regards all of the matters except for item I of the indictment, section 62 subsection 1 as regards the

matters in item II of the indictment and the supplemental indictment, and section 63 subsection 2 as regards items II to VI of the indictment

and is sentenced to 12 – twelve – months’ imprisonment. 7 - seven – months of the prison sentence shall be served while the remainder shall be suspended pursuant to the provisions of sections 52 to 54 of the Penal Code subject to a probation period of 3 – three – years. The sentence is a joint sentence which also covers the judgement of the Telemark District Court dated 16 April 2008.

The unconditional part of the prison sentence shall be reduced by 13 – thirteen – days for custody on remand served in relation to matters covered by the judgement of the Telemark District Court dated 16 April 2008, and by 49 – forty nine – days for custody in remand in relation to the present case, in total 62 – sixty two – days, see the Penal Code section 60 subsection 1.

- 3. A, d.o.b. 15 June 1957 is ordered to pay compensation**
- for economic loss to B in the amount of 1600 – one thousand six hundred - Norwegian kroner
- for economic loss to X AS in the amount of 400 – four hundred – Norwegian kroner.
Payment of both claims falls due 2 –two – weeks from the date of service of the judgement.

- (4) The judgement was pronounced with dissenting votes, one of the lay judges having voted for a sentence of 13 months’ imprisonment, of which eight months unconditional.
- (5) Mr A lodged an appeal to the Agder Court of Appeal. The appeal concerned the assessment of evidence in relation to the conviction for violence against a public servant, two of the convictions for theft and the conviction for receiving stolen property. In the alternative, he appealed against the sentence.
- (6) On 16 July 2008, the Agder Court of Appeal pronounced the following decision:
- “Leave to appeal is denied.”**
- (7) No reason is given for the decision other than that the Court of Appeal has unanimously found it obvious that the appeal will not succeed. The Court referred to section 321 subsection 2 first sentence of the Criminal Procedure Act.
- (8) On 4 August 2008, Mr A lodged an appeal against the decision with the Supreme Court and alleged that it must be quashed. The appeal concerns the procedure applied by the Court of Appeal, see section 321 subsection 6 of the Criminal Procedure Act, and it is argued that the decision should have contained a reason.
- (9) On 17 July 2008, the United Nations Human Rights Committee delivered its ruling in the so-called “Restaurant Owner Case”, see Communication no. 1542/2007. The decision in the Restaurant Owner Case concerned a complaint from a person who

was convicted by the District Court of several offences of an economic nature perpetrated in his capacity as owner of a restaurant. The Court of Appeal denied his application for leave to appeal against the decision of the District Court without giving any reason other than that the Court of Appeal had found it obvious that the appeal would not succeed. His interlocutory appeal to the Appeal Committee of the Supreme Court was dismissed, see section 321 subsection 6 of the Criminal Procedure Act. In its ruling, the Human Rights Committee concluded that the failure to provide a reason as to why the court found that it was clear that the appeal would not succeed represented a violation of the right to have one's conviction reviewed as required by article 14 paragraph 5 of the International Covenant on Civil and Political Rights. This provision entitles a person who is convicted of a crime to have his conviction and sentence reviewed by a higher tribunal according to law.

- (10) The Appeal Committee of the Supreme Court decided that the scope of the decision in the Restaurant Owner Case should be determined by referring a selection of representative appeals against denials of leave to appeal by the Court of Appeal to the Supreme Court, where they should be heard in oral proceedings, see the Criminal Procedure Act section 387. Mr As's appeal was selected together with case no. 2008/1360 C v. The Public Prosecution and case no. 2008/1398 D v. The Public Prosecution.
- (11) On 19 September 2008, the Chief Justice of the Supreme Court decided that all three appeals should be determined together by the Grand Chamber of the Supreme Court, see the Courts of Justice Act section 5 subsection 4, cf. section 6 subsection 1 second sentence. The composition of the Grand Chamber was determined by the drawing of lots in accordance with the procedural rules for the Grand Chamber of the Supreme Court laid down by the Supreme Court on 12 December 2007 pursuant to section 8 of the Courts of Justice Act. By interlocutory order dated 31 October 2008, Justice Coward, Justice Øie and Justice Indreberg were required to vacate their seats in the appeal proceedings on the grounds of partiality.
- (12) In the course of the appeal proceedings, issues that are common to all three cases have been dealt with by defence counsel together and the legal issues have been shared out between them. Similarly, counsel for the prosecution has delivered a common presentation. Interlocutory judgements are being delivered today in case no. 2008/1360 C v. The Public Prosecution and case no. 2008/1398 D v. The Public Prosecution. HR-2008-02175-S, case no. 2008/1360 contains an account of the parties' submissions that are common for all three cases, and I refer to this.
- (13) *A's* principal submissions are as follows:
- (14) On account of the ruling of the Human Rights Committee in the Restaurant Owner Case, it must be clear that the Court of Appeal is under a general obligation to give reasons for its denials of leave to appeal. No such reasons were given in the present case and the decision of the Court of Appeal must therefore be quashed.
- (15) Even in the absence of a general obligation to give reasons, the circumstances of the present case are of such a nature that a reasoned decision was called for. The

appellant recalled that the appeal to the Court of Appeal mainly concerned the assessment of evidence, and new witness evidence was invoked. Furthermore, the circumstances of the case are so special that a reason should have been given even pursuant to prevailing jurisprudence.

- (16) In the further alternative, the failure to examine the invoked witness before the question of guilt was finally determined represents a violation of Article 6 of the European Convention on Human Rights, and the Court of Appeal's failure to obtain a statement from the witness before it reached its decision is a breach of its obligation pursuant to section 294 of the Criminal Procedure Act to ensure that the case is fully illuminated.

- (17) A made the following prayer for relief:

“The decision of the Agder Court of Appeal dated 16 July 2008 shall be quashed.”

- (18) The Public Prosecution's principal submissions are as follows:

- (19) On the Public Prosecution's understanding of the Restaurant Owner Case, there is no general obligation on the Court of Appeal to give reasons for its denial of leave to appeal. Nor are there any actual errors in the District Court's procedure that make A's case comparable with the Restaurant Owner Case.

- (20) The fact that A invoked a new witness is not sufficient to give rise to an obligation to give reasons, even though A alleged that this would lead to an acquittal for those matters on which the witness would testify. An allegation is not enough.

- (21) The Public Prosecution has made the following prayer for relief:

“The appeal shall be dismissed.”

- (22) I have concluded that the appeal shall be allowed.

- (23) I refer to the discussion on the scope of the ruling of the Human Rights Committee in the Restaurant Owner Case contained in my judgement in HR-2008-02175-S, case no 2008/1360 C v. The Public Prosecution. In that case, I have concluded that a reason must be given for all denials of leave to appeal pursuant to section 321 subsection 2 first sentence of the Criminal Procedure Act, although the extent of the reason that is required may vary considerably. Since no reason was given for the Court of Appeal's decision of 16 July 2008, the decision suffers from a procedural error and, as a consequence, it must be quashed pursuant to section 385 subsection 3, cf. section 343 subsection 1 of the Criminal Procedure Act.

- (24) I vote for the following

INTERLOCUTORY JUDGEMENT

The decision of the Court of Appeal shall be quashed.

- (25) Justice **Gjølstad**: I agree on the whole and with the result of the first voting Justice.
- (26) Justice **Lund**: Likewise.
- (27) Justice **Tjomsland**: Likewise.
- (28) Justice **Stang Lund**: Likewise.
- (29) Justice **Flock**: Likewise.
- (30) Justice **Matningsdal**: Likewise.
- (31) Justice **Utgård**: Likewise.
- (32) Justice **Endresen**: Likewise.
- (33) Justice **Bårdsen**: Likewise.
- (34) Chief Justice **Schei**: Likewise.

- (35) After the passing of votes, the Supreme Court delivered the following

INTERLOCUTORY JUDGEMENT

The decision of the Court of Appeal shall be quashed.