SUPREME COURT OF NORWAY

On 13 November 2009, the Supreme Court delivered the following judgement in

HR-2009-02153-A, (case no. 2009/841), criminal appeal against conviction

A (counsel Mr Kjetil Krokeide)

v.

The Public Prosecution (State prosecutor Kristian Jarland)

J U D G E M E N T:

(1) Mrs Justice **Sverdrup**: This case concerns whether regard for the defendant and the general public to be able to verify the assessments on which a criminal conviction is based have been safeguarded, and the consequences that must follow if the verifiability is substantially flawed.

(2) In 2008, A, who was born on 2.4.1957, was indicted for indecent/sexual abuse of two girls, who were his nieces.

(3) Item I of the indictment concerned offences against B up to and including 24 August 2000, in breach of the Penal Code section 195 subsections 1 and 2:

> **"For having indecently assaulted a child under 14 years of age, which indecent assault was sexual intercourse, committed against a child under 10 years of age and repeatedly, and for the period from and including 25 August for breach of section 195 subsection 1 and 2 (c) "for having sexually assaulted a child under 14 years of age, which sexual assault was sexual intercourse, committed against a child under 10 years of age and repeatedly."**

(4) The grounds for item I of the indictment were that the defendant, between 1998 and 2004, at X and Y35 in Z on several occasions had inserted one or more fingers into B's sexual organs. B was born on 4.6.1993.

(5) Item II of the indictment concerned breach of section 212 subsection 2 first sentence concerning indecent acts against persons under 16 years of age. The grounds for the indictment were that the defendant, on one occasion during Easter 1998 or 1999 at X

"asked …. his niece C, born 18.11.1990, if she wanted to feel something nice, pulled down her duvet and stroked her over the edge of her pants with his fingers."

(6) On 17 October 2008, the Trondenes District Court acquitted A of the charges in Item I of the indictment for offences against B, but found him guilty of the charges in Item II of the indictment for offences against C. A was sentenced to 30 days imprisonment and fined NOK 10 000. He was also ordered to pay NOK 15 000 in compensation to C. The judgement was passed with dissenting votes, as one of the lay judges voted in favour of also convicting A of the charges in Item I of the indictment.

(7) A filed an appeal against the assessment of evidence in relation to the question of guilt as regards item II of the indictment and the order to pay compensation to the victim, and the Public Prosecution filed an appeal against the acquittal in relation to item I of the indictment.

(8) The Hålogaland Court of Appeal granted the Public Prosecution's application for leave to appeal but refused A's application. A appealed against the refusal to the Supreme Court, which set aside the Court of Appeal's decision on the grounds of procedural error. The Court of Appeal refused A's application for leave to appeal for a second time, and the Appeals Committee of the Supreme Court dismissed A's appeal against this refusal on 16 April 2009.

(9) On 24 April 2009, the Hålogaland Court of Appeal pronounced the following judgment:

> "**A, born 02.04.1957, is found guilty and convicted of breach of the Penal Code section 195 subsection 1 first sentencing alternative, cf subsection 2 (prior to the statutory amendment of 11.08.2000) and section 195 subsection 1 first sentence, cf subsection 2 (c) (after the statutory amendment of 11.08.2000), together with the matters that are finally determined by the judgment of the District Court. A is sentenced to imprisonment for 1 – one – year and 9 – nine – months. 3 – three - days spent in custody on remand shall be deducted from the prison term. A is disqualified from having employment or taking work in a kindergarten or primary school for a period of five years.**
>
> **A shall pay compensation (for non-economic loss) to B in the amount of 75 000 – seventyfivethousand – Norwegian kroner. The time limit for payment is 2 - two - weeks from the date of service of this judgement. Interest shall accrue from the due date of payment until payment is made at**

the rate stipulated in section 3 subsection 1 of the Interest on Late Payments Act.

No order for costs in the District Court or Court of Appeal."

(10) A has appealed to the Supreme Court. The appeal concerns the Court of Appeal's procedure, alternatively the sentence, including the disqualification. He has also asked for a retrial of the compensation order. On 9 June 2009, the Appeals Committee of the Supreme Court suspended the appeal proceedings with regard to the Court of Appeal's procedure pending final judgments in the plenary decisions in Rt 2009 page 750 and Rt 2009 page 773 concerning whether reasons must be given for the jury's verdict. Leave to appeal was otherwise denied.

(11) On 9 July 2009, and after judgments in the plenary decisions were pronounced, the Appeals Committee of the Supreme Court granted leave to appeal against procedure in relation to the question whether the Court of Appeal should have given a more detailed reason for its assessment of the evidence related to the extent of the indecent/sexual assault.

(12) Counsel for the defence has subsequently submitted as new grounds for appeal outside the scope of the appeal that the Court of Appeal should have adjourned the appeal hearing and ordered a new investigation pursuant to section 294 of the Criminal Procedure Act.

(13) I have concluded that the appeal must succeed.

(14) The police became aware of the case when B presented herself to Z police station on 10 December 2007 and reported A for having sexual abused her over several years – from when she was 5 or 6 years old until she was about 12 years old. The District Court's judgment states:

"**She told the police, and as far as the court understands she was only questioned once, that when she was about 5 years old, A had on one occasion while she was visiting her aunt D and her aunt's boyfriend A touched/fondled her sexual organs. She thinks she was staying overnight with E, born 1994, on that occasion. E is D and A's son. The abuse took place in the "red old folks house" and the thinks it happened during the summer. This was the only time the abuse took place at X.**

In the summer of 2000, D and A moved to Y in Z. B told the police, and later the court, that she used to visit and play with E. She lived not far away and she was often together with him at his house.

She explained that the sexual abuse continued in Y. All of the occasions of abuse between 2000 and 2004 took place in Y. Except for one rape, see below, each occasion of abuse was the same. Every time she visited E, or went with her mother/father to visit her aunt and uncle, the same thing happened. When the defendant was there, she had to go into the living room and sit on his lap. She did this each time. They sat in an old armchair with open chair arms which stood in front of the television. There was a footrest in front of the chair and she put her legs up on the footrest. The defendant took a rug which belonged in the living room, a blue or turquoise coloured rug, and laid it over them from waist level and over their legs.

The defendant had, each time according to the victim, pulled her trousers, usually jeans, down to her knees. She is unsure whether he pulled her pants down too. He had then fondled her sexual organs, first by touching her, and then inserting one or maybe two fingers into her vagina. She didn't think he had moved his fingers, and if he had done, it had not been much.

The incident would be over quickly, and then she was allowed to go. This happened very many times – once or twice a week – also on occasions when the family was present. For instance, it happened when the whole family was gathered in connection with birthdays, Christmas and other social occasions. Even though D was sometimes in the basement having a cigarette, it also happened while D was present in the living room.

She knew that when she visited E to play, the "fondling" would happen too. She knew, but she didn't think about it, it was "just one of those things".

(15) The victim also testified that there had been one occasion of sexual intercourse in the autumn of 2003, when she was staying overnight with her cousin E and D was away. The defendant had entered the bedroom she was sharing with E and carried her into his and D's bedroom. The District Court stated:

"In the bedroom, he laid her on the bed and raped her by inserting his penis into her vagina. She lay on her back with the defendant over her. She understood that his penis was inside her. It lasted for perhaps 15 minutes. He had held both of her hands down on the mattress above her head. She did not bleed and did not have any other injuries after the rape.

She did not have any pre-existing sexual experience. The experience was painful, but she did not say anything while the rape took place or afterwards. She was ashamed."

(16) The victim testified that she had obvious bruises on both wrists as a result of this incident. The bruises had remained there for a long time, perhaps a month, but her mother had not noticed them.

(17) The abuse stopped at sometime between April and June 2004. She had then stopped sitting on the defendant's lap.

(18) A majority of the District Court acquitted the defendant. The Court found it "highly unlikely" that B's description of the facts in the report to the police, and on which the indictment was based, could be true because it could not have been possible for the defendant to abuse the victim as described while members of the family were present in the living room.

(19) The indictment before the Court of Appeal was the same as before the District Court. The Court put three questions to the jury:

<u>Question 1 –principal question</u>

(An answer of yes to this question requires more than 6 votes)

Is the accused A guilty of indecent/sexual assault of a child under 14 years of age,

On the grounds that he,

Between 1998 and 2004 in X and/or in Y 35 in Z, on one or more occasion put one or more fingers into B's, born 04.06.1993, sexual organs and/or on one occasion, probably in 2003, inserted his penis into her vagina and/or into and between the inner and outer lips of her vagina?

<u>Additional question 1</u>

(This question shall only be answered if the jury answers yes to the first question. An answer of yes requires more than 6 votes)

Did any of the sexual assaults described under the principal question amount to sexual intercourse, on the grounds that he on one occasion, after 24.08.2000, probably in 2003, inserted his penis into B's vagina and/or into and between the inner and outer lips of her vagina?

<u>Additional question 2</u>

(This question shall only be answered if the jury answers yes to the first question. An answer of yes requires more than 6 votes)

Were the assaults committed against a child under 10 years of age, and have there been repeated assaults, on the grounds that the abuse described under the principal question happened more than once and at least once before the child turned 10 years of age on 04.06.2003?

(20) The jury answered yes to the principal question as to whether A was guilty of indecent/sexual assault, but no to the first additional question as to whether the assaults amounted to sexual intercourse. The jury answered yes to the second additional question as to whether there had been repeated indecent/sexual assaults, at least one of which was committed before the victim turned 10 years old.

(21) The Court of Appeal accepted the jury's verdict. In its comments, the Court of Appeal stated by way of introduction

"In sentencing, the Court of Appeal finds it proven beyond all reasonable doubt – on the basis of the jury's verdict and the evidence that has been submitted to the court – that the defendant, A, between 1998 and 2004, indecently/sexually assaulted B, born 04.06.1993, on the grounds that he on several occasions when she was under 14 years of age inserted one or more fingers into her sexual organs and that he in doing so acted with intent (wilfully and knowledgeably). He abused her on several occasions by fondling her sexual organs, at least once before she was 14 years old on 04.06.2003. However, there was no sexual intercourse in that he did not insert his penis into her vagina or between the inner and outer lips of her vagina.

The abuse took place while the victim was visiting the defendant and his cohabitee D, who were her aunt and uncle, and their son E, born 12.07.1994, who was her cousin.

The first time the defendant fingered the victim's vagina was in a house (which was referred to as the red house or great-grandma's house) at X in 1998, when she was five or six years old.

The other occasions of abuse by fondling her vagina happened in the defendant's house in Y in Z, from when she was seven or eight years old in 2000 until she was eleven in 2004. This abuse happened when the victim sat on the defendant's lap in a chair in the living room, he laid a rug over them from the waist and down over the chair, he pulled her clothes down below her

thighs and inserted one or more fingers into her vagina, often after having rubbed his finger backwards and forwards outside her genital area. The abuse took place both when she visited alone in order to play with her cousin who was one year younger than her, and when she visited on various family occasions. No-one else discovered what happened, or reacted that there was something strange going on. B said several times that she must not tell C (her sister) and sometimes asked if B thought it was nice."

(22) The Court of Appeal found that the victim had "certainly" been abused on more than 10 occasions in the course of six years, and that most occasions of abuse occurred before she turned 10 years of age. The Court referred here to the victim's testimony.

(23) As mentioned, the jury acquitted the defendant of indecent assault amounting to sexual intercourse. In connection with the question of compensation, the Court of Appeal also concluded that there had been no sexual intercourse. The Court of Appeal stated:

"The Court does not find it proven beyond all reasonable doubt that the defendant also had sexual intercourse with B, by inserting his penis into her vagina (vaginal intercourse) or by inserting his penis into and between the inner and outer lips of her vagina (equivalent to intercourse). In the jury's verdict, he is not found to be guilty of this. Among other things, this is based on the fact that before the case was reported to the police at the end of 2007, B gave a number of different accounts of the sexual abuse that she had suffered to some friends and her sister. Nobody discovered obvious bruises on both of B's wrists, which according to B lasted for a month after the sexual intercourse in 2003, which she described as rape. Findings from a gynaecological examination of B's hymen in 2008 led the Institute of Forensic Science to state that a complete perforation of the whole posterior rim of the hymen is usually quite a conclusive indication of previous puncture, i.e. that something wider in diameter than the opening has been inserted into the vagina. This need not necessarily indicate sexual intercourse or an act equivalent to sexual intercourse, but could have occurred for instance as a result of fingering her sexual organs.

(24) The question before the Supreme Court is whether the requirement to give reasons in the Criminal Procedure Act, in the light of the plenary decision reported in Rt 2009 page 750, has been satisfied in this case. In its plenary decision, the Supreme Court held that there had been no violation of ECHR Article 6 § 1 or any other human rights

obligation when the jury did not give a reason for why it answered in the affirmative to the question of guilt, even though the defendant had been acquitted of the same offence in the District Court. The Supreme Court held that there are mechanisms in the Norwegian jury systems which adequately satisfy the same purposes that reasons are designed to fulfil, more particularly to ensure a conscientious assessment of the case, to ensure verifiability for the defendant and the general public, and to ensure an effective right of appeal. In general, the requirements of a fair trial will normally be satisfied if a case is dealt with in accordance with the provisions of the Criminal Procedure Act.

(25) Section 39 subsection 1 no. 2, cf. section 40 subsection 2 second sentence of the Criminal Procedure Act provides that the Court of Appeal shall give reasons for its sentencing decision. Pursuant to established practice, the professional judges and four appointed jurors jointly describe the act for which the defendant is convicted as a basis for passing sentence and describe what is found to be proven as regards subjective guilt, see paragraph 72 of the plenary decision. It may also be necessary to give details about the scope of the criminal act, as in the present case.

(26) One of the purposes of the Court of Appeal's reason is to give the Supreme Court a sufficient basis on which to review those sides of the judgment which are within its power to review. The defendant and the prosecution can file an appeal to the Supreme Court against the application of law in relation to the question of guilt, alleged errors in the determination of the sentence and alleged errors in procedure, see the Criminal Procedure Act section 306. However, the Court of Appeal's reason is designed to fulfil a broader objective. According to the plenary decision in Rt 2009 page 750, the defendant and the general public must be able to verify the assessment that has been undertaken. The defendant must be able to understand and control why he or she has been convicted. It was regard for the consideration of verifiability in particular that led the Supreme Court to conclude in the plenary decision that section 40 subsection 5 of the Criminal Procedure Act must apply by analogy to the Court of Appeal's assessment of the evidence in connection with sentencing in cases that are tried by jury, in line with what has previously been alleged in legal theory, see paragraphs 75 and 76 of the judgement. These two paragraphs read as follows:

> **The evidence on which the conviction is based will often be apparent from the context, but this is not always the case. If a case has been tried by a composite court, section 40 subsection 5 provides that the grounds of the judgement**

shall not only describe the matters which the court has found to be proven, but also state "the main points in the court's assessment of the evidence". The provision is explained in Ot.prp. (1992-93) on Amendments to the Criminal Procedure Act etc (two-instance procedure, appeals and the jury system) at page 77-78 as follows:

> **"First and foremost, the court shall give an account of the salient points and briefly point out what have been the decisive issues in the assessment of evidence. Precisely how detailed the account of the assessment of evidence must be will vary from case to case. The court is not required to give a detailed description."**

This provision does not apply directly in jury cases, but the view in legal theory is that it should apply by analogy to the Court of Appeal's assessment of the evidence in connection with sentencing, see Johs. Andenæs, Norsk straffeprosess [Norwegian Criminal Procedure], 4th Edition, Oslo, 2009 at pages 519-520, which points in particular to cases where the questions that are put to the jury are bound together by "and/or" and Hans Kristian Bjerke and Erik Keiserud, Straffeprosessloven – kommentarutgave [Commentary to the Criminal Procedure Act], 3rd Edition, Oslo 2001, Volume 1 at page 160. I agree with this. However, as in cases that are tried by a composite court, an inadequate account of the assessment of evidence will rarely be grounds for setting aside a judgement, see Ot.prp. no. 78 (1992-93) at page 78. A judgement will only be set aside on the grounds that the account of the assessment of evidence was inadequate if the deficiency hinders the hearing of the appeal or if it is deemed to have affected the substance of the judgement, see section 343 subsection 2 no. 8 and section 343 subsection 1.

(27) My understanding of these two paragraphs is that the requirement to give a reason in section 40 subsection 5 applies in sentencing also when factors that are relevant to the sentencing decision are related to the criminal act itself. For instance, the Court of Appeal shall explain why one of several possible courses of events have been chosen in circumstances where these are bound together by "and/or" in the questions that are put to the jury. The same applies when determining the extent of the criminal act in cases where this falls within the question of guilt, as in the present case. The law has developed since the case reported in Rt 2002 page 1530, where the Supreme Court rejected the application by analogy of section 40 subsection 5. Since the extent of the criminal act is also relevant to the question of guilt, it also touches on the allocation of

responsibility between the jury and the court on which the Criminal Procedure Act is based. However, my understanding of the passages cited above is that the Supreme Court in the plenary decision made a conscious decision to give greater regard to the defendant's and the general public's ability to verify the assessment that has been undertaken, than to regard for a clear demarcation of responsibilities. I do not find that paragraphs 75 and 76 of the judgement imply that the Court of Appeal in general shall be required to give reasons for the assessment of evidence when the jury delivers a guilty verdict. But a reason for the assessment of evidence must be given in cases where this is necessary to give the defendant and the general public a sufficient basis on which to verify why he or she was found guilty.

(28) Section 40 subsection 5 of the Criminal Procedure Act provides that the grounds of the judgment shall "state the main points in the court's assessment of the evidence". This means that the grounds of the judgment shall not only describe what the court has found to be proven (the evidential result), but also state why this evidential result has been accepted by the court. The travaux preparatoires to the Criminal Procedure Act state that the court shall first and foremost give an account of the salient points in the assessment of evidence and briefly describe what have been the decisive issues. The court is not required to give a detailed description, see paragraph 75 of the plenary decision which is cited above.

(29) The judgment will often state what evidence the conviction is based on, or it will be apparent from the context, and it will often be unnecessary to give a more detailed explanation. In some cases it may even not be possible to give a precise explanation – for instance, the assessment of a witness' credibility will often be based on an impression gained over a period of time where it can be difficult to point to one particular, decisive factor. But in exceptional cases there is a "crucial issue" that is capable of being described and explained, and in my view the present case is such a case.

(30) In the present case, the main evidence against the defendant is the victim's testimony. The Court of Appeal found that the abuse that allegedly took place in the defendant's living room took place both when the victim visited on her own to play with her cousin and when she visited on various family occasions. The Court of Appeal added that "no-one else discovered what happened, or reacted that there was something strange going on". The extent of the abuse is then described as follows:

"The victim was certainly abused on more than 10 occasions in total in the course of six years, and most of these occasions occurred before she turned 10 in the summer of 2003. The assessment of evidence is primarily based on the victim's testimony about the time, place, character and extent of the abuse. Among other things, she testified that the abuse happened regularly, that she knows it happened many times, that it felt like several hundreds of times, and that she felt as if it was every time she visited her uncle's house. This is evaluated with the other evidence in the case."

(31) As mentioned, the District Court found it "highly unlikely" that the victim's description of the facts could be true because it could not have been possible for the defendant to abuse the victim as alleged while other members of the family were present in the living room. The District Court explained this as follows:

"The house where the abuse allegedly took place comprises three floors, each being 44 m2. There is a basement, a ground floor with a living room/kitchen and a first floor with a bathroom and bedrooms. The only recreation rooms are the living room and kitchen. The living room is estimated to be about 30 m2. A majority of the Court cannot understand how it was possible for the defendant to take B on his lap, put a rug over them, draw down her (often used) jeans and then fondle her between her legs without anyone reacting on occasions where, according to her testimony, there were up to several people present. This is particularly so because most of the people who were present were aware of the episode with C. F testified that after the episode with C, he has asked them pay attention to the defendant's behaviour towards B. When there were several people in the living room, they must have sat very close together on account of its size."

(32) The District Court therefore concluded that the victim's testimony on this point could not be true. In my view, the District Court's acquittal with this very specific reason creates a critical issue which the Court of Appeal did not explain. The Court of Appeal's judgment does not state why the Court relied on the victim's testimony also with regard to those occasions of abuse that took place at family gatherings.

(33) Counsel for the prosecution has submitted that it is difficult to give a precise reason, both because an impression was created over several days in court and because a detailed reason will lose its nuances when it is formulated after the trial. However, it is not such a general reason that is lacking in this case – it is a concrete explanation

about one crucial issue, more particularly how it was possible for the defendant to abuse the victim whilst other members of the family were present without someone reacting. This point is not explained in the Court of Appeal's judgment.

(34) In my view, the failure to explain a matter which in the District Court's judgment is highlighted as crucial to the assessment of guilt must lead to the conclusion that the basis for the conviction here is not verifiable for the defendant or the general public. It is only possible to speculate as to whether there is an explanation for the matter which the District Court found to be "highly unlikely" and, in that case, what the explanation might be. The failure to give a reason for this point also gives reason to doubt whether the standard of proof applicable in criminal cases has been properly applied.

(35) Counsel for the defence has submitted that when the jury answered yes to whether the defendant was guilty of indecent/sexual assault but no to the question whether these acts amounted to sexual intercourse, an explanation must be given for why the court believed the victim as regards the indecent assault but not as regards the intercourse. In my view, there is not necessarily a contradiction in terms here. The alleged sexual intercourse was an isolated occurrence and the evidential situation was therefore different to the allegedly repeated occurrences of sexual abuse. The victim's overall credibility regarding the sexual abuse is therefore not necessarily diminished by the acquittal for sexual intercourse.

(36) The next question is whether the Court of Appeal's judgment must be set aside on account of the failure to give sufficient reasons in the grounds of the judgment.

(37) As mentioned, the justification for applying section 40 subsection 5 of the Criminal Procedure Act by analogy when sentencing in jury cases is the need to ensure verifiability for the defendant and the general public, see paragraphs 75 and 76 of the plenary judgment. Verifiability is altogether a key factor in the mechanisms which are designed to compensate for the weakness that is inherent in the fact that the jury does not give reasons for its guilty verdict. Persons who are convicted of criminal offences are entitled to know not only what they have been convicted of but also – as far as possible – why they have been convicted.

(38) Implicit in the requirement that a conviction must be verifiable for the defendant and the general public is a fundamental principle of the rule of law which necessitates that the judgment must be set aside when the verifiability is substantially impaired. In addition, the lack of an explanation in the present case casts doubt on whether the Court of Appeal has properly applied the fundamental principle that the accused is

entitled to the benefit of every reasonable doubt. On this basis, I can see no other alternative than that the Court of Appeal's judgment and the appeal proceedings must be set aside.

(39) I vote for the following

JUDGEMENT

The Court of Appeal's judgment and the appeal proceedings shall be set aside.

(40) Mr Justice **Endresen**: I find that the appeal must be dismissed.

(41) One of the main elements in the current jury system is that the jury determines the question of guilt without giving any reason for its verdict. The Court of Appeal shall not do so either. Section 40 subsection 1 of the Criminal Procedure Act provides as follows:

> **"In the case of judgments of the Court of appeal, when the judgment is based on the verdict of a jury, the grounds of the judgment concerning the issue of guilt shall simply consist of a reference to the said verdict."**

(42) Ot.prp. no.78(1992-93) page 47 first column, states the following:

> **"The jury shall not give a reason for its verdict. The grounds for the judgment shall therefore only contain a reference to the jury's verdict. However, a reason shall be given for the sentencing decision."**

(43) The jury system has been controversial ever since the Law Commission on Criminal Procedure proposed to abolish it in 1969. However, the jury system was retained when the Criminal Procedure Act was passed in 1981 and the same happened when a proposal to abolish the jury system was tabled in connection with the two instance reform in NOU 1992:28.

(44) The jury system was considered in depth on these occasions. A recurrent objection has been that the jury does not give a reason for its verdict. The introduction of a requirement that the jury must give a reason for its verdict has therefore been considered on various occasions, but no proposal has been put to parliament because of the drawbacks that such a requirement might have. However, there are no indications that anyone has considered requiring the Court of Appeal to give a reason for the jury's verdict. Determination of the question of guilt is the jury's domain.

(45) This was strongly emphasised by the Supreme Court in the case reported in Rt 2002 page 1530. One of the questions in the case was whether section 50 subsection 5 of the

Criminal Procedure Act should be applied by analogy to the Court of Appeal's assessment of the evidence in relation to the question of guilt:

> **"The provision in section 40 subsection 5 of the Criminal Procedure Act does not apply in cases that have been tried by jury. There are not – as far as I can see – any indications in the travaux preparatoires that the provision should be applied by analogy when determining the sentence. In legal theory, however, it has been asserted that it is "reasonable to require the Court of Appeal in such cases to state the main points in its assessment of the evidence, in other words to apply section 40 subsection 5 by analogy", see Andenæs, Norsk straffeprosess [Norwegian Criminal Procedure], Volume II at page 67. The same view is expressed in Bjerke/Keiserud: Straffeprosessloven Kommentarutgave [Commentary to the Criminal Procedure Act], 3rd Edition at page 160.**
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> **It may – as I see it – in some circumstances be natural for the Court of Appeal to give reasons for the evidential result in connection with sentencing also in cases that are tried by jury. The allocation of responsibility between the jury and the court may well sometimes make it difficult to give a reason. It would contravene the allocation of responsibility between the jury and the court which is manifested in section 40 subsection 1 of the Criminal Procedure Act if the court, when sentencing, were to give a reason for the evidential result which really concerns the question of guilt. …**
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> **However, I cannot see that the court's failure to give such a reason is a procedural error. The rules in section 40 of the Criminal Procedure Act on the obligation to give reasons in criminal cases are very detailed and in my view it must be assumed that they, in this respect, are exhaustive. …"**

(46) None of the main legal textbooks cite occasions when it has been asserted that the Court of Appeal's obligation to give reasons should also include reasons for the determination of the question of guilt. It has not even been raised as an issue. It is also illustrative that the renewed debate about the jury system in recent years has always been based on an assumption that the procedure in the Criminal Procedure Act is still current law.

(47) The question has never before been brought before the Supreme Court, but the related question regarding the application by analogy of section 40 subsection 5 of the Criminal Procedure Act was raised again in the plenary decision about the jury system

in Rt 2009 page 750. The question in that case was whether the fact that no reason is given for the determination of the question of guilt must mean that the Norwegian jury system violates the right to a fair trial in Article 6 § 1 of the European Convention on Human Rights. The Supreme Court held that the purpose behind the requirement to give a reason is sufficiently satisfied in other ways. The requirement to give a reason has been strengthened in various ways in recent years, and the Supreme Court sitting in plenary found that section 40 subsection 5 of the Criminal Procedure Act must apply by analogy to the Court of Appeal's assessment of the evidence when sentencing. At paragraph 76 , the Supreme Court held:

> **"This provision does not apply directly in jury cases, but the view in legal theory is that it should apply by analogy to the Court of Appeal's assessment of the evidence in connection with sentencing, see Johs. Andenæs, Norsk straffeprosess [Norwegian Criminal Procedure], 4th Edition, Oslo, 2009 at pages 519-520, which points in particular to cases where the questions that are put to the jury are bound together by "and/or" and Hans Kristian Bjerke and Erik Keiserud, Straffeprosessloven – kommentarutgave [Commentary to the Criminal Procedure Act], 3rd Edition, Oslo 2001, Volume 1 at page 160. I agree with this."**

(48) The requirement to give reasons is explained in more detail at paragraphs 72 and 73:

> **"(72)**
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> **Pursuant to section 376e of the Criminal Procedure Act, the sentence is determined by three professional judges and four jurors – the jury foreman and three other jurors chosen by lots. Section 39 subsection 1 no. 2 and section 40 subsection 2 provide that a reason shall be given for the sentence, and it is established practice that the professional judges and four appointed jurors jointly describe the act for which the defendant is convicted as a basis for passing sentence. The description of the criminal act must, among other things, state what is found to be proven as regards subjective guilt and, if the questions to the jury were formulated as alternatives using the words "and/or", the description of the criminal act must state which alternative is found to be proven. It may also be necessary to give details about the scope of the criminal act, see e.g. the case reported in Rt 2007 page 961.**
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> **(73)**

Thus, the grounds that are given for the sentence contain detailed information about what the four jurors and three professional judges have found to be proven. Normally – if there is no basis for concluding otherwise – the grounds must also be deemed to represent the jury's view."

(49) In my view, the plenary decision does not even touch upon the obligation to give reasons for the determination of the question of guilt. It is more the case that the lack of a reason for the guilty verdict makes it pertinent to assess the relevance of the assessment of evidence in connection with sentencing. If the Supreme Court had intended to set aside an explicit statutory provision, like section 40 subsection 1 of the Criminal Procedure Act, it must in my view be assumed that this would only happen following an in-depth discussion and with a clear reason. There is no such discussion in the plenary decision.

(50) For instance, it would have been natural to discuss the relationship to section 376e of the Criminal Procedure Act. The travaux preparatoires to the Criminal Procedure Act, Ot.prp. no. 35 (1978-79) at pages 48 to 59, discuss at great length that a most important consideration for the legislator when formulating the rules that govern the jurors' further involvement in the case was to maintain confidentiality about the position taken by individual jurors on the question of guilt. The weight attached to this issue by the legislator is manifested in section 376 e subsection 2 last sentence. In connection with the two-instance reform, the view was maintained that jurors should not participate in determining any civil claims out of regard for the need to preserve confidentiality, see NOU 1992: 28 at page 160 and Ot. prp. No. 78 (1992-93) at page 93. The underlying argument is even more pertinent to the involvement of four jurors in giving reasons for the question of guilt. It would also have been appropriate to discuss the situation that might arise if one or more of the jurors who had voted for an acquittal were to participate in explaining the basis for the jury's guilty verdict.

(51) In three cases dealt with by the Appeals Committee of the Supreme Court after the plenary decision, the appellants have submitted that there was a procedural error because no reason was given for the finding of guilt, see Rt 2009 page 866, Rt 2009 page 961 and decision of 6 November 2009 in case no. 2009/1664. Leave to appeal was refused in all three cases and, as far as I understand the decisions, there is nothing in any of any of them to indicate that the Appeals Committee has assumed that the grounds for the judgment should also contain a reason for the finding of guilt. In the

decision in Rt 2009 page 866 paragraph 16, the requirement of a reason is described as follows:

> **"In the plenary decision, the Supreme Court also held that in cases that are heard by a jury, section 40 subsection 5 of the Criminal Procedure Act shall apply by analogy to the Court of Appeal's assessment of evidence in connection with sentencing, see paragraphs 75 and 76. The Court of Appeal's explanation of the assessment of the evidence in the present case is quite brief, but the Appeals Committee finds – with a certain degree of doubt – that it is sufficient."**

(52) In my view, the fact that the Court of Appeal's judgement does not give a reason for the determination of the question of guilt confirms that the Appeal Committee's assessment relates precisely to the application by analogy of section 40 subsection 5.

(53) The case reported in Rt 2009 page 91 at paragraph 29 states:

> **"The present case has been dealt with pursuant to the provisions of the Criminal Procedure Act, and regard for a substantive and conscientious full review has therefore been safeguarded. The questions that were put to the jury and the description of the criminal acts in the judgment are also sufficient to ensure that the judgement can be reviewed and to ensure verifiability. The evidence on which the conviction is based is apparent from the circumstances. On this basis, the Appeals Committee is of the firm view that the fact that no reason has been given for the jury's verdict is not grounds to set aside the Court of Appeal's judgment."**

(54) The decision is of particular interest because the need for reviewability is linked to the description of the evidential result and not to the assessment of evidence. The decision is not so clear on the assessment of evidence, but must be seen in light of the Court of Appeal's decision. In accordance with section 40 subsection 1 of the Criminal Procedure Act, the Court of Appeal's judgment refers to the jury's verdict as regards the question of guilt, and then describes the assessment of evidence in relation to the sentence. The little that is said about the assessment of evidence is stated here. With regard to D, who did not appeal to the Supreme Court, the Court of Appeal uses the same words as the Appeals Committee:

> **"However, given that the delivery was to be made from a Dutch trailer, it must be assumed that he understood that it was not a question of an entirely insignificant amount."**

(55) 63 Court of Appeal judgments in cases where the Court sat with a jury are published in the legal data base "Lovdata" since the plenary decision. These judgments show that the Courts of Appeal have not understood the plenary decision to mean that they are required to give an account of the assessment of evidence on which the jury's verdict is based.

(56) None of these judgments mention the plenary decision.

(57) In an editorial in the legal journal Lov & Rett 2009 no. 7, Supreme Court Justice Jens Edvin Skoghøy expressed the view that the plenary decision must be understood to mean that the requirement to give reasons also applies to the determination of the question of guilt. After this became known to the Courts of Appeal, Mr Justice Skoghøy's view has been respected in some subsequent decisions. It is apparent from what I have stated above, however, that I do not share his view that the plenary decision has such a wide scope.

(58) The first voting justice in this case has based her decision on an application by analogy of section 40 subsection 5, and has concluded that "a reason for the assessment of evidence must be given in cases where this is necessary in order to give the defendant and the general public a sufficient basis on which to verify why he or she was found guilty." This bears a strong resemblance to the view expressed by Mr Justice Skoghøy, but in my view it goes far beyond what can be deemed to follow from an application by analogy of section 40 subsection 5.

(59) In my view, the approach is so fundamentally at odds with the existing civil procedure system that an extended obligation to give reasons cannot apply without infringing the allocation of responsibility which forms the basis for our jury system.

(60) On the other hand, the Norwegian jury system provides that the Court of Appeal shall of its own motion set aside the jury's verdict if it finds that insufficient evidence of guilt has been produced. The decision is made by way of judicial decision. This is expressed in the judgment by the Court stating that it relies on the jury verdict. It is clear that the Court of Appeal, as a general rule, is not required to give a reason. If the jury's verdict, seen as a whole, is such that there can appear to be reason to set it aside, a reason for the decision ought undoubtedly to be given. The Court of Appeal judges have assessed the evidence and could in the circumstances explain the assessment they have made. It is possible that the judicial decision is a decision of such importance that a requirement to give a reason must be deemed to follow from Article 6 § 1 of the European Convention on Human Right. However, in my view, the Court of Appeal's

judgment in the present case regarding the assessment of evidence in connection with the sentence is sufficiently clear.

(61) In this connection, it is relevant that my view of the Court of Appeal's judgment differs from the view of the first voting justice in some respects.

(62) Counsel for the appellant has in the appeal pleadings submitted, among other things, that the only evidence against the defendant is the victim's testimony and that the Court of Appeal should have explained that this was the only evidence. This criticism of the Court of Appeal's judgment is in my view unfounded. I mention in this connection that the District Court found the defendant guilty of indecent acts against the victim's sister, and this conviction is legally binding. The Court of Appeal also refers to the statement from the Institute of Forensic Science, which emphasised that a complete perforation of the whole posterior rim of the hymen is usually quite a conclusive indication of previous puncture, i.e. that something wider in diameter than the opening has been inserted into the vagina, but that the tear could have been caused by something other than sexual intercourse or an act equivalent to sexual intercourse, for instance as result of fingering her sexual organs.

(63) Some of the events described by the victim in her testimony took place some time ago. At least for most of that period, she was only a small child. I find it difficult to see that inaccuracies in her testimony should detract so much from the evidential value of her testimony as the first-voting justice appears to find. I add that, in my view, the question of evidential value should not be formulated as a question of credibility. As far as I understand, there is nothing in the case to indicate that the victim's account of the course of events in her testimony does not correspond to her subjective experience of what actually happened.

(64) The first voting judge recalled that the District Court's found it "highly unlikely" that the abuse could have taken place while other members of the family were present in the living room, and then emphasises that the crucial issue in the assessment of evidence is how it was possible for the defendant to abuse the victim whilst other members of the family were present without someone reacting. For my part, however, I cannot see that the Court of Appeal has found that the abuse happened while other people were present. Having found that the defendant is guilty of several counts of indecent assault of the victim, I do not find it as surprising as the first voting justice that the victim also links these events to situations where she also sat on the defendant's lap in the presence of other people.

(65) My view, like the view of the Appeals Committee in the case reported in Rt 2009 page 961, is that defendant's interest in being able to verify the decision is most adequately satisfied by the Court of Appeal's explanation of what it has found to be proven and the fact that the defendant is very familiar with the relevant evidence.

(66) Finally, I understand the first voting justice to mean that the Court of Appeal's judgement and the appeal proceedings must be set aside because she is in doubt as to whether the proper standard of proof has been applied. It follows that the doubt must also apply to the jury's assessment of the question of guilt. In my view, there is no basis on which to find such doubt regarding the standard of proof. It is not alleged that there was an error in the Court of Appeal's summing up to the jury and the Court of Appeal began its judgment with regard to sentencing by stating that the accused is entitled to the benefit of every reasonable doubt also when determining the extent of the criminal offence.

(67) The Court of Appeal ought perhaps to have clarified with a greater degree of precision that it has not made any finding as to the circumstances under which the abuse took place, but the fact that the jury's and subsequently the Court of Appeal's assessment of the evidence is different to that of the District Court does not on its own give reasons to doubt whether the standard of proof has been properly understood. In my view, there are no grounds for setting aside the Court of Appeal's judgment on this basis. I add that even if the reason for the assessment of evidence in connection with sentencing was found to be insufficient, this could not in my view result the appeal proceedings being set aside either.

(68) The defendant has also alleged that the Court of Appeal's judgment must be set aside because the Court of Appeal failed to adjourn the appeal hearing and order a new investigation pursuant to section 294 of the Criminal Procedure Act. In particular, the defendant wanted further investigation into the circumstances surrounding one or more rugs. I find it quite clear that this issue was not of such significance to the case that it was wrong of the Court of Appeal not to adjourn the case.

(69) I vote that the appeal should be dismissed.

(70) Mr Justice **Bårdsen**: I agree on the whole and with the result of the first voting Justice, Mrs Justice Sverdrup.

(71) Mr Justice **Tønder**: Likewise

(72) Mr Chief Justice **Schei**: Likewise.

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

JUDGEMENT

The Court of Appeal's judgment and the appeal proceedings shall be set aside.