SUPREME COURT OF NORWAY

On 12 June 2009, the Supreme Court delivered the following judgement in

HR-2009-01192-P, (case no. 2009/397), criminal appeal against conviction

A	(Counsel Mr John Christian Elden)
v.	
The Public Prosecution	(Director of Public Prosecutions Mr Lasse Qvigstad)

J U D G E M E N T :

(1) Mrs Justice **Indreberg**: This case concerns an appeal against a conviction by the Court of Appeal in a criminal case for, among other things, attempted murder. The main question to be decided is whether the defendant's right to a fair trial or his right to review of a criminal conviction has been violated because the question of guilt was determined by a jury, which does not give reasons for its decision.

(2) A was indicted pursuant to an indictment issued by the Oslo Public Prosecution Authority on 31 August 2007 for a number of offences. Item III of the indictment reads as follows:

> **"<u>III Penal Code section 233, cf. section 49</u>**
>
> **For attempted murder**
>
> **The indictment is based on the following circumstances or aiding and abetting the same:**
>
> **No. 1 A:**
>
> **a) On Tuesday 31 January 2006 at approx. 00.25 a.m. in --- road --- in X, after having attempted in vain to collect a debt from B, he induced a person, whose**

identity is unknown to the police, to fire approx shots with a UZI 9 mm machine pistol at B's house where B and his immediate family were residing. Several of the gunshots went through the wall and into the house. The attempt at murder was not successful as nobody was hit by the shots.

No. 1 A

b) At the time and place described in item IIIa, he conducted himself in the manner described towards C.

No. 1 A

c) At the time and place described in item IIIa, he conducted himself in the manner described towards D.

No. § 1 A

d) At the time and place described in item IIIa, he conducted himself in the manner described towards E.

No. 1 A

e) On Friday 11 August 2006 at approx. 2 a.m. in --- road --- 9 in Y, he fired in total 17 shots with a Scorpion 7.65 calibre machine pistol and a 38 calibre revolver or pistol at the house belonging to F, where she lay sleeping. Several of the gunshots went through the wall and into the house. The attempt at murder was not successful as F was not hit by the shots."

(3) On 3 June 2008, the Oslo District Court pronounced the following judgement in criminal proceedings against A and two accomplices. The conviction against A reads as follows:

"**3. A, date of birth 9.8.1977, is acquitted of the charges in items I, II, IIIe and IV of the indictment.**

4. A, date of birth 9.8.1977, is found guilty and convicted for breach of the Penal Code section 233, cf. section 49, the Penal Code section 292, cf. section 291, the Penal Code section 227 second sentencing alternative cf. section 232 third sentence, the Penal Code section 161, the Firearms Act section 33 subsection 1 second sentence cf. subsection 2 cf. subsection 3, cf. section 27b subsection 2 and the Penal Codes section 171 no 2, and sentenced to protective custody for a term of 8 – eight – years including a minimum term of detention of 4 – four – years, pursuant to the Penal Code section 39c no. 1. The term and the minimum term shall be reduced by 655 – six hundred and fifty five – days for time spent in custody on remand.

5. A, date of birth 9.8.1977, is ordered to pay compensation to Gjensidige Insurance Company in the amount of 63 971 – sixty three thousand nine hundred and seventy one – Norwegian kroner, to the Mosaic Religious Community in the amount of 15 000 – fifteen thousand – Norwegian kroner, to Gjensidige Insurance Company in the amount of 28 333 – twenty eight thousand three hundred and thirty three – Norwegian kroner, to F in the amount of 3000 – three thousand – Norwegian kroner, to IF General Insurance Company in the amount of 118 361 – one hundred and eighteen thousand three hundred and sixty one – Norwegian kroner, and to G in the

amount of 6000 – six thousand – Norwegian kroner. The time for payment shall be 14 days from the date of service of this judgement."

(4) A filed an appeal against the conviction to the Borgarting Court of Appeal. He appealed against the assessment of evidence on the question of guilt, the sentence and the order to pay compensation, all in relation to item III a – d of the indictment. The prosecution filed a cross-appeal against the assessment of evidence on the question of guilt related to item III e of the indictment.

(5) At the appeal proceedings, the Court of Appeal sat with a jury in accordance with section 352 of the Criminal Procedure Act. The presiding judge put the following questions to the jury:

> **Question 1 – principal question**
> **(An answer of yes to this question requires more than 6 votes)**
>
> **Is the accused, A, guilty of attempted murder?**
>
> **The grounds are the following circumstances or aiding and abetting the same:**
> **On Tuesday 31 January 2006 at approx. 00.25 a.m. in --- road --- in X, after having attempted in vain to collect a debt from B, he induced a person, whose identity is unknown to the police, to fire several shots with a 9 mm machine pistol at B's house where B and his immediate family were residing. Several of the gunshots went through the wall and into the house. The attempt at murder was not successful as nobody was hit by the shots.**
>
> **Question 2 – principal question**
> **(An answer of yes to this question requires more than 6 votes)**
>
> **Is the accused, A, guilty of attempted murder?**
>
> **The grounds are the following circumstances or aiding and abetting the same:**
> **On Friday 11 August 2006 at approx. 2 a.m. in ---road--- in Y, he fired several shots with a calibre 7.65 calibre machine pistol and a 38 calibre revolver at the house belonging to F, where she lay sleeping. Several of the gunshots went through the wall and into the house. The attempt at murder was not successful as F was not hit by the shots."**

(6) The jury answered no to the first question and yes to the second question. The Court of Appeal based its judgement on the jury's verdict and pronounced the following judgement on 20 February 2009:

> "**1. A, date of birth 9 August 1977, is acquitted of breach of the Penal Code section 233 cf. section 49, the charges in items III a) – d) of the indictment.**
>
> **2. The Oslo District Court's conviction of A for breach of the Penal Code section 227 cf. section 232 – item IV of the indictment – shall be quashed and A is acquitted.**
>
> **3. A, date of birth 9 August 1977, is found guilty and convicted for breach of the Penal Code section 233, cf. section 49 in relation to those matters that are finally determined and unappealable pursuant to the judgement of the Oslo District Court dated 3 June 2008, and is sentenced to protective custody for a term of 8 – eight – years including a minimum term of detention of 3 – three**

– years and 4 – four - months, pursuant to the Penal Code section 39c no. 1. The term and the minimum term shall be reduced by 917 – nine hundred and seventeen five – days for time spent in custody on remand.

4. A, date of birth 9.8.1977, is ordered to pay compensation to IF General Insurance Company NUF in the amount of 118 361 – one hundred and eighteen thousand three hundred and sixty one – Norwegian kroner, and to G in the amount of 6000 – six thousand – Norwegian kroner no later than two weeks from the date of service of this judgement."

(7) A has appealed to the Supreme Court against item 3 of the judgement. The appeal concerns the procedure in connection with item III e of the indictment and sentencing. On 12 March 2009, the Appeals Committee of the Supreme Court granted leave to appeal in so far as the appeal concerns the procedure. Leave to appeal was otherwise denied.

(8) On 13 March 2009, the Chief Justice of the Supreme Court decided that the appeal should be heard by the Supreme Court sitting in plenary pursuant to the Courts of Justice Act section 5 subsection 4 and section 6 subsection 2, second sentence. A question concerning the competence of some of the justices and their impartiality was determined by interlocutory order on 3 April 2009. The case has been heard together with HR-2009-01193-P (case no. 2009/202), H against the Public Prosecution. Defence counsel divided the various questions raised by the two cases between them, and counsel for the prosecution dealt with the legal questions raised by the two cases together. A separate judgement in HR-2009-01193-P (case no. 2009/202) will be pronounced later today.

(9) A's principal arguments are as follows:

(10) The conviction by the Court of Appeal, which is based on an unreasoned verdict of the jury, violates the right to a fair trial laid down in Article 6 § 1 of the European Convention on Human Rights – ECHR - and Article 14 § 1 of the International Covenant on Civil and Political Rights – ICCPR - and the right to review by a higher tribunal laid down in ICCPR Article 14 § 5.

(11) The European Court of Human Rights – ECtHR – has in several cases stated that the right to a fair trial includes, among other things, the right to be given reasons for the court's decision, see e.g. Kjølbro: Den europæiske menneskerettighedskonvention – for praktikere (The European Convention of Human Rights – A Practitioner's Guide), 2nd Edition at page 424 ff with references. It is correct that the ECtHR has for many years held that questions to the jury can compensate for a lack of reasons, provided that the questions are sufficiently precise, see e.g. the decision of the European Human Rights Commission of 29 June 1994 in the case of Zarouali v. Belgium and the decision of the ECtHR of 15 November 2001 dismissing the application in the case of Papon v. France. However, in its judgement dated 13 January 2009 in the case of Taxquet v. Belgium, the ECtHR found unanimously that ECHR Article 6 § 1 had been violated because Taxquet was convicted on the basis of the jury's simple "yes" answer to the questions posed to it by the court. The Taxquet judgement is not final, but it is no less important for that reason. The judgement emphasises the fundamental considerations behind the requirement of a reasoned judgement, which are the same as the value principles that have been emphasised in a number of studies and articles in the debate in Norway about the jury system.

(12) ICCPR Article 14 § 5 also requires judgements to be in writing and "duly reasoned", so that the right to appeal is effective. Reference was made to the Human Rights Commission's General Comment 32 (2007) paragraphs 45 to 49.

(13) It follows that the jury system in Norway, as it was practiced in the case against A, violates ECHR Article 6 § 1 cf. ICCPR Articles 14 § 1 and 14 § 5. A procedural error has therefore been committed and A's conviction must be set aside.

(14) It is also alleged that the Court of Appeal should have dismissed the prosecution's appeal against the District Court's acquittal because, as a matter of Norwegian law, there is no right to review the appeal court's assessment of evidence on the question of guilt if the accused is found guilty on appeal. Norway's reservation to ICCPR Article 14 § 5 for cases where the District Court has acquitted the accused but the Court of Appeal has found the accused guilty is a breach of international law and Article 100c of the Norwegian Constitution and is therefore invalid.

(15) A entered the following plea:

> **"Item 3 of the Court of Appeal's judgement and the appeal proceedings shall be set aside.**
>
> **The Prosecution's appeal against conviction as regards item III e of the indictment shall be dismissed.**
>
> **In the alternative:**
>
> **Item 3 of the Court of Appeal's judgement and the appeal proceedings shall be set aside."**

(16) The Public Prosecution's principal arguments are as follows:

(17) The lack of reasons for a jury verdict on the question of guilt is a weakness of the jury system, but the Norwegian jury system does not violate human rights.

(18) An obligation for the jury to give reasons for its decision cannot be derived from ECHR Article 6 § 1 on the right to a fair trial. The main case in this area, Taxquet v. Belgium, is not final. In addition, the judgement is unclear and its scope is questionable. Furthermore, there are considerable differences between the Belgian and Norwegian jury systems and between the Taxquet case and the A case. Under these circumstances, the Supreme Court should be cautious in finding that the Convention has been violated.

(19) Since the Supreme Court has no power to review the assessment of evidence on the question of guilt on appeal from the Court of Appeal, a reason is not necessary in order to ensure an effective right of appeal, cf. ICCPR Article 14 § 5. In this regard, it is irrelevant whether there is a conviction or an acquittal at first instance.

(20) Norway's reservation to ICCPR Article 14 § 5 does not violate international law or Article 110c of the Norwegian Constitution. Article 110c of the Norwegian Constitution is a statement of principle and no remarks were made during its adoption which indicate that the reservation was inconsistent with Article 14 § 5. A reservation to fundamental human rights may give rise to questions regarding Article 110c of the Constitution, but

the right to review of the assessment of evidence on the question of guilt is not such a question.

(21) The Public Prosecution entered the following plea:

> **"The appeal shall be dismissed."**

(22) My view of the case is as follows:

(23) I have concluded that the Court of Appeal's judgement and the appeal proceedings must be set aside, but for a different reason than A has alleged.

(24) *Is Norway's reservation to ICCPR Article 14 § 5 invalid?*

(25) ICCPR Article 14 § 5 entitles a convicted person to have his conviction and sentenced reviews. The provision reads as follows:

> **"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."**

(26) When Norway ratified the ICCPR in 1972, it entered reservations against several provisions, including this one. After the two-instance reform in 1993, the general reservation against ICCPR Article 14 § 5 was amended to a limited reservation which applies only to the Court of Impeachment ("Riksrett") and cases where the defendant is convicted for the first time by the appellate court. Norway's declaration regarding the latter reads as follows:

> **"2. Conviction by an appellate court**
>
> **In cases where the defendant has been acquitted in the first instance, but convicted by an appellate court, the conviction may not be appealed on grounds of error in the assessment of evidence in relation to the issue of guilt. If the appellate court convicting the defendant is the Supreme Court, the conviction may not be appealed whatsoever."**

(27) A has, firstly, alleged that the reservation is a violation of the ICCPR or of international law. This allegation cannot succeed.

(28) The ICCPR itself does not contain provisions on the right to make reservations, but the issue is raised in the Human Rights Committee's General Comment 24 of 1994. The Committee stated that the matter of reservations under the Covenant is governed by international law, which means that a state may make a reservation provided it is not incompatible with the "object and purpose" of the treaty, see Article 19(c) of the Vienna Convention on the Law of Treaties. Furthermore, provisions in the Covenant that are binding according to customary international law cannot be the subject of reservations. The right to review is not mentioned in the list of such provisions in paragraph 8 of General Comment 24. As regards Article 14, it is stated:

> **"And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be."**

(29) Paragraph 47 of the Human Rights Committee's General Comment 32, 2007, clearly assumes that a reservation like the one that Norway has made is acceptable. I find this without doubt.

(30) The allegation that the reservation violates Article 110c of the Constitution cannot succeed either. Nothing in the language or the preparatory works to Article 110c indicates that its adoption was intended to oblige the Norwegian authorities to comply with treaty conditions on human rights which Norway is not bound by in international law. Nor would it harmonise well with Article 26 of the Constitution on adoption of treaties. I also refer to the fact that the Human Rights Act, which was passed after Article 110c of the Constitution, assumes that Norway can make reservations to the conventions that are incorporated pursuant to the Act because these shall only have the force of Norwegian law "insofar as they are binding for Norway", see section 2.

(31) I therefore find that Norway's reservation to Article 14 § 5 is valid.

(32) *The requirement of a reasoned decision pursuant to the human rights conventions*

(33) Neither ECHR nor ICCPR state explicitly that a conviction shall be reasoned. However, the settled practice of the convention organs establishes that the right to a fair trial, as laid down in ECHR Article 6 § 1 and ICCPR Article 14 § 1, and the right to review of a conviction, as laid down in ECHR Protocol 7(2) and ICCPR Article 14 § 5, contain a presumption that criminal judgements shall adequately state the reasons on which they are based.

(34) According to the practice of the convention organs, a reason shall fulfil several purposes. Firstly, it shall serve as a safeguard against arbitrariness, see e.g. paragraph 43 of the ECtHR's judgement of 13 January 2009 in the case of Taxquet v. Belgium. Secondly, the reasons shall show the parties that they have been heard and enable public scrutiny of the administration of justice, see paragraph 89 of the ECtHR's judgement of 6 September 2005 in the case of Salov v. Ukraine. A reason shall also give the parties a basis on which to decide whether to appeal, see e.g. paragraph 33 of the ECtHR's judgement of 16 December 1992 in the case of Hadjianastassiou v. Greece, and give the appellate court a basis on which to review the judgement, see e.g. paragraph 49 of the Human Rights Committee's General Comment 32 of 2007. It shall also ensure that the appellate court can undertake a substantive review, see paragraph 48 of the same General Comment. The latter is discussed in more detail in the judgement in appeal case HR-2009-01193-P (case no. 2009/202) to be delivered later today.

(35) In summary, one can say that the purpose of the requirement of an adequately reasoned judgement is to ensure that *the assessment is substantive and conscientious, to ensure verifiability, and to ensure an effective right of appeal*.

(36) The question, then, is how the convention organs have practiced the requirement that a conviction shall be adequately reasoned and, in particular, how they have dealt with the requirement of a reasoned judgement in jury cases. I will deal with the practice and arguments related to ECHR Article 6 § 1 on the right to a fair trial first.

(37) The ECtHR has stated several times that the scope of the requirement that a judgment shall be adequately reasoned may vary according to the nature of the decision and must be determined in the light of the circumstances of the case, see e.g. paragraph 40 in the

Taxquet case with references to previous court practice. It is also pointed out that courts are not obliged to give a detailed answer to every argument and that an appellate court, in dismissing an appeal, may in principle simply endorse the reasons for the lower court's decision.

(38) As regards the requirement of a reason in jury cases in particular, the general view has for a long time been that the questions posed to the jury provide a framework for the jury's verdict and that precisely formulated questions compensate for the lack of more specific reasoning in a jury's guilty verdict, see the decision of the European Commission on Human Rights of 30 March 1992 rejecting the application in R v. Belgium, the Commission's decision of 29 June 1994 rejecting the application in Zarouali v. Belgium, and the ECtHR's rejection on this point in the case of Papon v France of 15 November 2001. An important question in the present case is whether the Taxquet case from 2009 follows the same line of precedent or whether there has been a change of direction and, if so, the weight to be attached to this. In order to asses this, I find it appropriate to look in more detail at the Commission's first decision about the relationship between the jury system and the requirement of a reasoned judgement in R v. Belgium and the subsequent development.

(39) R was convicted of murder and sentenced to lifetime imprisonment by a so-called assize court where the question of guilt is determined by a jury. R complained on the grounds that no reason was given for the jury's guilty verdict or for the sentence. The Commission pointed out first that there was no right of appeal against the determination of the question of guilt or the sentence. The Commission was also of the view that the requirement of a reason must be adjusted to the particular characteristics of the procedure in the assize court, where the jury has neither a duty nor a right to give a reason for its verdict. The Commission then pointed out that the president of the assize court must draft and put to the jury questions concerning the facts of the case and, in that connection and in the light of the evidence submitted to the court, draw to the attention of the jury the specific facts which must be established for the offence as charged to be proved. The Commission proceeded to describe the nature of the questions to be put to the jury:

> **"… the President has power to ask the jury questions about any circumstances qualifying the facts on which the indictment is founded, provided these have been discussed during the trial. The main question concerns the constituent elements of the offence, and each count on the indictment must be dealt with in a separate question. The main questions may be divided, provided this division does not work to the defendant's detriment. They may also be put in an alternative form. The main facts should be separated from the other facts, such as aggravating circumstances or grounds for arguing non-responsibility or mitigation, by asking separate questions on each."**

(40) The Commission further noted that the prosecution and the defendant may contest the questions asked and ask for alternative questions to be put to the jury. In these cases, the assize court must give a ruling in a reasoned judgment. On this basis, the Commission concluded:

> **"From its examination of the Belgian system, the Commission notes that, while the jury may reply only by 'yes' or by 'no' to the questions put by the President, these questions form a framework for the jury's verdict. In the Commission's opinion, the precision of these questions - some of which may be put at the request of the prosecution or the defence - compensate sufficiently for the brevity of the jury's**

replies. That assessment is supported by the fact that the assize court must give reasons for a refusal to put one of the questions raised by the prosecution or the defence to the jury."

(41) The applicant had not alleged that there were special circumstances in his case that required the giving of a reason, and the Commission went on to conclude that a violation of Article 6 had not been proven and rejected the application on the grounds that it was manifestly ill-founded.

(42) The question was raised again in the case of Zarouali v. Belgium, and in its decision of 29 June 1994, the Commission rejected the application on the same grounds as in R v. Belgium.

(43) The arguments and reasoning in R v. Belgium and Zarouali v. Belgium are also to be found in the ECtHR's decision of 15 November 2001 in the Papon case, which also refers to these decisions in paragraph 6f. Like the Commission, the Court recorded that

"[t]he requirement that reasons must be given must also accommodate any unusual procedural features, particularly in assize courts, where the jurors are not required to give reasons for their personal convictions."

(44) Papon was convicted for crimes against humanity during the Second World War. At paragraph 6, the ECtHR held:

"It is not in any case for the Court to decide in the abstract whether the French system satisfies the requirement arising from Article 6 § 1 that reasons must be given for judgments.

The Court notes that in the instant case the Assize Court referred in its judgment to the answers which the jury had given to each of the 768 questions put by the President of the Assize Court and also to the description of the facts declared to have been established and to the Articles of the Criminal Code which had been applied. Although the jury could answer only "yes" or "no" to each of the questions put by the President, those questions formed a framework on which the jury's decision was based. The Court considers that the precision of those questions sufficiently offsets the fact that no reasons are given for the jury's answers.

The Court accordingly considers that sufficient reasons were given for the Assize Court's judgment for the purposes of Article 6 § 1 of the Convention."

(45) In the ECtHR's judgement of 2 June 2005 in the case of Goktepe v. Belgium, the applicant succeeded in his allegation that there was a violation of Article 6 in a jury trial. The facts of the case were that the applicant and two accomplices were convicted and sentenced to 30 years' imprisonment for robbery resulting in the victim's death. Six questions were put to the jury. The first three questions concerned each of the defendants' participation in the robbery. The following three questions concerned all three defendants, and related to the existence of aggravating circumstances surrounding the robbery. The court had refused an application for these three questions to be put as distinct individual questions. The applicant, who denied using violence against the victim, alleged that the jury was therefore denied the possibility of determining each defendant's individual responsibility for blows and injury to the victim. The ECtHR agreed, and found that Article 6 had been violated. At paragraph 29, the ECtHR emphasised that it is particularly important that questions to the jury are precisely

formulated because the jury cannot give reasons for its decision. The ECtHR did not agree with the state that this could be repaired by any differences in criminal responsibility between the defendants being raised in sentencing, which is determined by the jury and the court together, see paragraph 30.

(46) As can be seen, the reason why there was a violation of the Convention was that the questions that were put to the jury were defective, not that the jury did not give a reason for its decision.

(47) The ECtHR's judgement of 13 January 2009 in the case of Taxquet v Belgium is the last in the series of judgement on whether an accused's right to a fair trial is safeguarded in jury trials. I emphasise that the judgement is not final. Belgium has applied for the case to be submitted to the Grand Chamber of the ECtHR and the application was accepted on 5 June 2009.

(48) Taxquet was convicted together with seven co-defendants and sentenced to 20 years' imprisonment for murdering a government minister and attempting to murder the minister's partner. Taxquet was implicated in the investigation on the basis of information from an anonymous witness. The informant had not been interviewed by the investigating judge and did not testify at the trial. The informant's identity was not disclosed to Taxquet or the trial judges. Taxquet complained to the ECtHR that Article 6 § 1 was violated because his conviction by the assize court had not included a statement of reasons for why he had been found guilty, and that Article 6 § 3 (d) was violated because he had been unable to examine or have examined the anonymous witness. The ECtHR held that both Article 6 § 1 and Article 6 § 3 (d) had been violated.

(49) The Court began its discussion of the complaint about the lack of reasons for the guilty verdict by recalling its previous general statements about the requirement in Article 6 to give reasons, including the need to accommodate any special procedural features, particularly in assize courts where the jurors are not required to give reasons for their personal convictions, see paragraphs 40 and 41. The Court then continued:

> **42. The Court notes that in the *Zarouali* and *Papon* cases (both cited above), the Commission and the Court found that "although the jury could answer only 'yes' or 'no' to each of the questions put by the President, those questions formed a framework on which the jury's decision was based", that "the precision of those questions sufficiently offsets the fact that no reasons are given for the jury's answers" and that "this appraisal is reinforced by the fact that the Assize Court must state its reasons for refusing to refer a question from the prosecution or the defence to the jury".**
>
> **43. However, since the *Zarouali* case there has been a perceptible change in both the Court's case-law and the Contracting States' legislation. In its case-law the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness. Thus, certain States, such as France, have made provision for the right of appeal in assize court proceedings and for the publication of a statement of reasons in assize court decisions.**
>
> **44. The Court considers that while it is acceptable for a higher court to set out the reasons for its decisions succinctly by simply endorsing the reasons for the lower**

court's decision, the same is not necessarily true of a court of first instance, particularly one sitting in a criminal case.

45. The Court notes that the Assize Court's judgment in the applicant's case was based on thirty-two questions that were put to the jury at his trial. The applicant was concerned by four of them, which the Court considers it useful to reiterate:

"Question no. 25 – PRINCIPAL COUNT

Is the accused Richard Taxquet, who is present before this court, guilty, as principal or joint principal, of having knowingly and intentionally killed [A.C.] in Liège on 18 July 1991?

Question no. 26 – AGGRAVATING CIRCUMSTANCE:

Was the intentional homicide referred to in the previous question premeditated?

Question no. 27 – PRINCIPAL COUNT

Is the accused Richard Taxquet, who is present before this court, guilty, as principal or joint principal,

...

of having attempted knowingly and intentionally to kill [M.-H.J.] in Liège on 18 July 1991, the intention to commit the offence having been manifested by conduct which objectively constituted the first step towards perpetration of the offence and which was halted or failed to attain the aim pursued only as a result of circumstances outside the control of its perpetrator?

Question no. 28 – AGGRAVATING CIRCUMSTANCE:

Was the attempted intentional homicide referred to in the previous question premeditated?"

46. The jury answered all the questions in the affirmative.

47. The Court further notes that the same questions were put to the jury in respect of all eight defendants and were not adapted to each individual case. In this connection, the Court observes that in the case of *Goktepe v. Belgium* (no. 50372/99, 2 June 2005), where admittedly there were objective aggravating circumstances, it found a violation of Article 6 on account of the Assize Court's refusal to put distinct questions in respect of each defendant as to the existence of such circumstances, thereby denying the jury the possibility of determining the applicant's individual criminal responsibility.

48. In the instant case, the questions to the jury were formulated in such a way that the applicant could legitimately complain that he did not know why each of them had been answered in the affirmative when he had denied all personal involvement in the alleged offences. The Court considers that such laconic answers to vague and general questions could have left the applicant with an impression of arbitrary justice lacking in transparency. Not having been given so much as a summary of the main reasons why the Assize Court was satisfied that he was guilty, he was unable to understand – and therefore to accept – the court's decision. This is particularly significant because the jury does not reach its verdict on the basis of the case file but on the basis of the evidence it has heard at the trial. It is therefore important, for the

purpose of explaining the verdict both to the accused and to the public at large – the "people" in whose name the decision is given – to highlight the considerations that have persuaded the jury of the accused's guilt or innocence and to indicate the precise reasons why each of the questions has been answered in the affirmative or the negative.

49. In these circumstances, the Court of Cassation was prevented from carrying out an effective review and from identifying, for example, any insufficiency or inconsistency in the reasoning.

50. The Court concludes that there has been a violation of the right to a fair trial, as guaranteed by Article 6 § 1 of the Convention.

(50) In other words, the Court found that the questions in this case were formulated in such a way that Taxquet could legitimately complain that he did not know why the jury had returned a "yes" answer, and that such a laconic answer to vague and general questions could have left Taxquet with the impression of arbitrary justice lacking in transparency.

(51) In my opinion, this reasoning and the finding of the Court are in line with the Court's previous practice, which attaches conditions to the questions to be put to the jury in order to weigh up for the lack of a reason. However, the Court's statements in paragraph 43 on developments since the Zarouali-case and in paragraph 48 about the lack of a reason for the conviction can give the impression that there has been a change of direction. There is therefore reason to look more closely at these paragraphs.

(52) In paragraph 43, the Court recalled that there has been a perceptible change since the Zarouali case, i.e. since 1994. The Court referred firstly to changes in its own case law, and that the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness. Secondly, the Court referred to the fact that some countries, such as France, have made provision for the right of appeal in assize court proceedings and for the publication of a statement of reasons in assize court decisions. Partly due to this statement, the Supreme Court approached the Director of Public Prosecution before the appeal proceedings and asked him to cooperate with defence counsel in gathering information from other European countries about their jury systems. The survey covers England & Wales, Scotland, Northern Ireland, Ireland, Austria, Belgium, France and Spain. The survey shows that in Spain the jury is required to give a brief reason for its assessment of the evidence, but this is not the case in the other countries. As pointed out by the ECtHR, France has introduced a right of appeal in criminal cases that are tried by jury, where the question of guilt is determined in both instances by a jury that does not give reasons for its verdict.

(53) Paragraph 43 of the Taxquet judgement can be seen as an expression by the Court that it will no longer confine itself to referring to the Commission's case law from the beginning of the 1990s and its own reliance on this case law, but that it will more actively review whether the applicant's right to a fair trial has been ensured in cases that are determined by a jury, a view which the Goktepe case before it can also be seen as an expression of. However, it is not possible to derive from this a general conclusion that judgements based on unreasoned jury verdicts violate ECHR Article 6 § 1.

(54) At paragraphs 45 to 49, which concern the specific merits of the Taxquet case, the ECtHR looked more closely at the questions that were put to the jury. It found that these were too vague and general – they could, as mentioned, leave an impression of arbitrary justice and lack of transparency. I understand the next sentences in paragraph 48 about the applicant not having been given a short summary of the reasons why the court was satisfied that he was guilty and the jury not having had access to the case file as an elaboration on why the Court finds that a conviction based on these questions does not satisfy the requirement of a fair trial. Finally, at paragraph 48, the Court states that it is important for the purpose of explaining the verdict both to the accused and to the public at large to highlight the considerations that have persuaded the jury of the accused's guilt or innocence and to indicate the precise reasons why each of the questions has been answered in the affirmative or the negative. Read in isolation, this sentence could be understood to establish a requirement for a jury to give reasons for its verdict. However, I find no basis for such a conclusion. Elsewhere in the judgement, among other places at paragraph 41, the ECtHR states that the requirement for reasons to be given must also accommodate the unusual procedural features of the assize courts. If the ECtHR had intended to establish a principle that the jury must give reasons for its decisions, it would have been unnecessary to consider whether the questions that were put to the jury had been sufficiently precise. Finally, the ECtHR would probably have expressed itself more explicitly if it had meant that all of the European states with a jury system where the jury is not required to give reasons for its verdict are required to change their system. It is also quite likely that the Chamber would have relinquished jurisdiction to the Grand Chamber, see ECHR Article 30.

(55) I therefore find that the Taxquet judgement cannot be understood to mean that a jury must give reasons for its verdict, or that the jury system must be abolished, but it might be a warning that the ECtHR will view criminal cases determined by a jury more critically than it has done until now.

(56) As mentioned, ICCPR Article 14 § 1 and § 5, and Article 2 of Protocol 7 to the ECHR also require reasons to be given for criminal convictions.

(57) Like ECHR Article 6 § 1, ICCPR Article 14 § 1 concerns the right to a fair trial, and there are no indications in the relevant sources of law that the requirement to give reasons is any different or any stricter in this provision than in the ECHR Article 6.

(58) ICCPR Article 14 § 1 and Article 2 of Protocol 7 to the ECHR provide that a person who is convicted of a criminal offence has the right to review by a superior tribunal. As already mentioned, the right to review in the ICCPR applies to both the conviction and the sentence, whereas the right to review in Article 2 of Protocol 7 to the ECHR applies to either the conviction or the sentence. The ICCPR is of greatest interest since it has the widest scope.

(59) The Supreme Court sitting in Grand Chamber considered ICCPR Article 14 § 1 in great depth in its interlocutory judgement concerning decisions on leave to appeal, which is reported in Rt 2008 page 1764. In this judgement, the Supreme Court stated that the right to review means, among other things, that decisions must be sufficiently reasoned to enable the appellate body to control them, see paragraph 91. I have not found any relevant source of law which deals more specifically with the application of this requirement in jury cases. Since the requirement to give reasons in ECHR Article 6 § 1 is intended to ensure that the appellate body is able to review the judgement, which, for

example, is also implicit in paragraph 49 of the Taxquet judgement, I cannot see that this aspect of ICCPR Article 14 § 5 requires states to do anything that does not also follow from ECHR Article 6 § 1. In the following, I will therefore concentrate my discussion on ECHR Article 6 § 1.

(60) *Did the Court of Appeal's procedure comply with ECHR Article 6 § 1?*

(61) According to the case law of the ECtHR, the lack of a reason for a jury verdict must be compensated by other mechanisms which adequately safeguard the same purpose. What is in fact required will, to a certain degree, depend on the specific circumstances of each individual case.

(62) The procedure in the Court of Appeal in the criminal proceedings against A followed the rules of procedure in the Criminal Procedure Act. I therefore find it expedient to consider whether such compensating mechanisms exist in Norwegian criminal procedure in general and in A's case in particular. The issue is whether the Norwegian jury system adequately ensures the purpose of the requirement to give reasons. As mentioned earlier, there are three main purposes: to ensure a substantive and conscientious assessment of the case, to ensure verifiability, and to ensure an effective right of appeal.

(63) A thorough procedure in accordance with the provisions of the Criminal Procedure Act is designed to ensure that the court's assessment is substantive and conscientious.

(64) The Court of Appeal sits with a jury, or "lagrette" as it is called in the Criminal Procedure Act, when an appeal is brought against the assessment of evidence in relation to the question of guilt and the appeal concerns a felony punishable pursuant to statute with imprisonment for a term exceeding six years, see section 352. The case is heard as a complete retrial, see section 331. Evidence is submitted directly to the jury, and after each individual witness has been examined and after all documentary evidence has been read aloud, the defendant is given an opportunity to speak, see section 303. After the production of evidence is completed, the prosecutor and the defence counsel address the court twice each, and the defendant is given the opportunity to make a closing statement, see section 304. After that, the jury determines the question of guilt by answering yes or no to specifically formulated questions, which are submitted to the jury in writing. The questions are formulated by the president of the court based on a draft prepared by the prosecutor on which defence counsel is given an opportunity to comment, see section 363. Section 364 subsection 2 emphasises that each question "must relate to only one person indicted, as far as possible to only one criminal matter, and to only one penal provision". A question shall not only describe the particular characteristics of the criminal act, but also describe in brief how the criminal act was committed, with details of time and place, see section 366. This is illustrated by the questions that were asked in A's case, which are set out above. It can be seen that the specific account of what A allegedly had done distinguishes them from the questions that were put to the jury concerning Taxquet's guilt.

(65) Before the jurors retire to a secluded room to consider their verdict, the president of the court shall give what is often called a "summing up" and explain the questions and the legal principles on which the jury must base its decision, and go through the evidence in the case, see section 368 subsection 2. The explanation of the applicable legal principles is binding on the jury, whereas the summing up of evidence is for guidance only. Before the jury retires, the parties may require "specially indicated parts of the explanation of the

legal principles" to be entered in the court record, see section 368 subsection 4. This was not asked for in A's case. Defence counsel has informed us that he asked the president of the court to explain precisely what is required to establish guilt, and that this was done.

(66) If the jury returns a not-guilty verdict, the court shall as a general rule base its ruling on the jury's verdict. The panel of professional judges may only set aside a not-guilty verdict if it finds that the defendant "without doubt" is guilty, see section 376a. A guilty verdict, however, is not binding on the panel of professional judges. Section 376b provides that if the panel of professional judges finds that the matter described in the question is not criminal or that criminal liability is statute barred, it shall acquit the defendant. And the panel of professional judges shall also set aside the jury's guilty verdict if it finds that "insufficient evidence of guilt has been produced", see section 376c. It is true that section 376 uses the word "may" and not "shall", and the preparatory works to section 376c state that "the court [i.e. the panel of professional judges] is not obliged to set aside a guilty verdict in all cases where it would have come to a different conclusion", as the jury has the "principal responsibility" for the assessment of evidence, see Ot.prp. no. 35 (1978-79) page 221. However, fundamental principles of the rule of law dictate that the court, i.e. the panel of professional judges, shall set aside a jury's guilty verdict if there is reasonable doubt about the defendant's guilt.

(67) For the sake of completeness, I mention that if the jury's verdict is set aside, the case is retried before other judges, and at the retrial the Court of Appeal sits as a composite court with three professional judges and four lay judges, see section 376a and 376c, cf. section 332.

(68) It is thus apparent that several mechanisms exist that are designed to ensure that the jury reaches its verdict following a conscientious assessment of the evidence on the basis of a correct understanding of the law. The questions that are put to the jury are specific and individual and are explained to them by the president of the court. The legal principles by which they are bound are explained to them and the evidence is summed up. The professional judges' review of a guilty verdict is also a safeguard. In light of the ECtHR's case law, I cannot see that there are any grounds on which to allege that a substantive and conscientious assessment is not sufficiently ensured, nor that it was not ensured in A's case.

(69) The next question is how the Criminal Procedure Act ensures that the defendant and the general public can *verify the assessment that has been undertaken.*

(70) Section 40 subsection 1 of the Criminal Procedure Act provides that a judgement of the Court of Appeal that is based on a jury verdict shall, "as regards the question of guilt, simply consist of a reference to the said verdict". As already mentioned, the ECtHR has given particular weight in its case law to whether the questions that are put to the jury in a particular case are formulated so precisely that they provide information about what the jury has found to be proven. As I have already shown, the questions that are put to the jury in Norway shall provide information about the facts that the jury has found to be proven, see section 365 and 366.

(71) A primary question shall begin with the words: "Is the person indicted guilty?", see section 366. The jury is not asked whether the individual conditions for criminal liability are satisfied. If the defendant is acquitted, one cannot know whether the jury was of the view that the defendant did not commit the offence, or whether it was of the view that

there were grounds for impunity, or whether the subjective conditions for criminal liability were not satisfied. However, acquittals are not the issue here. And a guilty verdict means that the jury has found that all of the conditions for convicting the defendant are satisfied. A different matter is that, in a guilty verdict, some questions may remain unanswered, for instance regarding the scope of the criminal act and the degree of guilt within the scope of the requirement of guilt in the particular case. These questions will be dealt with in sentencing.

(72) 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.

(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.

(74) Later in this judgement, I will cite from the grounds for the sentence in the judgement against A. The grounds contain a detailed description of the course of events.

(75) 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."**

(76) 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.

(77) Referring to paragraph 30 of the ECtHR's judgement in Goktepe v Belgium from 2005, defence counsel have alleged that a violation of the Convention in relation to the question of guilt cannot be repaired during sentencing. In the Goktepe case, the violation of the Convention consisted in a failure to put separate questions to the jury for each of the defendants, and the ECtHR rejected the state's argument that this was repaired by the possibility to differentiate between the defendants in sentencing. This is a different situation from the situation where separate questions for each defendant are put to the jury, and where the matters which the court has found to be proven within the scope of the questions that are put to the jury are specified in the grounds for the sentence. Paragraph 48 of the ECtHR's judgement in the Taxquet case, where the ECtHR points out that Taxquet was not given so much as a summary of why the assize court found him guilty, also indicates that a summary in the grounds for sentencing must be relevant when determining whether the requirement of a fair trial is satisfied.

(78) On this basis, I am of the view that the Norwegian Criminal Procedure Act adequately ensures that both the defendant and the public at large have access to the premises for a conviction, that the *interests of verifiability* are ensured, and that these interests were adequately ensured in A's case.

(79) I turn now to the question whether and to what extent the Criminal Procedure Act *ensures an effective right of appeal* of the Court of Appeals judgement.

(80) Pursuant to section 306 subsection 1 and 2, a criminal conviction by the Court of Appeal can be appealed to the Supreme Court on the grounds of error in the application of law with regard to the question of guilt, error in sentencing and error in procedure. However, section 306 subsection 3 provides that if the case has been tried by jury, an appeal against the application of law with regard to the question of guilt can only be brought to the detriment of the defendant if there is an error in the summing-up given by the president of the court of the legal principles that are applicable in the case, and the summing up has been recorded. There is no such limitation on the right to appeal to the benefit of the defendant. In a long series of cases, the Supreme Court has held that on appeal to the benefit of the defendant, it has power to review the jury's application of law both on the basis of the president's recorded summing up and on the basis of what the jury, in the light of the available information, probably founded its decision on, see the case recorded in Rt 2007 page 961 paragraph 29 with references to former case law. This means that when the Supreme Court hears an appeal over the Court of Appeal's application of the law, it can base its decision on the description of the criminal act given by the professional judges and the four jurors as the reason for the sentence as well as the questions that were put to the jury and any information available on the content of the summing up, see the case reported in Rt 2007 page 961 at paragraph 35. As I have previously pointed out, this must – in the absence of information to the contrary - also be deemed to represent the jury's view.

(81) Whether this provides the Supreme Court with a sufficient basis on which to review the application of law will depend on the circumstances of each individual case. In most cases, the questions that are put to the jury and the description of the criminal act in the

judgement will be a sufficient basis on which to review the Court of Appeal's application of law. In some cases, however, this may be insufficient. If it is not obvious that the criminal act as described falls within the scope of the relevant legal provision, it may therefore be wise to tape or make a written record of the summing-up even though neither of the parties has requested this. If this is not done, the Court of Appeal's judgement should, out of regard for the Supreme Court's review, contain an account of its application of the law.

(82) In A's case, the salient question is whether the requirement of intent is satisfied. The judgement contains a description of the relevant requirement of intent, dolus eventualis, and therefore enables the Supreme Court to review whether the law has been applied correctly. A has not otherwise appealed against the application of law.

(83) To summarise: It cannot be deduced from the case law of the Convention organs that a conviction based on an affirmative answer from the jury without any further reason is a violation of ECHR Article 6 § 1. The decisive issue is whether the purpose behind the requirement to give a reason is sufficiently satisfied in some other way. The Norwegian jury system contains mechanisms to satisfy these purposes, and cases that are dealt with in accordance with the provisions of the Criminal Procedure Act will normally satisfy the requirements of a fair trial. In some case, however, in order to ensure that the Supreme Court can effectively review the application of law, it may be necessary in the circumstances for the Court of Appeal to tape or make a written record of the summing-up and/or describe its understanding of the law in the grounds that are given for the sentence.

(84) A's case was dealt with in accordance with the provisions of the Criminal Procedure Act, and the judgement contains sufficient information to enable the Supreme Court to review the application of law. A's appeal against procedure must therefore be dismissed.

(85) Review of the application of law

(86) It remains to assess whether there are other circumstances which must lead to a conclusion that A's appeal must be allowed.

(87) A was acquitted in the District Court for the acts for which he was convicted in the Court of Appeal, attempted murder of F, see item IIIe of the indictment. In the District Court, he admitted that he had fired 14 shots with a machine pistol and a revolver at F's house with the purpose of threatening her son. The District Court acquitted him of attempted murder because it found that he had not acted with the necessary intent. I cite from the District Court's judgement:

> **The prosecution has not disputed that A and I carried out a kind of surveillance of the house in ---road--- a few hours before the shooting, nor is it disputed that A did not know that F was in the house. Similarly, it is not disputed that A did not intend to harm F in any way. However, the prosecution has alleged that the surveillance must have been extremely sloppy and superficial. The court agrees with this.**
>
> **Based on the above, the prosecution has in its closing arguments alleged that A "took a conscious risk" when he fired shots at the house; he must and ought to have considered that there could be people in the house, and he ought to have investigated this in more detail. The prosecution has alleged that the facts must be assessed as**

attempted murder, see the Penal Code section 233 cf. section 49, and that A acted with the necessary degree of intent (dolus eventualis by positive acquiescence).

Under items IIIa – d of the indictment above, the court has dealt with the conditions that must be fulfilled for dolus eventualis to be established. As mentioned there, the court must find it proven that the defendant foresaw that it was possible that the shots could cause another person's death, but nonetheless decided to go ahead with the shooting even though the worst might happen and the victim might be harmed by a fatal shot, see Rt-2007-1559, Rt-2005-83, Rt-2001-58 and Rt-1980-979. However, there is a difference between accepting a risk and accepting a consequence – the first can constitute conscious recklessness, while the other can constitute the form of intent known as dolus eventualis, see the distinction in Rt-1980-979, Rt-2004-1769 and Andenæs, Alminnelig strafferett [General principles of criminal law] (2004) page 237.

On the basis of all of the evidence before it, the court can only find that A acted recklessly when he fired shots at F's house. Although he can be seriously reproached for having taken a risk by shooting at the house, it is not proven to a sufficient degree that he thereby acted with the necessary degree of intent that is required for the offence of murder in section 233 of the Penal Code. Attempted manslaughter is not a criminal offence in Norwegian law, see Andenæs, Alminnelig strafferett [General principles of criminal law] (2004) page 355 and Rt-1999-874, which both recall that section 49 of the Penal Code requires intention to perpetrate an offence. Accordingly, A must be acquitted for item IIIe of the indictment.

(88) The District Court's description of the requirement of intent in this case is correct. The Court found that the condition was not satisfied. When the Court of Appeal, contrary to the District Court, found that A was guilty, it must have been of the view that the condition was satisfied – either because it assessed the evidence differently or because it based its decision on another, and in that case erroneous, understanding of the form of intent known as dolus eventualis. Since no reason is given in the jury's verdict, we must draw our conclusions about what the Court of Appeal based its decision on from other information.

(89) In the reasons it gave for the sentence, the Court of Appeal states as follows:

On the same evening, A went to F's house in Asker together with a female friend. J usually lived with his mother when he was in Norway, but A was aware that J himself was in Spain at that time. A arrived at F's house around midnight between the 10th and 11th of August 2006. A has testified, and the Court of Appeal assumes, that the purpose of this trip was to observe and find out whether there were people present in the house. A has testified that he felt the bonnet of the car that was parked outside the house and that it was cold. He then went round the house and on to the terrace which has an exit from the first floor of the house and looked in through the windows. The living room curtains were open, no lights were on and, according to A, the house appeared to be empty. A and his female friend then travelled back to Oslo.

On the same night, A returned to F's house. He was then armed with a 7.65 calibre machine pistol – probably a Scorpion – and a calibre 38 revolver. At about 2 am, he fired a total of 17 shots at the house and the car that was parked outside. F, who was sleeping in her bedroom at the back of the house, was not hit by any of the shots. She woke up, but did not understand at that time what had happened. She didn't discover that the house and car had been shot at until the next morning.

This was a dangerous and callous act, the background for which was the collection of a debt. The Court of Appeal finds that the shots were not fired in order to kill J's mother. The purpose was to frighten J. A has testified that his motive was that he was "irritated" because he felt exploited by J. However, the shooting at the house cannot be described as an act of impulse. A prepared himself by obtaining weapons and carrying out a surveillance of the place, which shows that the act was at least planned over several hours before it was carried out.

A's testimony about the purpose of the surveillance that he first carried out shows that he did in fact consider the possibility that someone was living in the house. The jury's answer implies that A accepted the possibility that J's mother could have been hit by a shot, but chose nonetheless to shoot at the house in order to frighten J himself."

(90) The Court of Appeal's description of the form of intent dolus eventualis is incorrect. It is not sufficient that A accepted the possibility that someone might be hit by the shots but chose nonetheless to shoot; he must have consciously decided to shoot notwithstanding that someone could have been killed. I refer to the case reported in Rt 2004 page 1767 paragraph 11, where it is stated:

It is not sufficient for a finding of intent in the form of dolus eventualis that the act to be covered by the intent was considered by the defendant as a possibility and that he nonetheless decided to act. The defendant must also have positively acquiesced to this fact. Thus, the Court of Appeal, when sentencing the defendant, must have found it proven that A had consciously decided to assist in the offence even though such a considerable amount of heroin – we are talking about 194 grams here – was to be purchased/stored. The positive acquiescence, which indeed contains a hypothetical element – distinguishes intent from conscious recklessness at the lower end of the scale.

(91) Defence counsel has informed that the summing up on this point was correct after he had asked the president of the Court of Appeal to define more precisely what lies in the form of intent dolus eventualis. Notwithstanding, since the reasons given for the sentence, which were prepared by the three professional judges and four jurors, contain an erroneous description of the conditions that must be fulfilled to satisfy the requirement of guilt, there is reason to fear that the jury has not correctly understood the principle of law. This view is endorsed by the fact that it is difficult to reconcile A's prior surveillance of the house to find out whether there were people living there, with the fact that he consciously decided to shoot even though someone might be killed.

(92) In Rt 1999 page 379, the Supreme Court set aside the Court of Appeal's judgement on appeal against the application of law because the reasons given for the sentence showed that the jury had based its decision on a misunderstanding of the law concerning the determination of the question of guilt. In the present case, the appeal concerns procedure, but pursuant to section 342 subsection 2 no. 1, the appellate court can try whether the criminal legislation has been correctly applied regardless of the grounds for appeal. In my view, the Court of Appeal's conviction of A and the appeal proceedings must be set aside on account of the uncertainty which the reasons for the sentence create as to the jury's understanding of the law.

(93) I vote for the following

JUDGEMENT

The judgement of the Court of Appeal, item 3, and the appeal proceedings shall be set aside.

Mrs Justice **Gjølstad**:	I agree on the whole and with the result of the first voting Justice.
Mr Justice **Lund**:	Likewise.
Mrs Justice **Gussgard**:	Likewise
Mr Justice **Tjomsland**:	Likewise.
Mrs Justice **Coward**:	Likewise
Mr Justice **Stang Lund**:	Likewise.
Mrs Justice **Bruzelius**:	Likewise
Mr Justice **Skoghøy**:	Likewise
Mr Justice **Utgård**:	Likewise.
Mrs Justice **Stabel**:	Likewise
Mrs Justice **Øie**:	Likewise
Mr Justice **Tønder**:	Likewise
Mr Justice **Endresen**:	Likewise.
Mr Justice **Bårdsen**:	Likewise.
Kst Justice **Falkanger**:	Likewise
Mr Chief Justice **Schei**:	Likewise.

After the passing of votes, the Supreme Court delivered the following

JUDGEMENT

The judgement of the Court of Appeal, item 3, and the appeal proceedings shall be set aside.