

SUPREME COURT OF NORWAY

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

HR-2009-01193-P (case no. 2009/202), criminal appeal against conviction

A (counsel Mr Steinar Thomassen – for examination)

v.

The Public Prosecution (Director of Public Prosecutions Mr Tor-Aksel Busch)

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 for, among other things, sexual offences. 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 did not give reasons for its decision.
- (2) On 9 May 2008, A was arraigned before the Sandefjord District Court pursuant to an indictment issued by the Vestfold and Telemark Public Prosecution Authority to answer the following charges:

I. Penal Code section 192 subsection 1(a)

for having obtained sexual intercourse by use of violence or threats.

Grounds:

Between the summer of 2004 and December 2006 in -----and/or----- Street in X, on several occasions he took his stepson B's penis in his mouth and sucked it notwithstanding that B clearly objected. He obtained the sexual intercourse by, during the same period and in connection with the individual assaults, hitting and/or kicking B and saying, among other things, that he would kill B and/or other members of his family if B did not do as he was told. In this manner, he created in B a persistent fear of him, so that B did not dare to protest.

II. Penal Code section 195 subsection 1, first sentencing alternative

for having engaged in sexual intercourse with a child under 14 years of age.

Grounds:

At the time and place described in item I, he had sexual intercourse as described with his stepson B, who was born on 29 October 1993.

III. Penal Code section 199 subsection 1

for having engaged in sexual intercourse with a stepchild.

Grounds:

At the time and place described in item I, he had sexual intercourse as described with his stepson B, who was born on 29 October 1993.

IV. Penal Code section 201(c)

for by deed having behaved in a sexually offensive or otherwise indecent manner toward a child under 16 years of age.

Grounds:

At the time and place described in item I, he performed the sexual assaults while C, who was born on 28 February 1995, was present and watching.

V. Penal Code section 219 subsection 1

from the summer of 2004 until 31.12.2005:

for having exposed persons belonging to his household to distress by being unwilling to perform his duty to provide support, or by neglect, maltreatment or similar conduct frequently or grossly violating his duties towards his spouse or children or other person belonging to his household or in his care who because of illness, age or other circumstance was incapable of taking care of himself.

From 01.01.2006 until January 2008:

For having repeatedly or grossly threatened, compelled, used violence against or in other manner abused or maltreated persons belonging to his household or in his care

Grounds:

Between the summer of 2004 and January 2008 at the place described in item I, he on several occasions abused, threatened or used violence against his stepchildren C and B, among other things, by

- **repeatedly threatening to kill them,**
- **repeatedly threatening to kill them with a meat axe and on one occasion running after them with the meat axe and hacking the axe into a door which they closed and locked behind them,**
- **repeatedly beating B, among other things with a belt,**
- **repeatedly kicking B,**
- **repeatedly beating C with his flat hand, his fist and a spatula**

- forcing C to eat food that he had spat on,
- threatening to throw a fruit knife at C,
- repeatedly verbally abusing C, among other things by saying she was stupid when she was doing her homework and calling her a whore and other abusive names.”

(3) On 19 September 2008, the Sandefjord District Court pronounced the following judgement:

“A, born 23.04.1973, is found guilty and convicted of breach of the Penal Code section 192 subsection 1(a), section 195 subsection 1 first alternative, section 199 subsection 1, section 201 (c) and section 219 subsection 1, and sentenced to three years imprisonment. The Penal Code section 62 subsection 1 and section 64 subsection 1 have been applied.

55 days spent in custody on remand shall be deducted from the prison term.

A, born 23.04.1973, is ordered to pay compensation in the amount of NOK 150 000 to B, born 29.10.93, and NOK 50 000 to C, born 28.02.95, no later than two weeks from the date of service of this judgement.

No order as to costs.”

(4) A filed an appeal against the conviction to the Agder Court of Appeal. He appealed against the assessment of evidence in relation to the question of guilt for all items of the indictment. At the appeal proceedings, the Court of Appeal sat with a jury in accordance with section 352 subsection 1 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 having obtained sexual intercourse by use of violence or threats,

On the grounds that he, between the summer of 2004 and December 2006 in ----- and/or----- Street in X, took his stepson B’s penis in his mouth and sucked it, and that he obtained the sexual intercourse by, during the same period, hitting and/or kicking B and saying, among other things, that he would kill B and/or other members of his family if B did not do as he was told?

Question 2 – principal question

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

Is the accused A guilty of having engaged in sexual intercourse with a child under 14 years of age,

On the grounds that he, at the time and place described in question 1, took the penis of his stepson B, born on 29.10.93, in his mouth and sucked it?

Question 3 – principal question

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

Is the accused A guilty of having engaged in sexual intercourse with a stepchild,

On the grounds that he, at the time and place described in question 1, had sexual intercourse as described with his stepson B.

Question 4 – principal question

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

Is the accused A guilty of having by deed behaved in a sexually offensive or otherwise indecent manner toward a child under 16 years of age,

On the grounds that he, at the time and place described in question 1, carried out at least one of the events of sexual abuse as described while C, born 28.02.95, was present and watching?

Question 5 – principal question

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

Is the accused A guilty of

from the summer of 2004 until 31.12.2005, having exposed persons belonging to his household to distress by being unwilling to perform his duty to provide support, or by neglect, maltreatment or similar conduct frequently or grossly violating his duties towards his spouse or children or other person belonging to his household or in his care who because of illness, age or other circumstance was incapable of taking care of himself.

From 01.01.2006 until January 2008, having repeatedly or grossly threatened, compelled, used violence against or in other manner abused or maltreated persons belonging to his household or in his care

On the grounds that he, between the summer of 2004 and January 2008, at the place described in question 1, abused and/or threatened and/or used violence against his stepchildren C and B, among other things, by threatening to kill them and/or by running after them with a meat axe and hacking it into a door which they closed and locked behind them and/or beating B, among other things with a belt, and/or kicking

B and/or beating C with his flat hand and/or his fist and/or a spatula and/or forcing C to eat food that he had spat on and/or threatening to throw a fruit knife at C and/or verbally abusing C, among other things by saying she was stupid when she was doing her homework and calling her a whore and other abusive names, and that one or more of these assaults happened repeatedly.”

- (5) The jury answered yes to all five questions and the Court of Appeal accepted the jury’s verdict. On 16 January 2009, the Agder Court of Appeal pronounced the following judgement:

“A, born 23.04.1973, is found guilty and convicted of breach of the Penal Code section 192 subsection 1(a), the Penal Code section 195 subsection 1 first sentencing alternative, the Penal Code section 199 subsection 1, the Penal Code section 201 (c) and the Penal Code section 219 subsection 1, together with the Penal Code section 62 subsection 1 and section 64 subsection 1, and sentenced to five years imprisonment. 55 days spent in custody on remand shall be deducted from the prison term.

A shall pay compensation to B, born 29.10.93, in the amount of 150 000 – onehundredandfiftythousand – Norwegian kroner no later than 2 – two - weeks from the date of service of this judgement.

A shall pay compensation to C, born 28.02.95, in the amount of 75 000 – seventyfivethousand – Norwegian kroner no later than 2 - two - weeks from the date of service of this judgement.”

- (6) A has appealed to the Supreme Court. The appeal concerns the procedure and the sentence. On 25 February 2009, the Appeals Committee of the Supreme Court granted leave to appeal against the procedure. Leave to appeal was otherwise denied.
- (7) In accordance with the decision of the Chief Justice of the Supreme Court of 13 March 2009, the appeal has been heard by the Supreme Court sitting in plenary pursuant to the Courts of Justice Act section 5 subsection 4 last sentence and section 6 subsection 2 first sentence. A question concerning the impartiality of some of the justices was determined by interlocutory order on 3 April 2009. The case has been heard together with HR-2009-01192-P (case no. 2009/397), D against the Public Prosecution. Defence counsel divided the various questions raised by the two cases between them, and, on the whole, counsel for the prosecution dealt with the two cases together. Judgement in HR-2009-01192-P (case no. 2009/397) has been pronounced today.
- (8) A’s principal arguments are as follows:

- (9) 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.
- (10) 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. Kjølbros: 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. 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.
- (11) The requirement in ICCPR Article 14 § 5 that judgements must be duly reasoned was the subject of the Human Rights Commission’s ruling of 17 July 2008 in the so-called “Restaurant Owner Case”. The Supreme Court explained its understanding of the Committee’s ruling in the judgement of the Grand Chamber reported in Rt. 2008 page 1764 at paragraphs 90 and 91. The Supreme Court emphasised that the requirement of a reason is a necessary safeguard for ensuring a *substantive* review, and also makes it possible to control whether there has been a substantive review of the appeal. The case concerned the procedure of leave to appeal, but the considerations must apply equally strongly to appeal proceedings. The Human Rights Committee has also stated that where domestic law provides for several instances of appeal, judgements that are subject to appeal must be in writing and duly reasoned in order that the right to appeal

shall be effectively exercised. Counsel has referred to the Committee's General Comment No. 32 (2007) at paragraphs 45 to 49 and to statements in individual complaints, e.g. *Morrison v. Jamaica* (case no. 663/1995) at paragraph 8.5.

(12) A has entered the following plea:

“The Court of Appeal’s judgement and the appeal proceedings shall be set aside.”

(13) The Public Prosecution’s principal arguments are as follows:

(14) 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.

(15) An obligation for the jury to give reasons for its decision cannot be derived from ICCPR Article 14 § 5 or from the judgment of the Grand Chamber of the Supreme Court in the case reported in Rt 2008 page 1764 on the requirement to give reasons when determining whether to grant leave to appeal. In applications for leave to appeal, a reason can be necessary in order to demonstrate that there has been a substantive review. Where the Court of Appeal sits with a jury and hears an appeal, there is a retrial with immediate submission of evidence, and it therefore follows from the procedure in the Criminal Procedure Act that there is a substantive review of the District Court’s judgment.

(16) 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. In this regard, it is irrelevant whether there is a conviction or an acquittal at first instance.

(17) Nor can an obligation for the jury to give reasons for its decision 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 A’s case. Under these circumstances, the Supreme Court should be cautious in finding that the Convention has been violated.

(18) The Public Prosecution entered the following plea:

“The appeal shall be dismissed.

(19) I have concluded that the appeal cannot succeed.

(20) In the judgment in case HR-2009-01192-P (case no 2009/397) which has been pronounced today, the Supreme Court has held that it is not possible to derive from the practice of the Convention organs that a criminal conviction based on an unreasoned affirmative answer from the jury is incompatible with the rights contained in ECHR

Article 6 § 1, ICCPR Article 14 §1 or ICCPR Article 14 § 5, in so far as the latter provision contains a requirement that reasons shall be given in order for the appellate court – the Supreme Court – to be able to review the judgment. The decisive issue is whether the purpose behind the requirement to give a reason is sufficiently satisfied in some other way. The Supreme Court has also found that 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. I revert to the question whether the procedure has been followed in A's case, but deal first with A's allegation that the lack of reasons for a jury verdict violates ICCPR Article 14§ 5 because the lack of a reason does not ensure that the Court of Appeal's review has been substantive.

(21) ICCPR Article 14 § 5 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.”

(22) The requirement in ICCPR Article 14 § 5 that judgements must be duly reasoned in order to ensure a substantive review was the subject of the Human Rights Commission's ruling of 17 July 2008 (Communication no. 1542/2007) in the so-called “Restaurant Owner Case”. The case concerned a Norwegian restaurant owner who was convicted by the District Court. His application for leave to appeal to the Court of Appeal was refused with no other reason than that it was obvious that the appeal would not succeed, see the Criminal Procedure Act section 321 subsection 2. The Human Rights Committee found that Norway had violated ICCPR Article 14 § 5. The Committee recalled that Article 14 § 5 imposes a duty on states to undertake a substantive review. The lack of a substantive reason as to why it was clear that the appeal would not succeed put into question the existence of a substantive review of the conviction and the sentence. The ruling and its consequences for the Court of Appeal's determination of applications for leave to appeal are dealt with in the judgment reported in Rt 2008 page 1764. At paragraphs 90 and 91, the Supreme Court recalls that a reason is designed both to ensure that the decision is reached following a thorough and sound assessment and to enable the defendant and any superior appellate body to control whether there has been a substantive review of the appeal.

(23) A has alleged that the Restaurant Owner Case is substantially similar to his case. In my view, the Restaurant Owner Case is not transferable to cases where the appeal has been referred for a hearing. Where an appeal hearing includes the assessment of evidence in

relation to the question of guilt, there is a full retrial before the Court of Appeal, see the Criminal Procedure Act section 331. The judgment of the Court of Appeal shall be based solely on the facts and the evidence that is put before it, and before the jury gives its verdict only the conclusion of the District Court's judgment that has been appealed shall, as a general rule, be read aloud, see section 362 subsection 3. The procedure in the Criminal Procedure Act thus ensures that there is a substantive review as required by ICCPR Article 14 § 5.

- (24) A has also alleged that there is a violation of ICCPR Article 14 § 5 because in the Norwegian jury system it is impossible for a defendant to control whether the jury has properly assessed his submissions, whether it has correctly applied the standard of proof and whether it has based its decision on facts which contradict the obvious or are otherwise clearly and indisputably wrong. In my view, this goes to the question whether the Norwegian jury system contains mechanisms to safeguard the need for verifiability. The Supreme Court has discussed this question in HR-2009-01192-P (case no. 2009/397) and has concluded that it does, see in particular paragraphs 69-78.
- (25) I will now deal with the merits of A's case.
- (26) The court record from the Court of Appeal shows that the appeal proceedings lasted for four days. Nine witnesses testified, the Court saw a video recording of the judicial examination of one of the victims and some other evidence was submitted. Otherwise, the appeal proceedings were conducted in accordance with the legal rules described in the judgment pronounced earlier today in HR-2009-01192-P (case no 2009/397). The questions to the jury described the offences contained in the indictment and the facts which the jury was required to decide whether A was guilty of. It is true that several of these questions were joined together with "and/or", so that the jury's affirmative answer did not give any information about which he was found guilty of. As described in HR-2009-01192-P (case no 2009/397), under the Norwegian system, this is determined in connection with sentencing, and this was done in A's case. The reasons given for the sentence contain a detailed description of the course of events on which the sentence is based.
- (27) Therefore I cannot find any indication that the Court of Appeal failed to undertake a substantive review of the District Court's judgment, or that the purposes behind the requirement to give a reason have not been satisfactorily safeguarded in the Court of Appeal's hearing of A's appeal. There has therefore been no violation of ECHR or ICCPR.

(28) I vote for the following

JUDGEMENT

Appeal dismissed.

(29) Mrs Justice **Gjølstad**: I agree on the whole and with the result of the first voting Justice.

(30) Mr Justice **Lund**: Likewise.

(31) Mrs Justice **Gussgard**: Likewise

(32) Mr Justice **Tjomsland**: Likewise.

(33) Mrs Justice **Coward**: Likewise

(34) Mr Justice **Stang Lund**: Likewise.

(35) Mrs Justice **Bruzeli**: Likewise

(36) Mr Justice **Skoghøy**: Likewise

(37) Mr Justice **Utgård**: Likewise.

(38) Mrs Justice **Stabel**: Likewise

(39) Mrs Justice **Øie**: Likewise

(40) Mr Justice **Tønder**: Likewise

(41) Mr Justice **Endresen**: Likewise.

(42) Mr Justice **Bårdsen**: Likewise.

(43) Kst Justice **Falkanger**: Likewise

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

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

JUDGEMENT

Appeal dismissed.