THE SUPREME COURT OF NORWAY

On 15 September 2017, the Supreme Court gave judgment in

HR-2017-1776-A, (case no. 2017/674), criminal case, appeal against judgment,

A	(Counsel Arild Dyngeland)
v.	
The public prosecution authority	(Public prosecutor Helene Bærug Hansen)

O P I N I O N :

(1) Justice **Arntzen:** The case concerns sentencing for acts of gross corruption committed abroad.

(2) In March 2004, the fertiliser business of Norsk Hydro ASA was spun off as a separate company. The new company, Yara International ASA (Yara), has its registered office in Oslo. The company is listed on the Oslo Stock Exchange, and the Norwegian state holds 36.2 percent of the shares.

(3) A was Yara's chief legal officer from the start and until he retired in the summer of 2008.

(4) On 15 January 2014, A and three other members of the group management were indicted by Økokrim[1] for two acts of active gross corruption pursuant to the Penal Code 1902 section 276a, cf. section 276b. One of the acts concerned bribery of USD 4.5 million to a public official in Libya, while the other act concerned bribery of USD 3 million to a public official in India.

[1] Translator's remark: Norwegian national authority for investigation and prosecution of economic and environmental crime.

(5) Oslo District Court gave judgment on 7 July 2015. A was convicted as charged and sentenced to two years and six months of imprisonment.

(6) The other defendants were also sentenced – one of them to three years of imprisonment and the two others to two years of imprisonment.

(7) Both the defendants and the prosecution appealed to Borgarting Court of Appeal, which on 17 January 2017 gave this judgment against A:

> **"A, born 3 August 1945, is convicted for violation of the Penal Code (1902) section 276a, cf. section 276b and sentenced to 7 – seven – years of imprisonment.**
>
> **Credit for time in custody is 3 – three – days."**

(8) The other defendants were acquitted.

(9) The big gap in the sentencing between the district court and the court of appeal can mainly be ascribed to different views on the relevance of the bribery taking place towards officials in countries with widespread corruption. The district court also emphasised that the punishment for this type of corruption should be subject to a gradual increase with time.

(10) A appealed against the court of appeal's procedure, application of the law and sentence. The Supreme Court's Appeal Selection Committee has granted leave to appeal against the sentence based on the facts relied on by the court of appeal.

(11) *My view on the case*

(12) The case is heard in accordance with the provisions in the Penal Code 1902, see HR-2016-1834-A para 15.

(13) Punishment must be imposed for two acts of active gross bribery or complicity in such bribery. "Active bribery" is to give or offer someone an undue advantage, as opposed to passive bribery, which is to demand, receive or accept an offer of such an advantage.

(14) The bribery that took place in Libya concerns an agreement on transfer of an amount equal to NOK 27 million according to currency rates applicable at the time, of which one third was in fact paid. This circumstance is described as follows in item a of the indictment:

> **"During the period from 2004 to 2009, Yara negotiated with the Libyan state-owned oil company National Oil Corporation (NOC) regarding a joint venture for fertiliser production in Libya. Once, probably early in 2007, A entered into an agreement, on behalf of Yara, to pay USD 4.5 million or more to B, the son of C. C was at the time the de facto oil minister and the chair of the board of NOC. The agreement was related to Yara's negotiations with NOC and C's role there.**
>
> **Parts of the agreed amount, USD 1.5 million, were transferred to an account in Switzerland managed by B. This took place in the following manner: The Swiss company Nitrochem Distribution AG (Nitrochem) was asked to prepay the amount for Yara, which Nitrochem did by transferring USD 1.5 million to the agreed account on 29 March 2007. Yara then reimbursed Nitrochem via Yara's partially owned company in Switzerland, Balderton Fertilizer SA (Balderton). The reimbursement was concealed by excess invoicing of several ordinary ammonia deliveries from Nitrochem**

to Balderton, from October 2007 to May 2008. The relevant ammonia deliveries were resold from Balderton to Yara Switzerland SA (Yara Switzerland), at a price also covering the excess price Balderton had paid for the raw material. Thus, it was in fact Yara Switzerland that covered the payment to B.

The payment was made simultaneously with Yara and NOC's final negotiations regarding the 'Heads of Agreement' (HoA), which was signed in April 2007."

(15) The conviction is based on the fact that A, when entering into the agreement with B on future payments of a total of USD 4.5 million, in fact offered his father, C, an undue advantage. The advantage was offered in connection with C's post as the chair of the board in the state-owned Libyan oil company NOC. At the time, NOC functioned as Libya's ministry of oil and energy after the then leader Muammar al-Gaddafi had "cancelled" the Ministry of Oil and Energy. Through the payment of USD 1.5 million to his son, C received an undue advantage.

(16) The bribery that took place in India concerns an agreement regarding a transfer of an amount equal to NOK 18 million according to currency rates applicable at the time, of which a third in fact was paid. This circumstance is described as follows in item b of the indictment:

"During the period from December 2006 to the spring of 2008, Yara International ASA (Yara) negotiated with Krishak Bharati Cooperative Limited (KRIBHCO) regarding a joint venture in the fertiliser industry in India. The Indian state owned 67 percent of KRIBHCO, an administrative subunit of the Ministry of Chemicals & Fertilizers.

In April 2007, A and D offered, on behalf of Yara, to enter into an agreement with E, the son of F. F was then Additional Secretary and Financial Adviser in the Ministry of Chemicals & Fertilizers and a board member of KRIBHCO on behalf of the Ministry.

The offer made to E was linked to F's position.

The Representative Engagement Letter presented to E involved, among other things, a lump sum payment of USD 250,000 as well as an offer, on specific terms, to receive USD 0.50 per metric tonne of all fertiliser products that Yara would sell in India. A condition for the duration of the agreement was that the agreement between Yara and Kribcho was concluded. In a subsequent draft agreement from Yara, the lump sum was replaced by an amount of USD 3 million, which was to be paid by USD 1 million each year from 1 January 2007 until 31 December 2009.

On 16 October 2007, Yara paid USD 1 million based on an invoice sent by E from the Libyan company CYC s.a.r.l. The amount was instead, and upon the request of E, transferred from Yara to an account in Hong Kong belonging to the company Krystal Holdings & Investments Limited (British Virgin Islands), a company in the names of the spouses of F and E."

(17) The conviction is based on the fact that A, when entering into the agreement with E on future payments of a total of USD 3 million, in fact offered the father, F, an undue advantage. The advantage was offered in connection with F's position as Additional Secretary and Financial Advisor in the Indian Ministry of Chemicals & Fertilizers and his post as chair of the board in the cooperative Krishak Bharati Cooperative Limited (Kribhco). Through the payment of USD 1 million to his son, F received an undue advantage.

(18) The case concerns cross-border corruption, and a central issue is whether the sentence should be *reduced* because the bribery took place towards public officials in countries with widespread corruption.

(19) In the summer of 2003, the anti-corruption provisions in sections 276a and 276b, which are continued in the Penal Code 2005 sections 387 and 388, were added to the Penal Code 1902 chapter 26 regarding fraud, breach of trust and corruption. Previously, corruption was regarded as a separate category of breach of trust ("breach of trust by corruption") under sections 275 and 276 of the Penal Code. The amendment is based on an opinion by the Criminal Law Committee in the Official Norwegian Report NOU 2002:22. It is set forth in the mandate that the work on new anti-corruption provisions was largely an effect of the international cooperation in which Norway has been involved in this field. The mandate sets forth the following:

> **"Corruption is often hard to investigate, especially across the borders. International cooperation in the form of coordinated criminal legislation and mutual legal assistance is therefore important in the fight against corruption. Through its participation in for instance the European Council and the OECD, Norway has participated in the preparation of and has committed to comply with international anti-corruption regulations."**

(20) The European Council's Criminal Law Convention on Corruption of 4 November 1998 was ratified by Norway on 29 August 2003. Pursuant to the Convention's Article 5, each state shall establish as criminal offenses the active and passive bribery of public officials of another state. The convention also includes bribery in the private sector, see Articles 7 and 8. Pursuant to Article 19, each state "shall provide effective, proportionate and dissuasive sanctions and measures, including penalties" for such offences.

(21) OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 was ratified by Norway on 4 December 1998. Pursuant to the Convention, each state shall establish as a criminal offence the active corruption and bribery of foreign public officials, see Article 1. Pursuant to the sanctions provision in Article 3, the penalties shall not only be "effective, proportionate and dissuasive", but also "*comparable* to that applicable to the bribery of the Party's own public officials" (italics added). As an effect of this convention, corruption committed towards, among others, foreign public officials, became a criminal offence in 1999 through the adding of subsection 2 to section 128 of the Penal Code.

(22) Norway also participated in the preparation of the UN Convention against Corruption of 31 October 2003, ratified on 9 June 2006.

(23) The follow-up of international cooperation against corruption is a central part of the preparatory works of the new penal provisions on corruption. For instance, in Proposition to the Odelsting no. 78 (2002-2003) chapter 1 regarding the main content of the Proposition, the overall concerns are described as follows:

> **"International cooperation is a condition for efficient combat against corruption, often taking place cross-border. In recent years, several interstate organisations have put a great deal of work in developing conventions and other instruments for combating corruption and its adverse effects.**

> **Corruption is a threat to the rule of law, to democracy, to human rights and to social justice, and may also prevent economic growth and distort competition. Therefore, Norwegian authorities prioritise active participation in international efforts against corruption. It is also essential to secure efficient instruments to prevent corruption on a national level."**

(24) The Parliament's Standing Committee on Justice agreed that for these reasons it was "important to combat corruption efficiently, both at national and international level", see Innst. O.[2] no. 105 (2002-2003) chapter 1. In continuation of this, the committee stated the following regarding the compliance with Norway's international obligations:

> **"Interstate cooperation and measures to combat corruption are highly prioritised on an international level. The Committee therefore requests that Norway comply with its obligations on anti-corruption measures pursuant to conventions entered into with the OECD, the European Council and the UN. In the Committee's view, it is important that we, at national level, have rules that clearly define punishable corruption. The Committee's wish is for Norway to be a pioneer in the fight against corruption and that our legislation in this field may create an international standard.**

(25) Thus far, I note that the new anti-corruption legislation was not only aimed at maintaining national interests. A central purpose of combating cross-border corruption was to contribute to social and economic development also in other countries. This perspective is followed up in Report to the Storting no. 35 (2003-2004) "Common fight against poverty", where the following is stated regarding anti-corruption work in chapter 3.8:

> **"It follows from thoughts on political contexts and from Norwegian involvement and obligations in development policy, that Norway at all times has an active anti-corruption policy. Strict legislation and firm enforcement are necessary to reduce the risk of Norwegian players, consciously or unconsciously, contributing to harming public finances and political culture in other countries."**

(26) Nothing in the preparatory works suggests that the punishment for corruption should be reduced when committed towards a public official in a country with widespread corruption. The fact that the assessment of impropriety in the question of guilt may depend on the business or administration culture in the various countries – I refer in particular to the discussion of "facilitation payments" in Proposition to the Odelsting no. 78 (2002-2003) page 35-36 – does not change this. Once a criminal offence is established, the purpose of the law indicates that otherwise similar cases must be assessed equally. In my view, relativisation of the protection under criminal law depending on the country affected by the corruption finds no support in sources of law.

(27) I will now turn to reviewing the sentencing aspects in the case at hand compared to the Supreme Court's case law with regard to the Penal Code 1902 section 276b, cf. section 276a.

(28) In 2003, the maximum sentence for gross corruption was increased from six years to ten years of imprisonment. The corruption acts for which A is convicted must be assessed as two different acts of corruption within the meaning of the Penal Code section 62 subsection 1. The maximum sentence is thus doubled. The provision is also

[2] Translator's remark: Recommendation to the Odelsting

a guideline for the measurement of the joint custodial sentence within the extended sentencing range, see the Supreme Court judgment in Rt-2008-1473 para 33.

(29) As pointed out in the Supreme Court judgment in Rt-2011-477 para 23 and HR-2016-1834-A para 27, the concerns for individual and general deterrence may vary from case to case. The concerns for general deterrence, however, are essential in the sentencing for both active and passive bribery. It concerns a form of "mutual" economic crime that may be hard to disclose – most of all in countries with a widespread corruption culture. In addition, such crime often involves substantial economic values.

(30) Similar to the Criminal Law Committee, the Ministry held in Proposition to the Odelsting no. 78 (2002-2003) chapter 7.3.2 that "gross acts of corruption may appear more punishable than other gross crimes against property" This is illustrated by the Supreme Court judgment in Rt-2012-243 where the sentencing level for passive bribery of NOK 1.5 million was determined to be "in excess of three years of imprisonment" (para 43), while the sentence for breach of trust involving more than NOK 8 million was stated to be "between two years and six months and three years" of imprisonment (para 47).

(31) The decision closest to the circumstances of our case in terms of its scope is the sentencing of one of the convicted persons in the Supreme Court judgment HR-2016-1834-A. A sales manager in a private company had been complicit in active gross bribery towards the management in a wholly owned municipal company (Unibuss). With reference to the fact that the tasks of the public authorities reach longer than the exercise of public authority in the traditional sense, the offence was judged under the stricter norm applicable to bribery of public officials, see para 34. The sales manager was regarded as "a small piece in a large, corrupt system", although he "for several years [was] a central person in the corruption that took place in Norway", see para 54. The Supreme Court took as a starting point that involvement in payments of almost NOK 7.4 million would lead to a prison sentence of around five years. The convicted person himself had received in excess of NOK 242,000 in personal gain. For the purpose of the sentencing, it was taken into account that in excess of NOK 2.2 million concerned payments made before the new anti-corruption provisions were implemented, and which, consequently, were judged under a "somewhat less strict" norm on gross breach of trust for the purpose of corruption.

(32) Against this background, I will now turn to reviewing the act of bribery in Libya.

(33) The bribery was committed towards a high-ranking public official. I repeat that C was the chair of the board of the state-owned oil company NOC, which according to the court of appeal "undoubtedly" functioned as Libya's ministry of oil and energy at the time. The very fact that the bribery was towards an official of such a high rank – in practice on a minister level – makes the offense very serious.

(34) On his part, A was the chief legal officer and member of Yara's group management. He thus held a prominent position in the company and played a central part in the planning and completion of the act of corruption. The court of appeal, however, did not find it proved that he, on his own initiative, decided to enter into agreements to pay bribes. But by virtue of this position, he could have refused to be involved in the criminal acts without risking that this would have negative consequences for his

position. As opposed to the convicted sales manager in HR-2016-1834-A, the court of appeal found that A was not a "small piece" in a large, corrupt system. It was he who was in contact with B and prepared the improper "consultancy agreement". It was also he who decided that the agreement was to be entered into orally and who took the initiative to pay the first instalment of USD 1.5 million through an external, foreign company. The procedure was chosen to keep the relationship with B and his father concealed. This shows that the offence was well planned with a firm intent to carry out the acts of corruption.

(35) Furthermore, when determining the sentence, it is essential that it concerns such a high amount. The agreement concerned a transfer of in total NOK 27 million. Since an act of corruption is completed the moment an *offer* is made of an undue advantage, it is of little relevance that the amount that was actually paid was limited to NOK 9 million. Also, an offer of future payments creates commitments and contributes to the "palm greasing" of which the court of appeal has found proof. The fact that the further instalments were stopped can also not be ascribed to A, who at that time had retired and left the company.

(36) Consequently, I find that the Libya matter, considered in isolation, qualifies for a sentence of around six years of imprisonment. It concerns a much higher amount than in HR-2016-1834-A, and both A and C had far more prominent positions than those involved in that case. In our case, there is no personal gain, but the entire offence must, in turn, be assessed in accordance with the somewhat stricter norm that was established in the amendment in 2003.

(37) I will now turn to reviewing the corruption act in India.

(38) The corruption was committed towards a central public official. As I have already mentioned, F was a secretary and financial adviser for the Indian Ministry of Chemicals & Fertilizers. He was also a government-appointed board member in Kribhco, where the Indian state had a substantial ownership. According to the court of appeal, the other board members listened "extra carefully" to board members appointed by the government.

(39) The court of appeal held that A was the "operational player" on Yara's side. It was he who negotiated with E, F's son, the terms of the "assignment agreement". I agree with the court of appeal that this bribery also appears to be "well planned", which amplifies the gravity of the offence.

(40) Furthermore, the bribery concerns a substantial amount equal to NOK 18 million distributed over three years. After F went to a different company in the summer of 2007, the CEO of Yara decided to terminate the agreement with the son. The fact that the remaining instalments were not paid may, against this background, not be ascribed to A. Later, A ensured that USD 1 million was paid in final settlement for assistance provided. The amount was transferred to a company on the British Virgin Islands, owned by a trust with the spouses of F and E as beneficiaries.

(41) Consequently, I find that the India matter, considered in isolation, qualifies for a sentence of around five years of imprisonment. Compared to HR-2016-1834-A it concerns a much higher amount. On the other hand, A did not receive any personal gain or advantage.

(42) The defence counsel has contended that neither of the two acts of bribery have had any provable negative consequences or adverse effects. The negotiations in Libya had developed solely to the advantage of NOC despite the bribery, while the cooperation agreement between Yara and Kribhco was terminated in the summer of 2008. The underlying cooperation agreements on production of Yara's fertiliser was also of potentially great social benefit to both Libya and India.

(43) I find no reason to attach much importance to these aspects as mitigating. The purpose of offering and paying bribes to C in Libya and to F in India was to secure their goodwill – and thus strengthen Yara's position with respect to the possibility of realising the cooperation projects in question. As set out in HR-2016-1834-A para 38, it is the *risk* of damage that is decisive under the relevant anti-corruption provisions, see also the Supreme Court judgments in Rt-2012-243 para 41 and Rt-2010-1624 para 25. This is also related to the fact that the adverse effects of corruption can be hard to measure. The damage is also not limited to the economic effects, but involves more indirect damage, such as loss of trust and reputation. As I have already mentioned, cross-border corruption may also contribute to maintaining a corruption culture in the relevant country with the damaging effects this entails. For instance, there is a risk that the will to invest in countries with widespread corruption is undermined. And naturally, it is of no relevance for the sentencing that the corruption was committed "in the service of a good cause" in the sense that the underlying cooperation agreements could have been of great benefit to the two countries.

(44) The criminal acts were committed in 2007, but no delay has been documented during the investigation or in the courts. The time lapsed can thus not be given weight in the sentencing, see the Supreme Court judgment in Rt-2012-243 para 50.

(45) The court of appeal fixed a sentence of seven years of imprisonment for the two acts of bribery. The sentence was based on the total amount of the acts of bribery, like in HR-2016-1834-A, where the acts of bribery had affected the same company. Our case, however, concerns two clearly separated criminal acts committed at various points in time where persons unrelated to each other received the bribes. Pursuant to the Penal Code section 62, as mentioned, individual assessments must be made of the sentence level for each offence before a total sentence is fixed. In view my, such an assessment implies a prison sentence in the range of eight to nine years, see Matningsdal, Commentary on the Penal Code 2005, pages 752 and 753, with reference to sentencing practice in connection with conviction for several offences (accumulation of offences).

(46) When I nevertheless find that the appeal should be dismissed, it is because the prosecution did not demand a stricter sentence than the one passed by the court of appeal, and because the Supreme Court did not signal a potential increase of the sentence.

(47) I vote for this

J U D G M E N T :

The appeal is dismissed.

(48) Justice **Kallerud:** I agree with the justice delivering the leading opinion in all material aspects and with her conclusion.

(49) Justice **Bårdsen:** Likewise.

(50) Justice **Bull:** Likewise.

(51) Justice **Matningsdal:** Likewise.

(52) Following the vote, the Supreme Court gave this

J U D G M E N T :

The appeal is dismissed.