THE SUPREME COURT OF NORWAY

On 28 September 2017, the Supreme Court gave judgment in

HR-2017-1840-A, (case no. 2017/867), criminal case, appeal against judgment

A (Counsel Marius O. Dietrichson)

v.

The public prosecution authority (Public prosecutor Nina M. Prebe)

V O T I N G :

(1) Justice **Bergsjø:** The case concerns a contact ban with electronic monitoring – a so-called reverse violence alarm.

(2) A and B have been a couple, and in periods they also lived together. The relationship between them was turbulent, and on 1 February 2013, a restraining order was imposed on A. By Follo District Court's judgment of 6 June 2013, he was convicted for bodily harm against B's brother-in-law under especially aggravating circumstances. The district court concluded that A had stabbed a knife with a 23 cm long blade halfway into the stomach of the brother-in-law. The conviction also included two instances of violation of the restraining order. Furthermore, by Heggen og Frøland District Court's judgment of 5 September 2014, he was convicted for, among other things, bodily harm against B. The court found proved that A had hit and kicked her in the head and also taken a stranglehold on her throat.

(3) The case at hand was initiated on 24 April 2015 when the Regional Public Prosecution Office in Oslo issued an indictment against A. Item I concerned violation of the Penal Code 1902 section 132 a subsection 1 a, see subsection 2, see subsection 4 first penal option regarding obstruction of the administration of justice. The grounds for indictment set out the following:

> **"On Friday 22 August 2014 at 6.09 p.m. in -----road 0 in X, he showed up at B's house. He went towards her with a hammer held up high saying something like 'I'll crush your**

scull so you won't be able to say anything on Thursday'. B is the aggrieved party in a violence case where he is the defendant and where the main hearing was scheduled to Thursday 28 August 2014."

(4) Item III of the indictment concerned two cases of threats with a knife against B, see the Penal Code 1902 section 227, while item IV concerned a total of 23 instances of violation of the restraining order towards her, see the Penal Code 1902 section 342. By Follo District Court's judgment of 25 September 2015, he was convicted under items I, III and IV, but acquitted of two of the instances of violation of the restraining order. The punishment was imprisonment for one year and three months, as well as a contact ban with regard to B applicable for five years.

(5) The district court concluded that it was disproportionate to impose a contact ban with electronic monitoring. However, A was expressly warned that another violation of the restraining order "most likely" would entail the imposition of such a ban.

(6) On 14 July 2016, the Commissioner of Police District East issued a new indictment against A. Item I concerned threats against a friend of B's son, see the Penal Code 2005 section 263, item II included four instances of violation of the restraining order towards B, see the Penal Code 2005 section 168, while item III concerned attempted violation of the restraining order. By Follo District Court's judgment of 8 December 2016, A was convicted as charged. The district court sentenced him to imprisonment of 77 days, which was regarded as served in custody. A contact ban with electronic monitoring was also imposed on A, thereby ordering him to stay outside a specific exclusion zone.

(7) A appealed both judgments to Borgarting Court of Appeal. The appeal against the judgment of 25 September 2015 concerned the assessment of evidence with regard to the question of guilt in the conviction for violation of the Penal Code 1902 sections 132 a and 227, the sentencing and the awarding of damages. The entire appeal was referred to hearing. A's appeal against the judgment of 8 December 2016 concerned the assessment of evidence with regard to the question of guilt in one of the indictment items and the sentencing. Only the appeal against the sentencing was referred to hearing.

(8) The court of appeal scheduled a joint hearing of the two cases, and gave judgment on 28 March 2017 concluding as follows:

"1. A, born 00.00.1961, is convicted for violation of the Penal Code 1902 section 132 a and the Penal Code 1902 section 227 first penal option, and for the offences finally decided by Follo District Court's judgments of 25 September 2015 and 8 December 2016, to imprisonment of 1 – one – year, already served in custody.

2. A is ordered not to contact B for 4 – four – years. The contact ban also applies to the address -------road 0, 0000 Y.

3. A is ordered, subject to electronic monitoring and for 1 – one – year, to stay outside of map coordinates 32W 599073 6638817, 32W 647524 6642475, 32W 655298 6572846 and 32W 595693 6565358 in accordance with the coordinates system Euref89.

4. A is ordered to pay damages for economic loss in the amount of 5 650 – fivethousandsixhundredandfifty – and damages for non-economic loss in the

amount of NOK 30 000 – thirtythousand – within two weeks from the serving of this judgment.

5. Costs are not awarded."

(9) The exclusion zone stated in item 3 of the judgment's conclusion reads as follows in the judgment:

> **"The exclusion zone constitutes a square from a north-western corner of the island Skilpadda outside of Bekkelaget in Oslo, via a south-western corner outside of Hankø, via a straight line east almost to the Swedish border, and then up to an area north-east of Bjørkelangen, and constitutes approximately 3 900 square kilometres."**

(10) This implies that the zone covers most of Østfold county and parts of Akershus county.

(11) A has appealed the sanctioning in the form of electronic monitoring to the Supreme Court. The Supreme Court's Appeals Selection Committee granted leave to appeal by its decision of 12 July 2017.

(12) *My view on the case*

(13) As mentioned, the appeal concerns the imposition of a contact ban with electronic monitoring for a period of one year. The defence counsel has asserted that the monitoring in its current form is not sufficiently warranted by law. He has also argued that the requirement of necessity is not met and that the intervention under any circumstance is disproportionate. Before I consider these issues, I find it appropriate to account for the *arrangement with electronic monitoring* and the *consequences* it has for the convicted person.

(14) Provisions on contact ban in their current form were included in the Penal Code 1902 section 33 by the Act of 20 May 2005 no. 28, but initially without allowing for electronic monitoring. A contact ban is a loss of rights that is part of the sanctioning. It means that the person having committed a criminal act may, on certain conditions, be ordered to stay away from specific areas and be prohibited from pursuing, visiting or otherwise contacting another person. By the Act of 19 June 2009 no. 75, a new subsection 5 was added to section 33, which allowed the court to decide that the person against whom the contact ban was made should be subjected to electronic monitoring to secure compliance with the ban. The amendment did not enter into force until 1 February 2013. The provisions on electronic monitoring were included unamended in the Penal Code 2005 section 57 subsection 5 at the entry into force of the Act, see Act of 19 June 2015 no. 65.

(15) The monitoring entails that the convicted person must wear an electronic ankle monitor – a so-called reverse violence alarm. The alarm is triggered if the convicted person moves into the exclusion zone. The arrangement was introduced as part of the work on protection of persons subjected to violence or threats by a known perpetrator, see Proposition to the Odelsting no. 25 (2008-2009) page 6. On page 8 of the Proposition, it is stated that the goal was to move the burden of dealing with electronic monitoring from the person that is threatened to the person that threatens or uses violence. In line with this, the Parliamentary Committee states in Recommendation to the Odelsting no. 68 (2008-

2009) on page 5 that the responsibility, through this amendment, is "placed where it belongs – with the offender". I refer to the Supreme Court judgment HR-2016-783-A paras 16-17, where the justice delivering the leading opinion gives an account of the concerns behind the reform.

(16) However, the technical solutions selected entail certain challenges. The alarm is triggered not only if the convicted person moves into the exclusion zone, but also if the battery is empty or the convicted person is present in an area without mobile coverage for more than 20 minutes. The ankle monitor must be charged for about two hours every day. This takes place by inserting a charging cord into the socket and the ankle monitor, which gives the convicted person limited freedom of movement during the charging.

(17) The technology requires that the convicted person only stay in areas with GPS coverage. In the Police Directorate's circular RPOD-2013-3 item 5 this is stressed and specified as follows:

> **"This entails for instance that the convicted person may not go to the cinema or be in certain shopping centres or parking houses over a longer period of time etc… If the exclusion zones are located in Oslo, the convicted person will not be able to use the metro."**

(18) At the same place in the circular, the Directorate establishes that the convicted person cannot travel "by plane or other means of transportation which implies that the person is without GPS coverage". In item 3, it is stated that the convicted person "may not stay outside of the country during the period the contact ban with electronic monitoring persists". The convicted person must, pursuant to item 4, have access to "suitable housing" and may be ordered to move.

(19) The police authorities have prepared a template implementation plan for electronic monitoring, where the same limitations are included and to a certain extent specified. Here, it is stated that the convicted person cannot be without GPS coverage for more than ten minutes. In the implementation plan prepared for A, it is expressly stated that he is prohibited from being present in areas without GSM and GPS connection, that he cannot stay abroad and that he is prohibited from using planes and helicopters.

(20) The Supreme Court has received a report with the headline "RVA – reverse violence alarm, technical and practical limitations/challenges". The report confirms the limitations and consequences for which I have just accounted. Furthermore, it is stated that the shape of the ankle monitor makes it difficult to use certain types of footwear, such as slalom boots and rubber boots. The prohibition against leaving the country is explained as follows:

> **"The challenge is that the Norwegian police do not have the opportunity to enforce potential non-compliance as long as the convicted person is not in the country. In addition, the police's map solutions only include maps for Norway and Sweden, which makes it troublesome to detect the accurate position of the convicted person. One must then apply a commercial website that provides maps".**

(21) These various limitations in the convicted person's freedom are the basis for the submission regarding *lack of legal basis*, which I will now consider. The defence counsel

has not contested that the very arrangement involving electronic monitoring has sufficient statutory basis in the Penal Code section 57. He has also acknowledged that the provision allows for ordering the convicted person to contribute to maintenance of the equipment, such as charging of the batteries. On the other hand, he has argued that the other extra burdens – the so-called lateral obligations – lack sufficient legal basis. The argumentation has been especially associated with the prohibition against leaving the country, the imposition to be present in areas with mobile coverage and the prohibition against travelling by plane.

(22) In the case at hand, the question whether the requirement for a legal basis is met is related to the scope of a provision on a sanction under criminal law. Anyone obstructing ongoing electronic monitoring may, however, be punished pursuant to the Penal Code section 168 c. It concerns a serious intervention, and the requirement for a legal basis must be applied strictly. As for the contents of the requirement in the fields of criminal law and criminal procedure, I refer to the Supreme Court judgments HR-2016-1458-A para 8 and HR-2016-1833-A paras 14–18, both with further references.

(23) As a starting point, I will apply the wording in section § 57. Subsections 1-5 read as follows:

> **"A ban on making contact may be imposed on any person who has committed a criminal act when there is reason to believe that the said person will otherwise**
> **a) commit a criminal act against another person,**
> **b) pursue another person, or**
> **c) in any other way disturb another person's peace.**
>
> **The ban on making contact may entail that the person subject to the ban is prohibited from**
> **a) being present in specific areas, or**
> **b) pursuing, visiting or in any other way making contact with another person.**
>
> **If there is an imminent risk of such an act as is referred to in subsection 1, the offender may be prohibited from staying in his or her own home.**
>
> **The ban on making contact may be limited subject to specific conditions.**
>
> **If deemed necessary for compliance with the contact ban, the court may decide to impose electronic monitoring on the person subject to the ban during the entire or parts of the period during which the ban applies. Such control may only comprise registration of information that the convicted person is moving in proximity of the aggrieved party and information that the monitoring equipment lacks signals. The convicted person must provide the assistance and follow the instructions given by the police and which are necessary for the monitoring to be effective. The King may give further instructions on the implementation of electronic monitoring, including on processing of personal data in connection with such monitoring."**

(24) Pursuant to subsection 5 first sentence, electronic monitoring can only be imposed when deemed "necessary for compliance with the contact ban". This must be considered in context with subsection 2 providing the contents of the contact ban. The convicted person can be prohibited from "being present in specific areas" or from "pursuing, visiting or otherwise contacting" another person. Thus far, the wording suggests that the purpose of the monitoring is to prevent violations of the contact ban, and that the convicted person's

enjoyment of life is not to be limited in any other way. I cannot see that subsection 5 second sentence changes this starting point.

(25) However, pursuant to the third sentence, the convicted person "must provide the assistance and follow the instructions given by the police and which are necessary for the monitoring to be effective." This wording is so general that it can be deemed to allow for the impositions and limitations for which I have accounted. The question is, nevertheless, what the legislator has meant to warrant.

(26) In my view, the preparatory works are not completely clear. I will first mention the Ministry's consultation document of 22 September 2006. In item 5.2, it is stated that electronic monitoring may be "characterised as a form of confinement". This can be interpreted to mean that the Ministry has been aware of the aspects of the arrangement questioned by the defence counsel.

(27) Proposition to the Odelsting no. 25 (2008–2009) gives a detailed review of the reform. On page 15, the statement of the Director of Public Prosecutions is quoted, arguing that the convicted person is to "be equipped with a transmitter which materially limits the person's freedom of movement and which technically makes it possible to track every move". This too may suggest that the legislator has been aware of the serious burden the convicted person must sustain, apart from having to stay out of the exclusion zone. The Ministry then states on page 16 that electronic monitoring involves a "material intervention". Here, the daily charging of the battery and the convicted person's "obligation to follow the police's orders" are mentioned. Next, it is stated:

> **"The Ministry's proposed amendment of the Penal Code section 33 to allow for electronic monitoring does not entail a further limitation of the freedom of movement. The electronic monitoring will primarily entail that any violation of the contact ban will be registered – provided that the technology functions as intended. To the extent the electronic monitoring is deemed to constitute confinement or a limitation of the freedom of movement beyond what is comprised by the contact ban, this will be a result of the obligations to maintain the technical equipment, including charging of the batteries."**

(28) The review continues on page 17 in the Proposition, where the Ministry states:

> **"The most prominent difference is that persons subject to a contact ban must be able to move freely outside a specific geographic area. This implies among other things that they must be able to leave the country and use domestic flights. Since an electronic ankle monitor like mobile phones must be switched off during the flight, such flights necessitate special agreements between the police and the convicted person."**

(29) On page 21 of the Proposition, it is stated that the control does not involve "any extended warrant for prohibiting a person from being present in specific areas". On the other hand, the comments on page 22 suggest that the Ministry was fully aware that the control requires that the convicted person is present in areas with mobile coverage.

(30) The Ministry mentions the various "lateral obligations" also in the special comments to the Penal Code 1902 section 33 – now section 57 – and to the penal provision, which has now been included in section 168, see pages 36-37. In the comments to section 57, problems are discussed relating to the GPS and GSM coverage. At the same place, the Ministry states that the police may impose "other obligations deemed necessary for the

implementation" on the convicted person. The comments to section 168 (the Penal Code 1902 section 342) mention movements in "places where the signals from the ankle monitor cease" as an example of a situation that may be comprised by the penal provision.

(31) When the wording in section 57 is read in context with these comments to the preparatory works, I find that the law expresses clearly that the convicted person must sustain serious limitations in his or her freedom of movement, also beyond those comprised by the prohibition against moving into a specific area. The convicted person must accept daily battery charging and the limitations the obligation to stay only in areas with mobile coverage gives. On the other hand, based on the legislator's clear arguments in the Proposition, it is hard to conclude that the police may prohibit air travel. When necessary, the police must contribute to making it possible for the convicted person to travel by plane by removing/putting on the ankle monitor upon departure and arrival. The prohibition against leaving the country is also debatable. Such a prohibition may, in any case, not go further than what is necessary for the monitoring to function effectively.

(32) Before I leave the issue of legal basis, I mention that the Supreme Court addressed these issues outside of the appeal in HR-2016-783-A. In para 34, the justice giving the leading opinion accounts for some of the limitations the monitoring entails for the convicted person's enjoyment of life, while the most central comments to the preparatory works are quoted in para 35. He concludes as follows in para 36:

> **"In my view, however, it is necessary to further clarify the scope of the arrangement in the Penal Code section 57 subsection 5."**

(33) Based on this statement, the Police Directorate asked the Ministry of Justice and Police Security in a letter of 6 June 2016 to swiftly initiate regulation work. The Police Directorate has stated in this respect that "no clarifications have been made relating to these problems". I consider it material that the scope of section 57 be clarified by the legislator.

(34) I will then turn to the question whether the intervention in the case at hand is *necessary*. The condition is expressly set out in section 57 subsection 5. About the interpretation, the following is stated in Proposition to the Odelsting no. 25 (2008–2009) page 21:

> **"The conditions for imposing electronic monitoring are thus made somewhat more stringent compared to the proposition in the consultation paper. With this criterion, the courts are nevertheless given much freedom when assessing whether electronic monitoring should be imposed. At the same time, the wording entails that the court must justify its decision to impose electronic monitoring in addition to the contact ban, either with a reference to the parties' history, to statements from the convicted person or to previous violations of the restraining order or the contact ban. The Ministry concludes that if the convicted person has previously violated a restraining order or a contact ban, this shall normally have the consequence that the contact ban is combined with electronic monitoring."**

(35) This does not suggest that the condition is meant to be practiced particularly strictly. The court of appeal has assessed the question of necessity as follows:

> **"The court of appeal has found the necessity assessment difficult. On the one hand, at the time of the court of appeal hearing, one year has passed without information**

emerging that the defendant has contacted the aggrieved party. Furthermore, as accounted for under the sentencing, a substantial number of the violations seem to be a result of B's prior contact.

On the other hand, we are dealing with a very large number of violations, and the defendant was convicted for similar offences in 2013. In this respect, we refer to Proposition to the Odelsting no. 25 (2008-2009) page 21. In the judgment of 2015, it is strongly signaled that that electronic monitoring will be the result if new violations are committed, but the defendant chose nevertheless to violate the restraining order repeatedly as set out in the judgment of 2016."

(36) At present, even more time has passed without A having contacted B. Furthermore, it is stated that he is still often staying at his girlfriend's in S in Nord-Trøndelag. These circumstances may entail that the need to contact B is no longer present. Based on the many and serious violations of the restraining order and the contact ban, I still do not find reason to depart from the court of appeal's assessment after the immediate presentation of evidence.

(37) The final question is whether the intervention in the form of electronic monitoring is *proportionate*. The majority of the court of appeal judges have concluded that a contact ban with electronic monitoring is not a disproportionate sanction, while a minority consisting of one of the lay judges, had a different view.

(38) I support the starting point for the court of appeal's assessment: The disadvantages the ban entails for A must be balanced against the need for protection of B. In addition, I mention that the loss of rights in the form of the contact ban with electronic monitoring must be considered in context with the other elements of the sanction when assessing its proportionality, see the Penal Code section 29 subsection 2 and the Supreme Court judgment in Rt-2005-1020 paras 14–15.

(39) In the previous instances, the assessment of proportionality has primarily been linked to the size of the exclusion zone. The size of the zone must of course be included in the assessment of whether a contact ban with electronic monitoring is proportionate. But the prohibition against being present in a specific area is not necessarily the most burdensome to a convicted person subject to such monitoring. The limitations that are otherwise placed on the convicted person's enjoyment of life, and for which I have accounted under my review of the issue of legal basis, may be of greater importance. These too must be included as weighty aspects in the specific assessment of the proportionality.

(40) The assessment in the case at hand must be based on the fact that A has a permanent residence in the municipality of R, and that he, as mentioned, often stays in S. His closest family members live outside of the exclusion zone, most of them in the same municipality as he. He has not expressed any special needs to visit the exclusion zone. The same applies for the parts of Østfold which are south of the zone, but which in practice are unavailable as the E6 largely lies within the zone. The contact ban is to apply for one year.

(41) The exclusion zone's borders are determined so that the police are allowed 25-30 minutes before the convicted person reaches the aggrieved party. The starting point that the police's response time may thus constitute a basis for the determination, is accepted by the

Supreme Court in HR-2016-783-A, see in particular para 22. But, as mentioned, the zone is very large – it constitutes 3 900 square kilometres and covers almost the whole of Østfold and substantial parts of Akershus. The zone is 2.6 times larger than the one assessed in the Supreme Court judgment in HR-2016-783-A.

(42) Several comments in preparatory works suggest that the legislator has primarily had smaller areas in mind. For instance, the Ministry states in Proposition to the Odelsting no. 25 (2008-2009) page 16 that contact bans "may apply to larger areas such as a municipality or a smaller populated area". Nevertheless, I do not agree that the size of the zone itself makes the intervention disproportionate in the case at hand. The decisive element must be whether the convicted person has a genuine need to move within the zone, for instance if he has work, family or friends there. A has not asserted any such needs. In comparison, the situation in the Supreme Court judgment HR-2016-783-A was that the contact ban made it difficult for the convicted person to have contact with his family.

(43) As mentioned, the electronic monitoring also entails other limitations, such as the fact that the convicted person can only be present in areas with mobile coverage. But also here, A has not emphasised any specific circumstances that make this particularly difficult to him. He has health issues that may make it difficult to wear an ankle monitor. If this should turn out to create urgent problems, he may be assisted by the police or health personnel with the removal of the ankle monitor.

(44) These disadvantages must be balanced against B's need for safety. A is convicted for several instances of violence against her and persons surrounding her. She has also received serious threats from A on several occasions, see in particular the offences for which he was sentenced by Follo District Court's judgment of 25 December 2015. These criminal acts do not date far back. He has also, on a number of occasions, violated the restraining order and the contact ban. Thus, he has demonstrated a lack of respect for the impositions he has received and the concerns on which they are based.

(45) It is true that many of the violations were triggered by B making contact first, and that A has not contacted her for more than a year. Nevertheless, I have not found any reason for deviating from the assessment made by the majority of the court of appeal after hearing the statements of parties and witnesses. The need for protection is so weighty that the intervention cannot be deemed disproportionate when considered along with the other elements of the sanction.

(46) Consequently, the appeal is dismissed.

(47) I vote for this

J U D G M E N T :

The appeal is dismissed.

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

(49) Justice **Ringnes:** Likewise.

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

(51) Justice **Tønder:** Likewise.

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

J U D G M E N T :

The appeal is dismissed.