



# THE SUPREME COURT OF NORWAY

On 21 December 2017, the Supreme Court gave judgment in

**HR-2017-2429-A (case no. 2017/1660), criminal case, appeal against judgment**

The public prosecution authority

(Public prosecutor Stein Vale)

v.

A

(Counsel Trygve Staff)

## V O T I N G :

- (1) Justice **Webster**: The case raises the question of whether a foreign national can be punished in Norway for criminal acts that were not criminal in the country in which they were committed, when the acts continued after the foreign national had moved to Norway.
- (2) By Nedre Romerike District Court's judgment of 29 November 2016, A was sentenced to imprisonment of three years for violation of the Penal Code 1902 section 219. The basis for the conviction was that he had been found guilty of repeated and long-term physical and mental abuse against his wife and their children. He was also sentenced to pay compensation for non-economic loss. The offences of which A was convicted by the district court, took place in Yemen during the period 2003-2009 and in Norway in the period 2009-2014.
- (3) A appealed against the verdict and, in the alternative, the sentencing to the court of appeal. By Eidsivating Court of Appeal's judgment of 28 August 2017, A was sentenced to imprisonment of one year and eight months and ordered to pay compensation for non-economic loss. The court of appeal held that he could not be convicted of the part of the abuse that had taken place in Yemen.
- (4) The prosecution authority appealed to the Supreme Court. The appeal concerned the original application of the law during the determination of guilt, in the alternative the procedure and under any circumstance the sentencing. The Supreme Court's Appeals

Selection Committee granted leave to appeal on 8 November 2017. On 30 November 2017, the prosecution authority withdrew the appeal against the procedure and the sentencing, and this part of the appeal was dismissed on 11 December 2017.

- (5) Thus, the only issue before the Supreme Court has been whether A can be convicted in Norway of the acts committed in Yemen.
- (6) *I have concluded* that the appeal must be dismissed.
- (7) The Penal Code 1902 section 12 regulated Norwegian criminal law's jurisdiction at the time the acts were committed. The Penal Code 2005 does not provide a result more advantageous to the convicted person, and the Penal Code 1902 is therefore applicable.
- (8) First, pursuant to section 12 subsection 1, nos. 1 and 2, the law is applicable to "acts committed in the realm" and on "any Norwegian vessel" or "any Norwegian aircraft". The provisions are an expression of Norway's sovereignty over its own territory. Secondly, Norwegian criminal law is applicable to a number of offences committed abroad by a Norwegian citizen and any person domiciled in Norway, see subsection 1 no. 3. Thirdly, a foreign national may in some cases be punished in Norway for acts committed abroad. This concerns, among others, the acts dealt with in the sections listed in subsection 1 no. 4 (a), and cases where the act is punishable also according to the law of the country in which it was committed and the foreign national "is resident in the realm or is staying therein", see no. 4 (b).
- (9) Section 12 subsection 2 regulates in particular the cases "in which the criminality of an act depends or is influenced by any actual or intended effect". In that case, the act must be regarded as "committed also where such effect has occurred or is intended to be produced."
- (10) One of the purposes of the wording of the provision in section 12 is to maintain our obligations under international law to respect the sovereignty of other states. But it also intends to ensure that serious crime is prosecuted, although the offences are not committed by our own citizens or they threaten Norwegian interests, see for instance *Udkast til Almindelig borgerlig Straffelov, del II Motiver* [Draft General Civil Penal Code, part II Motives] page 14 and onwards.
- (11) For a foreign national like A to be eligible for punishment in Norway for acts committed abroad, the clear principle in the law is that the act must be comprised by section 12 subsection 1 no. 4. Section 219 is not among the provisions listed in (a), hence, this provision is not applicable. The prosecutor and the defence counsel agree that the abuse to which A exposed his wife in Yemen is not punishable there, so that section 12 no. 4 (b) does not entail punishment for A in Norway for this part of the abuse. However, the prosecutor has asserted that both section 12 subsection 1 (1), regarding acts committed in the realm, and subsection 2, regarding acts that have had effects in the realm, are applicable.
- (12) I will first consider whether section 12 subsection 1 no. 1 entails punishment for A in Norway for acts he committed in Yemen.

- (13) The wording, "acts committed in the realm" suggests that A cannot be punished in Norway for the part of the family abuse that took place in Yemen. In legal theory, however, it has been assumed that acts that are part of a continuing offence are to be regarded as committed in Norway, although only a few of them have actually been committed here. The prosecution's argument is that the abuse of A's family is a continuing offence that started in Yemen, but ended in Norway. The entire offence must thus be regarded as committed in Norway pursuant to the Penal Code 1902 section 12 subsection 1 no. 1. This view has been advanced in a number of theoretical accounts. As pointed out by Ørnulf Øyen in the article "*Fortsatt forbrytelse*" [Continuing offence] in *Jussens Venner* 2015 page 222, no definitive case law exists for the solution to this issue, but "the general view is nevertheless that in such cases, the entire criminal activity can be prosecuted in Norway". The view is generally not supported by sources of law, and no in-depth analyses exist regarding the conditions that must apply. For instance, the question of whether this also applies when the act is not criminal where it is committed is not addressed.
- (14) However, the solution has also made basis for several rulings by the court of appeal. None of the rulings is based on a comprehensive analysis of the legal basis for this view, and the issue in the case at hand has not been discussed.
- (15) In the case at hand, the court of appeal has assumed that it is a condition that the act for which punishment might be imposed is also criminal in the country where it was committed; hence, there is a requirement for dual criminality when applying the rule on a continuing offence in a case as the one at hand.
- (16) When studying the preparatory works to the Penal Code 1902 section 12, it seems clear that the lawmaker, in 1896, primarily pictured a requirement for dual criminality if foreign nationals were to be convicted in Norway of crimes committed abroad, see *Udkast til Almindelig borgerlig Straffelov, del II Motiver* page 18. In the preparatory works to the Penal Code 2005 section 5, establishing the application of Norwegian criminal law on acts committed abroad, the following is set forth in Proposition to the Odelsting no. 90 (2003-2004) in item 13.5.5.4.2:

**"The Ministry agrees with the Criminal Law Commission and the Nordic Criminal Law Committee that as a main rule, there should be a requirement for dual criminality in order for Norwegian law to apply to acts committed abroad: The act must be criminal under the law of both the country where it was committed and under Norwegian law. This should, as a starting point, be the case irrespective of whether the act is committed by a Norwegian or a foreign national. The concern for predictability is central. This will apply to Norwegian citizens in particular who are long-term or regular residents abroad, and who live by the penal standards applicable at the place of residence. Also the concern for the sovereignty of the country where the act is committed suggests the same."**

- (17) Likewise, in Norwegian Official Report [NOU] 1984: 31 The jurisdiction of Norwegian criminal law, the Criminal Law Commission, Partial report II, item 5.2.6, it has been assumed that a requirement for dual criminality must apply, as it is generally "unreasonable that a foreign national is to be eligible for prosecution in Norway for acts committed abroad and which were not criminal in the country where they were committed". I find that the same concerns apply in the prosecution of continuing offences.

- (18) The concerns that are emphasised in the preparatory works also relate to the requirement for sentencing according to law in the Constitution Article 96 and the prohibition against retroactive laws in Article 97, and stress that one, here, must be loyal to the wording. To A, who was legally free to commit the acts in Yemen, a conviction for these offences can be compared to a new penal provision becoming applicable to acts that were legal when committed. The effect for A is that he can be punished for acts of which he could not predict the criminality, and that is what Articles 96 and 97 of the Constitution are meant to prevent.
- (19) Hence, I find it clear that in the case at hand, and in accordance with section 12 subsection 1 no. 4 (b), dual criminality is required to punish A for the part of the offence that took place in Yemen – also if the abuse is considered to be a continuing offence. However, I will not deliberate on whether there should be a general requirement for dual criminality in all cases concerning the application of Norwegian law to a continuing offence. To me, it is sufficient to establish that a requirement must be made where concerns for legal protection manifest themselves as firmly as they have done in the case at hand.
- (20) I will then turn to the question whether the Penal Code 1902 section 12 subsection 2 may justify that A is punished for the acts committed in Yemen. The prosecutor has contended that the effects of the abuse have occurred in Norway, since A's spouse is currently domiciled here.
- (21) This contention cannot succeed. Subsection 2 is a provision for determining the place where "the criminality depends on or is influenced by any actual or intended effect". In that case, "the act is subject to Norwegian criminal law jurisdiction if such effect has occurred or is intended to be produced' in Norway", see the Supreme Court judgment in Rt-2010-1217 para 17.
- (22) Criminality pursuant to the Penal Code 1902 section 219 is not conditional on or influenced by an "actual or intended effect". Section 12 subsection 2 can thus not make basis for Norwegian criminal law jurisdiction for the part of the abuse that took place in Yemen. However, I will mention that the effects of the abuse in Yemen; that A's wife is particularly vulnerable after having endured the abuse for so many years, may be relevant for the sentencing for the abuse that has taken place in Norway. Since the appeal has been dismissed with respect to the sentencing, I will not address these issues any further.
- (23) Consequently, I have concluded that the appeal must be dismissed.
- (24) I vote for the following

#### J U D G M E N T :

The appeal is dismissed.

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

- (26) Justice **Høgetveit Berg:** Likewise.
- (27) Justice **Arntzen:** Likewise.
- (28) Justice **Endresen:** Likewise.
- (29) Following the voting, the Supreme Court gave this

J U D G M E N T :

The appeal is dismissed.