



# SUPREME COURT OF NORWAY

## J U D G M E N T

Given on 4 March 2019 by the Supreme Court composed of

Justice Hilde Indreberg  
Justice Ragnhild Noer  
Justice Knut H. Kallerud  
Justice Espen Bergh  
Acting Justice Sven-Jørgen Lindsetmo

**HR-2019-440-A (case no. 18-168736STR-HRET)**

Appeal against the judgment of Gulating Court of Appeal of 10 September 2018

A (Counsel Halvard Helle)

v.

B (Counsel Odd-Rune Torstrup)  
C

The Public Prosecution Authority (Counsel Asbjørn Eritsland)

- (1) Acting Justice **Lindsetmo**: The case concerns sentencing and calculation of damages for non-economic loss after serious threats.
- (2) A is the father of B, born 00.00.1997, C, born 00.00.2000 and two younger children.
- (3) On 26 March 2017, A was indicted for abuse of his four children during the period June 2014 to June 2016. The indictment included aiding and abetting in threatening a public official and in making false reports.
- (4) By the judgment of Dalane District Court of 10 May 2017, A was acquitted of the aiding and abetting in threatening a public official and of the making of false reports, but convicted of the abuse of his children. He was sentenced to three years and nine months of imprisonment. He was also ordered not to contact three of his children for a period of five years from the date of a final judgment. In addition, A was ordered to pay damages for

non-economic loss in the amount of NOK 140 000 to each of his son B and his daughter C, and NOK 120 000 and NOK 100 000, respectively, to the two younger children.

- (5) A appealed the entire judgment to the court of appeal.
- (6) By the judgment of Gulating Court of Appeal of 15 December 2017, A was acquitted of gross abuse of his two younger children, after being declared "not guilty" by the jury. He was also discharged from the younger children's claim for damages for non-economic loss. The professional judges also set aside the jury's "guilty" answer with regard to gross abuse of B and C under section 376 c of the Criminal Procedure Act, when the professional judges unanimously concluded that guilt had not been sufficiently proved.
- (7) On 23 February 2018, A was indicted anew for violation of section 264 of the Penal Code, cf. section 263 for serious threats against his daughter C and his son B. As for the daughter, the grounds of indictment read as follows:

"a)

**From early May to mid-May 2016, from Germany, Croatia, Greece and/or from Turkey, he threatened to kill and/or hurt his daughter C, born 00.00.2000, directly or through others.**

**In text and/or audio messages sent to B, he said among other things:**

- **Listen B! Tell your sister, tell her that my father will deliver ... that I will return to Norway because of her ... and then I will show C. Wait and see',**
- **'The man who will protect his honour. You will slaughter her and move on! You will escape to Germany with 80 million people, I will send to you and make all arrangements. You will go to Greece, you hear me? Or else I will not speak to you at all, you are just sitting at home like a bitch while D is fucking your sister and others are fucking your sister. Shame on you!,**
- **I am a dog because I haven't slaughtered her and gone to prison. She must be slaughtered from ear to ear',**
- **'You need to know that I will kill you and your sister during a night with no moonlight if I am returned and the children are taken from me',**
- **'Killing you will be a relief to me',**
- **'I will return to Norway anyway, I will come. If I get hold of you, I will turn you into kebab and go to prison. You hear me? You and your sister! Watch out for me! Both you and your sister. If they return me to Norway now, they will have me back, then I will turn you and your sister into kebab!', and/or similar.**

**In text and/or audio messages sent to B, he said among other things:**

- **'The day will come, your day will come, and then you will say: Let me kiss your shoes, your feet. I hope that you will be humiliated, that you are chewed and spat out and chewed and spat out once more, and then you will say, yes my father is right. Go! You slut you whore, who have humiliated us. I spit on you'."**

- (8) Count a of the indictment regarding threats against C is largely based on audio and text messages sent to B. Count b of the indictment concerns threats against B, involving killing or hurting him, evidenced among other things in the quotes in the last three bullet points under the first part of count a of the indictment.
- (9) On 10 December 2018, Gulating Court of Appeal, composed of three professional judges and four lay judges, concluded the following:

- "1. A, born 00.00.1973, is convicted of two violations of section 264, cf. section 263 of the 2005 Penal Code, cf. 263, cf. section 79 subsection 1 a, and sentenced to one year and eight days of imprisonment. A credit of 506 days is granted for time served in custody.
2. A, born 00.00.1973, is not to contact C for a period of five years.
3. A is to pay damages for non-economic loss in the amount of NOK 100 000 – onehundredthousand – to C within two weeks of the service of the judgment.
4. A is to pay damages for non-economic loss in the amount of NOK 75 000 – seventyfivethousand – to B within 2 – two – weeks of the service of the judgment."

- (10) The sentence of one year and eight months of imprisonment was pronounced with dissenting opinions. The minority consisting of three lay judges, voted for a sentence of one year of imprisonment.
- (11) A has appealed to the Supreme Court against the sentence and against the calculation of damages for non-economic loss. The Supreme Court's Appeals Selection Committee decided on 23 November 2018 to grant leave to appeal, and that that the sentence and the claims for damages were to be reviewed based on the findings of the court of appeal.
- (12) A contends that the court of appeal's grounds entail a violation of Article 96 subsection 1 of the Constitution and the presumption of innocence in Article 6 (2) in the European Convention of Human Rights (ECHR), and that the sentence should therefore be reduced. He also contends, regardless of this, that that the sentence is too strict and that the damages for non-economic loss should be reduced.
- (13) The prosecution authority and counsel for the aggrieved parties contend that the appeal must be dismissed.
- (14) *My view on the case:*
- (15) I will first discuss the contention that the sentence pronounced by the court of appeal is a violation of the presumption of innocence under Article 96 (2) of the Constitution and Article 6 (2) of the ECHR.
- (16) The contention arises from the court of appeal's reference to alleged new death threats, which are not part of the indictment, and from the following statements in the court of appeal's judgment on pages 8 and 10:

**"Both witnesses were confident that C felt that the death threats were real, and they could also confirm C's statement before the court of appeal that she later, on several occasions – especially during the main hearing or the appeal hearing – has received new death threats. C has stated that the defendant is also behind these threats.**

...

**Above, it has been trusted that C on several recent occasions has received death threats from the defendant or from others acting on his behalf that she has perceived to be real, and that have scared her tremendously. C has reported the threats to the police. Status in the cases are unknown to the court of appeal. The defendant cannot, in this case, be punished for the said threats, but the court notes that C has received threats as mentioned. They contribute to shedding light on the threats for which the defendant is now to be punished and confirm the need of a very strict reaction."**

- (17) Relatively extensive case law exists on violation of the presumption of innocence, both from the Supreme Court and the lower instances. As emphasised in the judgment HR-2018-1783-A paragraphs 26 to 28, a natural starting point is the Grand Chamber judgment of the European Court of Human Rights 12 July 2013 *Allen v. UK*. The judgment provides a summary and a clarification of the Court's view on the application of the presumption of innocence in various situations.
- (18) The presumption of innocence has several aspects, and in the case at hand, it is held that the quotes from the court of appeal's judgment implies that the defendant was declared guilty of crimes that are not part of the indictment.
- (19) When the court of appeal gave its judgment, A was indicted for violation of orders not to contact his children, and the new threats referred to in the court of appeal's judgment had been reported. It has been stated that the defendant is currently charged with this offence, but not indicted.
- (20) Hence, it is possible that an indictment will be issued for the alleged new threats, which could also raise questions of dual criminality if the threats are given weight in the sentencing in the case at hand. I mention that the prosecution authority has submitted before the Supreme Court that the alleged new threats cannot be given weight in the sentencing.
- (21) Although the starting point is that the court cannot attach importance to offences that are not part of the indictment, this principle is not absolute. The following is set out in the Supreme Court judgment Rt-2013-287 paragraph 21:
- "The starting point according to Supreme Court case law is that the sentencing must take place within the scope drawn up in the indictment, see Rt-1986-219 and Rt-1990-309 as well as Matningsdal, *Forholdet mellom tiltalebeslutning og dom* (the relationship between indictment and judgment) in the periodical *Jussens Venner* 2002 pages 89-132 on pages 123-128. Admittedly, in ... , it is stated that one may, in the sentencing, emphasise other criminal acts which the court finds proven 'to the extent they shed light on the circumstances concerned in the case at hand'. However, as stressed by Matningsdal in the mentioned article, it must mean that this can only be given weight to the extent it amplifies the gravity of the acts comprised by the indictment."**
- (22) I find that the court of appeal's statement that the new threats "contribute to shedding light on the threats for which the defendant is now to be punished" is rooted in such a view.
- (23) In the sentencing about to take place, I will completely disregard any new threats. It appears to be unclear whether the court of appeal by "trusted" means the general standard of proof in criminal cases, and it is uncertain whether the parties have had a sufficient chance to present their versions of the alleged new threats. And, as mentioned, there is the issue of dual criminality in a possible new case against the defendant with regard to these acts.
- (24) In the case at hand, the Supreme Court will make a full new review of the sentence and give independent grounds for its result. In such a situation, the sentence will not be based on the grounds given by the court of appeal. In any case, after the Supreme Court's hearing, no violation of the presumption of innocence will have taken place. Hence, no compensation will be awarded in the form of a reduced sentence or otherwise.
- (25) I will now turn to the sentence.

- (26) As mentioned, the sentence will be reviewed based on the findings of the court of appeal.
- (27) Regarding the background of the case, the court of appeal writes the following on page 6 et seq. of its judgment:

**"The defendant and his four children came to Norway on 10 June 2014. The defendant and his children have later resided in Norway. The Penal Code is thus applicable for acts committed abroad, see sections 4 and 5 of the Penal Code. Incidentally, the application of Norwegian criminal legislation has not been disputed.**

**The defendant and his children are originally from Syria. The defendant and his family lived and worked in Lebanon before they came to Norway. The defendant's wife and youngest child died in Lebanon. The defendant came to Norway as a resettlement refugee under an agreement between the UN and Norway. The defendant has legal residence in the country on the said basis. He is not a Norwegian citizen.**

...

**The relationship between the defendant and his oldest son B and oldest daughter C gradually deteriorated. This and other circumstances lead to contact with the police and the child welfare service. The background for the increasing conflicts within the family were the demands made to the children's behaviour. The demands were rooted in the defendant's and other family's religious and cultural background. At the same time, it must be assumed that the defendant's demands towards B and C were also motivated by a desire to keep them away from the influence of a local petty crime environment, and for C's part, keep her away from much older men. The child welfare service received notifications regarding the children from the police and others in 2015 and 2016. C became involved with an eight years older man named D. The defendant strongly opposed this, and an extreme tension arose between him and C. On some occasions, she was away from home all night. This is set out for instance in journal notes from February 2016. It appears from the notes that the defendant was furious with C.**

...

**Against this background, it is clear that the defendant, in 2016 at the latest, did not manage to control or dictate his daughter C, which was a large problem to him. Eventually, the environment around the family learned that the defendant had no control over his daughter – that she did not comply satisfactorily with what her religion and culture demanded from her. That intensified the conflict. As mentioned, the police and the child welfare service became involved in the relationship between the defendant and the two oldest children. The court finds no reason to elaborate on details here. It should be mentioned that the defendant had contact with family members from Syria – which were in Lebanon at the time – and that they, too, had opinions on the family situation in Norway."**

- (28) Regarding the relevant threats, the court of appeal writes on page 7 et seq:

**"In May 2016, the defendant acted as described in the new indictment before Gulating Court of Appeal. The defendant thus made a number of threats in May 2016 against his daughter C and his son B. The threats were made from outside of Norway, but the Penal Code is applicable because the defendant was residing in Norway, see sections 4 and 5 of the Penal Code. The threats involved hurting and killing both children. The threats must be read against the background briefly described above. C had, in the defendant's view, dishonoured him and other family members in the worst possible manner. This constitutes the most central cause of the threats. B had also acted in an unacceptable manner, among other things by becoming involved with the police.**

**The threats were made through text and/or audio messages... It is trusted that B and C perceived the threats to be genuine death threats when they were made, and they still**

**do. Reference is made to the statements of C and B confirming this. This is given material weight in the findings of fact. The defendant was – when the threats were made – aware of B and C's extensive contact. He was aware that any threats made against one of the children would rapidly be communicated to the other. The defendant was aware that he threatened to hurt and kill both the aggrieved parties. It can be ruled out that this was a 'normal way of speaking within the family' and meant something other than what the words imply. This is primarily substantiated by the statements of C and B rejecting this. It is also substantiated by the aggrieved parties' perception of the threats as genuine and the fact that they still do. Also, emphasis must be placed on the consequences the threats have had for the aggrieved parties, in particular C. She has been fearing for her life for a long time. She has had, and has, a genuine fear that the defendant or others – such as one of the defendant's brothers – will kill her. This is a serious and genuine fear she has sustained for more than two years. Because of this fear of being killed, C has trouble going out alone. C has injured herself and made attempts to take her own life..."**

- (29) The maximum penalty for serious threats under section 264 of the Penal Code is three years of imprisonment. Our case concerns two criminal offences, which means that the sentence may be doubled, see section 79 subsection 1 (a) of the Penal Code.
- (30) I mention that the maximum penalty for serious threats was somewhat reduced in the 2005 Penal Code without the intention being a reduction of the penalty level. The purpose of the amendment was to adjust the maximum penalty to the actual penalty level, see Proposition to the Odelsting No. 22 (2008–2009) chapters 5.8 and 16.5.
- (31) Supreme Court case law dealing with sentencing for threats of this nature is scarce. The following is stated in Rt-2008-401 paragraph 11:
- "Against this background, I take as a starting point that 15 to 30 days of imprisonment is appropriate for serious threats, but that, depending on the circumstances, a stricter as well as a milder penalty may be imposed. At the lower end of the scale, it may thus be possible to apply community sentence if the circumstances so allow. In particular cases, or if personal conditions so suggest, it must also be possible to impose a suspended sentence."**
- (32) In particularly serious cases, the penalty level will by far exceed the stated starting point. I mention as an example the Supreme Court judgment Rt-2014-745, where the convicted person had threatened to shoot several police officers who had come to search his house, and then run after them armed with a pistol and a sword. The police officers suffered strong psychological strain from the episode. He was sentenced to 10 months of imprisonment.
- (33) In the Supreme Court judgment Rt-2015-788, a sentence was given of one year and six months of imprisonment, of which nine months were suspended, for threats against NAV<sup>1</sup> employees. The convicted person, who was displeased with having his application for social aid rejected, had showed up at the NAV office and fired one shot towards the roof before pointing the pistol at several of the employees. One of them was threatened for about half an hour, partially with the weapon pointed at her head and body. It was stated that these threats alone qualified for an excess of one year of imprisonment.
- (34) In paragraph 13, it is stated that "[t]he penalty level for violence that has gradually increased since the 1990s through case law and legislation, must however also have

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<sup>1</sup> Norwegian labour and welfare organisation

consequences for the penalty level for both threats of violence and for illegal deprivation of freedom including violence or threats of violence."

- (35) The two mentioned judgments concern single situations, where the threats were made against persons in the capacity of their profession. The threats were situational and ceased once the situation was under control.
- (36) The threats in our case are of a different character and scope.
- (37) It concerns extremely serious threats against the defendant's own children, made on several occasions in May 2016, while the defendant was abroad. Some of the threats were made directly against them both through text and/or audio messages, but most of them were sent to the son, B. The defendant was however aware of the close relationship between the siblings, and knew that threats against one of them would quickly be communicated to the other.
- (38) The defendant has repeatedly threatened to kill them both. B was ordered to kill his sister, and the defendant made it clear that he would be relieved if both were killed. The children have perceived this to be genuine death threats.
- (39) There are several elements of these threats that call for a severe reaction. The threats were made by the children's father, who after their mother's death became the children's closest care person. The threats constituted a serious breach of the trust, reliance and care to which children are entitled. As such, the case is very similar to cases regarding abuse in close relationships. Aspects of the sentencing in such cases are thus also relevant in the case at hand.
- (40) C is particularly affected by the threats. She has suffered large, psychologic strains and serious psychologic injuries. It must be added that some of this is related to previous traumatic experiences. C is diagnosed with a post-traumatic stress disorder and needs voluntary after-care by the child welfare service until the age of 23. She still perceives the threats to be genuine, and she is living at a covert address. The fact that the threats were made over a long period of time and C's perception that they are still genuine, is clearly similar to living under a regime of unsafety and fear of future violence, which is central in domestic violence cases.
- (41) In this regard, I add that the preparatory works to the Penal Code's provisions on abuse in close relationships, sections 282 and 283, state that the "penalty for abuse in close relationships should generally slightly exceed the sentence for comparable offences involving violence", see Proposition to the Odelsting No. 22 (2008–2009) page 199. This is rooted in the particular sentencing aspects applicable in such cases, also in this one.
- (42) For illustration purposes, I mention the Supreme Court judgments in Rt-2004-844, paragraph 13 et seq. and Rt-2010-129 paragraph 21, where living under regimes of threats was a central aspect of the sentencing. The penalty in these two cases were two years and three months and two years of imprisonment, respectively.
- (43) As for the threats against B, I emphasise that his father repeatedly threatened to kill him if he did not kill his own sister. The threats appear to have been be very specific, and includes a suggestion that B travel to Germany afterwards and get help from the defendant to travel on to Greece. The father placed his son in an impossible conflict of loyalty. There

are aspects of the defendant's conduct that are similar to attempted contribution to premeditated murder.

- (44) In that respect, I note that the penalty level for attempted premeditated murder is normally nine years of imprisonment, see the Supreme Court judgment in Rt-2012-1095.
- (45) The family's "honour" and "honour killing" form the background for this case. Threats motivated by this must be taken seriously, and considerations of general deterrence are highly significant. In relation to the sentencing, this aspect is particularly relevant as it substantiates the gravity of the threats and because such threats are not situational, but lasts over a longer period of time. The way the threats have affected C and reduced her ability to enjoy life illustrates this.
- (46) The fact that it concerns verbal threats made from another country, cannot have a mentionable mitigating effect. Considering the gravity of the circumstances, it did not make the threats any less serious or genuine.
- (47) The threats are made with a clear intent. The defendant has expressed no guilt or apology. Nor has he withdrawn the threats or dissociated himself from them.
- (48) The sentencing is to take place upon an overall assessment of the offences and aspects I have mentioned regarding this process. After such an assessment, I find that the court of appeal's sentence of one year and eight months of imprisonment is suitable.
- (49) Two years and six months have passed since A was arrested, and it is a question whether this should be considered in the sentencing. The original indictment was issued in March 2017. Dalane District Court gave judgment on 10 May 2017, and the judgments of Gulating Court of Appeal are from 15 December 2017 and 10 September 2018 respectively. No delays can be established, and the total time spent cannot give any reduction of the penalty here. I refer to the Supreme Court judgment HR-2016-225-S paragraphs 35-36.
- (50) Against this background, the appeal against the sentence should be dismissed.
- (51) I will now turn to the damages for non-economic loss.
- (52) The court of appeal has awarded damages for non-economic loss to C in the amount of NOK 100 000 and to B in the amount of NOK 75 000. No fixed norm applies in cases regarding serious threats, and I mention for the sake of comparison, that the norm applicable for homicide is NOK 200 000, for rape in the first degree NOK 150 000 and for rape in the second degree NOK 100 000.
- (53) In cases where the level of damages for non-economic loss is not based on any norm established by the Supreme Court, the penalty level may often, but not always, give certain guidance for the size of the damages for non-economic loss, see the Supreme Court judgment Rt-2012-1576 paragraph 18.
- (54) I also mention that in the Supreme Court judgment Rt-2014-745 regarding threats against police officers, each of the aggrieved parties were awarded damages for non-economic loss of NOK 25 000.



- (55) In the sentencing process, the central aspects to consider are the seriousness of the acts, the level of the injuring party's guilt, the aggrieved parties' subjective perception of the violation, as well as the nature and the scope of the injuring effects the aggrieved parties have sustained. Which specific consequences the act has had for the aggrieved parties in each case may vary, and are thus not necessarily vital, see the Supreme Court judgment Rt-2012-1576. The sentencing is based on a discretionary overall assessment.
- (56) B and C have been subjected to very serious threats, which has undoubtedly put an enormous strain on them. The threats have affected C particularly harshly, and I refer to what has been stated in this regard during the sentencing.
- (57) Both B and C should clearly be awarded substantial damages for non-economic loss, but I have concluded that they should be slightly reduced, based on a discretionary overall assessment and compared to the normal levels I have already mentioned.
- (58) Damages for non-economic loss should amount to NOK 80 000 to C and NOK 60 000 to B.
- (59) I vote for this

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

1. The appeal against the sentence is dismissed.
  2. In the court of appeal's judgment, item 3 of its conclusion, the damages for non-economic loss are reduced to NOK 80 000 – eighty thousand.
  3. In the court of appeal's judgment, item 4 of its conclusion, the damages for non-economic loss are reduced to NOK 60 000 – sixty thousand.
- (60) Justice **Bergh**: I agree with the Acting Justice Lindsetmo in all material respects and with his conclusion.
- (61) Justice **Noer**: Likewise.
- (62) Justice **Kallerud**: Likewise.
- (63) Justice **Indreberg**: Likewise.
- (64) Following the voting, the Supreme Court gave this

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

1. The appeal against the sentence is dismissed.

2. In the court of appeal's judgment, item 3 of its conclusion, the damages for non-economic loss are reduced to NOK 80 000 – eighty thousand.
3. In the court of appeal's judgment, item 4 of its conclusion, the damages for non-economic loss are reduced to NOK 60 000 – sixty thousand.