SUPREME COURT OF NORWAY

J U D G M E N T

given on 13 May 2019 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Clement Endresen
Justice Ragnhild Noer
Justice Wenche Elizabeth Arntzen
Justice Cecilie Østensen Berglund

HR-2019-900-A, (case no. 19-007393STR-HRET)
Appeal against Borgarting Court of Appeal's judgment 23 October 2018

A	(Counsel Bjørn Stordrange)
v.	
The Public Prosecution Authority	(Chief Public Prosecutor Trude Stanghelle)

(1) Justice **Arntzen:** The case questions whether an omission to correct wrong information before exporting goods is an offence under the Export Control Act.

(2) A was employed with the Norwegian Armed Forces from 1977 until he retired in 2014. He was an executive officer engaging in sales of materials in the Supplies Division under the Logistics Organisation of the Armed Forces. A was responsible for the sale of military maritime equipment.

(3) On 1 July 2018, A was indicted for gross corruption, gross disloyalty, gross embezzlement gross theft and violation of the Export Control Act. Count V of the indictment, which we are dealing with in this case, reads:

> **"Section 5 subsection 1 no. 4, cf. section 2, as it read from 1 July 2005 until 1 October 2015,**
> ***For not having given the information to the Ministry of Foreign Affairs that is required to control that the provisions of the law have been complied with.***
>
> **Grounds:**
> **In the capacity as mentioned in count I, with responsibility for the sale and export of vessels, A omitted to inform the Ministry of Foreign Affairs in connection with the export of six MTB vessels during the period 9 February – 25 November 2013 and KNM Horten on 26 February 2014, that the first information received in connection with the Ministry's decision to introduce a licence requirement for the vessels after the sale was incorrect, as the real end-user of the vessel was not the UK company CAS Global Ltd, but the Nigerian company Global West Vessel Specialist.**
>
> **The information was required for the Ministry's control whether the vessels were subject to licence under section 7 c of the Export Control Regulations.**

(4) On 16 May 2017, Oslo District Court concluded the following with regard to punishment:

> **"1. A, born 00.00.1957, is guilty of violation of section 276a, cf. 276b, of the 1902 Penal Code, section 275 subsections 1 and 2, cf. section 276 of the 1902 Penal Code, section 255, cf. section 256 of the 1902 Penal Code, section 257, cf. 258, of the 1902 Penal Code and of violation of section 5 subsection 1 no. 4 of the Export Control Act, cf. section 2 of the Export Control Act applicable from 1 July 2005 to 1 October 2015, cf. section 62 of the 1902 Penal Code, and sentenced to 4 – four – years and 8 – eight – months of imprisonment."**

(5) He was also ordered to pay compensation, and the proceeds of his offence were confiscated.

(6) A appealed the judgment to Borgarting Court of Appeal. The appeal was against the application of the law, the findings of fact to determine guilt and the sentence for all counts of indictment. Leave to appeal was granted with regard to the conviction for count V. The Court of Appeal, sitting with a jury during the hearing in accordance with section 352 of the Criminal Procedure Act, gave judgment on 23 October 2018 with the following conclusion regarding the punishment:

> **"1. A, born 00.00.1957, is guilty of violation of section 276a, cf. 276b, of the 1902 Penal Code, section 275 subsections 1 and 2, cf. section 276 of the 1902 Penal Code, section 255, cf. section 256 of the 1902 Penal Code, section 257, cf. 258, of the 1902 Penal Code and of violation of section 5 subsection 1 no. 4, cf. section 2 of the Export Control Act, as well as the acts of which he has been convicted with final and enforceable effect in the Oslo District Court's judgment of 16 May 2017, cf. section 62 subsection 1 of the 1902 Penal Code, and sentenced to 4 – four – years and 3 – three – months of imprisonment."**

(7) Once more, A was ordered to pay compensation, and the proceeds of his offence were confiscated.

(8) A has appealed to the Supreme Court. The appeal is against the application of the law under count V of the indictment, the procedure relating to the directions given to the jury and the sentence. Only the appeal against the application of the law was allowed before the Supreme Court.

(9) *My view on the case*

(10) The case concerns violation of export control rules, and I will start by giving a brief overview of the relevant aspects in this regard.

(11) According to section 1 of the Export Control Act, it may be decided that a special permission (licence) is required for export of certain goods from the Norwegian customs area. Provisions to that effect were given in Regulations 10 January 1989 for the implementation of the regulation of export of strategic goods, services and technology. These are continued in Regulations 19 June 2013 on export of defence material, multi-purpose products, technology and services. Until the rules became stricter in September 2014, there were no differences in the contents of these two sets of export control regulations of significance to our case. From now on, I will refer to the 2013 Regulations as they read before the said amendments.

(12) In accordance with sections 3 and 4 of the Regulations, the Ministry of Foreign Affairs has issued lists of goods whose export requires a licence, including military material. Demilitarised vessels will under the circumstances not be found on these lists.

(13) Crucial in the case at hand is the so-called "catch all" provision in section 7 c of the Regulations, stating that in addition to the goods on the said lists, a licence is required for "any goods … for military use to areas of war or threats of war or to countries with civil war". The licence requirement under this provision also includes demilitarised material.

(14) The Ministry of Foreign Affairs is the licensing authority and decides in cases of doubt whether or not a performance requires a licence, see section 3 first and second sentence of the Regulations.

(15) Several of the counts of indictment concern A's role in the Armed Forces' sale of six former motor torpedo boats (MTBs) and the former supply ship KNM Horten in 2012. The contracts were entered into with CAS Global Ltd (CAS), a UK security company with offices in London and Nigeria, among other places.

(16) Before the MTBs were taken over by the buyer, they were demilitarised at the Armed Forces' marine base at Haakonsvern. Then, they were rebuilt to have a "civil" look. A kept the Ministry of Foreign Affairs informed of the rebuilding plans.

(17) In agreement with the Ministry of Foreign Affairs, A obtained an end-user declaration from CAS regarding the six MTBs. This end-user declaration, which was passed on the Ministry of Foreign Affairs, stated among other things:

> **"CAS-Global Limited as a wholly owned UK company would be the vessels' owners and as such these vessels would be registered under the UK flag and be operated under UK jurisdiction whilst conducting the fishery protection operations."**

(18) Based on this end-user declaration and the information on the rebuilding of the vessels, the Ministry of Foreign Affairs concluded in January 2012 that the export of the vessels would not "trigger a licence requirement".

(19) After having received the same end-user information regarding KNM Horten, the Ministry of Foreign Affairs concluded in October 2012 that there was no licence requirement for this vessel either.

(20) It is undisputed that CAS functioned as a shell company, and that the vessels ended in Nigeria and the Nigerian company Global West Specialist Agency Limited ("Global West"), after first having been shipped to the United Kingdom.

(21) There is nothing to suggest that A knew that Global West was the real end-user when the end-user declarations were passed on to the Ministry. However, he learned it before the vessels left Norway. As for the sentencing, the Court of Appeal states:

> **"It follows from the jury's verdict that A, before the vessels were exported from Norway, wilfully kept the Ministry oblivious of the fact that CAS was not the real buyer and end-user of the MTBs and KNM Horten. This was information he knew that the Ministry needed to make a correct assessment. A also knew that he had an obligation to give correct information. Significant in this regard is that A did not need to know that Global West was the real end-user. It is sufficient that he was fully aware that CAS was not the real end-user, and that the information in the end-user declaration was consequently wrong. It is clear that A also did not notify anyone else in the Armed Forces of the need to correct the end-user information towards the Ministry."**

(22) The question is whether A's omission to correct the end-user information towards the Ministry of Foreign Affairs before the vessels left Norwegian customs area, is an offence.

(23) Section 5 of the Export Control Act has the following penal provision:

> **"Unless the matter is subject to more severe penal provisions, any person who wilfully:**
> **1. exports or attempts to export goods, technology or services in contravention of this Act or regulations issued pursuant thereto,**
> **or**
> **2. contravenes or attempts to contravene any condition laid down pursuant to this Act, or**
> **3. orally or in writing furnishes incorrect information concerning circumstances of significance for authorisation to export goods, technology or services if this information is furnished:**
> **a. in a declaration made for use by a public authority or anyone acting on behalf of a public authority in connection with export or an application for permission to export,**
> **b. in a declaration intended to enable another person to make such a declaration as is mentioned under item a,**
> **or**
> **4. in any other way contravenes or attempts to contravene provisions set out in or issued pursuant to this Act, is liable to fines or a term of imprisonment not exceeding five years, or both.**
>
> **Any negligent contravention mentioned in the first paragraph, is punishable by fines or a term of imprisonment not exceeding two years."**

(24) It follows from the provision's context that the criterion of guilt under subsection 1 is intent.

(25) The indictment is filed under section 5 subsection 1 no. 4, cf. section 2 subsection 1, on the exporter's duty to "provide the Ministry with any assistance and information required" to

ensure compliance with the export rules. These provisions make basis for the Court of Appeal's conviction. During the preparatory proceedings in the Supreme Court, questions have been raised whether to place the omission directly under section 5 subsection 1 no. 3. Neither of the parties has had any procedural objections to this, and I cannot see that the use of the provision implies that the offence changes its character, see section 38 of the Criminal Procedure Act.

(26) I find it clear that the omission to correct the end-user information is covered by section 5 subsection 1 no. 3 of the Export Control Act.

(27) The Export Control Act covers the very physical performance of various services. The duty to provide the Ministry with correct information on matters of relevance to the right to export, must then apply until the date of export.

(28) End-user information is necessary for the Ministry to assess whether the export requires a licence under, among others, the "catch all"-rule in section 7 c of the Regulations. According to its wording, this provision covers information provided "in connection with export or application for permission to export". In other words, it is not a requirement that the information has been provided as a part of a licence *application*. One must keep in mind the Ministry's role also in determining whether the export of certain goods require a licence, see section 3 second sentence of the Regulations.

(29) The defence counsel has submitted that mere omissions are not covered by the penal provision. However, as long as the information in the first end-user declarations procured by A remained uncorrected, we are not dealing with mere omissions. At the date of the export, the Ministry had every reason to trust the information that CAS was the real end-user, and there was no cause to reassess the previous decisions that the vessels could be exported without a licence. In my view, the situation in the case at hand falls naturally within the wording of the provision.

(30) Furthermore, according to the preparatory works to section 5 subsection 1 no. 3, the provision must also be deemed to cover cases where someone, from the start, "wilfully retains or tries to retain information of relevance to the right to export goods, services and technology", see Proposition to the Odelsting No. 9 (1987–1988) page 19. In other words, the exporter has a duty to provide both correct and complete information. This must undoubtedly apply in a situation where it is evident that the recipient trusts that all relevant information has been provided, see the Supreme Court judgment HR-2019-599-A paragraph 45 on false statements under section 166 of the 1902 Penal Code.

(31) I cannot see that the requirement for clarity in Article 7 of the European Convention on Human Rights can prevent conviction, as it is described in the Supreme Court judgment Rt-2009-780 paragraph 21. In the Grand Chamber judgment of the European Court of Human Rights of 20 October 2015 *Vasiliauskas v. Lithuania*, the state of the law is summarised in paragraphs 154–155. Paragraph 155 reads:

> **"The Court reiterates that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial interpretation is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the**

resultant development is consistent with the essence of the offence and could reasonably be foreseen …"

(32) The possibility to elucidate the contents of a penal provision from case to case, is thus a natural part of legal method. The condition is however that the core of the provision remains the same after this interpretation process in order to maintain foreseeability.

(33) For the reasons I have already presented, I find that the state of the law under section 5 subsection 1 no. 3 of the Export Control Act section 5 is sufficiently clear and foreseeable to meet the requirements in Article 7 of the European Convention of Human Rights in the case at hand.

(34) Against this background, my conclusion is that A has been rightfully convicted of the omission, but that he must be convicted under section 5 subsection 1 no. 3 of the Export Control Act.

(35) I vote for this

J U D G M E N T :

The Court of Appeal's judgment, item 1 of its conclusion, is changed so that A, born 00.00.1957, rather than under section 5 subsection 1 no. 4, cf. section 2, of the Export Control Act, is convicted under section 5 subsection 1 no. 3 of the Export Control Act.

Justice **Endresen:** I agree with Justice Arntzen in all material respects and with her conclusion.

Justice **Noer:** Likewise.

Justice **Østensen Berglund:** Likewise.

Chief Justice **Øie:** Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

The Court of Appeal's judgment, item 1 of its conclusion, is changed so that A, born 00.00.1957, rather than under section 5 subsection 1 no. 4, cf. section 2, of the Export Control Act, is convicted under section 5 subsection 1 no. 3 of the Export Control Act.