SUPREME COURT OF NORWAY

J U D G M E N T

given on 29 January 2020 by the Supreme Court composed of

Justice Erik Møse
Justice Aage Thor Falkanger
Justice Knut H. Kallerud
Justice Ingvald Falch
Justice Cecilie Østensen Berglund

HR-2020-184-A, case no. 19-104841STR-HRET
Appeal against Gulating Court of Appeal's judgment 19 June 2019

A	(Counsel Laila Kjærevik)
v.	
The Public Prosecution Authority	(Counsel Kristine Herrebrøden)

(1) Justice **Falch:** The case concerns a comment posted on Facebook and the application of the Penal Code's section 185 on hate speech, as well as the possible sentence.

(2) Background and proceedings

(3) On 2 July 2018, A was indicted of violation of section 185 subsection 1 first sentence, cf. subsection 2 (a), cf. section 10 subsection 2 second sentence. The grounds were:

> **"On Tuesday 5 September 2017 from her home in --- 00 or elsewhere, she posted the following comment under an article that Facebook profile B had posted regarding a statement from C: 'Bloody black offspring go back to Somalia and stay there you corrupt cockroach'."**

(4) C was an active social commentator. She was 20 years old at the time, and is originally from Somalia.

(5) In Bergen District Court's judgment 22 February 2019, A was convicted as charged. The sentence was 24 days of imprisonment, which was suspended for a probation period of two years. In addition, she was ordered to pay a fine of NOK 10 000 in addition to legal costs.

(6) After A had appealed both the conviction and the sentence, Gulating Court of Appeal gave judgment on 19 June 2019 with the following conclusion:

> **"A, born 00.00.1948, is convicted of violation of section 185 subsection 1, cf. subsection 2 (a) of the Penal Code (2005) and sentenced to 14 – fourteen – days of imprisonment."**

(7) The Court of Appeal based its conviction on the following facts:

(8) A's statement was posted in the Facebook group "We who support Sylvi Listhaug". The group, which shortly after counted more than 20 000 members, was closed in the sense that only the group's administrator could give access to others, and then by approving requests for membership. At that time, Sylvi Listhaug was Minister of Immigration and Integration in Norway.

(9) A's post appears below a post from "B", which is an alias of an unknown person. "B"'s post reads as follows:

> **"Now they've become too comfy.**
> **The leftist press has given them a red carpet and a green light to brand Listhaug as a Nazi."**

(10) Below the text was a photo of C, with a smaller inserted photo of Sylvi Listhaug. The photo had this caption:

> **"On holiday in the country she fled from – Now she is attacking Listhaug once more. C is angry she can't confront Listhaug in a debate."**

(11) According to information provided, those who clicked on the photo were redirected to an article on "24avisen.com", which is described as a news blog. The blog contained critical articles about C, referring to statements she had allegedly made.

(12) Under "B"'s posts, there were first a number of comments from other people. The Court of Appeal has described them as follows:

> **"The other comments express highly insulting statements against C and her ethnic group, such as 'Debate with a monkey?!... let them have a banana to fight about', that girls should be raped, 'NIGGER BITCHES', 'THROW THE FUCKING BITCH THE HELL OUT', 'fucking swine', 'Fuck you Muslims', 'repulsive buck face', 'these wogs' etc."**

(13) Then A wrote what is quoted in the indictment: 'Bloody black offspring go back to Somalia and stay there you corrupt cockroach'. The Court of Appeal assumed that A had read the preceding posts.

(14) *A* has appealed the Court of Appeal's judgment to the Supreme Court. She claims that her statement is not covered by section 185 of the Penal Code, as it is political and protected by the freedom of expression. In the alternative, she claims that the sentence is too severe. There is no basis for imposing an immediate sentence.

(15) *The Public Prosecution Authority* has requested that the appeal be dismissed. A's statement is covered by section 185 of the Penal Code and is not protected by the freedom of expression. The sentence is not too severe. In this area, it is expedient to increase the sentences a little from what has been customary in case law from lower courts.

(16) **My view on the case**

(17) I have concluded that the appeal against the Court of Appeal's application of law should be dismissed, but that the sentence should be reduced.

(18) *The interpretation of the law*

(19) Section 185 of the Penal Code reads:

> **"A penalty of a fine or imprisonment for a term not exceeding three years shall be applied to any person who with intent or gross negligence publicly makes a discriminatory or hateful statement. 'Statement' includes the use of symbols. Any person who in the presence of others, with intent or gross negligence, makes such a statement to a person affected by it, see the second paragraph, is liable to a penalty of a fine or imprisonment for a term not exceeding one year.**
>
> **'Discriminatory or hateful statement' means threatening or insulting a person or promoting hate of, persecution of or contempt for another person based on his or her**
>
> **a) skin colour or national or ethnic origin,**
> **b) religion or life stance,**
> **c) homosexual orientation, or**
> **d) reduced functional capacity."**

(20) The provision is a continuation of section 135 a of the Penal Code 1902 with no significant changes. This implies that section 185 of the Penal Code must be interpreted in light of previous case law.

(21) First, I state the fact that it has no independent relevance to the punishability of the statement that it is posted on Facebook. The condition is that the statement is made "in public", which is further defined in section 10 of the Penal Code. A Facebook group with around 20 000

members, as the case was here, undoubtedly fits this definition, although the group was closed. This is undisputed.

(22) The punishable act is having made "a discriminatory or hateful statement". According to section 185 subsection 2, such a statement "means threatening or insulting a person or promoting hate of, persecution of or contempt for another person based on his or her a) skin colour or national or ethnic origin ...". In several previous judgments, the Supreme Court has clarified what this entails in light of the freedom of expression in Article 100 of the Constitution and Article 10 of the European Convention on Human Rights on one side, and the protection against racial discrimination in Article 4 the UN Convention on the Elimination of All Forms of Racial Discrimination and Article 20 (2) of the UN Covenant on Civil and Political Rights on the other. Here, I refer to the Supreme Court judgment in Rt-1997-1821, the *Hvit Valgallianse* [white electoral alliance] judgment, and Rt-2007-1807 paragraph 32, the *Vigrid* judgment.

(23) Against this background, case law draws a line between critical statements on a *subject*, either of a political, cultural, religious nature or other, and statements attacking one or several *persons*. I refer to the Supreme Court judgment in Rt-1981-1305 on page 1314, the *flier* judgment, where the justice delivering the leading opinion, with the support of the other justices, stated:

> **"I have now distinguished between statements on Islam as a religion, on the conditions in Islamic states and on Norwegian immigration policy, which in my view cannot be covered by section 135 a of the Penal Code [1902], and statements more directly attacking the Islamic immigrants in this country, which will be punishable under the circumstances."**

(24) The first type of statements are normally protected by the freedom of expression and not covered by section 185 of the Penal Code, even if they are perceived as insulting. Such statements – for instance of a political nature – are not directed to "a person", as required under section 185.

(25) This is different when it comes to personal attacks that, depending on the circumstances, are covered by section 185. Such utterances enjoy only "modest constitutional protection", because they "do not have anything in common with the essence of what the freedom of expression is meant to protect, namely an open debate", see the Supreme Court judgment HR-2018-674-A paragraph 15, the *quarrel* judgment.

(26) Details of what is required here are provided in the Supreme Court judgment Rt-2012-536 paragraph 28, the *doorman* judgment, paragraph 33:

> **"In Rt-1997-1821 [the *Hvit Valgallianse* judgment], case law is summarised on page 1826 to express that only serious acts are covered. A reference is made to Proposition to the Odelsting No. 29 (1980–1981), which with the addition of the second sentence in section 135 a [of the Penal Code 1902], specifies that only 'statements of a qualifiedly insulting nature will be covered'. In Rt-2002-1618, this is described on page 1624 as statements 'calling for or supporting violations of integrity. The same applies if the utterances 'entail serious degradation of a group's dignity.'"**

(27) In other words, only utterances of a "qualifiedly insulting nature" are covered. This includes utterances that "call for or support violations of integrity", and those entailing a "serious degradation of a group's dignity". The condition is that the serious insult is based on the

person's "skin colour or national or ethnic origin", alternatively on any of the other options listed in section 185.

(28) In this regard, I emphasise that also in an area not directly protected by the freedom of expression, there is a "relatively wide margin for tasteless utterances". I refer to the *quarrel* judgment paragraph 17, with reference to previous case law.

(29) Against this background, it must be clarified how the statement is to be interpreted. This interpretation is part of the application of law that the Supreme Court may examine, see the doorman judgment paragraph 17.

(30) Key in this regard is the general reader's "natural perception of the statement made from the context", see the *doorman* judgment paragraph 18 with further references. In paragraph 19, the significance of context in the interpretation is discussed in more detail. Next, the so-called caution rule is mentioned in paragraphs 20 and 24. It implies that no one should risk criminal liability for opinions that are not expressly given, "unless such opinions may be derived from context with a reasonable level of certainty".

(31) *The individual assessment*

(32) The way A formulated her statement, it is clear to me that it is directed at C personally. It is C who is described as "[b]loody black offspring" and as "you corrupt cockroach". The statement has a clear reference to her skin colour, and thus to her ethnic origin. The general reader will in my opinion clearly perceive the statement as a serious insult, and as a significant degradation of her dignity as a human being. The use of the word "cockroach" may have connotations of vermin. However, there is no reason to interpret this as an opinion that C should be extinguished or similar.

(33) A contends that the statement must be read as a part of the political debate. I agree that the Facebook group must be considered a support group for Sylvi Listhaug's political stand, being in charge of immigration and integration matters in the Government. C had criticised Listhaug. Furthermore, B's post also mentioned that C had been on holiday in the country she fled from, which is a political immigration issue.

(34) However, A's statement does not touch upon these subjects. Her comment is exclusively connected to C's person as I have described. Section 185 of the Penal Code also covers serious insults launched against someone in what is initially a political debate, see Rt-1997-1821 page 1831, the *Hvit Valgallianse* judgment. In A's case, moreover, the connection to political issues was so weak that this cannot influence the interpretation of her statement.

(35) A's statement was posted after a number of other insulting statements against C in the comment field, from other persons. A cannot be punished for other people's comments, and I do not agree with the Court of Appeal that A has given her "support" to them. However, these other comments are suited to strengthen the interpretation of A's statement that can be derived from the words she herself chose, and for which I have accounted.

(36) Against this background, I find that the Court of Appeal has applied the Penal Code correctly. The appeal against the application of law must therefore be dismissed.

(37) *The sentence*

(38) The maximum sentence for violation of section 185 subsection 1 first sentence of the Penal Code, which is relevant here, is three years of imprisonment.

(39) There is no guidance in Supreme Court case law for the sentencing, nor in case law dealing with section 135 a of the Penal Code 1902. I mention nonetheless that both in the flier judgment from 1981 and in Rt-1977-114, the schoolteacher judgment, sentences were imposed of 60 and 120 days of suspended imprisonment respectively. The latter judgment sets out that there is no "disproportion" between the sentence imposed and the offence.

(40) When the maximum sentence increased from two to three years in 2005, the Ministry stated that "there [could] be reason to increase the sentences for violations of section 135 a of the Penal Code [1902]", and justified it by the consideration of proportionality between crime and punishment, see Proposition to the Odelsting No. 33 (2004–2005) page 188. A similar position is expressed in Proposition to the Odelsting No. 8 (2007–2008) page 343, that such offences should "in the same way as other hate crime, generally be punished slightly more severely than today". However, the preparatory works do not specify from which level the sentences are meant to increase. I also mention that section 77 (i) of the Penal Code describes it as an aggravating circumstance that the offence originates from other people's "skin colour" or "national or ethnic origin".

(41) I finally mention that, up until now, case law from lower courts contains several rulings imposing suspended sentences and fines, or just fines. However, there are also examples of immediate sentences.

(42) Recent years' development, making the Internet and social media available for everyone, has made it possible for more people to make public statements to a larger audience. It is a positive feature of the social development that many are able to express their opinions. This means that more people need to learn what type of statements are subject to criminal liability. The Equality and Anti-Discrimination Ombud's report from 2018 "Hate speech in the public debate on the internet" shows that the scope of hate speech is large, especially in comment fields on Facebook. This is clearly onerous for those affected, and many will stay away from the public debate in fear of such reactions. Their freedom of expression is in practice restricted. C is an illustrative example. She has been exposed to many hateful statements – not only from A – which made her withdraw from the public for a period, and she allegedly had a domestic violence alarm installed.

(43) Considerations of general deterrence therefore suggest that such statements should be punished relatively severely. My view is nonetheless that restraint must be exercised. Firstly, the threat of even a moderate, but noticeable, penalty should have a disciplinary effect for many over time. Next, the general position ought to be that interference with the freedom of expression should not be disproportionate. This view is maintained by the European Court of Human Rights in a number of judgments, including *E.S. versus Austria*, of 25 October 2018, paragraph 56, which concerned a judgment of conviction for having called the prophet Mohammad a pedophile.

(44) Against this background, I find that an immediate prison sentence would be too strong a reaction. I emphasise the facts that A has violated section 185 of the Penal Code on one occasion, that she has not previously been convicted of similar offences and that she has not made any statement calling for or supporting serious violations of integrity. In the case at

hand, I find that the appropriate reaction would be suspended imprisonment and a noticeable fine, see section 54 of the Penal Code.

(45) In my opinion, the suspended imprisonment should be 24 days. Essential here is that there has been a clear violation of section 185 of the Penal Code.

(46) In a case like this, the fine should generally be equal to around one month's gross salary. In the Court of Appeal's court record, it is stated that A, being a pensioner, receives a monthly payment of NOK 19 000 after tax. The fine is therefore stipulated to NOK 25 000. The alternative imprisonment, see section 55 of the Penal Code, is stipulated to 15 days.

(47) I vote for this

J U D G M E N T :

1. The penalty of the Court of Appeal is amended to a prison sentence of 24 – twentyfour – days. Execution thereof is suspended for a probation period of two years. In addition, A will pay a fine of NOK 25 000 – twentyfivethousand – , alternatively 15 – fifteen – days of imprisonment.

2. Otherwise, the appeal is dismissed.

(48) Justice **Falkanger:** I agree with Justice Falch in all material respects and with his conclusion.

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

(50) Justice **Østensen Berglund:** Likewise.

(51) Justice **Møse:** Likewise.

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

D O M :

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