



SUPREME COURT OF NORWAY

O R D E R

issued on 31 March 2020 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Aage Thor Falkanger
Justice Kristin Normann
Justice Wenche Elizabeth Arntzen
Justice Kine Steinsvik

HR-2020-710-A, (case no. 19-166502STR-HRET)
Appeal against Gulating Court of Appeal's order 18 October 2019

Osprey (PD357) Limited

(Counsel Tor Henning Rustan Knudsen)

v.

The Public Prosecution Authority

(Counsel Lars Fause
and Tore Kulstad)

- (1) Justice **Arntzen**: The case concerns a value confiscation effected against the owner of a fishing vessel. The question is whether it is a condition for claiming confiscation against the owner that the vessel has been validly seized, or that security has been provided, see section 74 subsection 1 of the Penal Code.
- (2) On Wednesday 25 April 2018, the UK registered fishing vessel Henk Senior was stopped by the Coast Guard due to suspicion of violation of Norwegian fishery legislation. The vessel was brought to the port of Egersund, see section 25 of the Coast Guard Act, where it arrived on Friday 27 April 2018. On Saturday 28 April 2018, the Prosecution Authority of South West police district issued an “[o]rder of arrest” of NOK 600 000 in the vessel. In an e-mail of 30 April 2018, the vessel’s owner, Osprey (PD357) Limited, provided security by depositing the amount on its lawyer’s client account in return for a release of the vessel. The Prosecution Authority responded by demanding a bank guarantee from a Norwegian bank. The owner then demanded an immediate release of the vessel, claiming that the court has exclusive jurisdiction under section 35 of the Coast Guard Act to issue such orders. In a new “[o]rder of arrest” of 2 May 2018, the Prosecution Authority reduced the amount to NOK 450 000 without commenting on the jurisdiction issue. Osprey (PD357) Limited provided security in the form of a bank guarantee on the same day, and the vessel was released. No court decision was made under section 35 of the Coast Guard Act, cf. subsection 3 on the provision of security as an alternative to arrest. The parties agree that the Prosecution Authority’s two arrest orders were invalid.
- (3) On 14 March 2019, the Prosecution Authority issued a confiscation fine NOK 200 000 to the owner for several violations of Act 17 December 1976 No. 91 relating to Norway’s economic zone (the Zone Act) committed by the vessel’s captain. The owner refused to accept the fine, and the case was brought to the District Court.
- (4) The owner demanded that the case be dismissed, as the conditions for bringing an action in section 74 subsection 1 of the Penal Code were not met. Jæren District Court conducted an oral hearing to resolve the dismissal issue, and decided on 28 June 2019:

“The District Court will hear case 19-044652MED-JARE.”
- (5) Osprey (PD357) Limited appealed to Gulating Court of Appeal, which after an oral hearing issued this order on 18 October 2019:

“The appeal is dismissed.”
- (6) The owner has appealed against the order to the Supreme Court on the grounds of incorrect application of the law. On 22 November 2019, the Supreme Court’s Appeals Selection Committee decided to refer the case to division of the Supreme Court in accordance with section 5 subsection 1 of the Courts of Justice Act.
- (7) *Osprey (PD357) Limited* contends:
- (8) Section 74 of the Penal Code is a procedural rule regulating when third parties, i.e. persons other than the offender, may be joined in proceedings dealing with confiscation. The provision’s subsection 1 must be interpreted in the same manner as the corresponding provision in subsection 2. A confiscation claim may thus only be directed against the owner if a valid seizure has been made. This follows both from the wording in subsection 1 and from the connection with the corresponding terms in section 2. Subsection 2, which is a

continuation of section 37c of the Penal Code 1902, lays down a requirement of a valid seizure before confiscation proceedings may be instituted against third parties. It is undisputed that the owner's vessel, whose release was due to the provision of security, has not been subject to a valid seizure in the form of arrest under section 35 of the Coast Guard Act. The case must therefore be dismissed.

- (9) Osprey (PD357) Limited invites the Supreme Court to issue this order:

“1. Gulating Court of Appeal's order 18 October 2019 is set aside.”

- (10) *The Public Prosecution Authority* contends:

- (11) Under section 74 subsection 2 of the Penal Code, it is a condition for instituting confiscation proceedings against persons other than the owner, that the property has been validly seized, alternatively that the property has been exempted from seizure on provision of security. The parties agree that arrest under section 35 of the Coast Guard Act is on par with seizure under this provision.

- (12) The intent behind section 74 subsection 1 is to codify the fundamental procedural principle that the owner must be made party to the confiscation proceedings, see the Supreme Court order Rt-1916-695. There are no indications in preparatory works or in other sources of law that the inclusion of this principle in the Penal Code 2005 was also meant as a requirement of a valid seizure when the confiscation claim is directed against the owner. In any case, a voluntary provision of security like in the case at hand may take the place of seizure or arrest.

- (13) The Public Prosecution Authority invites the Supreme Court to issue this order:

“The appeal is dismissed.”

My opinion

- (14) The case concerns a second-tier appeal against the District Court's decision to hear the confiscation case against the owner. The Supreme Court's jurisdiction is thus limited to the Court of Appeal's interpretation of the law, see section 388 subsection 1 (3) of the Criminal Procedure Act.

- (15) The confiscation fine is issued to the owner, Osprey (PD357) Limited, in accordance with section 9 of the Zone Act:

“In the event of violation of regulations provided in or in accordance with this Act, vessels used during the violation may be confiscated, along with accessories, catch and tools on board, regardless of owner. Instead of the property, the value may be confiscated in whole or in part from the liable person or from the person of whom he has acted on behalf, or from the owner. It may be decided that security or other rights in property confiscated in whole or in part will be lost. The provisions in section 74 of the Penal Code have similar application. When a legal and an illegal catch are mixed together, the entire catch may be confiscated.”

- (16) The first and last sentence provide a legal basis for confiscating property, while the second provides a basis for confiscating the property's value. The rules are partially similar to the confiscation provisions in sections 67 and 69 of the Penal Code. The regulation of whom confiscation may be effected against has its parallel in section 71 of the Penal Code. These substantive confiscation provisions do not lay down a requirement of a preceding seizure or

provision of security. The relevant option in our case is confiscation of value against the owner.

- (17) Through its reference to section 74 of the Penal Code, section 9 of the Zone Act also contains a procedural rule on the legal status of the parties in confiscation cases. Subsections 1 and 2 of section 74, which are essential to the interpretation issue at hand, read:

“When confiscation of seized proceeds, see sections 67 and 68, or property, see sections 69 and 70, which do not belong to the offender is claimed, the claim is directed at the owner or rights holder. The same applies when confiscation is claimed of the value of property which has been seized, or which has been exempted from seizure on provision of security.

When the owner or rights holder is unknown or his whereabouts in Norway are unknown, confiscation may be effected in proceedings against the offender or the person who was in possession at the time of seizure, provided this is deemed reasonable in view of the owner's circumstances. The same applies when confiscation is claimed of the value of property which has been seized, or which has been exempted from seizure on provision of security. The owner shall as far as possible be notified about the matter.”

- (18) Subsection 1 provides the main rule that the owner or the rights holder (hereafter only “the owner”) must be made a party to the confiscation proceedings, while subsection 2 provides a basis for exemption. Both subsections 1 and 2 presuppose that the property has been seized, or that it has been released on provision of security. It is clear that it is a condition under subsection 2 for effecting confiscation against third parties that the property has been validly seized, alternatively that security has been provided as described, see for instance the Supreme Court order Rt-2002-1271 page 1274 on the corresponding provision in section 37c of the Penal Code 1902. I agree with the parties that arrest under section 35 of the Coast Guard Act must here be considered on par with seizure.
- (19) The question is whether the “seizure criterion” in section 74 subsection 2 applies correspondingly under subsection 1, in the sense that also the right to direct the confiscation claim against the owner is conditional on a preceding seizure or provision of security. In that case, the requirement of a seizure or provision of security will in fact be a substantive rule.
- (20) The appellant contends that the seizure criterion must be interpreted in the same manner in subsections 1 and 2. Such an approach seems plausible at a first glance. However, when taking a closer look, subsection 1 only says that confiscation claims in *the mentioned situations* are to be directed against the owner. It cannot be read from the wording what applies to confiscation of property without a preceding seizure, or to confiscation of value with neither a preceding seizure nor a provision of security as described in the second sentence.
- (21) Read in context, subsection 2 appears to be an exception from the main rule in the situation described in subsection 1. Thus interpreted, the seizure criterion in subsection 1 is a description of the circumstances, while in subsection 2 it is a legal condition for instituting confiscation proceedings against a person other than the owner.
- (22) In other words, I cannot see that the wording in subsection 1 gives an exhaustive description of situations in which a confiscation claim may be directed against the owner.
- (23) Nor other sources of law support that a preceding seizure – or provision of security – is a legal condition for directing such a claim against the owner.

- (24) The main rule in section 74 subsection 1 that the owner must be joined as a party was codified with the adoption of the Penal Code 2005. Previously, this was a non-statutory principle rooted in the fundamental principle in procedural legislation that the person whose interests are at stake must be made a party. This is expressed as follows in Rt-1916-695 page 696–697:

“With regard to this question, I agree with the appellants that one may not, under Act of 21 July 1911, cf. Act of 21 June 1912, subject the owner of the vessel to confiscation without prior proceedings against him being instituted in accordance with an indictment, and after he has been summoned as a party.

If, in our process, there exists a basic principle that, apart from being strongly justified in immediately evident justice requirements, is also expressed in such firm and general terms that exemption cannot be granted without a clear and positive legal basis, then it is the one provided in N.L. 1-4-1, stating that ‘no proceedings must be instituted against anyone – – without the person whose either property, honour or life is at stake being legally summoned’. The validity of the sentence is not less certain in criminal procedure, as the Criminal Procedure Act, which otherwise aims to be exhaustive, assumes that this rule is so evident and already given, that it is unnecessary to state it.

The requirement of the necessity to summon the person against whom a judgment will be given is sufficiently clear from a number of provisions in the Criminal Procedure Act, and, naturally, applies no less to the smaller cases regulated by the Criminal Procedure Act despite not being criminal cases under section 2, than to the cases concerning imposition of penalty.”

- (25) It is worth noting that the Supreme Court, here, bases its deliberations on the principle in civil procedure of who should be made a party, before it establishes that the same applies to criminal procedure, and “naturally” also cases that are decided in accordance with the Criminal Procedure Act without being criminal cases. The Supreme Court set aside the confiscation order from the lower court, stating that the owner of the confiscated vessel had not been joined as a party.
- (26) This order was central when the non-statutory principle was codified in section 74 subsection 1 of the Penal Code 2005. The following is set forth in Proposition to the Odelsting No. 90 (2003–2004) page 353:

“The person against whom confiscation is effected must as main rule be joined as a party to the case. If the confiscation claim and the claim for penalty are directed against the same person, that person automatically becomes a party to the confiscation proceedings. If the confiscation is to be effected against a person other than the person charged, that person must according to legislation and case law be made a party, see Rt-1916-695. Only exceptionally may confiscation be effected without the owner being joined in the case. This is regulated in section 37c of the current Penal Code.”

- (27) Section 37c of the Penal Code 1902, implemented by Act 26 January 1973 No. 2, is continued in section 74 subsections 2 to 4 of the Penal Code 2005. In the recommendation from the Penal Code Committee on confiscation of 11 March 1970, the proposed exemption is balanced against the non-statutory principle referred to in the order Rt-1916-695. After a presentation of the order, the Committee states on page 41:

“Apart from that, the Supreme Court stressed that it is a basic principle in our procedural system, the civil as well as the criminal, that no proceedings may be instituted against any person without the person being legally summoned thereto, and that exceptions from this basic principle need a clear and positive legal basis.”

- (28) The sources of law show that the inclusion of *the basis for exemption* in section 74 subsections 2 to 4 was the key issue. However, the main rule stating that the owner must be made a party stems from a fundamental rule of law principle that does not need to be codified.
- (29) The view that the key issue was the basis for exemption also seems to have prevailed when the reference to “section 37c of the Penal Code” in section 9 of the Zone Act was replaced by “section 74 of the Penal Code” in connection with the adoption of the new Penal Code. In the special comments to this amendment, it is simply stated that the reference to section 37c of the Penal Code has been replaced by a reference to “the corresponding provision in the Penal Code 2005”, see Proposition to the Odelsting No. 22 (2008–2009) page 492. There is nothing to support that the intention was to intensify the conditions for directing a confiscation claim against the owner because the reference to section 74 also included subsection 1.
- (30) Nor are there any indications in case law before or after the adoption of section 74 of the Penal Code that a preceding seizure or provision of security is required before a confiscation claim may be directed against the owner, see for instance Rt-2002-1063, Rt-2014-996 and HR-2017-930-A.
- (31) Incidentally, I cannot see what could be the justification for such a requirement. On the contrary, a linkage between the party’s status and the use of coercive means reaches beyond the objectives of the respective sets of rules. Moreover, it would be unfortunate if the possibility of instituting confiscation proceedings in practice should depend on the owner’s nationality or economy. For example, in cases regarding arrest under section 35 of the Coast Guard Act, the security requirement will less likely be considered met for Norwegian shipowners than for shipowners from other countries. An owner’s capacity to provide security may also vary.
- (32) Against this background, my conclusion is that section 74 subsection 1 cannot be interpreted as an exhaustive list of situations in which a confiscation claim may be directed against the owner. In other words, to effect confiscation towards the owner, one must either institute proceedings against him, or have access to the object – alternatively the security – in line with section 74 subsection 2 et seq.
- (33) Hence, it is not necessary for me to elaborate on the appellant’s contention that the provision of security in the case at hand is not legally established, since the Prosecution Authority’s orders of arrest were invalid. I confine myself to pointing out that any irregularities in relation to the provision of security are only significant for the securing of the Prosecution Authority’s confiscation of value claim.
- (34) I vote for this

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The appeal is dismissed.

- (35) Justice **Falkanger:** I agree with Justice Arntzen in all material respects and with her conclusion.

- (36) Justice **Normann:** Likewise.
- (37) Justice **Steinsvik:** Likewise.
- (38) Justice **Indreberg:** Likewise.
- (39) Following the voting, the Supreme Court issued this

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The appeal is dismissed.