SUPREME COURT OF NORWAY

On 22 June 2021, the Supreme Court's Appeals Selection Committee composed of Justices Skoghøy, Bull and Falch issued, in

HR-2021-1336-U, (case no. 21-088528STR-HRET), criminal case, appeal against order:

A	(Counsel Knut-Erik Storlykken Søvik)
v.	
The Public Prosecution Authority	(Counsel Odd Skei Kostveit)

the following

O R D E R :

(1) The case concerns remand in custody due to the risk of tampering with evidence, and the question of whether information from communication monitoring carried out by a foreign police authority may be used to establish reasonable cause for suspicion.

(2) The background to the case is an international police operation. The U.S. Federal Bureau of Investigation – the FBI – established a platform for exchange of encrypted information. Communication on this platform was monitored, and the FBI has gathered the information and forwarded it to police authorities in other countries. In Norway, the information has been received by the National Criminal Investigation Service – Kripos – and passed on to relevant police districts for follow-up.

(3) The underlying material from the FBI's communication monitoring is reportedly now available to defence counsel from Kripos. According to an e-mail to the Appeals Selection Committee of 21 June 2021, defence counsel have been notified that the material is available, and that counsel have agreed to issue a guarantee of secrecy in return for access, see section 242 subsection 2 of the Criminal Procedure Act. However, during the hearing of the remand application and the appeals, the material was not available to either counsel, the District Court, the Court of Appeal or the Supreme Court. The police had instead prepared extracts, which are included in the case file.

(4) *A* was arrested on 7 June 2021, charged with an aggravated drug offence, and a request for his remand was issued on the same day. The charge also includes another person, whose remand was requested on the same grounds. The persons charged were not given access by the police to the central case documents. The District Court has upheld this decision.

(5) Vestfold District Court's ordered A's release on 9 June 2021. The District Court found that two key documents, namely the extracts from the communication monitoring, had to be precluded. Against this background, the District Court found that there was no reasonable cause for suspecting A of the offence with which he was charged. The other person charged was also released. The Public Prosecution Authority appealed, and the court decided to give the appeal a suspensive effect.

(6) By Agder Court of Appeal's order 15 June 2021, the remand requests were allowed, but not beyond 23 June 2021. The persons charged were subjected to a ban on letters and visits during the entire period in custody.

(7) *A* has appealed to the Supreme Court, claiming that the grounds given for the order were flawed. It is contended that the Court of Appeal has neither taken notice of nor discussed the argument in A's response to the Prosecution Authority's appeal that it is an absolute prerequisite for using the extracted information as evidence that the person charged and the court have access to the underlying material. Furthermore, the Court of Appeal has failed to discuss whether the use of the information is a violation of his rights under Article 6 of the European Convention on Human Rights.

(8) In addition, A contends that the Court of Appeal has made an error of law, as the gathering of information in this case, unlike in previous cases considered by the Supreme Court, was aimed at all users of the platform regardless of any concrete suspicion of criminal activity. Such mass monitoring would not be permitted in Norway, which means that the gathering of information is contrary to basic Norwegian value conceptions and cannot be used as evidence. The investigation method departs significantly from basic conditions for communication monitoring in Norway, and since there was no suspicion of any other crime when the monitoring of the person charged commenced, it is a violation of Article 8 of the ECHR. It is finally contended that A should have been granted access to the underlying material, that the lack of such access has prevented A from exercising his right to present his case, and that this amounts to a violation of the "equality of arms" principle.

(9) *The Public Prosecution Authority* has responded, claiming that the Court of Appeal has assessed the arguments of the person charged, and that no error of law has been committed. It is not an absolute condition for remand in custody that the person charged has full access to the case documents when the conditions for refusing such access are met. Furthermore, it is key that the encryption service is developed for criminals and for the most part used by criminals. The Norwegian police have played a passive part, the encryption service has been established for use by criminal organisations, and it has been spread amongst criminals. Gathering evidence from this environment is not contrary to basic Norwegian value conceptions, when the users have been aware that the service is tailor-made for criminal activity. It is noted that the gathering evidence in question was accepted as legal in the USA, and that permitting communication monitoring as a step in the disclosure of and combat against serious crime is of great public interest.

(10) *The Supreme Court's Appeals Selection Committee* may review the Court of Appeal's general interpretation of the law and its procedure, see section 388 subsection 1 of the Criminal Procedure Act. When it comes to the relevance of the Constitution and the ECHR, the Committee may also review the concrete application of the law.

(11) As mentioned, *A* contends that the Court of Appeal has committed procedural errors by, firstly, failing to consider his argument that his and the court's access to the underlying material from the communication monitoring is an absolute prerequisite for using the extracted information as evidence. Secondly, the Court of Appeal has failed to consider whether this also amounts to a violation of Article 6 of the ECHR.

(12) The Appeals Selection Committee points to the following statement by the Court of Appeal:

> "It follows from the Court of Appeal's reasoning above that the court does not have access to the communication material beyond the two mentioned extracts. Defence counsel claim that the material can thus not be verified and must be precluded as evidence in the remand case. The Court of Appeal does not agree. However, such circumstances may affect the evidentiary value of the underlying material".

(13) As the Appeals Selection Committee sees it, the Court of Appeal has thus, albeit briefly, considered the argument that it is an absolute prerequisite for using the information extracted by the police as evidence that A and the court have access to the underlying material.

(14) As for the argument that the failure to discuss the requirements for a fair trial set out in Articles 5 and 6 of the ECHR, the Appeals Selection Committee points out that an important aspect of this principle, and of the principle of "equality of arms" derived therefrom, is in fact the parties' equal access to information. The Court of Appeal has discussed this in the quoted passage. These principles must also be regarded as part of basic Norwegian value conceptions. The Court of Appeal has stated the following in more general terms:

> "The material has been gathered in the USA upon a decision by a US court. Consequently, it must be assumed that the method is legal under US law. It cannot be required that a foreign police and prosecution authority follows Norwegian procedural rules in criminal cases. It would restrict international collaboration in connection with cross-border crime in an unacceptable manner. Considerations of privacy and private life in intrusive investigation methods such as that in our case, must give way to the interests of preventing crime. The gathering of evidence is not considered to be contrary to basic Norwegian value conceptions or amount to a violation of Article 8 of the ECHR, and in the Court of Appeal's view, there are no legitimate interests suggesting that the material on the communication platform cannot be used as evidence."

(15) Against this background, the Appeals Selection Committee cannot see that the Court of Appeal has failed to consider A's contentions regarding his right to acquaint himself with the underlying material from the communication monitoring.

(16) A further contends that the Court of Appeal's has made an error of law when, in this case, permitting use of the information from the communication monitoring carried out by a US police authority.

(17) Initially, the Appeals Selection Committee notes that the Court of Appeal has trusted that the gathering of information was legal under US law. The Supreme Court does not have jurisdiction to review this conclusion, nor has it been disputed in the appeal to the Supreme Court. The ruling in Rt-2002-1744 establishes that investigation material from another country gathered in a manner permitted there, but not under Norwegian law, may under the right circumstances be used in a remand case in Norway. In that regard, Supreme Court's Appeals Selection Committee stated:

> "The limitations placed upon the use of communication monitoring as an investigation method, are justified by the individual's right to respect for private life and personal integrity, see Proposition to the Odelsting no. 64 page 46. Opinions may differ on how these considerations should be balanced against the need to solve crime, and different countries have opted different solutions. If a person chooses to take residence in a country where the use of communication monitoring is not as restricted as in our country, he or she cannot have a legitimate expectation that Norway will not permit information gathered by legal communication monitoring in the relevant country used as evidence.
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> Against this background, the Committee finds that it should not be a condition for using information gathered from legal communication monitoring abroad in a criminal case in Norway, that the information could have been gathered from communication monitoring here. If the communication monitoring in the foreign country has not been carried out contrary to basic Norwegian value conceptions, and the information is used as evidence of a criminal act that in the relevant country may justify the form of communication monitoring from which the information stems, the information must be valid as evidence in a criminal case in Norway, provided that the person charged has access to the information gathered from communication monitoring in the relevant case."

(18) A contends that the information in the case at hand has been gathered through mass monitoring of all users of the communication platform regardless of any concrete suspicions of criminal activity. It has the character of mass monitoring of users that would not be permitted in Norway. According to A, the Court of Appeal's use of such information is contrary to "basic Norwegian value conceptions".

(19) The Public Prosecution Authority contends in response that the relevant encryption service is developed for criminal networks in particular, that it is spread amongst criminals and used by criminals only. The system requires custom-made phones that cannot be bought in regular manners, and subscription is expensive. The payment must be made by untraceable means such as cash or cryptocurrency, and users must be invited by other users.

(20) The Court of Appeal for its part has briefly described the encryption service as a communication platform for encrypted communication with a large number of users worldwide, including criminal networks.

(21) The Appeals Selection Committee's majority – consisting of Justice Skoghøy and Justice Bull – notes that the Court of Appeal might well have given a more thorough description of the communication platform and of the networks deemed to have used it. However, as the majority sees it, users of such a platform must at least acknowledge that the police will assume that the encryption service is widely used by criminal networks, and consequently, that as users, they may easily be subject to monitoring and investigation. The majority finds, like the Court of Appeal, that the use in Norway of results from such monitoring as a step in the investigation is not a violation of basic Norwegian values or the right to private life under Article 8 of the ECHR.

(22) Finally, A contends that he should have been granted access to the underlying material on which the police's extractions from the communication monitoring was based.

(23) A united Appeals Selection Committee notes that, under section 98 subsection 3 of the Criminal Procedure Act, defence counsel shall "at the latest before the court sitting receive a copy of the documents with which he is entitled to acquaint himself pursuant to section 242". According to section 242, the person charged and his defence counsel, among others, shall be

permitted to acquaint themselves with the documents in the case "if this can be done without detriment or risk to the purpose of the investigation or to a third person."

(24) According to the District Court's order, the police refused to present the underlying material due to an agreement with the FBI. As mentioned initially, however, defence counsel may now access the material.

(25) In the above quote from the ruling in Rt-2002-1744, it is set forth that "the information must be valid as evidence in a criminal case in Norway, provided that the person charged has access to the information gathered from communication monitoring in the relevant case". The statement is worded in general terms, and applies "in a criminal case". A united Appeals Selection Committee finds that this cannot be understood to mean that it thus automatically applies at any stage of the criminal case. In connection with major international investigations, there is undoubtedly a need to carry out coordinated arrests in the various countries involved. If the Norwegian police were prevented from taking action simultaneously with the police authorities of other countries because they could not even in the initial phase of the operation comply with a foreign police authority's request for secrecy, it would be detrimental to the Norwegian police's ability to investigate and bring such cases to trial. The suspects would easily learn about the arrests in other countries and take precautions before the Norwegian police could act. This would pose a "risk to the purpose of the investigation", as set out in section 242.

(26) A united Appeals Selection Committee therefore finds that the Court of Appeal interpreted the law correctly when it assumed that, in deciding the question of remand in custody, it was free to use the police's extracts from the monitoring results without the court or defence counsel at this stage being granted access to the underlying material.

(27) Another issue is that withholding of the underlying material may affect the evidentiary value attributable to the information that the Public Prosecution Authority actually presents to the court and to defence counsel – as the Court of Appeal has assumed.

(28) As a united Appeals Selection Committee sees it, such short-term lack of access for defence counsel to the underlying material on which the Public Prosecution Authority bases its evidence, is not contrary to the "equality and arms" principle or the right to present one's case, as these principles in Article 6, cf. Article 5 (4), of the ECHR apply to remand in custody decisions. The Appeals Selection Committee refers to judgment 13 February 2001 in *Garcia Alva v. Germany*, paragraphs 39 to 43. There, the European Court of Human Rights acknowledged that it may be necessary to withhold documents for the purpose of the ongoing investigation, but found that this consideration is outweighed by the "equality of arms" principle when the withheld information is essential for the court's decision to remand in custody. In the case at hand, the court has not had access to more information than defence counsel, and it has taken into account, when assessing the evidentiary value of the available information, that it was based on underlying material accessible to neither the court nor to defence counsel.

(29) Against this background, the Appeals Selection Committee's majority has concluded that the appeal must be dismissed.

(30) The Appeals Selection Committee's minority – consisting of Justice Falch – notes that the case distinguishes itself from that decided in Rt-2002-1744. There, the Appeals Selection

Committee found that the person charged did not have a "legitimate expectation" that the information gathered from legal communication monitoring abroad could be used as evidence in Norway. The reason was that the person charged had "chosen to take residence in a country" where communication monitoring is less restricted than in Norway.

(31) In the case at hand, the Court of Appeal has, as the minority sees it, assumed that the person charged was residing in Norway when US authorities without concrete suspicion started monitoring his communication. Even if US authorities should have jurisdiction under international law to carry out such a measure, this situation is significant in the assessment of whether the monitoring has taken place "contrary to basic Norwegian value conceptions". In the minority's view, the information is less acceptable as evidence when it is based on communication monitoring by another country's authorities and aimed at a person residing in Norway, than if the person had resided in the country where the monitoring was carried out. This has not been considered by the Court of Appeal, which the minority considers a flaw in the reasoning with the result that the Court of Appeal's order must be set aside.

(32) In accordance with the majority's view, the appeal is dismissed.

C O N C L U S I O N

The appeal is dismissed.

Henrik Bull	Jens Edvin A. Skoghøy	Ingvald Falch
(sign.)	(sign.)	(sign.)