



SUPREME COURT OF NORWAY

J U D G M E N T

given on 30 September 2022 by a division of the Supreme Court composed of

Justice Bergljot Webster
Justice Ragnhild Noer
Justice Wenche Elizabeth Arntzen
Justice Ingvald Falch
Justice Erik Thyness

HR-2022-1843-A, (case no. 22-085322STR-HRET)
Appeal against Gulating Court of Appeal's judgment 13 May 2022

A

(Counsel Jon Wessel-Aas)

v.

The Public Prosecution Authority

(Counsel Rudolf Martin Christoffersen)

- (1) Justice **Noer**: This case questions whether four comments made on Facebook are covered by section 185 of the Penal Code on hate speech against vulnerable minorities. More specifically, the issue is whether the statements are sufficiently offensive (*kvalifisert krenkende*) to persons due to their gender identity or gender expression.

Background and issue

- (2) A, born on 00.00.1969, is indicted for violation of section 185 of the Penal Code on hate speech on the following grounds:
- “On Wednesday 24 March 2021 between 6 p.m. and midnight from his home in --- 0 in Askøy or elsewhere, he wrote the following comments directed at B under a Facebook post that was potentially visible to 585 persons:
- Perverted male pigs permanently larping as little girls strictly speaking have no slanderous power.
 - Do you really think that a single person thinks of you as a woman and not an old man with strange fantasies?
 - That being said it is incomprehensible to me that the authorities still allow you to care for children.
 - ‘B’ doesn’t exist. It is a sick fantasy in C’s mind.
- (3) The cited statements were made on a private Facebook account belonging to D, a joint friend of the defendant and the aggrieved person. D had 585 Facebook friends, who could read what was written.
- (4) B – the aggrieved person – was born on 00.00.1973 and worked as an engineer in Oslo municipality in Eastern Norway when this took place. She and the defendant were old acquaintances, and had previously participated together in so-called LARPS – live action role-plays.
- (5) Some years ago, the aggrieved person changed legal gender from male to female. At the same time, she changed her name from the male name C to the female name B.
- (6) By Hordaland District Court’s judgment of 18 December 2021, A was convicted in line with the indictment and received a suspended prison sentence of 21 days and a fine of NOK 15 000. The District Court ruled as follows:
- “1. A, born 00.00.1969, is convicted of violation of section 185 subsection 1 first sentence cf. subsection 2 of the Penal Code and sentenced to 21 days of imprisonment and a fine of NOK 15,000, alternatively 15 days of imprisonment. Execution of the sentence is postponed by a trial period of two years, see section 34 of the Penal Code.
 - 2. A, born 00.00.1969, is liable for costs of NOK 3,000.”
- (7) A appealed to Gulating Court of Appeal, which dismissed the appeal by judgment of 13 May 2022.

- (8) The defendant – A – has appealed to the Supreme Court. The appeal challenges the application of the law and the sentence. In short, A contends that the threshold for what is covered by section 185 of the Penal Code must be higher for statements regarding gender identity/gender expression than for statements regarding, for instance, skin colour and ethnicity. Moreover, the Court of Appeal was wrong in finding that the comments in questions – interpreted in context – are sufficiently offensive and thus punishable. In addition, the appeal challenges the sentence.
- (9) The public prosecution authority finds that the Court of Appeal has applied the law correctly and that the sentence at least is not too strict.

My opinion

- (10) I have concluded that the appeal against the application of the law must be dismissed, but that the sentence should be reduced.

Basic principles for the interpretation of section 185

- (11) Section 185 of the Penal Code covers anyone that makes hateful or discriminatory statements targeted at vulnerable groups. The provision 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. gender identity or gender expression, or
- e. reduced functional capacity.”

- (12) The provision must be read together with section 266 of the Penal Code on “harassing conduct”. It may give a basis for punishment for hateful statements at a more general level, irrespective of whether the statements are targeted at vulnerable groups.
- (13) The Supreme Court has heard a number of cases dealing with section 185 of the Penal Code. According to case law, the provision is only meant to cover sufficiently offensive statements. Particularly important is whether the statements express serious disparagement of the vulnerable individual’s or group’s human worth due to one or more of the grounds for discrimination listed in section 185 subsection 2. The provision must be interpreted in the light of the freedom of expression, and there is a relatively wide margin for tasteless remarks. I reference Supreme Court’s judgment HR-2022-1707-A paragraphs 18 to 22 concerning the general principles for the interpretation of the penal provision. In the case at hand, it is clear

that the statements were made in a public place, see section 10 of the Penal Code, and that the defendant has acted with intent.

- (14) The appeal challenges the application of the law. Like the Court of Appeal, the Supreme Court must rely on the facts presented in the District Court's judgment, and cannot review the evidence. However, interpreting the relevant statements is part of the application of the law, see the Supreme Court ruling Rt-2012-536 paragraph 17. That means that the Supreme Court may also bring in statements other than those quoted in the indictment, see Rt-1997-1821 on page 1826. What matters is how the general reader will perceive them. The courts must not read more into the statements than what is clearly reasonable, see HR-2022-1707-A paragraph 22.

Gender identity or gender expression

- (15) The prohibition in section 185 of the Penal Code against making hateful statements regarding persons' gender expression or gender identity was adopted in 2020 and entered into force on 1 January 2021.
- (16) The objective is to protect "transgender persons and others that have a gender identity or a gender expression deviating from the expectations of those around them", see Proposition to the Storting 66 L (2019–2020) item 8.3.3. The protection therefore does not apply to persons whose gender identity or gender expression corresponds to the biological.
- (17) The Storting's Acting Committee of Justice gives the following arguments for the Proposition in Recommendation to the Storting 41 L (2020–2021) chapter 8:
- "The majority points out that persons challenging society's norms related to gender identity and gender expression constitute a group exposed to discrimination, harassment and violence, and considers it necessary and important to protect this group against hate crime."
- (18) The majority of the Committee stresses that only serious violations should be punishable. Examples mentioned are "[s]tatements that encourage or support violations of transgender persons' integrity, and statements expressing serious disparagement of a transgender person's human worth".
- (19) The majority of the Committee mentions that difficult assessments may be required in this regard, including when there is disagreement as to transgender persons' use of dressing rooms and gyms. The Committee writes:

"The majority is aware of the discussion whether a transgender person who has not undergone gender-changing or gender-affirming treatment, but who identifies as a woman, can be denied access to the women's dressing room. The majority acknowledges that the choice of dressing rooms brings about a few issues of principle, where different interests may collide. The issue must be evaluated under the Equality and Anti-Discrimination Act, and the outcome depends on an individual assessment. The Penal Code is not applicable in situations where a transgender person is asked to use a certain dressing room. On the other hand, denying a trans person access to a gym, a swimming pool or similar because of the person's gender identity or gender expression is an act covered by section 185 of the Penal Code."

- (20) However, another majority of the Committee warned against stretching the penal provision too far:

“The majority of the Committee, the members from the Conservative Party, the Progress Party and the Centre Party, have noted the development for instance in Canada, where the debate has demonstrated that regulations related to gender identity and gender pronouns may come into conflict with the freedom of expression. The majority will strongly advise against Norway going in a direction where it is considered a crime to talk about a person based on their appearance, even if that person identifies as something else. A clear distinction must be made between hateful and punishable statements and statements that do not fall under these categories.”

- (21) It follows from this that there is large room for statements related to gender identity and gender expression. The provision typically covers harassment and bullying involving serious disparagement of a person or a group of persons due to their gender identity or gender expression.

Threshold for punishment

- (22) The defendant’s counsel contend that the threshold for being convicted of discriminatory or hateful statements regarding gender identity or gender expression must be higher than the threshold for statements targeting other groups protected by the provision. He points out that Norway is not obliged under any international conventions to punish such discrimination. He also points out that gender identity or gender expression in some sense is a choice, as opposed to, for instance, ethnicity and skin colour.
- (23) However, section 185 of the Penal Code is worded in a manner that gives no basis for distinguishing between the different groups protected by the provision. According to the preparatory works, the amendment is based on anti-discrimination and justice considerations, and persons with a deviating gender identity or gender expression should be treated in the same way as other exposed groups, unless other weighty considerations suggest otherwise, see Proposition to the Storting 66 L (2019–2020) items 8.3.1 and 8.3.3.
- (24) Therefore, my view is that the threshold for punishment must be the same for all groups protected under section 185 of the Penal Code. The individual assessment of the punishability may, however, be influenced by the vulnerability of the group or persons affected, for instance if the hate speech is directed at a child, see HR-2022-1707-A paragraphs 28 to 30.

The individual statements concerned

- (25) As mentioned, the comments concerned in the case were posted on the private Facebook page of a mutual friend of the defendant and the aggrieved person, D. It started as D posted a humorous message that he had misread a newspaper article regarding Tromsø municipality’s illegal purchase of services for nearly NOK 100 million. He had read “horses” instead of “services” and wondered “how on earth do you hide so many horses?”

(26) The discussion progressed as follows:

“A third person:

‘Could be a very expensive horse.’

The aggrieved person:

‘Horse steak!’

The defendant:

‘Well, maybe not so far out after all. Oslo municipality has probably spent 50 times as much on its hobbyhorses. I think they are hiding them in basements of closed restaurants, but the bill will probably come to the natives like Christmas Eve to the old woman.’

The aggrieved person:

‘But what about whataboutism, isn’t that a serious problem too?’

The defendant:

‘Have a banana C [the aggrieved person’s name before the gender change]. You don’t always have to be such a humourless forum troll...’

Another third person:

‘Use the right name for the right person, you banana.’

The aggrieved person:

‘Oh well, A [the defendant], you just landed squarely in the asshole category. Hope you feel uncomfortable being an asshole.’

(27) Shortly after, the defendant wrote the *first statement* for which he is indicted:

“Perverted male pigs permanently larping as little girls strictly speaking have no slanderous power.”

(28) The thread then developed as described in the indictment. The defendant wrote some 17 comments and the aggrieved person 19. Some other persons also participated in the exchange.

(29) Two circumstances have a certain relevance to the context. First, the aggrieved person’s comments were posted with her profile picture – showing a woman – and with her woman’s name. However, as the comments show, the defendant answered her with the man’s name she had used earlier.

(30) Secondly, the defendant used the expression “permanently larping”. As mentioned, he and the aggrieved person had previously participated together in so-called LARPS – live action role-play events. The expression must thus be understood to denote a form of permanent role-play.

(31) The question is whether the defendant’s first comment – *“Perverted male pigs permanently larping as little girls strictly speaking have no slanderous power.”* – is sufficiently offensive due to the aggrieved person’s gender identity.

(32) In my opinion, the answer to this is yes. The comment contains a highly derogatory characterisation of the aggrieved person. The description of her as a perverted male pig is

directly linked to her gender change. It is the defendant that brings in gender identity, without this having been a topic initially in the Facebook thread.

(33) The defendant has every right to express negative views on the right to change gender. But he could have done so without making highly derogatory remarks about transgender persons.

(34) Also, I cannot see that the aggrieved person's earlier comments in the thread, including calling the defendant an "asshole", make the defendant's statements less punishable. As stressed in the Supreme Court judgment HR-2018-674-A paragraph 20, a person participating in a quarrel must also be protected by anti-discrimination rules. The aggrieved person reacted to the defendant's use of her former man's name. Her outburst against him must be read as a clear message of her disapproval of this. Nonetheless, the defendant went on by characterising her in a strongly offensive terms aimed at, exactly, her new gender identity.

(35) The *second and fourth statements* from the defendant came later on and have approximately the same content. He wrote:

"Do you really think that a single person thinks of you as a woman and not an old man with twisted fantasies."

"'B' doesn't exist. It is a sick fantasy in C's mind."

(36) Although these statements, considered in isolation, are not as derogatory as the first comment, they are, in my view, also punishable when read together with the first comment. Admittedly, it does not necessarily reach the threshold of punishability to say that the aggrieved person cannot be regarded as a woman. However, the defendant also describes her in derogatory terms and writes how he believes everyone else sees her. In my view, the comments express coarse disdain for and ridicule of the aggrieved person because of her gender change.

(37) My conclusion is therefore that these statements too – read together with the other comments in the thread – are punishable. I note, however, that they are at the lower end of what may be regarded as punishable. As mentioned, there is a relatively large room for tasteless statements before the threshold for punishment is reached.

(38) *The third statement* from the defendant read:

"That being said it is incomprehensible to me that the authorities still allow you to care for children."

(39) According to the defendant's defence counsel, this comment is not punishable, as it is not linked to the aggrieved person's gender identity. He points out that the courts are not to read more into a statement than "what may reasonably be inferred from the context", see HR-2022-1707-A paragraph 22 – the "caution principle". The defence counsel's argument is that the discussion between the aggrieved person and the defendant eventually involved more than the aggrieved person's gender. I therefore cite parts of the exchange prior to the comment:

"The defendant:

'Do you really think that a single person thinks of you as a woman and not an old man with strange fantasies ... well I'm sure they are afraid to tell you, but

they know it and they think it. ... all the time... despite having pity and accepting it politically.'

The aggrieved person:

'No, but I'm not used to anyone openly being an utter asshole, with such zealous efforts. Funny that you also insist you're ok with it after all that alt-right barf of mouth poo you sprayed out. But I understand that you are on a completely different planet when you operate online. Planet Asshole, apparently.'

A little later, the defendant replies:

'Yes I'm being an asshole, obviously, but why do insist on trolling and provoking instead of making arguments in every single thread? That is totally asshole too. I have a black belt in being an asshole, but I don't use my superpowers for no reason. 'Barf', 'poo' and 'spray' is strictly speaking kindergarten level. That being said it is incomprehensible to me that the authorities still allow you to care for children.'"

- (40) Here, the defendant is being critical to several aspects of the aggrieved person. The aggrieved person's harsh language at "kindergarten level" could be among the things that make the defendant question her ability to raise children. But read together with the other comments in the thread, there can be no doubt what the defendant wanted to express, namely that the aggrieved person, in his view, belongs in the category "perverted male pigs" and that he is an "old man with strange fantasies" pretending to be a little girl. These characterisations constitute the starting point for the attacks and constitute a red line throughout the exchange. Like the District Court and the Court of Appeal, I therefore find that the defendant's comment was primarily linked to the aggrieved person's gender identity.
- (41) I consider this comment also to be sufficiently offensive. This applies despite the aggrieved person's prior coarse descriptions of the defendant's writing. To be labelled as someone who is not fit to take care of one's own children based on matters relating to gender identity, is a serious accusation touching upon fundamental qualities – such as the human worth – of a person. Read together with the other comments, this statement must also be covered by section 185 of the Penal Code.

Sentencing

- (42) In the Court of Appeal, the defendant was sentenced to 21 days of suspended imprisonment and to a fine of NOK 15 000.
- (43) When setting the sentence, I will base myself on the Supreme Court's judgment HR-2020-184-A *Cockroach*. There, the convicted person received a 24 days' prison sentence and a fine of NOK 25 000 for a race-discriminatory remark in a Facebook group.
- (44) I perceive the statement in that case to be somewhat harsher than those in the case at hand altogether. There are also other differences: First, the defendant and the aggrieved person in our case were two adults who knew each other from before. In comparison, the *cockroach* judgment dealt with highly offensive descriptions of a young social commentator. Attacks on young people participating in the public debate are serious. I reference the Equality and Anti-

Discrimination Ombud's report "Hate speech on the Internet", 2021 page 11, stressing that online harassment is "a serious threat against the freedom of expression and the democratic participation for a large number of people".

- (45) Secondly, the relevant statement in the *cockroach* judgment was posted in a Facebook group with more than 20 000 members, which means that there were more potential readers than in our case. On the other hand, the aggrieved person was not a member of the Facebook group, and did thus not experience the same "exposure" or personal and direct bullying as in the case at hand.
- (46) It is a mitigating factor that the defendant deleted the first comment on his own initiative during the discussion on Facebook. By doing so, he demonstrated a will to take back the statement. He thus limited the risk that the post remained out there "for eternity". The fact that the aggrieved person later posted a screen shot of the comment, has no relevance to the assessment.
- (47) Both the District Court and the Court of Appeal emphasised how the aggrieved person perceived the offence. The District Court wrote the following:

"The four statements of which the defendant is convicted, all have the underlying premise that that the aggrieved person and the group targeted are subjected to insults (*forhånelse*) due to circumstances listed as grounds for discrimination in the law, namely 'gender identity' or 'gender expression'... The aggrieved person has confirmed that she perceived the statements as very hurtful, and that she perceived them as so-called 'deadnaming' and 'outing', in that the defendant exposed her to persons who had no knowledge about her background."
- (48) I agree with the District Court.
- (49) The maximum sentence for the type of violation of section 185 of the Penal Code as we have seen is a fine or imprisonment of up to three years. Although online hate speech is a rather common phenomenon, the punishability of the statements will vary, depending, for instance, on whether they incite violence or are of a more bullying nature. Therefore, a fine alone may often be a proper reaction. When I find it necessary to impose a suspended prison sentence in this case, it is mostly due to the first statement, which clearly falls within the scope of section 185, and to the fact that the defendant made several other punishable statements. The suspended prison sentence is reduced to 15 days.
- (50) When assessing a fine, weight must be given to the defendant's income and assets, see section 53 subsection 2 of the Penal Code. According to information provided, the defendant has an annual income in the form of work assessment allowance in excess of NOK 200 000. The District Court and the Court of Appeal set the fine at NOK 15 000, and I find no reason to change this.
- (51) For the sake of simplicity, I will formulate a new item 1 in the conclusion of the District Court's judgment.

Conclusion

- (52) I vote for this

J U D G M E N T :

The District Court's judgment, item 1 of its conclusion, is changed to read:

A, born 00.00.1969, is convicted of violation of section 185 subsection 1 first sentence cf. subsection 2 of the Penal Code and sentenced to fifteen days of imprisonment. Execution of the sentence is suspended by a trial period of two years, see section 34 of the Penal Code. He is also sentenced to a fine of NOK 15,000, alternatively 15 days of imprisonment.

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| (53) | Justice Arntzen: | I agree with Justice Normann in all material respects and with her conclusion. |
| (54) | Justice Thyness: | Likewise. |
| (55) | Justice Falch: | Likewise. |
| (56) | Justice Webster: | Likewise. |
| (57) | The Supreme Court gave this | |

J U D G M E N T :

The District Court's judgment, item 1 of its conclusion, is changed to read:

A, born 00.00.1969, is convicted of violation of section 185 subsection 1 first sentence cf. subsection 2 of the Penal Code and sentenced to fifteen days of imprisonment. Execution of the sentence is suspended by a trial period of two years, see section 34 of the Penal Code. He is also sentenced to a fine of NOK 15,000, alternatively 15 days of imprisonment.