# SUPREME COURT OF NORWAY

On 4 November 2022, the Supreme Court's Appeals Selection Committee composed of Justices Webster, Arntzen and Østensen Berglund issued, in

**HR-2022-2125-U, (case no. 22-156788STR-HRET), criminal case, appeal against order:**

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| A | (Counsel Heidi Juritzen and Øystein Ola Storrvik) |
| B | (Counsel Live Sjuve Johansen and Ole Magnus Strømmen) |
| C | (Counsel Marius Oscar Dietrichson and Albulena Krasniqi) |
| v. | |
| The Public Prosecution Authority | (Counsel Richard Beck Pedersen and Frederik G. Ranke) |

this

**O R D E R :**

(1) This case concerns a second-tier appeal against an order in a case dealing with exclusion of evidence.

(2) A, B and C are charged with, among other things, illegal import of a substantial quantity of narcotic drugs as part of the activities of an organised criminal group, see section 232 subsection 1 first penal provision, cf. section 231 subsection 1, cf. section 79 (c) of the Penal Code. The factual basis for the charges in this regard consists primarily of materials acquired from the encrypted communication service EncroChat.

(3) In its order HR-2022-1314-A, the Supreme Court dealt with the admissibility of the materials from EncroChat as evidence. Paragraphs 4–9 of the ruling describe how Norwegian authorities got hold of the materials. The Supreme Court dismissed the request for exclusion of the EncroChat materials. A premise for the conclusion was that the evidence had been legally acquired under French law.

(4) The reason why the appellants are once again raising the issue of exclusion of the EncroChat materials is a ruling from the French supreme court – the Court of Cassation – handed down on 11 October 2022. A key question now is to which extent the new French ruling gives a

basis for changing the conclusion in HR-2022-1314-A that the evidence had been legally acquired under French law.

(5) In a pleading of 11 October 2022, the appellants requested that the EncroChat materials be excluded as evidence, alternatively that the main hearing in the District Court be postponed. As a result of the request, the commencement of the main hearing was postponed from 17 to 18 October 2022.

(6) On 17 October 2022, Oslo District Court ruled as follows:

> "1. The request that materials from communication on EncroChat and SKY ECC be excluded as evidence is dismissed.
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> 2. The request for a postponement of the main hearing is dismissed."

(7) On 21 October 2022, after the defendants' appeals, Borgarting Court of Appeal ruled as follows:

> "The appeals are dismissed."

(8) The Court of Appeal found that the evidence had been legally acquired under French law, so that the standard laid down in HR-2022-1314-A could not give any other result in the present case.

(9) *A, B and C* have appealed against the Court of Appeal's ruling to the Supreme Court. The appeals challenge the application of the law and the procedure. In short, the appellants contend that the Court of Appeal has incorrectly assumed that the evidence was legally acquired under French law; that the Court of Appeal has misinterpreted the ruling from the Court of Cassation; that the Court of Appeal has applied the wrong exclusion standard; that the ruling is in conflict with basic principles of criminal procedure; and that the reasoning is flawed. They also contend that the ruling amounts to a violation of Article 6 of the European Convention on Human Rights (ECHR), as the defence counsel was denied access to the chain of custody. The appellants have also requested that the appeal be given a suspensive effect.

(10) *The Public Prosecution Authority* has responded. The Prosecution Authority generally supports the Court of Appeal's reasoning and conclusion. No error in law or procedural error has been committed, nor any violation of the ECHR.

(11) *The Supreme Court's Appeals Selection Committee* notes that the appeal is a second-tier appeal against an order. The Committee may, therefore, only review the Court of Appeal's procedure and general interpretation of the law, see section 388 subsection 1 of the Criminal Procedure Act. As for the application of the Constitution and the European Convention on Human Rights (ECHR), the Committee may also review the individual application of the law, but not the findings of fact. The wording "interpretation of a statutory provision" in section 388 subsection 1 (3) of the Criminal Procedure Act also covers the general understanding of non-statutory procedural rules, see for instance HR-2021-966-A paragraph 15. However, establishing the content of foreign statutory provisions falls outside the scope of the Committee's competence, see HR-2021-1336-U paragraph 17 and HR-2022-1314-A paragraph 36. In other words, the Appeals Selection Committee may not review the Court of Appeal's interpretation or application of French legal rules.

(12) In HR-2022-1314-A paragraph 26, the Supreme Court lays down the conditions for when evidence acquired by foreign authorities can be used in a Norwegian criminal case:

> "If the acquisition could not have been legally carried out in Norway, three criteria must be met in order for investigation materials acquired by foreign authorities in a Norwegian criminal case to be admissible: (i) they must have been acquired in accordance with applicable rules in the relevant country, (ii) the defendant must have access to all the acquired information, and (iii) the information must not have been acquired in a manner causing the use as evidence to conflict with basic Norwegian values. A prohibition against using materials acquired by foreign authorities as evidence would be particularly relevant where the acquisition is carried out by states in which criminal procedural traditions differ from ours."

(13) The context in the paragraph shows that condition (i) is aimed at the very acquisition of the materials, and does not include a legal obligation to verify them. It was the acquisition of the materials that was the issue in the case, as well as the case law referenced in the order.

(14) The question now is whether the new French ruling demonstrates that the evidence, after all, was not acquired in accordance with the rules applicable in France. As regards the interpretation of the conditions laid down in HR-2022-1314-A paragraph 26, the Court of Appeal states:

> "The key question before the Court of Appeal is whether the evidence has been 'acquired in accordance with applicable rules in the relevant country', see the Supreme Court order HR-2022-1314-A paragraph 26. This implies, conversely, that French rules regulating *something other than the acquisition* of the evidence are not relevant for the assessment.
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> It is thus not relevant whether the same materials can be *presented as evidence in the French court.* The admissibility of the materials as evidence in a French trial depends on a number of procedural factors other than the acquisition itself. Whatever the result may be in the French case with regard to the issue of exclusion of evidence, is therefore not of decisive importance.
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> Nor can the Court of Appeal see that there is a basis for a wide interpretation of the condition from Norwegian case law on the legitimacy of the acquisition, such that it requires compliance with French legal rules in the *subsequent handling* of already acquired evidence. This applies either to the legal rules that, here, lay down requirements for issuance of authenticity certificates, or to the preparation of technical guidelines, procedures for transfer, safe storage, surrender restrictions etc.
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> …
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> In the Court of Appeal's view, the acquisition of the evidence does not become illegal because a rule is violated at a later stage by failure to issue an authenticity certificate. As the Court of Appeal interprets the condition for legal acquisition in HR-2022-1314-A, the term acquisition does not cover subsequent issuances of authenticity certificates or any other attestations necessary under French law."

(15) The Appeals Selection Committee considers this to be a correct interpretation of the law.

(16) Furthermore, the appellants argue that admitting the evidence would conflict with Article 6 (1) and (3) of the ECHR because the defence are not granted access to the "chain of custody". The Appeals Selection Committee notes that it is the adjudicating court in the criminal case

that must carry out an individual assessment of the significance of denying the defence access to the chain of custody.

(17) Finally, a unanimous Appeals Selection Committee finds it clear that the appeals cannot succeed. The other parts of the appeals are dismissed in accordance with section 387a subsection 1 of the Criminal Procedure Act.

(18) Consequently, it is not necessary to consider the issue of suspensive effect.

(19) The ruling is unanimous.

## C O N C L U S I O N

The appeals are dismissed.

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| Wenche Elizabeth Arntzen | Bergljot Webster | Cecilie Østensen Berglund |
| (sign.) | (sign.) | (sign.) |