



Supreme Court's DECISION

delivered in Stockholm on 19 June 2024

Case no.

Ö 5165-23

Ö 3711-23

PARTIES

Applicant and appellant

EB

Respondents

1. Prosecutor General

Box 5553

114 85 Stockholm

2. TR

3. Secrecy NN1

4. Secrecy NN11

5. Secrecy NN14

6. Secrecy NN7

7. Secrecy

THE MATTER

Relief for a substantive defect and appeal for relief for grave procedural error

RULING APPEALED

Judgment of the Svea Court of Appeal of 27 September 2022 in case B 4540-22.

THE SUPREME COURT'S RULING

The Supreme Court grants EB's application for relief for a substantive defect as regards his liability for the offences of which he was convicted, his sentence, the damages awarded to the victims and the obligation to advance a contribution to the Crime Victims' Fund.

The remainder of the case will be reconsidered by the Court of Appeal.

The Supreme Court rejects the motion for a stay of execution.

The Supreme Court dismisses the case as regards EB's appeal for relief for grave procedural error (Ö 3711-23).

The secrecy provisions in Chapter 21, Section 3a and Chapter 35, Section 12 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to the information in the party annexes to this decision.

CLAIMS IN THE SUPREME COURT, ETC.

EB has applied for relief for a substantive defect, requesting that he be acquitted of liability for the offences of which he has been convicted and that the private claims be dismissed.

EB also lodged an appeal for relief for grave procedural error, requesting that the judgment of the Court of Appeal be set aside.

He has also requested the Supreme Court to order any further execution of the Court of Appeal's judgment to be stayed.

The Prosecutor General has opposed the granting of EB's application for relief for a substantive defect. The Prosecutor General likewise opposes EB's appeal for relief for grave procedural error.

The injured parties were invited to submit an opinion on the applications.

REASONS FOR THE DECISION

Background

1. In March of 2022, the Stockholm District Court convicted EB of four counts of assault, four counts of aggravated assault, three counts of unlawful deprivation of liberty, two counts of unlawful threat, aggravated unlawful threat, six counts of child rape and sexual molestation. The sentence was six years' imprisonment. EB was also ordered to pay damages to several of the injured parties.
2. The Svea Court of Appeal modified the judgment of the District Court such that EB was convicted of an additional case of child rape, two cases of aggravated assault and assault. The sentence was increased to eight

years' imprisonment. EB was also ordered to pay damages to an additional injured party.

3. EB appealed the judgment of the Court of Appeal to the Supreme Court, which did not grant leave to appeal.

4. EB has now applied for relief for a substantive defect and lodged an appeal for relief for grave procedural error.

5. In support of his application for relief for a substantive defect, EB submits, in essence, the following. CN worked as a lawyer at Advokatbyrån Rebecca Lagh AB in the autumn of 2019. During this time, a preliminary investigation was being carried out in which he was a suspect. RL was appointed as counsel for one of the injured parties. All preliminary investigations in which he was a suspect were closed in August of 2020. In December of the same year, the preliminary investigations were reopened by a decision of CN, who by that time had commenced work as a prosecutor. RL was reappointed as counsel for the same injured party. CN has also carried out work for another law firm which, through one of the lawyers working in the firm, represented another of the injured parties.

6. Against this background, and taking into account that both law firms are clearly focussed on representing victims of crime and that RL was recently CN's boss, EB considers that CN could not possibly have remained objective in the process. CN was therefore disqualified from assuming a position within the preliminary investigations, bringing a prosecution and taking other measures against him pursuant to the Code of Criminal Procedure.

7. The Prosecutor General has argued that the issue of disqualification has already been examined, both by the Prosecutor General and the Supreme Court. As EB has not presented any new circumstances, the Prosecutor General considers that EBs' application is to be rejected.

What is at issue in the Supreme Court

8. At issue in the Supreme Court is whether the prosecutor in the case was disqualified, and whether this constitutes grounds for relief for a substantive defect.

Disqualification as grounds for relief for a substantive defect

9. Relief for a substantive defect may be granted for the benefit of the defendant if any legally qualified judge or the prosecutor has been disqualified and it is not plain that the disqualification has been without importance as to the outcome of the case (see Chapter 58, Section 2, second paragraph of the Code of Judicial Procedure). The provision thus equates judges and prosecutors.

10. In order for a disqualification to give rise to relief for a substantive defect, it is not necessary to establish that the disqualification affected the outcome. Rather, it is sufficient, as is clear from the text of the law, that it be "not plain" that the disqualification has been without importance as to the outcome of the case.

11. If relief for a substantive defect is granted, the court shall simultaneously direct that the case be taken up anew by the court that last adjudicated in the case. However, when such relief is granted in a civil case or in a criminal case for the benefit of the defendant and the matter is found

to be plain, the court may change the judgment immediately. (See Chapter 58, Section 7, of the Code of Judicial Procedure.)

Regarding prosecutorial disqualification

12. Provisions regarding prosecutorial disqualification are contained in Chapter 7, Section 6 of the Code of Judicial Procedure. The first paragraph states that if there is any circumstance which regarding a particular offence would disqualify a judge, it also disqualifies a public prosecutor from participating in the preliminary investigation, prosecution of the offence, or taking other measures pursuant to the Code of Judicial Procedure. The same applies to the performance of other prosecutorial duties.

13. The second paragraph states that the disqualification of a prosecutor may not be founded upon an official action taken by that prosecutor or an act committed against the prosecutor because of his office. It follows from the third paragraph that a prosecutor, although disqualified, is entitled to take a measure that cannot be postponed without risk. In these respects, the rules applicable to prosecutors differ from those applicable to judges.

14. The fourth paragraph states that the issue of disqualification of a prosecutor is determined by the prosecutor's immediate superior. A court may not, in the ordinary course of proceedings, consider the issue of disqualification of a prosecutor, nor may it dismiss a prosecution under Chapter 45, Section 8 of the Code of Judicial Procedure on the grounds that the prosecutor is disqualified (see Govt. bill 1987/88:23 p. 7). The issue of disqualification may, however, be assessed by the court if the defendant applies for relief for a substantive defect pursuant to Chapter 58, Section 2, second paragraph of the Code of Judicial Procedure.

Regarding judicial disqualification

Regulations, etc.

15. The provisions regarding the disqualification of judges, which are thus in essence also applicable in assessing whether prosecutors are to be disqualified, are contained in Chapter 4, Section 13 of the Code of Judicial Procedure.

16. Paragraphs 1 through 9 list certain more specific circumstances which disqualify a judge from hearing a case.

17. In addition, the so-called ‘general clause’ of the tenth paragraph states that a judge is disqualified “if some other special circumstance exists that is likely to undermine confidence in his impartiality in the case”. While the wording of the general clause refers to partiality, the clause, as it has been interpreted, even includes other special circumstances operating on the independence or impartiality of a judge in the case (see, inter alia, “The Pirate Bay Case” NJA 2010 p. 274 para. 4, “Disqualification of the Co-opted Member” NJA 2014 p. 482 para. 10 and “Disqualification of the Technical Judge” NJA 2022 p. 905 para. 8).

18. The determination of disqualification under the general clause concerns not only the judge’s personal attitude towards the case and the parties. The fact that the judge is impartial and independent in fact therefore does not suffice for him or her to be deemed qualified. Conversely, the lack of confidence in the judge on the part of one party is not sufficient to constitute disqualification. The party must have reasonable grounds for its view that the judge is not impartial or independent. This may be the case if, viewed objectively, a special circumstance is liable to undermine

confidence in the judge's impartiality or independence. (See "Disqualification of the Technical Judge", para. 9 and references.)

19. The Supreme Court has stated that the purpose of the disqualification rules is to protect the objective administration of justice and ensure public confidence in the courts by excluding judges from hearing cases in which their relationship to one of the parties or the matter at hand is such as to create a risk of partiality. (See "Disqualification of the Technical Judge", para. 6.)

20. The disqualification rules must be interpreted and applied in the light of the provisions on human rights and fundamental freedoms, from which it follows, inter alia, that everyone is entitled to a hearing by an independent and impartial tribunal (see, for example, "Disqualification of the Technical Judge", para. 6; cf. inter alia Chapter 2, Section 11 of the Instrument of Government and Article 6 of the European Convention on Human Rights).

Regarding disqualification due to employment relationships in particular

21. In case law, the issue of disqualification has been determined in some cases where a judge is, was or has become employed by a party to the case. In assessing whether disqualification arises from the employment relationship itself, it must be determined to what extent the circumstances of the individual case are likely to undermine confidence in the judge's impartiality and independence. (See "Disqualification of the Technical Judge", para. 11 and 12, with reference to "Disqualification of the Co-opted Member", para. 22, RÅ 2009 abstract 8 and HFD 2011 abstract 15 and HFD 2020 abstract 16 para 19.)

22. When determining disqualification due to prior employment pursuant to the general clause, the main factor is what type of contact the judge had with the case during his or her employment. Other relevant factors include the time that has elapsed since the end of the employment relationship, the nature of the judge's position with the previous employer, the duration of the employment relationship, the size and internal organisation of the previous employer, and the links between the judge and his or her former workplace. (See "Disqualification of the Technical Judge" para. 13 with further reference to *Piersack v. Belgium*, 1 October 1982, Series A no. 53, *Paunović v. Serbia*, no. 54574/07, 3 December 2019 and *Walston v. Norway* [dec.], no 37372/97, 11 December 2001.)

23. The circumstances relevant to disqualification may vary in strength. This is particularly evident regarding temporal factors – for example, the length of time for which the judge has been employed by a party at an earlier stage, or the time elapsed since the employment ended – but the circumstances may vary in strength in other respects as well.

How to consider the issue of prosecutorial disqualification?

24. As mentioned (see para. 12 and 15), the provisions on judicial disqualification in Chapter 4, Section 13 of the Code of Judicial Procedure are essentially also applicable when assessing the existence of prosecutorial disqualification. In situations where the same ground for disqualification applies to both judges and prosecutors, the case law concerning judges can provide guidance, although the different roles of judges and prosecutors in the context of judicial proceedings must be taken into account.

25. A prosecutor does not decide the outcome of a case in the way that a judge does. This might suggest that the issue of relief for a substantive

defect due to disqualification should be assessed more restrictively in the case of a prosecutor than in the case of a judge, both as regards the existence of disqualification and, perhaps more importantly, as regards whether any such disqualification has been plainly without importance as to the outcome of the case.

26. Prosecutors are subject to a duty of objectivity explicitly set out in several provisions. During the preliminary investigation, the lead investigator and his or her assistants must seek out, take charge of and consider circumstances and evidence which are or are not in the favour of the suspect. The prosecutor and his or her assistants must also continue to work in an objective manner even after prosecution has been brought. (See Chapter 23, Section 4 and Chapter 45, Section 3a of the Code of Judicial Procedure, cf. also, e.g., Chapter 20, Section 2, third paragraph.)

27. The requirement of objectivity should be seen, *inter alia*, in the light of the fact that the court in many respects relies on the material presented in the case to give a fair picture of what has emerged from the investigation, which in turn may depend on the instructions given by the prosecutor during the preliminary investigation. The legal literature has stated that a prosecutor may be disqualified even if he or she does not appear during the main hearing, since the prosecutor's decisions during the preliminary investigation, regarding investigative measures and the decision to bring prosecution, can have a significant impact on the outcome (see Christer Thornefors, *Rättegångsbalken*, Lexino 01/10/2021, JUNO, commentary on Chapter 58, Section 2, passage 2.3.3).

28. This does not mean that the differences between the roles of prosecutor and judge are necessarily irrelevant in the assessment of

disqualification, but it does mean that the difference between the two roles is not so great after all.

29. The relevant provision for relief for a substantive defect does not require that the circumstances invoked be new in relation to what has occurred previously. In this way, the provision in Chapter 58, Section 2, second paragraph differs from that of the fourth paragraph as concerns new circumstances and evidence. It should be noted that the question of prosecutorial disqualification is not at all subject to examination by the court in the ordinary course of proceedings (see para. 14). Furthermore, a piece of evidence or a circumstance first being invoked in an appeal to the Supreme Court – where leave to appeal has not been granted – is to be regarded as new when relief for a substantive defect is subsequently sought on the basis of Chapter 58, Section 2, first paragraph, item 4 (see NJA 1998 p. 148). It is therefore not the case that what is put forward in an application for leave to appeal constitutes material which, in the event of a subsequent application for relief for a substantive defect, is to be regarded as having previously been invoked.

The assessment in this case

30. The fact that the disqualification issue has been examined within the Prosecution Authority, and that it was invoked prior to the examination of leave to appeal in the Supreme Court, does not mean that EB's application for relief of a substantive defect shall not be examined in full (cf. p. 7 and 29).

31. CN was employed at Advokatbyrån Rebecca Lagh AB during the autumn of 2019. During that time, a preliminary investigation was under way against EB, in which RL was appointed as counsel for an injured party. About

a year after CN left Advokatbyrå Rebecca Lagh AB, the previously closed preliminary investigation was reopened, with her as the lead investigator. RL was then reappointed as counsel for the same injured party. At issue is whether these circumstances can be considered to mean that CN was disqualified in application of the general clause of Chapter 4, Section 13, tenth paragraph in conjunction with Chapter 7, Section 6 of the Code of Judicial Procedure.

32. CN's employment at Advokatbyrå Rebecca Lagh was relatively brief, and it has not emerged that she participated in the ongoing preliminary investigation there or was otherwise involved in the work on the case during her time at the firm. At the same time, it was a small law firm where RL had a leading position and where CN worked on the same type of cases. It is also worth noting that the case in question was distinctive and extensive. Furthermore, CN started working on the case as a prosecutor only shortly after she left Advokatbyrå Rebecca Lagh AB.

33. In this case, the circumstances relevant to the assessment of disqualification do not relate solely to the fact that CN could have been perceived more generally as representing an interest opposed to that of the defendant (see "Disqualification of the Co-opted Member"). Through her previous work at the law firm, there is also a more direct link to this particular case.

34. All in all, there are special circumstances in this case which, from an objective point of view, may be regarded as liable to undermine confidence in the prosecutor's impartiality. CN was therefore disqualified.

35. A motion to dismiss the case, which was examined by the District Court and the Court of Appeal, made it known to the court that EB was claiming prosecutorial disqualification based on CN's prior employment. It

was therefore possible for the court to take that fact into account in adjudicating the case. However, the wording of the provision on relief for a substantive defect requires that every conceivable influence on the outcome must be considered. Given the size of the case and the complexity of the circumstances (cf., the description in para. 1 and 2), the circumstances of this case are such that it cannot be excluded that the disqualification has affected the outcome.

36. In the light of the foregoing, relief for a substantive defect should be granted as regards liability for the offences of which EB was convicted, his sentence, the damages awarded to the victims and the obligation to advance a contribution to the Crime Victims' Fund. Since the matter is not plain, the case must be reconsidered by the Court of Appeal in those respects.

37. Given this assessment, there is no need to consider EB's appeal for relief for grave procedural error.

38. There is no reason to order a stay of execution of the sentence.

Justices of the Supreme Court Anders Eka, Agneta Bäcklund, Petter Asp (reporting Justice), Malin Bonthron and Jonas Malmberg participated in the ruling.

Judge referee: Johanna Siesing