

SUPREME COURT'S JUDGMENT

Case no.

B 1200-19

delivered in Stockholm on 11 July 2019

PARTIES

Appellant

S-EB

Counsel and Public Defender: Attorney JF

Respondents

1. Prosecutor-General

Box 5553

114 85 Stockholm

2. Secrecy MGDD

3. Secrecy MGD

2 and 3 represented by the Prosecutor-General

THE MATTER

Rape etc.

RULING APPEALED

Judgment of the Court of Appeal for Northern Norrland of 5 February 2019 in cases B 1040-18 and B 1167-18

OPERATIVE PART OF THE JUDGMENT

The Supreme Court varies the judgment of the Court of Appeal in case B 1167-18 in that the Supreme Court convicts S-EB of negligent rape under Chapter 6, Section 1 a of the Swedish Criminal Code and sets the sanction – which is also for rape of a child and sexual molestation – at imprisonment for two years and three months.

The Supreme Court issues leave to appeal regarding MGDD's private claim. Her action for damages is separated from the criminal case to be dealt with as a civil case.

The Supreme Court affirms the Court of Appeal's secrecy order.

The secrecy provision in Chapter 35, Section 12 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to the information presented at the Supreme Court's hearing in private and that may disclose the identities of MGDD and the witness (Secrecy E).

JF shall receive compensation from public funds for the defence of S-EB in the Supreme Court of – correctly calculated – SEK 73 834. Of the amount, SEK 22 080 relates to work, SEK 26 840 relates to loss of time, SEK 10 147 relates to outlays and SEK 14 767 relates to value added tax. The state shall bear the cost.

CLAIMS IN THE SUPREME COURT

S-EB has presented the claims that the Supreme Court refuse the prosecution for rape and the injured party's claim for damages. S-EB has also presented the claim that he

be, at any rate, sentenced to a milder sanction than that decided by the Court of Appeal.

The Prosecutor-General and the injured parties have opposed a variation of the Court of Appeal's judgment.

The Supreme Court has issued leave to appeal as set out in para. 3.

REASONS FOR THE JUDGMENT

Background

Court of Appeal's judgment

1. In the judgment appealed, the Court of Appeal has examined two district court judgments. The Court of Appeal has convicted S-EB of intrusive photography and gross defamation and sentenced him to a conditional sentence and day fines (case B 1040-18). That part of the Court of Appeal's judgment has not been appealed.
2. The Court of Appeal has also convicted S-EB of rape, rape of a child and sexual molestation. The sanction has been set – applying Chapter 34, Section 1, first paragraph and Section 2 of the Swedish Criminal Code – at imprisonment for three years and three months. S-EB has been required to pay damages to MGDD. (Case B 1167-18.)

The Supreme Court's leave to appeal

3. On account of S-EB's appeal, which refers to the Court of Appeal's judgment in case B 1167-18, the Supreme Court has issued leave to appeal concerning responsibility for rape and concerning the sanction. The question of leave to appeal regarding MGDD's private claim has been stayed. The Supreme Court has not issued leave to appeal in the other parts of the case.

The prosecution and the Prosecutor-General's adjustment of the prosecution

4. The statement of the act regarding rape has the following wording.

S-EB did perform sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with MGDD who did not participate voluntarily. The sexual act was that S-EB did insert his fingers in MGDD's genitals. This happened on 17 October 2018 at [---], Municipality of Skellefteå. – S-EB did commit the act with intent.

Section of the law: Chapter 6, Section 1, first paragraph, first sentence and third sentence, point 1 of the Swedish Criminal Code.

The Prosecutor-General has adjusted the prosecution in the Supreme Court and is alleging the following in the alternative.

S-EB was, when he committed the act being prosecuted, grossly negligent regarding the circumstance that the injured party MGDD was not participating voluntarily.

Section of the law: Chapter 6, Section 1 a of the Swedish Criminal Code.

The case in the Supreme Court

5. The Supreme Court has held a main hearing and reviewed the same evidence as the Court of Appeal.

6. In accordance with the Court of Appeal's judgment, S-EB is guilty of intrusive photography and gross defamation (case B 1040-18) and of rape of a child and sexual molestation (case B 1167-18).

The issues in the Supreme Court

7. The issues in the Supreme Court are whether S-EB should be held responsible for rape, or in the alternative negligent rape, and what sanction should be imposed.

The incident concerned

8. The following has been established through the consistent information given by the injured party and S-EB. They had been in contact with one another on social media for quite a long time. They had talked about all kinds of things; for instance, S-EB had proposed that they have sex. The injured party wrote to S-EB, who lived in a different place from her, that he could meet her and sleep over in her flat. They had not met before. The injured party wrote to him that she did not want to have sex and he replied "OK" or something similar. He arrived at around one in the morning. Shortly before that, she had written that the door was open and he could just come in. The injured party was in bed under a quilt when he arrived. She was wearing panties. He undressed, taking off everything but his underpants and lay down in the bed; they each had their own quilt. S-EB slept over at the injured party's place and they went their separate ways the next morning.

9. The case is about what happened during the night. In the main, the injured party and S-EB have given the following accounts.

10. The injured party has said that she was very tired and that she may have dozed off after S-EB had got into the bed. She reacted when he started touching her body. He touched her breasts and genitals. She stiffened and did not know how to behave. He inserted his fingers in her genitals and then had vaginal intercourse with her. She lay still in the same position – on her stomach with her face turned away from him – throughout the sequence of events. In some phase he tried to turn her round, but she resisted. She did not show in any way that she wanted to participate. S-EB ejaculated. When he was finished he lay beside her. She talked on her phone with a friend and said what had happened. The time was around 03.30 in the morning. She was not the one who took off her panties. She does not know what happened when they were taken off. She let S-EB sleep over since he was far from home. When S-EB got in touch a day or so after the incident and asked what she thought about what had happened, she reacted strongly and wondered whether he had not understood that she had not agreed to it. She has felt bad after what has happened.

11. S-EB has said that on one occasion the injured party rolled towards him and lay turned towards him but that nothing physical happened between them at that moment. He does not know whether she was awake but the way he experienced it was that she wanted to have sex. She then turned around so that she was lying facing away from him. After a while he started touching her back and breasts. He was not thinking that much about what she wanted just then. He inserted his fingers in her genitals. Since he did not get a no, he continued. When he was stroking her around her panties, her hand was there and helped him take the panties off. Then they had vaginal intercourse. They said nothing and the injured party was completely passive, but his understanding was that she agreed to what was happening. After a while, however, he experienced that it did not feel good and that it looked as though she might not want to. It did not feel right for either of them and he ended the sexual intercourse. He did not ejaculate. The injured party did not seem sad afterwards. Later on he sent a message to her and asked her what she thought of the previous day. In another message he apologised since he realised that what he had done was wrong.

The legal regulation

The 2018 sexual offences reform

12. The relevant provisions on sexual offences were enacted through legislation that entered into force on 1 July 2018. As part of the amendment made to the offence of rape the dividing line for a punishable act is now set at whether or not participation in a sexual activity is voluntary. There is no longer a requirement that the perpetrator used violence or a threat, or exploited the victim's particularly vulnerable situation, for it to be possible to convict the perpetrator of rape. In addition, a special responsibility for negligence was introduced for certain serious sexual offences. The legislation is based on proposals from the 2014 Sexual Offences Committee. (See Govt Bill 2017/18:177 and SOU 2016:60.)

Rape

13. A person who performs sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape and is sentenced to imprisonment for at least two and at most six years. When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way. A person can never be considered to be participating voluntarily if:

1. their participation is a result of assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person;
2. the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; or
3. the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator.

If, in view of the circumstances associated with the offence, the offence is considered less serious, the person is guilty of rape and is sentenced to imprisonment for at most four years. (See Chapter 6, Section 1 of the Swedish Criminal Code.)

14. The dividing line between an act that is punishable and an act that is not punishable is set at whether participation was voluntary, and the provision is intended to reflect every person's right to sexual self-determination and their right to choose whether they want to participate in a sexual act. A person who is subjected to a sexual approach against their will does not have any responsibility for saying no or expressing their dislike in any other way. A person who participates voluntarily in

sexual intercourse does not need to show their will to have sexual intercourse either. (See Govt Bill cited, p. 31 f.)

15. The requirement of voluntariness refers to the actual actions and not the person's inner attitude at the same time as the legislative history states that passivity can express consent. This means that passivity can be an expression of participation that is not voluntary, but also an expression of voluntary participation. When assessing whether participation is voluntary, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way. This rule must be considered to mean that the scope for assessing pure passivity as expressing a choice to participate in a sexual act is limited. The assessment of whether or not the participation was voluntary has to be based on the situation as a whole.

16. On the basis that it is the prosecutor who has the burden of proof in criminal cases, it is the task of the prosecutor to prove that the participation was not voluntary. When there is passivity, this means that the prosecutor has to show that the passivity did not mean that the injured party has expressed their consent.

17. It is only when it has been concluded that the participation was not voluntary that the question arises of what the perpetrator realised or ought to have realised regarding whether the participation was voluntary. The fact that a person did not make sure that the other person had chosen to participate voluntarily in the sexual relations is of no importance for the question of whether the participation was voluntary as long as the other person had, in actual fact, made that choice. Responsibility for negligence can only come into consideration if the participation is not voluntary. (Cf. Petter Asp and Göran Nilsson, Lexino, Brottsbalken 6 kap. En kommentar [*Chapter 6 of the Criminal Code. A commentary*], 2018, p. 25, also Govt Bill cited p. 34.)

18. The new wording of the provision does not mean any changes regarding what sexual acts can result in responsibility for rape.

Negligent rape

19. A person who commits an act referred to in Section 1 and is grossly negligent regarding the circumstance that the other person is not participating voluntarily is guilty of negligent rape and is sentenced to imprisonment for at most four years. If, in view of the circumstances, the act is less serious, the person is not held responsible. (See Chapter 6, Section 1 a of the Swedish Criminal Code.)

20. For it to be possible to consider criminal responsibility for negligent rape, the perpetrator must, in objective terms, have performed sexual intercourse or a comparable sexual act with a person who did not participate voluntarily (see para. 16 and 17). The provision is intended for acts that are manifestly punishable. This refers, in the first place, to situations where the perpetrator was deliberately negligent, i.e. cases where they suspected that the other person was not participating voluntarily but nevertheless performed the sexual act. However, there is also some scope to assess unintentional negligence as gross. More manifestly reprehensible instances where the perpetrator did not suspect, but ought to have suspected, that the injured party had not chosen to participate are covered by criminal liability. (Cf Govt Bill cited pp. 84 f.)

More about the examination of intent and negligence

21. The prosecutor also has to prove what the perpetrator is being accused of when it comes to the requirement of intent or negligence. To hold a person responsible for intentional rape – in a case like the present one – it must have been shown either that the perpetrator understood that the injured party was not participating voluntarily or that the perpetrator realised the risk that the injured party was not participating voluntarily and was also indifferent to the circumstance that the injured party was not participating voluntarily.

22. So for there to be intent, it is not sufficient that the perpetrator realised the risk that the other person was not participating voluntarily, but acted nevertheless. This only constitutes deliberate negligence.

23. For there to be intent, the perpetrator must, over and above this, be indifferent to the fact that the injured party was not participating voluntarily – and not only to the risk that this was so. The requirement is that it can be considered certain that, for the perpetrator, the occurrence of the relevant circumstance (in this instance absence of voluntariness) was not a relevant reason to refrain from the act. Put differently: realisation that the injured party was not participating voluntarily would not have restrained the perpetrator from going ahead with the act. The crucial point for the assessment is the perpetrator's actual attitude at the time of the act.

24. For there to be intent through indifference, the risk of a certain effect, in the mind of the perpetrator, generally has to be considerable. Normally this means that the perceived risk must be quite high on a scale of probabilities. These starting points should, in principle, also be applied when the question is whether there was indifference regarding preconditions for the offence other than effects. (See NJA [*Supreme Court case reports*] 2016 p. 763 para. 15 and 18.) An assessment of the probability perceived by the perpetrator is often based on an assessment of the actual probability of, for example, a particular effect arising. However, in cases like the present one only very limited guidance can be obtained from actual probability of that kind.

25. Nor can other factors identified in case-law as factors of importance in the assessment of whether there was intent through indifference normally provide any real guidance in a case like the present one (cf. NJA 2004 p. 176 on pp. 199 f. under the heading *Riktlinjer för bevisbedömningen* [*Guidelines for assessing the evidence*] and NJA 2016 p. 763 para. 23).

26. The examination of whether a perpetrator acted with indifference in relation to the circumstance that the injured party was not participating voluntarily must be made on the basis of the actual circumstances in the specific case. Acts that preceded the event and what happened after it are of importance, as is what has emerged about the actions of the parties during the actual sequence of events. The perpetrator's age, maturity and mental health can also be circumstances of importance for the assessment (see, e.g. NJA 2016 p. 763). The examination of the evidence is aimed at

what the perpetrator perceived at the time of the act about relevant circumstances and his attitude towards them.

27. Criminal responsibility can also be relevant when the perpetrator was grossly negligent regarding the circumstance that the injured party was not participating voluntarily (see para. 19). Negligence can be deliberate or inadvertent. Deliberate negligence matches the first step in an assessment of intent through indifference; the perpetrator must have either suspected or realised the risk that the other person was not participating voluntarily. The perpetrator is indifferent, but only to the risk, and acts in reliance on the participation – even though the perpetrator realises the risk of the opposite – being voluntary.

28. Inadvertent negligence means that the perpetrator did not understand, but ought to have understood, that the circumstance was in place, i.e. that the injured party was not participating voluntarily. The perpetrator is at fault in these cases because they have not obtained knowledge about what the position was, even though this should have been done.

The assessment in this case

The sexual acts

29. S-EB had sexual intercourse with the injured party and also inserted his fingers in her genitals. These are sexual acts that are covered by the provision on rape.

The injured party did not participate voluntarily

30. The injured party has given an account that is clear and consistent. It does not contain any direct contradictions, although it does contain some features that are hard to explain. The information she has given about the incident appears to be reliable concerning the main sequence of events, even though there is uncertainty about some details. Her account receives indirect support from the information given in witness testimony to the effect that, a short time after the incident, she told two people who were close to her about it (see NJA 2017 p. 316 I para. 11).

31. The investigation also shows that she sent a message to SE-B in which she expressed that she did not want to have sex with him when he came to her home. Even considering that a person can, at any time, change their position about participating or not participating in sexual acts, the message does provide some support for her account of the incident. The parties have also described in a consistent way that, in all essential respects, she remained passive throughout the sequence of events.

32. An appraisal of the Prosecutor-General's and the injured party's evidence, viewed separately, leads to the conclusion that the standard of evidence has been met regarding the circumstance that the injured party did not participate voluntarily. So, the question is whether S-EB's account affects this assessment.

33. It can be noted, to begin with, that the fact that the injured party and S-EB agreed to lie in the same bed and that they were only wearing underclothes does not mean that the injured party also participated voluntarily in the sexual acts.

34. S-EB has mainly given brief answers lacking detail to the questions put him, which has made it more difficult to assess his account. He has given information that can appear contradictory; for instance, he has confirmed some parts of what the injured party has said and has, at the same time, given information, in reply to questions from the defence, that is not consistent with the injured party's account. However, there is nothing to suggest that he has tried to withhold information that is to his disadvantage. He has thus confirmed information given by the injured party; for instance, that before his visit to the injured party, he had received a message from her saying that she did not want to have sex with him. Nor is there anything to suggest that he has deliberately given incorrect information.

35. S-EB has said that the injured party – who was lying with her back towards him – rolled over towards him at an early stage in the sequence of events and also lay turned towards him for a while. S-EB has also said that, after he had started stroking her, the injured party had taken off her panties herself or that they had, at any rate, helped one another to take them off. An act of that kind can generally be seen as an

expression of voluntary participation. Even if there is no reason to question that he experienced it in this way, his information is hard to interpret.

36. There are shortcomings in this part of his statement that, taken together, mean that it cannot have a decisive effect on the appraisal made of the Prosecutor-General's and the injured party's evidence about the actual situation (para. 32). It has therefore been shown beyond reasonable doubt that S-EB performed sexual intercourse and that he inserted his fingers in the injured party's genitals without her participating voluntarily in the sexual acts.

37. So, the next question is whether this fact, that the injured party did not participate voluntarily, is covered by S-EB's intent or whether he was grossly negligent in this respect.

S-EB did not have intent that the injured party did not participate voluntarily

38. It has not been shown that S-EB knew or understood that the injured party did not want to have sexual relations with him. However, the message that the injured party sent before they met in which she stated that she did not want to have sex must have given him reason to believe that she was probably not interested in sexual relations that evening. This also applies even considering that every person can change their mind at any time at all as to whether they want to participate in sexual acts. The investigation thus shows that when he came to her flat he knew that it could be the case that she did not want to participate in sexual acts.

39. He has himself said that he thought that she had agreed to participate in the sexual acts. Part of his explanation of why he believed this is that she rolled towards him and that he understood this as a sign that she might be interested in sexual relations, but also that she let him continue when he touched her and his understanding was that she helped him take off her panties. His account of how he perceived the situation has not been disproved, even though parts of it do not match the injured party's account of the actual sequence of events. He has, at the same time, stated that she was passive and that when she turned towards him, he was uncertain

about whether she was asleep. This means that all that his account provides support for is that he acted in uncertainty about how the situation was to be understood.

40. S-EB has also said that he broke off the sexual intercourse when the injured party moved down the bed, since he then got the impression that she no longer wanted to participate. Even though the information he has given about this part of the actual sequence of events partly contradicts what the injured party has said, her account cannot be considered to disprove what S-EB has said about the reason why he broke off the sexual intercourse.

41. Against this background, it has been proved that after the initial phase S-EB still realised the risk that the injured party was not participating voluntarily. However, having taken account chiefly of his information that he broke off the sexual intercourse when he noticed that it did not feel good, there is still doubt about whether, at the time of the act, S-EB was indifferent to whether the injured party was not participating voluntarily in the way required for intent. Therefore the requirement for intent has not been met.

42. The prosecution for rape shall therefore be refused.

S-EB has been grossly negligent

43. So the question is whether S-EB has been grossly negligent in the way required for criminal responsibility. What has been said above shows that he realised the risk that the injured party was not participating voluntarily in the sexual acts. This realisation lasted while he performed them. So he was deliberately negligent in relation to the fact that the injured party was not participating voluntarily.

44. In general, deliberate negligence is considered gross. This case does not involve an exceptional situation in which the deliberate negligence is not considered gross. On the contrary, there was deliberate risk-taking of a serious kind.

45. The circumstances are not such that the act is less serious. S-EB shall therefore be held responsible for negligent rape.

Penalty value and sanction

46. The penalty for negligent rape is imprisonment for at most four years. So the question is what penalty value the present offence has.

47. The starting point is that negligent offences have a lower penalty value than corresponding intentional offences, as is also expressed in the scales of penalties for the offences in question. When assessing the penalty value, consideration is given both to the degree of negligence shown by the perpetrator and to what sexual act is involved. An act that includes deliberate negligence generally has a higher penalty value than one performed with a lower degree of negligence. (See Govt Bill cited p. 85.)

48. The scale of penalties for negligent rape matches the scale of penalties for a rape offence that, in view of the circumstances, is considered less serious. It can be noted, in this context, that exemptions are made from criminal responsibility for grossly negligent acts in the cases where the act is less serious in view of the circumstances. If some negligent conduct would, if there has been intent in relation to the other person not participating voluntarily, have been assessed according to the milder level of the offence, then responsibility should not normally be considered regarding gross negligence (see Govt Bill cited, p. 85).

49. S-EB was deliberately negligent when he performed the sexual acts. He performed sexual intercourse with the injured party and also inserted his fingers in her genitals. The penalty value is clearly above the minimum penalty for the offence.

50. The negligent rape that S-EB is guilty of has a penalty value corresponding to imprisonment for eight months.

51 S-EB shall also be sentenced for rape of a child and sexual molestation. The penalty value for the combined offences corresponds to imprisonment for two years and four months.

52. In sentencing consideration must also be given to that fact that all the acts now being considered were committed before the district court judgment through which he was sentenced to a conditional sentence and day fines. (See point 1, Court of Appeal case B 1040-18.)

53 Applying Chapter 34, Section 2 of the Swedish Criminal Code, the sanction for the offences now being considered is set so that the sanctions do not in total exceed what would have been imposed for the combined offences. The sanction shall (Court of Appeal case B 1167-18) be set at imprisonment for two years and three months.

Action for damages

54. In view of the outcome regarding the classification of the offence, leave to appeal should be granted concerning the injured party's private claim. It is not now possible to consider the substance of the question of compensation. The question of damages should therefore be separated and dealt with as a civil case.

Justices of the Supreme Court Gudmund Toijer, Agneta Bäcklund (reporting Justice), Ingemar Persson, Petter Asp and Stefan Reimer participated in the ruling.

Judge Referee: Lina Nestor