

SUPREME COURT'S JUDGMENT

delivered in Stockholm on 15 February 2022

Case no.

B 1770-21

PARTIES

Appellant

Prosecutor General

Box 5553

114 85 Stockholm

Respondent

MK

Counsel and Public Defender: Attorney KC

THE MATTER

Human exploitation, etc.

RULING APPEALED

Judgment of the Göta Court of Appeal of 2021-02-19 in case B 4056-19

JUDGMENT

The Supreme Court modifies the judgment of the court of appeal in that the Supreme Court:

- finds MK guilty of human exploitation in accordance with Chapter 4, first paragraph of the Swedish Criminal Code;
- determines the sanction to be a conditional sentence; and
- orders MK to pay a fee of SEK 800 in accordance with the of Crime Victim Fund Act (1994:419).

KC shall receive compensation from public funds for the defence of MK in the Supreme Court of SEK 32,625, of which SEK 21,269 relates to work, SEK 475 relates to outlays, SEK 4,356 relates to loss of time and SEK 6,525 relates to value added tax. The state shall bear the cost.

CLAIMS IN THE SUPREME COURT

The Prosecutor General has claimed that the Supreme Court shall sentence MK to imprisonment for human exploitation or, in the alternative, fraud. She has adjusted the charge by adding the following to the statement of the criminal act as charged. *The offence has entailed a profit for MK in a total amount of SEK 35,511 and a loss for IA in the amount of SEK 32,328 and for FZ in the amount of SEK 3,183.*

MK, who has denied that he is guilty of human exploitation or fraud, has opposed modification of the judgment of the court of appeal.

The Supreme Court has granted the leave to appeal set forth in paragraph 2.

REASONS FOR THE JUDGMENT

Background

1. MK was indicted and found guilty in the district court for human exploitation. According to the judgment of the district court, the crime consisted of MK, in the autumn of 2018, at the Indra restaurant in Norrköping, by deception and exploitation of FZ and IA's difficult situation, exploiting them in labour under clearly unreasonable conditions. The sentence was determined to be imprisonment for 8 months. The court of appeal has dismissed the action.

2. Following the Prosecutor General's appeal of the judgment of the court of appeal, the Supreme Court has granted leave to appeal based on what the court of appeal has found established in respect of the criminal act.

What is at issue in the Supreme Court

3. The case raises separate questions regarding the purport of the provisions regarding human exploitation and the question regarding the sanction for such a crime.

The incident concerned

4. The circumstances in the case, as they are presented in the judgment of the court of appeal and references made therein to the judgment of the district court, are as follows.

5. IA and FZ are married to one another. They both grew up in Bangladesh where they both received university education. They came to Sweden in the beginning of September 2018. FZ was granted a temporary residence permit as a consequence of the fact that she had been accepted to a programme at Linköping University. IA had also been granted a residence permit, in his case due to his ties to FZ. The intention of the spouses was that

IA would work while FZ studied. There was also a thought that IA would himself later obtain further education in Sweden.

6. According to FZ and IA, they belonged to the Bangladeshi middle class and FZ's studies were to be paid for by her family. When they travelled to Sweden, they had with them assets of a not insignificant value (according to their own information in the district court, a total of EUR 3,000 and USD 1,000 and jewellery worth approximately SEK 50,000). Both of them spoke good English.

7. Upon arrival to Sweden, it proved to be difficult to find a residence in which both could reside. In conjunction with their visit to a restaurant operated by MK in Nörrköping, he offered them accommodation in one of the rooms in an apartment in the building in which the restaurant was situated. IA and FZ accepted and moved in.

8. Some days after moving in – i.e. in the middle of September 2018 – an agreement was entered into according to which FZ and IA would work in the restaurant. MK promised them that the wages would be SEK 100 per hour and, in addition, they would receive free room and board. The promise of wages was decisive to FZ and IA's decision to accept the offer to work. However, MK had no intention of paying any wages in money.

9. FZ worked in the restaurant for fifteen days while IA continued to work until 3 November 2018. FZ's work consisted essentially of cleaning and washing dishes, while IA's work tasks were to man the till, clean, and help in the kitchen. In IA's case, long work days were involved, eleven to twelve hours per day, six to seven days a week. This means that his total work time amounted to approximately 480 hours or, on average, approximately 69 hours a week. FZ's work was less extensive, totalling approximately 47 hours divided into approximately 15 days.

10. No wages were ever paid. FZ and IA accordingly received no compensation for their work other than as corresponded to the value of their room and free board during the period from the middle of September up to and including 3 November 2018. The district court and court of appeal have calculated the value of the room and board benefit to be SEK 5,320 per person per month.

11. FZ and IA repeatedly requested the wages. In such context, MK expressed what IA and FZ perceived to be threats, including threats that he would see to it that they were deported. However, it has not been established that MK acted in such a manner as may be regarded as an unlawful threat.

12. A last exchange on 3 November 2018 led to MK urging FZ and IA to leave the restaurant and the apartment.

The legal regulation

13. The provisions regarding the crime of human exploitation are found in Chapter 3, Section 1 b of the Swedish Criminal Code. Therein, *human exploitation* means, by unlawful coercion, deception or exploitation of another person's position of dependence, defencelessness or difficult situation, the exploitation of another person in forced labour, labour under clearly unreasonable conditions or begging. A person who is guilty of human exploitation is sentenced to imprisonment for at most four years. In the event the offence is gross, the range of punishment is imprisonment for at least two and at most ten years.

14. The purpose of the provisions is to achieve criminal law protection against the exploitation of vulnerable persons as labour or for begging. The intention has been to counteract phenomena which seriously infringe the individual's freedom, peace and human dignity. (See Government Bill 2017/18:123, p. 33 ff.)

15. What is punishable as human exploitation is the use by the perpetrator of someone in an improper manner. The first element of the description of the crime addresses the *means* (i.e. the method) employed by the perpetrator in order to exploit the victim; this is to be comprised of unlawful coercion, deception or exploitation of another person's position of dependence, defencelessness or difficult situation. The concluding element of the description of the crime is *the manner in which* the victim is used; this is to be forced labour, labour under clearly unreasonable conditions or begging. An additional condition for the perpetrator's action to be punishable is that the behaviour has the character of *exploitation* of another person.

16. The concept of *deception* in Chapter 4, Section 1 b of the Swedish Criminal Code has the same purport as the concept in, for example, the provision regarding fraud in Chapter 9, Section 1 (*cf., ibid.*, Government Bill, p. 59). Deception within the meaning of the section is accordingly involved when the perpetrator succeeds in creating a misconception on the part of another person, as is the case when the perpetrator induces another person to provide some consideration (money, other property or service) under the erroneous pretence that he or she will pay compensation for such consideration. In certain negotiations situations, the provision of erroneous information can fall outside the penal area. However, criminal liability may be imposed where what is involved is a clear overstep of the limit which, according to conventional wisdom, is deemed to be reasonable for a certain negotiations situation. (See the "*Bidding Fraud*" case, case NJA 2016, p. 39, para. 12.) Such a clear overstep exists as a rule when someone induces another person to perform certain work in exchange for payment and, upon entering into the agreement, has no intention of making the promised payment.

17. "Exploitation of another person's position of dependence, defencelessness or difficult situation" means, in principle, the same as the provisions regarding human exploitation in Chapter 4, Section 1 a of the

Swedish Criminal Code designated “exploitation of another person’s vulnerable situation”. The requirement of vulnerability, however, is not as equally stringent as it is in conjunction with human trafficking. Accordingly, the preparatory works express the fact that criminal liability does not require that the victim lack other actual or acceptable courses of action (see, *ibid.*, Government Bill, p. 43). As an example of the exploitation of another person’s difficult situation, it is stated that the perpetrator exploits the fact that the victim is living subject to economically challenging conditions, lives as a refugee or is drug-dependent (See, *id.*, Government Bill, p. 59). These examples may not be regarded as exhaustive. “Difficult situation” may also include situations other than in which the victim lives in circumstances which, practically speaking, limit in a tangible way his or her possibility to exercise freedom of choice. Accordingly, the requirement may be met even if the difficulties are due, for example, to a lack of housing or similar circumstances. The difficulty of the situation need not be qualified; the extent to which the perpetrator’s exploitation of the difficult situation is so objectionable that it may give rise to criminal liability may be determined in conjunction with the application of the other requirements in the section.

18. According to the preparatory works, *labour under clearly unreasonable conditions* means work or service subject to conditions – both the actual working conditions and other terms – which are so poor that, on the basis of an objective, overall assessment of the circumstances in the individual case, differ in a striking and negative way from what may be deemed acceptable on the labour market. Examples given of conditions of this type are where a person works for a particularly low wage or without remuneration, for unreasonably long work days, or subject to unacceptable safety risks. (See, *id.*, Government Bill, p. 60.)

19. In the determination of what is a clearly unreasonable condition, it is natural to make a comparison to what appears to be commonplace for work of

the relevant type. Existing legal provisions and collective bargaining agreements may then serve as guidance. (Cf. Erik Sjödin, *Människoexploatering – en analys av ett straffbuds förhållande till regleringen av arbetsmarknaden* [Human Exploitation – An Analysis of the Relationship of a Penal Provision to the Labour Market Regime], JT 2019/20, p. 696 ff.) However, a working condition is clearly unreasonable only if it deviates in a more tangible way from what normally applies; the mere fact that the condition appears to be unreasonable or inequitable is insufficient. The assessment is dependent on both the nature of the working condition and the circumstances in the individual case. A deficiency which entails unacceptable safety risks may be of the clearly unreasonable sort even if it is only minor. In order for a low wage to appear in this context as a clearly unreasonable working condition, it should, on the other hand, normally require that the divergence is substantial. In each individual case, an overall assessment must be made as to whether the aggregate working conditions appear to be clearly unreasonable.

20. An additional condition for criminal liability to arise is that there is a causal connection between the means and the manner in which the victim has been used (cf. para. 15). Such connection exists, for example, when a perpetrator, by exploiting another person's difficult situation, induces such person to work for a particularly low wage or when the absence of a wage is a consequence of the fact that the perpetrator, from the very outset, does not intend to pay compensation.

21. A final condition for criminal liability is that the perpetrator's use of the victim has the character of exploitation. *Exploitation* means, according to the preparatory works, an improper use of the victim (see, *inter alia*, Government Bill, p. 43 ff.). What is improper use – and thereby exploitation – may be assessed against the background of the purpose of the criminal provision, to sanction behaviour which constitutes an infringement on another person's

freedom, peace and human dignity. In order for human exploitation to subsist, the act must thus have a not insignificant element of violation of personal integrity. To the extent the actions of the perpetrator are substantially limited to economic exploitation, the character of which is not a violation of personal integrity, the issue regarding criminal liability may be assessed in accordance with other provisions, including the provisions regarding fraud and usury in Chapter 9 of the Swedish Criminal Code.

22. Exploitation thus requires that the use of the victim by the perpetrator appears to be particularly objectionable because it constitutes an infringement of the victim's freedom, peace and human dignity. An overall assessment of the situation must be made here. This cannot be carried out independently of the assessment of the other requirements of the section. Accordingly, it is natural that, when someone is used in forced labour or otherwise in work subject to particularly difficult conditions, it is, as a rule, a matter of exploitation. When the work performance is a consequence of unlawful coercion on the part of the perpetrator, the character of the coercion is also material. And, if the victim is induced to work while exploiting his or her difficult situation, consideration must be given to how difficult such situation is. Other relevant circumstances are the perpetrator's purposes, the length of time during which the exploitation occurs and how the victim is dealt with and treated.

The assessment in this case

Deceptive?

23. It is established that MK told FZ and IA that, if they worked in his restaurant, they would not only receive free room and board but also compensation in the form of money in the amount of SEK 100 per hour. It is also clear that he did not intend to pay the promised compensation in the form

of money. This means that he deceived them in the sense referred to in Chapter 4, Section 1 b of the Swedish Criminal Code.

Difficult situation?

24. At the time the agreement regarding work was reached, FZ and IA were in a difficult situation in several respects. They had come to Sweden only a few days earlier, they were not familiar with Swedish society, and they could not speak Swedish. They must have also understood that the financial assets they had with them – and which were not insignificant in themselves – could not secure their support for the entire period of time they intended to stay in Sweden. However, these circumstances alone do not give cause to assess their situation as being difficult. This applies in particular since both were well educated and spoke good English and that it may also be assumed that IA, in any case, within several months, could obtain certain support.

25. However, their situation was made significantly more difficult by the fact that they did not have access to any common accommodation other than that which MK was prepared to provide. The risk of being without accommodation must – in particular for persons who, like FZ and IA, were without other contacts in Sweden and specifics regarding Swedish society – have appeared to be a particularly problematic circumstance. Overall, their situation must therefore be deemed to have been difficult in the sense referred to in Chapter 4, Section 1 b of the Swedish Criminal Code.

26. It is clear that both the promise of wages and the need for continued accommodation were relevant to FZ and IA's decision to work at the restaurant.

Clearly unreasonable conditions?

27. The question then is whether FZ and IA worked under clearly unreasonable conditions. It then becomes a question of assessing the

reasonableness of the remuneration they actually received for their work and the working hours they had.

28. The remuneration which IA received consisted entirely of the benefit of free room and board. The Supreme Court finds no reason to calculate the value of the room and board benefit in any manner other than the court of appeal did, i.e. in the amount of SEK 5,320 per month per person. This means that the compensation to IA was equivalent to approximately SEK 19 per hour. The amount may be compared to the level of SEK 124 per hour from the applicable collective bargaining agreement in the restaurant industry. The remuneration must be characterised as clearly unreasonable.

29. The room and board benefit which FZ received in relation to the work equalled remuneration in the amount of SEK 56 per hour. This amount – less than half of what would have been paid upon the application of the collective bargaining agreement applicable at that time – appears as well to be clearly unreasonable.

30. It is established that IA worked on average approximately 69 hours per week. This may be compared to what applies in accordance with Sections 5 and 7 of the Working Hours Act (1982:673) according to which ordinary working hours may not exceed 40 hours per week and, in addition, there may be no more than 50 overtime working hours during a calendar month. IA's working hours thereby substantially exceeded the level allowed by Swedish labour legislation. It is also to be taken into account that, pursuant to Section 14 of the Working Hours Act, an employee shall receive a minimum uninterrupted rest period of thirty-six hours per every seven-day period. It is clear that IA, in any case during certain weeks, did not receive such rest. In conjunction with an overall assessment, it appears that his work conditions were, therefore, even as regards work hours, clearly unreasonable.

31. What has come to light regarding FZ's working hours provides no reason to find them clearly unreasonable in the sense referred to in the human exploitation section.

Exploitation?

32. MK's actions entail that he, by means of both deception and exploitation of IA's difficult situation, induced him to work subject to conditions which were clearly unreasonable both in terms of wages and work hours. It is clear that the purpose was to advance MK's own business. The exploitation persisted for a relatively long period of time. Notwithstanding that there were no punishable threats on the part of MK per se, he contributed to maintaining the situation by statements that he would see to it that IA and FZ were deported. In an overall assessment, it appears that his actions were so violative of personal integrity for IA that it must be deemed to be exploitation.

33. In FZ's case, the clearly unreasonable working conditions were comprised only of the fact that she received compensation which was altogether too low for her work in the restaurant, compensation which was comparably higher than that received by IA. To this is to be added that she did not work in the restaurant more than 15 days and she appears to have been able to retain the free room and board benefit even after she had stopped working. Against this background, MK's exploitation of her appears not to be as objectionable and violative of personal integrity as his treatment of IA. When, as in this case, there is exploitation of two spouses who are dependent on one another, however, the assessment of whether it is a matter of exploitation cannot be limited to that to which each of them has been subjected. It also therefore appears in FZ's case, in an overall assessment, that MK's actions were so clearly objectionable that they constitute exploitation.

34. In accordance with the aforementioned, MK is guilty of two cases of human exploitation.

Sanction issue, etc.*Penalty value*

35. The circumstances forming the basis of the Supreme Court's ruling on the issue of culpability are not as similarly grave for MK as the circumstances which, according to the district court, justified a sentence of eight months' imprisonment. According to the Supreme Court, the criminal act has a penalty value equal to imprisonment for four months.

Choice of sanction

36. In the choice of sanction, the court shall ascribe particular weight to the circumstances which support a sanction which is milder than prison. This means that an alternative to prison has precedence, and a prison sentence is to be chosen as the last resort. As grounds for imprisonment, the court, in addition to the penalty value and nature of the crime, may take into account the fact that the accused previously committed a crime (*cf.* Chapter 30, Section 4 of the Swedish Criminal Code.)

37. In this case, the penalty value of the act is not so great that, on its own, it undermines the presumption against a prison sentence. This is also not a case of recidivism. Decisive to the issue of whether the sentence will be imprisonment is thus whether such a sentence is required taking into account the nature of the crime together with its penalty value.

38. The case law which has developed on the issue of the nature of the crime is founded on the notion that, as regards certain special types of crimes, there is a need to take into account the interest in general obedience to the law. The Supreme Court has stated that the room, through the legal development in case law, for special treatment of additional types of crimes by reference to their nature is limited. If such special treatment is considered, regard shall be had as to whether there is a particular need for the formation of norms to

which the relevant type of crime may lead. The type of crime, however, is not decisive on its own; an individualised assessment is to be carried out as to how strongly the nature of the criminality indicates imprisonment in the individual case (See the “*Chinese Ball Bearings*” case, case NJA 2014, p. 559, paras. 31–33 and the “*Negligence and Nature of the Crime*” case, case NJA 2021, p. 536, para. 13.)

39. A reason for special treatment of a certain crime in terms of sanctions may be that it involves criminal activity which is difficult to detect or that the type of crime entails a danger to the public which is not reflected in another manner (see the “*Chinese Ball Bearings*” case, para. 32). Another reason may be that the crime entails a grave violation of personal integrity (*cf.* the “*Negligence and Nature of the Crime*” case, para. 15).

40. The preparatory works contain no express statements according to which human exploitation constitutes a crime which, given its nature, should lead to imprisonment. However, it is apparent from the preparatory works that the purpose of criminalisation is to sanction behaviour which gravely infringes an individual’s freedom, peace and human dignity (*cf., ibid.*, Government Bill, pp. 34, 36, 42 f. and 47). There are also clear points of contact between the crimes of human trafficking and human exploitation; accordingly, the preparatory works presuppose that an application of the provisions regarding human exploitation may arise when someone who themselves has not participated in human trafficking uses someone who is a victim of human trafficking.

41. To this is to be added the fact that crimes with elements involving a violation of integrity in the form of unlawful coercion, e.g. extortion and even unlawful threats, have been regarded in case law as crimes which may receive special treatment for sentencing purposes due to the nature of the crime (*cf., inter alia*, the “*Extortion in Östersund*” case, case NJA 1997, p. 507). If this type of act is included as an element in a human exploitation crime and is

merged into it, this may influence the choice of sentence (*cf.* the “*Nine Months Stalking*” case, case NJA 2020, p. 216, para. 20).

42. Against the above background, the nature of the crime should be ascribed certain weight when the sanction for human exploitation is determined. In the event the penalty value of human exploitation, as in this case, is less than imprisonment for six months, no presumption of imprisonment, however, may be deemed to exist as a rule. How substantial the violation of integrity has been in the individual case is of particular weight in the assessment.

43. The crime for which MK is guilty has not involved such a substantial violation of integrity that a prison sentence is necessary taking into account the nature of the crime.

44. Accordingly, the sentence may be suspended. Since MK has been under arrest or remanded in custody due to the crime for approximately one and a half months, there is special cause not to combine the suspended sentence with fines.

Fee to the crime victim fund

45. MK is now sentenced for a crime with imprisonment in the range of punishments. Accordingly, he will be ordered to pay a fee of SEK 800 to the crime victim fund.

Justices of the Supreme Court Kerstin Calissendorff,
Svante O. Johansson, Sten Andersson (reporting Justice), Eric M. Runesson
and Stefan Reimer participated in the ruling.
Judge referee: Sofie Westlin