

Supreme Court's JUDGMENT

delivered in Stockholm on 14 February 2023

Case no.

B 2354-22

PARTIES

I

Appellants

1. MA

Counsel and Public Defender: Attorney SDB

Counsel and Public Defender by substitution: Attorney EE

2. AS

Counsel and Public Defender: Attorney JH

Respondents

1. Prosecutor General

Box 5553

114 85 Stockholm

2 JA

Counsel and legal representation: Attorney ML

Counsel and legal representation by substitution: Attorney JL

3. DG

Counsel and legal representation: Attorney TE

Counsel and legal representation by substitution: Attorney DK

II

Appellants

1. AA

Counsel: Attorney SDB

2 NA

Counsel: Attorney SDB

Respondents

1. JA

Counsel and legal representation: Attorney ML

2 DG

Counsel and legal representation: Attorney TE

THE MATTER

Attempted murder, etc.

RULING APPEALED

Judgment of the Svea Court of Appeal of 10/03/2022 in case B 10649-19

JUDGMENT

The Supreme Court modifies the judgment of the Court of Appeal in that the Supreme Court

- acquits MA and AS of the charge of attempted murder, etc., of 12 April 2019,
- affirms the judgment of the District Court with regards to the sanction imposed on MA, and
- discharges MA, AA, NA and AS from liability for damages to JA and DG.

In its other respects, the Court of Appeal's judgment stands.

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

Secrecy according to Chapter 22, Section 1 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to such information that may reveal the addresses of DG, MA, AA and NA and which is set out in the Party Annex to this judgment.

SDB shall receive compensation from public funds for the defence of MA in the Supreme Court in the amount of SEK 69,860, of which SEK 51,191 relates to work, SEK 3,960 to loss of time, SEK 737 to outlays and SEK 13,972 to value added tax.

JH shall receive compensation from public funds for the defence of AS in the Supreme Court in the amount of SEK 74,702, of which SEK 54,940.20 relates to work, SEK 4,092 to loss of time, SEK 729.50 to outlays and SEK 14,940.43 to value added tax.

ML shall receive compensation from public funds for the representation of JA in the Supreme Court in the amount of SEK 51,586, of which SEK 35,329 relates to work, SEK 5,940 to loss of time and SEK 10,317 to value added tax.

TE shall receive compensation for representation of DG in the Supreme Court in the amount of SEK 55,642, of which SEK 38,574 relates to work, SEK 5,940 to loss of time and SEK 11,128 to value added tax.

The State shall bear the costs of the defence counsel and legal representation.

CLAIMS IN THE SUPREME COURT

MA has claimed the Supreme Court shall acquit him of the charge of attempted murder and reject the claims for damages, or at least to reduce the sanction and the damages. If the Supreme Court affirms the Court of Appeal's judgment as regards guilt, he has acknowledged the amounts of damages and interest claims as reasonable in themselves.

AA and NA have claimed the Supreme Court shall reject the claims for damages. In the event that the Supreme Court affirms the Court of Appeal's judgment as regards guilt, they have acknowledged the amounts of damages and interest claims as reasonable in themselves.

AS has claimed the Supreme Court shall acquit him of the charge of attempted murder and reject the claims for damages. In the event that the Supreme Court affirms the Court of Appeal's judgment as regards guilt, he has acknowledged the amounts of damages and interest claims as reasonable in themselves.

The Prosecutor General, as well as JA and DG, has opposed modification of the judgment of the Court of Appeal.

REASONS FOR THE JUDGMENT

Background

1. At the time of the incident in question, MA, AS and a third person, KW, were friends and used to hang out at Årsta Square, including at Folkets hus. They had gotten to know several people who worked there, including the caretaker, TP. He had allowed them and other young people to stay in the cellar of a residential building at Bränningevägen 9.
2. On the afternoon of 12 April 2019, JA and DG served as security guards at Årsta Square. They were there together with other security guards. The reason was that they had received information that a gang of young people were creating disturbances in and around the square, including by openly using drugs and behaving in a threatening manner towards staff and visitors of Folkets hus. JA and DG spoke with staff at Folkets hus, who told them that MA and AS were two of the young people who were part of the gang.
3. During the conversation, JA and DG were informed that MA and AS had come to Årsta Square and that MA was smoking a joint containing cannabis. MA was searched but nothing illegal was found except the joint. The security guards initiated a conversation with MA and AS. The conversation ended with MA and AS being expelled from the square at 16:02.

4. When JA and DG left the square in their official car at 16:55, they were shot at. The bullet went through the driver-side door and hit DG's trousers. There were no physical injuries.

5. The crime-scene investigation found the bullet in the car and an empty shell casing on the amphitheatre at Årsta Square. A search of the basement premises at Bränningevägen 9 revealed, approximately 20 minutes after the shooting, a semi-automatic tear gas or flare gun that had been converted into a live firearm. Two so-called "necktubes" were also found there.

Prosecution

6. MA, AS and KW were charged with attempted murder, or attempted exceptionally gross assault or gross assault, and aggravated weapons offences. Secondly, the prosecution requested they be sentenced for aiding and abetting the stated offences. The statement of the criminal act as charged included the following.

MA, AS and KW, after MA and AS had been expelled from Årsta Square by security guards JA and DG, jointly and in collusion obtained a live weapon and attempted to kill or seriously injure the victims by firing a shot with the live weapon at the car in which the victims were travelling. The bullet passed through the driver-side door.

MA, AS and KW have subsequently, jointly and in collusion, ensured that the weapon was stored in a storage space on Bränningevägen in Årsta.

KW possessed and provided a live weapon or a firearm stored together with ammunition and a face mask, and had several contacts with MA and AS in connection with the expulsion and shooting, thereby strengthening their intention to use a live weapon.

MA had several contacts with KW and AS in connection with the shooting, thereby strengthening their intention to possess and use a live weapon,

gained access to a storage area where a firearm, ammunition and face mask were stored, and retrieved and provided a live firearm shortly before the shooting.

AS participated in the offences by having several contacts with MA and KW in connection with the shooting, thereby strengthening their intention to possess and use a live weapon, gained access to a storage area where a firearm, ammunition and face mask were stored, and then possessed and fired the live weapon at the car in which the security guards were travelling.

In any event, MA, KW and AS have, through their respective actions, facilitated the offences.

District Court and Court of Appeal

7. MA, AS and KW denied the offences. The District Court acquitted all of them.

8. The prosecutor, who appealed the acquittal of the defendants, adjusted the statement of the criminal act as charged in the Court of Appeal by, among other things, no longer stating which of the three had fired the weapon at the car.

9. The Court of Appeal has found it established that it was AS who shot at the car, and that the offence was carried out jointly and in collusion with MA. The Court of Appeal has therefore convicted them both of attempted murder. On the other hand, the Court has considered that the possession of the weapon by MA and AS during the attempted murder is consumed by the attempt, and that the evidence is not sufficient for either of them to be considered to have possessed the weapon at another time. The Court of Appeal has therefore dismissed the charge of aggravated firearms offence against these two.

10. In the case of KW, the Court of Appeal acquitted him of attempted murder, but convicted him of an aggravated weapons offence as charged.

What is at issue in the Supreme Court

11. The case before the Supreme Court concerns in particular whether it is established beyond reasonable doubt that MA and AS have committed attempted murder as alleged by the prosecution in the statement of the criminal act as charged. The case raises general questions about the consideration of evidence in criminal cases.

General principles for the consideration of evidence in criminal proceedings

Burden of proof and evidentiary requirements

12. In a criminal case, the court adopts a position with regard to the prosecutor's statement of the criminal act as charged. This basically consists of a series of factual statements (dispositive facts), often a sequence of events, which must correspond to the description of the offence contained in the penal provision(s) that the prosecutor considers applicable. It is, in principle without exception, the prosecutor who has the burden of proving that the alleged dispositive facts exist, and that events thus proceeded in the way the prosecutor claims in the statement of the criminal act as charged.

13. For the prosecutor to fulfil his or her burden of proof, he or she must present an investigation that meets the requirement(s) of evidentiary strength applicable in criminal proceedings. Neither the Code of Judicial Procedure nor any other legislation specifies the requirements placed on evidence to convict a defendant in a criminal case. However, the requirement is generally expressed in terms of substantiating the charge.

14. In several cases, the Supreme Court has held this to mean that a conviction requires the court to find that the investigation presented in the case establishes beyond reasonable doubt that the defendant committed the offence alleged by the prosecution. It is required that the investigation be so complete

as to leave no reason to assume that further investigation would change the judgment; the court must be able to conclude, on the basis of the investigation presented, that no other possible explanations for the course of events exist. If uncertainty remains in any respect after the investigation has been presented, e.g., with regard to other possible perpetrators, this may entail that the evidentiary requirement is not met. (Cf. "*Balkongmålet*" NJA 2015 p. 702 paras. 28 and 29, and "*Målsägandens ålder*" NJA 2019 p. 347 para. 16)

15. As to whether any alternative explanations exist, the court should consider them in the context of what the investigation suggests and what otherwise seems worth considering. The starting point is that all reasonable alternative explanations must be ruled out in order to convict. However, an alternative explanation to what the prosecution claims must appear practically possible and there must be reason to consider it in the particular case under consideration. The significance of any alternative explanation may depend in each case on the strength of the other evidence in support of the prosecution.

16. When it is alleged that an act has been carried out by several persons together and in collusion, evidence is required at the individual level such that it can be established with regard to each of the persons involved – with the evidentiary requirements applicable in criminal cases – that they have participated in the commission of the offence in such a way that they are to be regarded as co-perpetrators (see, e.g., "*Akallarånet*" NJA 2006 p. 535).

17. The substantial evidentiary requirement for a person to be convicted of an offence is based on the presumption of innocence, which is part of the provisions on a fair trial in Chapter 2, Section 11, second paragraph of the Instrument of Government and Article 6 of the European Convention on Human Rights. The evidentiary requirement is essential to prevent innocent people from being convicted. The requirement also aims to avoid that convictions that have become legally binding are later overturned due to new facts or evidence.

18. Difficulties encountered by the prosecutor in obtaining evidence do not normally entail a less demanding evidentiary requirement. In case law, however, a reduced and differently worded requirement has been accepted in certain specific circumstances, in particular the defendant's objections to discharge from liability on the grounds of self-defence or similar circumstances, in which case it is considered sufficient for the prosecution to present enough evidence to make the objection appear unfounded. The main reason for the reduction of the burden of proof is that in these situations the prosecutor must prove that something did not happen. (See, e.g., "*Målsägandens ålder*" para. 18)

Free consideration of evidence

19. According to Chapter 35, Section 1, first paragraph, of the Code of Judicial Procedure, the court shall decide what has been proven in the case after a conscientious examination of all the evidence.

20. This provision entails a freedom with regards to the production and consideration of the evidence. However, this does not mean that evaluation of the evidence referred to is left entirely to the court's discretion. Some principles of assessment have been developed in case law. At the same time, the Supreme Court has clearly emphasised that principles and guidelines for the assessment of evidence must be treated with caution and discretion and that it is not possible to provide a model for the assessment of evidence that can be applied to all different types of cases. Of essence is that the assessment be based on rational grounds and involve an objective, structured analysis of the evidence. (See "*Balkongmålet*" paras. 20 and 21 and NJA 2017 p. 316 I para. 7.)

21. Evidence is usually divided into direct (causal) and indirect (structural) evidence. Indirect evidence is also often referred to as circumstantial evidence. Direct evidence refers to evidence that is directly linked to what is alleged in

the statement of the criminal act as charged. A witness who states that he or she saw the defendant shoot the victim is an example of direct evidence. In the case of indirect evidence, there is no corresponding direct link between the evidence and what is alleged in the statement of the criminal act as charged; this means that what is shown by the evidence may be true without it having happened in the way alleged in the statement of the criminal act as charged. This applies, for example, to DNA traces of the defendant on bullet casings found at the place where the victim was shot.

22. There is no requirement for the prosecution to present direct evidence in order for a prosecution to lead to conviction. Even in situations where the evidence is purely circumstantial, the overall value of the evidence may be so strong as to prove beyond reasonable doubt that the defendant has committed the offence alleged by the prosecution.

Regarding consideration of evidence

23. The court should first evaluate the significance of each piece of evidence (e.g., information provided by a witness). It should take into account all circumstances relevant to this evaluation. The evaluation of a witness's testimony should therefore take into account, inter alia, whether or not the witness had a clear view and any explanations or objections made by the defendant regarding the evidence in question.

24. As the state of the evidence varies greatly between different types of cases, it is not possible to specify one method that can be applied in all situations. The method by which the court is to examine the evidence referred to by the parties must always be determined in the light of the circumstances of each case. For example, in some cases, the evidence referred to by the prosecution and the defendant is the same or relates to the same circumstances. This may involve the prosecution and the defendant calling different witnesses on the same issue, such as whether the defendant was

present in a certain place. In these cases, it is often appropriate to evaluate the evidence of the prosecution and that of the defendant together.

25. In some cases, however, it is more suitable to evaluate the evidence for and against the charge in a more separate way. In "*Balkongmålet*", the Supreme Court, in line with this approach, began by evaluating the evidence that the prosecutor has referred to in substantiating the statement of the criminal act as charged, then took a position on the defendant's evidence (see paragraphs 22 and 23 of the case). This approach can often be used when two alternative – and often incompatible – concrete courses of events are in conflict. However, even when the court proceeds in this way, the evaluation of various pieces of evidence should take into account all the circumstances that are relevant to that evaluation (see para. 23 above, cf., also the Supreme Court's assessment in, e.g., paras. 44 and 62 of "*Balkongmålet*").

26. The assessment of a single piece of evidence often requires several steps. First, the certainty of the evidence as such is examined, e.g., how likely it is that DNA found at a crime scene comes from the defendant, then the court examines the strength of its support - direct or indirect - for the allegations in the statement of the criminal act as charged.

27. Once the court has assessed the strength of each piece of evidence in this way, it is possible to weigh up all the evidence that has been referred to. This can be done in different ways (see paras. 24 and 25).

28. The overall strength of the evidence depends on the strength of each individual piece of evidence, the number of pieces of evidence and how the pieces of evidence relate, e.g., whether they are independent and interacting or form a chain of several links. The combined evidentiary value of two independent and interacting pieces of evidence is in principle greater than the value of each individual piece of evidence. In a chain of evidence, the

relationship is often the opposite: the more links in the chain, the weaker the evidence for the final link in the chain.

29. It is only by weighing all the evidence referred to by the parties that the court can decide whether the prosecution has presented evidence strong enough to prove beyond a reasonable doubt that the defendant committed the offence charged. The court must then also examine the relevance of alternative explanations (see para. 15).

The assessment of evidence in this case

The question of the motive for the offence

30. The indictment is based on the fact that MA and AS committed the offence charged as a direct consequence of their expulsion from Årsta Square. If the investigation shows that they had a strong motive to commit the offence, it may have evidentiary value, particularly in that it may strengthen the value of the other evidence that the Prosecutor General has referred to in support of the statement of the criminal act. For a conviction, however, there must be evidence linking them to the components of the offence as found in the statement of the criminal act as charged.

31. In support of the fact that MA and AS had a motive to commit the offence, the Prosecutor General has referred to an extensive investigation, including films from cameras worn by the security guards when MA and AS were expelled, and witness testimonies by security guards, police officers and employees of Årsta Folkets hus.

32. The investigation shows that the youth gang to which MA and AS belonged during the winter and spring of 2019 had behaved as if they "owned" Årsta Square. They had created disturbances in and around the square, including by openly using drugs and behaving in a threatening manner towards staff and visitors of Folkets hus.

33. Furthermore, the footage from the cameras worn by security guards during the intervention that led to the expulsion of MA and AS shows that the atmosphere was initially agitated and that they both clearly questioned the actions of the security guards. However, towards the end of the intervention, the atmosphere was relatively calm and before leaving the square, MA and AS shook hands with several of the security guards.

34. There is thus support for the motive on which the indictment is based. However, this support is not particularly strong.

The investigation into the gun, cartridge case and bullet

35. The National Forensic Centre (NFC) has analysed the weapon found in the cellar, the empty casing found at the amphitheatre and the bullet found in the car. NFC has found that the results strongly indicate that the cartridge case was released from the pistol (Grade +3) and to some extent that the bullet was shot from the pistol (Grade +1). This is such strong evidence that it is clear that the weapon found in the basement room is the one used in the shooting.

The investigation into MA and AS's access to the weapon

36. The indictment is based on the fact that MA and AS obtained the weapon jointly and in collusion by collecting it from the cellar.

37. When the weapon was found in the cellar after the shooting, it was locked in an electrical cabinet. On the weapon, only DNA from KW was found. Images and films on KW's phone and information from the witness WK show that there was a weapon in the youth gang to which KW, MA and AS belonged and that it was similar to the weapon found in the cellar. The investigation also shows that it was primarily KW who possessed the weapon in the youth gang.

38. From TP's information and from what MA and KW, among others, have stated, it is clear that TP had on several occasions given the youth gang permission to stay in the cellar.

39. The technical investigation shows that at 16:04, i.e., immediately after he and MA were expelled from the square, AS called and spoke to KW, as well as that KW called and spoke to MA at 16:24.

40. The technical investigation also shows that MA's and AS's phones moved towards a mobile phone mast covering Bränningevägen 9 shortly after the expulsion from the square. Furthermore, it appears that AS repeatedly tried to call TP and that this finally resulted in a call between them at 16:13.

41. MA has stated that TP let him into the basement, but has claimed that the sole purpose was for him to collect cannabis. TP has stated under examination that, in addition to MA, he let in one or two other people, but that he is unsure whether it was AS or KW or both. However, the witness examination with municipal police officer TL shows that, in a telephone conversation with her, shortly after he had opened the cellar, TP indicated that it was MA and AS whom he let into the cellar. There is no reason to doubt the accuracy of the information provided by TL.

42. In view of what has now been stated, it has been established that shortly after the expulsion from the square, MA and AS gained access to the cellar premises at Bränningevägen 9.

43. However, there is no evidence that more strongly supports the idea that the weapon was stored in the cellar before the shooting. Indeed, it is possible that MA and AS's contacts with KW and TP were made with the aim of gaining access to the cellar to retrieve a weapon. However, it has not been established that this was the case.

Investigation of MA and AS's presence at the scene of the crime and firing of the shot

44. The statement of the criminal act as charged leaves open which of the defendants fired the shot, but in the Supreme Court the Prosecutor General has primarily argued that it was AS.

45. MA and AS have stated that they were at Kafé Årstabo at the time the shot was fired.

46. An expert opinion on telephone analyses states that MA's telephone was in an area covering Årsta Square between 16:46 and 17:06, and that AS's telephone had no connection at all from 16:34 until the alarm pursuant to the shooting at 16:57.

47. The testimony of three people who were at the Kafé Årstabo – CT, EH and AH – has been referred to. According to their information, MA was at the café sometime around 17:00. However, it cannot be determined from their statements whether he arrived before or after the moment the shot was fired, nor whether he arrived alone or in the company of someone else.

48. None of those examined in the case saw anyone fire the shot at the car. The two victims stated that they heard a bang as they drove out of the square, and thought that someone was throwing a rock at the car. They did not observe any individual whom they could link to the bang.

49. The Prosecutor General has called three witnesses to testify about a person who, according to the Prosecutor General, was the person who fired the shot at the car. Two of these witnesses, KR and MW, were at Årsta Square. They heard a bang and then saw a person dressed in dark clothes running from the amphitheatre.

50. KR has indicated that the person had a black and somewhat diminutive silhouette. The person, who appeared masked, ran down a staircase leading to Skedviksvägen and Bränningevägen.

51. MW has stated in his testimony that he could not determine the gender of the person who ran away. He further stated that, shortly after the incident, he observed two young men walking across the square, and that one of them may have been wearing a jacket similar to that of the person he'd earlier seen running from the scene. The young men moved in the direction of Årstavägen and one of them walked towards the library, while the other continued walking. According to the notes of the police interrogation held shortly after the incident, MW stated in that interrogation that both young men went into the library and that later, in the café, he saw the young man who had left with the young man who, MW believes, ran from the scene where the bang was heard. It was also noted that the young man MW saw in the café was about 16 years old, 170 cm tall and appeared Southern European. However, MW has stated in his testimony that he cannot confirm the information recorded in the police interrogation.

52. The third witness, EL, stated that at 17:00 she was in her apartment, which is on the ground floor and located near Årsta Square. About four metres away, she saw a young man running past her window. The young man had a balaclava on his face. His clothing consisted of a hip-length sports shirt or anorak, shiny tracksuit bottoms and dark or black shoes. The young man, who ran quickly and easily, looked slim and athletic. EL stated in her testimony that she estimated the young man's height at between 180 and 185 cm.

53. The circumstances strongly suggest that the person observed by KR, MW and EL was the person who fired the shot. Witness statements indicate that the person was wearing dark clothing, and KR's and EL's statements also indicate that the person was wearing some form of mask. However, it is not possible to draw any further conclusions about the identity of the person from

the witnesses' testimony, so the evidentiary value of the witness testimony is rather limited. It can be noted in this context that the witnesses' description of the person's physique could fit MA, but does not match AS's physique.

54. In summary, the technical evidence shows the following.

- DNA was found on the weapon used in the offence, but only from KW.
- In connection with the seizure of the weapon in the cellar, two so-called “necktubes” were also found. DNA from KW was found on both of them, and on one of them also DNA from MA.
- When AS was arrested, four particles of primer residue were found on his left hand. Three of them matched the composition of the cartridge found at the amphitheatre. The fourth particle had the same composition as police training ammunition. NFC's conclusion is that the results are neither in favour nor against AS being in close proximity to firearms when fired or in contact with something weapon-related (Grade 0).
- Particles of primer residue have also been found on a glove in AS's jacket, on MA's jacket and on a pair of trousers and a jacket belonging to KW. In all cases, there was one particle per garment. The particles were consistent with the composition of the cartridge found at the amphitheatre. NFC's conclusion is that the results neither support nor contradict the assertion that any of the items of clothing have been in close proximity to firearms that have been fired or in contact with something weapon-related (Grade 0).

55. Different elements of the technical evidence indicate to varying degrees that MA, AS and KW each have taken possession of or been in the vicinity of the weapon in question. However, it is not possible to draw firm conclusions about the link between these circumstances and the shooting of the security

guards' car. In addition, the investigation, including a film on KW's phone, shows that a weapon was fired at Årsta Folkets hus in the early morning of the same day. The technical traces that have been secured may therefore have been deposited at another time.

Overall assessment of the evidence in the case

56. In an overall assessment, it can be concluded that the evidence strongly indicates that MA and AS, or at least one of them, were involved in the shooting. However, a conviction requires evidence at the individual level such that it is established beyond a reasonable doubt that each individual has contributed to the offence as a perpetrator or in some other way (cf. para. 16). In this case, where there is also scope for other persons to have carried out or participated in the offence, it is not possible to draw firm conclusions about the possible nature of any involvement by MA or AS in the shooting.

57. It is therefore not established beyond a reasonable doubt that MA and AS are guilty of what is alleged in the statement of the criminal act as charged.

58. The charges must therefore be dismissed and the claims for damages rejected.

Sanction for MA

59. As a result, MA must be convicted of the offences set out in the District Court's judgment. The Supreme Court shares the District Court's assessment that the sanction should be set at probation.

Justices of the Supreme Court Anders Eka, Sten Andersson, Stefan Johansson (reporting Justice), Petter Asp and Christine Lager participated in the ruling.
Judge referee: Elisabeth von Salomé