

Supreme Court's JUDGMENT

delivered in Stockholm on 16 December 2022

Case no.

B 419-22

PARTIES

Appellant

ML

Counsel and Public Defender: Attorney LE

Respondent

Prosecutor General

Box 5553

114 85 Stockholm

THE MATTER

Photographic activity constituting invasion of privacy

RULING APPEALED

Judgment of the Göta Court of Appeal of 16/12/2021 in case B 2616-21

JUDGMENT

The Supreme Court modifies the judgment of the Court of Appeal in case B 2616-21 in that the Supreme Court fixes the number of day fines at 30.

LE shall receive compensation from public funds for the defence of ML in the Supreme Court in the amount of SEK 14,420. Of the amount, SEK 11,536 relates to work and SEK 2,884 relates to value added tax. The State shall bear the cost.

CLAIMS IN THE SUPREME COURT

ML has claimed that the Supreme Court shall acquit him of the charge of photographic activity constituting invasion of privacy.

The Prosecutor General has opposed modification of the judgment of the Court of Appeal.

The Supreme Court has granted the leave to appeal referred to in paragraph 3.

REASONS FOR THE JUDGMENT

Background

1. Following a custody dispute, ML has had no contact with his daughter since she was two years old. At the time of the offence, ML stopped his car outside the house where his daughter and her mother live and took a photograph of his daughter when she was inside by a window. The daughter was ten years old at the time. The photographs were taken without the knowledge or consent of the daughter or her mother. ML sent the picture to the child's grandmother with the caption "She's grown up, the little tyke. Will always love her more than anything else on this earth. Ask [the child's mum] to call me. She and I need to talk. You have my number."

2. The District Court found ML guilty of photographic activity constituting invasion of privacy, and imposed a day fine (60 days) of SEK 50. The Court of Appeal upheld the District Court's judgment.

At issue in the Supreme Court

3. The Supreme Court has granted leave to appeal on the basis of what the Court of Appeal has found established regarding the actual course of events and intent. The question is whether the photographic activity was justifiable, and thus exempt from liability, under Chapter 4, Section 6a, second paragraph, of the Criminal Code.

Photographic activity constituting invasion of privacy

The penal provision

4. Anyone unlawfully using a technical device to secretly take a picture of someone who is inside a dwelling or in a toilet, changing room or other similar space, will be convicted of photographic activity constituting invasion of privacy and sentenced to a fine or imprisonment for a maximum of two years. If the offence is justifiable in view of the purpose and other circumstances, liability shall not be imposed. Criminal liability requires intent with regards to all the necessary conditions of the offence. (See Chapter 4, Section 6 a of the Criminal Code.)

Photographic activity

5. What is punishable by law is the capturing of an image by technical means, i.e., the actual taking of a photograph or film. The penal provision is intended to be technology-neutral and cover photography as well as filming and other image recording (see Govt. bill 2012/ 13:69 pp. 23 & 39). There is no requirement for the photograph to be taken in an intimate or intrusive manner, or for the content of the image to be invasive in the individual case;

rather, the legislator has indicated places where being photographed can typically be considered threatening to privacy.

In a dwelling, etc.

6. The legislator's intention has been to make the offence of photographic activity constituting invasion of privacy so restrictive that it applies only in certain places where there is a real and imperative need to prevent or prosecute infringements of privacy, and where the need for legal protection is particularly great. The penal provision has therefore been limited to situations where the person being photographed is in a place that belongs to the individual's private environment or is otherwise intended for particularly private circumstances. These are places where the individual can assert a protected personal sphere, and where, for that reason, they should not normally have to endure being photographed in secret without consent or the explicit support of permissive provisions (ibid. pp. 18 and 27 et seq.).

7. The offence includes photographing someone who is "inside a dwelling or in a toilet, changing room or other similar space". As a general rule, criminal liability also covers cases where a person is fully visible in the window of a dwelling. Furthermore, the provision is applicable regardless of whether the photographic activity takes place inside or outside the dwelling and regardless of to whom the dwelling belongs. However, the criminal provision does not cover photographing someone on a balcony or patio, or in a garden, since in such places one can generally expect to be observed by other people (ibid. pp. 26 et seq. and 40)

Secretly and unlawfully

8. For photographing someone in, e.g., a dwelling to constitute a crime, the photographic activity must be carried out secretly and unlawfully. The picture must have been taken in a way that could have prevented the person

being photographed from realising that he or she was being photographed. The technical equipment must have been kept completely hidden from the person being photographed, or else the individual must have been in any case completely unaware that images were being captured (cf. "*Webbkameran*" NJA 2018 p. 844). Such photographic activity is legal when done with consent. Such consent must be granted by someone authorised to act in the interest of protecting the individual against photographic activity constituting invasion of privacy, normally the person to be photographed.

Justifiable photographic activity

9. Liability shall not be imposed if the offence is justifiable in view of the purpose and other circumstances (Chapter 4, Section 6a, second paragraph of the Criminal Code). The question of whether the offence is justifiable may be determined by an overall assessment in the individual case, where the interest represented by the photographer is weighed against the individual's interest in being protected against photographic activity constituting invasion of privacy. That is to say, circumstances must exist that justify photographing someone secretly and without consent, as made clear, inter alia, by the legislation's statement that the 'act' must be justifiable.

10. The assessment must thus take as its starting point the limitation of the legislation to representative situations where privacy has been violated and where the need for legal protection is particularly high. Any interest able to balance out the photographic activity must therefore normally be of a certain weight. Statements in the legislative history point in the same direction. These include mention of news coverage and other very significant societal interests. It is also mentioned that photography forming part of, for example, scientific work or that is justified with reference to artistic considerations may be justifiable, although in the vast majority of such cases the individual's protection against photographic activity is likely to prevail (ibid. p. 41 et seq.).

11. The wording of Section 6a, first paragraph, also encompasses photography in everyday situations, such as within a family, where the intrusion into the private sphere of the person photographed is insignificant or even non-existent. This may be the case when such photography takes place in the family home without explicit consent being obtained and without the subject being aware of the photographic activity. However, judging from the legislative history, the intention was such that everyday situations should often fall outside the scope of the offence. This is practically permitted by the rule of justifiability in the second paragraph. That rule must therefore be understood to enable finding a balance which includes a countervailing interest that is perhaps less weighty than normally required (cf. paragraph 10), namely if the intrusion into the private sphere in an individual case appears relatively insignificant. In assessing whether the act was justifiable, it must be considered whether it was reasonable to require the photographer to obtain consent or to inform the photographed person in advance of the intention to take a picture.

12. It may be added that there is no provision stating that liability must not be imposed if the photographic activity is less serious in view of the circumstances (cf. e.g. Chapter 4, Section 7a).

The assessment in this case

13. ML photographed his daughter when she was inside her home. Neither the daughter nor her legal guardian was aware of the photography or had consented to it. In such circumstances, the starting point for assessment is that he shall be convicted of photographic activity constituting invasion of privacy. However, if the act was justifiable in view of the purpose and other circumstances, he shall not be held liable.

14. ML has stated that the purpose of the shooting was to obtain a photograph of his daughter. He also wanted to show his mum and sister how big his daughter had grown.

15. It is understandable that a parent who has no contact with their child may want a photograph of the child. However, the fact that ML had an interest in photographing his daughter does not justify his secretly and without consent photographing his daughter when she was in her home. An everyday situation cannot be presupposed where it was not reasonable to obtain consent or to, in advance, draw notice to the photographic activity (cf. paragraph 11).

16. Nor were the circumstances otherwise such that the act was justifiable in the manner referred to in Chapter 4, Section 6a, second paragraph of the Criminal Code. ML shall therefore be convicted of photographic activity constituting invasion of privacy.

Sanction

17. In determining the number of days for which the day fine shall be applied, account must be taken of the fact that this was an isolated photograph and not part of repeated attempts at contact or similar behaviour. Furthermore, ML's purpose was not to disseminate the image to anyone beyond several close relatives. The offence is thus of a less serious nature, and the sanction can therefore be limited to a day fine of 30 days.

Justices of the Supreme Court Gudmund Toijer, Johnny Herre (dissenting), Dag Mattsson (dissenting), Cecilia Renfors and Jonas Malmberg (reporting Justice) participated in the ruling.
Judge referee: Johanna Siesing

DISSENTING OPINION

Justices Johnny Herre and Dag Mattsson dissent and dismiss the action. They state as follows.

The legislative history makes extensive and rather detailed statements regarding what can be considered a justifiable act that is free from liability (see Govt. bill 2012/ 12:69 pp. 30 et seq. & 41). These statements are illustrative and cannot in themselves have the effect of widening the scope of what constitutes a punishable offence in relation to the text of the law.

The determining factor is therefore the meaning that emerges from the wording of the criminal statute, taking into account the legislation's fundamental starting point, namely that the offence must encompass only genuinely reprehensible conduct where the failure to respect privacy is offensive to the sense of justice and where the need for legal protection is particularly great (cf. e.g. *ibid.*, pp. 18, 24 & n27). This approach is not limited to the first paragraph of the section but applies to the whole statute. Despite technically constituting a separate second paragraph, the provision on justifiability is an integral part of the established conditions for criminal liability.

As it is a question of assessing the justifiability of the offence, the secret photography must be weighed against the other interests at stake in a given context. When assessing whether another such relevant interest justifies the act, all circumstances must be taken into account. The text of the law particularly emphasises the purpose of the photographic activity as a relevant factor.

In this respect, the text of the law does not impose any limitation; rather, all relevant countervailing interests must be taken into account. It is clear that the photographer's personal interest can justify photographic activity, even in a case where consent cannot be considered to have been granted. Further, photographic activity may be found justifiable in the public interest, for example in connection with news coverage. The personal interest of a close relative may also justify photographic activity, e.g., an everyday family photograph. Nor does the text of the law preclude the possibility that the individual interest of the photographer may lead to photographic activity being deemed justifiable.

In this way, the individual's interest in having their privacy respected must be balanced against the interest able to justify the secret photography. It cannot be concluded, either from the text of the law or the purpose of the criminal statute, that the countervailing interest must generally have a certain weight in order to have effect. Rather, the determining factor must be what appears generally reasonable in the particular situation, taking into account the fundamental purpose of the legislation to prevent truly reprehensible and invasive behaviour. If the balancing of interests in the individual case results in the act being considered justifiable, it is not punishable by law. It can be noted here that the act need not be found fully acceptable: the text of the law requires no more than that it be justifiable in its context.

The investigation shows that ML secretly took a picture of his daughter when she was inside her home. Neither the daughter nor her mother was aware of the photography or had consented to it. Given the relationship between ML and the mother, it was not practically possible for her to permit him to take a photo. The purpose of the photographic activity was to obtain a picture of his daughter for his own keeping. He also wanted to show his mum and sister how big his daughter had grown.

It requires no explanation that a parent, even one without contact with his or her child, may have a strong desire to possess a picture of the child, and ML possessed a reasonable and indeed acceptable interest in having access to a recent photograph of his daughter. Nor was the photographic activity carried out in an annoying or intrusive manner. This was a one-off photograph that was not part of repeated contact attempts or similar behaviour. The daughter and her mother indeed possessed an interest in protecting the daughter from photographic activity to which they have not consented. However, the investigation does not support the view that the photographic activity subjected the daughter to any significant violation of her privacy.

In balancing the interests to be taken into account, the act may therefore be considered justifiable and thus not criminal. ML shall therefore be acquitted.
