SUPREME COURT'S DECISION

Case no.

delivered in Stockholm on 5 April 2022

B 4450-21

PARTIES

Appellant

DC

Counsel and Public Defender: Attorney HD

Respondent

Prosecutor General

Box 5553

114 85 Stockholm

THE MATTER

Gross robbery, etc.

RULING APPEALED

Judgment of the Court of Appeal for Western Sweden of 2021-06-18 in case B 3065-21

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SUPREME COURT	Postal address	Telephone 08-561 666 00	Opening hours
Riddarhustorget 8	Box 2066 103 12 Stockholm	Fax - E-mail: hogsta.domstolen@dom.se www.hogstadomstolen.se	08:00–12:00 13:15–16:00

THE SUPREME COURT'S RULING

The Supreme Court quashes the judgment of the court of appeal on the issue of sanction and returns this part of the case to the court of appeal for further proceedings.

DC shall remain in custody in the case.

HD shall receive compensation from public funds for the defence of DC in the Supreme Court of SEK 77,067. Of the amount, SEK 36,031 relates to work, SEK 25,622 relates to outlays, and SEK 15,414 relates to value added tax.

It shall be incumbent on the court of appeal to examine the issue of the obligation of DC to repay the state the costs of defence in the Supreme Court.

CLAIMS IN THE SUPREME COURT

DC has claimed that the Supreme Court shall acquit him or, in the alternative, reduce the sanction and set aside the decision on expulsion.

The Prosecutor General has opposed modification of the judgment of the court of appeal.

The Supreme Court has granted the leave to appeal set forth in paragraph 7.

REASONS FOR THE DECISION

The precedential issue

1. The precedential issue is whether Chapter 34, Section 2 of the Swedish Criminal Code is to be applied when the offence subject to examination is newly discovered relative to a judgment delivered in another EU country. The case also raises questions regarding the responsibility for obtaining an investigation regarding foreign judgments in such a situation.

Background

2. In 2021, DC was prosecuted in the Gothenburg District Court for, *inter alia*, gross robbery regarding an event which occurred in 2013. According to the application for summons, he committed robbery, in cooperation and collusion with another person or persons, by means of violence against a truck driver, by stealing a truck which contained copper wire and aluminium wire at a value of just over EUR 22,300.

3. The district court found that the charge of gross robbery in accordance with the prosecutor's statement of the criminal act had been proved. The penal value was considered equivalent to seven years imprisonment. The sanction was determined to be imprisonment for four years and six months taking into account primarily the fact that DC was 19 when the crime was committed. In addition, he was expelled from Sweden.

4. The court of appeal has made the same assessment of the questions regarding culpability, sanction and expulsion and has affirmed the judgment of the district court.

5. Since 2019, DC has been serving a prison sentence in his home country, Romania. At the time of trial in the district court and court of appeal, he had been temporarily surrendered by Romanian authorities for legal proceedings in Sweden but is currently back in Romania.

6. The court of appeal has noted that DC committed the gross robbery in Sweden prior to the offence for which he has been sentenced in Romania. Like the district court, however, the court of appeal has found no support, by application of Chapter 34, Section 2 of the Swedish Criminal Code, for taking this offence into account.

The leave to appeal

7. The Supreme Court has granted leave to appeal on the issue of sanction. This has occurred on the basis of what the court of appeal found established regarding the factual chain of events and the question of intent.

Determining new sanctions following previous judgments

8. If a person who has been sentenced to imprisonment committed another offence before the judgment (newly discovered offence), the court shall determine a new sanction for the additional offences (see Chapter 34, Section 1 of the Swedish Criminal Code).

9. When the court imposes a new sanction for a newly discovered offence, it shall ensure that the sanctions do not in total exceed what would have been imposed for the combined offences. The court may then impose a less severe penalty than is provided for the offence. (See Chapter 34, Section 2). The provisions express the notion that the determination of penalty shall be made in the same manner as in case of multiple offences and that the asperation principle shall be applied when the penalty is determined for a newly discovered offence (*cf.* the "*GPS Pucks*" case, case NJA 2020, p. 703, primarily paras. 24–27).

10. Thus, the court shall consider what the length of the penalty would have been had the court, all at once and by application Chapter 29, Section 1, determined the penalty for both the offence examined in the relevant case and the offences for which the accused has been sentenced in the earlier judgment or judgments which are to be taken into account. This means that a penalty which has been imposed by application of Chapter 34, Section 2 is normally less severe than it would have been had that provision not been applicable.

11. The provisions of Chapter 34 were amended in 2016. They entail that a fundamental distinction is to be made between an offence committed before a

previous judgment (newly discovered offence) and an offence committed after a previous judgment but before the sanction has been enforced in its entirety or has otherwise ceased (new offence). Joint determination of penalty shall be applied only to newly discovered offences.

12. The provision which regulated, *inter alia*, the determination of penalty for newly discovered offences existed prior to the 2016 statutory amendment to Chapter 34, Section 3, second paragraph. Even if the provision had another formulation and demarcation, it expressed the same fundamental principle as the current Chapter 34, Section 2; the starting point for the determination of penalty for a newly discovered offence is to be the combined penal value of the offences. The current wording of Chapter 34, Section 2 may thus be applied in the case even if the relevant offence was committed prior to the entry into force of the Section.

Framework Decision 2008/675/JHA

Content of Framework Decision 2008/675/JHA

13. A minimum obligation for Member States to take into account convictions in another Member State is set forth in Framework Decision 2008/675/JHA.[1] The purpose of the Framework Decision is to establish the conditions under which a previous criminal conviction in a Member State against a person, but on different grounds, is to be taken into account in criminal proceedings against the same person in another Member State. As far as possible it should be avoided that the person concerned is treated less favourably than if the previous conviction had been a national conviction. (See Article 1, *cf.* whereas clauses 3 and 8.)

[1] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

14. Each Member State shall ensure that in the course of criminal proceedings against a person previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account. The obligation applies to the extent previous national convictions are taken into account. This entails that a foreign conviction will have equivalent legal effects attached to it as a national conviction in accordance with national law (Article 3.1). The undertaking applies during the preliminary investigation, during the legal proceedings themselves and at the time of enforcement of the conviction (Article 3.2).

15. The fact that previous convictions from other Member States are taken into account may not, however, have the effect of interfering with, revoking or reviewing previous convictions or any decision relating to their enforcement by the Member State conducting the new proceedings (Article 3.3). The Framework Decision shall also not apply if the previous conviction is a national conviction and if the taking into account of it would entail that it had the effect of interfering with, revoking or reviewing the previous foreign conviction (Article 3.4).

16. The undertakings pursuant to paragraphs 3.1 and 3.2 shall not have the effect that the court is limited in imposing a sentence in cases of, *inter alia*, newly discovered offences. However, the Member States shall ensure that in such cases their courts can otherwise take into account previous convictions handed down in other Member States. (See Article 3.5.)

Implementation of the Framework Decision in Swedish law

17. Framework decisions have to be implemented by Member States. Framework decisions are binding upon the Member States as to the result to be achieved, but it is a matter for the national authorities to choose the form and method of implementation. When applying national law, national courts are obliged to interpret it in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues (*Cf. Pupino*, C-105/03, EU:C:2005:386, para. 31 ff.).

18. In conjunction with the adoption of the Framework Decision, the assessment was made that legislative measures were not necessary to meet the requirements of the Framework Decision. It was noted that Swedish legislation contains many possibilities to take into account prior convictions and that neither the wording of an act, the preparatory works, nor case law prevent taking into account foreign rulings. (*Cf.* the memorandum of the Ministry of Justice, Ju2008/1389/L5, 2008-01-21.) In Sweden's notice to the General Secretariat of the Council and the Commission on the implementation of the Framework Decision, it was stated regarding Chapter 34 of the Swedish Criminal Code only that the applicability of the Framework Decision in situations governed by the Chapter are limited by virtue of Articles 3.3–3.5 of the Framework Decision (*cf.* the notice of the Ministry of Justice, Ju2011/476, 2011-05-05).

19. When the provisions of Chapter 34 of the Swedish Criminal Code were amended (see para. 11), the issue regarding Framework Decision 2008/675/JHA was briefly addressed. The preparatory works state that it follows from the Framework Decision that foreign convictions in certain cases are to be taken into account in the application of Chapter 34 of the Swedish Criminal Code (see Government Bill 2015/16:151, p. 29).

Foreign rulings are to be taken into account when Chapter 34, Section 2 of the Swedish Criminal Code is applied

20. According to its wording, the Framework Decision contains an obligation to take into account rulings which have been issued in another EU country in the same manner as Swedish rulings. This is to be able to take place both during the trial stage as well as enforcement of a sanction and is to be able to lead to both less severe and more stringent interventions. Articles 3.3–-3.5 of the Framework Decision do not afford the possibility to exempt Chapter 34, Section 2 of the Swedish Criminal Code from the area of application of the Framework Decision.

21. Both the wording of the Framework Decision and its purpose thus indicate that foreign convictions are to be taken into account in the application of Chapter 34, Section 2. Such an interpretation is also in line with the principle of mutual trust between EU countries and the basic notion that other Union citizens are not to be treated differently relative to a country's own citizens. The views asserted in the legal literature also support the conclusion that foreign rulings are to be taken into account when applying Chapter 34, Section 2 (*cf.* Martin Borgeke and Mikael Forsgren, *Att bestämma påföljd för brott* [Determining Sanctions for Crimes], 4th ed., 2021, p. 629 ff. and Ulf Wallentheim and Joakim Zetterstedt, *Europeiska unionens straffrätt i allmän domstol (I)* [The European Union's Penal Law in General Courts (I)], SvJT 2021 p. 119 ff.).

22. Thus, it is clear that the Framework Decision is to be applied and that foreign rulings shall be ascribed weight in the examination of a newly discovered offence. This entails, according to the wording of Chapter 34, Section 2 of the Swedish Criminal Code, that the penalty shall be determined on the basis of the combined penal value of the offences.

23. The penal legislation of the Member States differs, however, in many ways, e.g. as regards the penalty to be determined, the manner in which the determination is carried out and how the penalty is enforced. Often, it is not possible to proceed on the basis of the penal value of the combined offences. Against this background, it is not possible to apply Chapter 34, Section 2 in strict adherence to its wording.

24. The examination must instead proceed on the basis of the principle which is expressed in the Section, the asperation principle. This principle may be said to entail in practice that the penalty for the combined offences is determined to be less severe than would have been the result had the penal values for each offence been combined.

25. The starting point for the examination must be the circumstances in the individual case and it is not possible to state any uniform model for the assessment. Normally, the application should lead to a certain mitigation of the sentence. However, it may occur that the determination of penalty is not affected even if it involves a newly discovered offence. This applies, for example, in a situation in which the newly discovered offence has a very high penal value and the earlier judgment pertains to legal proceedings for offences at the level of fines or otherwise with low penal values.

Investigation regarding foreign rulings

Exchange of information in criminal records

26. Within the EU, a system has been built up for the exchange of information from criminal registers (Ecris). Each Member State which renders a conviction against a citizen in another Member State shall inform the state of citizenship regarding the judgment. The state of citizenship shall store the information. This means that each Member State shall have information regarding all convictions which have been delivered within the EU against

their own citizens. The Member States subsequently have the possibility, via central authorities, to request information from one another's criminal records in individual cases.[2] In addition, a computerised system for the exchange of the information between the states has been established.[3]

27. In Sweden, information from Ecris may be requested by public authorities who are entitled to obtain the information from the criminal records, e.g. police, prosecutors and courts. A request to obtain information is to be submitted to the Swedish Police Authority which forwards the request to the relevant state and reports the response to the Swedish authority or court.

28. The European Court of Justice has stated that Framework Decision 2008/675/JHA and the Framework Decision Regarding the Exchange of Information from Criminal Records are inseparably linked and that it is important that Member States cooperate diligently in exchanging information on criminal convictions in order to avoid giving judgment without those previous foreign convictions having been taken into account. The court has further stated that national procedures liable to affect that diligent exchange of information thus clash with both framework decisions. (Cf. *Lada*, C-390/16, EU:C:2018:532, para. 47.)

Obtaining judgments and other investigations

29. Foreign judgments and other investigations which apply to a foreign criminal proceeding may be obtained in accordance with the International Legal Assistance in Criminal Matters Act (2000:562). Both prosecutors and

[2] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.
[3] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

courts may apply for legal assistance in accordance with the Act. (See Sections 2 and 7.)

30. The European Investigation Order Act (2017:1000) also provides the possibility to obtain investigations from other Member States within the EU. The Act contains provisions for the implementation of an EU Directive[4] which is intended to create an aggregate and more effective regulation of the gathering of evidence within the EU. The Investigation Order has an overall area of application and should be applicable to all investigatory measures which are intended to gather evidence (*cf.* whereas clause 8 of the Directive). A court may issue a European Investigation Order for an investigatory measure which pertains or corresponds to the presentation of evidence in a court, certain questioning and temporary transfer of a person in detention. In other cases, it is the prosecutor who may issue an Investigation Order. (See Chapter 1, Section 4 and Chapter 2, Sections 1 and 2.)

Conclusions regarding the procurement of investigation

31. Framework Decision 2008/675/JHA presupposes that information is obtained in accordance with applicable instruments regarding the exchange of information from criminal records or regarding mutual legal assistance. It may also be deemed to be an obligation, where possible, to obtain sufficient basis in order to be able to apply Framework Decision 2008/675/JHA.

32. The court has the responsibility for ensuring that the investigation necessary is available. Although the court is responsible for the investigation, it may, in many cases, be incumbent upon the parties to draw the court's attention to such circumstances as may be relevant. Thus, the prosecutor and the accused also have a responsibility for ensuring that the court's basis for taking decisions is sufficient as regards resolution of questions pertaining to

[4] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

the determination of sanction. (*Cf*. the "*Age of the Refugee Boy*" case, case NJA 2016, p. 719 paras. 16–18.)

33. In order to determine whether a criminal proceeding gives rise to the application of Framework Decision 2008/675/JHA, it is normally required that a criminal record extract is obtained from the EU country in which the suspect is a citizen. Such an extract should, as a starting point, be obtained at an early stage during the preliminary investigation. Accordingly, it appears easiest that the police authority or the prosecutor obtains the extract, even if the court has final responsibility for ensuring that there is a sufficient basis for taking decisions.

34. In many cases, the information in the criminal record extract should be sufficient in order to apply Framework Decision 2008/675/JHA. However, in certain cases, additional investigation is necessary. The question regarding the need for additional investigation must be determined on a case-by-case basis. The assessment is affected, *inter alia*, by the type of offence previously committed by the accused and the manner in which the criminal activity may be relevant in the Swedish proceedings, e.g. if it is an issue of new or newly discovered criminal activity. Where an additional investigation is necessary, e.g. relevant judgments, the investigation may be obtained in accordance with applicable rules regarding mutual legal assistance (*cf*. paras. 29 and 30).

The assessment in this case

35. DC is serving a prison sentence of eight years and one month in Romania in accordance with a Romanian judgment issued by the Slobozia District Court on 5 February 2018.

36. Furthermore, in accordance with the judgment of the court of appeal, he committed gross robbery in 2013 (Chapter 8, Section 6 as worded prior to 1 July 2016). The robbery was committed before the Romanian conviction was

delivered and constitutes a newly discovered offence in relation to the conviction. The sanction to be imposed shall thus be determined by application of Chapter 34, Section 2 of the Swedish Criminal Code.

37. The Romanian district court judgment was appealed and the judgment of the Romanian court of appeal is available in this case. It is apparent from the judgment that DC was convicted in that case for two cases of rape and that the penalty for these offences was determined to be imprisonment for a period of five years and four months. In addition, it is apparent that a penalty period of two years and nine months, which pertains to a judgment from 2013, has been added to the penalty for the two rapes. The penalty has thereby been determined in the Romanian court of appeal to be prison for a period of eight years and one month.

38. However, no criminal record extract from Romania is available in the case. In addition, the information regarding the Romanian judgment from 2013 is incomplete.

39. Accordingly, there is insufficient basis for determining the sanction for the crime for which DC is now to be sentenced. It should be a task for the Swedish court of appeal to obtain the investigation necessary. The question regarding sanction should therefore be addressed once again in the court of appeal.

40. The judgment of the court of appeal shall thus be reversed to the extent covered by the leave to appeal granted by the Supreme Court, i.e. the sanction question, and the case shall be returned to the court of appeal for further proceedings in this respect.

Other questions

41. There is still cause for DC to be detained in the case.

Justices of the Supreme Court Gudmund Toijer, Johnny Herre, Agneta Bäcklund (reporting Justice), Stefan Johansson and Johan Danelius participated in the ruling.
Judge referee: Charlotte Hellner Kirstein