

# SUPREME COURT'S JUDGMENT

Case no.

delivered in Stockholm on 5 May 2021

B 5595-19

## **PARTIES**

### **Appellant**

KBHS

Counsel and Public Defender: Attorney AS

### **Respondent**

Prosecutor-General

Box 5553

114 85 Stockholm

## **THE MATTER**

War crimes, etc.

## **RULING APPEALED**

Judgment of the Göta Court of Appeal of 24 September 2019 in case B 939-19

Document ID 200017

SUPREME COURT  
Riddarhustorget 8

Postal address  
Box 2066  
103 12 Stockholm

Telephone 08-561 666 00  
Fax:  
E-mail: [hogsta.domstolen@dom.se](mailto:hogsta.domstolen@dom.se)  
[www.hogstodomstolen.se](http://www.hogstodomstolen.se)

Office hours  
8:45 am – 12 noon  
1:15 – 3:00 pm

## **JUDGMENT**

The Supreme Court affirms the judgment of the Court of Appeal.

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

The secrecy provision in Chapter 21, Section 1 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply in respect of information concerning photographs in unredacted condition and films shown during that part of the main hearing which was held in private.

AS shall receive compensation from public funds for the defence of KBHS in the Supreme Court in the amount of SEK 46,865, of which SEK 31,350 relates to work, SEK 979 relates to loss of time, SEK 5,163 relates to outlays and SEK 9,373 relates to value added tax.

The state shall bear the cost of the defence.

## **CLAIMS IN THE SUPREME COURT, ETC.**

KBHS has presented the claims that he should be released from the charge of war crimes and, in the alternative, that the sentence should be reduced.

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

According to the judgment of the Court of Appeal, KBHS is to be sentenced for illegal driving, gross crime, and use of a false instrument.

## **REASONS FOR THE JUDGMENT**

### **Background**

#### *Introduction*

1. In the spring of 2015, a non-international armed conflict was underway in the Iraqi Kirkuk Province, more specifically in and about the villages of Wahda,

Saad and Khalid in the Daquq District. The Iraqi government forces, together with the forces linked to the Kurd Peshmerga, had, with the support of American air forces, initiated an offensive in order to retaliate and reclaim the area from the Islamic State (IS).

2. KBHS participated in the fighting as a soldier in the Peshmerga forces. In connection therewith, he posed for photographs and in a film with dead persons from the opposing side in a manner which, according to the charge, constituted war crimes through the humiliating or degrading treatment of protected persons. The statement of the criminal act charged regarding war crimes reads as follows.

In the spring of 2015 and, in any case, up to and including October 2015, a non-international armed conflict in the Daquq District of the Kirkuk Province of Iraq was underway between, on one side, the state of Iraq and, on the other side, the Islamic State (IS)/Daesh.

During this time, KBHS was part of a military armed force within the Iraqi state or, in the alternative, the Kurd Peshmerga forces/Asayish, which at this time was allied with the Iraqi regime and has fought against IS/Daesh.

KBHS has, together and in concert with others, on four occasions during the period February up to and including March 2015 in the area around the villages of Wahda, Saad and Khalid in the Daquq District, subjected four persons, protected according to customary international law, who belonged to the opposing side's armed forces or armed groups or civilian population to humiliating or degrading treatment that was calculated to seriously violate their personal dignity.

The persons are to be regarded as protected persons since, at the time of the acts, they were placed *hors de combat* as wounded or deceased or because they were civilians.

The humiliating and degrading treatment has consisted of the following.

1. KBHS has, together and in concert with two other persons, posed and caused himself to be photographed standing next to a victim on to whose body both accomplices each placed a foot. The victim's body was mutilated at that time.
2. KBHS has, together and in concert with other persons, posed and caused himself to be photographed next to a victim whose body was mutilated.
3. KBHS has, together and in concert with other persons, posed and caused himself to be photographed and filmed next to a victim while the latter was subjected to offensive treatment. In that context, one of the accomplices leaned on the victim's body with a rifle barrel, spit on the victim's face, and kicked the victim's body while the victim was denigrated with abusive speech.
4. KBHS has, together and in concert with another person, posed and caused himself to be photographed standing next to a victim with a foot placed on the victim's body.

Thereafter, KBHS has published or caused the publication of pictures from these events on two different profiles which belonged to him on the Facebook social network service where they could be spread since both profiles were public.

The act was considered to seriously violate the personal dignity of the victims and was part of or otherwise connected with the armed conflict. KBHS committed the act with intent.

Section of law: Section 4, first paragraph (7) and second paragraph of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406)

3. The District Court sentenced KBHS for war crimes in accordance with the charge and for the other criminal acts to a term of imprisonment of one year and three months. The Court of Appeal has modified the sentence to a term of imprisonment of one year but otherwise affirmed the judgment of the District Court.

### **The case in the Supreme Court**

4. One question before the Supreme Court is whether the term protected persons also covers dead persons. Another question is whether the character of the acts of the type relevant in the case is such that it fulfils the requirement of being calculated to seriously violate personal dignity. The case also concerns the question of whether a war crime is a crime the character of which normally calls for the imposition of a term of imprisonment (so-called offence for which there is a presumption of imprisonment).

### **The legal regime**

#### *The Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes and the background thereof*

5. The Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) is intended to regulate the international crimes which have their basis in international criminal law. It is a matter of Swedish law notwithstanding the fact that the interpretation and application must take place with substantial regard for international law rules and the manner in which they are interpreted and applied by the International Criminal Court and international tribunals (see Government Bill 2013/14:146, p. 71).

6. It is natural that terms which are well established within international law are, as a starting point, used with the purport they have within the legal regime. In this way, the ongoing development of law in the area can be followed. According to the preparatory works, international criminal law constitutes the framework both

for the formulation and application of national law and ultimately establishes the limits for what may be punishable (see, *id.*, Government Bill, p. 70).

*Applicable legal provisions*

7. According to Section 4, first paragraph (7), a person is guilty of a war crime if he or she subjects a protected person to humiliating or degrading treatment which is considered to seriously violate their personal dignity if the act is part of or otherwise connected with an armed conflict or occupation. The scale of penalties is imprisonment for at most six years (Section 4, second paragraph).

8. According to Section 3, protected person means a person who, being wounded, sick, shipwrecked, a prisoner of war or a civilian or in some other capacity, enjoys special protection under the Geneva Conventions of 12 August 1949, Additional Protocol I to these Conventions from 1977, or otherwise under customary international law applicable in armed conflicts or during occupation.

9. In order to determine the area of application for Section 3, and thereby what is meant by the term protected person in accordance with the Swedish Act, it must thus be gleaned how the term is to be understood in the context of international humanitarian law.

*Connection to the Rome Statute*

10. By virtue of the Rome Statute of the International Criminal Court of 1998, the court was established as an international court with universal jurisdiction. The Rome Statute also enumerates the penalty provisions for the international crimes over which the court has jurisdiction. The Swedish Act is intended to penalise the acts committed in armed conflicts defined in Articles 6–8 of the Statute. The descriptions of the offences have been taken nearly word for word from the Geneva Conventions, including the identical Article 3 of the Conventions. The Article applies to non-international armed conflicts.

11. The Swedish regime is thus based to a large extent on the Statute and the underlying international instruments. Accordingly, the Statute is the natural starting point also for the interpretation of the provisions of the Swedish Act.

12. The offence in Section 4, first paragraph (7) corresponds to the war crimes provision of the Rome Statute in Articles 8 (2) (b) (xxi) regarding international armed conflicts and 8 (2) (c) (ii) regarding non-international armed conflicts.

13. Article 8 (2) (c) penalizes serious violations of Article 3 of the Geneva Conventions committed in non-international armed conflicts. Article 3 (c) specifically states that the commission of acts which entail outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.

*The Rome Statute and customary law as the basis for interpretation*

14. One intention of the Rome Statute was to codify the then-applicable customary international law. Following the creation of the Statute, customary law has developed somewhat. The assessment was made in the preparatory works that, in certain areas, there may be cause, with the support of customary law, to extend criminal liability further than that which follows from the Statute which primarily pertains to the regulation of non-international armed conflicts (*cf., id.*, Government Bill, pp. 67 and 69.)

15. The Statute is also based on the basic premise that both the International Criminal Court and national courts shall be able to prosecute the offences set forth in the Statute. It follows from the so-called principle of complementarity that prosecution on a national level in principle has precedence. (See, *id.*, Government Bill, pp. 46 f. and 67.)

16. As guidance as to the manner in which the Statute is to be interpreted, so-called elements of crimes have been adopted under Article 9 to provide support to the International Criminal Court in the interpretation and application of Articles 6–8. The preparatory works of the Swedish Act have specifically pointed out that the

elements of crimes are to be ascribed certain weight also for the Swedish regulation (see, *id.*, Government Bill, p. 70).

17. The interpretation of the Statute's regulation of war crimes is governed by rulings from the International Criminal Court. Supporting information for interpretation may also be obtained from international humanitarian law in general and the manner in which this has been interpreted and applied by, *inter alia*, international tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Rulings from national courts are also relevant. The application of the Statute is otherwise influenced by customary international law.

18. Customary law norms are, in principle, binding on all states of the world and, in certain cases, also on inter-state organisations. The purport of customary international law is also determined principally on the basis of decisions from the International Criminal Court, other international tribunals and national courts. When the purport of customary international law is to be gleaned, guidance may be obtained, *inter alia*, from studying that which constitutes customary international law published by the International Committee of the Red Cross in 2005 and which has subsequently been continuously updated.

19. Customary international law obtains, to a certain extent, its content from a mutual interaction with the law of treaties in which new treaties are not infrequently intended to codify customary international law in the area at the same time as they, in turn, thereby consolidate the content of customary international law. As stated, this was also the case as regards the Rome Statute (see paragraph 14).



**Are dead persons also covered by the term protected persons?***Generally regarding protected persons*

20. As has been stated, Section 3 of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes has in view the term *protected persons* (see paragraph 8). Article 3 of the Geneva Conventions states that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or other cause shall be protected from outrages upon personal dignity, in particular humiliating and degrading treatment. Accordingly, Section 3 covers persons from the opposing side who, in various ways, have been placed *hors de combat*.

*The elements of crimes in the Rome Statute and the relevance of customary international law*

21. Article 21 (1) (a) of the Rome Statute states that the court shall apply, in the first place, the Statute, elements of crimes and rules of procedure and evidence and, in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

22. In application, the elements of crimes have also been given a prominent and decisive role in the interpretation of the provisions concerning the various war crimes. In identical footnotes relating to Articles 8 (2) (b) (xxi) and 8 (2) (c) (ii), it has been stated in the elements of crimes that, for this type of war crime, the term persons can include dead persons. The fact that dead persons are mentioned only in the footnotes does not per se mean that the text is not to be deemed to be an integral part of the elements of crimes.

23. The creation of the elements of crimes apart from the text of the Statute itself was surely part of the result of the diplomatic negotiations between the

delegations of the various countries which led to the adoption of the Statute. However, the intention of the work of the Drafting Committee which construed the elements of crimes was that the general purport would correspond to established international humanitarian law. It has thus been asserted that, as a starting point, the criteria (including the footnotes and the general commentary) should be viewed as part of the customary international law when the Rome Statute was created (*cf., inter alia*, Michael Cottier, Elements of War Crimes in Triffterer and Ambos (ed.), Rome Statute of the International Criminal Court: A Commentary, 3rd ed. 2016, p. 311 at Section 26).

*International legal precedent and jurisprudential discussion*

24. The fact that the term person in Article 8 (2) (c) (ii) in accordance with the elements of crimes was deemed to also cover dead persons derives from a number of rulings originating from the time after the Second World War. In the rulings from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda dead persons have been regarded as being covered by the regulation. The International Criminal Court has also allowed, *inter alia*, handling of dead persons, at least indirectly, to be covered by Article 8 (2) (c) (ii). (See, *inter alia*, *Brđanin*, (ICTY), judgment of 1 September 2004, IT-99-36-T, Section 1019 and *Bagosora et al.* (ICTR), judgment of 18 December 2008, ICTR-98-41-T, Sections 2219 and 2222. See, also, *The Prosecutor v. Dominic Ongwen*, (ICC), judgment of 4 February 2021, ICC-02/04-01/15, Sections 2901-2904 compared with Section 173 and Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary, 2003, p. 314.)

25. Support for the notion that dead persons are to be treated as “persons” in conjunction with offences which have their origins in international humanitarian law and war crimes in accordance with Article 8 (2) (c) (ii) of the Rome Statute is also found in case law of the national courts of states. Mention may be specifically made here of a ruling from the German high court (Bundesgerichtshof of 27 July

2017, BGH 3 StR 57/17). The court reached the conclusion that the accused, who had been photographed after posing in a group with two other persons in front of crania of dead persons, was to be found guilty of a crime in accordance with the German counterpart to Section 4, first paragraph (7) of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (see Section 8 (1) (9) Völkerstrafgesetzbuch). Like the Swedish Act, the intention of the German Act is to criminalise acts in accordance with the Rome Statute. As far as has come to light, there is no case law from other European national courts which refute the notion that dead persons may be covered (*cf.*, for example, the EUROJUST Report, Prosecuting war crimes of outrages upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union, The Hague, February 2018).

26. The issue of whether dead persons can be covered by crimes which entail serious violations of personal dignity in accordance with international humanitarian law has also been discussed in the international jurisprudential literature (see, *inter alia*, Knut Dörmann, *ibid.*, p. 314 f.; Anna Anderson, Outrages upon Personal Dignity of the Dead in International and Swedish War Crimes Legislation and Case Law in Lundstedt (ed.) Investigation and Prosecution in Scandinavia of International Crimes, (2020), p. 245; and Kai Ambos, Deceased Persons as Protected Persons Within The Meaning of International Humanitarian Law, *Journal of International Criminal Justice* 16 (2018), pp. 1105-1116). See, also, Treatment of the dead and identification of human remains in the UN report, UN Human Rights Council, Advisory Committee, UN Doc A/HRC/AC/4/CRP.2/Rev.1, 25 January 2010 and Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, 2005 (reprinted with corrections 2009), Rule 90 and Rule 113, p. 315 ff. and p. 409 ff.).

*Conclusion of the Supreme Court*

27. The purpose of the elements of crimes in the Rome Statute and the application thereof clearly indicate that dead persons are covered by the term protected persons in accordance with customary international law and, accordingly, are also covered by the definition in Section 3 of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes. Such an interpretation is also supported by rulings from international tribunals and courts in other countries. Furthermore, such cannot be deemed to violate the principle of legality. Criminal liability in accordance with Section 4 may thus exist in conjunction with serious violations of personal dignity, even if the person is no longer alive.

**Circumstances of the crime in accordance with Section 4 of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes**

28. The penal provision in Section 4, first paragraph (7) pertains to humiliating or degrading treatment which is calculated to seriously violate personal dignity.

29. Humiliating or degrading treatment refers to treatment which can be generally regarded as constituting a debasement of personal dignity. Typically, the act must entail serious humiliation or degradation. In the assessment, consideration is to be given to the exposed person's cultural background. There is no requirement enumerated according to which the treatment must give rise to any observable effects. Nor is there any requirement that the treatment in individual cases causes the exposed person to actually be offended or feel humiliated. Accordingly, the act can also be directed against persons who are not aware of the offence, e.g. unconscious persons. (*Cf., inter alia*, Government Bill 2013/14: 146, p. 144 f. and p. 268 f. and the International Criminal Tribunal for the Former Yugoslavia, *Alekovski*, (ICTY) judgment of 25 June 1999, IT-95-14/1-T, Section 55 f.)

30. The mere fact that someone in a photograph or film of, or relating to, a battlefield appears together with a dead protected person need not entail that such humiliating or degrading treatment has occurred as can constitute a serious violation. It requires that the circumstances contain additional debasing or demeaning elements. For example, it can involve the mutilation, collection, arrangement or handling of the deceased in a demeaning or offensive way. It can also be the case that they are presented as trophies in a photograph or film as part of the opposing side's war propaganda.

### **Intent**

31. Liability for war crimes is conditional on intent. It requires a customary determination of intent in accordance with Swedish law, and no special form of intent is required. The person who perpetrates the act need not have the intention that the act takes place during an armed conflict or that it is connected with such a conflict. It is sufficient that he or she intended to bring about the actual circumstances to which the assessment pertains. Furthermore, the perpetrator himself or herself need not perform any evaluation of the fact that it involves a treatment which is intended to seriously violate personal dignity. Also in this respect it is sufficient that the intent covers the factual conditions forming the basis of the court's assessment.

### **Determination of the sentence**

#### *Penalty value*

32. The penalty for a war crime is imprisonment for at most six years. The crime entails a wide variety of types of acts from killing, serious abuse and serious sexual assault of protected persons to damaging and confiscating another person's property, which explains the broad scale of penalties. The same scale of penalties thus applies to war crimes against a person as well as war crimes relating to property. All war crimes are, to begin with, grave acts. The penalty value must also be viewed in light of the fact that they involve crimes subject to universal

jurisdiction and in respect of which prosecution is not of concern to merely one individual state. Taking action against them is a concern for the entire international community. Accordingly, even for war crimes of the normal degree, there must be room for relatively severe assessments in terms of penalty value.

33. Serious violations of personal dignity in accordance with Section 4, first paragraph (7) of deceased persons, however, constitute, as a rule, crimes with a penal value at the lower end of the scale of penalties. At the same time, it must be pointed out that it involves a war crime against a person which is intended to protect personal dignity.

*Nature of the crime*

34. There are no statements in the preparatory works in support of the notion that, generally speaking, war crimes are crimes the nature of which is such that imprisonment will normally result. The Supreme Court has previously stated that, in the absence of express support in the preparatory works of an act, there is reason to exercise great caution in treating additional types of crimes differently by reference to the nature of the criminal act and that there is limited room to do so through legal precedent (see The “Chinese Ball Bearings” case, NJA 2014, p. 559, paras. 31 and 32).

35. As stated, war crimes constitute crimes of universal character the taking of measures against, and prosecution of, which is a concern for the entire international community. This suggests that war crimes in accordance with Section 4 should be treated differently in terms of sentencing. The nature of the crime is, according to accepted practice, also often significant for crimes with apparent integrity elements which entail violations of someone’s person, e.g. in the form of abuse and many forms of sexual crimes. War crimes against persons may, in this light, be regularly adjudged to be crimes the nature of which is such that imprisonment will normally result.

**The assessment in this case***Issue of guilt*

36. To begin with, it has been established that the acts charged took place during a non-international armed conflict and that they were part of or otherwise connected with an armed conflict.

37. KBHS has claimed that the alleged victim in the photograph in Section 4 of the statement of the criminal act as charged is not a dead person but merely an object laying on the ground. During the investigation, however, he conceded that it was a dead person from the opposing side. He subsequently claimed that he learned from other persons who were at the location that it was not a human body, but merely objects.

38. It appears to be unrealistic that KBHS, while on site, when he was photographed with his foot on something which also appears to be part of a human body in the photograph, would not be able to determine whether or not it was a human body. This is supported by the information which he originally provided and by the temporal connection with other pictures which undeniably depict dead persons. The description also has certain support in the analysis from the NFC (the Swedish National Forensic Centre). All in all, it is beyond a reasonable doubt that it is a dead person laying in the ground also in the photograph referred to in Section 4.

39. Furthermore, the starting point is, in the absence of other evidence, that all victims in the photographs and in the film are persons from the opposing side who were killed during the air attacks which preceded the offensive by the military forces in which KBHS was a soldier. In other words, the victims were soldiers who had been killed in combat and were thereby placed *hors de combat*. Accordingly, they are protected persons in accordance with Section 3 of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (*cf.* paragraph 27).

40. The question is then whether the relevant photographs and the film depict acts which entail that the deceased persons were subjected to such humiliating or degrading treatment as was calculated to seriously violate the victim's personal dignity.

41. The photographs referred to in counts 1 and 2 of the statement of the criminal act as charged show KBHS standing with other persons next to the deceased, whose bodies are without hands (count 1) or head (count 2).

42. In the photograph of the deceased without hands, one sees KBHS close to two other persons who have placed their feet on the body of the deceased. KBHS leans forward and holds his hands against a tree so that it is a group photograph in which the three together pose with the deceased, which creates the impression that the victim is a quarry or a trophy which they willingly desire to show to the world. The placement of feet on the victim clearly enhances the impression of a humiliation.

43. As regards the photograph which shows a body without a head, KBHS stands in a group together with two other persons in which the person in the middle holds the shoulders of the other two. The situation, in a comparable way, creates the impression of a trophy event to be exhibited for the world.

44. The offences in counts 1 and 2 have entailed that the dead persons have been subjected to humiliating or degrading treatment which was calculated to seriously violate personal dignity.

45. The film and the photograph referred to in count 3 of the statement of the criminal act as charged shows a dead person laying on the ground whose face is bloodied and deformed. In the film, one can see how someone rests a rifle barrel on the deceased's body, that someone spits on the face of the deceased and that someone is kicking the deceased's body. It is apparent from the sound on the film that the deceased is denigrated with abusive speech. It may also be observed in the photograph and film how KBHS sits on the ground close to the deceased at the



same time as the deceased is subjected to offensive treatment. The offence in count 3 of the indictment thus entails that the deceased has been subjected to humiliating or degrading treatment which was calculated to seriously violate personal dignity.

46. The photograph in Section 4 shows how KBHS and another person pose next to a dead person on the ground and in which both have a foot placed on the deceased's body. The placement of their feet on the victim clearly enhances the impression of a humiliation. Also this event has entailed that the victim was subjected to a humiliating or degrading treatment which was calculated to seriously violate personal dignity.

47. It is apparent from the photographic materials that KBHS has actively participated in the events together and in concert with his accomplices. His participation has neither been passive nor less participatory than that of the other. Accordingly, he is to be regarded as an accomplice.

48. KBHS was well aware of what was occurring in connection with the photography and filming and thereby also intended to bring about the actual circumstances. His statement that he was only following orders from his superiors is strongly contradicted by the fact that he subsequently published the pictures and films on his own profiles on Facebook. The basis for release from culpability, acting on orders, cannot under any circumstances be applied in conjunction with such grave criminal acts as are involved here.

49. Accordingly, in accordance with the indictment, KBHS shall be found guilty of four offences against Section 4, first paragraph (7) of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes.

*Issue of sentencing*

50. The penalty value of each and every one of the four offences for which KBHS is to be sentenced varies somewhat and is comparable to six months'

imprisonment or slightly less. In any case, the penal value of the offences amounts in aggregate to one year's imprisonment.

51. Due to the high penalty value and the nature of the offence (see paragraph 35) the sentence is determined, in the absence of particularly special grounds, to be a term of imprisonment. What has come to light regarding KBHS's personal circumstances do not constitute such grounds. There is no reason to deviate from the penalty value in the determining the penalty.

52. There are no conditions for imposing a prison sentence in excess of one year. Accordingly, the judgment of the Court of Appeal is affirmed.

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Justices of the Supreme Court Anders Eka, Ann-Christine Lindeblad, Johnny Herre, Eric M. Runesson and Stefan Reimer (reporting Justice) participated in the ruling.

Judge referee: Elin Dalenius