

# Supreme Court's JUDGMENT

delivered in Stockholm on 14 April 2023

Case no.

B 5813-22

## **PARTIES**

### **Appellants**

1. JS

Counsel and Public Defender: Attorney PA

2. JT

Counsel and Public Defender: Attorney NP

### **Respondent**

Prosecutor General

Box 5553

114 85 Stockholm

## **THE MATTER**

Attempted exceptionally aggravated weapons offence, etc.

## **RULING APPEALED**

Judgment of the Svea Court of Appeal of 06/09/2022 in case B 6390-22

**JUDGMENT**

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

- acquits JS of the charge of attempted exceptionally aggravated weapons offence and imposes a sentence of four years and four months' imprisonment, and
- acquits JT of the charge of aiding and abetting an attempted exceptionally aggravated weapons offence and imposes a sentence of three months' imprisonment.

PA shall receive compensation from public funds for the defence of JS in the Supreme Court in the amount of SEK 12,809. Of the amount, SEK 10,247 relates to work and SEK 2,562 relates to value added tax. The State shall bear the cost.

NP shall receive compensation from public funds for the defence of JT in the Supreme Court in the amount of SEK 11,866. Of the amount, SEK 9,492 relates to work and SEK 2,374 relates to value added tax. The State shall bear the cost.

**CLAIMS IN THE SUPREME COURT**

JS has argued that the Supreme Court shall find him not guilty of the attempted aggravated weapons offence and that the sentence shall, in all circumstances, be reduced.

JT has argued that the Supreme Court shall find him not guilty of aiding and abetting the attempted aggravated weapons offence and that the sentence shall, in all circumstances, be reduced.

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

The Supreme Court has, based on what the Court of Appeal has found to be substantiated regarding the offences, granted leave to appeal as regards the question of guilt of the attempted aggravated weapons offence and guilt of aiding and abetting the attempted aggravated weapons offence, as well as in the matter of sentencing.

## **REASONS FOR THE JUDGMENT**

### **Background**

1. On 30 March 2021, the police conducted a search of a basement storage room in Södertälje. Two fully automatic assault rifles and a semi-automatic pistol loaded with live ammunition were found in the storage room, in addition to magazines and ammunition for the weapons. The items were seized and the police placed a dummy weapon at the location where the weapons had been found. The storage room was then monitored by the police.
2. On 3 August 2021, JS came to the storage room but did not enter it. The next day he came back, first alone and then in the company of JT. JS was at that time inside the storage room holding the dummy. Later on the same day, he returned once more and entered the storage room, this time accompanied by an unknown person.
3. JS was charged with an attempted exceptionally aggravated weapons offence consisting of attempted unlawful possession of the pistol, automatic rifles, magazines and ammunition on the date of 4 August 2021. The prosecutor claimed that it was only due to chance circumstances that no danger of the offence being completed arose. According to the prosecutor, the weapons offence was to be assessed as exceptionally aggravated as it involved several weapons of a particularly dangerous nature, the weapons were possessed in such an environment that they could typically be feared to be used for criminal ends, the gun had previously been used for criminal ends and

the offence was of a particularly dangerous nature, as the weapons were stored together with particularly dangerous ammunition.

4. JS was also charged with a grave narcotics offence involving the transport of 399 grams of cocaine and with commercial money laundering, a minor offence, involving the storage of SEK 90,500 in cash.

5. JT was charged with aiding and abetting an attempted exceptionally aggravated weapons offence consisting of assisting JS's attempted unlawful possession of the pistol, automatic rifles, magazines and ammunition on the date of 4 August 2021. According to the prosecution, such assistance consisted of JT driving JS to and from the address in question, accompanying him to the storage room and assisting him in searching for the weapons, magazines and ammunition. The statement of the criminal act as charged concerning JT likewise stated that it was only due to chance circumstances that no danger of the offence being completed arose. The prosecutor invoked the same circumstances as in the statement of the criminal act as charged pertaining JS to support the assessment of the weapons offence as exceptionally aggravated.

6. JT was also charged with a narcotics offence, consisting of seven counts of unlawful dealing in narcotics involving a total of 24 tablets of ecstasy/MDMA, 7.5 grams of cannabis and 6 grams of cocaine.

7. The District Court acquitted JS and JT of the attempted exceptionally aggravated weapons offence and of aiding and abetting the attempted exceptionally aggravated weapons offence respectively. JS was convicted of a grave narcotics offence and commercial money laundering, a minor offence. He was sentenced to four years and four months in prison. JT was sentenced to three months' imprisonment for five narcotics offences (transfer of a total of 4 tablets of ecstasy/MDMA, 5.6 grams of cannabis and 3 grams of cocaine).

8. The Court of Appeal modified the District Court's judgment and convicted JS and JT also of the attempted aggravated weapons offence and aiding and abetting the attempted aggravated weapons offence respectively. JS was sentenced to five years and six months' imprisonment. JT was sentenced to one year in prison.

### **Weapons offences**

9. Anyone who deliberately possesses a firearm without being entitled to do so, or who transfers or lends a firearm to someone not entitled to possess it, is sentenced to imprisonment for a maximum of three years for weapons offences (see Chapter 9, Section 1 of the Offensive Weapons Act, 1996:67).

10. An aggravated weapons offence is punishable by a minimum of two and a maximum of five years' imprisonment. When assessing whether the offence is aggravated, particular consideration shall be given to whether (1) the weapon has been possessed in a public place, in another place where people typically gather or have gathered or in a vehicle in such a place, (2) the weapon has been of a particularly dangerous nature, (3) the possession, transfer or lending has involved several weapons, (4) the weapon has been possessed in such an environment that it can typically be feared that it will be used for criminal ends, or (5) the offence has otherwise been of a particularly dangerous nature. (See Chapter 9, Section 1a of the Offensive Weapons Act.)

11. Attempted aggravated weapons offences and exceptionally aggravated weapons offences are punishable under Chapter 23 of the Swedish Criminal Code (see Chapter 9, Section 8 of the Offensive Weapons Act).

### **Attempted offences**

12. According to Chapter 23, Section 1 of the Criminal Code, a person who has begun to commit a certain offence, without completing it, shall be convicted of attempting the offence. This presupposes, first, a specific

provision making an attempt punishable by law, and, second, a danger that the act would lead to the completion of the offence, or that such a danger is excluded only due to chance circumstances. Where the minimum sentence for the completed crime is two or more years, the range of punishment for attempted offences is at least the general minimum of imprisonment and no more than the maximum for the completed offence.

13. The provision on liability for criminal attempt has remained essentially unchanged since general rules on liability for attempt were first introduced in Swedish law in 1948.

14. Criminal attempt is limited, inter alia, by the requirement that the offender has begun the commission of a particular offence, i.e., the requirement that the threshold of attempt has been achieved. The threshold of an attempt to commit a particular offence depends, among other things, on the wording of the penal provision, but also on the circumstances of the individual case. As a rule, however, the threshold of attempt must be considered to have been passed when the attempt is concluded, i.e., when the offender has done everything necessary to complete the offence. (Cf. "*Bussen i Östberga*" NJA 2017 p. 531, para. 19–26.)

15. An attempt to commit an offence also requires that the offender intended to commit a completed offence. With regards to a concluded attempt, the usual forms of intent are applied (see "*Bussen i Östberga*" para. 16).

16. Liability for attempt requires that there be a danger that the offence may be completed or that such danger was excluded only by chance circumstances. Danger refers to concrete danger, which means that, in any given case, it must have been possible and reasonably likely that the offence would be completed.

### **Regarding impossible attempts**

17. Attempts which fail to bring about any danger of the offence being completed are usually referred to as impossible attempts. Such attempts are therefore punishable if the danger of the offence being completed was excluded only due to chance circumstances.

18. The question of the extent to which impossible attempts should be punished depends in great measure on whether emphasis is placed on the offender's criminal intent (a subjective theory of criminal attempt) or whether the external nature of the act must necessarily lead to the realisation of the criminal result (an objective theory of criminal attempt).

19. The text of the law does not provide clear guidance on the delimitation of criminal liability for impossible attempts. In the legislative process that led to the provision on attempts, it was stated that the result of a subjective theory of criminal attempt would in many cases come across as offensive. However, exempting from liability all cases without concrete danger of the offence being completed was considered overly lenient. The preparatory works stated that an attempt shall be punishable if the situation "can be modified without difficulty such that the offence were completed" and that the dangerousness of the offender or the offence should be taken into account in determining the scope of punishability. (See Swedish Government Official Reports 1940:19 pp. 21 et seq. and 46 et seq.) Further, it was stated that the regulation is intended to be applied so that all serious attempts, and only serious attempts, are punished (see Govt. bill 1942:4 p. 59 et seq.).

20. A typical case in which the danger of completion of the offence is excluded is when the authorities have intervened, or when the offence has been prevented by some other similar circumstance beyond the offender's control. The question of criminal liability in such situations has been examined by the Supreme Court in several cases (see "*De tomma resväskorna*" NJA

1985 p. 544, "*Flickvännens fritagningsförsök*" NJA 1990 p. 354 and "*Russinlådorna*" NJA 1992 p. 679). In all of these cases, the danger of the completion of the offence was eliminated during the planning of the offence but before the attempt began (cf. the statements on previous case law made in "*Skottet mot säkerhetsdörren*" NJA 2003 p. 670).

21. If, on the contrary, the danger of the completion the offence has already been eliminated before the criminal plan has taken shape, i.e., before the offender has formed an intention to complete the offence, a fundamental flaw exists in the criminal plan. If the impossibility already existed at the time when the intention formed and the offender cannot change the factual conditions such that the planned offence could be completed, a linguistic interpretation suggests that the danger cannot be considered excluded due to chance circumstances. If the offender's criminal plan could never have led to any danger of the offence being completed, it cannot be said to be a coincidence that the danger never arose.

22. This interpretation of the attempts provision agrees with the basic idea that liability should apply to attempts which fail only because of circumstances which, from the offender's point of view, must be regarded as chance, while, on the other hand, attempts should be exempt from punishment if their failure cannot be attributed to coincidence but rather to a more profound flaw in the criminal plan (see *ibid.* p. 60). This interpretation is also consistent with previous case law. This delimitation expresses the restrictiveness that, not least for reasons of legality, should characterise the application of the attempts provision (see "*Skottet mot säkerhetsdörren*").

### **Conclusion**

23. It is thus concluded that criminal liability - in cases such as the one at hand (cf. para. 20) - does not, in principle, entail when the danger of the



completion of the offence was already excluded before the offender formed his or her intention.

24. This limitation entails that, in many cases, it should be possible to look at the possible actions available to the offender within the framework of his or her intention. If any of these options could have led to a completed offence, but the offender chose one that made such an outcome impossible, criminal liability may arise.

### **The assessment in this case**

25. JS has attempted to unlawfully possess the weapons, magazines and ammunition previously stored in the basement storage room. By his actions, JT has assisted in the attempted crime. The danger of the offences being completed was excluded because the police had seized the objects more than four months earlier.

26. One principle for the Supreme Court's assessment is that JS's intention to handle the weapons, magazines and ammunition, as well as JT's intention to assist in the same, took shape only after the police seized the objects. The danger of completion of the offence has therefore not been excluded by chance circumstances alone.

27. JS shall therefore not be convicted of an attempted aggravated weapons offence and JT shall not be convicted of aiding and abetting an attempted aggravated weapons offence.

28. In accordance with the Court of Appeal's judgment - which in these parts has not been appealed with regard to guilt - JS is found guilty of a grave narcotics offence and commercial money laundering, a minor offence. There is no reason to change the sentence imposed by the District Court. The sentence shall therefore be imposed at four years and four months' imprisonment.

29. JT's crimes relate to five counts of narcotics offences. No reason is found in this case to change the three-month prison sentence imposed by the District Court.

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Justices of the Supreme Court Gudmund Toijer, Agneta Bäcklund (reporting Justice), Svante O. Johansson, Malin Bonthron and Johan Danelius participated in the ruling.  
Judge referee: Petter Selberg