

SUPREME COURT'S JUDGMENT

Case no.

B 6101-19

delivered in Stockholm on 31 March 2021

PARTIES

Appellant

FL

Counsel and Public Defender: Attorney VB

Respondent

Prosecutor General

Box 5553

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THE MATTER

Threat against public official

RULING APPEALED

Judgment of the Svea Court of Appeal of 23 October 2019 in case B 11175-18

JUDGMENT

The Supreme Court sets aside the judgment of the court of appeal and acquits FL and relieves him from the obligation to pay a fee in accordance with the Fund for Victims of Crime Act (1994:419) and from the repayment obligation for the costs of the defence counsel in the court of appeal.

VB shall receive compensation from public funds for the defence of FL in the Supreme Court in the amount of SEK 17,989. Of that amount, SEK 14,391 relates to his work and SEK 3,598 relates to value added tax.

The state shall bear the costs of the defence counsel in the Supreme Court and the court of appeal.

CLAIMS IN THE SUPREME COURT, ETC.

FL has claimed that the Supreme Court shall acquit him or, in the alternative, reduce the sanction as well as, in any event, relieve him from the repayment obligation for the costs of the defence counsel.

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

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

REASONS FOR THE JUDGMENT**Background**

1. Performing artist FL was prosecuted for making a threat against a public official consisting of the fact that he wrote a rap song with related lyrics and saw to it that the song was released on the Spotify music streaming service. The lyrics contain statements regarding police officer AL. The Prosecutor asserted that FL, for the purpose of revenge, had threatened AL with violence as a consequence of earlier measures in the line of duty which she had taken in her exercise of authority.

2. The song was uploaded on Spotify just over a month after a concert had been arranged by, *inter alia*, FL at Kägelbanan, Södra Teatern in Stockholm. At the concert, the police intervened against a number of persons due to suspected possession of narcotics. Following the concert, AL, who had led the police operation, stated in mass media that her opinion was that Kägelbanan should not book these types of performances. AL's statement had been made in connection with her responses, following consultation with her superior, to questions from the media regarding the operation at Kägelbanan.

3. The rap song to which the indictment pertains is entitled "*Då ska hon skjutas*", [which translates into "Then she should be shot"]. The song states, *inter alia*, that all whores and all drug addicts are to be shot. There is a repeated recurrence of a chorus with the phrase "*då ska du skjutas*", which is rendered with the melody of a known birthday song. In one part of one verse mention is made of AL's name and the verse is worded:

"A post on Insta, I fuck your entire operation, I fuck your family, fuck where you live, blow you like I was wind power. Give back my computer with the disc or I will write [AL] is an ugly fish and then all the small fish will suffer."

4. On the same day as "*Då ska hon skjutas*" was released on Spotify, the song "#attgöraen[A]" was also released there. This song also contains the chorus "*då ska du skjutas*" with the birthday melody, but in the background in this case. "#attgöraen[A]" states that AL should not have expressed herself as she did. In the song it is stated, *inter alia*, "if you fuck with my work, [A], I am going to fuck with your work". In addition, there are statements indicating that AL is to die from cancer. At the same time, the song concludes with the words "In spite of everything you have done to me, I wish you good luck and I say that the only way out of this is love".

5. Both songs appeared on Spotify for three days before they were removed following complaint. "*Då ska hon skjutas*" was streamed approximately 27,000 times and "#attgöraen[A]" approximately 14,000 times.

6. The district court acquitted FL since it was not deemed proven that he had intended to threaten AL. The court of appeal varied the judgment of the district court and sentenced FL for a threat against a public official to a conditional judgment and 70 day fines.

7. The Supreme Court has granted leave to appeal based on what the court of appeal found to be established regarding the factual circumstances and the question of intent.

The case in the Supreme Court

8. The case primarily pertains to the manner in which freedom of expression aspects are to be considered in the assessment of an indictment for a threat against a public official.

Threat against a public official

9. By virtue of Chapter 17 of the Swedish Criminal Code, persons who perform public functions are protected against attack. The provisions are intended to prevent undue pressure on such persons so that the function may proceed unimpeded (see NJA II 1975, p. 645). In the provisions, acts which are already subject to sanctions by virtue of other provisions are, in part, subject to sanctions, and the more stringent scales of penalty in Chapter 17 thereby provide enhanced penal protection.

10. According to Chapter 17, Section 1, a person who, through threat of violence, abuses a public official in their exercise of public authority or coerces the public official to take, or impede their taking, a measure in their exercise of public authority or to avenge such a measure is guilty of a threat against a public official. The same applies to a person who, in this way, abuses a public official who previously exercised public authority for something they did or failed to do in their exercise of public authority.

11. The criminal act consists of a threat of violence against a person. Such violence means the same thing as in the provision regarding robbery in Chapter 8, Section 5 of the Swedish Criminal Code, namely assault or severe coercion (see NJA II 1942, p. 357). According to Chapter 17, Section 2, threats of something other than violence may give rise to a penalty for abuse of a public official. The threat of violence must be directed towards the person threatened. The penalty for threats against public officials is fines or terms of imprisonment for at most two years.

12. It is not necessary that the threat of violence was intended to occasion serious fear in the exposed person (*cf.* unlawful threat in accordance with Chapter 4, Section 5). Nor is it necessary that the threat entails or appears to involve an imminent danger to the person threatened (*cf.* robbery in accordance with Chapter 8, Section 5). What is required according to Chapter 17, Section 1, is that there is a threat of violence which entails, at a minimum, abuse or serious coercion of the person's freedom of movement, e.g. kidnapping or unlawful deprivation of liberty.

13. The threat of violence must also be such that it appears seriously intended. Thus, it is required that the threat is asserted in such a manner that is normally sufficient to give rise to apprehensions in the threatened person that the threat could be realised. However, the apprehensions need not be that the threat could be realised exactly in the manner stated and even more veiled threats of violence may lead to criminal responsibility. (*Cf.* Gösta Westerlund, *Våld mot tjänsteman* [Violence Against Public Officials], 1990, p. 144 ff.)

14. Responsibility for a threat against a public official requires intent in relation to the exercise of authority by the person assailed. In addition, direct intent to assault the public official with the aim of coercing, preventing or avenging is required. As a rule, the fact that the perpetrator believes that the exercise of authority is improper does not give rise to a release from responsibility. (*Cf.* NJA II 1975, p. 645 f. and Agneta Bäcklund, *et al.*, *Brottsbalken* [The Swedish Criminal Code], Supplement 17, July 2020, commentary on Chapter 17, Section 1.)

Threat against public official and the relationship to the freedom of expression

The legal regulation of freedom of expression

15. According to Chapter 2, Article 1, first paragraph (1) of the Instrument of Government, the freedom of expression is the freedom to communicate information and express thoughts, opinions and sentiments. According to Chapter 2, Article 20, the freedom of expression may be limited in law. Such a limitation may, pursuant to Chapter 2, Article 21, be imposed only to satisfy a purpose acceptable in a democratic society. The limitation must never go beyond what is necessary with regard to the purpose which

occasioned it (the so-called proportionality principle), nor may it be carried so far as to constitute a threat to the free shaping of opinion.

16. According to Chapter 2, Article 23, the freedom of expression may be limited with regard to, *inter alia*, public order and public safety, the good repute of the individual, the sanctity of private life, and the prevention and prosecution of crime. According to the second paragraph of the Article, particular attention shall be paid to the importance of the widest possible freedom of expression in, *inter alia*, cultural matters.

17. The European Convention on Human Rights contains rules regarding the freedom of expression in Article 10 (1). According to the Article, everyone has the right to freedom of expression including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The right to the freedom of expression may be limited in accordance with the provisions of Article 10 (2).

The freedom of expression and penalty provisions

18. As a consequence of the principle of the legality of criminal law and reasons of legal certainty, the requirements of a penalty provision are to be interpreted as worded. It further follows from procedural principles that only what may be gleaned concerning the criminal requirements in the statement of criminal act charged, which constitutes the prosecuted offence, may form the basis of the assessment of whether the constituent elements of the crime are met.

19. In the event the application of a criminal provision may entail a constraint on the freedom of expression, what is stated, *inter alia*, in Chapter 2, Article 23, second paragraph of the Instrument of Government regarding the widest possible freedom of expression in political, religious, professional, scientific and cultural matters must also be permitted to have effect. This calls for caution in the application to avoid conflicts with the constitutionally anchored values. The European Court of Human Rights has expressed a comparable view in its case law regarding Article 10 in the European Convention on Human Rights (see, for example, *Pentikäinen v. Finland*, [GC] no. 11882/10, § 87, ECHR 2015).

The significance of freedom of expression aspects in connection with threats against public officials and other threat crimes

20. The preparatory works relating to the 1976 reform of the rights rules of the Instrument of Government state that the legislature then assumed that crimes involving unlawful threats and threats against public officials would fall wholly outside the constitutional protection of freedom of expression (see Government Bill 1975/76:209, p. 141). Currently, however, the starting point must be that the criminal provisions regarding threat crimes may per se constitute limitations on the freedom of expression (see the “Aftonbladet case”, case NJA 1999, p. 275 and Government Bill 2001/02:74, p. 59 ff.).

21. In the balancing to be carried out between the interest in the freedom of expression on one hand and the interest in counteracting assaults on the exercise of public authority on the other hand, a great deal of latitude must be allowed in the interest of the freedom of expression. In a democratic and pluralistic society, lyrics and music performed in a cultural context must be allowed to be provocative, challenging and questioning. The fact that the expressions and manner of expression may be deemed to constitute contributions to an ongoing social debate, a polemical response to a perceived injustice, socially critical satire or, for that matter, boundary-crossing art or a satirical ballad is significant. Such contributions, as a rule, constitute permissible expressions even if they are perceived to be unpleasant, excessive or provocative.

22. The extensive protection of the freedom of expression may thus, in practice, require that we tolerate that which we perceive to be uncomfortable and unpleasant (*cf.* Thomas Bull, *Yttrandefrihet och konstitutionell kultur* [The Freedom of Expression and Constitutional Culture], *Svensk Juristtidning 100 år*, p. 385).

23. The issue whether an encroachment on the freedom of expression is necessary in a democratic society in accordance with Article 10 of the European Convention is also resolved by a balancing, on the one hand, of an individual’s interest in the freedom of expression and, on the other hand, the public or individual interest justifying the encroachment. The Convention protection covers not only expressions which are positively received or deemed harmless, but also expressions which offend, shock or disturb the state or some part of the populace. The European Court of Human Rights has,

at the same time, emphasised that whoever exercises his freedom of expression undertakes duties and responsibilities the scope of which depends on the situation. (Cf. judgments of the European Court of Human Rights in *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24 and *Müller and Others v. Switzerland*, 24 May 1988, §§ 33–34, Series A no. 133 and Harris *et al.*, Law of the European Convention on Human Rights, 4th ed. 2018, p. 611 ff.)

24. Pursuant to both the Instrument of Government and the European Convention on Human Rights, a line is crossed when that which is expressed transitions into a threat of violence or the like. And this also applies if the expressions are uttered within the context of, for example, a political debate or in a cultural context. As a consequence of the latitude granted by the Instrument of Government regarding limiting the freedom of expression, no conflict with the Constitution normally arises by virtue of the penalisation of a threat against a public official (see, in particular, Chapter 2, Article 23). Nor is an impediment raised to this by the European Convention on Human Rights; expressions which are hateful or which encourage violence against individuals may, as a starting point, be penalised without hindrance from the Convention.

25. As stated, freedom of expression aspects may be significant as regards the assessment of what constitutes a threat. As a consequence, what may be perceived as a threat of violence by virtue of its wording may instead be regarded as a permissible – even if harsh, provocative or polemical – contribution. The decisive factor is whether the alleged threat appears to be seriously intended in the context and in the form in which it is presented.

Assessment in this case

26. The indictment against FL pertains to whether the content of the song “*Då ska hon skjutas*” is such as entails a threat of violence which appears seriously intended and thus may give rise to responsibility for a threat against a public official (see paragraphs 12 and 13).

27. The song contains, with regard to its title in combination with the above-cited lines of text (see paragraph 3), expressions which, according to their wording, could be regarded as threats of violence against AL's person.

28. However, these expressions can also be viewed in the context as such multi-faceted metaphors and rhetorical exaggerations which not infrequently appear in the genre in which FL is active and which are an expression of a provocative and boundary-crossing musical style. The title and the melody in the chorus clearly suggest a well-known birthday tune. Some words are used in a manner which can hardly be taken literally and these may have various meanings. It is further stated that if AL does not return the computer with the disc, the performing artist will "write" that she is an ugly fish, followed by the words "then all the small fish will suffer". What is meant by "suffer" is not specifically apparent and need not necessarily indicate the use of violence.

29. The song otherwise contains no references to AL's person, rather something else is sung about. The chorus pervades the entire song and therein expresses "then you will be shot". However, the words are not presented in immediate connection with the verse forming the basis of the indictment. At the same time, the grave purport of the expression must be taken into account if the title "*Då ska hon skjutas*" is to be taken literally.

30. A starting point in the assessment is, furthermore, the conclusion drawn by the court of appeal that FL's intention with the song was revenge against AL as a representative of the police due to the police operation and her subsequent statements in the media and that FL understood the risk that she could understand the message in the song as threatening.

31. FL's intention to obtain revenge appears to have had primarily aimed at AL's statement that Kågelbanan should not have booked the relevant type of performance. Whether statements on such an issue were part of her work duties may certainly be debated. On the other hand, there can be no doubt that she provided the information regarding the raid while on duty and that the information was connected to her exercise of authority. Furthermore, reference is made in the song to "your entire operation" as well as the seizure of a computer. Thus, it has been a matter of revenge for what AL did in connection with the exercise of authority.

32. As regards the issue of how the freedom of expression aspects have an effect on FL's criminal liability for the alleged threat crime, all circumstances surrounding the act are to be taken into account.

33. It may be noted that the song "*Då ska hon skjutas*" was, in part, released as a reaction to AL's statements in the media regarding performances which should not have been booked and, in part, presented in a musical genre in which the tone may generally be regarded as harsh. The words used in the verse of lyrics to which the indictment pertains are ambiguous. They constitute part of a provoking polemic and may be understood to be metaphorical. The recurring chorus is obtained from, and creates associations with, a well-known birthday tune without connection to violent acts. The chorus is not presented in connection with the verse to which the indictment pertains. The expression used according to which all small fish will "suffer" does not necessarily indicate the commission of violence and the song is otherwise not about AL.

34. Taken together, the circumstances are not such that the song, in the form and in the context in which it is performed must be viewed as a seriously intended threat of violence within the meaning referred to in Chapter 17, Section 1 of the Swedish Criminal Code. The contents of the song, even if harsh and assuredly unpleasant for AL who feels designated, falls within what may be accepted and is therefore not punishable (*cf.* Chapter 2, Section 23, second paragraph of the Instrument of Government). Accordingly, the judgment of the court of appeal will be set aside and FL is acquitted.

Justices Anders Eka (dissenting), Ann-Christine Lindeblad (dissenting), Malin Bonthron, Eric M Runesson and Stefan Reimer (reporting Justice) have participated in the ruling.
Judge Referee: Josefine Wendel



Date
16 February 2021

Case no. B 6101-19
Appendix

DISSENTING OPINION

Justices Anders Eka and Ann-Christine Lindeblad dissent and affirm the judgment of the court of appeal. They state:

We concur with what is stated in the judgment up to and including paragraph 27. It is our position that the reasons for the judgment thereafter should be worded as follows.

It is important to establish a restrictive view when statements are made in a cultural context. Consideration must be given to the context and then, *inter alia*, to the art form within which the expressions are presented.

What suggests that the expressions are not to be regarded as threats, but more as harsh and provoking criticism, is, *inter alia*, that the matter involves lyrics within a musical genre in which a forceful and rough vernacular with metaphors and rhetorical exaggerations and double meanings often appear. Naturally, not everything stated in the lyrics may be taken literally.

However, the statements must also otherwise be put into their context. It has been established that the police operation for which AL was responsible provoked anger and irritation on the part of FL. Posts were published on Instagram which, *inter alia*, were about her and the police operation. In addition, another song was also released on Spotify on the same day as the song “*Då ska hon skjutas*”. In the song “#attgöraen[A]” harsh and aggressive statements were made and directed at AL which, *inter alia*, indicated that she would die of cancer. When she learned of the statements, AL knew nothing of FL or what intentions he could conceivably have had with them. Against this background, the statements which were made in “*Då ska hon skjutas*” and which are stated in the statement of the criminal act charged were such that, from AL’s point of view,

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it was justified to take them seriously and that it was natural that the statements made her apprehensive that it was a matter involving a threat which could be acted upon.

Taken together, that which was stated in the song "*Då ska hon skjutas*" constituted a threat of violence to a person. It is clear that the statements were intended as revenge against AL for such as she had done in her exercise of authority.

Accordingly, the judgment of the court of appeal is to be affirmed.