Norway's Supreme Court - HR-2016-2263-A

Authority	Norway's Supreme Court – Judgment
Date	03/11/2016
Published	HR-2016-2263-A
Keywords	Criminal law. Sentencing. Receiving/handling of proceeds of digital data abuse. Social media. Torrent technology.
Summary	The sentence for violation of the Penal Code (1902) section 317 subs. 1 and section 162 subs. 1 was set at five months' imprisonment. The offence of handling proceeds of crime applied to downloading and file sharing by means of "torrent technology" of a large number of images of private nature of young women, many of them in the nude, without the women's consent. The images had been retrieved from social media, where most of them had been posted by the women themselves, as they trusted the pictures would not and could not be disseminated. In the file sharing application, the images were sorted in such a way that many of the women could easily be identified. The judgment emphasised the need for a general deterrent. The sentence for the handling of proceeds of crime alone was set at 120 days' imprisonment. (Supreme Court Reports – summary)
Proceedings	Nedre Romerike District Court TNERO-2015-118153 – Eidsivating Court of Appeal LE-2016-5099 – Supreme Court HR-2016-2263-A (case no. 2016/1636), criminal proceedings, appeal against judgment.
Parties	I. *A* (Advocate John Christian Elden) vs the public prosecuting authority (Public Prosecutor Kirsti Elisabeth Guttormsen). II. The public prosecuting authority (Public Prosecutor Kirsti Elisabeth Guttormsen) vs *A* (Advocate John Christian Elden).
Written by	Justices Stabel, Webster, Bull, Normann, Chief Justice Øie.

(1) Justice Stabel: The matter at hand is the sentencing of a violation of Penal Code (1902) section 317 about the handling/receiving of proceeds of crime, cf. the Copyright Act section 54 cf. section 45c: downloading and sharing large numbers of photos and films of young women without their consent.

(2) On 14 July 2015, *A* was indicted on charges of violation of *inter alia* the Penal Code (1902) section 317 subs. 1 first penal alternative (Count I). The factual basis was as follows:

> "On Friday 17 October 2014, in his home in X, he had a large quantity of photos etc. stored on his computer. The files had been taken from their rightful owners by means of one or more criminal acts. The majority of the files were private and of a sensitive nature. The images had been illegally obtained from the service Snapsaved and other sources. Shortly before, the photos had been downloaded and shared with a large group of people through the file sharing network BitTorrent Sync. Using BitTorrent he also helped make the photos available to a large number of other users of the service."

(3) The charges in the indictment included storage of 400 g of marijuana and use of marijuana approx twice a week during the period October 2014 to April 2015.

(4) On 09 November 2015, Nedre Romerike District Court passed judgment [TNERO-2015-118153] with the following conclusion:

> "*A*, born 0.0.1994, is acquitted of Count I.
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> *A*, born 0.0.1994, is convicted of violation of the Penal Code (1902) section 162 subs. 1 and the Medicinal Products Act section 31 subs. 2 cf. section 24 subs. 1 and sentenced to 60 – sixty – hours' community service, alternatively 60 days' imprisonment. The period for the execution of the sentence is set at 120 – one hundred and twenty – days. Time spent in custody on remand – one day – will be deducted from the alternative prison sentence, cf. the Penal Code (2005) section 83."

(5) The prosecuting authority appealed against the assessment of evidence of guilt with regard to the count about violation of the Penal Code section 317.

(6) On 15 June 2016, Eidsivating Court of Appeal passed judgment [LE-2016-5099] with the following conclusion:

> "1. *A*, born 0.0.1994, is found guilty of violation of the Penal Code (1902) section 317 subs. 1 first penal alternative, in addition to the violations for which he was found guilty by Nedre Romerike District Court on 09 November 2015 and for which he was given an enforceable sentence, all in conjunction with the Penal Code (1902) section 62 subs. 1 and section 63 subs. 2, and sentenced to imprisonment for 120 – one hundred and twenty – days. 1 – one – day spent in custody on remand will be deducted from the sentence.
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> 2. *A*, born 0.0.1994, is sentenced to forfeiture of an Apple Mac Book Pro computer in accordance with the Penal Code (1902) section 35 subs. 2."

(7) The Court of Appeal did not deliberate whether the digital image files had been stolen from their rightful owners, cf. the Penal Code (1902) section 145, but found that, in any case, section 45c cf. section 54 subs. 1 letter b of the Copyright Act had been wilfully

violated. In view of the material's content and extent, and given how it had been obtained, circumstances were found to be particularly aggravated, cf. the Copyright Act section 54 subs. 3. The Court of Appeal found that violation of section 317 alone warranted a penalty of 120 days' imprisonment, and that the point of departure for the entire penalty would be six months' imprisonment. The fact that the sentence was set at only 120 days was due to the defendant's confession and a somewhat protracted processing time.

(8) The prosecuting authority and *A* have both appealed against the sentencing.

(9) **I have reached the conclusion** that the sentence should be slightly increased.

(10) The factual basis for the judgment is that, by means of file sharing and the use of so-called "torrent technology", the convicted person has stored – and made available to others – photographs of women without their consent. By and large, the pictures were taken by the women themselves and are what are commonly known as "selfies". Each woman is therefore both the legal copyright holder of the photograph in question, cf. the Copyright Act section 43a, and protected by the privacy provision in the Copyright Act section 45c. Some images appear to have been taken by a person other than the woman in question, but with her consent. Others, again, appear to have been taken covertly. What they all have in common is their private character. In many of them, the women are undressed and in intimate situations. The material also includes private video recordings.

(11) The Court of Appeal found that the photographs were initially shared by the women themselves, through "Snapchat" or other social media such as Facebook and Instagram. Snapchat is a mobile device app used to share snapshots and video footage with one or more recipients. The sender determines the recipient and the picture's "lifetime". A photo taken and shared through Snapchat can have a lifetime on the recipient side of no more than 10 seconds before it vanishes from the screen and is deleted. The recipient, on the other hand, can take a screenshot of the picture and save it on his/her mobile device, in which case the sender will be notified that a screenshot has been taken.

(12) However, applications have been made by other developers that allow the recipient to circumvent such limitations. The application "Snapsaved" allows the recipient to save Snapchat pictures without the sender's consent and unbeknownst to her. The Court of Appeal found that the images from Snapchat in the material shared by the convicted person had been stored by the recipient by means of Snapsaved or as screenshot copies.

(13) The images were shared anonymously on the Internet on the website anon-ib.com and similar Internet forums. The women themselves did not know that pictures of them were circulating on the Internet. Consequently, they did not consent to the pictures' use. On anon-ib.com, users are urged to share pictures on a large scale by means of BitTorrent Sync.

(14) This file sharing tool – which was used by the convicted person – applies so-called torrent technology to transfer large quantities of digital material between users' computers. The computers are configured to form a network and are synchronised. All the material uploaded by users with BitTorrent Sync make up a database. The traffic load on the Internet is thus shared between the users' devices. Even if a user fails to upload new material, he will contribute to the file sharing, since other users can download what he himself has downloaded from BitTorrent Sync to his own computer. So by

downloading material from BitTorrent Sync to his own computer, the convicted person facilitated other users' downloading.

(15) One of the purposes of sharing with BitTorrent Sync was to enable identification of women to the extent possible, by linking photos to addresses. By means of BitTorrent Sync, users can sort and catalogue files in the database by creating subfolders. Such folders can be catalogued, for instance, according to county, and the county folders can contain other folders for individual women in the county. Pending cataloguing, large quantities of files can be uploaded to folders for interim storage. This was the structure of the folders and files shared by the convicted person by means of BitTorrent Sync. All in all, there were 442 subfolders and 36,270 files, 35,764 of which were pictures. More than 200 folders were named after specific women or users.

(16) Counsel for the defence has argued that such acts do not fall within the core of what section 54 subs. 3 of the Copyright Act about aggravated circumstances sets out to defend, so that sentencing needs to be moderate. I am of a different opinion. The right to determine the use of one's own photographs also clearly has to do with privacy protection. In the Official Norwegian Reports 2007:2 *Lovtiltak mot datakriminalitet Delutredning II*, item 3.7.4 (about personal pictures on the net) highlights section 45 c as a key provision which will particularly have a bearing on unwanted and illegal publication of such pictures on the net. The provision does not only defend financial interests, as some opinions expressed in the act's preparatory works, cf. *Ot.prp.nr.34 (1987-1988)*, might seem to indicate.

(17) In determining the sentence, I take into account the very large number of pictures and films involved – 36,270 files altogether – and the very large number of victims, 200 of whom have been identified. By and large, they are young and inexperienced. Five of them are underage. As for the others, they are presumed to be about 18 years old. At that age, many people are unable to fathom the consequences of posting or allowing others to post intimate pictures.

(18) The very fact that such pictures fall into the wrong hands involves, *per se*, a serious offence against a person's integrity, all the more so, when the identity of the victim – name and address – is given. The pictures can be recognised by friends and acquaintances, relatives, neighbours and, not least, present or potential employers.

(19) We know of instances when victims of offences such as this one were contacted by male strangers that threatened to, for instance, send pictures to their employer or others unless the victim produced even more explicit pictures. Having pictures deleted from the net is very difficult, and since the victims cannot control where the pictures are, the situation can become a lifelong offence against their integrity.

(20) Searching for and downloading pictures of this kind means sustaining the demand. Albeit the convicted person has not posted pictures himself. However, by downloading them he has – since the system works as described above – indirectly contributed to their dissemination.

(21) The need to ensure a general deterrent warrants a firm reaction in cases such as this one. Counsel for the prosecution has referred to sentencing precedent in cases of child abuse pictures. However, an important distinction between them and this type of case, where

the pictures were initially posted voluntarily, is that sexual child abuse pictures are derived from mistreatment. Although the child in a child abuse picture is usually not identified, the sentencing level in our case needs to be lower.

(22) I have considered the penalty for the convicted person's receipt of proceeds of digital data abuse bearing this in mind. In view of what I have said about the extent and seriousness of the case, I believe the custodial sentence should not be too short. The Court of Appeal was satisfied that the convicted person understood that the technology entails dissemination of pictures and identification of the victims, and the material clearly shows that they had not given their consent to such publication. The penalty should therefore be set at 120 days' imprisonment.

(23) His confession, following the search of his dwelling, was not unconditional, and should not carry much weight, in view of the evidence that was available. Neither does the duration of the criminal proceedings – two years in all, from when the criminal offence was committed –warrant a penalty reduction.

(24) The full sentence should include the two counts in the indictment – storage and use of marijuana – for which the District Court has already passed an enforceable sentence of 60 hours' community service, alternatively 60 days' imprisonment. In view of the Supreme Court's comments in paragraph 15 of *Rt-2013-188*, I find that the penalty for this isolated offence should be 60 days' imprisonment. Seen as a whole, the aggregate penalty should be set at five months' imprisonment.

(25) I vote for the following
1. sentence:
2. The conclusion of the judgment passed by the Court of Appeal is amended so that the imposed sentence is 5 – five – months' imprisonment.

(26) Justice Webster: I agree, in essence and with regard to the result, with the judge casting the leading vote.

(27) Justice Bull: Likewise.

(28) Justice Normann: Likewise.

(29) Chief Justice Øie: Likewise.

(30) Following the vote, the Supreme Court passed the following

sentence:
The conclusion of the judgment passed by the Court of Appeal is amended so that the imposed sentence is 5 – five – months' imprisonment.