

National Public Prosecution Department
International Public Prosecution Office
Stockholm
Public Prosecutor [H.L.]
Public Prosecutor [H.A.]

Appeal
31.05.2016

Page 1 (4)
Document 347
Case AM-138168-14
Admin. Officer 109-36

Svea Court of Appeal
Dept.
Box 2290
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Appeal of the verdict of Södertörn District Court on 11.05.2016, B 2639-16

Appellant

The public prosecutors [H.L.] and [H.A.], International Public Prosecution Office Stockholm

Counterparty

[the Defendant M.D.]

Court-appointed lawyer

[S.M.]

Case

Particularly aggravated assault and crimes under international law; now a question of appeal.

Petitions

It is requested that the court of appeal, in overturning the district court's verdict, also convicts [the Defendant M.D.] of crimes under international law. It is also requested that the court of appeal, regardless of whether the judgement relating to crimes under international law is overturned, imposes a longer sentence of imprisonment.

Grounds

The prosecution shares the view of the district court that at the time the crime was committed, there was an internal armed conflict in Syria and that the injured party was incapacitated at the time.

The question of nexus

On the contrary, the prosecutors consider that the district court has made an incorrect assessment regarding the requirement for a sufficient link, nexus, between the act and the armed conflict.

The demand for a nexus is intended to distinguish war crimes from purely private matters, such as a murder committed due to jealousy. The issue has been considered in several judgements of the International Criminal Tribunal for the former Yugoslavia, especially in the Kunarac case.¹

In the ruling, the tribunal emphasises that what makes an act a war crime is that there must be a link between the act and the armed conflict and that its execution must have been affected by or depended on the conflict. Furthermore, the tribunal points out that the armed conflict must have had an important role in the perpetrator's decision and opportunity to carry out the offence, in the manner in which the offence was committed *or* in the purpose of the offence.² Contrary to what the district court has concluded, the offence does not need to promote the overall goal of the conflict, but can also be performed e.g. for personal gain. The tribunal then sets out a number of examples of factors that may indicate that there is such a connection between the offence and the armed conflict, so that it should be regarded as a war crime. These are therefore *indicative factors* that the tribunal highlights in the present case.³ An adequate link may exist even if the stated factors are not present in a specific case. The reasons set out by the district court, however, state that the specified factors are deemed necessary for the requirement for nexus to be fulfilled, which leads to the incorrect conclusion that there is no sufficient connection.

In assessing whether there is a nexus between the current act and the armed conflict, an overall assessment of the circumstances in the individual case should be carried out instead. Regarding the [the Defendant M.D.]'s offence, particular account should be taken of the time and place of the event, as well as third-party positions, but also other significant circumstances.

In such an assessment, it can be determined that the offence was performed in close chronological and geographical proximity to violent clashes between the FSA and the Syrian regime. Both [the Defendant M.D.] and other perpetrators such as the injured party EAA are to be regarded as combatants, with the addition that at the time of the offence, the injured party was incapacitated and therefore had no direct involvement in the hostilities. He can thus be regarded as a protected person under common Article 3 of the Geneva Conventions (see below). These factors indicate that there is a connection between the offence and the armed conflict.

The two reasons behind the offence also indicate that there is a connection between the offence and the armed conflict. The first is a disagreement about the strategy for the war in Al-Haffa, which was the reason why EAA broke away from the armed group to which the [the Defendant M.D.] belonged, and formed a separate group instead. The other underlying cause is disagreements about arming the opposition in Al-Haffa for forthcoming hostilities, where the leader of [the Defendant M.D.]'s group would not arm the injured party's group. Thus, the underlying motive for the offence was disagreement about how the armed conflict could be won in the most efficient way, a motive that was directly linked to the ongoing conflict.

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1. International Criminal Tribunal for the former Yugoslavia, Appeal Judgement, The Prosecutor v. Dragoljub Kunarac and Others, 2002, IT-96-23 & 23/1 paras 50 ff.
 2. Kunarac, para 58. and 3. Kunarac, para 59.

Finally, it can be noted that the perpetrators, by abusing EEA and depriving him of his freedom in connection with the clashes with the regime, managed to destroy the group formed by EEA. It should be noted in this context that the armed conflict in Syria, neither now or at the time of the offence, was a two-party war. It is instead a conflict with a very large number of armed groups with both common and opposing interests, loyalties and objectives. The fact that, at the time of the offence, EEA and the [the Defendant M.D.] had essentially a common enemy in the conflict, does not prevent the requirement for a nexus being fulfilled. Instead, the crucial circumstance is that, as a result of the armed conflict, they had opposing interests which led to the offence.

The overall assessment in our opinion is that the offence was so closely linked to the conflict that the act must be considered a war crime. The armed conflict played a significant role in both [the Defendant M.D.]'s ability and decision to carry out the offence and the way in which it was committed. The armed conflict has also played a significant role regarding the purpose of the offence, namely, to destroy another armed group.

The issue of whether the injured party is a protected person

The prosecutor also does not share the opinion of the district court that the injured party's status as a protected person must be affected by the fact that he and the perpetrator had a common opponent in the armed conflict. The common Article 3 of the Geneva Conventions protects *all* those who do not participate directly in hostilities. EEA was not captured by his own forces. It is noted, however, that even persons who are incapacitated and captured by their own forces are protected by the article.⁴ EEA is thus a protected person in the present case. Thus, the fact that EEA and the [the Defendant M.D.] have had a common opponent does not affect the applicability of Article 3 and the EEA's protection under the article.

Penalty

The penalty for the offences for which [the Defendant M.D.] has been convicted more than 7 years' imprisonment. The case concerns an offence where the injured party was detained both by being prevented from moving freely, as well as by being bound and unable to defend himself against the prolonged and extreme violence exercised by several people over an extended period.

Evidence

Permission is requested to submit a statement of evidence until [the Defendant M.D.]'s approach to the appeal is clarified.

Proceedings

It is proposed that the court of appeal schedule the case proceedings for the weeks 25-26.

Public Prosecutor [H.L.]

Public Prosecutor [H.A.]

4

⁴ Refer to the 2016 comment on the Geneva Convention I, Art 3, paras 544-549

https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc446324301