

APPEALED DECISION

Södertörns District Court's decision of 11 May 2016 in case no. B 2639-16, see Annex A

PARTIES (number of accused 1)

Appellant and counterparty (Prosecutor)

Public Prosecutors [H.L.] and [H.A.]
Swedish Prosecution Authority
International Public Prosecution Office in Stockholm

Counterparty

(Injured party) EAA

Address for counsel for the injured party

Representative and counsel for the injured party: [Lawyer C.B.]

Appellant and counterparty

[Defendant M.D.],
Citizen of Syria
Detention: Under arrest
Swedish Prison and Probation Service Hall

Representative and court-appointed: [Lawyer M.S.]

THE CASE

International crimes etc.

THE JUDICIAL DECISION OF THE COURT OF APPEAL

1. The Court of Appeal thus amends the District Court's judgement that the Court of Appeal
 - a. also convicts [Defendant M.D.], for international crimes according to chapter 22.6, first paragraph of the Penal Code, as worded before 1 July 2014, and
 - b. determines the length of the term of imprisonment to be 8 years.

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2. The Court of Appeal determines compensation from public funds for [Lawyer C.B.] correctly calculated at SEK 116,696. Of this amount, SEK 78,057 relates to work, SEK 8,505 to time lost, SEK 6,795 to expenses and SEK 23,339 to VAT.
3. The Court of Appeal determines compensation from public funds for [Lawyer M.S.] of SEK 207,218. Of this amount, SEK 132,300 relates to work, SEK 16,403 to time lost, SEK 17,071 to expenses and SEK 41,444 to VAT.
4. The state shall be responsible for the costs for the counsel for the injured party and public defenders.
5. The seizure is upheld.
6. [The Defendant M.D.] shall remain in detention until the judgement has obtained the force of "res judicata" against him in terms of sentencing and deportation.
7. The Court of Appeal confirms the confidentiality order.

Confidentiality according to Section 5(1) of the Code of Judicial Procedure and Section 21(1) of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to the uncensored film that has been shown in camera during the main proceedings at the Court of Appeal.

PETITIONS IN THE COURT OF APPEAL

The prosecutor has requested that the Court of Appeal should also convict [the Defendant M.D.] for international crime and in any event sentence him to a longer prison sentence than that imposed by the District Court.

[The Defendant M.D.] has opposed the prosecutor's petition to overturn the judgement of the District Court and for his part has requested the Court of Appeal to acquit him and dismiss EAA's claim for damages. He has also requested that the Court of Appeal should in all events reduce the sentence and dismiss the petition for deportation. As regards the compensation, he has the same attitude towards the amounts reported in the District Court's judgement.

The prosecutor has opposed [the Defendant M.D.]'s petition to overturn the District Court's judgement.

As counsel also stated in the District Court, EAA opposed [the Defendant M.D.]'s petition to overturn the District Court's judgement.

THE FINDINGS OF THE COURT OF APPEAL

Proceedings in the Court of Appeal

Where appropriate, the Court of Appeal uses the same abbreviations and terms used in the District Court's judgement.

The Court of Appeal has relied on extensive written evidence, films and photographs, essentially the same as in the District Court. The hearings at the District Court have been reported by playing the recordings from the District Court. Some additional evidence has been presented in the Court of Appeal.

Additional hearings have been held with EAA and [the Defendant M.D.] in the Court of Appeal. There they essentially stated the following.

EAA: He has not provided incorrect information, but he has not dared to tell everything for fear of reprisals. There may be further things that he has not yet disclosed. He can now tell us that there was a person in the area named HQ, who was a powerful man and head of ST. There was a rumour that he, EAA, had hired a person, AQ, to kill HQ. There was also a person in the area called the mukhtar, who is an elected representative and a respected person and who helps with mediation in conflicts. He turned to this person, who arranged a meeting with a number of people, including HQ, ST, [the Defendant M.D.], himself and AQ. All who attended the meeting were senior people. He and AQ explained that there was no such mission and HQ was pleased. After the meeting, however, he was threatened by ST among others. Shortly afterwards he was arrested and taken to the school. He also saw other people there being mistreated.

[the Defendant M.D.]: There was no meeting like that described by EAA where he himself was present. He has never heard mention of HQ. He knows nothing about a contract mission to kill someone. He does not know how EAA ended up at the school. The receipt he relied on in the Court of Appeal is dated 21 February 2012 and relates

to a payment in Syrian currency that was made in connection with his release by the regime that day.

Aggravated assault

For the reasons presented in the District Court, the Court of Appeal agrees with the opinion that [the Defendant M.D.], to the extent found by the District Court, together and in concert with others, participated in the mistreatment of EAA. The Court of Appeal, like the District Court, also considers that [the Defendant M.D.]'s objection that he should be exempted from liability because he was forced to join the armed group, is unfounded. As the District Court also found, therefore, [the Defendant M.D.] should be convicted of aggravated assault. The Court of Appeal also considers that the crime should be considered as particularly grievous under Chapter 3.6, second paragraph, of the Penal Code.

International crime

Armed conflict

In order to be able to convict for an international crime, there must be an armed conflict, but there are no international or other bodies that can determine with binding effect for a court, whether and, if so, when there is an armed conflict (internally in this case) in a country. As the District Court has stated, the court must therefore make its own assessment of the matter. The assessment shall consider whether the actual circumstances were such that the criteria laid down in international case law to determine the existence of an internal armed conflict in the overall assessment were fulfilled.

Although the Court of Appeal will conduct an independent assessment, it is reasonable to use as a starting point the assessments made by international and recognised bodies, in this case primarily COI and ICRC, which in turn are based on the evidence available to them. As regards the period after mid-July 2012, when the ICRC issued a press release, the parties also agree that the assessments of the COI and ICRC that there was an internal armed conflict were correct, based on the knowledge and information about

the actual conditions that each organisation had. However, the parties disagree about whether a state of internal armed conflict only arose in mid-July 2012 and thus after the time of the actual offence, or whether such a situation already existed before then.

In the judgement under appeal, the District Court has reported the content of the hearings with the expert witnesses, senior lecturer [O.E.] and Professor [S.M.]. This includes descriptions of international law in the field and assessments of, in particular, the position, mandate, working conditions and basis for the COI and ICRC to conduct assessments.

The District Court has also provided a chronological account of the circumstances on which the trial was based. The Court of Appeal notes that, in its report of August 2012, the COI estimated that the criteria for an internal armed conflict were met in February of the same year, that in March 2012 a ceasefire agreement was reached between the regime and the FSA, that the Human Rights Watch organisation claimed in May 2012 that there was an internal armed conflict in Syria, that in a press statement on 27 May 2012, the ICRC urged the warring parties to observe the principles that apply to an armed conflict and that, in a statement by President Al-Assad on 26 June 2012, the Syrian regime stated that there was a war situation in Syria. All of these circumstances indicate that there was already an internal armed conflict before mid-July 2012. The Court of Appeal shares the opinion of the District Court that the statement in the ICRC press release on 17 July 2012 that there "*currently*" (which the Court of Appeal interprets as "at present") exists an internal armed conflict in Syria, does not mean that such a conflict did not exist before that date. The Court of Appeal thus comes to the same conclusion as the District Court, namely that it is clear that at least from the end of May 2012, and thus during the first days of the month of June when the crime was committed, there was an internal armed conflict in Syria, including in Latakia province where the mistreatment was committed.

The relationship between the mistreatment and the armed conflict (nexus)

From the beginning, EAA has stated that he and ST disagreed when he intended to form his own opposition group of 20-25 people, which he wanted ST to arm, but that

ST was only willing to give him two automatic rifles. During the court proceedings, EAA provided further information, including that he and ST had different views on strategy and preparations prior to an anticipated attack by the regime, and that information was spread that EAA commissioned another person to kill ST, that there had been a meeting about this between different senior people and that ST and EAA attended the meeting. EAA has provided a reasonable explanation for why he has now provided further information, namely that he now dares to provide more information because his family is in safety. The Court of Appeal, like the District Court, finds that EAA's information should be accepted for the assessment.

The investigation does not reach any definitive conclusions about who ordered the detention and mistreatment of EAA or what reason(s) the person may have had. The information provided by EAA does not give the impression that the conflict between him and ST was of a private nature. It seems, rather, that EAA was perceived as a person who wished to split up the existing group and instead create a competing group under his own leadership. The film of the torture shows that EAA was asked if he is a spy for the regime and if he killed many of the people and other similar questions. This gives a clear impression that the purpose of the treatment of EAA was to discover whether he belonged to or worked for the regime, which appears to be a more reasonable explanation for the prolonged torture than that it was merely vengeance for a wrong. As previously determined by the Court of Appeal, it is not possible to identify the exact motives behind what was done to EAA with any certainty. However, the Court of Appeal believes that all the explanations or combinations of explanations that are relevant to the case are such that they originate in or relate to the internal armed conflict, notwithstanding the fact that there may also have been a personal animosity or dispute between the persons involved. Against this background, the Court of Appeal considers that there is such a connection, nexus, between the internal armed conflict and the treatment of EAA, that the conditions exist for a conviction for a crime under international law. Regarding the term "put out of action", which the prosecutor specifically indicated refers to an enemy who, for reasons of injury or for other reasons, cannot be considered capable of defending themselves, the Court of Appeal agrees with the District Court that EAA is one of this protected group of persons. The objective preconditions for international crimes are therefore met.

Intent

[The Defendant M.D.] was aware that there were hostilities between different opposition groups and the regime. He must at least have realised the risk that the circumstances, such as the extent and intensity of the hostilities, the organisation of the opposition groups and the connection between the armed conflict and the mistreatments, were such that the conditions for an internal armed conflict could be fulfilled. He must also have realized the risk that EAA belonged to the group of protected persons. His actions, torture of a helpless person, were such that it is clear that he was indifferent to the fact and indeed the consequences of this. His intentions thus also include international crimes.

As a result, [the Defendant M.D.] should be convicted of crimes under international law.

Concurrence

The Court of Appeal applies the provision of international law in accordance with Chapter 22.6, in its wording before 1 July 2014. The preamble to the original provision on international crime that was first introduced into the old Criminal Code and later transferred to the Penal Code, states that the range of penalties for international crimes that are not grievous, was designed so that the penal provision was intended to be applied concurrently with general crimes that could be included in the international crime, see NJA II 1949 p. 188. No changes were made to the range of penalties until the changes to the Penal Code in 2014. Thus, [the Defendant M.D.] must be convicted of aggravated assault and international crime concurrently i.e. he should be convicted of both crimes, even if they refer to the same course of events.

Deportation

On the issue of deportation, the Court of Appeal finds no reason to reach any conclusions other than those arrived at by District Court. Thus, the District Court's judgement should not be overturned in this matter.

Sanctions

[The Defendant M.D.] is now convicted of aggravated assault, which is considered to be particularly serious and for international crime. The Court of Appeal considers that [the Defendant M.D.]'s crime carries a penalty of imprisonment for 8 years. Any other penalty

other than imprisonment is thereby precluded. As the District Court found, [the Defendant M.D.] has no connection to Sweden that would cause the decision on deportation to reduce the sentence. There are also no other such circumstances. Thus, [the Defendant M.D.] must be sentenced to imprisonment for the full term, i.e. 8 years.

Damages

On the issue of damages, the Court of Appeal reaches no conclusions other than those arrived at by District Court. Thus, the District Court's judgement is upheld in this matter.

Remuneration

[Lawyer M.S.] has claimed remuneration from public funds totalling SEK 240,293.

[Lawyer C.B.] has claimed remuneration from public funds totalling SEK 116,678.

The prosecutors have expressed their opinion about the remuneration claims.

[Lawyer M.S.] has claimed compensation for 120 hours' work. The statement of costs shows, among other things, that about a quarter of this time relates to the review of documents. In view of the fact that the case previously involved two main proceedings in the District Court and commencement of main proceedings in the Court of Appeal, the Court of Appeal finds, taking into account the fact that new information and new material has been added in the Court of Appeal, that the work claimed appears to be more extensive than necessary. [Lawyer M.S.] may be considered to be reasonably compensated with remuneration for work equivalent to 100 hours. The Court of Appeal has no objection to [Lawyer M.S.] 's claim for remuneration generally.

The remuneration claimed by [Lawyer C.B.] is reasonable.

The state shall bear the costs of the counsel for the injured party and the public prosecutor.

Detention

[The Defendant M.D.] is convicted of inter alia a crime of mistreatment which is considered to be very serious. The minimum sentence for this crime exceeds

imprisonment for two years. Detention should then occur if it is not clear that there is no reason for this. In view of the length of the sentence imposed and the risk of [the Defendant M.D.] evading punishment and deportation, this is not the case. [The Defendant M.D.] will therefore continue to be detained until the judgement in terms of sentence and deportation takes legal effect against him.

The decision may be appealed until 02/09/2016.