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New steps towards a Norwegian drug reform? Three recent Supreme Court cases concerning sentencing for drug crimes

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1. Introduction

Our previous article 'Status report: A Norwegian decriminalisation of use and possession of drugs?' in Volume 9 no. 1 of Bergen Journal of Criminal Law and Criminal Justice described the situation of the drug reform as of June 2021. At that time, of our last report, it was hard to predict the future development within this area. The Parliament's deliberations did not result in any on decriminalistion of use and possession of drugs, nor on any threshold values for differentiating the sentencing. Two of the three political parties that rejected the proposed reform, the Labour Party and the Centre Party, are now in power.[1] A more restricted reform has been suggested, but not (yet, at least) proposed for the Parliament. A much-debated issue is to what extent section 98 of the Norwegian Constitution, stating that '[a]ll people are equal under the law' and '[n]o human being must be subject to unfair or disproportionate differential treatment', allows for decriminalisation only for specific groups, that is; for drug addicts.

Even if the reform issue has not reached a final conclusion, it has already had significant impact on this area of Norwegian law. Some legislative amendments have been made. It has been decided that all municipalities must establish an 'advisory unit for

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1 On the political disagreement over the reform proposal, see Jacobsen and Westrum 2021 pp. 47-48.

drug cases'.[2] This is combined with an opportunity for the courts to require of the convicted offender, as a criterion for conditional sentence, to appear for this unity.[3] Furthermore, an amendment is made regarding the right to impose a conditional fine on acquisition, possession or storage of drugs for own use.[4] These amendments will enter into force on the 1 July 2022.

Also, Norwegian court practice has been significantly affected by the reform process. Lower court practice considered the clear and quite unanimous signals from the political deliberation of the reform proposal and, in line with these signals, reduced the level of punishment for heavy drug addicts. And, most recently, in three cases decided by the Supreme Court – HR-2022-731-A, HR-2022-732-A and HR-2022-733-A – new guidelines for sentencing in such cases has been formed. The Supreme Court, which plays a very significant role in Norway regarding sentencing guidelines, gave its verdicts on all three cases on the same day of April 8 2022.

The aim of this second report is to inform of the three judgements and the new legal situation set out by these judgements. First, section 2 gives a short introduction of the Norwegian Supreme Court's important role Norwegian law. Then, the judgements will be described in sections 3-5, as well as the current legal situation. Section 6 briefly concludes the report.

2. The Norwegian Supreme Court's precedent function

The Norwegian Constitution Article 88 provides the the legal basis for the Supreme Court's position as a state power and precedent court. It states that '[t]he Supreme Court pronounces judgment in the final instance'.[5] The legal opinions expressed by the Supreme Court have a norm-forming effect, which allows for legal clarification

2 By Act of 18 June 2021 no. 117 on amendments to the Penal Code. See the Health and Care Services Act § 3-9 b. For an explanation of what 'advisory unit for drug cases' involves see Jacobsen and Westrum, (2021). Status report: A Norwegian decriminalisation of use and possession of drugs?, 9(1) *Bergen Journal of Criminal Law & Criminal Justice* (2021) pp. 42-48 https://doi.org/10.15845/bjclcj.v9i1.3359.

3 The Norwegian Penal Code § 37 first paragraph, letter k.

4 The Norwegian Penal Code § 53 fourth paragraph. Cf. the Penal Code § 231 and the Medicines Act § 31l, cf. § 24 first paragraph. See the English translation of the Norwegian Penal code. Last accessed 25 April 2022 https://lovdata.no/dokument/NLE/lov/2005-05-20-28/.

5 See the English translation of the Norwegian Constitution. Last accessed 25 May 2022 https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf. See also Bårdsen, De nordiske høyesterettene som prejudikatdomstoler – et perspektiv fra Norges Høyesterett, 55 (5) *Lov og rett* (2016) pp. 259-289, at 259.

beyond the specific case. This contributes to predictability and equal treatment in the legal system.[6] It also implies a certain dynamic element since the Supreme Court can contribute to a legal development. This function thereby serves to fulfill the needs to maintain, adapt and change the law.[7]

While generally important, the Supreme Court plays an even more distinctive role in sentencing in Norwegian criminal law.[8] By considering a significant number of such cases, the Supreme Court communicates to the lower courts, as well as other institutions in Norwegian criminal justice system, guidelines for what punishment different crimes should result in, what premises that are of relevance in sentencing and other issues of relevance to the it. This provides an important background for understanding the importance of the three mentioned cases.

In the following, numbers in parentheses refer to the section in the court judgement it is referred to.

3. The first case: HR-2022-731-A

The first case involved a man, A, who had been using illegal drugs since he was 12 years old and had been addicted to heroin since the age of 20. He had several prior convictions and sentences for different drug offences (3). Now, he was convicted for possession of 4 grams of heroine as well as use of diverse drugs and was sentenced by the District Court to imprisonment in 54 days. The regional court first dismissed the appeal but this decision was overruled by the Supreme Court. After having heard the case, the regional court reduced the sentence to imprisonment for 14 days, but its execution was suspended in line with section 34 of the Penal Code. The regional court considered whether the sentenced could be deferred or waived, cf. the Penal code section 60 and 61, but concluded that this would go too far, given that the drug reform had not been accepted by the Parliament (58).This verdict was then appealed to the Supreme Court.

On this background, the Supreme Court was to decide on whether and, in case, how a drug addict was to be sentenced for the act of possession of 4 grams of heroin for own use (2).The Supreme Court considered two main questions in this case: First, it considered if a conviction for use and possession for own use would be in conflict with the Norwegian Constitution § 102 and the European Convention of Human Rights

6 Bårdsen 2016 p. 259.

7 Bårdssen 2016 p. 259.

8 See further Gröning, Husabø and Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, 2nd ed. (Fagbokforlaget 2019) pp. 684-713.

article 8 on the right to privacy. And ii), given that a conviction would not violate with the Constitution and the ECHR, what sentence should be delivered? As background for its reasoning, however, the Supreme Court outlined the reform process and pointed to the fact that, despite disagreement over the proposed drug reform, the reform deliberations had displayed broad political agreement on the issue of heavy drug addicts – punishment for use and possession of small amounts of drugs for own use was for this group was not appropriate (25).

Regarding the issue of violation of the Norwegian Constitution section 102 and ECHR article 8, the court rejected this claim, which was raised during the proceedings.[9] The conviction in the case was in accordance with law, served a legitimate purpose and, in view of the sanction that the Supreme Court would settle for, was proportional (28-41).

The court then moved on to the sentencing issue. Here, the court started by underlining that the political signals had to be given significant weight: The view of the Parliament should be considered as an authoritative expression of the public views of justice and fairness, views which should guide sentencing (43). Thereby, the sentencing level had to be reduced for drug addicts who were convicted for drug crimes. As this change of sentencing practice would benefit the individual, it would not violate the prohibition of retroactivity in the section 97 of the Constitution (44).

However, it was not quite clear what this general signal from the Parliament should imply for the sentencing in concrete cases. For that reason, the court had to address several specific issues.

The first issue concerned the relevance of the purpose displayed by the involvement in drugs. In this regard, for a reduced senttence, the case had to concern drugs for personal use. Possessing drugs for other purposes, such as sales, would thereby not lead to reduced punishment. Any doubt regarding the purpose will, however, be the benefit of the accused (45-46). Furthermore, the requirement of own use implies that there are limits as to how large amounts of drugs one may have possessed in order to benefit from the reduced level of punishment. For heroin, amphetamine and cocaine, the Supreme Court considered 5 grams to be an adequate threshold. However, at the same time, cases that marginally exceeded this threshold should not be treated very differently. This threshold of 5 grams was in line with the view of the majority in the drug reform commission, who considered five grams appropriate based on what is usually acquired and owned by users. The Supreme Court considered this to be supported by other reports as well (49). Also, it was discussed what kind of involvement

[9] See also Rui, Straff av tunge rusmisbrukere for bruk av narkotika og besittelse til eget bruk – Grunnloven § 102 som skranke mot straff uten legitimt formål, 61(1) *Lov og rett 61* (2022) pp. 53-58.

with drugs that was subject to reduced punishment. The Supreme Court emphasised that in *Inst. 612 L (2020–2021)* the term 'use and possession' had often been used, but 'acquisitions' were also mentioned at several places. Also, the drug reform commission as well as the Ministry had included acquisitions of drugs in their proposals. Based on this, the Supreme Court considered that acquisition as well as use and possession were all covered by the legislative signals. Possession in this regard should not be understood narrowly but could also refer to storage and other forms of possession as covered by the Penal Code, not only by the Medicine Act (51).[10] Summarised, the Supreme Court found acquisition, possession, and storage of drugs up to five grams to be covered by the legislative signals.

Finally, it was emphasised that the political signals only regarded 'drug addict[s]'. However, in this case, the Supreme Court did not clarify the requirements for being a 'drug addict'. This was justified by the fact that A, with no doubt, was a 'drug addict'(52). This left it open what criteria that must be fulfilled in this regard, apart from that people with a similar history and situation as A will be defined as a 'drug addict' in this context. As we will return to, the third of these three cases says something more about this, which is bound to be a challenging criterion to handle in practice. This is also one of the reasons why a partial decriminalisation of possession and use of drugs limited to this group, as mentioned in section 1, has been contested in view of section 102 of the Constitution. However, in this case, the Supreme Court abstained from going into that discussion, as what was at stake in this case, was only a matter of criminal reactions, where there has been a long tradition for this kind of differentiation (53-56).

After concluding that A's case fulfilled all these criteria, the next question was what sentence that was to be delivered. The current practice of unconditional imprisonment (approximately in two months for a case of this kind) would now have to be abandoned (59). Conditional imprisonment was considered not to be an adequate reaction, because drug addicts would likely reoffend, unaffected by the threat of having to serve also the conditional sentence (59-60). Community service was not considered an option either.

The Norwegian Penal Code section 61 allows, however, for waiver of sentencing. The section states:

> 'Even if guilt is deemed proven, the court may, when exceptional reasons so warrant, waive sentencing

[10] For an explanation of storage and other forms of possession see Jacobsen and Taslaman, The Norwegian Criminal Regulation of Drugs: An Overview and Some Principled Challenges, 6(1) *Bergen Journal of Criminal Law & Criminal Justice* (2018) pp. 20-52.

> In deciding whether exceptional circumstances apply, particular weight shall be given to whether imposing a sentence will have the effect of an unreasonable additional burden on the offender, provided that the purpose and effects of the penalty in general do not indicate that a sanction should be imposed.
>
> Section 60, second paragraph, applies correspondingly.'[11]

The Supreme Court highlighted that the wording 'exceptional reasons' suggests that a waiver of sentencing is reserved for a small number of cases under very special circumstances (63).[12] As A's case was rather typical for this kind of drug crimes, the case was not exceptional in that sense: There are a significant number of drug addicts who are in a similar situation (63). However, the Supreme Court stated that A's case did to a large extent conform to the considerations in section 61 second paragraph, suggesting that the section 61 still could be used. The Supreme Court emphasised that punishment for drug addicts who have small amounts of drugs for their own use can seem like an unreasonable additional burden, and to avoid this was a central part of the background for the drug reform process as well as the legislative signals resulting from it (63).

With this justification the Supreme Court concluded that a waiver of sentencing would be the most reasonable reaction for use of punishment against drug addicts in such drug offenses as described (68). The consequence of the judgement is that a drug addicts' acquisition, possession, and storage of up to five grams of heroin, amphetamine or cocaine for their own use hereafter will generally lead to a waiver of sentencing, cf. the Penal Code § 61. The same applies to the actual use of the substances (70). The prosecutor stated in the case that the prosecuting authority, given this clarification from the Supreme Court, will henceforth normally respond by waiving prosecution in accordance with the Criminal Procedure Code section 69 (71). These types of cases will therefore not be prosecuted.

4. The second case: HR-2022-732-A

The second case concerned a drug addict who had possessed 6,69 grams of heroin for own use, which is an amount above the threshold at 5 grams established by the Supreme Court in the first case. Thereby, this case provided the court with an opportunity to clarify the sentencing level for cases just above this threshold. As mentioned,

[11] See the English translation of the Norwegian Penal code section 61. Last accessed 25 April 2022 https://lovdata.no/dokument/NLE/lov/2005-05-20-28/

[12] See also the preparatory works for The Norwegian Penal Code section 61 Ot. Prp. nr. 90 (2003-2004) p. 458 and Innst. O. nr. 72 (2004-2005) p. 20.

the court signaled in the first case that there should not be a drastic shift in level of punishment to cases marginally over this threshold.

In this case, the Supreme Court considered 6,69 grams to be 'well over' the threshold set in the first case (14). However, the reduced level of punishment for cases under the threshold should also affect cases above it. Unconditional imprisonment would thereby not be an adequate starting point for sentencing, even if the risk for the drugs being spread was more serious than in cases involving smaller amounts of drugs (16). A starting point in such cases would be a short conditional sentence of imprisonment (16). In case of reoffending, if this new case concerned less serious violations under the threshold of 5 grams, this should not be enough to execute the conditional sentence. The court delivered a sentence of 24 days of imprisonment, the entire sentence made conditional.

5. The third case: HR-2022-733-A

The third case concerned an even more serious case, as the person convicted in this case was convicted for possession of 24 grams of amphetamine and 4 grams of hashish. The person convicted in this case was not by the regional court considered to be the most typical example of the kind of drug addicts that the legislator had had in mind. He was 63 years old and had a long history of drug abuse but did not consider himself a drug addict. He had explained that the use of drugs was to improve his own life quality and ability to work (13). However, his own counsel argued that he should be considered to be a drug addict (8).

The amount of amphetamine possessed in this case, was far beyond the threshold at 5 grams set by the Supreme Court in the first case. An amount of this much amphetamine implied a greater risk of spread of the drugs to others, which is the key criteria for assessing the seriousness of drug crimes in Norway in general. Thereby, the court stated that the political signals that had been followed up on in the two cases prior to this one, did *not* extend to cases such as this case (22).

Still, the court used the case to say something more about the criteria 'drug addict', which, as stated above, was not elaborated by the court in the first case. The court stated that the individual's own opinion of the level of addiction should not be decisive. A medical diagnosis by a doctor, could, however, not be required. The courts are supposed to make an individual assessment based on prior use, treatment as well as criminal reactions for drug use should be considered (26).

The court then went on to the sentencing and considered imprisonment for 60 days as a proper starting point (29). However, also in this case did the political signals

influence the sentencing: As the person convicted in this case were considered to be a drug addict, the court sentenced him to community service for 60 hours. This is a clear statement that also for cases of this kind, a more differentiated approach to sentencing is applied, contributing to avoid some of the negative consequences a sentence of imprisonment is likely to have for drug addicts.

5. Closing remark

These three cases have several interesting and important sides to them. They demonstrate the important role of the Norwegian Supreme Court in criminal law and sentencing, but also the active dialogue between the Supreme Court and the Parliament. The cases raise interesting principled issues, as they, for instance, provide an exception to the general principle in Norwegian criminal law - making prior convictions one of the most important factors in sentencing (at this point, see explicitly, for instance, section 17 in the second of the three judgements). Disregarding this principle allows the court to establish these new guidelines. Most of all, the cases are a welcome correction to a rather harsh sentencing practice regarding minor drug crimes committed by drug addicts.

These cases are, however, not likely to be – or at least should not be – the last word of the Norwegian process of reforming drug criminal law. At least, as suggested by the Supreme Court appeal committee's decision to reject the prosecutor's appeal in HR-2022-902-U, an even more recent decision, the new directions for sentencing in drug cases for addicts are likely to affect also other drug cases. This case concerned possession of 10 grams amphetamine. The offender was not a drug addict. However, he had no history of involvement in drugs and his offence was characterised by the regional court as a one-time act performed in a difficult life-situation.[13] Considering the case, and in view of the mentioned principle of equal treatment in section 98 of the Constitution, the regional court settled for a conditional prison sentence for 21 days.

[13] LB-2021-78375