



The Supreme Court of Norway - Ruling - HR-2019-34-S

Authority	The Supreme Court of Norway – Ruling
Date	2019-01-09
Published	HR-2019-34-S
Keywords	Criminal procedure. Impartiality. Co-prosecutor. Grand chamber.
Summary	<p>An attorney at the Office of the Attorney General was appointed co-prosecutor under Section 77 of the Criminal Procedure Act in a criminal case concerning the harvesting of snow crab on the Norwegian continental shelf, which will shortly be heard by the Supreme Court's Grand Chamber. He had not been involved in the investigation or question of prosecution, and was to assist the chief prosecutor with purely legal issues. The Supreme Court, which also heard the motion for disqualification against the attorney in the Grand Chamber, concluded that he was not disqualified under Section 60, cf. Section 55, final paragraph of the Criminal Procedure Act. Neither his employment relationship with the Office of the Attorney General nor his role as assistant attorney general and part of the office's management group entailed disqualification. Nor were there other factors which, on an objective scale, gave the outside world reasonable or objective grounds to doubt the attorney's impartiality. It was noted that he was only subject to instructions from the chief prosecutor and the superior prosecuting authority. The petition that the attorney should be ruled disqualified was dismissed. (Rt summary)</p>
Proceedings	Øst-Finnmark District Court TOSFI-2017-57396 – Hålogaland Court of Appeal LH-2017-144441 – The Supreme Court HR-2019-34-S, (case no. 18-064307STR-HRET), criminal case, appeal against judgment.
Parties	A and SIA North Star Ltd (Attorney Hallvard Østgård) v. the Prosecuting Authority (Chief Public Prosecutor Lars Fause, Attorney Tolle Stabell).
Author(s)	Chief Justice Øie and Justices Matningsdal, Endresen, Møse, Webster, Matheson, Kallerud, Bergsjø, Falch, Bergh and Berglund.

Semantix Translations Norway AS
 Stortorvet 10, 0155 Oslo
 Org.nr. NO 956 153 557 MVA
 Date 24.9.2021

Signature

Semantix

[Handwritten signature]

Table of Contents

Norges Høyesterett - Kjennelse - HR-2019-34-S	Error! Bookmark not defined.
Innholdsfortegnelse	Error! Bookmark not defined.

Scanned with
CamScanner

- (1) The issue in this case concerns whether Assistant Attorney General Tolle Stabell is disqualified as co-prosecutor, cf. Section 60 of the Criminal Procedure Act, in a case concerning punishment for harvesting snow crab on the Norwegian continental shelf in the fisheries protection zone by Svalbard without permission from the Norwegian authorities.
- (2) On 4 June 2018, the Appeals Selection Committee of the Supreme Court decided that leave for appeal by the Russian skipper A and the Latvian shipping company SIA North Star Ltd., respectively, against Hålogaland Court of Appeal's conviction of 7 February 2018 should be granted. After the appeal hearing was held in chambers, it was decided that the case should be resolved in reinforced court, and the Chief Justice decided that the case should be heard in the Grand Chamber. The appeal hearing is scheduled for 15 to 17 January 2019.
- (3) In the referral memorandum dated 14 December 2018 from the Director General of Public Prosecution, it was stated that Assistant Attorney General Stabell had been engaged by the Ministry of Justice and Public Security as an attorney for the Supreme Court, with the right to conduct cases for the prosecuting authority pursuant to the instructions of the Director General of Public Prosecution, cf. Section 77 of the Criminal Procedure Act. It further stated that the Director General of Public Prosecution has appointed him as co-prosecutor in the case.
- (4) In a written submission dated 19 December 2018, Attorney Hallvard Østgård submitted on behalf of the defendants a motion to disqualify Attorney Stabell, cf. Section 60, cf. Section 55, final paragraph of the Criminal Procedure Act.
- (5) In a letter dated 21 December 2018 from the preparatory judge, the parties were informed that the Supreme Court intended to issue a separate decision in the impartiality issue based on written submissions, cf. Section 117, first paragraph of the Courts of Justice Act. The parties were given a deadline to submit any objections to the choice of procedure, and to give their views on the issue of impartiality. The parties had no objections to the procedure. Comments have been received on the issue of impartiality, most recently by e-mails of 9 January 2019.
- (6) The objections concerning impartiality from A and SIA North Star Ltd. can be summarised as follows:
- (7) As a matter of principle, an attorney should not represent both the administration and the prosecuting authority. As assistant attorney general, Stabell is employed by the State, and he is its attorney in various disputes. He cannot be considered objective in a criminal case where the State has significant interests. The right to regulate and utilise snow crab as a resource is of great importance to the State, and the outcome of the case could have great significance for the exercise of authority in the sea areas surrounding Svalbard. It will also be possible to bring it before international courts, where the Office of the Attorney General traditionally has assignments.
- (8) In addition to the constitutional aspect, the case is of significance to the State on a private law basis. If the shipping company prevails, the State will incur significant liability for damages which the Office of the Attorney General will handle. It is therefore irrelevant that there is no litigation.
- (9) The State's real and current interests in the case are shown by the fact that Attorney Stabell and others from the Office of the Attorney General have assisted in the case over time. The State has the right to instruct Attorney Stabell, and even though he is released from this during the performance of his duties as prosecutor, he has a vested interest in satisfying his employer. The defendants are entitled to have the prosecuting authority act objectively, cf. Section 55, final paragraph of the Criminal Procedure Act.
- (10) It is of great importance that citizens can trust that the prosecuting authority is independent of political

authorities in individual cases. An appointment as prosecutor by an attorney who in his daily work works to advance the interests of the State, entails a violation of the principle of the prosecuting authority's independence. The defendants therefore do not trust that Attorney Stabell will act with the required objectivity.

- (11) A and SIA North Star Ltd. have requested that the Supreme Court declare Attorney Stabell disqualified from acting as co-prosecutor in the case.
- (12) **The prosecuting authority** has in brief argued:
- (13) The purpose of the appointment of Attorney Stabell as co-prosecutor is to ensure the best possible illumination of the issues in the case "present in the intersection between" criminal law, international law and administrative law. Neither the Government's constitutional responsibility for the realm's international law position nor the State's private law position can be feared to affect the performance of the assignment. Anyone who acts as a prosecutor is bound by the requirement to act objectively in Section 55, final paragraph of the Criminal Procedure Act. Attorneys are accustomed to professional requirements concerning the performance of their role.
- (14) Attorney Stabell's role during the appeal hearing will be to assist Chief Public Prosecutor Lars Fause. As chief prosecutor, Fause is responsible for the indictment, the positions that the prosecution may take, as well as the presentation of evidence. As co-prosecutor, Attorney Stabell will be subject to instruction only from the chief prosecutor and superior prosecuting authority, not from the Office of the Attorney General.
- (15) The Attorney General has no civil litigation assignments related to the proceedings, and the office therefore has no special and concrete interest in the outcome of the case that could indicate disqualification for Attorney Stabell. The fact that the prosecuting authority has consulted the Office of the Attorney General and others earlier in the case does not entail a breach of the duty of objectivity. The claim that Attorney Stabell cannot be the prosecutor in the case because he is employed by the State also cannot succeed. The prosecuting authority's officials are also employed by the State.
- (16) The prosecuting authority has entered the following statement of claim:

"The claim that Attorney Tolle Stabell shall be declared disqualified shall be dismissed."
- (17) **The Supreme Court notes** that the issue of impartiality for prosecutors must be decided based on the provisions in the Criminal Procedure Act and the Courts of Justice Act's procedural rules, as far as they are appropriate. Since the case is to be decided in the Grand Chamber, the impartiality issue will be heard by eleven judges when a special court is sat to decide this, cf. Section 117 of the Courts of Justice Act.
- (18) The impartiality of prosecutors is further regulated in Section 60 of the Criminal Procedure Act. The first paragraph reads as follows:

"An official serving the prosecuting authority or acting on its behalf is disqualified when he has such a relationship to the case as is specified in Section 106, No. 1 to 5, of the Courts of Justice Act. He is also disqualified when other special circumstances exist that are likely to weaken confidence in his impartiality. This is particularly the case when the issue of disqualification is raised by one of the parties."
- (19) The provision also applies to attorneys who are engaged as prosecutors pursuant to Section 77 of the Criminal Procedure Act, cf. Rt-2013-105.
- (20) The defendants have submitted that, as a matter of principle, Attorney Stabell should be disqualified

as prosecutor on account of his employment relationship with the Office of the Attorney General. It is pointed out that his employer must at all times promote the State's view, and that the State has major interests in this case, both constitutionally and in terms of private law.

- (21) It is not argued that Attorney Stabell has a relationship with the case as described in Section 106 of the Courts of Justice Act. The question is therefore whether the circumstances that have been highlighted mean that Attorney Stabell is disqualified under Section 60, second sentence of the Criminal Procedure Act concerning "special circumstances".
- (22) This is the same general norm that applies to judges under Section 108 of the Courts of Justice Act. However, because the prosecuting authority and the courts have different roles in the administration of justice, it is not a given that the specific assessment will be the same, see Rt-2015-1351, paragraph 18. The prosecutor's impartiality must be assessed in light of the objectivity requirement that ensues from Section 55, final paragraph of the Criminal Procedure Act, but the stipulation of requirements may not be as strict as for a judge with regard to independence in relation to the interests concerned.
- (23) The provision in Section 60 of the Criminal Procedure Act means that there must be no circumstances that cause the prosecutor to be subjectively influenced by external considerations. Nor must there be factors which, on an objective scale, give the parties and the general public reasonable and objective grounds to doubt that the prosecutor's positions are taken on a free and independent basis. The assessment of impartiality is independent of whether the parties are domiciled in Norway or abroad, cf. HR-2018-451-A, paragraph 11.
- (24) The Supreme Court finds that the State, on a general basis, has significant interests in the management of the sea area in question, and in matters that concern the Svalbard Treaty. The Office of the Attorney General is the State's law office in such matters. However, according to the submitted information, the Office of the Attorney General does not have any civil law assignments related to the case to be heard by the Supreme Court's Grand Chamber, nor has the office had any such assignments.
- (25) In the subjective assessment of whether there are circumstances that may indicate that Attorney Stabell is disqualified, it is natural to look at Section 55, final paragraph of the Criminal Procedure Act that the prosecuting authority's officials must act "objectively in all their activities, including at the investigation stage, when a prosecution decision is made and during the hearing of the case". This duty of objectivity also applies to an attorney who is engaged as a prosecutor. As an attorney, Stabell is well acquainted with the requirements made of a professional practitioner. The case concerns the application of law in the fields of criminal law, international law and administrative law, and Attorney Stabell's role is limited to prosecuting purely legal issues related to these areas of law. The Supreme Court cannot see that there are factors indicating that Attorney Stabell, as co-prosecutor, will act in violation of the basic premise in Section 55, final paragraph. This applies both when looking at the Government's constitutional responsibility for Norway's position under international law and the State's position in respect of private law.
- (26) The duty of objectivity under Section 55 of the Criminal Procedure Act is also important in the objective assessment of Attorney Stabell's impartiality.
- (27) In the Supreme Court's view, the duty of objectivity does not prevent the prosecuting authority from consulting specialist ministries or the Office of the Attorney General in connection with the case. Such consultations may be necessary for the case to be fully clarified. Nor does the duty preclude providing the prosecution with special expertise in a particular field of law, when so required by the nature of the case.
- (28) However, the defendants have submitted that it is in principle unfortunate that an attorney for the public administration assists the prosecuting authority and acts as prosecutor.

- (29) In the view of the Supreme Court, such fundamental concerns may more easily be considered to apply where the Office of the Attorney General already has or has had a civil law assignment related to the same case. As mentioned, this is not the case here. Attorney Stabell has also not been involved in the investigation or decided the question of prosecution. His assistance is limited to purely legal issues.
- (30) In Rt-2009-459 – where the underlying case concerned the issue of the conventionality of the Norwegian jury system – the Supreme Court took a position on "whether the State can be said to have a specific interest in the outcome of the case, and whether this possibly 'spreads' to the attorney general", see paragraph 11. The question was in particular whether the possibility of having to defend the Supreme Court's possible position in a later case before convention bodies provided grounds for disqualification. The first voting judge states in paragraph 13 as a spokeswoman for the majority that
- "...I [can] not see that the attorney general by virtue of being an attorney general should have any particular interest in the outcome of the case in the Supreme Court. I add that even if the State should have a specific interest in the outcome of a case, it does not automatically follow that the attorney general has a coincident interest as long as the attorney general has not been given an assignment in the case."
- (31) The Supreme Court cannot see that the assessment is different in the present case; neither as regards the State's interests as the case now stands nor as it may stand in any subsequent cases. This must apply even more when the issue of impartiality is related to a prosecutor, and not to a judge, as the situation was in the 2009 decision.
- (32) As the case stands, neither Attorney Stabell's employment relationship with the Office of the Attorney General nor his role as assistant attorney general and member of the office's management group, entail disqualification per se.
- (33) In the Supreme Court's view, the fact that prior to his appointment as co-prosecutor the Office of the Attorney General has been involved as an adviser to the prosecution cannot change this.
- (34) The question then is whether there are other factors which, on an objective scale, give the outside world reasonable or objective grounds to doubt the co-prosecutor's impartiality.
- (35) Both the Office of the Attorney General and the Director General of Public Prosecution are formally part of the executive branch, cf. Article 3 of the Constitution. The King in Council (the Government) has in principle general authority to issue instructions or reverse decisions vis-à-vis the Director General of Public Prosecution in individual cases, cf. Section 56, second paragraph, second sentence and Section 75 of the Criminal Procedure Act. At the same time, it is a firm and longstanding practice for political authorities not to intervene in individual cases in this area, cf. references including NOU 2016: 24 page 184, and there is no evidence that this basic feature of Norwegian criminal justice administration will not be respected in the present case.
- (36) In the Supreme Court's view, it must be assumed that Attorney Stabell, as appointed co-prosecutor, is only subject to instructions from the chief prosecutor, Lars Fause, and the superior prosecuting authority. The chief prosecutor is also responsible for the indictment and for the positions taken by the prosecution. According to the submitted information, Attorney Stabell's role is limited to assisting the chief prosecutor with legal issues that require special legal expertise in administrative law and international law.
- (37) The defendants have submitted objections concerning impartiality against Attorney Stabell. In the Supreme Court's view, however, both the public and the parties have, objectively speaking, reasonable grounds to trust that he will act with the impartiality required to be a prosecutor in the case, cf. Section 60 of the Criminal Procedure Act.

- (38) Attorney Stabell is accordingly not disqualified in the case.
- (39) The ruling is unanimous.

Conclusion:

The petition that Attorney Tolle Stabell shall be ruled disqualified is dismissed.

Semantix Translations Norway AS
Stortorvet 10, 0175 Oslo
Org.nr. NO 956 153 557 MVA
Date 24.9.2021

Signature

Semantix

Ol. Sawkins