

The cases which the Commission has referred to the court for review in 2005 are as follows:

**1. (2004-00018)**

A man was in 1988 sentenced to one year's imprisonment for contravention of section 195, paragraph 1, first penal alternative, and section 207, paragraph 1, first penal alternative, of the Penal Code for indecent assault on his daughter under 14. After having served his sentence, the convicted person died.

On behalf of the convicted person his other children petitioned for a review. The specific reason for the petition given was that there is today new medical knowledge as regards the evaluation of anogenital (anal and genital) findings in small children. Reference was also made to the fact that the interview of the child conducted by the judge in the relevant case must be deemed to have been without much probative value. After having investigated the case in more detail, including the obtaining of a new expert opinion of the anogenital findings described by the examining physician, the Commission found that there was a reasonable possibility that the convicted person would have been acquitted if the new expert opinion had been presented to the convicting court.

The Commission attached importance to the fact that the examining physician appeared to have expressed his opinion with a very high degree of certainty, a fact that was unfortunate in this case. The new expert opinion undermined the significance of the findings which the examining doctor had described. Furthermore, the Commission found it unfortunate that the physician's examinations took place before the judge's interview of the victim with the possibilities this gave for influencing the interview. The judge's interview was also characterised by leading questions and no free statement by the victim. Also what the victim allegedly told the examining physician seems to have come out after leading questions.

Based on an overall evaluation, the Commission decided that there were grounds for a review pursuant to section 391, subsection 3, of the Criminal Procedure Act and referred the case to the court. As the convicted person was deceased, the court would have to acquit him without a new trial, cf. section 400, last paragraph, of the criminal procedure act.

Subsequently, the court of appeal pronounced judgment acquitting the convicted person without a trial.

**2. (2004-00050)**

A man was in 1991 sentenced to a term of imprisonment of 1 year and 9 months for contravention of sections 195, paragraph 1, first penal alternative and 207, paragraph 1, of the Penal Code for indecent assault on his then 5-year old daughter. He was also convicted of contravention of section 212, paragraph 2, first penal alternative, of the Penal Code for indecent assault on his daughter. He petitioned for a review before the Commission, pleading amongst other things the fact that new medical knowledge would show that his daughter had not been a victim of any assault.

After having investigated the case in more detail, e.g. by appointing new medical experts and interviewing the convicted person and his now 20-year old daughter, the Commission decided that there were grounds for a review of the case and referring it to the court for a new trial. In its decision the Commission was split in a majority and a minority.

Based on an overall evaluation of the new expert report, seen in conjunction with the other evidence produced before the convicting court, the majority found that the evidence situation in the case – in the light of the medical knowledge we have today – is significantly different from what it was when the case was tried by the court in 1991. The Commission had to assume that the medical evidence at the time emerged as totally unambiguous to the effect that the convicted person's daughter must have been the victim of sexual assault and that there were no other conceivable explanations for the findings made. However, whether she had in actual fact been the victim of indecent assault is today an open question if the medical findings are evaluated separately. Seen in conjunction with the way in which the victim's statement came out and the way it developed over time, it could not be disregarded that what she explained to the judge in 1990 was not personal experience, but was for example based on scenes from a sex film. The convicted person's daughter has in interviews in connection with the Commission's consideration of the case not been able to contribute to a further elucidation of the case because she is today unable to remember anything from the time when the indecent assault allegedly took place. The Commission's majority concluded that the report from the new medical experts was likely to lead to an acquittal or to the application of a considerably milder penal provision or a considerably more lenient penal sanction pursuant to section 391, subsection 3, of the Criminal Procedure Act.

Based on an overall evaluation of the new expert report seen in conjunction with the other evidence produced before the convicting court, the Commission's minority found that there was no basis for drawing the conclusion that the new expert report would be likely to lead to an acquittal. After this, the case was referred to the court for a new trial.

### **3. (2004-00089)**

A 24-year old man was in 2001 convicted by the Court of Appeal to 13 years' imprisonment for the import of almost 10 kilos of heroin. Following an appeal to the Supreme Court, the sentence was reduced to 12 years. The convicted person's reasons for petitioning for a review was that there was new evidence in that his older brother admitted that he was the one who had committed the criminal offence for which his brother was convicted.

After having investigated the case in detail, including by interviews of the convicted person, his brother and other witnesses, the Commission found that there was a basis for reviewing the case and decided to refer it to the court for a new trial.

The Court of Appeal attached considerable importance to the police's telephone analyses which linked the convicted person to the import of drugs. The analyses showed that there was traffic between the two mobile phones which the convicted person used and other involved persons' telephones, before as well as during and after the import of the drugs.

The telephone transcripts showed among other things that there was a clear connection between the convicted person, the people pulling the strings abroad and the courier who brought the drugs to Norway. One of the telephones was confiscated by the police in a car which was at the convicted person's disposal at that time.

The convicted person's brother was also mentioned in connection with the case. However, during the police investigation it came out that the brother was abroad for a fairly long time and that he had left the country approximately one month before the crime took place. This was stated by both the convicted person and other members of the family. In the judgment the Court of Appeal states that it is in no way likely that the

brother was in Norway at the time in question.

The convicted person's brother was later sentenced to a long prison sentence for another contravention of the drugs legislation. He then wanted to confess that he was the one who had participated in the import of heroin for which his brother was convicted. When it became clear that the courier had been stopped and the heroin discovered, he put pressure on the family members to protect him by saying that he had left the country some time earlier. The reason why he had not said anything about his involvement in the case earlier was that he did not believe there was sufficient evidence to convict his brother.

The convicted person's brother has in interviews with the Commission's investigator given a very detailed explanation about his involvement in the case. His statement tallies on several and important points with the information that came to light through police investigation, and also with information that came out through the examination of other witnesses. For one thing, his brother gave information about the police's undercover work that was so detailed that it was a strong indication that he had made those observations personally. This was information that was not known from the case documents, nor had it been presented in court. The Commission found that the new evidence seemed likely to lead to an acquittal, the application of a more lenient penal provision or a considerably more lenient penal sanction pursuant to section 391, subsection 3, of the Criminal Procedure Act, and that there was a reasonable possibility that it would have led to a different outcome if it had been presented to the convicting court.

#### **4. (2004-00180)**

A man was in 1970 given a suspended sentence of 90 days for contravention of section 196, paragraph 1, of the penal code for indecent assault on a girl under 16. The convicted person was at the time of the act 18 years and 1 month, while the girl was 15 years and 5 months. He petitioned for a review before the Commission since both the victim and the convicted person said that they had not engaged in indecent intercourse. Both explained why the statements had turned out the way they did in 1970.

After having investigated the case in more detail, including interviews of the convicted person, the victim and two witnesses, the Commission decided that there were grounds for review and for referring the case to the court for a new trial.

The judgment from 1970 was based on the convicted person's evidence at the trial and the victim's deposition read out at the trial. It was not clear whether the defence counsel – at the time of the victim's deposition or at a later stage of the prosecution – was given sufficient opportunity to refute her statement and put questions to her. Nor did it transpire from the case documents what the basis was for the investigation and the suspicion against the convicted person of sexual assault on the victim. The Commission gave very concrete reasons for its decision and in this case accepted a review on the basis of the victim's changed statement.

The Commission also attached importance to the testimony from the owner of the bed-sit where the act allegedly took place. Based on an overall and concrete evaluation of the new statement in conjunction with the other evidence and the circumstances presented to the convicting court, the Commission concluded that the statement seemed likely to lead to an acquittal or to the application of a significantly more lenient penal provision under section 391, subsection 3, of the Criminal Procedure Act. The case was referred to the court for a new trial.

The District Court subsequently pronounced judgment acquitting the convicted person without a trial.

**5. (2005-00004)**

A man was in 1992 sentenced to 300 hours of community service for various contraventions of the Penal Code. The judgment was not appealed. During the investigation of a new case against the man, it was decided to put him under judicial observation. The experts concluded that the accused was mentally retarded to a high degree. The investigation was subsequently dropped because of doubt as to the accused's soundness of mind at the time of the offence.

Subsequently, a review of the earlier sentence was petitioned. Reference was made to the fact that it had to be taken for a basis that the convicted person was of unsound mind at the time when the offences for which he was convicted in 1992 were perpetrated. The prosecuting authority endorsed the petition.

The Commission found that there were grounds for reviewing the sentence from 1992 given that the court-appointed experts had concluded that the accused was mentally retarded to a high degree, a condition that had lasted his entire life. The statement by the forensic psychiatrists had to be regarded as a new circumstance or new evidence that seemed likely to lead to an acquittal, cf. section 391, subsection 3, of the Criminal Procedure Act. The case was therefore referred to the court for a new trial.

**6. (2005-00020)**

A 21-year old man was in the spring of 2003 in the Nedre Romerike District Court sentenced to imprisonment for 2 years and 1 month, of which 1 year and 3 months was suspended, for rape of and sexual intercourse with a girl under 14. He was also convicted for sexual intercourse and acts with children under 16. In addition to the prison sentence he was sentenced to pay damages to the victims.

In 2004, the convicted person was indicted for sexual intercourse with children under 14 and 16, and for aggravated theft. In this connection two experts were appointed who concluded that the defendant was mentally retarded to a high degree at the time of the criminal offences. The indictment was subsequently withdrawn and the case dropped because of doubt as to the defendant's soundness of mind.

In February 2005, the convicted person petitioned for a review of the judgment from 2003. The two experts were in September 2005 appointed by the court and given a mandate to present a statement concerning the question of his soundness of mind at the time the offences, for which he was convicted in the District Court in the spring of 2003, were committed. In the supplementary statement the experts stated that also at that time the convicted person was mentally retarded to a high degree.

The convicted person's petition and the supplementary statement from the forensic psychiatrists were forwarded to the Director General of Public Prosecutions with the question whether the petition for review would be endorsed. In a reply from the Director General of Public Prosecutions in October 2005 he states in conclusion that he considers that the conditions for a review are satisfied and the petition for a review is endorsed.

The Commission found that the statement by the forensic psychiatrists from 2004 and the supplementary statement from 2005 constituted new circumstances that were likely to result in an acquittal since the convicted person was considered to have been mentally

retarded to a high degree at the time when he committed the offences for which he was convicted in the District Court in the spring of 2003. The conditions for review under section 391, subsection 3, of the Criminal Procedure Act were satisfied and the case was referred to the court for a new trial pursuant to section 400 of the Criminal Procedure Act.

#### **7. (2005-00030)**

Four men were in 2004 convicted in the District Court for actual bodily harm and threatening behaviour under especially aggravating circumstances and for vandalism. Three of them appealed against the judgment and the Court of Appeal took a different view of the evidence. The exercise of violence was considered to be actual bodily harm, while especially aggravating circumstances were not deemed to be applicable. One of the appellants was also acquitted of vandalism in that the Court of Appeal found that two of the convicted persons had left the scene before the vandalism took place.

The person who had not appealed, petitioned for a review of the District Court's judgment. It was argued that his case should be considered in the same way as those who had appealed.

The Commission concluded that the conditions for a review in section 391, subsection 3 of the Criminal Procedure Act were satisfied. The way the Commission saw the case, the Court of Appeal's judgment constituted a new circumstance. In the evaluation of the question whether the Court of Appeal's judgment was likely to lead to an acquittal, the application of a more lenient penal provision or a significantly more lenient penal sanction, the Commission attached decisive weight to the fact that the role of the person who petitioned for review had to a large extent been both described and evaluated in the Court of Appeal's judgment. The case was accordingly referred to the court for a new trial.

#### **8. (2005-00187)**

A woman was in 1990 given a suspended sentence of 15 days plus a fine for contravention of section 317, cf. section 318 of the Penal Code – handling stolen goods. In connection with the investigation in another criminal case in 2002/2003 the convicted person was submitted to a forensic psychiatric examination. The experts concluded that she was assumed to have been psychotic at the time the offences were committed. A new forensic psychiatric examination showed that she was presumably also psychotic in the sense of forensic psychiatry at the time when the handling of the stolen goods took place. Against this background, the prosecuting authority requested a review of the judgment from 1990. The convicted person agreed upon the petition for review.

The Commission found that the fact that she was according to the forensic psychiatric statement psychotic at the time the offence was committed constituted a new circumstance in the case. This new circumstance is likely to lead to an acquittal because anyone who is psychotic at the time of the offence shall not be punished, cf. section 44, paragraph 1, of the Penal Code. It was decided that the case would be retried by a new court pursuant to section 391, subsection 3 of the Criminal Procedure Act.

Subsequently, the District Court pronounced a decision acquitting the convicted person without a trial.