

# SUPREME COURT'S JUDGMENT

Case no

B 3438-12

## APPELLANT

MM

Representative and public defence counsel: Advokat AB

## RESPONDENT

Prosecutor-General

Box 5553

SE-114 85 Stockholm

## MATTER

Gross assault

## RULING APPEALED

Judgment of the Court of Appeal for Western Sweden of 25 June 2012 in case B 4560-11

Doc. Id 95750

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JUDGMENT

Varying the judgment of the Court of Appeal, the Supreme Court acquits MM and sets aside the obligation for him to pay a charge to the Fund for Victims of Crime.

The Supreme Court sets aside the order that MM shall repay SEK 84 000 of the costs in the District Court for his public defence counsel and the special representative and orders that the state shall meet that cost.

MM shall receive compensation from public funds for the cost of attending the Supreme Court (travel costs and overnight accommodation) totalling SEK 2 100. MM shall also receive compensation of SEK 10 540 from public funds for evidence in the case.

The Supreme Court refuses MM's claim for compensation for loss of income.

AB shall receive compensation of SEK 133 461 from public funds for the defence in the Supreme Court. Of this amount SEK 86 768 relates to work, SEK 8 775 to loss of time, SEK 11 226 to outlays and SEK 26 692 to value added tax. The state shall meet this cost.

CLAIMS IN THE SUPREME COURT

MM has presented a claim that he be acquitted.

The Prosecutor-General has opposed a variation of the judgment of the Court of Appeal.

The Prosecutor-General has explained that he is also seeking a conviction in the Supreme Court for, in the first place, gross assault under Chapter 3, Section 6 of the Penal Code and, in the alternate, causing bodily injury, a gross offence, under



Chapter 3, Section 8, second paragraph of the Penal Code. In the Supreme Court he has adjusted his statements of the act so that they have the following wording:

On 14 May 2009 in his home in Kungsbacka MM did assault his son OM by shaking him vigorously or directing blows at his head, banging his head against something or using other violence against his head. The violence has caused O haemorrhages under the dura mater of the brain and haemorrhages in the fundus of both eyes. The crime is to be deemed to be gross since the act constituted a mortal danger and considering that O suffered a severe bodily injury. In the alternate, MM did by shaking O vigorously or directing blows at his head, banging his head against something or using other violence against his head cause O's injuries through carelessness, these injuries including haemorrhages under the dura mater of the brain and haemorrhages in the fundus of both eyes. Taking account of the nature of the injuries and the fact that they included conscious risk-taking on the part of MM, the act is to be deemed to be gross.

MM has objected to the prosecution saying that he did not cause O's injuries and that he has, at any rate, not done so intentionally or out of carelessness. He has added that, in the event the Supreme Court finds both that the injuries were caused by him and that he had intent or was careless, he acted in an emergency and that the act is therefore not a crime. If acquitted, MM has claimed compensation both for loss of income and for costs of attendance in connection with the main hearing at the Supreme Court and for outlays regarding the costs of the witness Jens Grøgaard in the District Court.

## REASONS FOR THE JUDGMENT

### *Background*

1. OM was born on 25 February 2009 and is the son of MM and his partner EN. O has a twin brother called A. The boys were delivered by a planned caesarean section. The delivery was conducted without complications. MM and EN also have an older daughter born in 2004.

2. A few weeks after the birth A became infected by an RS virus (a virus that attacks the respiratory passages). On 18 March 2009 both O and A were admitted to hospital



and had to stay there for a fourteen-day period. O was also infected. A, in particular, was severely affected by the infection. When O was admitted to hospital he had a couple of bruises on one cheek and bruising on, as is stated in the forensic medical certificate, “the whole of the front of his lower left leg/on his lower legs”.

3. On the morning of the day that the prosecution refers to, i.e. 14 May 2009, the family visited the child healthcare centre since O had been ‘vomiting torrents’ for two straight days. In the afternoon O was girny. At around 18.00 MM was with O in the bathroom. O was screaming. Suddenly he fell silent. When EN, who had been just outside, entered the bathroom, she saw that O was lifeless and was breathing poorly. She then immediately called SOS-alarm [*an emergency service*], which decided to send an ambulance. While EN was talking to the emergency operator, O was being held by MM.

*MM's position and the issue in the case*

4. MM has stated that when O was lying on the babycare table, he suddenly started screaming louder than before and that he then fell completely silent and became unconscious and “loose-limbed” and started to “roll the whites of his eyes”. MM has added that he was gripped with panic and that he shook O to bring him to life. The first question in the case is whether MM has caused O injuries by shaking O or directing blows at his head or banging his head against something or using some other violence against his head.

*The ambulance transport and stays in hospital*

5. When the ambulance personnel arrived at the family’s home, O was unconscious. His breathing was poor with infrequent breaths and he was pale. MM accompanied O in the ambulance. During the ambulance transport to the hospital O was ventilated with oxygen and his breathing improved. His pulse also got better and his tonus returned to some degree. When O was delivered to the hospital in Gothenburg after an ambulance



trip lasting just under half an hour, the ambulance personnel noted that he had got better but that he was still “very poorly”.

6. During his stay at hospital O had recurring spasms. He was given epilepsy medicine for them. He was also treated in a respirator. Once the respirator had been disconnected, O was given antibiotics for suspected pneumonia. The state of O’s health improved gradually and he was discharged from the hospital in Gothenburg on 27 May 2009 for further care at Länssjukhuset [*the county hospital*] in Halmstad. He stayed there for two days. Then he was discharged to an investigation unit in the social services in his home municipality.

*The forensic medical certificate*

7. The forensic medical certificate cited in the case was issued in April 2010 by clinic doctor Elisabeth Werner Rönnerman at the National Board of Forensic Medicine’s Forensic Medical Division in Gothenburg. The certificate states that, when he was in the hospital in Gothenburg, O had haemorrhages under the dura mater, blood residues “mixed with spinal fluid” under the dura mater and haemorrhages in the fundus of both eyes. It could also be shown that, even though his condition had improved gradually, “his breathing was severely affected with infrequent breaths”, that he showed “paleness and circulatory impact” and “enervation and unconsciousness”, that his fontanel was taut and that he had spasms and had “abnormal nerve cell activity in an EEG”.

8. According to the forensic medical certificate O’s injuries had been caused by blunt violence. As regards the type of violence the certificate states that the appearance, location and scope of the haemorrhages under the dura mater and the haemorrhages in the fondus of both eyes strongly indicate that they have arisen as a result of violent shaking by an adult. In contrast, the certificate states that it is not possible to determine what kind of blunt violence caused the bruising on his face and legs that he presented on



18 March 2009 (see page 2). However the certificate adds that normal handling and care of healthy babies does not give rise to bruising.

9. Regarding when the haemorrhages arose, the forensic medical certificate states that the overall picture of the acute symptoms strongly indicates along with the haemorrhages that O was subjected to violent shaking in close conjunction with the arrival of the ambulance. However, the certificate stresses that the finds made indicate that the haemorrhages were of different ages and had thus arisen at different times through repeated instances of violent shaking. According to what is stated in the certificate, it was not possible to make a detailed assessment of the different ages of the haemorrhages.

*The supplementary forensic medical certificate*

10. After the forensic medical certificate had been issued, a further examination of O's brain was carried out using nuclear magnetic resonance imaging. Then Elisabeth Werner Rönnerman supplemented the forensic medical certificate with information from that examination. The conclusion was that the new finds – some “brain shrinkage” and “fairly widespread gliosis” (an increased quantity of support cells in the brain, scar tissue) – demonstrated that O had had brain injuries and that these injuries were a result of violent shaking carried out by an adult person.

*The opinion of the Legal Advisory Council of the National Board of Health and Welfare*

11. After the Supreme Court had issued leave to appeal in the case, the Prosecutor-General obtained an opinion from the Legal Advisory Council of the National Board of Health and Welfare. In its opinion of 5 November 2013 the Legal Advisory Council associates itself with an opinion from Professor Anders Eriksson, a consultant physician, who is a specialist in forensic medicine and a scientific advisor in forensic medicine to the National Board of Health and Welfare. According to what Anders Eriksson stated in his opinion, which was delivered in October 2013, the probability that O's symptoms



had arisen in some other way than through the intentional actions of an adult person is very small. In his opinion Anders Eriksson expressed the view that no information had emerged to support any other assessment as regards the origin of the injuries than the assessment made in the case by the District Court and the Court of Appeal.

*Examinations of witnesses in the Supreme Court*

12. Witness examinations have been held in the Supreme Court of both Anders Eriksson and Senior Professor Peter Aspelin who has –at the request of MM – also delivered an opinion in the case.

13. Anders Eriksson has said the following. He based the conclusion in the opinion to the Legal Advisory Council on the fact that O presented three symptoms (a triad) that, if they occur at the same time, have been held, according to the traditional view, to strongly indicate that there has been violent shaking if it is not the case that the child has been subjected to some other form of “high-energy violence” such as a traffic accident or a fall from a high height. The symptoms included in the triad are haemorrhaging under the dura mater, haemorrhaging in the fundus of the eyes and swelling of the brain. However, this diagnostic model has been criticised. The point of the criticism is that the symptoms given can have other causes. It is not possible to disregard this. The Swedish Council on Health Technology Assessment (SBU) has therefore now started a project on violent shaking of babies. The project, which will run for two years and consist of a systematic study of the literature, is intended to shed light on what scientific evidence is available about the accuracy of various methods used to diagnose violent shaking. He is participating in the project himself as an expert. In view of what has emerged recently, there is currently no clarity about the extent to which the components of the triad are specific to violent shaking. So it is not possible to say today that the occurrence of the triad means that violent shaking has been proved. Instead, it must be concluded that we do not know; we are in a quagmire. This means that he does not stand by his opinion



to the Legal Advisory Council. Instead he agrees with what Peter Aspelin has said in his opinion.

14, Peter Aspelin has stated. He is a doctor and a professor of radiology. He has been the chair of the Scientific Advisory Council of the SBU for six years. As he said in his opinion, there are two camps in the research community with regard to violent shaking. The controversy is not about whether it is harmful to shake a child violently. The issue under discussion is with what scientific certainty it can be established how various injuries found in a child have arisen. The claim that the occurrence of the triad is strong evidence that violent shaking has occurred goes back to the late 1960s; however, the medical evidence for it was relatively thin. But the claim became generally accepted and grew into a medical truth over several decades, even though the situation in terms of evidence did not change. It is known that a very large share of fundus haemorrhages are not linked to violence and arise in another way. Nor has it been shown that nerve fibres are torn, and that the brain therefore begins to swell, in connection with violent shaking. It can also be asked whether violent shaking really can occur without neck injuries arising. There are also other objections to the triad as a diagnostic method. To sum up, it can be said that the scientific support for the diagnosis of violent shaking is uncertain. There is no established diagnostic standard, and it is not clear whether there is scientific support for the diagnosis in the light of various criteria.

*The Supreme Court's assessment*

15. There is no evidence that addresses what happened when MM was in the bathroom with O, who was screaming, immediately before O fell silent. The only information provided in this part of the case is the information from MM. Thus no conclusion can be drawn about the sequence of events in the bathroom from what EN has said.



16. MM's account is that when O was lying on the baby care table he suddenly started screaming louder than before and that he then fell completely silent and became unconscious and "loose-limbed" and started to "roll the whites of his eyes" and that MM was then gripped with panic and that he shook O to bring him to life. In a video recording made during the preliminary investigation MM showed what happened. The shakes appear fairly cautious and by no means match the description of shaking violence. (Here reference can be made to information about the American Academy of Pediatrics' definition that is included in the District Court's judgment: "The shakes are severe, violent and massive. They bear no relation to the trivial blows that arise in play like *Ride a cock horse* or swinging on someone's arm or sitting in a babysitter. A discerning person observing the sequence of events would realise readily that the child is being treated in a way that is very dangerous for the child"). Thus the information given by MM about how he shook O is hardly an explanation of O's symptoms.

17. This means that the only evidence that exists for the Prosecutor-General's claim that MM caused O's injuries is that they could not have arisen in any other way than through the use of violence by MM since O had not been involved in a serious accident. The question is then whether the information that the Prosecutor-General has cited to support this conclusion is such that, on account of this, it has been shown beyond reasonable doubt that MM caused the injuries stated to O.

18. The type of evidence involved here, which means that it is possible to draw sure conclusions about alleged actions solely because certain effects occur, must be assessed with very great caution. Here a comparison can be made to some extent with what the Supreme Court stated in case NJA [*Supreme Court case reports*] 1991 p.56. There the question was whether the possibility that some other person than the defendant had assaulted a person and caused their death could be ruled out. According to the Supreme Court's reasons for its judgment in that case it is only in exceptional cases that a



conviction can be based on the negative fact that the investigation does not appear to provide scope for any alternative perpetrator.

19. For it to be possible to show beyond a reasonable doubt, from the mere fact of the existence of certain bodily injuries, that these injuries have been caused by someone in some particular specified criminal way, the conclusion must rest on a scientific standpoint for which there is very strong proof. At the same time, the existence of any other conceivable explanation of the injuries must be ruled out in practice.

20. It is obviously a completely different situation if knowledge in, for example, forensic science is used as evidence in cases where there is also other evidence, for example to clarify the scope of a particular bodily injury that has occurred or to assess when the injury arose. Another example where forensic science can provide important input is when an assessment is to be made of the risks to life and health in a particular situation.

21. It can be concluded that, in general terms, the scientific evidence for the diagnosis of violent shaking has turned out to be uncertain. It has not emerged that the facts in this particular case are such that it can be established, despite this uncertainty, that O's injuries were caused by violent shaking or other violence on the part of MM. On the contrary, certain facts, including the facts that O had previously had RS virus and that there were signs of older haemorrhaging under the dura mater, indicate that there is another explanation for the symptoms that O had.

*The Supreme Court's conclusion*

22. The conclusion is that it has not been shown beyond reasonable doubt that MM caused the injuries stated by the Prosecutor-General to O. MM shall therefore be acquitted.



*Cost issues etc.*

23. Since MM has been acquitted the obligation under the District Court's judgment for him to repay SEK 84 000 of the costs of his public defence counsel and the special representative shall be set aside, along with the obligation to pay a charge to the Fund for Victims of Crime.

24. MM is entitled to a daily allowance and travel compensation because of the main hearing in the Supreme Court and to compensation for his costs for evidence in the District Court. However, he is not entitled to compensation for income he lost when he appeared here (see Chapter 31, Section 2 of the Code of Judicial Procedure and Section 7 of the Ordinance on Compensation from Public Funds to Witnesses etc. (1982:805)).

25. The compensation requested by the defence counsel is reasonable.

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The following participated in the ruling: Supreme Court Justices Ella Nyström, Lena Moore, Martin Borgeke (rapporteur), Svante O. Johansson and Lars Edlund  
Judge referee presenting the case: Jenny Hjukström

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Translated from Swedish by Ian MacArthur, public translator authorised by the Swedish Legal, Financial and Administrative Services Agency for translations from Swedish to English (Stamp no 393).

  
Stockholm, 2 November 2014

