


EIDSIVATING COURT OF APPEAL

JUDGMENT

Pronounced:	2 December 2021	
Case no.:	21-137101AST-ELAG/	
Judges:	Court of Appeal Judge Court of Appeal Judge	Randi Egge Ørnulf Røhnebæk
Associate judges:	Associate Professor Adviser Finance Director General Manager GRC Manager	Randi Elisabeth Martinsen Shahnaz Khani Arnt Helge Høyem Kristin Beate Kjøs Johan Nygaard
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The charged person		Advocate Christian Jacques Aubert
The prosecuting authority	Hedmark and Oppland Regional Public Prosecution Office	Police prosecutor Einar Gauslaa Bergem

The case concerns confiscation.

On 20 June 2020, the chief of police of Innlandet County issued a confiscation order against [REDACTED] born on [REDACTED]. The order concerned the confiscation of 94 late-Roman bronze coins in favour of the State. The stated reason for the confiscation is contravention of:

Section 27, first alternative penalty, of the Cultural Heritage Act; see also section 23a

for having imported into Norway cultural objects which have been unlawfully exported from a state which is party to an agreement to which Norway is also a party concerning the return of cultural objects or measures to prevent illicit import and export of, and trade in, cultural objects.

Grounds:

In July 2017, he bought 94 bronze coins from Spain on the internet without making sure that they could be legally exported from Spain.

[REDACTED] did not accept the order, which was therefore forwarded to Østre Innlandet District Court; see section 268 of the Criminal Procedure Act. On 10 September 2021, Østre Innlandet District Court issued a judgment in the case containing the following conclusion:

[REDACTED] born [REDACTED], is ordered to accept confiscation of 90 late-Roman bronze coins, see section 69, first paragraph, b), of the Penal Code; see also section 75, first paragraph, of the Penal Code.

[REDACTED] has appealed against the judgment. By decision of Eidsivating Court of Appeal dated 12 October 2021, the appeal was forwarded for an appeal hearing.

The appeal hearing was held at Hamar Court House on 19 November 2021. [REDACTED] attended and gave evidence. Four witnesses were called. Other submitted evidence is apparent from the court record.

The public prosecutor submitted the following:

That [REDACTED] born [REDACTED] be sentenced to:

1. Confiscation of 90 late-Roman coins; see sections 69 and 75, first paragraph, of the Penal Code.
2. To pay legal costs to the public purse as determined by the court on a discretionary basis.

Defence counsel submitted the following:

Principally:

That the judgment of the district court be set aside and the case be dismissed with final effect.

In the alternative:

That [REDACTED] be acquitted.

That [REDACTED] be awarded legal costs before the district court and court of appeal.

Assessment of the **court of appeal**:

On 22 June 2020, [REDACTED] was granted a waiver of prosecution in respect of contravention of section 27, first alternative penalty, see also section 23a, of the Cultural Heritage Act, for having purchased 94 bronze coins from Spain on the internet in July 2017 without making sure that they could be legally exported from Spain. The waiver of prosecution was made conditional on [REDACTED] not committing any new criminal act during a probationary period of two years. [REDACTED] did not appeal against the waiver of prosecution.

With reference to the contravention on which the waiver of prosecution was based, the chief of police of Innlandet County issued a confiscation order the same day.

The court of appeal does not find, as submitted by defence counsel, that there are grounds for setting aside the judgment of the district court or dismissing the case based on lack of a right of action under section 23d of the Cultural Heritage Act.

The question of confiscation must be decided pursuant to the rules of criminal procedure.

Further, the court of appeal cannot see any basis for dismissal on the grounds that the confiscation was not notified by the applicable deadline. It is noted that the waiver of prosecution and the confiscation order were issued and notified to [REDACTED] on the same day.

The court of appeal has concluded that the court must carry out a full review of the factual and legal basis for the confiscation; see Supreme Court Reports (Rt.) 2013-541.

Pursuant to section 69, first paragraph, b), of the Penal Code, objects which have been the subject of a criminal act may be confiscated.

Section 27 of the Cultural Heritage Act defines the penalty for any person who intentionally or negligently contravenes a prohibition, order, condition or provisions issued in or in pursuant to the act.

Section 23a of the Cultural Heritage Act states that it is “prohibited to import into Norway cultural objects which have been unlawfully exported from a state which is party to an agreement to which Norway is also a party concerning the return of cultural objects or measures to prevent illicit import and export of, and trade in, cultural objects.”

The term “cultural objects which have been unlawfully exported from a state” is further defined in section 9, first paragraph, of the Regulations relating to the export and import of cultural objects. Paragraph (a) of the provision states that ““cultural objects” shall mean the categories of cultural objects defined the legislation of the country of export on the definition and protection of cultural objects”.

Translation from Norwegian

Unlawful export from a state is understood to mean “any export from the territory of a state in violation of the legislation of that state on the protection of cultural objects”; see paragraph b), first hyphenated item.

It is undisputed that ██████ bought 94 late-Roman bronze coins (later found to be 90 in total) in a coin auction on the Dutch website Catawiki, and that he paid NOK 3,000 for the coins. It is also clear that the seller was located in Spain, that the coins were sent to ██████ from Spain and that ██████ imported the coins to Norway. Spain is covered by the return agreement.

Based on the evidence of then-senior customs inspector Heidi Eriksen, the court of appeal has concluded that the shipment was not accompanied by an export permit. In a letter to ██████ dated 7 July 2017, Norwegian Customs requested documentation evidencing the contents and any permits. The court of appeal does not find it necessary to decide whether it is a requirement that the shipment must be accompanied by an export permit or whether this can be presented at a later date, as no export permit was presented subsequently either.

The crux of the matter is whether the coins were unlawfully exported from Spain. The answer to this question depends on whether the coins must be deemed to be “cultural objects” under Spanish law and whether a special permit from the authorities is required to export these coins.

The prosecuting authority bears the burden of proving that the coins were unlawfully exported from Spain.

The report on the customs infraction/police report dated 9 September 2019 states that, “The Ministry of Culture in Norway has contacted the appropriate authorities in the country of origin, and the country of origin has confirmed that the shipment contained unlawfully exported objects.” Based on the witness evidence of Senior Inspector Heidi Eriksen from Norwegian Customs and Senior Adviser Sunneva Sætevik from the Ministry of Culture, the court of appeal has concluded that this is incorrect. Sætevik gave evidence that the first enquiry to the Spanish authorities was sent via the IMI channel on 20 November 2020.

The documentation shows that the Spanish authorities replied via IMI on 23 November 2020. A submitted screenshot from IMI shows the following reply:

“These coins need an export authoritation from the spanish authorities (Ministry of Culture and Sports of Spain) because they are over 100 years old. Do they have this autoritation?”

It is unclear what information and what images, if any, the Spanish authorities had received before sending their reply, as the submitted communications are not complete. The report and images from the University of Oslo were not available until 4 December 2020.

Translation from Norwegian

In an email dated 5 May 2021 til Andres Cristobal Carlos, Sunneva Sætevik requested additional documentation in the form of

“a letter from your authorities, confirming the illicit exportation due to lack of the necessary export licence, and perhaps, requesting the return of the coin collection to Spain.”

A letter dated 31 August 2021, signed by María Dolores Jiménez-Blanco, “the general director of fine arts”, stated the following:

“According to our legal frame, these coins can be considered as Spanish Historical Heritage (art.1.2. of Spanish Historic Heritage Law 16/1985) and they needed an express and prior exportation permission from the Ministry of Culture and Sports of Spain before their departure from Spanish territory (art.5. of Spanish Historic Heritage Law 16/1985 and art.45. and following of Royal Decree 111/86).

If these coins have been exported without this express and prior permission it could be considered and illegal exportation and these coins would belong to the Spanish State (art.29.1. of Spanish Historic Heritage Law 16/1985).”

The letter states that the coins may constitute cultural heritage, and that they may have been unlawfully exported; see “*can be considered as Spanish Historical Heritage*” and “*could be considered and illegal exportation*”. The wording of the letter is circular and does not provide clear confirmation by the Spanish authorities that the coins must be regarded as cultural heritage and that they have been unlawfully exported. Moreover, the Spanish authorities did not ask for the coins to be returned.

Although it is clear that the shipment was not accompanied by an export permit, based on the documentation the possibility cannot be excluded that the seller was permitted to export the coins. Reference is made to the fact that, in the IMI communications, the Spanish authorities asked whether there was an export permit for the coins. The letter dated 31 August 2021 contained a proviso in respect of such authorisation not existing.

Based on the evidence given by [REDACTED] and coin dealer [REDACTED], the court of appeal has concluded that the imported coins are very common, that they have little value either financially or as collector’s items, and that there are millions of them. Further, the court has concluded that thousands of such coins are sold in coin auctions on the internet every week. In the absence of clear confirmation from the Spanish authorities, the possibility cannot be excluded that these circumstances make the export lawful even without an export permit or without the shipment being accompanied by an export permit.

The court of appeal takes the view that, in order to provide a basis for a criminal sanction, the documentation from the country of export stating that the objects have been unlawfully exported must be clear and leave no room for doubt. In view of the vague wording of the letter from the Spanish

authorities, the Court finds that it has not been proven beyond reasonable doubt that the coins required an export permit and were therefore unlawfully exported from Spain.

The basic condition for confiscation – that the coins have been the subject of a criminal act – is thus not fulfilled and [REDACTED] must be acquitted of the confiscation claim.

[REDACTED] has claimed reimbursement of legal costs before the district court and the court of appeal. Advocate Aubert has been publicly appointed to appear as defence counsel before the court of appeal, and the costs will be covered in the usual manner in accordance with the Unit Price Regulations.

The court of appeal does not have jurisdiction to hear claims for reimbursement of costs incurred in connection with the proceedings before the district court, as Aubert was not appointed to appear before the district court.

Any claim for reimbursement of legal costs in connection with district court proceedings must be submitted to the police district which has investigated the matter, and will be assessed in accordance with the rules in chapter 31 of the Criminal Procedure Act.

The judgment is unanimous.

The judgment has not been pronounced by the statutory deadline. The reason is that it was impossible to gather all the judges for the pronouncement of sentence at an earlier point in time.

CONCLUSION OF JUDGMENT

██████████, born ██████████ is acquitted of the confiscation claim.

Randi Egge

Ørnulf Røhnebæk

Randi Elisabeth Martinsen

Johan Nygaard

Shahnaz Khani

Arnt Helge Høyem

Kristin Beate Kjøs

*Document in accordance with the signed original:
Anne-Signe Schriwer (electronic signature)*