

## **Norwegian Criminal Cases Review Commission**

### **Annual Report for 2005**

The Criminal Cases Review Commission is an independent body that considers whether a convicted person should have his/her case retried by another court.

## NORWEGIAN CRIMINAL CASES REVIEW COMMISSION

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#### The Criminal Cases Review Commission's activities and composition

The Criminal Cases Review Commission was set up following a revision of Chapter 27 of the Criminal Procedure Act. The amendment came into force on 1 January 2004.

The Commission has five permanent members and three alternates, all of whom are appointed by the King in Council. The Chairman, Vice Chairman and one member must hold a university degree in law [LLM]. The Chairman is appointed for a period of five years and members for a period of three years.

The Commission is made up as follows:

Chairman: Janne Kristiansen

Vice Chairman: Ann-Kristin Olsen, Governor of Vest-Agder County

Members: Vidar Stensland, Court of Appeal Judge at the Hålogaland Court of Appeal.  
Svein Magnussen, Professor of Psychology at the University of Oslo.  
Anne Kathrine Slungård, Director of Marketing at Entra Eiendom.

Alternates: Helen Sæter, District Court Judge at the Fredrikstad District Court  
Øystein Mæland, Head of Department at Ullevål University Hospital.  
Harald Stabell, advocate and defence counsel (until March 2005)  
Erling O. Lyngtveit, advocate and defence counsel (from March 2005)

The Criminal Cases Review Commission's Chairman is also employed full-time as Head of the Secretariat. She has previously practised as an advocate and defence counsel. The Secretariat also comprises eight employees, six of whom are investigators. Two of the investigators have police background and four are lawyers. The investigators have experience that includes *Kripos* (the National Criminal Investigation Service), the Institute for Forensic Medicine, the Access Reviewing Committee on the Norwegian Police Security Service (*Innsynsutvalget*), the Parliamentary Ombudsman for Public Administration, the Ministry of Justice, as well as law practice and the courts. The Secretariat also has two secretaries and its offices are situated at Teatergaten 5, Oslo.

## **The Criminal Cases Review Commission in general**

The Criminal Cases Review Commission is an independent body that is to decide whether a convicted person petitioning to have the judgment (i.e. the conviction/sentence) that was pronounced in his/her case reviewed, should have that case retried in court. If the Commission concludes that it should, the case will be referred for retrial before a court other than the one that pronounced judgment.

The Criminal Cases Review Commission decides its own working procedures. It cannot be directed as to how to apply its authority. Members of the Commission may not consider cases where they are disqualified under the provisions of the Courts of Justice Act (domstolsloven). Where a petition to review a conviction/sentence in a criminal case has been submitted, the Commission must make an objective assessment about whether the conditions for review are satisfied.

The convicted person may petition for a conviction/sentence passed in a criminal case to be reviewed if:

- There is new evidence or new circumstances that may lead to acquittal, the application of a lesser penal provision, or a considerably lighter sentence.
- In a case against Norway, an international court or the UN Commission on Human Rights has concluded that the decision, or hearing of the case, is in contravention of international law, so that there are grounds to expect that a new examination of the criminal case will lead to a different conclusion.
- Anybody, who has had crucial dealings with the case, has committed a criminal offence that may have affected the judgment to the disadvantage of the person convicted.
- The Supreme Court has departed from an interpretation of the law on which it relied earlier and on which the judgment is based.
- There are special circumstances that cast doubt on the correctness of the judgment and where serious consideration suggests that there should be re-examination of the charged person's guilt.

A petition for case review must be submitted in writing. There is no time limit for petitioning a review. The Commission has a duty to provide guidance to the person requesting his/her case to be reviewed. The Commission itself is responsible for ensuring that all relevant information about the case is produced. In most cases, direct contact and dialogue will be established with the individual concerned. The appellant calling for review may have a defence counsel appointed at public expense only where special reasons apply.

The Criminal Cases Review Commission ensures that a thorough examination is carried out on the case's legal and factual aspects, with a subsequent report, and the Commission may gather information in the way it sees fit.

The Commission may call the accused and witnesses to informal discussions or questioning. It may hold oral hearings or request evidence to be heard in court. Moreover, it can petition the court for persons to be investigated, put under observation, and for coercive measures to be applied. The Commission can make orders for compulsory disclosure, appoint experts and conduct investigations. In special circumstances, it may request the prosecuting authorities to conduct criminal investigations. Otherwise, cases are reviewed and reported on by the Secretariat's own investigators.

The Commission's Chairman/Vice Chairman may turn down petitions that by virtue of their nature cannot be reviewed, that do not contain any grounds for review according to the law or that clearly will not succeed. In other cases, the whole Commission will decide on petitions.

If the Commission decides to review a judgment, the case will be referred for retrial to a court of equal standing to the one that pronounced the judgment. This means:

- If the judgment was pronounced by a district court (formerly county or city courts), the Commission will send the case to the Court of Appeal to nominate a district court.
- If the judgment was pronounced by a Court of Appeal, the case will be sent to the Interlocutory Appeals Committee of the Supreme Court to nominate a Court of Appeal.
- If the Supreme Court pronounced the judgment, the Supreme Court will reconsider the case.

### **Cases and procedure**

During the year, the Commission held 9 meetings over 14 days. The number of petitions received has gone down in comparison with the start-up year, but the Commission nevertheless received 140 petitions for case review in 2005 against 232 in 2004. In 2005, a total of 129 cases were completed. 110 of these were heard on their merits. Of the cases heard on merit, 8 were referred to the court for review, while 19 were disallowed. The remaining 83 cases were rejected, as it was clear that they could not succeed. The other 19 cases concluded were formally dismissed, as they did not fall within the Commission's mandate. This applied mainly to petitions for the review of civil judgments and investigations dropped. Some of the petitions were also withdrawn for various reasons.

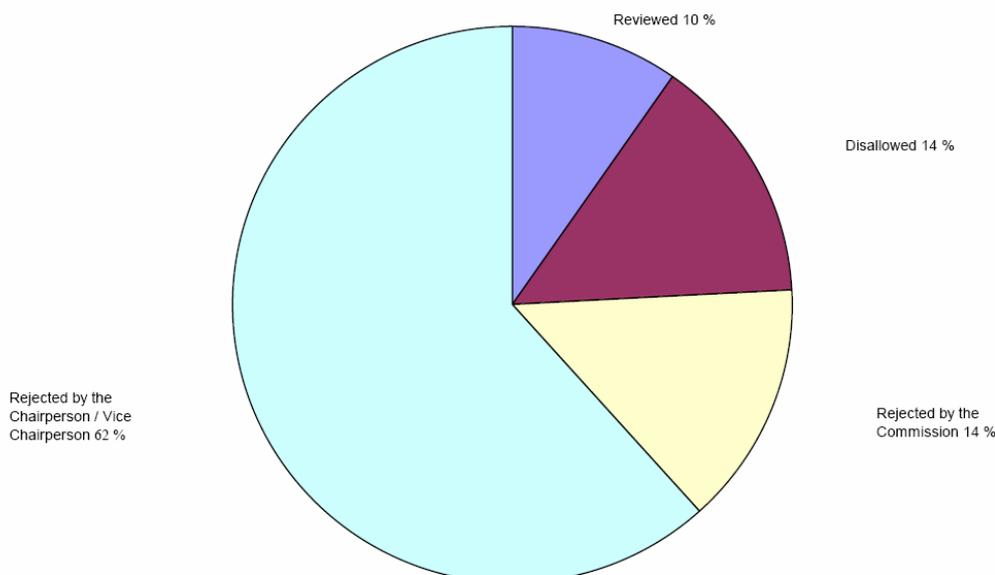


Since the start-up 1 January 2004, the Commission has received a total of 372 petitions and 190 of the cases are completed. A total of 13 have been referred to the court and 19 disallowed. 101 of the cases were rejected because they could clearly not succeed, while the rest, 57 cases, were dismissed on formal grounds.

The table below thus gives a complete overview of the number of petitions received and cases completed for the Commission's first two years of operation:

	Received	Concluded	Reviewed	Disallowed	Rejected by the Commission	Rejected by Chairperson / Vice Chairperson	DISMISSED													
							General inquiry	No written petition / withdrawn	For information	Foreign judgment	Of no judicial interest	Prosecution dropped	Civil cases	Administrative decisions	Request for investigation	Fines	Anonymous			
General	3	2					1		1											
General	2	2					1	1												
Sexual offences	77	38	7	8	2	16		2	1											
Violence, threats	87	39	1	2	4	25	1	4	1										1	
Drugs	37	18	1		2	12		2		1										
Crimes of gain	55	18	1	5	2	8		2												
Misc. offences	25	10		1	3	5							1							
Misc. misdemeanours	49	31	3	3	6	16		2					1							
Temporary rulings																				
Prosecution dropped	9	9											8							1
Confiscation or extinguishment	1																			
Inquiries	6	4					2	1	1											
Fines	3	3																		3
Civil cases	17	17												17						
Other regarding professional matters	1	1																	1	
<b>Total</b>	<b>372</b>	<b>190</b>	<b>13</b>	<b>19</b>	<b>19</b>	<b>82</b>	<b>5</b>	<b>14</b>	<b>4</b>	<b>1</b>	<b>2</b>	<b>8</b>	<b>17</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>3</b>	<b>1</b>		

The diagram below shows the outcome of the cases heard on merit in 2004 and 2005:



The Commission's Chairman or Vice Chairman has the authority to reject any petitions that clearly will not succeed, and a considerably larger number of petitions has this year been rejected by the Chairman/Vice Chairman than in 2004. This is due to the fact that a large number of this type of cases was considered by the whole Commission during the Commission's first year of operation even though the Chairman/Vice Chairman formally had the authority to reject them. This was done in order to establish the borderline between petitions that could and could not be considered by the Chairman/Vice Chairman. Regardless of this, the proportion of petitions that are rejected has increased since 2004, something that is primarily attributable to the fact that the secretariat receives relatively many petitions for review which are in effect pure appeals, and the secretariat has devoted a great deal of effort to "filtering" these as quickly as possible. This is of vital importance in order to use the Commission's overall resources in the best way possible for cases that require further investigation.

A lot more cases than expected came in in 2004 when the Commission was set up, and the number of petitions for a review is still above what the legislator relied on. It is an important objective to catch up with the backlog from the start-up year. The Commission has an independent duty to investigate, which may be very labour-intensive in cases of a certain size. This work is resource-consuming while at the same time constituting a crucial part of the secretariat's duties as well as perhaps the most important reason for setting up the Commission. Several of the cases which now make up the Commission's backlog must be expected to require a good deal of investigation after importance was for a while attached to filtering petitions which clearly could not succeed.

In order to catch up with the backlog and contribute to an effective processing of petitions, the Commission has set tentative time-limits for the individual steps of the processing of cases. However, larger cases will require more time than what these time-limits allow for and the time-limits shall under no circumstances affect the quality of the Commission's work. Already during the first year of operation, the secretariat was allocated three new posts, but in order to catch up with the backlog, the allocation of further resources is necessary so that more investigators can be appointed for a limited period of time.

The appointment of a defence counsel for the convicted person may also to a certain extent save the secretariat a great deal of work in connection with guidance and investigation. The law gives the Commission the right to appoint a defence counsel where special reasons apply. Consequently, it is necessary to make a concrete evaluation on a case-to-case basis of the question whether a defence counsel shall be appointed. In practice, the Commission has appointed a defence counsel when there has been reason to assume that the convicted person may be not guilty by reason of insanity, because he will in that case be entitled to a defence counsel at every stage of the proceedings. A defence counsel has also been appointed in especially comprehensive or complex cases, or if the person convicted lives in an out-of-the-way place so that it will be particularly resource-consuming for the secretariat to give the person in question proper guidance. The

appointment of a defence counsel may in such cases also contribute to a better and more proper investigation of the case. The appointment will in most cases be limited to a certain number of hours, for example in order to provide a more detailed rationale for the legal and factual basis of the petition. Also in the larger or complex cases such a ceiling has been set, which can be reassessed if and when the need arises.

#### **Other activities of the Commission:**

In April 2005, the Commission and the secretariat held a two-day seminar with a view to further improving the internal routines of the secretariat and routines between the secretariat and the Commission. In this connection certain amendments/adjustments to the law which seem necessary after the first year of operation were discussed.

The cooperation with the Commissions in England and Scotland has continued and the Chairman of the Commission attended together with the Chairmen of these Commissions a major international conference in Winnipeg in Canada. The conference was called "Unlocking Innocence – An International Conference on Avoiding Wrongful Conviction". During the conference, which was held in October 2005, the Commission's Chairman attached special importance to explaining in more detail the Commission's fundamental principles and method of operation.

The Chairman of the Commission has briefed the Minister of Justice every six months about the activities of the Commission and has maintained contact with members of the Ministry of Justice's political leadership.

A meeting has been held with the legal department of the Ministry of Justice on matters concerning adjustments to the Criminal Procedure Act as well as other laws and regulations. Proposals for amendments and adjustments have been forwarded to the Ministry and been circulated for consultation in 2005 with 1 February 2006 as the closing date for comments.

Among other activities is mentioned the Chairman's attendance at the Minister of Justice's Conference for Department Heads and the Nordic Lawyers Conference in Reykjavik.

The Commission's Chairman has also conducted external activities in the form of lectures on the Commission's activities at the Director General of Public Prosecution's meeting for the public prosecutors, as well as a lecture to the Ministry of Justice's legal department and the Probation and Care of Offenders Services (Kriminalomsorgen), region south and region west. The Chairman also gave a lecture at a seminar on crime policy at the University of Oslo, and the Vice Chairman of the secretariat presented a paper at a seminar on criminal law and court practice and procedure in criminal proceedings under the auspices of the Competence Committee for Judges.

The Commission's website is updated with information about the Commission and its work at [www.gjenopptakelse.no](http://www.gjenopptakelse.no). A summary of the cases that are referred to the court for review can be downloaded continuously.

### **Current decisions:**

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.