

**APPLICATION N° 25399/94**

**H M A v/SPAIN**

**DECISION of 9 April 1996 on the admissibility of the application**

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**Article 6, paragraph 2 of the Convention** *States may establish presumptions of fact or law on condition that they remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence*

*On the facts, it was not contrary to the principle of the presumption of innocence to convict the manager of a plant producing environmentally-harmful emissions, since he had had the opportunity to defend himself and the presumption of "liability" was not irrebuttable*

**Article 7, paragraph 1 of the Convention** *The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects and, consequently, to define the constituent elements of such an offence*

*An extensive interpretation intended to adapt an offence to developments in society is acceptable only if it can reasonably be brought under the original concept of the offence and is foreseeable by the citizen*

*In the present case the applicant, the manager of a plant producing environmentally-harmful emissions, was convicted on the basis of legal provisions which were sufficiently accessible and foreseeable and which entailed obligations of which the applicant, as a specialist in the field, could not reasonably have been unaware*

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## THE FACTS

The applicant is a Spanish citizen. He was born in 1947 and lives in Madrid. At the material time he was a plant manager for a limited company, C, whose registered office is in Vimianzo (La Coruña). He was represented before the Commission by Ms. Maria Jose Benavente and Mr. Iñigo Rodríguez de Robles, lawyers practising in Madrid.

The facts of the present case, as submitted by the parties, may be summarised as follows:

### 1 *The particular circumstances of the case*

On 7 July 1988 an enormous number of asphyxiated trout were found floating at the surface of a river. A company called C was suspected of being responsible. It held a licence to use the river waters for industrial purposes, and discharged its waste water into the river, at the mouth of which there was a fish farm belonging to company A. An unidentified person had, either on his own initiative or acting on orders or specific instructions, opened a valve on one of the outflow pipes from C's discharge-tank (these valves being in a secure, locked area). As a result, an amount of highly toxic liquid industrial waste was discharged, causing widespread destruction amongst many species of fish in the river, as well as killing approximately nine million trout from A's fish farm.

In July 1988, company A filed a criminal complaint, together with an application to claim civil damages, against company C. On 15 May 1989, Corcubión investigating judge issued an order (auto) ruling that, on the facts, the appropriate charge was for the minor offence of negligent damage to property under section 600 of the Criminal Code.

A appealed against this order. On 31 July 1989, La Coruña Audiencia Provincial, holding that there was sufficient circumstantial evidence to make out a major offence, ordered the case to be remitted to Corcubión investigating judge in order for a prosecution for a major offence (procedimiento abreviado) to be commenced.

On 17 January 1990, Corcubión investigating judge set the case down for hearing. In a judgment of 30 October 1990, the Criminal Court found the applicant guilty of a minor offence of negligence under section 600 of the Criminal Code, taken in conjunction with sections 263, 250, 251 and corresponding provisions of the Regulations on the Use of Publicly Owned Waters of 11 April 1986 (Decree 849/1986) and sections 16 and 17 of the 1961 Regulations on activities classified as causing a nuisance or being unhealthy, noxious or dangerous (Decree 2414/1961). The applicant was fined and ordered to pay compensation for the damage caused, *inter alia*, to A. Company C was also held vicariously liable at civil law. The judgment stated that the

facts of the case would have made out the major offence of damage to property under sections 557 and 558 of the Criminal Code had the offence been committed intentionally

The court found the applicant guilty, by virtue of his position as the plant manager, of failing to take the measures necessary to ensure that any water which might be discharged into the river was of the requisite quality. It held that the applicant had failed to comply with his supervisory obligations and his duty to implement safety measures and that he had breached a number of regulatory provisions, thereby creating a risk. The judgment stated that the applicant's failure to act had resulted in pollution of the river waters and widespread destruction amongst many fish species in the river, but that this had been unintentional and the applicant had not actively contributed to it. In this regard, the judgment recorded that the person who had opened the relevant valve and the person who had given the relevant order had not been identified.

Both the applicant and company A disagreed, *inter alia*, with the facts as found by the court and the manner in which it had assessed the evidence, and both lodged appeals.

In a judgment of 26 June 1991, La Coruña Audiencia Provincial partly set aside the first instance decision and found the applicant guilty of the major offence of gross negligence or recklessness under section 565 of the Criminal Code resulting in a threat to public health or the environment as defined in section 347 bis thereof taken in conjunction with the Water Act (Law 29/1985 of 2 August 1985) and the Regulations on the Use of Publicly Owned Waters of 11 April 1986 (Decree 849/1986). The applicant was sentenced to two months' imprisonment (*arresto mayor*) and ordered to pay compensation. The judgment held company C vicariously liable at civil law and referred to the large amount of evidence on the basis of which the judge at first instance had found the applicant guilty - including, apart from the circumstantial evidence, witness evidence of the fact that the valve had been opened, samples of contaminated water, tests carried out on the river and the results of the examinations carried out on the asphyxiated trout.

The Audiencia Provincial held as follows:

It is perfectly possible for the major offence of causing a threat to public health or the environment under section 347 bis of the Criminal Code to be committed either intentionally (*por vía dolosa*) or negligently or recklessly (*por vía culposa*). The persons responsible for emissions or discharges in such places or of such kinds as are referred to in the said provision may have acted either intentionally, that is, intending or accepting the unlawful consequences of their actions, or they may have knowingly and wilfully failed to show the necessary care and diligence and have thereby caused the unlawful result which was, in any event, foreseeable and avoidable. Here, we must recall the tests laid down

in case-law for establishing negligence or recklessness there must have been an intentional, but non-malicious, act or omission, a breach of the duty to take care; the creation of a foreseeable and avoidable risk, and a dangerous result ."

The judgment stated that the terms of the licence gave C. a temporary authorisation to discharge waste water, providing that it installed measuring apparatus, that the liquid stored in the discharge-tank was permanently monitored and that the quality of any water which might flow into the river was monitored. It also found that the measuring apparatus had not been installed. Further, the judgment held that the applicant, as C.'s plant manager, was under a duty to take all necessary steps to ensure that the quality of any water which might be discharged into the river was checked. He was under an *ex officio* duty to be aware of the harmful effects of industrial waste, to supervise operations and to ensure that the safety measures required under the terms of the licence were implemented. If the company refused to install the measuring apparatus required by the terms of the licence, he should have refused the job or resigned. The judgment stated that, by failing to carry out his supervisory tasks and duties and by failing to take steps to prevent the outflow-pipe valves being opened (the decisive factor in his conviction), the applicant had caused a risk which he should have foreseen and avoided.

On 31 July 1992, the applicant lodged an *amparo* appeal with the Constitutional Court based, *inter alia*, on the principle of the presumption of innocence (enshrined in Article 24 of the Constitution). The appeal was dismissed on 28 February 1994.

The Constitutional Court held that La Coruña Audiencia Provincial had based itself on a certain amount of circumstantial and direct evidence in finding the applicant guilty. This evidence had led it to convict the applicant of an offence of negligence or recklessness. The Constitutional Court recalled that assessing the evidence is a matter for the trial court. It went on to hold that the Audiencia Provincial had properly assessed the causal relationship between the circumstantial evidence and the consequential damage in finding the applicant guilty.

## 2 *Relevant domestic law*

(Original)

Código penal

Artículo 347 bis

"Será castigado con la pena de arresto mayor y multa de 50.000 a 1 000.000 de pesetas el que, contraviniendo las Leyes o Reglamentos protectores del medio ambiente, provocare o realizare directa o indirectamente emisiones o vertidos de cualquier clase, en la atmósfera, el suelo o las aguas terrestres o marítimas, que pongan en peligro grave la salud de las personas, o puedan perjudicar gravemente las condiciones de la vida animal, bosques, espacios naturales o plantaciones útiles. ."

## Artículo 565

El que por imprudencia temeraria ejecutare un hecho que, si mediare malicia, constituiría delito, será castigado con la pena de prisión menor

(Translation)

### Criminal Code

#### Section 347 bis

Anyone who, in breach of environmental protection legislation or regulations, causes to be released or directly or indirectly releases into the atmosphere, the soil or inland or sea waters any emission or discharge likely seriously to endanger human health or seriously to harm the conditions of animal life, forests, natural sites or cultivated areas shall be liable to a sentence of between one and six months' imprisonment (arresto mayor (1)) and a fine of 50,000 to 1,000,000 pesetas "

#### Section 565

"Anyone who, recklessly or with gross negligence, acts or omits to act in any way which, if the action or omission were intentional, would constitute a major offence, shall be liable to a sentence of imprisonment of between six months and six years (prisión menor (2))

## COMPLAINTS

The applicant, who invokes Article 6 para 2 of the Convention, complains that the principle of the presumption of innocence was breached in his case. He considers that it has not been proven that he was involved in the offence in question and that the prosecution evidence was not sufficient to ground his conviction.

## THE LAW

The applicant complains that the principle of the presumption of innocence was breached in his case and invokes Article 6 para 2 of the Convention. He considers that it has not been proven that he was involved in the offence in question and that the prosecution evidence was not sufficient to ground his conviction.

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(1) Section 30 Criminal Code

(2) *Ibid*

Article 6 para 2 of the Convention reads as follows

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Commission also examined the applicant's complaint under Article 7 of the Convention

Article 7 provides as follows:

"1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed . .

2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations "

The Government submit that the applicant's conduct amounted to a failure to act on the part of the management of company C , which was grossly negligent or reckless and which led to toxic waste being discharged, causing an environmental catastrophe. They further submit that the applicant knew what measures he should take in order to ensure the safety and quality of the water yet failed to take them. Moreover, the Government state that the unidentified person who opened the valve must have been connected with company C. and must have had authorised access to the outflow system since the valve were in a locked, secure area to which entry had not been forced. They argue that the discharge must have been an exceptional measure, carried out deliberately with the authorisation or at least the consent of the plant manager, that is, the applicant.

The Government note that the offence could be committed by way of act or omission. As C's plant manager, the applicant was responsible for ensuring that environmental protection regulations were complied with. Since he had failed to do so, he was guilty of the major offence of which he was convicted, as the consequences could have been foreseen and avoided.

Further, the Government emphasise that the applicant's conviction was based on a finding that he had behaved (in the words of section 347 bis of the Criminal Code) in a manner "likely seriously to endanger human health or seriously to interfere with the conditions of animal life, forests, natural sites or uncultivated areas". They note that the essential element of the offence is the occurrence of a "discharge" or "emission". Given this essential element as the starting-point, there is no difficulty in completing the definition by reference to the relevant Acts and Regulations in the field. Moreover, such references cannot be avoided, since a criminal code cannot itself set out all the conditions which must be observed in order to protect the various aspects of the environment.

The Government refer, on this point, to a Constitutional Court judgment of 28 February 1994, which held that, "criminal laws which refer to other legislation for their detailed provisions ['framework' criminal laws] are constitutionally acceptable, provided that the reference is express and is justified in the light of the aim pursued by the law, that the primary legislation, as well as specifying the relevant penalty, sets out the essential element of the offence; and that the requirement of certainty is satisfied, that is, that the scope of the provision is sufficiently foreseeable" In the light of this judgment, the Government consider that section 347 bis of the Criminal Code is a clear, written legislative provision which predated the commission of the offence and which fulfils the criteria for lawful criminal legislation.

The applicant, for his part, argues that there is no direct or objective proof that any liquid waste was discharged, that company C. needed to discharge it or that the applicant gave any instructions, whether general or specific, relating thereto. He challenges the Government's argument that the person who allegedly opened the valve must have been connected to company C.; he states that it would not have been impossible (albeit difficult) for an outsider to open the valve in question and that, in any event, it would have been illogical from a technical point of view to order the discharge. The applicant considers that he has been obliged to prove his innocence, which infringes the principle of the presumption of innocence.

Further, the applicant points out that the administrative authorities have acknowledged that no administrative offence arose relating to the use of the river water or the discharge of water into the river, and that the failure of measuring apparatus cannot be considered as the sole direct cause of the incident. He claims that non-compliance with a tiny part of the conditions set out in the water-use licence cannot be deemed a breach of administrative law (see the Water Act of 2 August 1985 and the Regulations on the Use of Publicly-Owned Waters of 11 April 1986) such as would have, indirectly, allowed the "framework" criminal provisions creating the "ecological offence" to be applied. Moreover, the applicant considers that there is no causal link between the discharge and the decimation which occurred amongst the various fish species, so that no criminal law penalty can arise.

The Commission recalls, first, that the Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects (see Eur. Court H R , Engel judgment of 8 June 1976, Series A no. 22, p. 34, para 81) and, consequently, to define the constituent elements of such an offence. In particular, and again in principle, they may, under certain conditions, penalise a simple or objective act or omission, as such, irrespective of whether it results from criminal intent or negligence. The Commission also recalls that presumptions of fact or law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. Article 6 para. 2 does not regard presumptions of fact or law provided for in the

criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see Eur. Court H.R., Salabiaku judgment of 7 October 1988, Series A no 141, p 16, para 28).

In this regard, the Commission notes that La Coruña Audiencia Provincial expressly found in its judgment in the present case that the applicant (who, as the plant manager for company C, was the person responsible for any emissions or discharges in such places or of such kinds as were referred to in the relevant legislation) had knowingly and wilfully omitted to display the requisite care and diligence and had thereby created a risk which he should have foreseen and avoided.

The Commission also notes that the Constitutional Court judgment stated that the tribunal of fact had based its findings on a certain amount of circumstantial and direct evidence which had led it to find the applicant guilty of an offence of negligence or recklessness and that, in finding the applicant guilty, it had properly assessed the causal relationship between the circumstantial evidence and the consequences. The Commission notes that the applicant was able to defend himself and that the presumption of 'liability' for discharges arising against him as C's plant manager was not irrebuttable. It notes that both the Criminal Court and the Audiencia Provincial gave their judgments after hearing the applicant's side of the case, that their decisions set out full reasons and that they did not fail to weigh the evidence available to them, to assess it carefully and to base their finding of guilt on it.

More specifically regarding compliance with Article 7 of the Convention, the Commission recalls that, in order to be regarded as a 'law' within the meaning of the Convention, a criminal law provision must fulfil the requirements of accessibility and foreseeability. It must be formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee the consequences which a given action or omission may entail (see, *inter alia*, Eur. Court H.R., Muller and Others judgment of 24 May 1988, Series A no 133, p 20, par 29 and Kokkinakis judgment of 25 May 1993, Series A no 260, p 19, para 40).

The Commission considers that there can be no objection to clarifying or adapting the constituent elements of an offence to new circumstances which fall reasonably within the original concept of the offence. In the present case, section 347 bis of the Criminal Code made it an offence to cause to be released or to release, directly or indirectly into inland or sea waters any emission or discharge of any kind likely seriously to endanger human health or seriously to prejudice the conditions of animal life, forests [or] natural sites 'in breach of environmental protection legislation or regulations'.

The applicant was convicted under sections 565 and 347 bis of the Criminal Code in conjunction with the Water Act of 2 August 1985 and the Regulations on the Use of Publicly-Owned Waters of 11 April 1986. As regards the two last-mentioned



pieces of legislation, which relate to discharges of water, there can be no doubt that the applicant, as a specialist in the field, could not reasonably have been unaware of the obligations which they imposed on him.

Having regard to the above, the Commission considers that no breach of the rights guaranteed by the Convention can be found. It follows that the application is manifestly ill-founded and must be rejected under Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

**DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.**