

APPLICATION N° 28236/95

Fermín BOCOS RODRIGUEZ v/SPAIN

DECISION of 12 April 1996 on the admissibility of the application

Article 6, paragraph 2 of the Convention *States may establish presumptions of fact or of 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. Need to balance the various interests at hand: informing the public and upholding the presumption of innocence.*

In this case, the conviction of a journalist, who was the acting editor of a magazine while the editor was away, for imputing a crime to persons named in unsigned articles, did not infringe the principle of the presumption of innocence, as the journalist in question was able to defend himself and the presumption of "liability" was not irrebuttable.

Article 10, paragraph 1 of the Convention *The conviction of a journalist, who was the acting editor of a magazine while the editor was away, for imputing a crime to persons named in unsigned articles constitutes an interference with the exercise of the right to impart information.*

Article 10, paragraph 2 of the Convention *Conviction of a journalist, who was the acting editor of a magazine while the editor was away, for imputing a crime to persons named in unsigned articles.*

Interference prescribed by law and considered in this case to be necessary in a democratic society in the interests of protecting the reputation and rights of others. Margin of appreciation of the national authorities. Need to balance the various interests at hand: informing the public and upholding the presumption of innocence. Examination of the balance to be struck between the protection of freedom to impart information and the right to honour.

Article 26 of the Convention

- a) *To exhaust domestic remedies the person concerned must have raised before the national authorities, at least in substance, the complaint he puts before the Commission*
 - b) *An applicant who complains about the unfairness and excessive length of proceedings before a Spanish court must lodge an amparo appeal*
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THE FACTS

The applicant is a Spanish national and lives in Madrid. He is a journalist and the deputy editor on the weekly magazine "Interviú". He was represented before the Commission by Mr. Jesús Santaella López, a lawyer practising in Madrid.

A *Particular circumstances of the case*

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

Between 6 and 12 July 1983, "Interviú" published two articles, in its 373rd and 375th issues, on the "U" murder, which had been committed during the night of 1 August 1981. The articles named possible participants in the crime, quoting the victims' butler and other judicial or police sources.

On 18 July 1983, M. S., M. E. and J. H. instituted criminal proceedings against the applicant, the editor and executive editor of the magazine for injurious imputation and criminal defamation. In a decision of 27 December 1991, the Criminal Court acquitted the applicant on the grounds that the offence had not been made out and the authors of the offending articles had not been identified.

M. S., M. E. and J. H. appealed. In a judgment of 23 September 1992, Barcelona Audiencia Provincial allowed M. E.'s appeal, in part, and sentenced the applicant, under section 15 of the Criminal Code, to six months and one day's imprisonment for criminal defamation. The Audiencia Provincial specified that the applicant, who was the deputy editor of the magazine in question, edited the magazine in Madrid while the editor was on holiday.

On 29 October 1992, the applicant lodged an *amparo* appeal with the Constitutional Court, relying on the right to freedom of expression and the principle that only a statute can define offences and lay down penalties (Articles 20, para 1 (d) and 25 of the Constitution) and arguing that the information published was true and fell within the public domain and the public interest

His appeal was dismissed in a judgment of 30 January 1995. As regards the alleged infringement of his right to freedom of expression, the Constitutional Court first examined the lower courts' assessment of the rights in question, that is, the right to freedom to impart information and the right to honour. It held that, although the right to freedom of information is normally deemed to prevail over the right to honour on the ground that the aim of the former is to enlighten the public about matters concerning the public interest, injuring an individual's honour is not justifiable unless the information published is true and falls within the public domain and the public interest. Even though the articles in question were intended to impart information of public interest, the Constitutional Court found that the actual manner in which the information had been handled was such as to injure the respondent's honour.

As regards the article published in issue no. 375 of the magazine, the court held that, in this case, the article had quoted statements by the U s' butler implicating M E in the crime, and that, given that these statements had actually been made, "Interviu" bore no responsibility for checking their authenticity, as such responsibility lay entirely with the person making the statements.

However, as regards the article published in issue no. 373, the Constitutional Court found that, given the nature of the title on the cover page and that of the article, the magazine had not confined itself to quoting third parties, but had given its own embroidered version of the U s' murder and had expressly stated that certain individuals were involved. The Constitutional Court also stressed that the applicant had not only failed to cite the alleged source of the published information, but had also fallen short of professional standards by failing to check the authenticity of the information in question and, in particular, whether or not M E was being prosecuted, which resulted in serious injury to the honour of the persons named in the article. It concluded that the information in question was inaccurate and noted that nothing had emerged from either the police or the judicial investigation to implicate M E in the crime and that any such implication was probably pure invention on the part of the journalists.

As regards the alleged infringement of the principle that only a statute can define offences and lay down penalties, the Constitutional Court noted the applicant's submission that he was not the "deputy editor" of the publication in question, but assistant to the editor" and that section 15 of the Criminal Code had therefore been applied by analogy. The Constitutional Court held, however, that as the authors of the articles had not been identified, criminal liability was imputable to the person who had

assumed the editor's duties while the latter was on holiday, i.e. the applicant. The above-mentioned provision of the Criminal Code had not been applied by analogy in this case but, on the contrary, on the basis of a very literal construction of the relevant section. The court found further that as the applicant had acted intentionally or, at the very least, negligently, he was deemed criminally liable for the offence in question.

B. Relevant domestic law

(Original)

Código penal, artículo 15

« (...) solamente se reputarán autores de las infracciones mencionadas en el artículo 13 los que realmente lo hayan sido del texto (...) publicado o difundido. Si aquellos no fueren conocidos (...), se reputarán autores los directores de la publicación (...).»

(Translation)

Criminal Code, section 15

"... only the actual authors of the words ... published or disseminated shall be deemed to have committed an offence under section 13 (1). Where the actual authors have not been identified ..., the persons responsible for the publication shall be deemed to have committed such offence."

COMPLAINTS

1 The applicant complains that he did not have a fair trial within a reasonable time, contrary to Article 6 para. 1 of the Convention.

2 The applicant also complains of a breach of the presumption of innocence. He considers that it was never proven that he was involved in the offence and that he was convicted on the basis of an application by analogy - which is prohibited in the domain of criminal law - of section 15 of the Criminal Code. He invokes Articles 6 para. 2 and 7 of the Convention.

3 The applicant argues lastly that the Spanish courts' decisions infringed his right to freedom of expression in so far as the courts incorrectly evaluated the conflicting constitutional rights and convicted him on the grounds that he had failed to check the authenticity of the information published, despite the fact that, as the proceedings were pending before the courts, he could not have done so. He invokes Article 10 of the Convention.

(1) Major and minor offences committed by means of print, ... or any other mechanical means of reproduction, broadcasting or other method which has facilitated publication. Only the authors shall be criminally liable.

THE LAW

1 The applicant complains that he did not have a fair trial within a reasonable time, contrary to Article 6 para 1 of the Convention, the relevant part of which reads as follows

1 In the determination of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by a tribunal

The Commission notes, however, that the applicant's *amparo* appeal to the Constitutional Court omitted to raise expressly, or even in substance, the complaint which he now raises before the Commission. The applicant has not therefore validly exhausted domestic remedies. This part of the application must therefore be rejected in accordance with Articles 26 and 27 para 3 of the Convention.

2 The applicant complains further of a breach of the presumption of innocence and considers that he was convicted on the basis of an application by analogy which is prohibited in the domain of criminal law of section 15 of the Criminal Code. He invokes Articles 6 para 2 and 7 of the Convention, the relevant parts of which are worded as follows

Article 6 para 2

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

Article 7

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 Commission notes the Constitutional Court's ruling that as the authors of the articles had not been identified in this case, criminal liability was imputable to the person who had assumed the editor's duties while the latter was on holiday, i.e. the applicant. The Constitutional Court also held that the provision of the Criminal Code under which the applicant had been convicted was not applied by analogy, but, on the contrary, on the basis of a very literal construction of the section

The Commission recalls that presumptions of fact or of law do in any case 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 of the Convention does not regard presumptions of fact or of 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).

The Commission notes in this regard that, on the facts, Barcelona Audiencia Provincial found that the applicant, who was deputy editor of the magazine in question, edited the magazine in Madrid while the editor was on holiday. It notes that the applicant was able to defend himself and that the presumption that he, as acting editor, was "liable" was not irrebuttable. The Commission notes on this point that both the Criminal Court and the Audiencia Provincial gave judgment in fully reasoned decisions after hearing evidence from the applicant and that they duly weighed in the balance the evidence in their possession, assessed that evidence with care and convicted the applicant on the basis of that evidence, given that he had acted at the very least negligently in authorising publication of the offending material without first checking its authenticity.

Having regard to the foregoing, the Commission does not find any infringement of the rights guaranteed by the relevant provisions of the Convention. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 27 para. 2 of the Convention.

3 The applicant argues finally that the Spanish courts' decisions infringed his right to freedom of expression, contrary to Article 10 of the Convention, which provides that.

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"

The Commission considers first of all that there was in this case an interference by the public authorities with the applicant's right to freedom to impart information within the meaning of Article 10 of the Convention

The question arises whether that interference is justifiable under paragraph 2 of that provision. The Commission will therefore examine whether the interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

No difficulties arise here in respect of the first two conditions, in so far as this kind of interference is provided for by the combined provisions of Articles 18 para 1 and 20 para 1 (d) of the Constitution and the case-law of the Constitutional Court and was aimed at protecting the reputation of others.

As regards whether the measure was necessary in a democratic society, the Commission recalls that the protective machinery established by the Convention is subsidiary to the national systems for the protection of human rights (Eur Court H.R., the Case "relating to certain aspects of the laws on the use of languages in education in Belgium" of 23 July 1968, Series A no 6 p. 35, para 10), and emphasises that Article 10 para 2 of the Convention leaves to the Contracting States a margin of appreciation; this margin is given both to the domestic legislator and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (Eur. Court H.R., Engel and Others judgment of 8 June 1976, Series A no 22 pp 41-42, para. 100)

It is not the Commission's task to take the place of the competent national courts, but rather to review under Article 10 of the Convention the decisions given by those courts in the exercise of their power of appreciation.

The Commission considers, however, that account must be taken of the specific circumstances of the case and a balance struck between the interests involved, namely the legitimate interest of the public and of the press in being informed and the interest of the person suspected of committing an offence (cf, *inter alia*, No 10857/84, Dec. 7 10.85, D R 44 p. 245)

The Commission notes here the Constitutional Court's ruling, in which it referred to its case-law, that an assessment of the freedom of information - at least where an individual's honour is at stake - should draw a distinction between what are facts and what are comments on the conduct of the individuals concerned, and that statements liable to injure another's honour should be proscribed unless necessary to inform the public

The Commission observes that the Constitutional Court, in examining the *amparo* appeal, first considered whether the lower courts had correctly assessed the rights in question, namely the right to freedom to impart information and the right to honour. It held that although the right to freedom to impart information had to be recognised as prevailing over the right to honour, given the former's aim of informing

the public about matters concerning the public interest, injuring an individual's honour was not justifiable unless the information published was true and fell within the public domain and the public interest.

The Commission notes that, on the facts, given the seriousness of the crime in question, there was a clear public interest in the information being published

As regards the authenticity of the information published and, in particular, the article published in issue no. 375 of the magazine, the Commission notes the Constitutional Court's finding that the applicant could not be held liable for the information contained in that article. However, as regards the article published in issue no. 373, the Commission notes the Constitutional Court's finding that the magazine had given its own version of the facts and had expressly stated that certain individuals were involved. The Constitutional Court stressed that the applicant had fallen short of professional standards by failing to check the authenticity of the information and that implicating M.E. in the crime had resulted in serious injury to the latter's honour. The court went on to note the lack of reference to the alleged judicial and police sources of the information published and concluded that the applicant could not rely on the right to freedom to impart information to justify injuring an individual's honour

The Commission considers, in the light of the criteria laid down by the relevant case-law of the Convention organs, that the Spanish courts assessed the rights in question, that is, the right of freedom to impart information and the protection of the reputation of others, on the basis of fully reasoned decisions.

The Commission notes, in particular, that the Constitutional Court, in its judgment of 30 January 1995, took care to examine in detail the criteria to be taken into account in assessing the rights in question fairly and that it attached particular importance to the fact that the applicant, who, at the material time, was acting editor of the magazine in question, had failed to check the authenticity of the information and had authorised publication thereof without first ascertaining its source and without M.E.'s involvement in the crime being clear from the judicial or police investigation.

In the light of these considerations, the Commission concludes that, on the facts, a fair balance was struck between the various interests at stake and that the applicant's conviction is therefore justified as having been necessary in a democratic society for the protection of the rights of others

It follows that this part of the application is also manifestly ill founded and must be rejected in accordance with Article 27 para 2 of the Convention

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE