



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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28 May 2009

FIRST SECTION

Application no. 6490/07
by Wolfgang ROTHE
against Austria
lodged on 5 February 2007

STATEMENT OF FACTS

THE FACTS

The applicant, Mr Wolfgang Rothe, is a German national who lives in St Pölten. He is represented before the Court by Ms M. Windhager, a lawyer practising in Vienna.

A. The circumstances of the case

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

The applicant used to be the deputy principal (*Subregens*) of the St Pölten seminary (*St. Pöltener Priesterseminar*), where future Roman Catholic priests are trained.

The seminary became the subject of public debate after police carried out a house search and discovered that one of the seminarians had downloaded child pornography on his computer.

On 12 July 2004 the weekly news magazine “profil” published an article entitled “Go on!” (*Trau dich doch*), with the sub-heading “Porn scandal. Photographic evidence of sexual antics between priests and their students has thrown the diocese of St Pölten into disarray. First the principal and now the deputy principal have resigned. High-ranking dignitaries expect Kurt Krenn [i.e. the bishop of the diocese] to be removed from office.” (*Pornoaffäre. Fotobeweise von Sexspielen zwischen Priestern und deren Schülern stürzen die Diözese St. Pölten ins Chaos. Nach dem Regens tritt*

auch der Subregens zurück. Höchste Würdenträger erwarten die Entmachtung von Kurt Krenn.)

The article stated that the applicant and the principal had had homosexual relations with the seminarians, but that previous rumours that seminarians were coerced into engaging in homosexual acts with their superiors had not been confirmed. The article also stated that some seminarians had downloaded pornography and child pornography on their computers. According to the article, homosexual relations were well-known within the seminary and even known to the bishop, who had tried to hush up the case at first. However it would be likely that the officials of the Roman Catholic Church in Rome would now take disciplinary sanctions against the leading persons in the diocese.

In the article two photos of the applicant were published, one on which he was about to hug the seminarian Mr K. and on the other photo the applicant and Mr K. were about to kiss each other. On this photo the applicant's eyes are closed and his mouth is half open.

The photos had been taken by Mr P., another seminarian, at a Christmas party in the applicant's apartment on 24 December 2003. The applicant claims that before the bishop confronted him with the pictures, he had not known that they existed.

On 6 August 2004, the applicant applied to the Vienna Regional Criminal Court. Relying on sections 6 et seq. of the Media Act (*Mediengesetz*), he claimed that the allegations of the article amounted to defamation (*üble Nachrede*) and violated his right to privacy, especially the following passages:

“Porn scandal. Photographic evidence of sexual antics between priests and their students has thrown the diocese of St Pölten into disarray.” (*Pornoaffäre. Fotobeweise von Sexspielen zwischen Priestern und deren Schülern stürzen die Diözese St. Pölten ins Chaos*), “A painful truth: Krenn's principal engaged in sex with subordinates, also Krenn's private secretary and legal adviser ...” (*Diese Wahrheit ist schmerzlich: Krenns Regens beim Sex mit Untergebenen, Krenns Sekretär und Rechtsberater ebenfalls ...*), “Photos showing, among others, seminarians from St Pölten in kinky situations, in some cases with their superiors ... and because they were doing it with the boss and his deputy too, it was all quite normal and they felt perfectly safe ...” (*Fotos auf denen auch St. Pöltner Jungpriester in perversen Situationen, teils mit ihren Vorgesetzten zu sehen sind ... und weil sie es auch mit dem Chef und seinem Stellvertreter getrieben haben, war alles so normal, und man sich ganz sicher gefühlt ...*).

The applicant thus applied to the court to schedule a hearing, order the newspaper editor to publish a short notice that proceedings are pending because of the article, order the newspaper editor to pay compensation to the applicant and publish the judgment and order the newspaper to pay the cost of the proceedings.

The newspaper editor replied that the contents of the article were true; he also argued that in the light of the Roman Catholic Church's position of condemning homosexuality and the fact that the applicant was the private secretary of the bishop, who had repeatedly publicly condemned homosexuality as being a sin and being a disease, there was a connection to public life and a public interest of knowing about the situation at the seminary. The newspaper editor also relied on Article 10 of the Convention.

The Vienna Regional Criminal Court held hearings and heard several witnesses, among which seminarians. It refused to take as evidence an expert's opinion submitted by the applicant, which apparently stated that the photo does not show a French kiss but a kiss on the cheek and that the perception of the kiss as a French kiss is due to an optical illusion.

In its judgment the court thus established as fact that the applicant was the deputy principal of the seminary. Proceedings on suspicion of child pornography had been commenced against several seminarians. After child pornography and homosexual pornography were found saved on a computer in the course of a house search, the public started to be interested in the seminary and the sexual orientation of the seminarians and the heads of the seminary, and even more so after the bishop had played down the occurrences at the Christmas party as "boyish pranks" (*Bubendummheiten*). Against this background the article and the two incriminating photos had been published. The photos showed the applicant and Mr K. about to exchange a French kiss. Newspapers such as the defendant weekly newspaper are not only read by persons who diligently read each article but to a large extent also by readers who browse articles they find important, and also consume other media. Such a reader would find in the article that in the seminary homosexual contacts between seminarians and also between the applicant and Mr K. had taken place and that photos of this existed. It was clear that the kiss was not merely a kiss but a French kiss and the sexual motivation of the kiss was visible from the fact that the applicant and K. had their eyes closed, their mouths open and their tongues were visible. Since the article also stated that previous rumours about sexual coercion of the seminarians by their superiors were not confirmed, it was clarified that the two men had a consensual homosexual relationship.

The court found that the newspaper had in essence succeeded to prove that the facts were true (*Wahrheitsbeweis*). The photos had been taken during a Christmas party in the applicant's apartment; from the quotation of the applicant's statement according to which the photos could be interpreted in one way or the other, the reader would conclude that the photos were real and had not been manipulated before publication.

Regarding the assessment of evidence, the court held that some witnesses' statements were partly not credible, and one witness had made the impression of being very insecure and only after several questions admitted that the affidavit he had signed had actually been drafted by the applicant. The court found the statements of one of the witnesses, R., credible. He had stated that during the Christmas party the applicant and K. had kissed each other a few times. The credibility of R.'s statements was also not lowered by the fact that he had signed an affidavit that there were no homosexual relations in the seminary and later recalled the affidavit, saying he was pressured into signing it by – among others – the applicant and the bishop.

The request to obtain the opinion of an expert in photogrammetry was rejected as section 126 of the Code on Criminal Procedure (*Strafprozeßordnung*) provided that experts' opinions were only to be taken in case of necessity, necessity being defined as a situation where the solution of a question of fact requires expert knowledge the court does not have. In so far as a judge is able to judge evidence by his or her own

knowledge, an expert's opinion is not necessary. The judge held that the photo, of which it was never claimed that it was a manipulated photo, could be interpreted without an expert.

The court thus concluded that the incriminated statements amounted to libel as in section 111 of the Criminal Code (*Strafgesetzbuch*). Section 7 of the Media Act provides for a claim for compensation if issues of a person's private life is described or discussed in a manner capable of embarrassing him or her in public. Private life is mostly defined as being family life, health issues and sexuality. No such claim for compensation is awarded if the publication is true and in direct connection with public interest.

As the Roman Catholic Church still has a strong influence as a role model to the Austrian public, the public has an interest in knowing about incidents within the Church, especially about the incidents in the seminary in connection with the possession of child pornography.

Since the applicant had been the deputy principal of the seminary, he is to be considered as a public figure in this function. Although the pictures were taken in the applicant's apartment, there still is a connection with the applicant's public function, and the proof that the facts were true was admissible. Thus, even though the incriminated passages of the article touched upon the applicant's private life and accusing a Roman Catholic dignitary homosexual activities amounts to libel, the passages were proven to be true and therefore the applicant could not claim compensation.

The applicant lodged an appeal on points of law and fact (*Berufung wegen Nichtigkeit und Schuld*) to the Vienna Court of Appeal (*Oberlandesgericht*).

In its judgment of 28 June 2006 the Court of Appeal, after holding a hearing, turned down the appeal. It held that the first instance court had rightly held that the newspaper editor had in essence proved that the facts were true. The incriminated statement that photos showing seminarians in "kinky situations" (*perverse Situationen*) existed was true in so far as the majority of readers would qualify photos of Roman Catholic seminarians in sexual acts as "kinky", especially as the persons involved belong to a group that publicly denounces homosexuality as a sin. The applicant's complaint that the newspaper editor had not proven there was a homosexual relationship between the applicant and Mr K. was turned down as the Court of Appeal found the photo of the two hugging and kissing and a witness who had stated he had seen them French kissing at the Christmas party was sufficient to prove that there was a relationship.

The applicant's argument that he was not a public figure was rejected as the Roman Catholic Church is a body of public law and Austria has ratified a treaty with the Holy See on its recognition (*Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich*). Therefore acts of dignitaries which are in blatant disaccord with the principles of this religion can be of public interest, especially when happening in a training institution. The public interest also results from the fact that the Roman Catholic Church's position on homosexuality is in contradiction to an individual's right to privacy as regards his or her sexual life (as enshrined in Article 8 of the Convention on Human Rights) and the prohibition of discrimination. Uncovering the occurrences at the seminary was thus in the public interest. Also, identifying the applicant in the article had been necessary as otherwise

the newspaper could not have plausibly criticised the occurrences at the seminary. Furthermore the applicant was not only active in the seminary but also the private secretary and legal adviser to the bishop and did public relations work; therefore there was a connection to public life.

As regards the complaint that the first instance court had not taken the expert's opinion into consideration, the Court of Appeal held that the judge had rightly held she could interpret the photo on her own. Furthermore the statement that the applicant and Mr K. had a homosexual relationship was not only based on the photo of them kissing but first and foremost on a witness' statement. Therefore it was not decisive whether on the photo the applicant's tongue was visible or whether it was just an optical illusion and what was seen on the photo was not his tongue but the inside of his cheek.

The Court of Appeal also rejected arguments on the appeal on points of fact, finding that the first instance court had given valid reasons why it found some witnesses' statements more credible than others.

The judgment was served on the applicant's counsel on 13 July 2006.

B. Relevant domestic law

Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim damages from him. In this context "defamation" has been defined in Article 111 of the Criminal Code (*Strafgesetzbuch*), as follows:

"(1) Anybody who, in such a way that it may be noticed by a third person, attributes to another a contemptible characteristic or sentiment or accuses him of behaviour contrary to honour or morality and such as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine ...

(2) Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public, shall be liable to imprisonment not exceeding one year or a fine ...

(3) The person making the statement shall not be punished if it is proved to be true. In the case of the offence defined in paragraph 1 he shall also not be liable if circumstances are established which gave him sufficient reason to believe that the statement was true."

Section 6 of the Media Act provides as follows:

"(1) Where a medium publishes statements which constitute the actus reus of disparagement, insult, derision or defamation the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered ..."

(2) The right referred to in paragraph 1 above shall not apply where ...

2. in the case of defamation

(a) the publication is true or

...

(3) Where the publication concerns the strictly personal sphere, a claim under s.1 shall only be excluded on the grounds set forth in ... s. 2(2)(a) ..., but in the case of s.2(2)(a) not where the published facts directly relate to public life.

Section 7 of the Media Act provides a claim for damages in cases of interference with the strictly personal sphere of an individual's life. It reads as follows:

“(1) If the strictly personal sphere of an individual’s life is discussed or portrayed in the media in a way liable to publicly undermine the individual concerned, he or she shall have the right to claim compensation for the damage sustained from the media proprietor (publisher). ...

(2) The right referred to in paragraph 1 above shall not apply where:

(i) ...

(ii) the statements published are true and are directly related to public life;

(iii) ... “

COMPLAINTS

1. The applicant complains under Article 8 of the Convention about a violation of his right to respect for his private life, in that the courts failed to protect him against a defamatory newspaper article which displayed his private life in public and against the publication of his picture.

The applicant claims that the newspaper editor had not succeeded in proving that the article was true, as the article implied that he engaged in perverted sexual practices and that photos of him engaging in these practices existed. He also argues that the witness on whose statements the first instance court had based some of its findings was not at all reliable.

The applicant argues that he is not a public person and that his public relations work for the bishop and the Church also did not render him a public person. There was thus no public interest in media coverage identifying him and in having the photos of him published. The applicant thus claims that the State had failed to protect his rights under Article 8 of the Convention, as his rights under Article 8 of the Convention prevailed over the newspaper editor’s rights under Article 10 of the Convention.

2. The applicant complains under Article 6 of the Convention that the courts had refused to take the expert’s opinion on photogrammetry into consideration, which would have rebutted the newspaper editor’s proof that the article was true.

3. Lastly the applicant complains of a violation of Article 13 of the Convention, arguing that there is no possibility of an appeal to the Supreme Court.

QUESTION TO THE PARTIES

Has there been a violation of the applicant’s right to respect for his private life, contrary to Article 8 of the Convention?