

Criminal chamber ruling: Freedom of expression on the internet

01/09/2020



Freedom of expression on the internet (Article 10 ECHR): Referring to a defamatory hypertext is not in itself defamatory.

Ruling n°1168 of 1 September 2020 (19-84.505) – Cour de cassation (Court of Cassation) - Criminal Chamber-
ECLI:FR:CCAS:2020:CR01168

Press

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Summary

The publication of a right of reply requested pursuant to Article 13 of the Law of 29 July 1881 on the freedom of the press is not prejudicial to the honour of the journalist, author of the original article that is being replied to such an extent that it could prevent its publication, when such reply merely questions, in terms proportionate to the article, the legitimacy of the aim pursued by article, the seriousness of the investigation carried out by its author, his prudence in expressing himself or his lack of personal animosity.

The ruling confirming the refusal to publish a reply on the grounds that it would be prejudicial to the journalist's honour is sanctioned. Criticism of the journalist's methods that were expressed in strong but measured terms remained proportionate to the content of the original article, the ironic tone of which the court accurately perceived.

Appellant : Ms B... Y...

Facts and procedure

1. According to the ruling under appeal and to the submissions in the proceedings :

2. On 20 February 2017, Alternative Libertarian group posted a press release on its website containing the following message : "On 28 January 2017, the federal committee of Alternative Libertarian voted to exclude A..., a member of the Moselle group, following an accusation of rape. This decision results from a federal procedure that began within the organisation in November 2016 with the provisional suspension of the activist concerned. At the end of this procedure, the organisation deemed the facts extremely serious and that the activist's presence within our ranks had become impossible. We would like to inform broadly our activist community of our decision to ensure that there is no possibility of A... further perpetrating such acts. We call on all other bodies in which he could continue to perpetrate such acts to make necessary arrangements to ensure the safety of their activists and supporters. We believe it is essential to break the law of silence that allows such behaviour to prosper".

3. The trade union CNT Santé, social, collectivités territoriales (SSCL) de Lorraine, of which A... was a member, subsequently published a text on 5 March 2017 referring to this press release and criticising the internal procedures of the Alternative Libertarian group. It stated that the information it had in its possession did not lead it to the same conclusion with regard to the accusation of rape against A.... It recalled that Alternative Libertarian had previously acted differently with two other members of its organisation, also accused of rape, and had not excluded them.

4. On the 9 March 2017, these two texts were reproduced in their entirety on a third-party website accessible at [...], with the title "Accused of Rape, A... X... causes a crisis among antifascists (Màj)". 5. On the same day, Ms Y..., an elected local representative, posted a hyperlink to the said publication via her Facebook account, preceded by the words "Where an **antifa** group which rules in Metz justifies covering up for its leader accused of rape... by accusing the antifa group which denounces it of covering up for... two rapists in their ranks". It's laughable, were the context not so serious".

6. On May 27, 2017, Mr. A... X... filed a complaint and filed a civil action for public defamation on the basis of the sole text emanating from Alternative Libertarian, to the extent that it had been subsequently reproduced on numerous websites, including that of Ms Y

7. The case was referred to the tribunal correctionnel (Criminal court) which found Ms Y... guilty.

8. Ms Y.... appealed the conviction.

On the possible statute of limitations on the public action referred to in the report

9. As the proceedings were initiated on 27 May 2017, i.e. more than three months after the disputed document was first posted online on 20 February 2017, the first question to be asked is whether the hypertext link in question making reference to the disputed document and inserted on 9 March 2017, could have triggered a new limitation period.

10. The Cour de cassation (Court of Cassation) ruled that when proceedings for defamation and public insults are initiated on the basis of the dissemination of a message on the internet, the starting point of the limitation period for the public action provided for in Article 65 of the Law of 29 July 1881 on the freedom of the press must be set at the date of the first act of publication, and that this date is the date on which the message was first made available to the users of the network (Crim, 16 October 2001, Appeal No. 00-85.728, Bull. crim. 2001, No. 210, dismissal).

11. With regard to paper publications, it considers that since the publication is the element by which the offences are carried out, any public reproduction in writing of a text already published is itself an offence and that the starting point of the limitation period, in the case of a new publication, is set at the date of that publication (Crim., 8 January 1991, appeal no. 90-80.593, Bull. crim. 1991, no. 13, quashing ; Crim. 2 October 2012, appeal no. 12-80.419, Bull. crim. 2012, no. 204, dismissal). The same applies to radio and television rebroadcasts (Crim., 8 June 1999, Appeal No. 98-84.175, Bull. crim. 1999, No. 128, dismissal).

12. With regard to the internet, it restates the same principle. It rules that making publicly available disputed content that was previously posted on a website in situations where the owner deliberately reactivates the website, having previously deactivated it, amounts to a reproduction triggering a new limitation period (Crim., 7 February 2017, appeal no. 15-83.439, Bull. crim. 2017, no. 38, quashing).

13. On the other hand, it stated that the mere addition of a second address to access an existing website could not be regarded as a new act of publication of texts already appearing identically on that site (Crim., 6 January 2009, Appeal No. 05-83.491, Bull. crim. 2009, No. 4, dismissal), having observed that such an addition had been made by the site's publisher.

14. Lastly, with specific consideration of the use of a hypertext link, the Court considers that the insertion on the internet by the author of a written document of a link referring directly to the said document, previously published, is characteristic of such reproduction (Crim., 2 November 2016, appeal no. 15-87.163, Bull. crim. 2016, no. 283, quashing).

15. As a result, a hypertext link which, as in the present case, refers directly to a written document which has been put online by a third party on a separate website, constitutes a reproduction of this text, which triggers a new limitation period. The public action was therefore not time-barred.

Reviewing pleas

On the first plea Statement of the plea

16. The plea submits that the ruling under appeal has upheld the judgment whereby Ms Y... was found guilty of public defamation of Mr X..., whereas : "1°/ the statements published by Ms Y... on her facebook account criticise an "antifa" group which justifies covering up its leader accused of rape by accusing another "antifa" group, which denounces the latter of covering up two of its members also accused of rape ; that they are accompanied by a hypertext link to an internet site entitled "Accused of rape, A... X... provokes a crisis among antifascists", reproducing, on the one hand, the press release published by Alternative Libertaire on its own website concerning the exclusion of A... from its movement following an accusation of rape and, on the other hand, the press release subsequently published by the Lorraine CNT SSCT union on its own website criticising the handling of the case by Alternative Libertaire and contesting the credibility of the rape accusations brought against A... X... and also criticising Alternative Libertaire for having, shortly beforehand, cleared two other members also accused of rape ; by redirecting facebook users to this information concerning the exclusion of a group from the "antifa" movement of a militant accused of rape and the turmoil that this exclusion caused in this movement, information already available to the public on internet sites ; Ms. Y.... had not accredited Mr X... with any specific fact likely to be prejudicial to his honour or reputation ; by nevertheless categorizing the defamation of an individual as public defamation, the court of appeal violated Article 10 of the European Convention on Human Rights and Articles 23, 29 paragraph 1, 32 paragraph 1 of the Act of 29 July 1881, 591 and 593 of the Criminal Procedure Code ; 2°/ the insertion of a hypertext link engages the criminal liability of its author only with regard to the content to which the link refers and only if the author has approved that content or has embraced the content knowing that it was

defamatory ; in the present case, Ms Y.. merely created a hypertext link to the content of the Fdesouche site, without having embraced or approved the content ; for its part, this site reproduced, without having approved them, the press releases published respectively by Alternative Libertaire and the SSCT trade union of Lorraine CNT on their own sites ; Ms Y...who is not an information professional, could not reasonably have presumed that the insertion of a link via her Facebook account to the Fdesouche site that simply reproduced the Alternative Libertaire press release and also included the press release of the Lorraine CNT SSCT trade union could be considered as constituting the offence of public defamation in respect of Mr. Y.. X..., on the grounds that it could be considered as a new act of publication of the accusation of rape disclosed in the first communiqué, which would itself be defamatory ; in holding that the text published by Alternative Libertaire and "re-disseminated" by the defendant contained a pure and simple accusation of rape against A... X..., and that the fact that the defamation was supported by a hypertext link was "without prejudice", the insertion of such a link "being tantamount to reproduction" and "publication", without carrying out a concrete examination of the circumstances of the case and without weighing up stakes, the court of appeal failed to take account of Articles 10 of the European Convention on Human Rights, 23, 29 paragraph 1, 32 paragraph 1 of the Law of 29 July 1881, 591 and 593 of the Criminal Procedure Code."

Court's response

In view of Article 10 of the European Convention on Human Rights, Article 29(1) of the Law of 29 July 1881 on the freedom of the press and Article 593 of the Criminal Procedure Code :

17. It follows from the first of these texts, as interpreted by the European Court of Human Rights (ECHR, judgment of 4 December 2018, Magyar Jeti Zrt v. Hungary, no. 11257/16), that hypertext links contribute to the proper functioning of the internet by making the very extensive information contained therein easily accessible, so that, in order to assess whether the author of such a link, who refers to content liable to be defamatory, may incur criminal liability as a result of the re-publication of that content, he or she must take steps to do so, The court must examine in particular whether the author of the link has approved the disputed content, has only taken over the disputed content or has merely created a link, without taking over or approving the disputed content, whether he knew or was reasonably supposed to know that the disputed content was defamatory and whether he acted in good faith.

18. Such an examination concerns elements extrinsic to the incriminated content, the nature of which the Cour de cassation (Court of Cassation) considers that it is for the courts to take into account when assessing the meaning and scope of the statements prosecuted as defamatory, within the meaning of the second of these texts (Crim., 27 July 1982, appeal no. 81-90.901, Bull. crim. 1982, no. 199, dismissal ; Crim., 11 December 2018, appeal no. 17-84.899, Bull. crim. 2018, no. 214, quashing).

19. While the Cour de cassation (Court of Cassation) also holds that the court's assessment of these extrinsic elements is sovereign (Crim., 8 October 1991, appeal no. 90-83.336, Bull. crim. 1991, no. 334, dismissal), it is nevertheless incumbent upon it to ensure that such an examination has been carried out in compliance with the requirements of Article 10 of the European Convention on Human Rights as interpreted by the European Court of Human Rights.

20. Finally, any judgment or ruling must include the grounds for the decision and respond to the main points of the parties' submissions. Insufficient or contradictory grounds are tantamount to their absence.

21. In finding the defendant guilty, the ruling under appeal, after correctly pointing out that the statement in question contained an insinuation that the plaintiff had committed the crime of rape, states that the fact that the defamation was supported by a hypertext link is irrelevant, in so far as the reactivation of content on the Internet is tantamount to reproduction and the insertion of such a link constitutes a new act of publication.

22. The court notes that by activating the hypertext link, the reader becomes aware of the rape charge against Mr. X.

23. In so deciding, without examining the elements extrinsic to the content in issue, namely the manner and context in which the hypertext link to such content had been inserted, and in particular the meaning of the other text to which the link referred, which contradicted the aim pursued, and the conclusions drawn by the defendant from the combination of

those two texts, the cour d'appel (court of appeal) did not justify its decision.

24. The quashing is therefore pronounced on this ground.

ON THESE GROUNDS, and without examining the second ground, the Court :

QUASHES AND SETS in all its provisions, the above-mentioned judgment of the Cour d'appel of Metz (Metz Court of Appeal), dated 13 June 2019, and for a retrial in accordance with the law ;

REFERS the case and the parties to the Cour d'appel of Paris (Paris Court of Appeal), to be designated by a special decision taken in chambers ;

President : Mr. Soulard

Reporting Judge : Mr. Bonnal

Advocate-General : Mr. Croizier

Lawyers : SCP Le Griel

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Translated rulings