

Invocation of the state of necessity to justify an offence : breaking into a nuclear power plant to denounce the lack of protection of the nuclear power station's pools and absence of current or imminent danger

15/06/2021



Ruling no 743 of 15 june 2021 (20-83.749) - *Cour de cassation* (Court of Cassation) - Criminal Chamber -
ECLI:FR:CCAS:2021:CR00743

Dismissal

Appellant(s) : Greenpeace France association, and others

Civil Party : Électricité de France (EDF)

Facts and procedure

1. The following results from the ruling under appeal and the documents of the proceedings.
2. On 12 October 2017, at around 5 am, eight members of the Greenpeace France association broke into the Cattenom nuclear power plant by scaling an enclosure and cutting through fencing.
3. They were arrested and issued with a summons to appear before the criminal court. They were charged with trespassing, without authorisation from the competent authority, on the premises of a civil facility containing nuclear materials, within an enclosed space, in concert and causing damage. These offences are stipulated in Articles L. 1333-13-14, L. 1333-13-12, L. 1333-1, L. 1333-2, L. 1333-14, L. 1411-1, D. 1333-79 of the Defence Code, L. 593-8 of the Environment Code, and punishable by Articles L. 1333-13-14, paragraph 5, and L. 1333-13-17 of the Defence Code.
4. The preliminary enquiry led to the summons to appear before the same court, for both the Greenpeace association on account of the same offence and Mr [T] for aiding and abetting.
5. The court of first instance found all the defendants guilty of the charges.
6. The defendants, the public prosecution and EDF, the civil party, appealed this decision.

Reviewing pleas

On the first plea, in its second, third and fourth parts; the second plea, in its second part; the third plea, in its second and third parts; the fourth plea; the fifth plea; the sixth plea; the seventh plea; and the eighth plea

7. They are not such as to allow the appeal to be admitted according to the meaning of Article 567-1-1 of the Criminal Procedure Code.

On the first part of the first plea, the third part of the second plea and the first part of the third plea

Statement of pleas

8. The first part of the first plea criticises the ruling under appeal in so far as it found Ms [Q], Mr [O], Ms [N], Ms [P], Mr [V], Mr [L], Mr [Y] and Mr [U] guilty of the offence of trespassing on the premises of a civil facility containing nuclear materials, in concert and causing damage, when:

“1° A person is not criminally responsible if they perform a necessary act to safeguard the person or property when faced with a current or imminent danger that threatens that same person, another person or property, unless there is a disproportion between the means used and the seriousness of the threat. If an event occurs, there is no longer the option of carrying out a necessary act to safeguard the life and physical integrity of oneself and others. By failing to adopt safety measures essential to safeguarding these interests, the danger qualifies as an actual and not a possible danger. In

order to exclude the state of necessity, affirming that the lack of protection of the nuclear power station's pools - used for cooling spent fuel that is still radioactive - in the event of land or air terrorist attack against the facility, does not represent an actual or imminent danger but rather the expression of a fear of a potential or even hypothetical risk (ruling page 25). It thus considers danger is present only in the event of a proven terrorist attack. It follows from the defendants' conclusions that, according to several expert reports and an IRSN opinion, the wall thickness of the fuel pools does not provide protection to these buildings, which contain the highest radioactivity, against external attacks (conclusions page 8). According to the report of the parliamentary commission of enquiry into the safety and security of nuclear facilities of 28 June 2018, submitted for the deliberations, in the event of an aerial terrorist attack on a nuclear power station, the competent authorities will be unable to act effectively beforehand because between its identification and the impact they will have too little time to intercept the aircraft (report, page 103). Finally, once the impact has occurred and the pool has been damaged, no human intervention is possible to counter the fallout due to the rapid massive release of lethal radioactivity in the immediate vicinity and over a very large radius (conclusions page 8). Therefore, the cour d'appel (Court of Appeal) infringed Articles 122-7 of the Criminal Code, L. 1333-13-12, L. 1333-13-14 of the Defence Code, together with Article 591 of the Criminal Procedure Code."

9. The third part of the second plea criticises the ruling under appeal in so far as it found the Greenpeace France association guilty of having provoked, encouraged or incited anyone, in this case Mr [O], Mr [L], Mr [Y], Mr [V], Mr [U] and Ms [Q], Ms [N] and Ms [P], to enter without authorisation the premises of a civil facility containing nuclear materials, the provocation or incitement having been followed by action, when:

"3°/ Quashing of the first plea will entail, by way of consequence, the quashing on the account of the operative part of the ruling which found Greenpeace France association guilty of provocation, followed by effect, to trespass without authorisation on the premises of a civil facility containing nuclear materials."

10. The first part of the third plea criticises the ruling under appeal insofar as it found Mr [T] guilty of aiding and abetting in the offence of trespassing on the premises of a civil facility containing nuclear materials, in concert and causing damage, when:

"1°/ Quashing of the first plea will entail, by way of consequence, the quashing on the account of the operative part of the ruling which found Mr [T] guilty of aiding and abetting trespass without authorisation on the premises of a civil facility containing nuclear materials."

Court's response

11. The pleas are joined.

12. In order to dismiss the state of necessity invoked by all the defendants - with the exception of Mr. [T] - the ruling, first recalled that their breaking and entering into a nuclear power plant without authorisation from the competent authority had been intended to denounce, by means of a high-profile action, the unreliability of the protection of a restricted and secure area. It held that, according to Article 122-7 of the Criminal Code, a state of necessity can only be usefully invoked if, on the one hand, danger is present or imminent, i.e. real, certain and in the process of being carried out or is likely to be carried out in the immediate future by directly threatening the person who carried out the unlawful act, and on the other hand, this act was the only way to avoid it.

13. The judges added that the defendants had acted to denounce the lack of protection of the nuclear power station's pools - used for cooling spent fuel that is still radioactive - particularly in the event of land or air terrorist attack against the facility. This represented not an actual or imminent danger threatening them directly, but the expression of a fear in the face of a potential, even hypothetical risk.

14. In so deciding, the cour d'appel (Court of Appeal) justified its decision.

15. Firstly, a future danger that cannot be prevented by any current measure cannot be considered a current or imminent danger within the meaning of Article 122-7 of the Criminal Code.

16. Secondly, the offence prosecuted was not, in itself, such as to remedy the danger complained of.

17. The pleas must therefore be dismissed.

On the first part of the second plea

Statement of plea

18. The first part of the second plea criticises the ruling under appeal in so far as it found the Greenpeace France association guilty of having provoked, encouraged or incited anyone, in this case Mr [O], Mr [L], Mr [Y], Mr [V], Mr [U] and Ms [Q], Ms [N] and Ms [P], to enter without authorisation the premises of a civil facility containing nuclear materials, the provocation or incitement having been followed by action, when:

"1°/ The criminal court cannot declare an accused person guilty of an offence without characterising all the constituent elements. The cour d'appel (Court of Appeal) declared the Greenpeace France association guilty of the offence of provoking, causing action to be taken of entering without authorisation the premises of a civil facility containing nuclear materials - a qualification that had not previously been considered, on the grounds that the Greenpeace France association had voluntarily assisted in preparing the offence of entering without authorisation the premises of a civil facility containing nuclear materials. The Greenpeace France association did so by organising it and providing activists with the means to commit the offence (ruling page 26). In fact, in finding the constitutive elements of the Greenpeace France association's aiding and abetting the unauthorised entry into the premises of a civil facility containing nuclear materials, the cour d'appel (Court of Appeal), infringed Article L. 1333-13-13 of the Defence Code by misapplication and Articles 121-7 of the Criminal Code and L. 1333-13-12 of the Defence Code by refusal to apply them, together with Articles 388 and 591 of the Criminal Procedure Code."

Court's response

19. In order to reclassify the acts of which the Greenpeace France association was accused and declare it guilty of provocation or incitement, causing subsequent action to be taken, to trespass onto the premises of a civil facility containing nuclear materials, the ruling stated that the findings were drawn from observations made by gendarmerie officers who had intervened on site, from news story images broadcast on the Arte television channel, and from explanations provided by the association's legal representative. These explanations noted that the events of 12 October 2017 were part of an awareness-raising campaign on the nuclear risk linked to the supposed fragility of fuel pools.

20. The judges added that this campaign was decided upon and organised by the association in accordance with the purposes defined by its statutes. The other defendants only participated in the activity that the association had chosen.

21. On the basis of these statements alone, the cour d'appel (Court of Appeal), which reclassified the facts as provocation to trespass, introduced into the deliberations by the defendant itself, instead of the initial charge of trespass, justified its decision.

22. As a result, the plea must be dismissed.

On the fourth and fifth parts of the third plea

Statement of plea

23. The third plea, in its fourth and fifth parts, attacks the ruling under appeal insofar as it found Mr [T] guilty of aiding and abetting the offence of trespassing on the premises of a civil facility containing nuclear materials, in concert and causing damage, when:

"4°/ Insufficient grounds are equivalent to having no grounds. Aiding and abetting requires a material act of aid or assistance, provoking or providing instructions. The assumption that Mr [T] had an active participation in organising the 12 October 2017 trespass is derived from an audio-visual documentary broadcast on the Arte channel. It established a conference was held by the accused on the eve of the event and in the vicinity of the premises. The chronological and geographical context demonstrated that this intervention was clearly directly linked to the trespass scheduled for the following day. The mere temporal and geographical proximity between a meeting and a militant action cannot establish that this meeting contributed to the organisation of the action. The only prosecutable evidence came from Mr. [T]'s words and images, as recorded and broadcast in this documentary. They only established, on the one hand, that Mr [T], working in his capacity as a Greenpeace employee as a nuclear campaigner, held an informative meeting before an audience of more than eight people, generally labelled by the commenting journalist as a "briefing". The subject was the failure to take into account the dangers around an explosion that would target a nuclear power station's cooling pool and the consequences such an event would have in terms of radioactivity. The meeting showed illustrations concerning the Fessenheim nuclear power station and not that of Cattenom. On the other hand, they only established that Mr. [T] had knowledge of the action planned by Greenpeace France the following day, but without establishing the slightest material act of aiding and abetting by provocation, provision of instructions or aid and assistance with a view to committing the act of trespass into the Cattenom power station on 12 October 2017 (conclusions on pages 5-7). Due to this, the cour d'appel (Court of Appeal) did not lawfully justify its decision in the light of Articles 121-7 of the Criminal Code and L. 1333-13-12, L. 1333-13-14 of the Defence Code, together with Article 593 of the Criminal Procedure Code;

5°/ Insufficient grounds are equivalent to having no grounds. Aiding and abetting requires a material act of aid or assistance, provoking or providing instructions. Mr [T]'s act of aiding and abetting is deduced from his description of the events prior to their occurrence to the journalist who accompanied him to the site of the trespass. He described the militants' action methods and objective. It is deduced from his using the pronoun "we/us", when giving the instruction "(Let us) turn everything off, get down, get down", from the assistance he gave in the documentary team's audio-visual recording of the trespass and its media coverage, and from his connection to the success of the trespass (ruling, pp. 26-27). These elements nevertheless only established that Mr [T], a Greenpeace employee, had knowledge of the methods of the trespass organised by that association, that he accompanied the documentary team to the vicinity of the site in order to view the trespass as a mere witness without being able to communicate with the activists, and lastly that in his capacity as spokesperson for the association, the defendant's statement about the success of an operation intended to demonstrate the danger linked to the lack of adequate security at the site and the cooling pools in particular (conclusions pp. 9-10). These elements do not characterise any act of aid or assistance to the commission of trespass, therefore the cour d'appel (Court of Appeal) did not lawfully justify its decision in the light of Articles 121-7 of the Criminal Code and L. 1333-13-12, L. 1333-13-14 of the Defence Code, together with Article 593 of the Criminal Procedure Code."

Court's response

24. In finding the defendant guilty of aiding and abetting trespass, the ruling stated that he was fully aware of the details of the operation to the extent that he was able to describe them precisely to the journalists who accompanied him.

25. The judges - after pointing out that he had been a full-time employee of the Greenpeace association since 2002 and that, the day before the intrusion, he had held a conference in front of several people, using an illustration of a nuclear power plant as visual aid, and that he had ended the meeting by stating that the next day he planned to demonstrate the fragility of the pools - deduce that, far from having taken part in a purely informative meeting of a general nature, he had in fact held a conference the day before in close proximity to the site, which was described as a "briefing" by the

attending journalists .This chronological and geographical context shows that this action was clearly directly linked to the trespass on the following day.

26. The cour d'appel (Court of Appeal) also noted that he accompanied the journalists by car at night and explained to them the method of action and the purpose of the trespass, before giving the "following instructions: (let us) turn everything off, get down, get down". The court determined that he escorted them to help set up the audio-visual recording by selecting a location that would provide an overall view and ensure the media coverage that the association had set out to achieve.

27. Finally, it noted that he was linked to the success of the operation in that he gave a report on it in front of the journalists' camera.

28. On the basis of these statements, which are based on its sovereign assessment of the facts and which characterise the acts of aid and assistance to the main act of trespass, the cour d'appel (Court of Appeal) justified its decision.

29. As a result, the plea must be dismissed.

30. Furthermore, the ruling is procedurally correct.

ON THESE GROUNDS, the Court:

DISMISSES the appeals;

SETS at 2,500 euros the total sum that the Greenpeace France association, Mr [L] [T], Mr [G] [L], Ms [E] [N], Mr [W] [Y], Mr [I] [O], Ms [J] [Q], Mr [F] [V], Ms [Q] [P] and Mr [S] [U] will have to pay to the company EDF pursuant to Article 618-1 of the Criminal Procedure Code;

President : Mr Soulard

Reporting Judge : Mr Samuel

Advocate-General : Mr Quintard

Lawyers : SCP Bauer-Violas, Feschotte-Desbois et Sebagh - SCP Sevaux et Mathonnet

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