AS TO THE ADMISSIBILITY OF

Application No. 16269/90
by B.T.
against Norway

The European Commission of Human Rights (Second Chamber) sitting in private on 1 April 1992, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO

Mr. K. ROGGE, Secretary to the Second Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 24 May 1989 by B.T. against Norway and registered on 8 March 1990 under file No. 16269/90;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Norwegian citizen, born in 1954. He is a journalist and resides at K., Norway. Before the Commission he is represented by Mr. Kevin Boyle, Colchester, United Kingdom.

From 1983 until 1988 the applicant was a programme secretary at Tromsø Radio, a regional unit of the Norwegian Broadcasting Corporation - NRK.

In 1985 the applicant was looking for a house to buy. He came in touch with a lawyer in Tromsø, S, who was selling a house which belonged to his wife. In connection with his law office S also had a real estate agency, named Eiendomsservice A/S.

In the name of the latter S had advertised the house for sale in a newspaper in Tromsø. The applicant was interested, made an offer and had an appointment with S in his office, discussing a possible sale. Four days later the applicant had a telephone conversation with S on the matter. This telephone conversation was tape-recorded by the applicant without S's knowledge.

At that moment the applicant intended to make a radio programme on what he had experienced during the meeting with S. His plans for the radio programme were presented to his superiors, who accepted them. The

programme was prepared and edited by the applicant and presented by him on 25 October 1985 on Tromsø Radio. It concerned the circumstances surrounding the applicant's negotiations with S in respect of the possible sale of the house in question. S's name was not mentioned, but reference was made to "a lawyer in town, himself a real-estate agent". The main coverage of the subject was an edited version of the telephone conversation with S in the way that a representative of NRK acted as S and read out his statements. As an introduction it was mentioned that NRK's broadcaster, the applicant, had been asked to pay 250,000 NOK under the table on approaching a lawyer to buy a house.

An excerpt of the story was broadcast on the national network on Sunday 27 October 1985. In the Tromsø Radio news broadcast on Monday 28 October 1985 the story was referred to again and it was stated, among other things, that the lawyer concerned had reported NRK to the police. On 2 November 1985 the applicant was furthermore quoted in the local newspaper in an article concerning the case.

The lawyer S found several of the statements in the NRK programmes in October 1985 and in the newspaper article defamatory and reported the matter to the police. On 29 November 1985, however, the police decided not to take any further action. Subsequently, on 21 March 1986, S asked for a writ to be issued in a private criminal case before Tromsø City Court (Tromsø Byrett) against the applicant, the applicant's superiors, R and G, and NRK. He demanded that the persons sued be punished under Section 247 of the Penal Code and applied for damages, rehabilitation, and the following statements to be declared null and void:

(translation)

> "1. A lawyer in Tromsø demands 250,000 NOK under the table for a detached house. The lawyer says that it is quite common for sales of houses to be arranged in this manner.
>
> 2. A buyer says to NRK that the lawyer for one house demanded 1/4 million NOK under the table.
>
> 3. The applicant who is an employee of this radio station has experience of his own. He was faced with a demand for 250,000 NOK under the table when he approached a lawyer in town to buy himself a house.
>
> 4. The purchase of the house has come to nothing, but our colleague has secured for himself documentary evidence showing that the lawyer, on behalf of the vendor, wants part of the purchase sum to be paid unofficially.
>
> 5. Then suddenly it is no longer an offer but a demand. Either I agree to pay under the table, or the sale will come to nothing.
>
> 6. The buyer had been offered a house for 750,000 NOK and the lawyer, acting in his capacity as a real-estate agent, demanded that 1/3 of the sum, 250,000 NOK, be paid under the table.
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> 7. From the story it was evident that the lawyer wanted 250,000 NOK not to be stated in the title deed, thus money under the table.
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> 8. I came across a lawyer who put pressure on me to pay a very large sum under the table. The story I have told about this on the radio is true all the way."

The statements 1 to 5 derived from the features in the broadcast of 25 October 1985. The statements 6 and 7 related to the news broadcast from Tromsø Radio of 28 October 1985, and statement 8 to the newspaper interview with the applicant of 2 November 1985.

The case was heard in the City Court from 17 to 20 November 1987. The parties, present and represented by counsel, had the opportunity to submit what in their opinion would be of relevance to the case. Furthermore, the Court heard 10 witnesses and had at its disposal certain documentary evidence, including the tape-recorded conversation between the applicant and S. In its 87-page judgment of 22 December 1987 the City Court noted that the parties did not agree on the factual circumstances surrounding the applicant's negotiations with S concerning the sale of the house. On the basis of the available evidence, however, it found it established that the facts were not as described by the applicant in the statements 1-8 set out above for which reason the Court concluded that the statements were incorrect. Secondly the Court considered whether the statements contained defamatory remarks contrary to Section 247 of the Penal Code. It found that the statements expressed allegations about actual facts which in the Court's opinion were very defamatory, injuring the good name and

reputation of S. In particular the Court found it defamatory when S was wrongfully accused of tax evasion, or alternatively of being a party to it. The Court concluded under this head that all 8 statements were unlawful (rettsstridige) from an objective point of view.

Thirdly the Court considered whether the applicant had had the necessary intent required for convicting him of violating Section 247 of the Penal Code, a question which the Court, on the basis of the established facts, answered in the affirmative.

Finally, the Court considered whether the applicant nevertheless could avoid punishment, with reference to Section 249, no. 3, of the Penal Code, having acted with due respect for his own interests and those of others. In this respect the Court found that it would be in the public interest if the applicant intended to disclose and criticise illegal transactions of a lawyer in regard to a house sale. The Court found, however, that the applicant had not acted with sufficient diligence and defamed in the mass media a lawyer who was particularly dependent on the trust of his clients.

For these reasons the applicant was found guilty of defamation in violation of Section 247 of the Penal Code. He was sentenced to pay a fine of 15,000 NOK, 25,OOO NOK in damages to the applicant and the costs. Furthermore, the Court ruled that the above statements 1-8 be declared null and void.

The applicant appealed against the judgment to the Supreme Court (Høyesterett) which upheld the judgment on 22 December 1988.

COMPLAINTS

The applicant complains of an unjustified interference with his right to freedom of expression as a journalist. Although he accepts that the defamation offences in the Norwegian Penal Code pursue a legitimate aim, he maintains that features of the domestic law governing defamation excessively impede freedom of expression and the freedom of the press to seek and impart information on issues of public concern. These features are the use of penal law, the onus of proof in regard to defamation charges, the standard of proof with respect to the defence and the proof of fault or lack of due diligence. The applicant invokes in this respect Article 10 of the Convention.

The applicant also complains of the fact that, being faced with

a criminal charge, he was required to shoulder the burden of proof of the truth of the statements disputed by the private prosecutor. He had to prove the truth beyond a reasonable doubt in order to avoid conviction. The applicant invokes in this respect Article 6 paras. 1 and 2 of the Convention.

THE LAW

1. The applicant invokes Article 10 (Art. 10) of the Convention complaining that this provision has been violated due to his conviction for defamation of character by the Norwegian courts. Article 10 (Art. 10) of the Convention reads as follows:

> "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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, 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 finds that there was in the present case an interference by a public authority with the exercise of the applicant's freedom of expression. This interference resulted from the applicant's conviction for defamation by the Tromsø City Court on 22 December 1987, which was upheld by the Supreme Court on 22 December 1988. Such interference contravenes the Convention if it does not satisfy the requirements of the second paragraph of Article 10 (Art. 10). The Commission must accordingly examine whether the interference was "prescribed by law", had an aim that was legitimate and was "necessary in a democratic society" for the aforesaid aim (cf. for example Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103, p. 24, para. 35).

As regards the two first elements the Commission finds that the applicant's conviction was prescribed by law in that it was based on Section 247 of the Norwegian Penal Code. The restriction moreover pursued a legitimate aim covered by Article 10 para. 2 (Art. 10-2) of the Convention, namely the protection of the reputation of others. What remains to be examined is accordingly the question whether the restriction complained of was "necessary in a democratice society" for achieving this aim.

In this respect the Commission recalls that according to its case-law and that of the European Court of Human Rights the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision covering both the legislation and the decisions applying it. The Commission therefore has jurisdiction to ascertain whether, having regard to the facts and circumstances of the case, a "restriction" or "penalty" is compatible with freedom of expression (cf. Eur. Court H.R., Barfod judgment of 22 February 1989, Series A no. 149, p. 12, para. 28).

In exercising its supervisory function the Commission must look at the case as a whole and determine whether the interference was proportionate to the legitimate aim pursued and whether the reasons adduced by the Norwegian courts were relevant and sufficient.

The Commission recalls that the statements broadcast by the applicant represented the facts of the case as seen from his point of view. However, the facts were disputed by the lawyer S and on the basis of the evidence produced in court the Tromsø City Court found it established that the applicant's statements were untrue. In this respect the Commission finds it necessary to distinguish between facts and value judgments. The existence of facts can be demonstrated and the Commission has not found that the City Court, in establishing the facts, drew grossly unfair or arbitrary conclusions from the available evidence. Thus the Commission notes that the applicant was convicted for wrongfully accusing a lawyer inter alia of tax evasion. The Commission has no difficulty in finding that such an interference with freedom of expression could be regarded as necessary in a democratic society for the protection of the reputation of others.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains under Article 6 paras. 1 and 2 (Art. 6-1, 6-2) of the Convention that due to the fact that he carried the burden of proof as to the truth of the statements in question, he was deprived of the presumption of innocence.

Article 6 paras. 1 and 2 (Art. 6-1, 6-2) of the Convention read as far as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. "

The Commission recalls that in Norway the burden of proof in defamation proceedings lies, as in other Convention States, with the person who makes the defamatory statements. In this way the law intends to compel the author of such statements to make sure in advance that what is being said can also be proven as true, i.e. it imposes a particular standard of care on these persons. The reputation of the victim is protected in this way not only against untrue statements but also against allegations the truth of which cannot be proven (cf. No. 8803/79, Dec. 11.12.81, D.R. 26 p. 171).

The Commission does not find that this system runs counter to the Convention as such. It is true that Article 6 para. 2 (Art. 6-2) requires States to confine presumptions of fact and law within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (cf. Eur. Court H.R., Salabiaku judgment of 7 October 1988, Series A no. 141-A, pp. 15-18, paras. 28-30).

However, in the present case the Commission recalls that the applicant was provided under domestic legislation with the possibility of exculpating himself and it does not consider that the conditions required for doing so imposed an insurmountable presumption of guilt. Furthermore, the Commission finds that the Norwegian courts enjoyed a genuine freedom of assessment on the basis of the evidence adduced. They were not required to apply the relevant legislation in a manner incompatible with the presumption of innocence and indeed did not resort automatically to a presumption of guilt (cf. also No. 16641/90, Dec. 10.12.91, not yet published).

In these circumstances the Commission finds no appearance of a violation of Article 6 paras. 1 and 2 (Art. 6-1, 6-2) of the Convention, and it follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)