

Supreme Court

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Protection of personal privacy

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Supreme Court decision KKO 2018:51 concerned the question of whether, in the circumstances at hand, linking a news item that concerned an offence committed by a private individual on a web site with a photograph of the offender fulfills the essential elements of the offence of dissemination of information violating personal privacy.

The framing of the question and the facts in the case

In September 2013, B was sentenced to imprisonment for two years and two months for aggravated sexual abuse of a 14-year-old child, committed earlier that year. The sentencing of B had been reported by several national media outlets, and in the reports B's name, his age (26 years), the age of the victim, and the place where as well as the date when the offence had been committed had been mentioned.

A had been the administrator of a public Facebook social network group called "In Support of Pedophilia Victims". According to A, one of the purposes of the group was to draw attention to the sentences imposed for sexual offences. In January 2014, A uploaded a link to a news item that had been published on a website in September 2013 that dealt with the sentence B had received for the sexual assault. A had also taken a photo of B from B's public Facebook profile, linked it to the news item, and added the comment, "B has apparently already been released?"

The District Court and the Court of Appeal had sentenced A to a fine for violating B's personal privacy. A appealed to the Supreme Court and requested that the charges be dismissed. A had argued that his conduct did not meet the essential elements of dissemination of information violating personal privacy.

The applicable provision and its interpretation

According to Chapter 24, section 8(1) of the Criminal Code, a person who unlawfully (1) through the use of the mass media, or (2) otherwise by making this available to many persons, disseminates information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced to a fine for dissemination of information violating personal privacy.

However, according to section 8(3), presentation of an expression in the consideration of a matter of general importance is not to be considered dissemination of information violating personal privacy if its presentation, taking into consideration its contents, the rights of others and the other circumstances, clearly does not exceed what can be deemed acceptable.

This provision of the Criminal Code safeguards the right to privacy referred to in section 10 of the Constitution Act, article 8 of the European Convention on Human Rights, and article 7 of the Charter of Fundamental Rights of the European Union. It contains a statutory restriction on the freedom of expression safeguarded in section 12 of the Constitution Act, article 10 of the European Convention on Human Rights and article 11 of the Charter of Fundamental Rights. When applying the penal provision, the court is required to weigh the violation of personal privacy against the freedom of expression, and to strike a fair balance between these two.

Assessment of the conduct of A

The Supreme Court noted that the information concerning the criminal offence and the sentence that had been imposed concerned B's private life. Also the photograph of B that had been linked to the news item related to his private life. The

fact that the information shared by A was essentially a question of previously published information did not eliminate the nature of this information as something concerning B's private life.

The Supreme Court also noted that commission of a sexual offence against a minor was conducive to arousing considerable condemnation and contempt of the offender. Publication of B's photograph had highlighted his identity as a person. B's photograph was part of the core of his private life and publishing it together with the news item reporting the offence had signified particularly strong violation of B's right to privacy. B was a private individual and therefore, as a matter of principle, had the right to the highest level of the protection of privacy.

The Supreme Court further noted that both the linked news item on the offence and the photograph of B had previously been published, and therefore even if A had not acted, they had been made available to the public. This did not, however, mean that the information could have been freely published by different parties in different contexts. Also the fact that B himself had uploaded his photograph to his public Facebook page did not signify that A had an unlimited right to use said photograph in any connection whatsoever. B had not given his consent to the publication of a private photograph that had been on a personal site. The conduct of A had been unlawful.

Application of the restrictive provision in Chapter 24, section 8(3) of the Criminal Code

The Supreme Court noted that, according to the Constitution Act, everyone has the freedom of expression, and the contents of the right do not depend on what means is used to disseminate information. Especially along with the internet, the potential for the dissemination of information independently of the traditional media has expanded considerably, and the significance of such dissemination for the public debate has increased. However, the obligation to respect the limits of privacy applies not only to the media, but also to discussions on the internet. In assessing, on a case-by-case basis, rights connected to the freedom of expression and to personal privacy, among the factors to be considered are the extent to which information published on the internet contains material that has been prepared in accordance with journalistic principles, and what significance the publication has in this respect for the spreading of information and for public debate.

The Supreme Court further noted that questions related to sexual offences and their level of punishment are important subjects to a debate of general interest. The protection of the right to freedom of expression when dealing with such questions is particularly strong, and in this respect there is little scope for restrictions on the freedom of expression. Indeed, publication of the information disclosing B's identity could be justified on the grounds that the case involved a more aggravated sexual offence. Due to the nature of the conduct, B could have expected that also his name and identity would interest people. The provisions protecting privacy were not intended to provide protection against the loss of reputation that results from the normal sanctions imposed on an offender for having committed a criminal offence.

The Supreme Court drew attention to the fact that A had published the information about four and a half months after the District Court had issued its judgment. Although the linked news item reporting the District Court judgment was no longer new at the time it was uploaded to the website, it could not be considered to have completely lost its timeliness. B's appeal against the judgment of the District Court was pending before the Court of Appeal at the time of publication.

The Supreme Court noted that B, as a private individual, enjoyed the widest scope of protection of privacy. The identity of B was not of general importance from the point of view of the stated aim of the publication of the information. A had not only linked the crime news to the website, but also published a photograph of B, which had strongly infringed against his privacy. B was clearly recognizable in the photograph, and in addition the photograph showed, among other things, his hobbies.

According to the Supreme Court, the link to the news item, the photograph and the short text presented on the website, when examined separately, were in themselves correct. However, the question was not one of newsworthy reporting on crime, and A had not engaged in a discussion on the matters of common concern identified by A. The main focus of the publication had been on the identity of B, and the publication had lacked editorial content. The publication had generated heated debate with a revenge mentality, even though A claimed to have removed dozens of inappropriate comments. In particular, the publication of the photograph of B in such a context had been a considerable infringement against his privacy. The Supreme Court noted that the combination of linking the news item, the photograph and the text to one another in the manner stated above had in fact signified labelling B as contemptible.

Conclusion of the Supreme Court

After having weighed the above-mentioned aspects of freedom of expression and the protection of personal privacy against one another, the Supreme Court held that the conduct of A in the circumstances at hand had been clearly beyond

what could be deemed to be acceptable. The conduct of A thus fulfilled the essential elements of the offence of dissemination of information violating personal privacy. A's appeal was dismissed, and the judgment of the Court of Appeal was upheld.

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