[NL] Court of Appeal judgment on offensive COVID-19 broadcast and incitement to hatred

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On 2 March 2021, the Amsterdam Court of Appeal delivered an important judgment on offensive expression and the limits of satirical and artistic expression in the media. The Court held that there should be no prosecution for incitement to hatred or group insult over the broadcast of an offensive satirical song about Covid-19 and Chinese individuals.

The defendant in the case was the presenter of a well-known programme, which regularly includes a segment responding to current events in a satirical manner. In February 2020, the defendant broadcast the so-called “Corona song” as part of the programme, which was sung by of a fictional character voiced by the defendant, and entitled “Voorkomen is beter dan Chinezen” (Prevention is better than Chinese). The defendant claimed the purpose of the satirical song was to ridicule the opinion of people who thought Chinese food could cause COVID-19, and included the lyrics “Het komt allemaal door die stink Chinezen … Corona heb je zo” (“It's all because of those stinky Chinese … you’ll have Corona in no time”).

Following the broadcast, an anti-discrimination hotline received thousands of complaints, and the broadcast was reported to the police over incitement to hatred. The defendant later issued an apology on the programme, and apologised to representatives of the Chinese community in the Netherlands. Importantly, in June 2020, the public prosecutor decided not to prosecute the defendant for incitement to hatred or group insult. However, in August 2020, a number of anti-racism organisations initiated legal proceedings under a special legal provision which allows a decision of the public prosecutor to be reviewed by the Court of Appeal.

In its judgment on 2 March 2021, the Court of Appeal reviewed the public prosecutor’s decision to not prosecute for both group insult and incitement to hatred, and concluded that there should be no prosecution against the defendant over the broadcast. The Court began by noting that it was required to assess whether a criminal court judge could reach a conviction for a criminal offence. The Court then examined whether the broadcast was punishable under Article 137c of the Criminal Code, which criminalises insulting a group of people based on race. The Court applied a three-step test, namely (a) was the statement offensive in itself; (b) does the context in which the statement was made take away the

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offensive nature of the statement; and (c) was the statement “unnecessarily offensive”?

The Court noted that when determining whether expression is punishable, the right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR) plays a “major role”. In this regard, the Court referred to the European Court’s case law that artistic expression enjoys a “high degree of protection”, as do statements in the media which contribute to public debate. Furthermore, in a democracy there must, in principle, also be room for statements that shock, offend or disturb. Applying these principles, the Court first noted that the lyric “It's all because of those stinky Chinese” was offensive in and of itself. However, the Court held that the song fell “within the context of satire”. Crucially, the Court held it was “artistic expression”, where the defendant’s intention was to ridicule an opinion - the opinion of a number of Dutch people that Chinese food could cause Covid-19. The limits of artistic expression and what is permissible is “high” under Article 10 ECHR. Finally, the Court held that while the statements were offensive and “not particularly tasteful”, they could not be regarded as “unnecessarily offensive by a criminal court”, given the purpose of the song was to ridicule an opinion.

The Court also examined whether the broadcast could constitute incitement to hatred. The Court acknowledged that people of Chinese descent have often been victims of (so-called) jokes and bullying for decades. However, the Court reiterated that for a successful prosecution, it would have to be proven that the defendant intentionally incited hatred, discrimination or violence as a result of the Corona song. However, given the defendant’s intention was to ridicule an opinion, a criminal judge would not impose a conviction.

Gerechtshof Amsterdam, ECLI:NL:GHAMS:2021:581, 2 maart 2021

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2021:581

Amsterdam Court of Appeal, ECLI:NL:GHAMS:2021:581, 2 March 2021

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