[NL] Court of Appeal upholds ruling on investigative crime programme using hidden-camera footage

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On 15 March 2022, the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal) delivered an important judgment largely upholding an earlier District Court judgment on the lawfulness of allegations contained in an investigative crime programme using hidden-camera footage (IRIS 2020-10/10). The Court of Appeal conducted a fundamental rights balancing exercise similar to that of the District Court, with the important difference that it assessed the original TV broadcast and the modified online episode as separate communications. It ruled that because of the implementation of privacy-preserving measures, the modified episode could not be regarded as unlawful.

The case was about an episode of the investigative television programme *Moord of zelfmoord (Murder or suicide)*, involving a journalist exploring other explanations for individuals' deaths that the Dutch police had classified as suicide. The episode of 18 January 2018 revolved around the death of a 46-year-old man who had fallen from a window in unexplained circumstances. Interviews with the landlord and a witness - who the police had deemed unreliable - suggested that another person had been in the victim's home at the time of the fatal incident and that this person could have been the Respondent (Claimant in earlier proceedings). About 500,000 television viewers had been presented with blurred Facebook photographs of the Respondent's face, shots of the street sign and area where the victim and the Respondent used to live, and hidden-camera footage of the Respondent, his face lightly blurred, talking to the journalist in a park. During the conversation, the Respondent stated that he had not been in the house at the time of the fall.

Soon after the broadcast, the episode was made available on the broadcaster's website and later modified so that a bigger part of the Respondent's face and body was blurred and his name was made inaudible. Still, the Respondent considered the episode unlawful and initiated court proceedings.

In line with the District Court, the Court of Appeal determined that the broadcaster/producer's fundamental right to freedom of expression had to be weighed against the right of the accused to the protection of privacy and to be free from public allegations. Although the Court recognised that the programme aimed to report on an important societal issue, it also noted that the episode had

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clearly portrayed the Respondent as a potential suspect of homicide even though he had never been officially prosecuted. The Court further considered the statements on which the allegations had been based to be weak and unconvincing. Unlike the District Court, however, the Court of Appeal did not think the use of a hidden camera and/or blurring techniques had had a "criminalising effect". On the contrary, it stated that blurring was "a generally accepted and adequate means (if applied well) to reduce people's recognisability to a minimum" and pointed to the fact that the hidden-camera footage had allowed the Respondent to tell his side of the story.

With respect to the invasion of privacy, the Court explicitly distinguished between the original episode (broadcast) and the modified episode (online). It was clear that initially, the broadcaster had done very little to conceal the Respondent's identity. The combination of footage of the street sign, the use of the Respondent's unique name, the light blurring of the face and the details about the Respondent's private life had allowed a relatively large number of people to recognise him. The wide identification had negatively impacted his mental health and relationships, which, according to the Court, could be attributed to the broadcast. Everything considered, the TV broadcast was declared unlawful. The modified online episode, however, was not. Because of the stronger blurring effects and the removal of the Respondent's name, the Court observed that only a few people could have recognised him. In those circumstances, the right to press freedom and the public interest had to take precedence over the Respondent's interests.

Gerechtshof Amsterdam, ECLI:NL:GHAMS:2022:748, 15 maart 2022

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2022:748

Amsterdam Court of Appeal, ECLI:NL:GHAMS:2022:748, 15 March 2022

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