[DE] Criminal liability for distribution of Nazi videos via WhatsApp status

IRIS 2022-9:1/21

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In a ruling of 6 January 2022 (case no. 907 Ds 6111 Js 250180/19), the *Amtsgericht Frankfurt am Main* (Frankfurt am Main District Court) decided that the distribution of videos promoting Nazi ideology and images from the Nazi era via WhatsApp status constituted the punishable offence of incitement of the masses. It fined the defendant EUR 750.

In 2019, the accused uploaded to his WhatsApp status a video that could be viewed for a period of 24 hours by anyone who had saved his phone number at the time on a device suitable for installing WhatsApp and had WhatsApp installed on that device. The first 30 seconds of the video, which lasted 1 minute 20 seconds in total, showed people in various situations, such as on the beach, reading or at a wedding. This was followed by video clips from the Nazi era showing, for example, Adolf Hitler performing the so-called “Hitler salute”, soldiers marching in step, a golden swastika, further images of Adolf Hitler, an aeroplane formation in the shape of a swastika and bombs being dropped from aeroplanes. Swastika flags were also repeatedly shown. The video also contained written text including the sentence *“ICH HABE GEGEN DIE JÜDISCHE TYRANNEI GEKÄMPFT”* (I fought against Jewish tyranny) during a video clip of Adolf Hitler.

Under German law, the offence of incitement of the masses involves the "dissemination" of unlawful content. The court decided that this could be done via WhatsApp status. It ruled that "dissemination" took place if content was made accessible to a large group of people, the size of which was undetermined or at least large enough that the defendant could no longer control it. It was not necessary for the "material" to have been successfully disseminated in the sense that a large number of people had actually viewed or at least been aware of it. At the time when the crime was committed, audio and visual media, as well as data carriers, constituted "material" within the definition of the offence.

Content uploaded to a WhatsApp status would be displayed in the app’s status notifications with the option of playback for anyone who had stored the mobile phone number of the person sharing the content in a device and had WhatsApp installed on that device. If the mobile number had been shared with other people, or if third parties had obtained and stored it by other means, the content would also be accessible to these people.

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In the court's opinion, the group of at least 75 people who could potentially play the video, uploaded to the defendant's status, on their own devices was so large that it could no longer be controlled by the defendant. It was not a closed group in the sense that its members were linked in some way, e.g. a group of friends, members of a club or work colleagues, but comprised people who had no connection with or knowledge of each other.

Furthermore, the video in question was clearly not intended to serve as a historical record, but contained images designed to serve as a call to arms against alleged Jewish tyranny. Although the video footage itself may have been taken from historical sources without any criminal content, analysis of whether its dissemination was unlawful depended largely on the context. However, the context was clearly not one of historical reporting, but one of incitement to hatred and violence against the Jewish people. The rule that Nazi audio or video content used for reporting about historical events could be lawfully disseminated under the so-called 'social adequacy' clause of Article 86a(3) in conjunction with Article 86(3) of the *Strafgesetzbuch* (Criminal Code – StGB) therefore did not apply.

Urteil des Amtsgericht Frankfurt am Main vom 6. Januar 2022 im Volltext

https://www.jurpc.de/jurpc/show?id=20220119

Decision of the Franksfurt am Main District Court, 6 January 2022

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