Regional Court Munich I

Court Docket: 24 Qs 18/17
1122 Bs 4/17 Local Court Munich

In the private criminal action of

1) [redacted]
represented by [redacted],
- Private Plaintiff 1) -

Representatives of Private Plaintiff:
[redacted]

2) [redacted], Munich,
- Private Plaintiff 2) -

Representatives of Private Plaintiff:
[redacted]

versus

[redacted]
[redacted]
- Private Defendant -

Representatives of Private Defendant:
[redacted]

on the grounds *inter alia* of insult,

the undersigned judges of the Regional Court Munich I – 24th Small Criminal Chamber – pronounced on 6 November 2017 the following

Decision

The immediate appeal of Private Plaintiff dated 3 July 2017 against the Decision of the Local Court Munich dated 20 June 2017 is dismissed with costs as unfounded.

Grounds:

I.

With the Brief dated 9 March 2017 (page 1/16 of the court file), received by the Local Court Munich on 14 March 2017, the legal representatives of Private Plaintiffs 1) and 2) filed a private action against Private Defendant and accused Private Defendant of having contacted by email at a no longer accurately determinable point in time after 16 April 2014 a number of addressees, including the [redacted] journalist [redacted], as well as the Minister of Science, Education and Sports in [redacted], as well as a further 25 persons, institutions or media outlets only identified by their email addresses. In this email, Private Defendant allegedly purported that the "Repatriate Mr. [redacted] Initiative" by "angry staff of the [redacted]," was collecting for a "slush fund" and that the addressee only had to name a desired amount. It was alternatively also possible to offer cars. The offered bribe was allegedly supposed to be paid such that the employees of the [redacted], would be freed "from this noxious pest". According to Private Plaintiffs, Private Defendant inasmuch rendered himself liable to prosecution on the grounds of insult pursuant to Sec. 185 of the German Criminal Code and defamation of a person in the political arena pursuant to Sec. 187 and Sec. 188 of the German Criminal Code. A request for prosecution had, it was stated, already been filed by Private Plaintiffs 1) and 2) by means of an earlier private action dated 24 June 2016 that was rejected for formal reasons.

According to the Order of the Local Court Munich dated 16 March 2017, the Complaint was served on Private Defendant on 22 March 2017. An extensive submission was made on behalf of Private Defendant in the Brief by its legal representative dated 30 March 2017 (pages 20/32 of the court file), as received on 3 April 2017, and it was asserted that not even the general procedural requirements for a private action had been met since the immunity of the Private Defendant had not been effectively waived, no conciliation attempt pursuant to Sec. 380 of the German Code of Criminal Procedure had been made and the time limit for filing a request for prosecution had not been observed. Furthermore, it was stated, there were no sufficient grounds to suspect that Private Defendant had committed an offence.

Further documents were submitted and additional statements were made in the further Briefs by the Private Defendant's representative dated 2 May 2017 (pages 34/45 of the court file), as received on 4 May 2017, and 19 June 2017 (pages 53/66 of the court file), as received on the same day, as well as in the further Brief of the Private Plaintiffs' representative dated 8 June 2017 (pages 46/52 of the court file), as received on 13 June 2017.

With the Decision dated 20 June 2017, served on the Private Plaintiffs' representative on 26 June 2017, the Local Court Munich rejected the private action pursuant to Sec. 383 (1) of the German Code of Criminal Procedure (pages 67/69 of the court file) since the time limit for filing the request for prosecution had not been observed.

Private Plaintiffs' representative filed an immediate appeal against this decision with the Brief dated 3 July 2017 (pages 70/74 of the court file), as received by the Court on the same day. This appeal was submitted to Regional Court Munich I for a decision, where it was received on 20 July 2017.

With the Briefs dated 31 July 2017 (pages 79/81 of the court file), as received on 1 August 2017, and 29 August 2017 (pages 82/84 of the court file), as received on 30 August 2017, as well as 27 September 2017 (pages 90/91 of the court file), as received on 28 September 2017, Private Defendant's representative requested that the immediate appeal be rejected and in this regard essentially cited the same circumstances as had already been asserted.

With the Briefs dated 11 September 2017 (pages 86/88 of the court file) and 6 October 2017 (pages 92/95 of the court file), each received on the same day, the Private Plaintiffs' representative filed supplementary statements and named Mr. [redacted] as a witness, who would allegedly be able to explain and provide additional details with regard to the flow of information between the concerned parties.

II.

1. The legal remedy of an immediate appeal pursuant to Sec. 311 of the German Code of Criminal Procedure as filed against the decision to reject the private action is permissible pursuant to Sec. 390 (1), sentence 2, and Sec. 210 (2) of the German Code of Criminal Procedure. This legal remedy, which was filed in due time, is also otherwise **admissible**.

2. However, the immediate appeal is **not successful on the merits** since the rejection of the private action by the Local Court Munich is consistent with the factual and legal situation. Pursuant to Sec. 383 (1), sentence 1, of the German Code of Criminal Procedure, the decision as to whether to open main proceedings or to dismiss the action is governed by the provisions that are to be applied if charges are preferred directly by the Public Prosecutor's Office. Pursuant to Sec. 203 of the German Code of Criminal Procedure, main proceedings are consequently to be opened if, with respect to the offence of the private action, there are no apparent procedural impediments, if the specific procedural requirements are met and if, in light of the statements in the complaint, there are sufficient grounds to suspect that the accused has committed this criminal offence. If the judicial review in interlocutory proceedings reveals that it is not sufficiently likely that there will be a later conviction, main proceedings will not be opened. This is the case here.

The statements in the appeal are unable to refute the grounds for the Decision of the Local Court Munich to dismiss the action. The Chamber shares the opinion of the Court of First Instance that the time limit for filing the request for prosecution was not observed and thus that a necessary procedural requirement has not been met (see in this regard the statements made below in section a. with respect to the general procedural requirements). Furthermore, the Chamber could also not be convinced that the required conciliation attempt pursuant to Sec. 380 (1) of the German Code of Criminal Procedure was made (see section b. below) or that there are sufficient grounds to suspect Private Defendant of insult that is punishable by law or defamation of a person in the political arena (see section c. below).

a. Fulfilment of the General Procedural Requirements

aa. Pursuant to Sec. 194 (1), sentence 1, of the German Criminal Code, a request for prosecution is required in order to prosecute an insult. Pursuant to Sec. 77b, (1), sentence 1, of the German Criminal Code, this request must be made within a time limit of three months, said time limit commencing, pursuant to Sec. 77b (2) of the German Criminal Code, upon expiry of that day on which the entitled party became aware of the offence and the identity of the offender. This time limit had already expired for both Private Plaintiffs when the request for prosecution was made on 24 June 2016.

The investigations against Private Defendant have already been going on for several years. Reference was already made to the email now forming the subject matter of this dispute in section 131 of the Statement of the Disciplinary Committee dated [redacted] 2015. It is

also apparent from this investigative report that the President was informed of the findings as early as 2 December 2014, whereupon he banned Private Defendant from entering the premises of on 3 December 2014 (cf. section 20 of this Statement). There are thus many indications that the decisive period for the , represented by its President, to file a request for prosecution already began on 2 December 2014. However, even if the suspicion against Private Defendant were to be regarded as only being sufficiently well-founded within the meaning of Sec. 77 (2) of the German Criminal Code once the final report had been prepared, the three-month time limit for the , represented by its President, to file a request for prosecution had in any case already been greatly exceeded at the time the request for prosecution was filed on 23 June 2016, and the private action by Private Plaintiff 1) is inadmissible for this reason alone. Private Plaintiffs' representative had also already been informed of this by the Public Prosecutor's Office Munich I with the Order dated 11 May 2016 and again with the Order dated 10 August 2016.

It must be assumed in favour of Private Defendant that the time limit for Private Plaintiff 2) to file a request for prosecution had also already expired at the time the (first) private action was filed and that the private action is thus inadmissible. The reason for this is that if – as in the present case – there are doubts as to whether a procedural impediment exists, it is generally acknowledged, regardless of the respective doctrinal reasoning, that in order to protect the affected party, it must be assumed that such a procedural impediment does indeed exist if there is the possibility that it might exist. However, merely theoretical doubts which are only possible according to rules of logic are not sufficient herefor; the doubts must rather be based on specific, actual circumstances and must be insurmountable even after exhausting all possibilities for determining whether such an impediment exists (cf. BGHSt 18, at 274; BGHSt 46, at 349, 352; Federal Court of Justice judgement as published in NStZ 2010, at 160 – "*Strafklageverbrauch Schwabenbauer*", HRRS 2011, at 26 *et seq.*, Federal Court of Justice judgement as published in NStZ 2010, at 160). Thus, if, even after examining the submission by Private Plaintiff 2) and possibly more extensive investigations initiated by the Court of its own motion, there are still doubts as to whether the request for prosecution was made in due time, criminal proceedings must be terminated and a private action that has been filed must be dismissed (as expressly stated in the Federal Court of Justice judgement as published in NStZ 1984, at 216; LK-StGB/Schmid, prior to Sec. 77, marginal number 10). This is the case here since the Chamber could also not be convinced beyond doubt that Private Plaintiff 2) only became aware that Private Defendant had been determined as the possible perpetrator with the *nolle prosequi* issued by the Public Prosecutor's Office on 11 May 2016. Even if it is assumed – as set forth

by the representative of Private Plaintiff – that Private Plaintiff 2), also since he was personally affected, was not involved in every step of the internal investigation, it must nevertheless be assumed that he became aware of this at the latest on 23 February 2016 when the representative of Private Plaintiff, in his capacity as the legal representative also of Private Plaintiff 2) ("our client"), sent the final report which he had now received as well as a copy of the USB stick to the Public Prosecutor's Office Munich I in respect of the proceedings 115 AR 1610/16. The Chamber is aware that the events that have already been going on for several years have been extremely unpleasant for Private Plaintiff 2) and that there are no standard guidelines for dealing with unpleasant issues. However, the Chamber finds it hard to believe that even when the Complaint was filed in his name on 23 February 2016, Private Plaintiff 2) was not made aware of the investigation result and the now planned and initiated procedural steps against Private Defendant who was determined as the perpetrator, and this also seems to be unrealistic in light of the prior history. Particularly because the proceedings are so onerous, it would have been a pleasing interim result to have now determined a suspect and to be able to file a complaint against him. In order to overcome the existing doubts, the Chamber asked the representative of Private Plaintiff with the Orders dated 1 September 2017 and 19 September 2017 to provide more detailed statements in this regard and to provide evidence. Although the representative of Private Plaintiff named the witness [redacted] in the Brief dated 6 October 2017, he did not, however, provide any specific facts relevant for the decision in the present case which this witness is supposed to be able to prove. Although – and of this the Chamber is convinced – the witness can provide a general report on the transmission of information and timings at the [redacted], he will, however, not be able to testify beyond all doubt when precisely Private Plaintiff 2) first became aware that Private Defendant had been determined as a suspect. Arguing in favour hereof is the fact that this obviously crucial fact is precisely not cited as evidence. In view hereof, the named witness is not a suitable means of evidence for overcoming the doubts which the Chamber has. His testimony was therefore unnecessary. The Chamber, just like the Local Court, is therefore assuming in favour of Private Defendant that Private Plaintiff 2) became aware of the situation at the latest on 23 February 2016, that the time limit for him to file a request for prosecution thus ended on 23 May 2016 and had consequently already expired when the request for prosecution was made on 24 June 2016.

bb. The Chamber is, however, satisfied that the possible immunity of Private Defendant did not present a bar to the filed private action. Pursuant to Art. 8 of the European Patent Convention (EPC) in conjunction with Art. 14 (a) of the Protocol on Privileges and Immunities of the European Patent Organisation (PPI), which, pursuant to Art. 164 (1) EPC is

an integral part of the European Patent Convention, the employees “have immunity from jurisdiction in respect of acts, including words written and spoken, done in the exercise of their functions”. It is additionally stipulated in Art. 19 (1) PPI that “the privileges and immunities provided for in this Protocol are not designed to give to employees of the European Patent Office or experts performing functions for or on behalf of the Organisation personal advantage. They are provided solely to ensure, in all circumstances, the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded”.

Immunity is consequently linked to the functions of the employee and is limited to the respective area of responsibility of the employee. The conduct being prosecuted by means of the private action is, however, quite clearly not a task of a member of the Board of Appeal and hence he does not have immunity.

Even if the scope of immunity were to be interpreted more broadly, immunity had in any case been effectively waived. It does not need to be discussed here whether, pursuant to Art. 10 and Art. 11 EPC, it is the President or the Administrative Council which is the organ qualified to exercise disciplinary authority over a member of the Board of Appeal since the exercising of disciplinary authority is an internal administrative matter. However, Art. 19 (2) PPI expressly assigns the President the duty to waive the immunity of the employee, whereas the Administrative Council may only waive the immunity of the President. Consequently, any existing immunity would have been effectively waived by the President’s letter dated 23 June 2016 (Exhibit 11).

b. Requirement for the Legal Action: Conciliation Attempt

The lack of a conciliation attempt also presents a bar to the admissibility of the private action in the present case. Pursuant to Sec. 380 (1) in conjunction with Sec. 374 (1), No. (2), of the German Code of Criminal Procedure, a private action on the grounds of insult (Secs. 185 to 189 of the German Criminal Code) may only be brought once conciliation has been attempted without success. The conciliation attempt is a compulsory requirement for a legal action and must be carried out prior to lodging the private action, i.e. cannot be subsequently carried out in the course of an ongoing private criminal action (cf. Meyer-Goßner/Schmitt StPO, Sec. 380, marginal number 10; KK-StPO/Senge StPO, Sec. 380, marginal numbers 1 to 11, LK-StPO/Hilger, Sec. 380, marginal number 28 *et seq.*; Regional Court Aachen as published in NJW 1961, at 524; Regional Court Hamburg as published in

NJW 1973, at 382). The requirement of a conciliation attempt can only be waived pursuant to the provisions of Sec. 380 (3) and (4) of the German Code of Civil Procedure.

The parties to these proceedings do not deny that a conciliation attempt has not been made to date. Private Plaintiff has furthermore not claimed that the requirements of Sec. 380 (4) of the German Code of Civil Procedure are met, nor is this apparent to the Chamber.

The requirements of Sec. 380 (3) of the German Code of Civil Procedure are not met in the present case either. It therefore does not need to be discussed whether the President or the Administrative Council should be regarded as the superior of the [redacted] pursuant to Art. 10 and Art. 11 EPC since, pursuant to Sec. 380 (3) of the German Code of Civil Procedure, it is only an entitlement of the superior pursuant to Sec. 194 (3) of the German Civil Code that is decisive, and not, however, the fact that the entitled party also actually filed a request for prosecution or even lodged the legal action (cf. Meyer-Goßner/Schmitt, StPO, Sec. 380, marginal number 14; KK/Senge, StPO, Sec. 380, marginal number 9; LR/Hilger, StPO, Sec. 380, marginal number 43). In any case, precisely this entitlement pursuant to Sec. 194 (3) of the German Criminal Code is missing. Sec. 194 (3), sentence 1, of the German Criminal Code regulates the right of a superior to request prosecution in the case of an insult against a public official, a person entrusted with special public service functions or a soldier of the German armed forces. The list in Sec. 194 (3) of the German Criminal Code refers to the public official as according to Sec. 11 (1), No. (2), of the German Criminal Code as well as to the person entrusted with special public service functions as according to Sec. 11 (1), No. (4), of the German Criminal Code. According to prevailing opinion, the capacity as a public official is determined by German Federal and State Law such that all public officials active in service to the Federal Republic, the German States, local authorities, local authority associations and corporations, institutions and foundations governed by public law are included. Common to all of these is the fact that they have a specific service or contractual relationship with a public authority and this appointment is based on German law (cf. Fischer, StGB, Sec. 11, marginal number 12 *et seq.*; Schönke/Schröder/Eser/Hecker StGB, Sec. 11, marginal numbers 14 to 16; BeckOK StGB/von Heintschel-Heinegg StGB, Sec. 11, marginal numbers 11-13.2). However, this requirement does not apply to the employees of the [redacted]. The [redacted] is an intergovernmental organisation, the members of which are not appointed on the basis of German law. Their status is rather governed exclusively by European law. Sec. 194 (3) of the German Criminal Code has not been extended to European officials within the terms of Sec. 11 (1), No. 2a, of the German Criminal Code. The EPC – unlike, for example, Art. 8 of the Europol Regulation, Secs. 1 and 4 of the International Bribery Act and Sec. 1 of the EU

Bribery Act (cf. Fischer, Sec. 11, marginal number 12, with further references) – does not have a specific regulation stipulating that foreign officials are subject to national law. Applying the same reasoning, the employees of the [redacted] are also not persons entrusted with special public service functions (No. 4), who – without already being a public official – are employed by or act for an authority or other body performing public administration services. The authorities and bodies must in this respect as well be such whose services are carried out precisely on the basis of German law. Thus, neither the President nor the Administrative Council is the superior of Private Plaintiff 2) within the terms of Sec. 194 (3) of the German Criminal Code, and a conciliation attempt is therefore not dispensable.

c. No Grounds for Suspicion

Furthermore, based on the statements made in the Complaint, there are also no sufficient grounds to suspect that a criminal act pursuant to Sec. 185 of the German Criminal Code and Secs. 187 and 188 of the German Criminal Code has been committed by Private Defendant.

aa. An insult is to be understood as an attack on the honour of another person by the expression of disrespect, disdain or contempt (cf. only RG 71, at 160, BGHSt 1, at 289; 7, 131; 16, 63, LK/Hilgendorg, Sec. 185, marginal number 1, SK/Rudolphi/Rogall, Sec. 185, marginal number 1; Schönke/Schröder/Eisele/Lencker, Sec. 185, marginal number 1). Referring to a person as a “noxious pest” does indeed fulfil these features of an insult despite a generally observable coarsening of personal dealings. From the context of the draft email, in particular from the reference to a “Repatriate [redacted] Initiative”, this can, if not inevitably then at least obviously, be identified as referring to Private Plaintiff 2) (as was already stated by the Public Prosecutor’s Office Munich I, Order dated 10 August 2016, page 6).

However, the authorship of the draft email and the sending of the email have not been proven with a sufficient degree of likelihood such as is required for conviction. According to the Complaint, only a USB stick with a text file of the email was seized from Private Defendant. Whether or not this email was actually sent by Private Defendant is not apparent from the Complaint. It is not apparent in this respect whether an email with this content was sent at all, and if so when, which recipients actually received the email and whether the recipients also took note of the content of the email. The Private Plaintiffs merely name a [redacted] journalist and a [redacted] Minister of Science as well as

numerous email addresses as the addressees, without proving that and when they received and took note of the email. It is already stated *verbatim* in section 131 of the Report of the Disciplinary Committee of the [redacted] dated [redacted] 2015 (Exhibit 5) as referred to in the Complaint that "[…] there is nothing more than an assertion […] that receipt of the letter was confirmed by the [redacted] Ministry of Science. In our opinion, this evidence is not sufficient to convince us that the message was actually sent". The Chamber agrees with this legally correct assessment since a necessary requirement for an insult punishable by law is that such an insult was expressed to and acknowledged by another person (cf. Fischer, StGB, Sec. 185, marginal number 5; Schönke/Schröder/Lenckner/Eisele, marginal number 1; BeckOK StGB/Valerius StGB, Sec. 185, marginal number 18). The authorship of the draft email furthermore cannot be attributed to Private Defendant with a sufficient degree of likelihood either. Based on the statements in the Complaint, it also cannot be ruled out that Private Defendant simply came to be in possession of the email text in another manner, for example was possibly himself a recipient of the email. The authorship of this email has merely been concluded based on a number of pieces of circumstantial evidence, which, when looked at more closely, can each only form the basis for assumptions against Private Defendant. The results and official minutes of the Disciplinary Committee of the [redacted] also only indicate suspicious facts and assumptions against Private Defendant in this respect. For example, the following is stated *verbatim* in section 131 of the Report of the Disciplinary Committee dated [redacted] 2015: "The authorship of the email text thus cannot be concluded therefrom with the required degree of certainty". The Chamber also agrees with the correct legal assessment of the Disciplinary Committee in this respect as well.

bb. Irrespective of whether Private Defendant is the author of the email and whether it was actually sent, this email is in any case not suitable for defaming a person in the political arena.

In this regard, the Criminal Chamber shares the legal opinion of the Public Prosecutor's Office Munich I as already expressed in its Order dated 10 August 2017 that the [redacted] is not a "person involved in the political life of the German people" within the terms of Sec. 188 of the German Criminal Code. According to prevailing opinion, the term "person involved in the political life of the German people" must be interpreted narrowly since there is otherwise a risk that interpretation would go too far (cf. SK-StGB/Rudolphi/Rogall, Sec. 188, marginal number 1; Schönke/Schröder/ Lencker/Eisele, StGB, Sec. 188, marginal number 2; BeckOK-StGB/Valerius, Sec. 188, marginal number 6, BayObLGSt 1982, at 56/58 *et seq.*; BayObLGSt 1989, at 50). Neither the execution of public

duties alone, even if this occurs in a prominent position, nor a particularly active participation in the political shaping of the community alone fulfils the requirement for the special protection of Sec. 188 of the German Criminal Code. This rather only includes such persons who are involved for a certain amount of time in fundamental matters directly affecting the state, its constitution, legislation, administration, international relations, etc., and who, owing to the exercised function, considerably influence political life (cf. RGSt 58, at 415; BGHSt 4, at 339; BayObLGSt 1982, at 56/58; BayObLGSt 1989, at 50; Fischer, StGB, Sec. 188, marginal number 2; Schönke/Schröder/Lencker/Eisele StGB, Sec. 188, marginal number 2; SK-StGB/Rudolphi/Rogall, Sec. 188, marginal number 3). This does not apply to the [redacted] of an intergovernmental organisation that essentially has administrative and in part also judicial competencies. The comparison made by Private Plaintiffs' representative with leaders of trade unions or employers' associations who, under certain circumstances and depending on the nature and significance of their activities, had been recognised as "persons involved in the political life of the German people", fails to recognise the political mandate of these persons, which the [redacted] does not have to a comparable extent.

Furthermore, the somewhat awkward-sounding and almost satirical-seeming (cf.: cars could optionally also be offered) email text is not able to create the impression that bribery payments are the order of the day at the [redacted]. The reason for this is that if this were the case, the employees would not specifically have to collect for a bribery fund, would not have to contact the addressees in this manner, and in particular would not have to let the addressees determine the amount. If it is looked at more closely, the email text is rather suited to discrediting the addressees and the offices which they represent by suggesting that they would obviously be receptive to bribes.

III.

The decision on costs is based on Sec. 473 (1) of the German Code of Civil Procedure.

Signed

Presiding Judge at the Regional Court	Judge at the Regional Court	Judge at the Regional Court

It is hereby confirmed that this
copy is identical to the original

Munich, 6 November 2017

[Round seal of the
Regional Court Munich]

(signature)

Chief Court Clerk
Registrar of the Court Registry