

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 1 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

Director Stefan Johansson

---

The Supreme Court  
P.O. Box 2066  
SE-103 12 STOCKHOLM

## **Appeal against judgment of the Court of Appeal – agitation against a minority group**

**Appellant:** Prosecutor-General,  
P.O. Box 5553, SE-114 85 STOCKHOLM

**Appellee:** ÅG  
Public defence counsel and representative: Attorney-at-law PB

**Subject:** Agitation against a minority group

**Judgment:** Göta Court of Appeal, division 1, judgment of 11 February 2005 in case B 1987-04

---

### **Motion**

I move that the the Supreme Court, by changing the judgment of the Court of Appeal, finds ÅG guilty of agitation against a minority group and sentences him to prison.

### **Adjustment to the statement of the criminal act charged**

For the purpose of defining exactly the criminal act of which ÅG is guilty I am adjusting the statement of the criminal act charged to the following wording.

On 20 July, 2003 in Borgholm, before at least fifty people, ÅG delivered a sermon entitled "Is homosexuality a natural instinct or evil forces playing games with humans?". The sermon included the following statements

"Legalizing partnership between men and men and woman and woman, this will simply create disasters. Without parallel. We are already seeing the consequences of this. We see it through the spread of AIDS. Certainly, not all those infected with AIDS are homosexuals, but it came into existence because of this in the past and then of course innocent people can become infected by this terrible disease without on that account having had anything to do with what lies behind it as regards homosexuality."

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 2 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

"The Bible takes up here and teaches about these abnormalities. And sexual abnormalities are a deep cancerous tumour on the whole body of society. The Lord knows that sexually twisted people will even rape animals. Nor do the animals go free from humans' sexual needs and the fire that burns in a human being. They are even capable of that."

"Defilers of boys. Already when the Bible was written the Lord knew what would happen. We have experienced it here and are still experiencing it and are horrified over it. And Paul speaks in First Corinthians one and ten on perverted humans. And perverted humans is translated from the original text that says "one who lies with boys". One who lies with boys is one of the perverted people the Bible is speaking of then". Now I would like to stress that all homosexuals are not paedophiles. And all homosexuals are not perverted. But the door is nevertheless being opened to forbidden areas and allowing sin to take a hold in one's thoughts. And the person who is a paedophile today does not start off as such. But simply started to change relationships. That was how it started. And being faithful in a homosexual relationship is in no way a better relationship than changing partners every day. It is not a better relationship. It is equally despicable in the eyes of God."

"Voluntarily I leave cleanliness and receive uncleanness. They made a conscious exchange, says Paul. Homosexuality is something sick. A healthy and clean thought has been exchanged for a contaminated thought. Where a healthy heart has been exchanged for a sick heart. That is what has been done. Where a healthy body has been laid waste because of an exchange says Paul...Is homosexuality something one chooses, the answer is yes. You choose it. You are not born into it. You quite simply choose this. You exchange it. This is absolutely the way it is, for otherwise it would be a betrayal of people."

Through the passages of his sermon quoted, seen in context, ÅG has disseminated statements that express contempt for homosexuals, alluding to their sexual orientation. ÅG's intention was that the statements should be widely circulated in such a way as to arouse considerable attention.

### **The judgment being appealed**

A transcription of the sermon, as recorded on tape, is attached as an appendix to the judgment of the District Court.

The District Court found ÅG guilty of agitation against a minority group as charged, in that he wilfully made statements in this sermon that clearly express contempt towards people because of their sexual orientation. The District Court stated that it was proved beyond reasonable doubt that ÅG's statements were made for the purpose of expressing contempt and disdain for homosexuals as a group. The District Court stated further that the crime is such that the sanction must be imprisonment unless special reasons exist for choosing a sanction that does not involve deprivation of liberty. The District Court made the assessment that no such special reasons existed and determined that the sanction would be imprisonment for one month.

The Court of Appeal found in its turn that ÅG's exposition of the Bible quotations was remarkable as regards choice of words, but that the contents were hardly more far-

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 3 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

reaching than the Bible texts he was referring to. The Court of Appeal stated that a right to preach in accordance with the Bible may be considered to include the possibility of expounding and interpreting the Bible as long as the exposition relates to the Bible's message. Also opinions that are foreign to the majority of citizens or even provocative may, thus, be presented. The Court of Appeal stated that there was nothing to indicate that ÅG had used the sermon situation as a cover for attacking homosexuals as a group to an extent beyond what follows from the religious source his Christian belief embraces. The intention of the sermon seemed instead to be, according to the Court of Appeal, to explain and expound the belief and view of the Bible texts for which ÅG stands and to influence people's way of living. The Court of Appeal made the assessment that this must be considered to fall outside what is covered by the penalty provision "agitation against a minority group" and therefore dismissed the action.

## **General comments on the legal regulation**

### ***Agitation against a minority group***

#### ***History***

The provision concerning agitation against a minority group was introduced in 1948. As objects of protection it incorporated minority groups of a particular origin or holding certain religious beliefs, such as Jews, gypsies and aliens who had escaped to Sweden. For criminal liability to exist it was required that someone had publicly threatened, slandered or vilified such a minority group. The range of punishment was fines or imprisonment. In the motives for the legislation it was emphasized that statements inciting to hatred towards other groups of citizens on the basis of their race or religion offended the general sense of propriety and should not be tolerated and that criminalisation afforded protection to an important social interest in order and propriety (Decisions of the Swedish Supreme Court - NJA II 1948 p. 357-359).

The range of punishment was changed in 1962. Anyone guilty of agitation against a minority group was to be sentenced to imprisonment for up to two years, or if the crime was minor, to a fine. The motive was that the crimes covered by the provision could be of a serious nature (NJA II 1962 p. 251).

In connection with Sweden's ratification of the UN Convention on the Elimination of All Forms of Racial Discrimination, the provision was amended in 1970 to include minority groups of a certain race, of a certain colour, of a certain nationality or ethnic origin or with certain religious beliefs. The minister, however, emphasized that when assessing the need for legislation, consideration should also be given to the circumstances that prevailed at that time in our country and to the risk of more widespread racial discrimination in the future. In connection with this a further two amendments were made. In the first place the publicity requisite was extended in such a way that it was sufficient

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 4 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

that the statement or communication had been disseminated among the general public. In the second place the punishable act was extended to measures implying threat or expression of contempt. The reference to contempt was intended to criminalize other offensive opinions than those that can be judged to be slander or vilification (NJA II 1970 p. 521-527 and 530-535 as well as "Brottsbalken En kommentar" p. 16:35 – The Penal Code, a Commentary).

The circle of objects of protection was again extended in 1982. The background was that various expressions of hostility towards immigrants had become increasingly common and that there was therefore a need for the provision to cover immigrants taken as a group. The circle protected was therefore extended to national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin or religious belief (NJA II 1982 p. 147-148).

The dissemination requisite was amended in 1988 in such a way that the requirement that a statement must have been made in public or disseminated to the general public was completely dropped. The amendment to the law thus meant that it was sufficient that the statement had been disseminated. Statements expressing racial contempt thereby became punishable as soon as they existed outside the purely private sphere (NJA II 1988 p. 540-541).

From 1 January 2003 the provision also covers a group of people with allusion to sexual orientation. The reason for the amendment to the law was stated to be that foremost homosexuals occupy a particularly vulnerable position in our society and that they are often exposed to hate propaganda of the kind against which there is no real protection (Bill 2001/02:59 p. 32-33). The expression sexual orientation must, however, as in other legislation, include homosexual, bisexual and heterosexual orientation, while such sexual interests, variations and approaches or behaviours that as well may be found in heterosexual, homosexual or bisexual persons fall outside the scope of the provision. The term sexual orientation thus does not for example cover transsexualism or transvestism (a. Bill p. 40).

Since 1 January 2003 the provision also includes a special range of punishment for serious crimes; imprisonment for a minimum of six months and a maximum of four years. The motive for the amendment was, among other things, that in the light of the large number of racist alliances that emerged in the 1990s and the increasing propaganda activities they pursued, there was a need for such a range of punishment (a. Bill p. 26-27).

***The present wording of the provision***

Pursuant to Chapter 16, Section 8 of the Penal Code a person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin,

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 5 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

religious belief or sexual orientation, shall be sentenced for agitation against a minority group to imprisonment for a maximum of two years or, if the crime is minor, to a fine. If the crime is serious a prison sentence of a minimum of six months and a maximum of four years is imposed. When assessing whether the crime is serious special consideration shall be given to whether the communication had a particularly threatening or offensive content and was disseminated to a large number of people in a way intended to arouse considerable attention.

The description of the crime thus contains three requisites. The criminal act must consist of a threat or expression of contempt, it must take place in a disseminated statement or other communication and the act must refer to a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation.

#### **Expression of contempt**

Using "contempt" is intended to also criminalize other offensive opinions than those that can be judged to be slander and vilification. To be punishable it is sufficient that a statement about a certain national group, for example, is derogatory to the group's reputation. Likewise, occurrences entailing ridicule would probably fall under the provision (NJA II 1970 p. 531). All statements of a derogatory or degrading nature are not, however, covered. To be punishable it is required that it is completely clear that the statement oversteps the boundary for an objective and factual discussion (a.a. p 535, cf. also NJA II 1948 p. 359).

#### **Objects of protection**

The categories afforded protection are national, ethnic and other such groups of persons when the attack is based on the persons' race, colour, national or ethnic origin, religious beliefs or sexual orientation. The provision only refers to collectively defined groups. Individually identifiable individuals are not protected by the provision ("Brottsbalken, En kommentar" p. 16:39).

#### **Disseminated statement or other communication**

To be punishable, it is required that the contempt be expressed in a disseminated statement or communication. It is not required that the statement be made in public or that it be disseminated among the general public. Hence, as stated above, the dissemination requisite is met as soon as the statement leaves the purely private sphere (NJA II 1988 p. 541).

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 6 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

***The Fundamental Laws of the Swedish Constitution***

**Freedom of the Press Act (TF) and Fundamental Law on Freedom of Expression (YGL)**

The crime of agitation against a minority group is also a freedom of the press and freedom of expression crime. According to Chapter 7, Section 4 of TF, it is thus punishable to threaten or express contempt for a minority group or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation by means of printed matter. There is a corresponding provision in Chapter 5, section 1 of YGL.

Both TF and YGL contain instructions to those applying the law. Under Chapter 1, section 4, first paragraph of TF, any person entrusted with passing judgment on abuses of the freedom of the press must bear in mind that the freedom of the press is fundamental to a free society, always direct their attention more to illegality of subject matter and thought than to illegality of expression, to the aim rather than the manner of presentation, and in case of doubt acquit rather than convict. The corresponding provision in YGL is in Chapter 1, section 5 §. The instructions express that the interests of freedom of expression and information must weigh heavily when they collide with other interests that are also protected by law.

It has been discussed whether a provision of the same import, a parallel instruction, is needed to give the courts legal authority also in ordinary criminal cases for consideration of the type prescribed in the instruction. The intention of such a provision would also be to impress on the bodies applying the law the importance of taking into consideration freedom of expression and information when administering the law.

The matter was dealt with when the provisions of the Penal Code on grounds for discharge from liability were revised (Bill 1993/94:130). The Government considered, as did the great majority of the referral bodies, that it was not possible to construct a provision in a way that would satisfy the requirements one may make of penal legislation. Therefore no provision of the nature of a "parallel instruction" was introduced into penal legislation. On the other hand, the Government argued that the present legislation on liability, meting out of punishment and choice of sanction provides scope for taking the interests mentioned into consideration. Firstly, in the cases in which the issue typically arises, there are direct legal provisions that specify the extent to which freedom of expression should be taken into consideration, for example Chapter 5, Section 1 (slander), Chapter 16, Section 10 a (child pornography crime) and Chapter 16, Section 10 b (illegal portrayal of violence). Secondly, Chapter 29, Section 1 of the Penal Code states that consideration must be given to the perpetrator's intentions and motives when determining the penal value of a crime and thereby both the choice of sanction and meting out of punishment (a. Bill p. 65-66 and Ministry publication Ds 1991:78 "Parallellinstruktionen Om tillgodoseended av yttrandefrihetsintresset I vanliga brottmåll")

p. 27-32 – Parallel instruction. On satisfying the freedom of expression interest in ordinary criminal cases).

Even if the wording of the crime, agitation against a minority group, does not give explicit support for taking into consideration the interest the so-called instruction gives expression to, in my opinion it is natural that the interests of freedom of expression and the press in general must also weigh heavily even outside the formal purview of TF and YGL.

**Instrument of Government (RF)**

In Chapter 2 of the RF there are provisions concerning fundamental freedoms and rights, including freedom of expression and freedom of religion. Freedom of expression is described as a freedom to communicate information and express thoughts, opinions and sentiments whether orally, pictorially, in writing or in any other way (Chapter 2, Section 1, first paragraph 1). Freedom of religion is described as the freedom to practice one's religion alone or in the company of others (Chapter 2, section 1, first paragraph 6).

Freedom of expression

According to Chapter 2, Section 12, freedom of expression may be restricted in law, but the restriction may only be made to satisfy a purpose acceptable in a democratic society and the restriction may never go beyond what is necessary, having regard to the purpose which occasioned it and nor may it be carried so far as to constitute a threat to the free formation of opinion as one of the fundamentals of democracy. In Chapter 2, Section 13, it is stated in addition that freedom of expression, among other things, may be restricted having regard to the security of the Realm, the national supply of goods, public order and public safety, the interest of an individual, the sanctity of private life or the prevention and prosecution of crime. In other respects restrictions to freedom of expression, as far as is now at issue, may only be made if particularly important grounds occasion it. When determining what restrictions may be made particular regard shall be given to the importance of the widest possible freedom of expression in political, religious, professional, scientific and cultural matters.

Freedom of religion

Freedom of religion is absolute, i.e. it may not be restricted. This is, however, related to the way in which freedom is defined in the fundamental law text: the definition refers exclusively to what is specific just for freedom of religion - the freedom to practice one's religion alone or in the company of others. Thus the elements of religious freedom that flow from other freedoms, such as freedom of expression, freedom of information, freedom of assembly and freedom of association may be restricted in accordance with what applies to those freedoms.

The general restrictions applicable to people's actions in society may in certain cases affect measures that are perceived as the practising of religious freedom. An action that is

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 8 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

generally punishable is, for example, not protected just because it takes place in a religious context. The protection does not, for example, imply any right to refuse military service for religious reasons or that parents may neglect their obligation to care for their children for religious reasons (see Holmberg, Stjernquist, Grundlagarna p. 79-80 – The Constitution, with references made there).

**The European Convention for the Protection of Human Rights and Fundamental freedoms (the European Convention)**

The European Convention has applied as law in Sweden since 1 January, 1995. According to Chapter 2, Section 23 of the RF no act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention.

Freedom of religion (Article 9)

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief and freedom, either alone or in community with others, and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. The freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The terms freedom of conscience and freedom of religion must be interpreted relatively cautiously. It may indeed be maintained that many different actions conflict with a certain person's conscience or religion, but the intent of Article 9 cannot go further than to protect against infringement of what appears to be the central content of a belief or religion and to prevent the occurrence of practical difficulties for religious worship (Danelius, Mänskliga rättigheter i europeisk praxis, second edition, p. 297).

Freedom of expression (Article 10)

Freedom of expression includes the right to hold opinions and the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. The Article states that this freedom may be subject to certain restrictions. It is stated that the exercise of the right to freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others.

## **Grounds for the appeal**

### ***Liability***

In connection with making the provision on agitation against a minority group applicable also to sexual orientation, the legislator stated that the same considerations of principle must be made when judging an action referring to homosexuals as when judging an action referring to any of the other groups protected by the provision. To be punishable it is hence required that it is completely clear that the statement oversteps the boundaries for a factual discussion concerning the group in question. When examining whether an action constitutes agitation against homosexuals the statement must also – as otherwise as regards examination of whether an action constitutes agitation against a minority group – always be judged in context. The motives for the action must thereby be taken into account. There must of course be a certain margin of exemption for statements that are critical etc. What is decisive is how the statement appears when an objective assessment is made (Bill 2001/02:59 p. 41).

Thus the legislator has made it clear that the provision on agitation against a minority group is not intended to prevent free and objective debate. Hence, arguments and discussions concerning homosexuals, for example, should be possible both in churches and in other parts of the community.

The Supreme Court has not tested the provision after its amendment on 1 January 2003. The Court's practice prior to this is not particularly extensive and is limited to a handful of cases. In addition, the cases the Court has heard have not in principle concerned the issue of whether certain statements are to be judged as criminal or not. Instead they have mainly concerned whether certain forms of indirect expressions of opinion constitute criminal agitation against a minority group and under what circumstances the dissemination requisite shall be deemed to have been met. The Supreme Court has stated in general, however, as regards interpretation, that the provision concerning agitation against a minority group implies a restriction to every citizen's guaranteed freedom, under Chapter 2 of the Instrument of Government, to express his opinions, and that this gives a special reason for restrictiveness when interpreting the provision (NJA 1996 p. 577).

As regards the matter of indirect expressions of opinion, the Supreme Court, in NJA 1982 p. 128 considered that a sign erected at the entrance to a camping site with the wording "Gypsies may not enter the campsite..." constitutes agitation against a minority group. In NJA 1996 p. 577 the Court found that it is agitation against a minority group when a person wears several nazi symbols in a public place (cf also the Court of Appeal decision RH 1997:53).

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 10 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

As regards the dissemination requisite, the Supreme Court, in NJA 1999 p. 702, has made it clear that in principle it is required that the statement has reached more than a few people (cf. also RH 1997:28 and 2000:72).

In this context the examination by the Chancellor of Justice (JK) in the capacity of prosecutor for freedom of the press and freedom of expression violations is also of interest.

JK has stated that statements called into question must always be considered in the context in which they were made, and not detached from their context. The purpose of the representation must be given particular consideration (decision of 30 October 2001, Registration number 2887-01-30). He further stated that it must be taken into account that the purpose of the introduction of the legislation on agitation against a minority group was not to obstruct debate or criticism of different phenomena. The expression contempt must be interpreted with some caution and to be punishable it is required that the statement clearly oversteps the boundary for an objective and factual discussion. Thus there must also be a wide margin for such statements that by a broad section of the general public would be perceived as objectionable or directly misleading (decision, 19 August 2002, Registration number 2010-02-30).

As regards the question of agitation against homosexuals, JK has called attention to the fact that the legislator has made it clear that the provision is to be interpreted in the same way as before and that the intention is not to prevent reasoning and discussions about homosexuality, for example, be it in churches or elsewhere in the community. In order to be punishable it is required that it is completely clear that the statement oversteps the boundary for an objective and factual discussion concerning the group in question (decision, 20 August 2004, Registration number 2900-04-31). JK has also stated that the collection of texts that the Bible constitutes cannot in itself be considered to comprise any crime, but that it could constitute agitation against homosexuals if the statements were to be emphasized and explicitly referred to in a disparaging way against a homosexual way of life (decision, 21 January 2003, Registration number 16-03-30, and the above-mentioned decision of 20 August 2004). JK has also, in connection with examining certain statements in a religious periodical referring to the so-called Pride manifestation, stated that it should also be taken into account that the statements were based on a philosophy of life - a religious creed - with which homosexuality is deemed incompatible (decision, 11 August 2004, Registration number 2719-04-30).

**Evaluation of the statements in question in the case**

The statements included in the statement of the criminal act charged show that ÅG - directly or indirectly - upholds that AIDS came into existence through homosexuality, that homosexuality is a sexual abnormality which is a deep cancerous tumour on the whole body of society, that homosexuals are sexually twisted people who will even rape

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 11 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

animals, and that homosexuals are perverted people and paedophiles. He also conveys that homosexuality is something sick, that it is a pure thought that is exchanged for a contaminated thought, a healthy heart that has been exchanged for a sick heart, a healthy body that has been laid waste because of an exchange. It is true that ÅG makes certain reservations in his statements, for example that not all homosexuals are paedophiles or perverted. The content of his statements cannot, however, be understood in any other way than that he believes that homosexuals as a group go in for paedophilia and bestiality, but that there are individual exceptions.

The statements made by ÅG were not objective and were deeply offensive to homosexuals as a group. They allude in all essentials to the sexual orientation as such and intimate that homosexuals typically exhibit behaviours that are generally regarded as highly reprehensible. The statements have been widely disseminated and ÅG was active in also getting the message spread beyond the congregation. Considering what the legislator has stated concerning the definition of the criminal area with regard to the provision agitation against a minority group and the practice with regard to its application to date, in my opinion it is obvious that ÅG's statements, when assessed objectively, are of such of a nature that they should imply criminal liability for agitation against a minority group.

The question is then, what significance is to be afforded the fact that ÅG made his statements in a sermon situation and that he used quotations from the Bible to support his statements.

In the courts ÅG has in brief stated the following. He holds a religious belief, faithful to the Bible, which is to be understood as the Bible being the word of God. Through prayer and meditation God's thoughts are revealed to him and they then come alive. Thus ÅG is saying that he preaches about what God is thinking. The subject of his sermon came "like a bolt from the blue". The Bible, both the old and new testaments, provide a clear and unequivocal answer to the question of homosexuality. He understands that homosexuals may feel offended by his sermon, this was not, however, his intention. He would not, despite this, refrain from proclaiming what he knows and what God has told him. Furthermore, he has explained that in his sermon he was addressing himself particularly to young people, who may be on the verge of trying out a homosexual way of life, and to people with a homosexual orientation, who through the sermon would reach awareness and afterwards be converted.

In the motives for the legislation it is stated that solely quoting and discussing religious sources does not fall within the criminal area. On the other hand – just as before the amendment to the law it was unlawful to threaten or express contempt for Muslims or Christians on the basis of religious texts – it is unlawful to use such material to threaten or express contempt for homosexuals as a group. The Government stresses that it is

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 12 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

important to differentiate between statements and communications that allude to sexual orientation as such, and express threats to or contempt for the collective due to this orientation, and such statements or other communications that allude to behaviour or such expressions as the orientation may take, but which cannot be conceived as being intended to offend or threaten the entire group of people who have this orientation (Bill 2001/02:59 p. 41-42). The Riksdag (Swedish parliament) agreed with the Government and declared that it is not the intention for separate rules to apply to statements made for example in a sermon situation, compared with spreading the same statements in some other context. As regards sermon situations, it would probably, according to the Committee, normally fall outside the criminal area to quote religious sources and only exhort the hearers to follow the direction of the sources (Committee Report 2001/02:KU23 p. 36-37).

Thus it must be clear that a statement which, seen objectively, is in itself a violation, cannot go unpunished solely on the grounds that the inspiration for the statement could be taken from a religious source. The consequences of such an exception would be difficult to analyze. Most religious sources came into existence in a completely different period under other historical and cultural conditions. It is not difficult to find sustenance for deeply offensive statements against various minority groups in religious texts. The deciding factor must be instead to evaluate whether the statements fall within the framework of an objective and factual discussion. Thus, it is just as inadmissible to use the sermon situation to express contempt while alluding to sexual orientation, for example, as it is in social life in other respects.

Nor did ÅG content himself with quoting from the Bible. He expounded the arguments and clothed them in modern language and applied them to contemporary phenomena in a way that, in my opinion, is deeply offensive to homosexuals as a group. Even if ÅG considers that he has support for his argument in the Bible texts he quotes it is easy to establish that his statements are not only offensive but also not objective. They are directly incompatible with the requirements for tolerance towards various social groups that present legislation expresses. This comes out clearly if you consider the hypothesis that the sermon could instead have been about Jews or Muslims.

#### **Purpose**

When evaluating criminality, the purpose behind the statements should also be taken into account. ÅG stated that for a long period a lot of attention had been given to homosexuals, both through the media and through demonstrations. He was therefore of the opinion that his views about homosexuals as a group must also be given comparable attention. Knowledge of the words and thoughts of God concerning homosexuality should be communicated to people. He contacted the local media and invited them to the sermon, but none of those invited came, so he distributed a resume of his sermon to a number of daily newspapers. The purpose of his sermon and the distribution of the

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 13 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

resume was to communicate the message to as many people as possible. ÅG has declared that he understands that homosexuals may feel offended by his sermon. This was not, however, his intention. He would not, however, despite this, refrain from proclaiming what he knows and what God has told him.

ÅG has obviously understood that his statements would be perceived as offensive to homosexuals. His statements have far exceeded what was necessary to illustrate the Bible's attitude to homosexuality. In my opinion there was no legitimate interest, for example for reasons of freedom of expression or freedom of religion, to express himself in the way he did.

In summary I accordingly believe that the requisites for the crime of agitation against a minority group have been met. The provision on agitation against a minority group must, however, also be interpreted in relation to the European Convention. The question is whether it is compatible with the Convention to convict ÅG for the statements he has made. Thus it must be considered whether the Swedish provision on agitation against a minority group has such a wide scope that it contravenes the European Convention.

#### **The European Convention and its application**

In its findings the Court of Appeal expressed itself in a way that can be interpreted to mean that the statements made and examples given in the preparatory work for the law may be regarded as including criminalisation that is too far-reaching. The Court of Appeal arrives at the conclusion that the European Convention's provisions concerning freedom of religion and the European Court of Human Rights' application of them implies that the question of judging statements made in a sermon situation as agitation against a minority group may only arise in rare cases.

In this respect I would like to adduce the following.

Article 10 of the Convention contains rules to protect freedom of expression. In the legislative work preceding the introduction of sexual orientation into the provision on agitation against a minority group, the Government reasoned that the interest in protecting homosexuals as a group against such things as expressions of contempt is an allowed objective under the European Convention. Neither the Council on Legislation nor the Riksdag made any other assessment (Bill 2001/02:59 p. 35, Committee Report 2001/02:KU23, Riksdag Communication 2001/02:234, Committee Report 2002/03:KU7, Riksdag Communication 2002/03:8). I also share this opinion and in this respect the Court of Appeal does not either appear to be of any other opinion.

The Court of Appeal, however, arrives at the conclusion that the European Convention's decision dated 25 May 1993 in the case Kokkinakis vs Greece means that Article 9 of the

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 14 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

Convention on religious freedom implies that statements made in a sermon situation may only be judged as agitation against a minority group in rare cases.

The case concerned whether it was compatible with article 9 under certain circumstances to punish actions that implied trying to convert people to another religious belief. The Court found that this is allowed. It found, however, (paragraph 49) that *"...the Greek courts... did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means."* On these grounds the court was of the opinion that the Greek authorities' intervention in the case in question was not in proportion to the legitimate purpose of the provision in question (i.e. to protect other people's freedom of religion. As regards the forms of influence that may be improper, the court stated (paragraph 48) that this may for example consist of *"..exerting improper pressure on people in distress or need; it may even entail the use of violence or brainwashing..."*.

It may be called into question whether the Court of Appeal has made too extensive an interpretation of Article 9 and the European Court of Human Rights' statements in the Kokkinakis case. As I explained above, the terms freedom of conscience and freedom of religion must be interpreted relatively cautiously. The intent of Article 9 does not go further than to protect against infringement of what appears to be the central content of a belief or religion and to prevent the occurrence of practical difficulties for religious worship (Danelius, "Mänskliga rättigheter i europeisk praxis" – Human rights in European practice - second edition, p. 297). This also follows from the practice of the European Court of Human Rights.

In the case of *Pichon and Sajous vs France* the court established that it is compatible with Article 9 to impose criminal sanctions on pharmacists who refused to sell prescribed contraceptives because of their religious beliefs. The complaint was dismissed as manifestly ill-founded. In its decision the court notes that *"... the main sphere protected by Article 9 is that of personal convictions and religious beliefs, in other words what are sometimes referred to as matters of individual conscience (...the main sphere protected by Article 9 is that of personal convictions and religious beliefs, in other words what are sometimes referred to as matters of individual conscience. It also protects acts that are closely linked to these matters such as acts of worship or devotion forming part of the practice of a religion or a belief in a generally accepted form.)"* The court also declares that *"...Article 9...does not always guarantee the right to behave in public in a manner governed by that belief. The word "practice" used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief."*

In the Kokkinakis case the the European Court of Human Rights established that it is permissible to restrict religious freedom through penal legislation, but that the courts, when applying the legislation, must make it clear in what way the accused has violated this legislation. Furthermore, the Court gave examples of what may constitute improper pressure when trying to convert people to another religious belief. In this context the Court states nothing other than that such improper pressure on people may even entail the use

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 15 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

of violence or brainwashing. This statement should be regarded as a description of what such improper pressure may entail in its worst variant and not as a minimum requirement for the circumstances that must exist for the pressure to be improper. In addition, it is too long to make a direct analogy between the issue in Kokkinakis - improper pressure in connection with religious conversion - and the issue here - whether the statements expressed contempt for homosexuals - and then draw the conclusion that judging statements made in a sermon situation as agitation against a minority group can only be considered in rare cases.

In this context the European Court of Human Rights' recent judgment in the case *Cumpana and Mazare vs Romania* should also be mentioned (judgment dated 17 December 2004, application no. 33348/96). The case concerned whether prison sentences against journalists who published articles with contents that implied defamation of certain individuals constituted a violation of the Convention. The Court found that freedom of the press under certain circumstances may be restricted, for example to fulfil the requirements of Article 8 concerning the right to respect for other people's private lives. On the other hand, the Court found that imprisonment was disproportionate and in violation of Article 10. The Court explains (paragraph 115) that "...imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression...only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence." "Hate speech" may be regarded as equivalent to such dissemination of contempt as is referred to in the Swedish provision concerning agitation against a minority group.

In the light of what is stated above I cannot share the view of the Court of Appeal that application of the European Convention leads to the conclusion that judging statements made in a sermon situation as agitation against a minority group can only be considered in rare cases. Nor in other respects does an interpretation of the text of the Convention imply other conclusions concerning the application of the penalty provision on agitation against a minority group than those presented above.

### **Sanction**

Agitation against a minority group is of such a nature that imprisonment may be seen as the normal sanction even for relatively mild statements judged to be crimes of normal degree (cf RH 2002:40).

When assessing the penal value of the crime, on the one hand it should be taken into consideration that ÅG is guilty of several offensive statements and that they were intended to arouse considerable attention. This indicates that the sanction imposed by the District Court should be increased.

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 16 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

On the other hand, Chapter 29, Section 1, second paragraph of the Penal Code must be taken into account. Under this provision, in assessing the penal value, special consideration shall be given to the intentions or motives the accused may have had. This means that the Court, when determining the punishment for a crime, shall take into consideration whether for example the accused was directed in his actions by urgent opposing interests. The preparatory work is relatively brief in the matter of which interests may be involved. It is, however, established that the background to the actions of the accused is of considerable significance and that two similar acts may be judged quite differently having regard to the fact that different motives were behind them (Bill, 1987/88:120 p. 81). It is probably beyond any doubt that the freedom of expression interest is such an opposing interest, which under the provision specified must be taken into account when determining the penal value and thereby the determination of sanctions in general. (Ministry publication, Ds 1991:78 p. 32).

ÅG has stated that the reason for his sermon was that for a long period a lot of attention had been given to homosexuals, both through the media and through demonstrations. Therefore he thought that his views about homosexuals as a group must also be given equivalent attention and that the knowledge of God's word and thoughts concerning homosexuality should be communicated to people. These circumstances may, in my opinion, tell against increasing the sanction. However, I do not believe that the circumstances are strong enough to constitute grounds for choosing a sanction that does not involve deprivation of liberty. ÅG should therefore be sentenced to imprisonment.

In an overall assessment of all the relevant circumstances of the case I am of the opinion that the sanction imposed by the District Court is well-judged and should therefore be affirmed.

### **Grounds for granting leave to appeal**

The provision concerning agitation against a minority group may, not least in the light of the opposing interests that may manifest themselves, give rise to delimitation difficulties (cf. for example NJA II 1970 p. 534). The more detailed limits of the application of the enactment must therefore be clarified through authoritative statements in practice.

The matter of the application of the provision for alleged offensive statements with allusion to sexual orientation has as yet not been tried by the Supreme Court. Of particular interest in the case in question is the weighing against the interest of freedom of expression and freedom of religion.

The case has aroused unusually great interest, both inside and outside Sweden. Several different interpretations of the provision on agitation against a minority group and its agreement with the fundamental laws of the Constitution and the European Convention

**SWEDISH PROSECUTION AUTHORITY**  
Office of the Prosecutor General  
Legal affairs division

**Appeal**

Page 17 (17)

Date  
9 March 2005

Reg. no.  
ÅM 2005/1081

have been presented in this connection. There is therefore a great need for an authoritative ruling.

Neither is there any Supreme Court ruling concerning sanctions in cases of this type.

Against this background it is of importance for guidance in application of the law that the Supreme Court examines the issue of liability and sanction.

**Evidence**

I refer to the same evidence as in the Court of Appeal, i.e. questioning of ÅG and playing back a sound recording of the sermon. I reserve the right, however, to supplement my evidence after studying the appellee's written response.

ÅG shall attend in person the main proceedings before the Supreme Court.

Fredrik Wersäll

Stefan Johansson

Copy:

- Local public prosecution office in Kalmar (C-8-1592-03)
- Development Centre Malmö