

SUPREME COURT'S JUDGMENT

delivered in Stockholm on 31 March 2023

Case no.

B 2501-22

PARTIES

Appellant

BM

Counsel and Public Defender: Attorney EP

Respondent

Prosecutor General

Box 5553

114 85 Stockholm

MATTER

Agitation against a population group

RULING APPEALED

Judgment of the Svea Court of Appeal of 16 March 2023 in case B 13147-21

JUDGMENT

The Supreme Court changes the judgment of the court of appeal and acquits BM of the charge of agitation against a population group, and also exonerates him from the obligation to pay a fee under the Fund for Victims of Crime Act (1994:419), as well as to repay the cost of the public defender in the district court and the court of appeal.

EP shall receive compensation from public funds for the defence of BM in the Supreme Court in the amount of SEK 6,309. Of the amount, SEK 5,047 relates to work and SEK 1,261.75 relates to VAT. The state shall bear this cost.

CLAIMS IN THE SUPREME COURT

BM has claimed that the Supreme Court shall acquit him of the charge of agitation against a population group.

The Prosecutor General has opposed modification of the judgment of the court of appeal.

REASONS FOR THE JUDGMENT

Background

1. BM was prosecuted for agitation against a population group because of a statement he made during a meeting as a member of the regional council in Region Sörmland. The statement was made during a speech in connection with discussions concerning the annual report for 2020. He touched on unemployment in the region, which, according to BM, was affected by the reception of quota refugees from South Sudan decided by the Swedish Migration Agency. The chairman of the council interrupted BM during the speech.

2. The indictment had the following statement of the criminal act as charged.

BM has expressed contempt for the South Sudanese population group with reference to national origin by stating that persons from that nation have the lowest intelligence quotient and worst IQ or similar expressions. The statement was disseminated in connection with a speech at Region Sörmland Council in front of about 50 people. It happened on 27 April near Olof Palmes väg, Nyköping municipality. BM committed the act with intent.

3. BM denied responsibility for the crime. His purpose was not to offend or disparage people from South Sudan. The speech followed a script and what he said before he was interrupted was that "The Swedish Migration Agency, in its lack of wisdom, placed a number of South Sudanese quota refugees in Sörmland. It should be noted that the population there is among the peoples with the lowest intelligence in the world, which is well documented in research." He had planned to go on to say that, according to the UN, South Sudan has a very low "Human Development Index" with a low level of education and widespread illiteracy and that the country should be supported in the immediate area. However, he was not allowed to continue. The purpose would have been clearer if he had been allowed to finish his speech.

4. The district court considered that BM's statement could hardly be interpreted in any other way than that the designated population group was worth less than other population groups and sentenced BM for agitation against a population group to a conditional sentence combined with a 40-day fine. The court of appeal has affirmed the judgment of the district court.

What the case concerns

5. The case concerns the conditions for criminal liability for agitation against a population group in relation to a statement made by a member of a political assembly during a session.

Agitation against a population group

Generally on criminal liability for agitation against a population group

6. A person who, in a statement or other communication that is disseminated, threatens or expresses contempt for a population group or other such group of persons by allusion to race, colour, national or ethnic origin, religious belief, sexual orientation or transgender identity or expression, shall be sentenced for agitation against a population group to imprisonment for at most two years or, if the offence is minor, to a fine (see Chapter 16, Section 8 of the Swedish Criminal Code).

7. The definition of the offence has three parts. Criminal liability presupposes that a statement or other communication has been disseminated, which means that it must have been transmitted to persons outside the strictly private sphere. The message must have consisted of threats or expressions of contempt. Criminal liability also presupposes that the communication has referred to a population group or other such group and alluded to a circumstance specified in the provision, such as race, colour, national or ethnic origin.

The concept of contempt

8. Contempt refers to slander and libel as well as other offensive opinions, such as statements and other communications that are derogatory or degrading to a particular population group. The communication should be assessed on the basis of the message it conveys rather than on a critical analysis of the exact wording. The appearance of the communication shall be objectively assessed. How a recipient has had reason to perceive the content is central to the assessment. This does not preclude the closer content of a statement from being relevant, for example that it involves an unjustified and a manifestly

offensive choice of words. (Cf. "The comment in the Facebook group" NJA 2020, p. 1083, para. 5 and 6 with references.)

9. Not every statement containing negative opinions about a particular group is punishable. When assessing whether an act is punishable as agitation against a population group, the statement must always be assessed in context. The motives for the act, i.e. the purpose of a statement, must also be taken into account. (Cf. "The Sermon in Borgholm", NJA 2005, p. 805.)

10. Statements that can be seen as factual criticism fall outside the punishable area of agitation against a population group. According to the legislative history, criminal liability can only be considered if it is clear that the limit for a factual and authoritative discussion of the group in question has been exceeded. Criminalisation should not constitute an obstacle to freedom of opinion or a threat to the free formation of opinion, and claims that are best addressed or corrected through free and open debate should not be covered. Admittedly, it was also stated that considerations of freedom of opinion or the right to criticise should not be able to be invoked in defense of statements expressing contempt for a group on the ground, for example, that it is of a certain nationality and for this reason would be worth less. At the same time, it was stressed that it must be tolerated that opinions are sometimes expressed that are not in line with generally accepted values in society. (Cf. Govt. Bill 1970:87 pp. 61 and 130, Govt. Bill 2001/02:59 p. 35 f. and KU 1981/82:24 p. 5.)

11. Since the provision entails a restriction on the freedom of expression, it must be interpreted restrictively. The interpretation must take into account fundamental rights and freedoms under the Instrument of Government and the requirements arising from the European Convention on Human Rights.

Protection of the freedom of expression in the Instrument of Government and the European Convention on Human Rights

12. The protection of fundamental rights and freedoms is regulated in Chapter 2 of the Instrument of Government. It states that everyone, in their relations with public institutions, is ensured, among other things, freedom of expression, i.e. freedom to communicate information in speech, writing or pictures or in any other way and to express thoughts, opinions and sentiments (see Chapter 2, Section 1).

13. A restriction on the freedom of expression must not go beyond what is necessary for the purpose for which it was pursued, nor must it go so far as to threaten the free formation of opinion as one of the foundations of democracy. When assessing which restrictions may be imposed, particular attention shall be paid to the importance of the broadest possible freedom of expression in, inter alia, political matters. (Cf. Chapter 2, Sections 20, 21 and 23 of the Instrument of Government.)

14. According to Article 10 of the European Convention on Human Rights, everyone has the right to freedom of expression, which includes freedom to receive and impart information and ideas without interference by public authority. Freedom of expression may be subject to such restrictions as are necessary in a democratic society with regard, inter alia, to the protection of the good name, reputation or rights of others.

15. The European Court of Human Rights has repeatedly stated that the convention protection for the freedom of expression in political contexts is particularly strong. That politicians can speak freely in debates and on issues of public interest is considered fundamental in a democracy. This applies especially to elected representatives in national and regional parliaments. In such contexts, therefore, very strong reasons are required for restrictions on the freedom of expression to be acceptable. This means that there is little

scope for restricting the freedom of expression in these contexts. (Cf. e.g. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 137 *f.*, 17 May 2016 and *Perinçek v. Switzerland* [GC], no. 27510/08, § 197, *ECHR 2015*, extracts.)

The punishable area in political contexts

16. It is already clear from the legislative history of the provision on agitation against a population group that the importance of a free and open debate must carry great weight when assessing whether a particular statement falls within the punishable area, i.e. whether it is to be regarded as an expression of contempt within the meaning of the provision. The importance of freedom of expression is underlined by the special protection afforded by the Instrument of Government and the case-law that has been established under Article 10 of the European Convention on Human Rights. The foregoing must be taken into account when interpreting the provision (see para. 11).

17. Against this background, there is little scope for considering statements made in the context of a debate in a political assembly to be punishable. It should only be considered in the case of statements with a particularly offensive content and which clearly go beyond what is acceptable in political discussions.

The assessment in this case

18. It has not been established that BM expressed himself in any other way than that which he himself has stated (see para. 3). The statement has been disseminated in the way that is required for criminal liability for agitation against a population group.

19. The statement categorically singled out an entire population group and conveyed a message that those who belong to the group are less intelligent than others. It must be regarded as clearly derogatory to the group targeted.

20. However, in assessing whether the statement constituted an expression of contempt which would give rise to criminal liability, account must be taken of the context. BM made the statement as a member of the regional council in connection with discussions under the overarching topic of unemployment. He has stated that he wanted to express that people from South Sudan find it difficult to get work in Sweden and that they can be better helped in other ways than by coming here. Furthermore, he has stated that by the term "intelligence" he meant the concept "Human Development Index", which the UN uses to measure prosperity based on various factors. That this was BM's intention is supported by the script he has submitted in the case.

21. Against this background, the statement – although derogatory to the group targeted – did not go beyond what would have to be accepted in the context of a debate in a political assembly.

22. The judgment of the court of appeal should therefore be modified and BM acquitted of the charge of agitation against a population group. As a consequence, he shall be exonerated from the obligation to pay a fee to the Fund for Victims of Crime and to reimburse the costs of the public defender in the district court and the court of appeal.

Justices of the Supreme Court Anders Eka, Stefan Johansson, Petter Asp, Cecilia Renfors (reporting Justice) and Christine Lager participated in the ruling
Judge referee: Charlotte Hellner Kirstein