LCA 6902/06

Menashe Dror Tzadik

v

1. Haaretz Newspaper Publishing Ltd. *et al*

The Supreme Court sitting as the Court of Civil Appeals

[26 December 2007]

Before Vice-President E. Rivlin and Justices J. Elon, A Grunis

Application for leave to appeal the judgment of the Tel Aviv-Jaffa District Court dated June 29, 2006, of CA 1974/04 by Judges I. Shilo, U. Fogelman and R. Ronen

Legislation cited:

Protection of Privacy Law, 5714-1981

Defamation Law, 5725-1965

Israeli Supreme Court cases cited:

[1] CA 439/88 *Database Registry v. Ventura* [1994] IsrSC 48(3) 808.

For the applicant – S. Peled, D. Shuv

For the respondents – T. Leiblich, T. Neumann

JUDGMENT

Vice-President E. Rivlin

Before us is an application to appeal the judgment of the Tel Aviv-Jaffa District Court (Judges U. Fogelman, R. Ronen and I. S. Shilo), which granted the respondents' appeal of the judgment of the Tel-Aviv Jaffa Magistrates Court (Judge Y. Shevah)**.** It also determined that the respondents are not required to compensate the applicant.

The facts

1. The applicant is a member of the ultra-Orthodox community. One day in January 2002, the applicant set up a stall to distribute religious books near Dizengoff Center in Tel Aviv. It turned out that the stall was situated next to a store in which hung an advertisement that was described by the Magistrates Court as -

> … A giant poster, of large proportions, hanging in the window of the shop in front of which the claimant set up his stall, featuring a woman wearing tight little shorts, standing with her legs wide open, with the figure of a man between them, looking at her.

At some point**,** the applicant noticed that respondent 4, a professional press photographer, was trying to photograph him. In response to the applicant's strong objections to being photographed, respondent 4 assured him that the pictures were being taken for his personal use only. This promise turned out to be short-lived and unfounded, for the picture was published on February 2, 2002 in respondent 4's regular column in *Haaretz* newspaper, published by respondent 1. The applicant filed suit against *Haaretz* Newspaper Publishing Ltd. (respondent 1), against its editors (respondents 2 and 3) and against the photographer (respondent 4) claiming that the publication of the photograph violated his privacy and constitutes a defamatory publication against him.

The previous proceedings

2. The Magistrates Court ruled that publication of the photograph constituted a violation of privacy under s. 2(4) of the Protection of Privacy Law, 5741-1981 (hereinafter: "Protection of Privacy Law"), because its

publication could humiliate the applicant and cause him embarrassment within the ultra-Orthodox community in which he lives. The Court ruled that in this case, none of the defences in the Protection of Privacy Law were applicable. According to the Magistrates Court, the defence provided in s. 18(3) of the Law does not apply to our case because there is no public interest that justifies the violation of privacy. The Magistrates Court also found that contributory fault can be attributed to the applicant in that he "chose" to situate his stall next to the "provocative poster." The compensation determined by the Magistrates Court, after a reduction of NIS 10,000 for the contributory fault, was set at NIS 20,000. The Magistrates Court rejected the applicant's claim that publication of the photograph was defamatory, based on the defence prescribed in s. 14 of the Defamation Law, 5725-1965 (hereinafter: "Defamation Law") regarding a true publication that is of public interest.

3. The District Court granted the respondents' appeal of the Magistrates Court's judgment. The District Court ruled that even assuming that the publication involved a violation of privacy, the respondents could invoke the defence specified in s. 18(3) of the Protection of Privacy Law. According to the District Court, the applicant "is the one who chose the location of his stall to distribute religious books to the non-religious public, out of free choice and even though he was aware of his surroundings. He saw fit to position himself next to the shop window containing the poster that sparked his wrath." Therefore, the District Court stated that "this is not a case of protecting someone who wished to be left alone, and the violation of privacy is limited in extent." Under these circumstances – so it determined – considerations of freedom of expression and the public interest in the publication outweigh the violation of privacy (assuming such a violation does indeed exist). The District Court concurred with the Magistrates Court's reasons for rejecting the applicant's suit based on the Defamation Law.

The applicant filed an application for leave to appeal the judgment of the District Court. Following the hearing held before us, the parties submitted supplementary summations on the question of whether in this case there was a violation of privacy, within the meaning of the provisions of s. 2(8) of the Protection of Privacy Law.

The Parties' Claims

4. The applicant reiterates his arguments that the publication constitutes a violation of privacy and defamation. He especially emphasizes the fact that he "resolutely announced his refusal to have his picture published and he *received explicit assurance of such* from respondent 4" [emphasis in original - E. R.]. The applicant argues, *inter alia*, that there is no public interest in the publication of the photograph which would justify the violation of privacy, since he is a private individual and he was not photographed in the context of any public event. He maintains that there is no justification for giving priority to freedom of expression in this case, and that the District Court did not achieve a correct balance between the violation and the public interest.

5. The respondents maintain that leave to appeal should not be granted because the conditions for holding a "third round" of hearings on this matter have not been fulfilled. Essentially, the respondents believe that there has been no violation of privacy within the meaning of the Protection of Privacy Law. In their opinion, publication of the photograph does not "debase" or "humiliate," and therefore it does not fall within the bounds of the provisions of s. 2(4) of the Law. Similarly, the respondents argue that there has been no violation of privacy in the sense of a "breach of duty of confidentiality regarding a person's private affairs, by virtue of an explicit or implicit agreement" – in accordance with s. 2(8) of the Law. This is because the published photo is unrelated to the "private affairs" of the applicant, who elected to distribute religious books in the public domain. They further argue that no agreement was made between the parties. The respondents believe that even if the applicant's privacy was violated, the defence prescribed in s. 18(3) of the Law applies in this case, since the published photo was true and of public interest. The respondents point out in their supplementary summation: "Indeed, respondent 4 may have erred when he told the applicant, out of distress and fear, that the images would be for his personal use only. Perhaps this was wrong. However, this error in no way adds to or detracts from the applicant's claims."

We have decided to grant leave to appeal and to treat the application as if an appeal had been filed based on the leave granted. The appeal should be granted.

Breach of a Confidentiality Agreement Regarding a Person's Private Affairs

6. As we will explain imminently, what makes the circumstances of this case unique is the promise given by respondent 4 to the applicant. S. 2 of the Protection of Privacy Law, which defines "what is a violation of privacy," includes various situations that constitute a violation of privacy, including the following situation (subsection 2(8)):

> 'A breach of a duty of confidentiality regarding a person's private affairs, as determined in an explicit or implicit agreement.'

This subsection lists three elements: an explicit or implicit agreement; the agreement creates a duty of confidentiality regarding the person's private affairs; a breach of that duty. The element of "agreement" is present in our case. Respondent 4 assured the applicant that the photographs were intended for his personal use only. He admits this, and even says that he "may have erred" in doing so. This is an agreement whereby respondent 4 undertook not to publish his photographs of the applicant against the background of the said poster on the wall. This is a "duty of confidentiality" – as specified by the Law. The fact that the agreement was given verbally, in the street, does not detract from its validity – this is a street agreement, contracted in real time when street photos were being taken. Furthermore, according to the wording of the Law, the existence of an implied agreement is sufficient to fulfill the conditions of the section. It was respondent 4 who chose to promise what he promised. He took the commitment upon himself. No circumstances that void his commitment have been proven to exist in our case. The element of a "breach of a duty of confidentiality" also exists in our case – it was breached when the photograph of the applicant was published in the newspaper.

7. Does the duty of confidentiality in the agreement relate to the applicant's "private affairs"? This question must be answered in the affirmative. The Protection of Privacy Law does not define the term "private affairs." The interpretation of the term was discussed in CA 439/88 *Registrar of Databases v. Ventura* [1], at p. 808: the question there related to whether the creation of a database of people and corporations who had provided checks without coverage constituted a violation of privacy under s.

2(9), which deals with the situation in which use has been made of information relating to a person's "private affairs" for a purpose other than the purpose for which it was divulged. In that case Justice Bach adopted a broad interpretation of the term “private affairs” and determined that –

> '[t]he natural and normal meaning of the words a person’s ‘private affairs’ is any information related to that person’s private life, including his name, address, phone number, workplace, his friends, his relationship with this wife and other family members, etc.'

Justice Strasberg-Cohen interpreted the term more narrowly and opined that its interpretation should be dependant on the particular context and circumstances of the case:

> 'The answer to the question of what are a person’s private affairs is not unequivocal, and as with many other expressions that we encounter in law books and in every day life, their interpretation depends on their context and the purpose that this interpretation must serve.'

According to Justice Strasberg-Cohen, “it may be that each separate detail does not constitute a person’s ‘private affairs’, whereas the combination of several details and the information derived from them might constitute such affairs.”

8. The scholar Eli Halm, in his book *Privacy Law* (2003)121-126, provides support for ascribing a broad interpretation to the term “private affairs.” In his opinion, we must distinguish between information relating to a person's "intimacy" and a broader framework of information that falls into the category of a “person’s private affairs.” This distinction is based on the fact that the Protection of Privacy Law does not prohibit everyone from publishing information related to a person’s “private affairs,” but rather, *it imposes this prohibition on a particular, defined group of people* who have a “special relationship” with the informants: one who by virtue of the law is obligated to refrain from publicizing (s. 2(7)); *one who by virtue of an agreement is obligated to refrain from publicizing* (s. 2(8)); one who makes use of information for a purpose other than the purpose for which the information was divulged to them (s. 2(9)). These special relationships – according to Halm – impose a greater duty on the person receiving

information not to expose details related to the privacy of the informant. Therefore, information belonging to the "outer circle" of a person's privacy – such as identifying details and contact information, as well as personal and particular details – should be included under the heading of "a person's private affairs."

9. The conclusion that the applicant's photograph constitutes a part of his "private affairs" is derived from the application of each of these approaches described above. According to the broad interpretation that Justice Bach assigned to the term, a photograph exposing the identity of the applicant and, in our case, his occupation at that time, certainly involves the applicant's "private affairs." According to Halm's approach, it would appear that a person's photograph is included in the applicant's "private affairs," since it includes identifying details and details particular to him, and the prohibition on their publication is justified in light of the "special relationship" that exists in our case, i.e. the photographer's promise not to publish the photograph. Even the application of the more limited approach, that is conditioned by the actual context and circumstances, will not yield a different outcome. According to this approach, assuming that a person's photograph does not necessarily constitute a part of his "private affairs" in every case, the photograph in the case before us – by means of which it is possible to identify the applicant, his communal affiliation, his location and his activities at that time – constitutes a combination of details that constitute a "private affair" in this specific context.

In our case, therefore, the elements listed in s. 2(8) of the Protection of Privacy Law are all present. Having reached the conclusion that the applicant's privacy was violated, we must now examine whether the defence claimed by the respondents – which appears in s. 18(3) of the Law – applies in this case.

The defence in s.18(3) of the Protection of Privacy Law

10. Under s. 18(3) of the Protection of Privacy Law, a valid defence requires that -

> 'There was a public interest that justified the violation in the circumstances of the case, provided that if the violation was by publication –the publication was not false.'

The parties disagree on the question of whether there was "a public interest that justified the violation in the circumstances of the case." The District Court answered this question in the affirmative, after considering the balance between freedom of expression coupled with the public's interest in the publication, and the right to privacy. The problem with this mode of analysis lies in the fact that it does not attribute sufficient weight to the central issue that makes the case before us *distinct* – the existence of a promise on the part of respondent 4 that he would not publish the photograph. Even though this promise does not automatically negate the applicability of the defence, it certainly has implications for the nature of the public interests involved and for the appropriate balancing point. First, the public's interest in upholding the principle that "a promise must be kept" does exist. Secondly, there is a public interest in the maintenance of journalistic integrity. This second interest is also, and especially, in the interest of newspapers wishing to maintain fruitful reciprocal relations with their sources. The need to protect all these interests certainly dims the "public interest" in the publication of the photo. We have not been convinced that in this particular case, a "public interest" exists that would justify the violation of a promise given to the applicant and the violation of his privacy. The more that this protection is extended to situations such as the one before us, the more s. 2(8) of the Law will lose its meaning. This was not the legislature's intention in prescribing the defence in s. 18(3). This was not the purpose of the Law (regarding this defence, see also: Halm, *ibid*., pp. 213-236; *Database Registry v. Ventura* [1], at pp. 825-827) .

As an aside we will mention that the question of whether there was deception in the published photo in this case is not a simple one. The "displacement" of the applicant, who belongs to the ultra-Orthodox world, from his usual surroundings and the capturing of his figure, identifiable by clothes distinctive to his community, against the background of a revealing picture of a young woman, draws a prejudicial connection between him and a world that he and the members of his community view as illicit. The question raised here is whether the photograph reflects the truth or a distortion of reality created by a coincidence. This question could arise in another similar, if not identical situation, for example where a camera captures a politician just as a huge advertisement for the opposing party

pasted to the side of a bus passes by. This question was not discussed in the lower court, nor will we address it now.

11. Having arrived at this conclusion, we have not found it necessary to decide on the applicant's claim that his privacy was also violated under s. 2(4). Regarding the claims related to the Defamation Law, we have not found any reason to interfere with the conclusion reached by the earlier courts. This is because we have not been convinced that the publication of the photograph harms the applicant to a degree that constitutes grounds for a suit under the Defamation Law. Needless to say, in such matters each case must be examined based on the particular circumstances. It must be said that if not for the violation of the promise to the applicant, in my view the applicant would not have had a case. Were it not for that promise, I think that freedom of expression would prevail over violation of privacy, as well as any damage to the applicant's good name.

The remedy

12. The Magistrates Court set the amount of compensation payable to the applicant at NIS 30,000. The Magistrates Court deducted NIS 10,000 from this amount due to the "contributory fault" that it assigned to the applicant, since he had chosen to situate his stall near the "provocative poster." Indeed, the stall was situated near the shop where the advertisement hung inside; however, this "contributory fault" is irrelevant to the issue of the agreement made between the applicant and respondent 4. Therefore, in light of the reasoning at the basis of our ruling today, there is no reason to reduce the compensation and it should be set at NIS 30,000.

The appeal is granted as stated. The District Court's judgment is voided. The judgment of the Magistrates Court, with the aforesaid amendment, is reinstated. The respondents will bear the applicant's court costs and lawyers' fees in the amount of NIS 10,000.

Justice J. Elon

I agree.

Justice A. Grunis:

I agree with my colleague, Vice-President Eliyahu Rivlin, that in this case, the applicant's privacy was violated, as stated in s. 2(8) of the Protection of Privacy Law, 5741-1981. I also agree that in light of the

promise made by respondent 4 to the applicant and following its violation, the defence prescribed in s. 18(3) of the Law does not apply to our case.

Therefore, I see no need to express an opinion about what conclusion would have been drawn were it not for the violation of the promise made to the applicant.

Decided as per the judgment of Vice-President E. Rivlin

12 Av 5768

13August 2008