

Court of Cassation

Criminal Chamber

Public hearing of Wednesday 21 February 1996

Appeal No.: 95-81605

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Partial appeal.

President: Mr. Jean Simon, acting dean advisor, president

Reporter: Ms. Ferrari, contributing advisor

General advocate: Mr. Amiel, general advocate

Lawyer: SCP Lyon-Caen, Fabiani at Thiriez, lawyer(s)

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

PARTIAL APPEAL, appeal by X...François, the company Friday, Saturday, Sunday (VSD), civilly liable, against the judgment (No. 94/05107) of the Paris Court of Appeal, 13th Chamber of 24 February 1995, which for complicity in the illicit public advertising of tobacco, condemned the first appellant to a fine of 200,000 francs and rules on the civil claims.

THE COURT,

Having seen the produced statement of the case;

The first ground of appeal alleges a violation of articles 10 of the European Convention on Human Rights, L. 355-24 of the Code of Public Health, 691 and 693 of the Code of Criminal Procedure, fault patterns and lack of a legal basis:

“In that the challenged judgment declared the offense of illegal advertising of tobacco;

on the grounds that the trial court had rightly decided that Article 10 of the Declaration of Human Rights and of the Citizens of 26 August 1789, which proclaims that “the free communication of thoughts and opinions is one of the most precious human rights,” permits the law to repress the abuse of this freedom and that the European Convention on Human Rights authorized States to submit the law to certain restrictions, particularly in the field of health; that the laws of 9 July 1976 and 10 January 1991, which were not declared unconstitutional, prohibit all advertising in favor of tobacco and tobacco products regardless of the form;

that, firstly, the article in question, under the guise of information, actually constitutes an advertisement destined to promote tobacco, presenting the product as new, the result of research highlighting the tastes can only have a financial incentive;

on the other hand, the legislator, by prohibiting all indirect advertising in favor of tobacco, intended precisely to prohibit the publication of photographs of objects bearing the mark of a tobacco or tobacco product manufacturer or and thus to derogate from freedom of information; that the violations are thus well formed;

while the concept of advertising or propaganda such as that referred to in Article L. 355-42 of the Public Health Code mean any communication made by the manufacturer or distributor to promote providing the goods or service, it cannot be widely interpreted to infringe freedom of expression, applying to any form of writing published, since they do not aim to promote the sale and distribution of tobacco products; it follows that, on the one hand, in so incriminating, under the unlawful advertising of tobacco, editorial information regarding technical innovation on a new type of cigarettes, in which no assessment was given about the taste of quality in general, the Court of Appeal violated the aforementioned text and Article 10 of the European Convention on Human Rights;

that, secondly, claiming sanction alongside the publication of an international automobile photography competition, on the grounds that a vehicle was bearing the name of a tobacco manufacturer, the Court thereby similarly infringed the freedom of information of the journalist, a fundamental principle which cannot suffer other exceptions than those absolutely justified for reasons of overriding public interest, which is obviously not the case here, where the 1993 Act authorizes the distribution of motor racing images on television under the same condition as the type in this case;”

And the second ground of appeal alleges a violation of Article L. 121-1 of the new Criminal Code, 691 and 693 of the Criminal Code of Procedure, fault patterns and lack of a legal basis:

“In that the challenged judgment declared François X...culpable of illegal advertising in favor of tobacco; on the grounds that it is right that the court decided that in the case of illegal advertising in favor of tobacco, criminal responsibility shall be assessed according to the common law; Mr. X...is the director of the publication; the director of a publication must ensure that the publication does not include violations of the law;

while the law of 10 January 1991 made no presumption of liability of the director of a publication regarding infringement of advertising of tobacco or alcohol, it follows that liability cannot be accepted except on the condition that it is duly established that the editor had a wrongful conduct, which judges must explain; that, therefore, claiming to deduce criminal responsibility of François X..., editor of VSD, the only general consideration that an editor must ensure is that the publication has no statutory offenses against the law, the Court, which has not characterized any wrongdoing committed personally by the editor, violated the abovementioned principle;”

The appeal being together:

It follows from the judgment that François X..., director of publication of the weekly VSD and the company of the same name, publisher of the newspaper, was cited as civilly liable for the unlawful advertising of tobacco;

Whereas, to declare the accused guilty of complicity in that offense, the judges state that, in an issue in the month of September 1993, it was published an article titled “Fragrant Cigarettes” dedicated to the launch of new cigarettes by Seita, “Royal Flavors,” accompanied by a photograph of a packet of cigarettes; that the text that presents the new product as the result of research and emphasizes its

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aroma constitutes and incentive to consume; they conclude that, under the guise of information given by the newspaper, this writing must be considered an advertisement to promote tobacco;

The judges notes that same issue presented an illustration in an article on the rally of pharaohs, with a full-page color photograph of a vehicle in front of a pyramid, on which the logo of Rothmans cigarettes appears nine times; they state that the prohibition of Article L. 355-25 of the Code of Public Health on all propaganda or advertising, direct or indirect, in favor of tobacco makes unlawful the publication of photographs of objects bearing the mark of a tobacco or tobacco product manufacturer;

They state that this prohibition is not contrary to Article 10 of the European Convention on Human Rights and Fundamental Freedoms since it constitutes a necessary measure to protect public health;

They add that the publishing director must ensure that it contains no violation of the law;

Whereas, by stating these reasons, resulting in the defendant knowingly permitting the committed offense, the Court of Appeal justified its decision without incurring the alleged grievances;

That, in effect, any diffusion of texts, pictures or photographs participating in the promotion of tobacco or tobacco products encouraging the purchase of such goods constitutes advertisement or propaganda forbidden by article L.355-25 of the Public Health Code;

Whence it follows that the plea cannot be upheld;

But the third ground of appeal alleges violations of Articles 485, 591 and 593 of the Code of Criminal Procedure, contradiction between the reasons and the measures, fault in response to the conclusions, which lack a legal basis;

“in that judgment, after stating its reasons that it was right to find that the judges assessed the damage due to the National Committee Against Smoking as 50,000 francs, said in his reasons to confirm that the judgment, in reality, had allocated the sum of 150,000 to the civil party;

While on the one hand, in the state of the glaring contradiction between the grounds and the measures, there is an irremediable uncertainty of the amount of interested damages that the Court has allocated to the National Committee Against Smoking, so the decision is deprived of a legal basis;

And whereas, on the other hand, in any event, there has been no response to the conclusions of the civil party’s argument that the National Committee Against Smoking has not paid any part in debated justifying its injury, so that the very existence of it was uncertain in principle, as in quantum;

Given these articles;

Whereas the judgments or decisions must be declared invalid where the reasons are in contradiction with the measures;

Whereas to confirm the civil provisions of the judgment, the challenged decision, after having just recalled that the accused was sentenced by the decision to pay the National Committee Against

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Smoking, civil party, compensation of 150,000 francs, states that the trial court judges rightly assessed the damage at 50,000 francs;

However, by so holding, the Court of Appeal disregarded the principle recalled above;

Whence it follows that the Court is at risk;

FOR THESE REASONS:

NULL AND VOID, but only in its civil provisions, the judgment of the Court of Appeal of Paris on 24 February 1995, and it is again judged according to the law, within the limits of appeal so pronounced;

REFERS the case and the parties before the Court of Appeal of Paris, differently composed.

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Challenged decision: Court of Appeal of Paris, 24 February 1995

Titling and summaries:

1. PUBLIC HEALTH – Smoking – Laws against smoking – Propaganda or advertising – Illegal advertising in favor of tobacco - Definition
1. Any distribution of writing, image, or photograph that promotes tobacco or tobacco products to encourage purchase, whoever the author, is advertising or propaganda prohibited by Article L. 355-255 of the Public Health Code. It must thus be regarded as an advertisement for the smoking section of a weekly which, under the guise of information given by the newspaper, praised the merits of new cigarettes in order to encourage consumption. It is the same publication in a newspaper illustration of an article on a car rally, a full color photograph page of a vehicle which appears nine times with the mark of a tobacco product.
2. EUROPEAN CONVENTION ON HUMAN RIGHTS – Article 10.2 – Freedom of information – Public health – Illegal advertising in favor of tobacco
2. The prohibition by Article L. 355-25 of the Code of Public Health, of all propaganda or advertising, direct or indirect, in favor of tobacco is not contrary to Article 10 of the European Convention on Human Rights and Fundamental Freedoms when it constitutes a measure necessary for the protection of public health.
2. PUBLIC HEALTH – Smoking – Laws against smoking – Propaganda or advertising – Illegal advertising in favor of tobacco – European Convention on Human Rights – Article 10 - Compatibility

Applied Texts:

Public Health Code L355-25; European Convention on Human Rights and Fundamental Freedoms 1950-11-04 art. 10