CUREDI033DE028

Question(s) at stake:

Whether calling a someone a "homosexual" is an insult.

Outcome of the ruling:

Calling someone a "homosexual" is only an insult if it is accompanied by disparaging language.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Defamation
- Non-discrimination
- Rights and freedoms
- Sexual orientation
- Hate crimes and hate speech

Tag(s):

- Homosexuality

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Official citation:

Regional Court Tübingen, 24. Small Criminal Division, Judgement of 18 July 2012, 24 Ns (13 Js) 10523/11 (LG Tübingen, 24. Kl. Strafkammer, Urteil vom 18.7.2012, 24 Ns (13 Js) 10523/11)

Link to the decision:

https://openjur.de/u/608958.html

ECLI:

ECLI:DE:LGTUEBI:2012:0718.24NS13JS10523.11.0A

Date:

18 July 2012

Jurisdiction / Court / Chamber:

Tübingen Regional Court, 24. Small Criminal Division

Remedy / Procedural stage:

Appeal on facts and law

Previous stages:

- Local Court Tübingen, Judgment of 1 March 2012, 9 Ds 13 Js 10523/11 (AG Tübingen, Urteil vom 01.03.2012, 9 Ds 13 Js 10523/11).

Subsequent stages:

None

Branches / Areas of law:

Criminal Law

Facts:

The 24-year-old accused visited a discotheque one night and, after consuming alcohol, got into an argument with two bouncers, insulting and injuring them. Subsequently, the police were called and he was taken to the police station, where he referred to the four police officers as “homosexuals”, among other

things. A criminal complaint was filed, resulting in the accused being fined by the local court for assault and insult.

Ruling:

On appeal by the Public Prosecutor's office, the verdict was largely upheld by the Regional Court, but corrected in one important respect. The Local Court had considered the term "homosexual" as such to be an insult. The Regional Court disagreed.

The Regional Court clarified that, in the context of criminal law, an insult involves a display of disrespect or disregard. A statement is to be interpreted according to the surrounding circumstances as well as an objective consideration of the values of the legal system rather than according to the understanding of the person making the statement. The Court held the view that according to contemporary opinion, labelling someone "homosexual" is no longer inherently offensive. However, the Court conceded that this perception has undergone a significant shift and would have been different not too long ago. The Court cited the prohibition of different forms of discrimination in Section 1 of the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*), which explicitly prohibits discrimination on the basis of sexual identity.

Considering the term "homosexual" offensive would constitute prohibited discrimination. An insult, however, would only occur if a term for homosexuality itself constituted disparagement.

Main quotations on cultural or religious diversity:

- "In this sense, the designation of other persons as 'homosexual' no longer has any value-reducing significance. This assessment follows from Article 3 of the Basic Law and the statutory concretization of the principle of equality in through Section 1 of the General Act on Equal Treatment of 2006. Accordingly, 'discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual identity must be prevented or eliminated'. Thus, no one should be discriminated against because of their

sexual identity." (para. 65)

- "From a purely empirical point of view, it is doubtful that describing someone as 'homosexual' contains any disparagement. This may have been different in the past. The change in social attitudes towards homosexuality is expressed, for example, in leading politicians or celebrities coming out as homosexuals. There is also a 'network for lesbians and gays' within the police, which campaigns for more tolerance (see www.velspol.de)." (para. 66.
- "What is decisive, however, is that criminal law would be in contradiction with the constitutionally-grounded anti-discrimination approach if the designation 'homosexual' were assessed as degrading and disparaging. This would precisely express discrimination, which, by legal standards, should no longer exist. In this respect, the situation is no different than with other designations of a sexual preference such as 'bisexual' or 'heterosexual' or designations of religious affiliation such as Catholic or Jew – completely independent of whether the recipient of the statement belongs to the respective group. This remains unchanged even when uniformed police officers are labelled as 'homosexual'. A special right for police officers in uniform – more precisely, an exception from the constitutional prohibition of discrimination – is not to be recognized." (para. 67)
- "Statements which are not limited to the term 'homosexual' but also express additional disparagement, such as 'dirty cocksuckers' [*dreckige Schwanzlutscher*] or 'faggots' [*Schwuchteln*], are judged differently. The Local Court also found such statements (see II. 3.) and quite rightly categorized them as insults." (para. 68)

Main legal texts quoted in the decision:

- Articles 1, 2, and 3 of the German Basic Law
- Section 185 of the German Penal Code

Cases cited in the decision:

Commentary

Is It an Insult to Call Someone a “Homosexual”? Defamation, Discrimination, and Changing Cultural Attitudes

All forms of defamation, categorized into three main offences against the victim’s honour in German law – namely, insult (the expression of a depreciating value judgement, Section 185 of the German Penal Code) and two types of allegation of a defamatory fact (Sections 186, 187 of the German Penal Code) – share the common goal of degrading the reputation of the victim.

The current case involves an insult under Section 185 German Penal Code. Whether an expression or an act is insulting depends on the various circumstances of the individual case, e.g., the relationship between the involved parties, the use of language common in specific groups, and cultural differences.

What constitutes a violation of honour is subject to constant social change, which may not simultaneously reach all members of society. This type of situation is precisely what we are dealing with here.

The accused called the police officers “homosexuals”. Over the centuries, not only was homosexuality outlawed, but being accused of homosexuality could be socially devastating, as such practices were even punishable by law in Germany until the criminalization of homosexuality was abolished in 1975. Despite this, homosexuals continued to face discrimination. Only gradually did attitudes change in the following decades.

The significance of this case for CUREDI lies in how it shows that even today, the views of the population are not uniform, and cultural diversity extends beyond ethnic groups to occur within the same population, such as due to generational differences. In the present case, the views of the two involved courts conflicted. The Local Court, in the first instance, ruled that designating someone as “homosexual” was defamatory, while the Regional Court, as the court of appeal, disagreed.

What is noteworthy is the reason for rejecting the dishonourable nature of the accusation of homosexuality. The Regional Court referred to the equal treatment requirement of Article 3 of the Basic Law (*Grundgesetz*). It also cited the 2006 General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*), which expressly prohibits, among other things, discrimination on the basis of sexual identity. From this, the Court inferred that perceiving the term "homosexual" as offensive would recognize homosexuality as diminishing in honour, constituting a violation of the prohibition of discrimination. However, the Court explicitly noted that if the neutral term "homosexual" is not used but instead a disparaging and insulting term – e.g., "*Schwuchtel*" – is used to refer to a homosexual, this would still constitute a punishable insult (*Formalbeleidigung*) (see also Local Court Frankfurt am Main, Criminal Division, Judgment of 15 January 2021, 907 Cs – 7680 Js 229740/19, ECLI:DE:AGFFM:2021:0115.907CS7680JS229740.00).

Literature related to the main issue(s) at stake:

- Fischer, Thomas. 2023. *Strafgesetzbuch mit Nebengesetzen.* 70th ed. München: C.H. Beck, § 185, recitals 3 et seq.
- Hilgendorf, Eric. 2023. "§ 185: Beleidigung". In Gabriele Cirener, Henning Radtke, Ruth Rissing-van Saan, Thomas Rönnau, and Wilhelm Schluckebier (eds), *Strafgesetzbuch – Leipziger Kommentar: Großkommentar. 10. Band: §§ 174 bis 210*, 13th ed. Berlin: De Gruyter.

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