Fakhoury v. Crusoé

Date of Decision: March 3rd, 2021

Case Number: 1113676-36.2018.8.26.0100

**Summary and Outcome**

In March 2021, the São Paulo Court of Justice, in response to the appeal filed by the magazine Crusoé, denied the right of reply to the businessman Otávio Fakhoury. Otávio Fakhoury was quoted in an investigative report by Crusoé magazine. After holding that his honor had been offended, Fakhoury wrote a text and sent it to the magazine, requesting the right to reply. The Court of Appeals found that although Fakhoury was offended, there was no real injury to his honor.

**Facts**

In October 2019, the magazine Crusoé published an investigative report called “Badge bloggers”, in which it pointed out the entrepreneur Fakhoury as articulator, investor and participant of groups on Whatsapp, who act as “virtual militancy” in defense of the government of Jair Messias Bolsonaro. This militancy group, according to the report, would be responsible for holding events, virtual attacks on those they understood as opponents and a threat to the government of President Jair Bolsonaro, in addition to publishing texts on the internet, putting themselves as an alternative to the information and news published by large media.

Fakhoury understood, however, that the investigative report by Crusoé magazine did not match reality, as, according to the businessman, the publication contained excerpts from the WhatsApp groups' conversations about this “virtual militancy” out of context, which would give the reader an understanding distorted of Fakhoury's performance in the political field. Thus, Fakhoury wrote a text to the magazine, asking him to publish the text as a right of reply, arguing that the journalistic article published by the magazine would have offended his honor.

Therefore, the magazine replied to the businessman that he would not publish the text sent by Fakhoury, as editorial board held that the investigative report did not offend his honor and would not fit into any hypothesis that the law provides for the granting of a right of reply.

In this way, Fakhoury files for a lawsuit, requesting that he be granted the right to reply, since the news story would have offended his honor, intimacy and reputation.

The sentence in the case accepts the request and grants the entrepreneur the right to reply. However, the magazine, disagreeing with the decision, appealed the sentence, which caused the decision to be reformed and, finally, the judgment handed down by the Court understood that there was no offense to Fakhoury, denying him the right to reply.

**Decision Overview**

The case has two decisions.

Initially, there is the sentence handed down by Judge Tonia Yuka Korôku, who grants the right of reply to Fakhoury. The decision, however, is not publicly accessible, which makes it impossible to know its entire content.

The other decision related to the case, in response to the appeal filed by the magazine Crusoé, issued by Appellate Judge Maria de Lourdes Lopez Gil, considered that there was no damage to Fakhoury's honor, intimacy and reputation.

The central point of the discussion was to verify the language used in the news story, in which the higher court pointed out that there was no attack directed at Fakhoury. In this sense, the judge affirms that the report was only concerned with the veracity of the facts, maintaining the informative character of the matter.

Fakhoury's defense argues that the excerpts of the conversation would have been obtained clandestinely, from an infiltrator in the Whatsapp groups in which Fakhoury participated or administered. In addition, his lawyer argued that the author of the report should have asked for prior authorization from Fakhoury, as well as from everyone involved and cited in the news story.

However, the Court of Appeals understood that prior authorization would imply prior censorship, thus, whenever people cited in a report did not like the content contained in it, they would refuse to be cited in the text, which would prevent investigative journalism from acting as well, as the exercise of the right to freedom of expression.

In view of the situation, the Court understood that Fakhoury would have no right of reply. Furthermore, the Court convicted him of litigation in bad faith, as he would have tried to mislead the judge of the first instance who judged the case, since he said that the article that allegedly attacked his honor was 46 pages long.

Thus, the Court held that there was no reason to grant Fakhoury the right to reply, understanding that granting him the right to reply would undermine the right of freedom of expression, the press and access to information.

In addition, supporting her thesis, the appellate judge cited the case number 1012131-93.2019.8.26.0011, in which Fakhoury sued the journalist of the magazine responsible for writing the report, demanding that the journalist be ordered to pay compensation for moral damages. The decision referring to this process dismissed the request as “unfounded due to the absence of requirements for the application of the moral damage institute” [p. 8].

**Decision Direction**

The Brazilian Constitution guarantees freedom of expression, as well as the right to reply in cases where the published content “attests, even if for information misunderstanding, against honor, intimacy, reputation, concept, name, brand or the image of an identified or liable person or legal entity ”(Braz., Law No. 13.188, 2015, art 2 (1)).

The decision handed down by Appellate Judge Maria de Lourdes Lopez Gil recognized the existence of both rights, freedom of expression and reply. However, she understood that in the event of a conflict between these constitutional guarantees, freedom of expression should be privileged. Furthermore, when analyzing the news story, she understood that there would be no conflict, since there was no offense to Fakhoury's honor, intimacy and reputation.

Thus, in view of international treaties, it is understood that the decision is mainly in line with General Comment 34 of the United Nations Human Rights, since it advocates for guaranteeing the uncensored performance of the Brazilian press, an essential factor to guarantee access to information for the population, in addition to contributing to democracy.

**Global Perspective**

There is no great discussion of precedents or even international standards related to freedom of expression. Thus, the decision only adheres to the provisions of the Brazilian legal system, having a national perspective.

**References**

Braz., T.J.S.P., Crusoé v. Otávio Oscar Fakhoury, No. 1113676-36.2019.8.26.0100 (2021)

Braz., Constituição Federal art. 5, item IV, 1988

Braz., Constituição Federal art. 5, item V, 1988

UNHR Comm., General Comment No. 34