



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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FOURTH SECTION

Application no. 53891/20
A.S.E.
against Bulgaria
lodged on 26 November 2020
communicated on 16 March 2021

STATEMENT OF FACTS

The applicant, Ms A.S.E., is a Bulgarian national, who was born in 2004 and lives in Kostinbrod. She is represented before the Court by Ms N. Dobрева, a lawyer practising in Sofia.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background

The applicant, who had been in conflict with her mother following the death of her father in 2018, had just turned fifteen when she started a relationship with a 23-year-old man, D.M. In March 2019 she moved in with D.M., in his house in a village, where he provided for her upkeep and where she kept some of her personal belongings. Allegedly, he beat her regularly.

2. The beating on 8 September 2019

After D.M. beat the applicant on 8 September 2019, she ran away from him on the same day and was subsequently examined in an emergency room and by a forensic doctor.

3. Medical report on the applicant's injuries

The forensic medical report of 9 September 2019 recorded hematomas on the applicant's body, as follows: on the left side of the forehead (measuring 3,5-2,5 cm), on the lower side of the left eyelid (measuring 2,5-0,8 cm), on the inner side of the left cheek (measuring 0,7-0,2 cm), on the lower left side of the jaw (measuring 2-1,5 cm), behind the left ear (measuring 2-0,6 cm), on the left side of the neck (two marks measuring respectively 1,7-0,3 cm and 5-0,4 cm, and located at about 1 cm distance from one another), on the right side of the neck (measuring 1,5-0,3 cm), on the left armpit (two marks measuring respectively 2 cm-1cm and 1,5-1 cm), on the left upper arm (measuring 2,5-1,5 cm), on the back side of the right shoulder (measuring 4-2 cm) and on the inner side of the right thigh (measuring 5-5 cm).

In addition, the report recorded a bruise, measuring 2,5-0,2 cm, on the front side of the right lower leg, as well as that the bruise was covered with a reddish-brown scab.

The report contained a conclusion that the traumatic injuries had been caused by blows and pressure applied with or over hard, blunt and edgy objects. The report stated that the injuries could have been caused in the manner and at the time as described, and had caused the applicant pain and suffering.

4. Notice of the beating to the prosecution

On 27 September 2019, the director of the local Directorate for social assistance ("the director") communicated to the prosecution a notice about a crime having been committed against a minor and requested that pre-trial criminal proceedings be opened into it. In particular, the director described in writing several beatings of the applicant by D.M., which had reportedly taken place in the preceding months.

During one of the beatings, on 8 September 2019, D.M. had slapped the applicant on the face, applied pressure to her neck in a choking position, pushed her to the ground, hit her head on the floor, and kicked her while she was on the ground. The applicant had felt pain in the head, jaw, chest and abdominal area, and had been seriously frightened.

The communication specified that the applicant had been a victim of several offences, allegedly perpetrated by D.M.: in the first place, attempted murder under Article 115 in conjunction with Article 18 of the Criminal Code ("the CC"), given that the marks on her neck indicated that pressure

had been applied to her carotid artery. Such an act, according to the communication, generally leads to life-threatening consequences as it stops the blood-flow to the brain and causes a loss of conscience and death within a few seconds. Furthermore, the same act represented also light bodily harm under Article 130 of the CC, defined by the forensic doctor as “pain and suffering” and subsumed under the heavier offence under Article 115 of the CC.

In addition, the aggression of the applicant represented ill-treatment of a minor under Article 187 of the CC, as she lived with D.M. and was under his care. Independently from the beating of 8 September 2019, D.M. was guilty of unlawfully living with a minor, as husband and wife, without the two being married, an offence under Article 191 of the CC.

All of the above represented “sufficient data pointing to a crime having been committed” within the meaning of Article 211 of the Code of Criminal Procedure (“the CCP”). The communication specifically asked the prosecutor to investigate the light bodily harm the applicant had suffered, a privately prosecutable offence, as a publicly prosecutable offence instead, on the basis of a prerogative which the prosecutor had under Article 49 of the CCP. Also, it suggested that the prosecution question the applicant’s mother, as well as the alleged aggressor’s own sister and former girlfriend who could testify about his character.

5. Follow-up by the prosecution

The Kostinbrod District Prosecutor ordered a preliminary check which was carried out by the police.

On 8 October 2019 the applicant was accommodated in a crisis centre for children who are victims of violence or trafficking.

On the same day she stated to a police officer, who was interviewing her in the context of the preliminary check, that she wished to withdraw her statement as she was no longer troubled by D.M. When interviewed in turn, D.M. denied that he had beaten the applicant; the police officer issued him with a warning, and informed him about criminal responsibility in the case of inflicting medium and heavy bodily harm.

On 19 November 2019 the Kostinbrod District Prosecutor refused to open criminal proceedings. The prosecutor found that only a privately prosecutable offence, namely light bodily harm, had been committed and the conditions under Article 49 of the CCP were not met.

6. Appeals by the applicant

The applicant, assisted by a lawyer, challenged that refusal before the higher prosecution instances. She argued in particular that she had presented evidence of violence committed in respect of her, and evidence which corresponded to three publicly prosecutable offences. She also emphasised

the gravity of those offences in the context of her age and gender. She relied on Article 3 of the Convention and on related case-law of the Court.

The Sofia Regional Prosecutor confirmed the refusal on 6 February 2020. The prosecutor found that the bodily harm caused to the applicant had not been serious enough to warrant the opening of criminal proceedings for attempted murder, for the following reasons. Not every pressing on someone else's throat could be qualified as attempted murder; there was no evidence that the applicant and her boyfriend lived as husband and wife as she had refused a gynaecological examination; and the applicant was not in the care of her boyfriend, so it was unnecessary to discuss whether her beating fell under Article 187 of the CC.

The applicant appealed further. She pointed out that her beating qualified as ill-treatment under Article 3 of the Convention and under the United Nations Convention on the Rights of the Child, hence it had to be investigated before a conclusion could be reached. On 10 April 2020 the Sofia Appellate Prosecutor upheld the lower prosecutor's decision, finding its conclusions correct.

The applicant appealed before the Supreme Cassation Prosecution Office, arguing that under the Convention the authorities had a positive obligation to investigate complaints of domestic violence and referred to the related case-law of the Court. She pointed out that relevant evidence had not been collected. She also stated that a private criminal prosecution could not provide appropriate redress and was not an effective remedy for her as a minor. Given her complaints about having been a victim of several publicly prosecutable offences, she did not have to pursue a private prosecution for only one of them.

On 4 August 2020, the Supreme Cassation Prosecution Office informed the applicant that there were no reasons for overturning the refusal to investigate her complaints.

B. Relevant domestic law

Under Article 161, in conjunction with Article 130, of the CC criminal proceedings in respect of wilfully inflicted "light bodily harm" may only be instituted by the victim directly in court and are not pursued by the public prosecutor. Under the CCP, where criminal proceedings are instituted by the victim, he or she acts as private prosecutor. The proceedings are discontinued if the victim fails to appear when summoned or abandons the case.

Article 49 of the CCP allows the prosecutor to institute criminal proceedings on his/her own motion in respect of privately prosecutable offences, where the victim is not able to defend his/her rights and there is a legitimate interest due to a helpless status or dependence on the perpetrator of the crime.

Article 93 of the CC specifies the meaning of “domestic violence” as follows: “The offence has been committed in the context of ‘domestic violence’ if it has been preceded by: systematic physical, sexual or psychological abuse; placing the person in economic dependency; forcefully limiting their private life, personal freedoms and rights; and has been committed in respect of an ascending or descending relative, a current or former spouse, a person with whom one has a child, a person with whom one is living or has lived as husband and wife, or a person with whom one lives or lived in the same household”. Domestic violence is not, as such, a specific offence in the CC; it is an aggravating circumstance in respect of a number of other offences under the CC, such as murder (Article 115-116 of the CC), kidnapping (Article 142 of the CC), deprivation of liberty (Article 142a of the CC) and coercion (Article 143 of the CC).

As regards bodily harm, since February 2019, domestic violence is an aggravating circumstance in respect of each type of bodily harm sustained (light, medium or grave). Light bodily harm remains a privately prosecutable offence even when committed in the context of domestic violence.

C. Relevant international materials

The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW Convention”) was adopted in 1979 by the United Nations General Assembly and Bulgaria ratified it in 1982. The implementation of the CEDAW Convention is monitored by the Committee on the Elimination of Discrimination against Women (“the CEDAW Committee”), which makes general recommendations to the States parties on any specific matters concerning the elimination of discrimination against women.

On 26 July 2017 the CEDAW Committee updated its General Recommendation no. 19 by adopting General Recommendation no. 35 on gender-based violence against women (CEDAW/C/GC/35). As regards prosecution and punishment, the CEDAW Committee recommended that States parties, amongst other things, (a) ensure effective access for victims to courts and tribunals and that the authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law and, as appropriate, *ex officio* prosecution to bring alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties.

In their Recommendation Rec(2002)5 on the protection of women against violence the Committee of Ministers of the Council of Europe recommended, amongst others, that member States “have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and

provide protection to victims”. The Recommendation also stated that member States should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutor, encourage prosecutors to regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest, ensure where necessary that measures are taken to protect victims effectively against threats and possible acts of revenge and take specific measures to ensure that children’s rights are protected during proceedings.

The Recommendation CM/Rec(2009)10 of the Committee of Ministers to member States on integrated national strategies for the protection of children from violence, adopted by the Committee of Ministers of the Council of Europe on 18 November 2009, emphasises that “children’s fragility and vulnerability and their dependence on adults for the growth and development call for greater investment in the prevention of violence and protection of children on the part of families, society and the State”.

COMPLAINTS

The applicant complained under Article 3 of the Convention, taken separately and in conjunction with Articles 13 and 14, that the relevant legal framework was deficient in that light bodily harm was not a publicly prosecutable offence under Bulgarian criminal law. Invoking the same Convention provisions, she also complained that, in the specific context of her situation as a victim of domestic violence, a minor and a girl, the prosecution’s refusal to investigate the allegations of violence against her was in breach of the authorities’ procedural obligation.

QUESTIONS TO THE PARTIES

1. Was the applicant subjected to ill-treatment contrary to Article 3 of the Convention? If so, did the domestic legal system provide practical and effective protection to the applicant's rights under Article 3? More specifically, were the applicable legal framework, in particular as regards light bodily harm sustained in the context of domestic violence, and the prosecution's response to the allegations of the applicant's ill-treatment compatible with the State's positive obligations under Article 3 to adequately shield individuals from treatment incompatible with that Convention provision, even when perpetrated by private parties (see *Abdu v. Bulgaria*, no. 26827/08, §§ 41 and 42, 11 March 2014, and *Valiulienė v. Lithuania*, no. 33234/07, § 75, 26 March 2013)?

2. Was there a violation of Article 14 of the Convention, taken in conjunction with Article 3, in the applicant's case on account of an alleged discrimination against women in matters concerning domestic violence (see *Bălșan v. Romania*, no. 49645/09, § 78, 23 May 2017)?