

FILE NUMBER : 2008/476
RULING NUMBER : 2009/434
PROSECUTOR DOCKET NO : 2008/6449

JUSTIFIED DECISION

ON BEHALF OF THE TURKISH PEOPLE

JUDGE : [REDACTED]
PROSECUTOR : [REDACTED]
CLERK : [REDACTED]
PLAINTIFF : K.H.
PARTICIPANTS : 1-H.E., son of [REDACTED] and [REDACTED] born on [REDACTED] in [REDACTED], registered in [REDACTED]. Employed at [REDACTED]. TR Identification number: [REDACTED]

2-S.Y., daughter of [REDACTED] and [REDACTED], born on [REDACTED] in [REDACTED] in [REDACTED], registered in [REDACTED]. Living at the address of [REDACTED]. TR Identification number: [REDACTED].

ATTORNEYS : Att. N.Ç., [REDACTED]
Att. T.K, [REDACTED]
:3- O.A., son of [REDACTED] born on [REDACTED] in [REDACTED], registered in [REDACTED]. Living at the address of [REDACTED]. TR Identification number: [REDACTED].

THE DEFENDANTS : 1- Y.Y., son of [REDACTED] born on [REDACTED], registered in [REDACTED]. Living at the address of [REDACTED]. TR Identification number: [REDACTED].
2- T.O., son of [REDACTED] born on [REDACTED], registered in [REDACTED]. Living at the address of [REDACTED].

ATTORNEYS : TR Identification number: [REDACTED].
: Att. R.K., [REDACTED]

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: 3- E.A. son of [REDACTED] born on
[REDACTED], registered in [REDACTED]. Living at the address of [REDACTED].
TR Identification number: [REDACTED].

ATTORNEY : Att. A. G., [REDACTED].

OFFENSE : Obstruction of Duty

DATE OF OFFENSE : 09/08/2008

LOCATION AND TIME OF OFFENSE: Mavişehir mah. 2040 sokak 104/223in the EGS shopping Center
At : 15:30 KARŞIYAKA / İZMİR

DATE OF RULING : 11/06/2009

As a result of the hearing conducted in our court concerning the defendants whose identifications are specified above,

THE FOLLOWING HAS BEEN CONSIDERED:

Due to the criminal charges brought against the defendants by the Karşıyaka Chief Prosecutor's Office a public case has been filed because of the predicate offences committed by the defendants.

The statement of participant S.: It is observed that the participant has stated that on the day of the incident she had been assigned with the duty of inspecting businesses for smoking on the instructions of the ministry of health, in the Karşıyaka crew, H.E. was at the head of the crew as provincial assistant manager and on their way to another business's inspection that they told the business place authority that they would be coming for an inspection at [REDACTED] and that there should be no smoking, the person there at the time name T responded to these words with an indifferent attitude and made hand gestures and when they came back later the defendant Y.İ. was there at which time an argument ensued with H. outside, later H. instructed her to "go inside and take pictures to confirm the situation", while she was preparing the camera for picture taking a female attorney present at the venue began to oppose the photograph taking, said she would not have her picture taken and as she remembered very well she was removed forcefully by E. of the defendants, the female attorney and two other people who were employed at the business, once outside the defendant T. used an expression to the effect of "leave" at which point the police intervened and the argument continued between the business owner, T. and the police, later the group was taken to the police station, smoking was prohibited in closed areas by law number 4207 and there was also a prime ministry decree in place on this subject, if such areas are not isolated it is prohibited to smoke in them but businesses were interpreting isolation in their own interests and it was stated that defendant T. was also among the individuals trying to forcefully remove her outside and was wanting to intervene.

In the statement of O.: It was said that on the day of the incident in the district of Karşıyaka, he was assigned with the duty of inspecting for compliance with the Law numbered 4207, together with S. and H. they arrive at the scene with the police they had picked up at the station, first they had conducted an inspection at the business named "[REDACTED]" and detected a number of people who were not complying with the smoking law and later arrived at the business called [REDACTED], on arrival the defendant Y.İ. and other business employees were out front, this person explained the prime ministry decree to them and added "do not go inside it will disturb the customers", however on the instructions of H., S. entered the workplace to take pictures and he saw her argue with a woman inside, then saw that she was pushed outside forcefully by people he did not know, an argument ensued followed by going to the police station where no charges were filed and added to his statement that he saw the participant S. being held by her arms and the officer forcefully removed outside by the individuals named T.O. and E.A.

Participant H.E. has said in his statement that he is employed as a provincial health assistant manager, on the day of the incident he went to the shopping center where the business involved in the incident is located with S.Y from the Karşıyaka Health Group directorate, O.A. and a group of police they had picked up from the karşıyaka police station, when they arrived at the business called [REDACTED] they encountered the business owner Y.İ. and proceeded to identify themselves and their task however the individual called T.O. said they could not go inside and would not allow them in,

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At this point he instructed S. to go inside and take pictures to confirm no smoking was going on inside and when no negative reaction was shown by the business owner she entered but 1-2 minutes later saw that S. was brought outside by the individuals named T.O. and E.A. holding on to both her arms, these individuals were obstructing the execution of their duty which was reported to the police and stated again after returning from the police station and the same statement was observed being given at during the judgment stage.

In his defense the Defendant Y.İ. has stated; he is the owner of the business called [REDACTED], there is a stand-alone ventilation system in the workplace therefore it is one of the exceptions to the prohibition on smoking in closed areas specified in the prime ministry decree this is why smoking was allowed in the workplace, on the day of the incident he was at home and came to the workplace in response to a call made by employee T. and when he saw the civil authorities approaching the workplace noticed that **one of the approaching individuals had a name card around his neck and it had doctor written on it so he knew they had come for a cigarette inspection,** he told them about the decree and said that smoking was going on in the workplace and that the workplace was full, then the plaintiff woman asked why there was no warning sign up about smoking to which he responded that the legal measures had been taken then he saw her start to take pictures to which a female attorney reacted severely but the woman continued to take pictures and he did not witness anyone grabbing the plaintiff woman by the arms and dragging her out or displaying any similar behavior.

In the defendant E.'s defense he stated that on the day of the incident he had dropped his kids off at the cinema, was waiting for them and looking for a place to smoke a cigarette so he went to the place called [REDACTED] and when told by the person on duty that smoking was allowed, went inside and witnessed the plaintiff woman and a female attorney arguing, that the plaintiff was taking pictures and the attorney was objecting and the plaintiff woman was taking everyone's pictures one by one with her mobile phone at which time he wanted to leave and said that he did not witness anyone being dragged off by force.

In the defense of the defendant T. he stated that he is a manager at the workplace called [REDACTED] and knew about the Law numbered 4207 and the prime ministry decree that has been issued in this scope, that although smoking is prohibited in closed areas, place with a stand-alone ventilation are an exception to this rule and allow smoking, that this workplace had such a system therefore smoking was allowed, the day of the incident a group of civilians including the plaintiff women had passed by the workplace, made hand gestures and said "we'll stop by here too, don't smoke", a short time later the same plaintiff woman, several civilians and two official policemen came, they did not identify themselves and did not show identification and the plaintiff woman started directly to take pictures with the camera in her hand of the tables and the people sitting at them at which time a female attorney objected and contrary to the indictment that was read there was no commotion or instance of anyone being dragged off by their arms and the defendant E. had not participated in anything but left the scene.

In the statement by the Witness M.A. it was said that he is a policeman and since help was requested he went to the mavişehir shopping center with the authorities from the provincial health directorate and first a procedure was completed at another workplace then they had arrived in front of the workplace where the incident took place where the Defendant T. was standing in the doorway in a manner preventing entry while the defendant Y. was talking about the prime ministry decree in a loud voice and saying the workplace could not be entered however S. from the group went inside for the purpose of taking pictures **and shortly thereafter an argument ensued and he saw S. being taken out of the place by her arms and that the individuals holding her by the arms were E. and T. and that the defendant Y.İ. was continuing to shout in a loud voice** at which time he called for back-up and took them all to the police station.

In the statement made by Witness S.D. he said that they had gone to egs park to conduct and inspection on the instructions of the Provincial Health Directorate and at this workplace the defendant Y.İ. was explaining the prime ministry decree, saying that smoking was going on inside at that they were not to go inside, also the defendant T. said that there were customers inside who would be disturbed and so they should not go inside at which time the woman in the crew went inside with the purpose of putting an end to the smoking **however he saw that the woman was grabbed by the arms and pulled outside and that the individuals doing this were T. and E.** he saw that there was smoking inside and called for back-up.

In the statement given by Witness H.Y. she said she was an attorney registered with the İzmir bar T.R. KARŞIYAKA 4TH CRIMINAL COURT OF FIRST INSTANCE File-Ruling No: 2008/476 – 2009.434

Who had come to the place called [REDACTED] with her sister on the day of the incident to drink coffee, that a woman came inside at one point and came literally within 10-15 cm and started to take pictures at which point she became uncomfortable because there was no identifying mark on her so she asked why she was taking pictures to which she responded that her superiors were waiting outside and that she wanted her to speak to them at which time she saw whom she thought was the supervisor, the business owner and the police talking outside, when she asked the supervisor she was told that they had come from an organization and asked her to go sit down in her place, when she went back inside she said that she witnesses no pushing or shoving while the woman taking photographs was being taken out, that there was shouting but nothing physical and that smoking was going on inside.

Opinion of the Prosecution as to the Accusations: Since on the date of the incident in which the provincial health assistant O.A and clerks S. and H. went to the scene of the incident to a business called [REDACTED], taking with them police officers M.A. and S.D. to conduct an inspection to enforce law number 4207, they encountered the business owner Y.İ. who told the officials that the customers would be disturbed and therefore they could not enter inside at which time he was asked to consent to one official entering so they could investigate the situation which is when authority S. entered the workplace, saw that there was smoking and when she started to try and document the situation she was grabbed on her arms by employee T.C. and E.A. who was there as a customer and dragged outside while the entry of the other officials was obstructed; these actions of obstructing the duties of officials do not constitute the legal elements of a crime of resistance therefore the predicate offense should be dropped and it has been requested on behalf of the people that a case be filed against the defendants for the crime of insulting officials and criminal complaint be filed with the karşıyaka chief prosecutor's office for this reason.

Upon examination of the file;

In the law numbered 4207 for the prevention of tobacco related harm and control issued to protect community, child and youth health, and the prime ministry decree within this scope that was published in the Official Newspaper dated 06/05/2008 in which the application matters are specified, it is set forth that tobacco products cannot be consumed in closed areas such as commercial centers and shopping centers and it has been ruled that in areas where smoking is not allowed, where the areas have not been isolated and where the circulation of air has not been blocked like restaurants, cafes, cafeterias and pubs tobacco products cannot be consumed. In this context, at the place of business called [REDACTED] owned by defendant Y.İ. located inside the ege park shopping center; it has been determined from the scope of the file, the pictures submitted during the hearing and the statements of the defense and witnesses that there are places to sit in front of this location and that the elements of isolation and blockage of air circulation are not applicable here and therefore does not constitute an place of work that is an exception to the non-smoking rule thus the claims and defenses made to the effect that smoking is allowed in this workplace are void of legal basis.

Since it has been seen that within the incident accepted by the Court the participants, who are understood to have been assigned by the provincial health directorate, were joined by police officers to proceed to the egs park shopping center to inspect the enforcement of the smoking ban and when they arrived at the work place called [REDACTED] encountered the defendant Y.İ. who said in his statement that he saw a doctor identification card on the collar of one official and therefore made the conclusion that they had come to inspect for cigarette smoking, however the owner Y.İ. and business manager T. barred entry to the workplace based on their incorrect interpretation of the law, said that smoking was going on inside and resisted saying that they had the necessary apparatus and made the verbal request that the officials not go

inside which was disregarded by the officials however the official H. tried to explain in the doorway of the workplace the purpose of their visit but was responded to by the owner and other employees by being dragged into a confrontational situation and during this scene participant S. entered the workplace on the instructions of the provincial health directorate supervisor H. and proceeded to take pictures of the atmosphere in which smoking was taking place with her telephone and camera at which time an argument ensued with a female attorney but the manager of the business T. and defendant E. who was there as a customer grabbed the participant S. by the arms and used physical force to literally drag her out of the

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venue; this use of force by the defendants was evaluated and the conclusion was made that it was physical force in legal terms and it was apparent that during this incident the defendants E and T had committed the crime of using physical force against the participant S. to obstruct her carrying out her duties however in terms of the defendant Y.İ. it is apparent that despite his loudly announcing his personal interpretation of the law and showing the officials that they could not enter the premises he did not become involved in any acts that could be interpreted as force or threat defined as an element of the law against the participants or plaintiffs personally and likewise it has been determined that he did not instigate the actions of the other defendants therefore a ruling for his acquittal needs to be issued and due to the defendants E. and T. not having any prior records and no material damages are being sought by the plaintiffs and a positive opinion has been formed that they will not repeat the offence in the future a disclosure of their ruling has been postponed.

RULING/ For the reasons described above,

- 1- Since no sufficient, final and convincing evidence has been obtained to prove that defendant Y.İ. committed the offence of resisting the execution of a duty or participated in, instigated or assisted in the actions that resulted in force being used by the other defendants, the ACQUITTAL of this defendant in accordance with CMK (Code of Criminal Procedure) article 223/2-e,
The 575 TL attorney fee that is set forth in article 13/5 of the minimum wage fee for lawyers shall be given to Defendant Y.İ.
- 2- Due to the actions of Defendants T.O. and E.A. being proven to be an offence of resistance against the execution of a duty, with consideration for the personal and social status of the defendants in accordance with TCK (Turkish Penal Code) Article 265/1 and the form in which the crime was committed 6 MONTHS IMPRISONMENT,
Due to the presence of the article 265/3 condition an increase of 1/3 in the sentence issued to the defendants for a SENTENCE OF 8 MONTHS IMPRISONMENT
Due to the acceptance of discretionary mitigation in accordance with article 62, a reduction in the sentence of 1/6 for a SENTENCE OF 6 MONTHS 20 DAYS IMPRISONMENT,
Due to there being no place for the application of articles 51-52 in accordance with CMK article 231/7 and since the defendants have no prior records, no material damages are being demanded by the plaintiffs and a positive conclusion has been reached by our court that the defendants will abstain from repeating such crimes in accordance with the CMK 231/5 article different from laws numbered 5560 and 5728, the DISCLOSURE OF THE SENTENCE for defendants T and E has been decided to be POSTPONED,
In accordance with CMK/ article 8 it has been ruled that the defendants shall be SUBJECT TO A 5 YEAR PROBATION PERIOD,
There is no APPLICABILITY here for the undertaking of a commitment within the probation period, When it is clear in accordance with CMK 231/article 10, that no new crimes have been committed intentionally within the probation period, THE DECISION SHALL BE MADE TO REMOVE THE SENTENCE AND DISMISS THE CASE,
In the event that, in accordance with CMK 231/article 11, that new crimes have been committed intentionally within this period THE SENTENCE SHALL BE DISCLOSED,
The 575 TL attorney fee will be obtained from the defendants T. and E. and given to plaintiff S.
The rights of S and H concerning private law shall be reserved

The claim of the insult offence made by the prosecutions is REJECTED

The expenses, excluding judgment expenditures concerning the Acquittal, for 11 invitations of 49,50 TL, one order of 1.2 TL for a total of 51.90 TL shall be COLLECTED from the defendants T. and E. in equal amounts.

With the path to appeal against the rulings made on defendants T and E being open,

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It has been explained to the defendant Y.İ. that in terms of the ruling against him in accordance with CMK 231/article 2 an objection can be submitted by means of submitting a petition to our Court within 7 days or by entering such objection on record as well as making a declaration to the records clerk and an appeal may be filed as specified in articles 272-273 of CMK; the defendant E., defense counsel of defendants Y.İ. and T., defense counsel of defendant E., defense counsel of plaintiff S. attorneys N.C and T.K. was read in person and clearly the ruling made against the demand in the absence of Y. İ. and T. and the participants and plaintiffs, with the path to Appellate Court being open. 11/06/2009