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Acquittal of Cardinal Philippe Barbarin: A victory for the Firm

On January 30, 2020, the Court of Appeals of Lyon acquitted Cardinal Philippe Barbarin, defended in particular by Mr. André Soulier, of the charge of failing to report abuses with regard to the sexual assaults and rapes committed by Mr. Father Bernard Preynat on boy scouts he supervised between 1972 and 1991.

In this high-profile case, the judges of the Court of Appeals decided to overturn the first-instance judgement handed down by Criminal Court of Lyon which had convicted Philippe Barbarin. Probably less receptive to the emotional turmoil legitimately created by this case, the appellate judges based their decision primarily on the strict application of the rule of law.

Indeed, several legal issues were brilliantly pointed out by Mr. Soulier and by the Attorney General in his closing argument during the hearing held on November 29 2019: (1) the instantaneous or continuous nature of the offence of failure to report abuses, (2) the fact that the prosecution of the main offence was time-barred, which made the reporting obligation meaningless, and also (3) the lack of vulnerability of the victims at the time Philippe Barbarin, Archbishop of Lyon, became aware of the facts in dispute.

Article 434-3 of the French Criminal Code, as applicable at the material time, provided that *"Any person who, having knowledge of mistreatment, deprivations, or sexual assaults or abuses inflicted upon a minor under*

fifteen years of age or upon a person unable to protect himself/herself due to his/her age, sickness, disability, physical or psychological impairment or pregnancy, omits to report this to the administrative or judicial authorities is liable to three years' imprisonment and a fine of 45,000 euros."

1. The instantaneous or continuous nature of the offence

The civil parties considered that failure to report sexual assault on a minor is a continuous offence, meaning that the limitation period would not begin to run until either the day on which the to-be-reported offence becomes known to the judicial authority or even the day on which the to-be-offense offence (i.e. sexual assault) becomes time-barred.

However, the Court of Appeals did not agree with this analysis and confirmed the instantaneous nature of the offence of failure to report mistreatment, thereby following the applicable the case law on the subject^[1]. Specifically, it held as follows: *"The offence is committed and instantaneously established when the person is aware of facts likely to constitute the main offence and does not report such facts. Even if the law does not provide for a specific time limit, in line with the utilitarian nature of this offence, (...) the time line must be as short as possible, once the person has become convinced of the reality of the facts"*.

The appellate judges therefore unambiguously rejected the hypothesis of the continuous nature of the offence by affirming, in accordance with applicable case law, that failure to report abuses is an instantaneous offence. In the present case, the first action that interrupted the statute of limitations dates back to February 26, 2016, and considering the time limitation applicable at the material time, i.e. 3 years, the facts that may constitute the offence prosecuted but that occurred prior to February 26, 2013 are time-barred.

2. The main offence is time-barred

It should be recalled that the Criminal Court had held that the limitation period for the to-be-reported facts was irrelevant, considering that Article 434-3 of the French Criminal Code did not exclusively serve a utilitarian function to limit or prevent the repetition of reprehensible actions. Consequently, Bernard Preynat's victims, although prevented under the applicable statute of limitations from bringing proceedings against him before the Criminal Court, would be entitled to compensation for the damage they suffered as a result of the failure to report acts of which they were victims.

The Court of Appeals of Lyon rightly noted that *"wherever prosecution is time-barred, the prosecuted facts are no longer criminal in nature"*, which means that the obligation to report sexual assaults on a minor cannot be legally maintained since the main offence, i.e. sexual assaults, can no longer be prosecuted as prosecution is time-barred. The judgement issued by the appellate judges indeed emphasizes that Article 434-3 of the French Criminal Code is intended to avoid obstruction of justice, without, however, going so far as to apply to what is no longer prosecutable.

3. Lack of vulnerability of the victims

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Last but not least, the decision of the Court of Appeals of Lyon highlights that Article 434-3 of the French Criminal Code uses the present tense to qualify the victim in the definition of the offence, a victim referred to as one “*unable to protect himself/herself*”. Judges thus held that the vulnerable condition must be contemporary to the time when the person prosecuted for failure to report becomes aware of the facts. When Philippe Barbarin became aware of the sexual assaults inflicted on minors by Bernard Preynat, the latter were, according to the Court of Appeals of Lyon, adults who had a family, who were socially and professionally integrated, and who were not suffering from an illness, disability or physical or psychological impairment within the meaning of the law.

As such, the Court of Appeals followed the interpretation of the defense: the fact that the main offence was time-barred had the effect of depriving the reporting obligation of its substance – such obligation being intended to prevent obstruction of justice – but above all the fact that a victim is not in a vulnerable condition at the time the abuses he or she had suffered are discovered also deprives said reporting obligation of its substance.

[1] Criminal Chamber of the *Cour de Cassation* (French Supreme Court), April 7, 2009, No. 09-80.655.

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