Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Early Marriages and the Best Interest of the Child

Question(s) at stake:

Whether cultural defence could outweigh the principle of the best interest of the child in cases prosecuting parents for the crime of facilitating early customary marriages.

Outcome of the ruling:

The rights of the child take priority over customary or religious norms.

Topic(s):

- Crime and Punishment under State Law
- Personal Status, Family and Inheritance

Keywords:

- Best interests of the child
- Child marriage
- Customary marriage
- Sentencing
- Violation of duties of care or education

Tag(s):

- Roma

Author(s):

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Country:

Bulgaria

Official citation:

Regional Court Haskovo, Judgement of 6 July 2017, Criminal Appeals Case (VNAHD) No. 269/ 2017 (Reshenie № 98/ 06.07.2017 g., VNAHD № 269/ 2017 / Решение № 98 от 06.07.2017 г., ВНАХД № 269/ 2017 г.)

Link to the decision:

No link available.

ECLI:

ECLI:BG:DC560:2017:20170600269.001

Date:

06 July 2017

Jurisdiction / Court / Chamber:

Regional Court Haskovo, Appeals Criminal Division I

Remedy / Procedural stage:

Appeals proceedings

Previous stages:

District Court Haskovo, Criminal Division

District Court Haskovo, Judgement of 23 March 2017, Criminal Case (AND) No. 307/ 2017 (Reshenie № 60/ 23.03.2017 g., AND № 307/ 2017 / Решение № 60 от 23.03.2017 г., АНД № 307/ 2017 г.)

ECLI:BG:RC564:2017:20170200307.001

Subsequent stages:

Final

Branches / Areas of law:

Criminal law; Administrative law

Facts:

S. aged 15 at the material time, and his girlfriend A, who was 14, had been in a relationship for two years. They both belonged to the Roma ethnic minority. In Spring of 2014, the couple approached their parents with the request that they are allowed to get married. With their parents' blessing, S. and A. were married in March 2014 in a customary ceremony. In compliance with Romani traditions, the bride moved into the groom's parents' home. Subsequently, she gave birth to a child, while still a minor.

Approximately two years after the customary wedding, S.'s mother was arrested and charged with the crime of facilitating child marriage. Under Bulgarian law, the criminal offence of child marriage is committed by cohabiting with a minor as spouses, under Article 191(1) of the Criminal Code ('CC'). The act of facilitating the cohabitation with a minor is criminalized under Article 191(2) CC, which stated: "Whoever induces or facilitates a male minor to cohabit without being legally married with a female minor who is under the age of 16 shall be punished by imprisonment for a term not exceeding two years or by probation."

The District Court Haskovo heard the case at first instance. The defendant, the groom's mother, was found guilty of the crime of facilitating the child marriage between her son and his girlfriend A.

The defendant then appealed her verdict before the present Regional Court. In her appeal, she claimed that her behaviour did not amount to a criminal offence because it did not possess the requisite gravity. Under Article 9(2) CC, criminal offences were defined by a "significant threat to society", and the absence of such a threat could be used as an exculpatory claim. (see also CUREDI017BG003). The defendant maintained that her behaviour is culturally meaningful and it was aimed at supporting and protecting the two minors.

Ruling:

The Regional Court Haskovo ('Appeals Court') confirmed the guilty verdict of the first-instance court.

The Appeals Court rejected the defendant’s claim that her conduct was not grave enough to be punished. Nor did the Court agree with the defendant’s position that her conduct could be justified by the customs of her ethnic group.

The Appeals Court referred to the United Nations Convention on the Rights of the Child of 1989 (‘CRC’), stating that every person under the age of 18 must be treated as a child. The Appeals Court reasoned that the defendant’s son and his girlfriend, who were assisted by the defendant to start living together as spouses, were children in the eyes of the law, and as vulnerable persons they are owed a higher degree of protection to allow them to develop fully, before they are burdened with the right to make life-altering decisions.

In accordance with Article 27 of the CRC, children are guaranteed a standard of existence that is commensurable with their specific needs. It fell on the state, and especially on the child’s parents, to ensure that standard of living.

This, the Court reasoned, was why the defendant’s conduct was not only a threat to society, but also unlawful and punishable under the law. Consequently, the Court denied the request of the defence to apply Article 9(2) CC and to acquit on the grounds of insignificant threat to society. Instead, the guilty verdict was confirmed by the Appeals Court.

The Court of first instance had applied the legal exemption under Article 78a CC. This allowed for an administrative sanction (a fine) to substitute a criminal penalty (probation or imprisonment), when certain conditions were met: absence of a criminal record, absence of sustained monetary damage resulting from the crime, and the punishment prescribed by the law for the crime in question was less than three years of imprisonment. The minimum fine permissible by law (1000 BGN, approx. 500 EUR) was meted out (for another example see also CUREDI017BG005).

The Appeals Court agreed with the sentencing approach of the lower court and approved it in full.

Main quotations on cultural or religious diversity:

- “The existence of specific customs in the Romani ethnic communities, exemplified by the cohabitation of children as spouses, cannot in itself negate the element of a threat to society, because in contemporary societies priority is given not to religion or custom as regulators of social conduct but to legal norms, the compliance with which is the responsibility of everyone [and] in the interest of the protection of each individual. Moreover, assuming that Romani customs should exclude criminal liability in respect of the members of that community would mean that only non-members … should be subject to liability [for that crime], which would lead to unequal treatment under the same law. In addition, every child, irrespective of the child’s ethnic origin, until they reach the age of 18, has the right to protection that can guarantee the child’s normal intellectual, spiritual, and social development”. (para. 12)

Main legal texts quoted in the decision:

Domestic Law

- Articles 9(2), 78a, 191(1) Criminal Code 1968

International Law

- Articles 1 and 27 United Nations. “Convention on the Rights of the Child.” *Treaty Series*, vol. 1577, Nov. 1989, p. 3

Cases cited in the decision:

- None

Commentary

Early Marriages and the Best Interest of the Child

This judgment is part of a specific subgroup of parental prosecutions within the broader body of case law on underage cohabitation or early (customary) marriages. The other common pattern in the prosecution of early marriages is

groom prosecutions. When the groom is an adult, i.e., when he is 18 or older, the charges are brought against the groom (Art. 191(1) CC). In both types, the bride is always younger than 16 (see also CUREDI017BG006 for an example of a groom prosecution).

In its reasoning on the guilty verdict, the Appeals Court held that the protection of children should have priority over any customary practice, and that legal norms had priority over religious or customary norms.

The Appeals Court took the position that the parents bore the responsibility for the well-being of their children who were minors, and that this responsibility was of paramount importance, both under domestic and international law (see also CUREDI017BG004, another case in which the court gave priority to the best interest of the child over customary practices).

The court of first instance and the Appeals Court agreed on the question of mitigating circumstances in this case. In the initial proceedings, the court of first instance had considered in mitigation the following: the defendant had good character and no prior convictions, and she had shown remorse for her conduct. The lower court had also included in mitigation the views of the defendant in relation to marital and family questions:

“As mitigating evidence, the court took into account [...] this ethnic group’s characteristic cultural perceptions and mentality regarding marriage and family.” (*District Court Haskovo, Judgement of 23 March 2017, Criminal Case (AND) No. 307/ 2017*)

When sentencing was being considered, the courts in Bulgaria were under the obligation to review all the mitigating, as well as the aggravating circumstances (Article 54 CC). In this case, both courts included among the mitigating circumstances the defendant’s cultural views (see also CUREDI017BG006, another case in which the Court considers mitigating circumstances in a cultural context). Even though the ethnonym *Roma* did not appear anywhere in the text of the judgment issued by the lower court, the reference to “this ethnic group,” “their traditions,” “their customs,” and the brief reference to a customary

engagement, all point to the fact that the defendant was indeed of Romani origin. In addition, at the time when the judgment was issued, there had been already a well-established body of case law on underage cohabitation, which not only shared many commonalities in terms of fact, but also in terms of custom. There could be no doubt as to the belonging of this judgment to the consistent case law on Romani early marriage prosecutions.

The Appeals Court confirmed in its entirety the lower court's judgment by stating that "[t]he first-instance court's judgment is correct and must be upheld."

After finding the defendant guilty, the Appeals Court Haskovo readily accepted that the exemption from criminal punishment and the prescription of administrative one instead was perfectly justified and sufficient to achieve the goals of deterrence. In fact, that decision of the Appeals Court is fully compliant with established judicial practice in cases of child marriage – the formal position appears to be that although cohabitation between minors as spouses could not be permitted or justified, a severe punishment in these cases would not necessarily resolve the issue. Consequently, when a case ends in conviction, an administrative penalty is typically meted out.

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

General legal literature on the topic:

- Nikolova, Maria G. 2020. "Parents, Children, Marriage: Bulgarian Courts' View on Romani Marriage-making." *Martor* 25: 153-164.
- UNICEF 'Research on the Social Norms Which Prevent Roma Girls from Access to Education' (Bulgaria) (February 2016)
- UNHCR 'Preventing and Eliminating Child, Early and Forced Marriage' (2 April 2014) UN Doc A/HRC/26/22

General literature on the topic from other disciplines:

- Amalipe Center for Interethnic Dialogue and Tolerance 'Preventing Early Marriages' (Astarta, Plovdiv 2011)

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Suggested citation of this case-law comment:

Nikolova, Maria G. (2024): Early Marriages and the Best Interest of the Child, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI017BG007, https://doi.org/10.48509/CUREDI017BG007.