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

No Discussion of the Existence of Base Motives in an Honour Killing Case – Individual Mistake of a Court or Pattern?

Question(s) at stake:

Whether the motive of restoring one's honour is a base motive.

Outcome of the ruling:

The motive of restoring one's honour is a base motive

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Homicide
- Honour crimes
- Sentencing
- Aggravating circumstances

Tag(s):

- Base motives

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Country:

Germany

Official citation:

Federal Court of Justice, 5. Division, Judgment of 22 July 2020, 5 StR 543/19 (Bundesgerichtshof, BGH, 5.Strafsenat, Urteil vom 22. Juli 2020, 5 StR 543/19)

Link to the decision:

https://openjur.de/u/2271076.html

ECLI:

ECLI:DE:BGH:2020:220720U5STR543.19.0

Date:

22 July 2020

Jurisdiction / Court / Chamber:

Federal Court of Justice, 5. Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Cottbus, Judgment of 28 May 2019, 1560 Js 35941/1821 Ks 2/19 (LG Cottbus, Urteil vom 28. Mai 2019 , 1560 Js 35941/1821 Ks 2/19)

Subsequent stages:

- Regional Court Cottbus

Branches / Areas of law:

Criminal law

Facts:

The defendant and his family had fled from Afghanistan to Germany. Whereas his wife was able to adjust to the living circumstances in Germany and hoped for a

self-determined life, the defendant was not prepared to adapt to the new way of life, particularly with regard to his understanding of his role within the family. Though he wa aware of the differences, he was not ready to act accordingly. In August 2018, his wife separated from him because of his increasing violence and threats to kill her. The defendant unsuccessfully tried to get her and their five children back. On the day of the crime, he went to the house of his wife and asked her to come back to him. When she refused, he got angry. She fled the house. The defendant then followed her in the street and struck her head with an empty vodka bottle multiple times. When she fell, he tried to thrust a piece of the broken bottle into her neck but he was hindered by two passers-by and his wife could be saved.

The first instance court found him guilty of attempted murder. The defendant and the private accessory prosecutor both appealed the judgement on points of law.

Ruling:

The defendant’s appeal on points of law was dismissed for reasons not immediately relevant to the CUREDI project. Upon the private accessory prosecutor’s appeal on points of law, the judgement of the first instance was quashed and the case was referred back to another criminal division of Cottbus Regional Court. According to the Federal Court of Justice, the Regional Court had erred by failing to discuss whether the crime had to be regarded as attempted murder under specific aggravating circumstances and not only as attempted murder. As the perpetrator had acted to restore his honour and the restoration of honour is, as a rule, a base motive – which is one of the possible elements of murder under specific aggravating circumstances (Section 211 German Penal Code) – it was obvious that the Regional Court should have examined the circumstances concerning this matter.

Main quotations on cultural or religious diversity:

- “Whereas the private accessory prosecutor could adapt to the different living conditions in Germany and hoped for a self-determined life, the defendant,

who was rooted in his cultural tradition, was, also due to his character, not ready to come to terms with the foreign way of life. This particularly concerned his ‘non-negotiable’ understanding of the distribution of roles within the marriage. Though he intellectually understood the cultural differences in the lifestyle, he did not want to adapt to them.” (para. 11)

- “According to these criteria, the Regional Court should have felt compelled to discuss the presence of elements of murder under specific aggravating circumstances in the reasoning. According to the statements and assessments that were free of legal errors, the defendant had tried to kill his wife out of anger and resentment over his wife’s refusal to come back to him. Such motives are unanimously regarded as base if they are based for their part on a base attitude […] In this regard, the Criminal Division has stated that the defendant was guided by his understanding of his role and, consequently, his claim of power over his family. Therefore he considered himself entitled to take more ‘severe’ measures against his wife, who only wanted to fulfil her desire for a self-determined life. The defendant perceived this as a grave violation of his honour. As a rule, the motive of restoring one’s honour is objectively regarded as base (Federal Court of Justice, Judgement of 25 September 2019, 5 StR 222/19).” (para. 17)
- “The fact that the Regional Court did not discuss in its judgement the presence of an element of murder under specific aggravating circumstances is a fundamental mistake in the application of the law. This is all the more true given that the Regional Court, which had sought the advice of an expert on this issue, was convinced that the defendant had intellectually understood the cultural differences [between Western and] his ‘traditional’ idea of marriage and family but was unwilling to adapt and to accept them.” (para. 18)

Main legal texts quoted in the decision:

- Sections 211, 212 German Penal Code

Cases cited in the decision:

- Federal Court of Justice, Judgment of 11 October 2005,1 StR 195/05 (BGH, 1. Strafsenat, Urteil vom 11. Oktober 2005, 1 StR 195/05)
- Federal Court of Justice, Judgment of 25 September 2019, 5 StR 222/19 (BGH, 5.Strafsenat, Urteil vom 25 September 2019 – 5 StR 222/19)
- Federal Court of Justice, Judgment of 28 November 2018, 5 StR 379/18 (BGH 1.Strafsenat, Urteil vom 28. November 2018– 5 StR 379/18)
- Federal Court of Justice, Judgment of 8 August 2001 – 2 StR 504/00 (BGH, 5.Strafsenat, Urteil vom 8. August 2001, 2 StR 504/00)
- Federal Court of Justice, Order of 10 January 2006, 5 StR 341/05 (BGH, 1.Strafsenat, Beschluss vom 10.Januar 2006, 5 StR 341/05)
- Federal Court of Justice, Judgment of 14 December 2000, 4 StR 375/00 (BGH, 4.Strafsenat, Urteil vom 14. Dezember 2000,4 StR 375/00)

Commentary

No Discussion of the Existence of Base Motives in an Honour Killing Case – Individual Mistake of a Court or Pattern?

In a landmark 1994 decision concerning base motives as an element of murder under specific aggravating circumstances, the Federal Court of Justice decided that “the criteria for the assessment of a motivation have to be based on the ideas of the legal community of the Federal Republic of Germany, not on the ideas of an ethnic group that does not recognize the moral and legal values of the German legal community” (objective side) and that “only in exceptional cases when the perpetrator was not aware of the circumstances that account for the baseness of his motivation or if he could not control the emotions that determine his actions neither intellectually nor volitionally” (subjective side) a conviction only for murder may come into question, instead of murder under specific aggravating circumstances based on base motives. (see in detail CUREDI033DE03). This case dealt with vendetta or blood feud, but soon the same reasoning was also used in honour killing cases (see for instance CUREDI033DE004; CUREDI033DE005; CUREDI033DE007). Both are similar in that

a supposedly injured honour is the motive for the crime. In the case of the blood feud, the crime is directed against the male member of another family; in the case of honour killing, the crime is mainly directed against a female member of one's own family who has violated the community's sexual norms. According to established German case law, to kill in order to restore the honour of the family has to be regarded as murder under specific aggravating circumstances due to the presence of base motives. In cases that came before the Federal Court of Justice at the time, the issue at stake was largely whether the perpetrator was, given his background, able to intellectually understand the circumstances that accounted for the baseness of that motive and could act accordingly. A criminological study dealing with all the honour killing cases decided by German courts between 1996 and 2005 (Oberwittler and Kasselt: 2011) shows, however, that in the assessment of honour killings, lower courts often did not follow the case law of the Federal Justice Court and continued to punish honour killings as murder only or as murder under specific aggravating circumstances based on other elements, e.g., insidiousness. It seems, however, that after 2002, when the Federal Court of Justice had confirmed its opinion on the presence of base motives in another landmark case (see CUREDI033DE006), there has been an increase in judgments that affirmed the existence of base motives in honour killing cases (Oberwittler and Kasselt 2011: 155–163).– This case was decided in the first instance in 2019 and the judgement does not even touch upon the problem of the baseness of motives in an honour killing case. – It would be very interesting to know whether the present case is an exception or whether it reflects a pattern that continud to persist in the lower courts. But regrettably, there is no comprehensive study on the judgements of lower courts in honour killing cases after 2005. Furthermore, the number of published honour killing cases decided by the Federal Court of Justice for more than one decade has been extremely small. Therefore the question remains open.

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

General legal literature on the topic that may not directly be connected with the case

- Burmeister, Jonathan. 2011. *Die schuldangemessene Bewertung von Ehrenmorden im deutschen Strafrecht –Differenzierte Schuldmerkmale auf Tatbestandsebene bei sonstigen niedrigen Beweggründen*. Frankfurt u.a.:Lang.
- Çakır-Ceylan, Esma. 2011. *Gewalt im Namen der Ehre – Eine Untersuchung über Gewalttaten in Deutschland und der Türkei unter besonderer Betrachtung der Rechtsentwicklung in der Türkei*. Frankfurt u.a.:.Lang.
- Elyafi-Schulz, Senan. 2012. *Das Phänomen des "Ehrenmordes" – Eine rechtliche Untersuchung unter Berücksichtigung der Täter- und Opferperspektive.* Marburg: Tectum.
- Erbil, Bahar. 2008. *Toleranz für Ehrenmörder?* Berlin: Logos.
- Grünewald, Anette. 2010. "Tötungen aus Gründen der Ehre". *Neue Zeitschrift für Strafrecht* 30 (1): 1–9.
- Kasselt, Julia. 2016. *Ehre im Spiegel der Justiz – eine Untersuchung zur Praxis der deutschen Schwurgerichte im Umgang mit dem Phänomen der Ehrenmorde*. Berlin/Freiburg; Duncker&Humblot and Max-Planck-Institut für ausländisches und internationales Strafrecht.
- Kasselt, Julia and Dietrich Oberwittler. 2014. "Die richterliche Bewertung von Ehrenmorden in Deutschland: Eine empirische Analyse der Sanktionspraxis im Zeitraum 1996 bis 2005". *Monatsschrift für Kriminologie und Strafrechtsreform* 97 (3): 203–223.
- Oberwittler, Dietrich and Julia Kasselt. 2011. *Ehrenmorde in Deutschland 1996-2005*. Köln: Luchterhand.
- Schorn, Martin. 2014. *Mord aus niedrigen Beweggründen bei fremden soziokulturellen Wertvorstellungen*. Baden-Baden: Nomos.

General Legal Literature on the Topic From Other Disciplines

- Bodendieck-Engels, Hildegard. 2013. *"Ehrenmord" vor deutschen Gerichten – eine anthropologische Untersuchung von Strafprozessen,* Hamburg: Dr. Kovač.
- Kızılhan, Jan Ilhan. 2012. *"Ehrenmorde". Der unmögliche Versuch einer Erklärung. Hintergründe – Analysen – Fallbeispiele.* 2nd ed. Berlin: Regener.

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