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

Murder under Specific Aggravating Circumstances as Reaction to an Insult

Question(s) at stake:

Whether a homicide committed out of anger over an insult may fulfil one of the requirements of murder under specific aggravating circumstances due to the existence of base motives.

Outcome of the ruling:

The judgment of first stage was quashed and referred back to the Tübingen Regional Court because it had falsely denied the existence of base motives.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Bodily harm
- Homicide
- Proportionality

Tag(s):

- Base motives
- Brawl
- Honour

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Germany

Official citation:

Federal Court of Justice, 1. Criminal Division, Judgement of 11 October 2005, 1 StR 195/05 (BGH 1. Strafsenat, Urteil vom 11. Oktober 2005,1 StR 195/05)

Link to the decision:

https://openjur.de/u/82427.html

ECLI:

No ECLI number / ECLI number unknown

Date:

11 October 2005

Jurisdiction / Court / Chamber:

Federal Court of Justice, 1st Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Tübingen , Decision of 6 October 2004, 3 KLs 26 Js 18537 (LG Tübingen, Urteil vom 6. Oktober 2004, 3 KLs 26 Js 18537)

Subsequent stages:

- Regional Court Tübingen

Branches / Areas of law:

Criminal Law

Facts:

On the evening of 3 September 2003 in the downtown of R., the defendants I. and A., probably of Greek origin, got into a dispute with the later victims Ra., Z., and A. They felt so insulted and dishonoured, particularly by the Greek pejorative term "*malaka*" (vocative form of "*malakas*", meaning "wanker"), which is normally not considered a very serious insult in Greek society, that they did not want to let the matter rest and called their friends, the defendants C., K., and S. They all attacked Ra., Z., and A. some 40 minutes later. I. severely stabbed Ra. in his throat and his back, but the life of Ra. could be saved by an emergency operation. After that, I. and S. attacked Z. I. stabbed him in the upper part of his body multiple times. He hit the heart of Z., who immediately died. All of the five defendants were convicted for dangerous bodily harm and taking part in a brawl; furthermore, S. was convicted for murder and I. for murder and attempted murder.

The public prosecutor and the private accessory prosecutors appealed on points of law.

Ruling:

The Federal Court of Justice partly dismissed the appeal and partly quashed the judgment. The following explanations are limited to the appeal of the prosecutor and the private accessory prosecutors regarding the defendant I. In their rather brief judgment the Federal Court of Justice stated that the first instance had wrongly punished the defendant for murder (according to Section 212 German Penal Code) instead of murder under specific aggravating circumstances (according to Section 211 German Penal Code), as it had falsely denied the existence of base motives, which constitute an element of murder under specific aggravating circumstances. According to the settled case law of the Federal Court of Justice, the assessment of a motive as base must be made on the basis of the ideas of the German legal community, which regards the restoration of one's honour as a base motive for killing another person. Furthermore, the Federal Court of Justice stated that there were no indications that the defendant might not have been able to understand the assessment of the German legal community or to act accordingly. Finally, the Federal Court of Justice agreed with

the argument in the grounds for appeal on points of law that also in the culture of origin of the defendant a simple insult does not require the killing of the insulting person to restore the honour of the insulted person. Therefore, the court quashed the judgment concerning I. and referred the case back to the lower court.

Main quotations on cultural or religious diversity:

- "When assessing the motives of the defendant, the division had wrongly included the 'background of his cultural origin, in which the concept of honour plays a particularly significant role'. The criteria for the assessment of motives have to be based on the ideas of the legal community of the Federal Republic of Germany and not on the ideas of an ethnic group that does not recognize the moral and legal values of this legal community." (para. 16)
- "In the findings made by the division there is nothing to indicate that the defendant had not been able to understand the assessment of his motives as base by the German legal order; this is also improbable. Apart from that, the appeal on points of law rightly points out that the assumption that a simple insult requires the killing of other persons for reasons of honour is also absolutely improbable in other cultures as well, especially if there is a blatant disproportionality between the cause and the crimes." (para. 17)

Main legal texts quoted in the decision:

- Sections 52, 53, 211, 212, 213, 224, 231 German Penal Code

Cases cited in the decision:

- BGH 47, 128, 130 mwN. (Official Collection of the Judgments of the Federal Court of Justice vol. 47: 128, 130 with further references);
- BGHNJW 1995: 3196;
- BGHR StGB Section 211 para. 2 niedrige Beweggründe (base motives) no. 41 mnW. (with further references).

Commentary

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The present case does not deal with honour killing in the sense of vendetta or killing a person because of a violation of sexual norms. The violation of honour that was the motive for the present crime consisted in a mere insult by using a pejorative term. Today it is unlikely for such a conflict to happen at all, particularly in a European nation, but the persons involved spoke Greek and therefore were very probably Greeks.

The court of first instance did not accept the existence of base motives. Base motives are motives that according to general moral ideas are on the lowest leveland therefore particularly despicable.(see Federal Court of Justice, Judgment of the 2. Division of 7 October 1994 - StR 319/94, CUREDI033DE003). If somebody kills a person out of rage and anger, it is important whether this motivation in itself is based on a base motivatio. When discussing whether the perpetrator of a homicide acted out of base motives, the assessment must distinguish between the objective part and the subjective part of base motives. According to the settled case law of the Federal Court of Justice, the objective part of the motivation of a defendant must be assessed on the basis of the views of the German legal community, not on the ideas of an ethnic group that does not recognize the moral and legal values of the German community. Ideas of the culture of origin may be taken into consideration only in very exceptional cases when assessing the subjective part of base motives, namely if the perpetrator is not capable of understanding why his motives are considered base motives in Germany or if he is not able to act accordingly (see for details Federal Court of Justice, Judgment of the 2. Division of 7 October 1994 - StR 319/94, CUREDI033DE003).

In the present case, however, the first stage instance took the different cultural background of the perpetrator into consideration when assessing the objective part of the existence of base motives. Namely, because honour played a very important role in the perpetrator's home country, the court denied that his anger

over an insult had to be regarded as a base motive. Thus they based their assessment of the objective part of base motives on the (presumed) ideas of a foreign ethnic community, not the German legal community. This mistake was crucial for quashing the judgment as far as the defendant I. was concerned. Furthermore, the Federal Court of Justice also mentioned the lack of indications that the defendant might not have been able to understand the German assessment and to act accordingly, which would have been necessary to deny the existence of the subjective side of base motives.

It was not necessary to describe the different legal ideas of the German legal community in this regard, but the Federal Court of Justice, in an additional remark, agreed with the argument in the grounds for appeal that also in foreign countries it would be "absolutely improbable that a simple insult requires the killing of another person for reasons of honour". Thus they indirectly stated that the disproportionality between the cause and the crime was the basis for an assessment of the motive as base. This is all the more important as in cases of murder, under Section 212 (not murder under specific aggravating circumstances, Section 211), a milder punishment is possible if the crime was caused by a serious insult (Section 213 German Penal Code), but in such a case proportionality of the provocation and the crime is essential. Such a provocation may be seen e.g. in adultery, but never in a simple insult.

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

General Legal Literature on the Topic

- Schorn, Martin. 2014. *Mord aus niedrigen Beweggründen bei fremden soziokulturellen Wertvorstellungen*. Baden-Baden: Nomos.
- Votteler, Verena. 2014. *Das Mordmerkmal der "sonst niedrigen Beweggründe" gem. § 211 Abs.2 1. Gruppe 4. Variante StGB -- im Spiegel gesellschaftlicher Moralvorstellungen*. Heidelberg etc.: C.F.Müller.

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Suggested citation of this case-law comment:

Tellenbach, Silvia (2024): Murder under Specific Aggravating Circumstances as Reaction to an Insult, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI033DE013, https://doi.org/10.48509/CUREDI033DE013.