Rape under Family Pressure

Question(s) at stake:

Whether the pressure on the perpetrator by his family to commit the crime, resulting from ideas from other cultures, may be assessed as a mitigating circumstance in favour of the perpetrator.

Outcome of the ruling:

The pressure on the perpetrator by his family to commit the crime, resulting from ideas from other cultures, may be assessed as a mitigating circumstance in favour of the perpetrator.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Mitigating circumstances
- Rape

Tag(s):

- Yezidi
- Family
- Marriage
- Hostage taking

Author(s):

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Germany

Official citation:

Federal Court of Justice, Fourth Criminal Division, Judgment of 01 February 2007, 4 StR 514/06 (Bundesgerichtshof, BGH 4. Strafsenat, Urteil vom 01. Februar 2007, 4 StR 514/06)

Link to the decision:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2007-2&Sort=1&nr=38987&pos=1&anz=280

ECLI:

No ECLI number / ECLI number unknown

Date:

01 February 2007

Jurisdiction / Court / Chamber:

Federal Court of Justice, Fourth Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Saarbrücken (Landgericht Saarbrücken)

Subsequent stages:

- None

Branches / Areas of law:

Criminal law

Facts:

The defendant and his 20-year-old cousin, both members of the Yezidi community in Germany, got engaged following the wishes of their respective parents, though his cousin secretly had a boyfriend. Therefore, she provoked a dispute with the defendant some time later to create a reason to break off the engagement with him. When he insulted her in the course of this dispute, she declared that she would not marry him and did not accept his excuse. In September 2005, the defendant, one of his brothers, and a cousin agreed to bring the young woman to the nearby Belgium in the house of a relative in order to discuss the marriage and convince her to marry the defendant. In line with their plan, they captured her and brought her in their car to Belgium to the house of a relative by force. There, she was under constant surveillance and put under great pressure to marry the defendant. When she did not give in, they decided to bring her back to Germany. But she did not agree to return with them and asked that someone from her family come and bring her home. Her family was informed and her father and other members of the family set off to pick her up. While waiting for the father to arrive, the defendant and his relatives continued to pressure the victim. They even threatened to kill her if she did not marry the defendant. Ou of fear, she finally agreed to the marriage but shortly afterwards she withdraw her consent. When her father and the other relatives arrived to pick her up, they also harried her to marry the defendant until she finally gave in just so she would be brought home. Her family, however, pressured her to have sexual intercourse with the defendant as a proof that she was really willing to marry him. Otherwise, they would not bring her home. When she was alone with the defendant in the bedroom, she asked him again not to have sexual intercourse with her but he denied her request. Finally, she gave up resisting out of fear. When she saw that there was blood on the sheet – which according to the traditions of her religious community was proof of intercourse and thus loss of virginity – she refused to continue having sex and the defendant stopped it without having ejaculated. They gave the bloodstained sheet to the relatives who congratulated the defendant and the victim and brought her home to Germany.

The Regional Court sentenced the defendant to two years imprisonment on probation for hostage taking and rape. The public prosecutor’s office appealed on

grounds of law because they regarded the punishment as too lenient.

Ruling:

The 4th Criminal Division of the Federal Court of Justice rejected the public prosecutor's appeal on points of law. The Regional Court had assessed the taking of hostages as a less serious case (Section 239b para. 2 in conjunction with Section 239a para 2 German Penal Code) and the rape as an average case (Section 177 para. 1), though normally it would have been punished as an aggravated case (Section 177 para 2 no 1 German Penal Code). In its overall assessment, the Regional Court had taken into account some aggravating circumstances but also a considerable number of mitigating circumstances, such as the pressure of the family, which it regarded as the spiritual author of the rape. The Federal Court of Justice approved the reasoning of the lower court. In particular, it stated that the criminal division of the Regional Court had not put into question that German law is binding for the defendant but that, contrary to the opinion of the public prosecutor, the criminal division of the Regional Court could take into account that the defendant, due to his culture of origin, felt under pressure from his family and therefore had to overcome a lower threshold of inhibition to commit the crime.

Main quotations on cultural or religious diversity:

- "The criminal division did not err in law in their overall consideration. They did not put into question that German criminal law and its values are binding for the defendant with regard to the crime he had committed. Contrary to the opinion of the public prosecution, they could take into account as a mitigating fact in the circumstances assessed by the court that the defendant – as well as the private accessory prosecutor – coming from another culture, acted under his family's 'pressure of expectations' and therefore had to overcome a lower threshold of inhibition to commit the crime" (para. 13)

Main legal texts quoted in the decision:

- Sections 177 para.1 and 2 no.1, 239a para.2, 239b para 2 German Penal Code

Cases cited in the decision:

- Federal Court of Justice NStZ 1996,80 (BGH NStZ 1996,80);
- Federal Court of Justice StV 2002, 20 (BGH StV 2002, 20).

Commentary

Rape under Family Pressure

The issue at stake is the extent to which foreign cultural ideas can have a mitigating effect on punishment if they lower the inhibition threshold to commit the crime. Here, too, the court did not consider the legal situation in the home country of the perpetrator or the duration of his residence in Germany (see in detail CUREDI033DE016), but rather directly discussed the role of a rootedness in another culture in sentencing. However, while the case described in CUREDI033DE016 is about the fact that the offender’s inhibition threshold was lowered due to the perpetrator’s own ideas regarding spousal rape, the situation here is somewhat different. The verdict explicitly considers it a mitigating circumstance that the perpetrator acted under the pressure of his family’s expectations because of the customs of his region of origin. Thus, according to the ruling, the norm, which was rooted in his tradition and triggered the conflict, did not refer to the rape itself but consisted in an extreme attachment to the family, whose pressure he could not resist. And it was his family’s ideas on how a marriage should come about that differed significantly from German culture. By requiring the perpetrator to have sexual intercourse with his victim, they interfered as a family in a highly personal decision of two people. And they did this with a certain calculation: According to their conception, a girl who was no longer a virgin had no chance to marry, except to the man who had taken her virginity. Therefore, showing the bloody sheets, which in their social surroundings mainly serves as proof of a bride’s virginity, was supposed to prove here that this

very virginity no longer existed and thus afforded them the certainty that the victim would enter into marriage with her cousin.

Also, legal scholars accept that in very rare cases, rootedness in traditional ideas can reduce guilt. However, the conditions for this are very strict. Hörnle sets out the following requirements for this (Hörnle 2014: C 86–89): There must be a genuine and serious conflict of norms. A religious or cultural counter-norm must exist which contains a concrete commandment of how to behave and the content of this norm must be described precisely. It must be binding and regarded as binding by the perpetrator and must cause him or her severe inner distress. Counter-norms that violate fundamental rules of the constitutional and legal order cannot, as a rule, justify a mitigation of punishment. In this case, Hörnle would recognize a mitigation of the sentence if the perpetrator himself rejected the religious or cultural norm that required the act, but ultimately committed it because the commandment of loyalty and obedience to his family was stronger. However, this commandment would have to have been the only motivation for action. The author doubts this, however, because the perpetrator did not accept the victim's suggestion that he only pretend to have sex and she thinks it possible that he had his own interest in the crime after all.

It is not known whether there have been any criminal proceedings, for abetting in a sexual offense, against the family members who pressured the perpetrator to have sexual intercourse with the victim.

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

Specific legal literature addressing the case

- Hörnle, Tatjana. 2014. „Kultur-Religion-Strafrecht – Neue Herausforderungen in einer pluralistischen Gesellschaft. Gutachten." In Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 70. Deutschen Juristentages Hannover 2014*. C. 1-118. München: C.H.Beck.
- Werner, Kai. 2016. *Zum Status fremdkultureller Wertvorstellungen bei der Strafzumessung - Sozialwissenschaftliche, kriminologische und*

strafzumessungsrechtliche Perspektiven. Berlin: Duncker&Humblot.

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

- Valerius, Brian. 2011. *Kultur und Strafrecht – Die Berücksichtigung kultureller Wertvorstellungen in der deutschen Strafrechtsdogmatik*. Berlin, Duncker&Humblot.

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