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

Spousal Rape Committed by an Old Turkish Husband

Question(s) at stake:

Whether ideas rooted in the original culture of perpetrator and victim may be taken into consideration in assessing a spousal rape as a less serious case (Art.177 para 5 German Penal Code).

Outcome of the ruling:

Ideas rooted in the original culture of perpetrator and victim may be taken into consideration in assessing a spousal rape as a less serious case (Art.177 para 5 German Penal Code)

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Mitigating circumstances
- Rape
- Spousal rape

Tag(s):

- Inhibition threshold
- Islam

Author(s):

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Country:

Germany

Official citation:

Federal Court of Justice, 2nd Criminal Division, Judgment of 29 August 2001, 2 StR 276/01 (BGH 2. Strafsenat, Urteil vom 29.08.2001, 2 StR 276/01)

Link to the decision:

https://openjur.de/u/64684.html

ECLI:

No ECLI number / ECLI number unknown

Date:

29 August 2001

Jurisdiction / Court / Chamber:

Federal Court of Justice, 2nd Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Wiesbaden (Landgericht Wiesbaden)

Subsequent stages:

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Branches / Areas of law:

Criminal law

Facts:

After more than 20 years of a harmonious marriage, an old Turkish couple quarrelled more and more frequently and finally the wife left the matrimonial home. On the urging of her sons, she returned seven months later but agreed

with her husband to have separate sleeping rooms and not to have any sexual contacts. This agreement worked well for some months. But one day, the husband did not abide by the agreement anymore and asked the wife to have sexual intercourse with him. When she refused, he took a fruit knife, pressed it against her belly and forced her to have sexual intercourse with him. After that, they drank coffee together. Shortly afterwards, he tried again to force her with a knife to have sexual intercourse, but this time he voluntarily abandoned his attempt when his wife again declined. They then sat together for some time. In the following weeks, disputes between the spouses became more and more frequent and about two months later, his wife left the matrimonial home for good definitely after the husband had beaten her head against a wall and kicked her. She reported her husband to the police for bodily harm and during her interrogation, she mentioned the spousal rape only in passing.

The judgment of the first instance convicted the defendant of dangerous bodily harm (Section 224 of German Penal Code) and spousal rape in a less serious case (*minderschwerer Fall*) (Section 177.5 of the German Penal Code). The public prosecutor's office made an appeal on points of law regarding the punishment for spousal rape, which it considered too mild. The appeal was rejected by the Federal Court of Justice.

Ruling:

According to the established case law of the Federal Court of Justice, the decision to commute an offence depends on whether the entirety of the offence – including all subjective elements and the personality of the offender – deviates so much from the average of cases that have occurred that applying the exceptional range of punishment is deemed necessary. For this purpose, a holistic approach is required, one that considers all the circumstances that ought to be appreciated for the evaluation of the offence and the offender, regardless of whether these circumstances are inherent parts of the offence itself, accompany it, precede it, or follow it. In this context, it is within the discretion of the judge the weight s(he) attaches to the individual grounds for mitigation on the one hand and the grounds for aggravation on the other; his assessment can only be reviewed by the

appellate court to the extent provided for in the German Code of Criminal Procedure (Section 333 et seq).

The Federal Court of Justice stated that the Regional Court did not err in law when it set out numerous weighty reasons for mitigating the sentence.

It stated that the Regional Court had explained many and important mitigating circumstances: Contrary to the opinion of the public prosecutor, it could take into account the fact that the defendant had been married to the victim for many years though he had not had sexual relations with her during the preceding two years, and that he did not commit the crime to punish his wife or to demonstrate his “rights” but because he was longing for her affection. Furthermore, the Regional Court did not question that German law was binding for the defendant but nevertheless it maintained that the defendant had to overcome a lower inhibition threshold. In view of this, the court explained that both the defendant and the victim come from a culture based on Islam and were still deeply rooted in traditional ideas, which required the obedience and submission of wives even though they had spent about 30 years in Germany.

Main quotations on cultural or religious diversity:

- “The chamber did not bring into question that German law is binding for the defendant as a Turkish citizen living in Germany. But it could take it as a mitigating fact that the defendant had to overcome a much lower inhibition threshold to commit this crime. The defendant as well as the private accessory prosecutor came from another culture that is characterized by values based on Islam. In spite of their long residence in Germany they were still rooted in a traditional understanding of roles that requires subordination and obedience from the wife. For instance, she had to ask her husband for permission when she planned to visit relatives or friends. The private accessory prosecutor had also not taken the rape as an opportunity to move out of the flat, as she did some time later after being abused by the accused.” (para. 15)

Main legal texts quoted in the decision:

- Section 177 of German Penal Code

Cases cited in the decision:

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Commentary

Spousal Rape Committed by an Old Turkish Husband

Since the 1990s, the question of whether an offender’s rootedness in the values and legal concepts of a foreign culture can lead to a mitigation of the sentence has occasionally been raised in the case law of the courts. Up to now, however, the number of rulings on this question of the Federal Court of Justice has remained low (see Federal Court of Justice, judgement of 12 September 1995, 1 StR 437/95; judgment of 22 August of 1996, 4 StR 280/96; judgment of 24 June 1998, 5. StR 258/ 98; order of 22 December 1998, 3 StR 587/98 order of 7 November 2006 1 StR 307/06 and decision of 23 May 2007, 1 Str 220/07; CUREDI033DE015; CUREDI033DE017). They assume that coming from a foreign culture as such does not justify a mitigation of the sentence, but that in individual cases a consideration may be possible. However, as a rule, this is limited by the requirement that the perpetrator’s ideas must be consistent with the legal situation in his home country and that there are strict limits to mitigation if the perpetrator has already lived in Germany for a long time. In some cases, however, the law of the home country or the duration of residence in Germany are not mentioned at all or not regarded as a sufficient reason to mitigate the penalty.

Legal scholars agree with the case law that cultural differences as such cannot be a reason for mitigating punishment, but can be taken into account in individual cases. However, they emphasize, more clearly than the case law does, that the perpetrator’s rootedness in a foreign value system must be expressed in direct reference to the circumstances of the offense (see, e.g., Valerius 2011: 291ff). Such a rootedness can lead to mitigation of punishment if it is the reason for the

offender’s significant failure to recognize the wrongfulness of his act. It is irrelevant for a mitigation of punishment if the offender is aware of the assessment by German law but does not share it due to his cultural rootedness (Valerius 2011: 292).

The fact of criminal liability in the home country, in this case Turkey, is also viewed in a more differentiated manner. It is not regarded per se as a reason for excluding the possibility of mitigation. However, it is sometimes viewed very critically and it is emphasised that the extent of guilt depends on the actual circumstances. For example, state law in weak states can have little significance compared to the norms of behaviour that in fact operate in the offender's living environment. (Hörnle 2014: C 83). Another scholar does not consider the punishability of an act in the home state as a reason for ruling out mitigation, but as a strong indication that the wrongfulness of the act was known to the offender (Valerius 2011: 293).

The length of residence in Germany is likewise not seen as an independent reason to exclude a mitigation of punishment, but only as an indication that a reduced understanding of wrongdoing is unlikely and that such misunderstanding is all the more unlikely the longer the residence (see Hörnle 2014: C 83; Valerius 2011: 292).

Finally, it is pointed out that increased difficulty to comply with German law is also possible due to extra-legal cultural factors that trigger a serious conflict of norms, but the conditions for this are very strict (Hörnle 2014: C 88-89; see in detail CUREDI033DE015; see also Valerius 2011: 293).

Werner differentiates between cases in which it is more difficult for the offender to comply with the law and cases in which the inhibition threshold to commit the offence is lowered. Werner believes that in the latter case, the circumstances mentioned would not be assessed as an obstacle (Werner 2016: 222).

It should also be mentioned that in the case of murder from base motives (section 211 German Penal Code), the question of the influence of the culture of origin on the perpetrator and his or her is punishment is dealt with in a different way. Here,

when examining the subjective side of base motives, it is asked whether the perpetrator was exceptionally unable to understand the actual circumstances that justify the baseness of the motives or was unable to act accordingly because of the influence of his or her culture of origin. However, this is only recognized by the Federal Court of Justice in extreme cases (See in detail for instance CUREDI33DE003 to CUREDI33DE008).

The present judgement from 2001 confirms that the lower court had mitigated the sentence because the accused had to overcome a lower inhibition threshold to commit a spousal rape as he was rooted in a different culture based on the Islamic value system that expected obedience and submission of the wife and to which both the perpetrator and the victim continue to be attached despite many years of residence in Germany. It is one of the judgements, however, that does not discuss whether the perpetrator's ideas correspond to the legal situation in his home country. Nor does it see an obstacle to a mitigation of the sentence in the case of a person who has lived in Germany for about 30 years, though it does not discuss this in more detail.

Regarding the Islamic value system, which according to the court's statements requires the obedience and submission of the wife, it is worth mentioning that in Islamic law marriage is a contract between a man and a woman in which the woman's willingness to have sexual intercourse with her husband and the man's obligation to support his wife are central elements of this contract, which are interdependent. Even though Islamic law as such is known in detail only to a few people, even in Turkey, it can be assumed that it influences the traditional values about marriage in the region from which the accused comes. This background may make it difficult for a perpetrator who is rooted in the values of his region of origin to understand that it is an injustice to force his wife into a sexual intercourse. As regards Turkish state law, spousal rape has only been a criminal offence since 2005 and, moreover, is only prosecuted upon the spouse's criminal complaint (Article 102 para. 2 of the Turkish Criminal Code of 2005). Under the previous Turkish Penal Code, spousal rape could only be punished as maltreatment of family members with up to 30 months in prison. urthermore, it

was a crime that was only prosecuted at the request of the spouse (Article 478 of the Penal Code of 1926). Turkish criminal law at the time of the crime could therefore punish spousal rape, but at least saw it as a significantly lesser wrong than in today's German law, which, as it happens, only began punishing spousal rape in 1997. This may also explain why the approximately 30 years that the perpetrator had lived in Germany were not regarded as an argument against a reduced sentence.

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

Specific legal literature addressing the case

- Werner, Kai. 2016. *Zum Status fremdkultureller Wertvorstellungen bei der Strafzumessung – Sozialwissenschaftliche, kriminologische und strafzumessungsrechtliche Perspektiven.* Berlin: Duncker&Humblot.

General legal literature on the topic

- Hörnle, Tatjana, 2014. "Kultur-Religion-Strafrecht – Neue Herausforderungen in einer pluralistischen Gesellschaft. Gutachten." In Ständige Deputation des Deutschen Juristentages: *Verhandlungen des 70. Deutschen Juristentages Hannover 2014.* C 1-118. München: C.H.Beck.
- Valerius, Brian. 2011. *Kultur und Strafrecht – Die Berücksichtigung kultureller Wertvorstellungen in der deutschen Strafrechtsdogmatik*. Berlin: Duncker&Humblot.

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