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

The Mistreated Roma Wife

Question(s) at stake:

Whether "archaic" ("archaische") traditions in which the perpetrator is rooted, may be regarded a mitigating circumstance if, in the perpetrators' country of origin, state law punishes the described acts.

Outcome of the ruling:

Archaic traditions the perpetrator is rooted in cannot be considered a mitigating circumstance if the crime is punishable in the perpetrator's country of origin.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Bodily harm
- Sentencing

Tag(s):

- Dangerous bodily harm
- Yougoslavia
- Foreign legal system
- Ethnic group
- Hostage-taking

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Country:

Germany

Official citation:

Federal Court of Justice, 1. Criminal Division, Order of 18 August 2009, 1 StR 351/09 (Bundesgerichtshof, BGH 1. Strafsenat, Beschluss vom 18. August 2009, 1 StR 351/09)

Link to the decision:

https://www.hrr-strafrecht.de/hrr/1/09/1-351-09.php

ECLI:

No ECLI number / ECLI number unknown

Date:

18 August 2009

Jurisdiction / Court / Chamber:

Federal Court of Justice, 1. Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Stuttgart (LG Stuttgart)

Subsequent stages:

-

Branches / Areas of law:

Criminal law

Facts:

The defendants in the case are the husband and the parents-in-law of the victim, a young woman. They are all members of a Roma family from the former

Yugoslavia. The husband had mistreated and tortured her in manifold ways and the three defendants had taken her hostage. The husband was convicted of causing bodily harm (Section 223 of the German Penal Code) and dangerous bodily harm (Section 224). All three were convicted of hostage-taking (Section 239b).

Ruling:

The defendants' appeal on point of law was rejected by order of the Federal Court of Justice as it unanimously deemed it manifestly ill-founded (Section 349 para 2 German Code of Criminal Procedure). However, the court took the case as an opportunity to make a fundamental observation. The court of the first instance had considered that the fact that the perpetrators were rooted in "archaic" values speaks for a less serious case(*minderschwerer Fall*) but had rejected this because the perpetrators had already lived in Germany for many years and had had sufficient opportunity to familiarize themselves with the German system of values and law (*Werte-und Rechtssystem*). Agreeing with the argument of the Attorney General, the Federal Court of Justice emphasized that it is an error in law to assume that being rooted in an "archaic" system of values should automatically commute the crime to less serious case (*minderschwerer Fall*). Furthermore, it stated that the punished acts would have also been punishable in the perpetrators' home country. Therefore, it did not matter how long the perpetrators had lived in Germany. It could be left open whether the behaviour of the perpetrators corresponded to the values of the ethnic group to which the perpetrators belonged because the perpetrators had been well aware that their behaviour was punishable in Germany.

Main quotations on cultural or religious diversity:

- "In its discussion of the sentencing range [*Strafrahmen*], the Criminal Division [of the Regional Court] states that 'the defendants' rootedness in an archaic value system, which played a fundamental role in the entire relationship between the private accessory prosecutor and the G. family,

also argues for the assumption of a less serious case', only to then reject this, especially since 'the defendants have already been living in the Federal Republic of Germany since 1992 and have had enough time to familiarize themselves with the value and legal system, which expressly rejects any coercion and violence against women within a relationship'." (para.2)

- "The defendants come from the former Yugoslavia. There, too, it was forbidden and punishable to throw another person's head against the wall with full force, to assault her in the open street together with her child to make her compliant, to drag her into a car, to lock her up for days and to physically abuse her during this time, to brutally beat her up with an aluminium broomstick so that it breaks, and to stab her with it because she attempted to escape. The fact that the defendants had been living in Germany since 1992 is therefore irrelevant. It is also irrelevant whether the defendants' inhumane treatment of the injured party corresponds to the ideas of the ethnic group, to which the defendants belong, about living together in a family, which would be absurd. The defendants knew very well that their actions were incompatible with the legal system and punishable. If they nevertheless 'in order to enforce their own egoistic interests', in order to be able to continue to treat the injured party 'like a slave', high-handedly disregarded the law in violation of the most elementary principles of the German and European value system, this at least does not mitigate the punishment, as the Regional Court ultimately also did not fail to recognize." (para. 5)

Main legal texts quoted in the decision:

- Sections 46, 223, 224, 239 b German Penal Code

Cases cited in the decision:

- Federal Court of Justice, Judgment of 7 November 2006,1 StR 307/06 (Bundesgerichtshof, BGH, Urteil vom 7. November 2006,1 StR 307/06)

- Federal Court of Justice, Judgment of 12 September 1995, 1 StR 437/95 (Bundesgerichtshof, BGH, Urteil vom 12. September 1995, 1 StR 437/95)
- Federal Court of Justice, Judgment of 22 August 1996, 4 StR 280/96 (Bundesgerichtshof, BGH, Urteil vom 22. August 1996,4 StR 280/95)

Commentary

The Mistreated Roma Wife

High courts such as the Federal Court of Justice or the Federal Constitutional Court sometimes add considerations to judgments that are not relevant to the judgment but are in the court's view considered to be important for other reasons. A case in point is when they wish to announce a change in the case law or when they consider it necessary to expressly confirm existing case law once again. Sometimes such a statement may also be explicitly addressed to a court that has to hear the case again if the issue cannot be dealt with in the judgment of the Federal Court of Justice itself for procedural reasons.

With regard to the reasoning of the lower court, the Federal Court of Justice considers it necessary to reaffirm the principle already established in former judgments (See CUREDI033DE016 with further references), namely that rootedness in an archaic value system cannot be considered a mitigating ground if, in the perpetrators' country of origin, state law punishes the described acts. Therefore, it did not matter, as the lower court had assumed, that the perpetrators had lived in Germany for a long time, nor did it matter whether the Roma community accepted such treatment of their women, which, moreover, the Federal Court of Justice expressly doubted. Apart from that, the court found that the perpetrators were fully aware that their conduct was punishable, so the question of exceptional mitigation of punishment did not arise for this reason alone.

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 that may not directly be connected with the case

- Hörnle, Tatjana, 2014. „Kultur-Religion-Strafrecht – Neue Herausforderungen in einer pluralistischen Gesellschaft. Gutachten*.“* In Standige 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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