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

A Deadly Dispute between Roma Families

Question(s) at stake:

Whether a homicide committed out of anger over an insult may fulfil one of the possible criteria for murder under specific aggravating circumstances, namely the existence of base motives.

Outcome of the ruling:

Killing another person out of anger over an insult is an act based on base motives.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Proportionality
- Provocation

Tag(s):

- Roma
- Self-justice
- Insult

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Country:

Germany

Official citation:

Federal Court of Justice, 5th Criminal Division, Judgement of 28 November 2018, 5StR 379/18 (BGH 5. Strafsenat, Urteil vom 28. November 2018, 5 StR 379/18)

Link to the decision:

https://www.hrr-strafrecht.de/hrr/5/18/5-379-18-1.php

ECLI:

ECLI:DE:BGH:2018:281118U5STR379.18.0

Date:

28 November 2018

Jurisdiction / Court / Chamber:

Federal Court of Justice, 5th Division

Remedy / Procedural stage:

Appeal on Points of Law

Previous stages:

Regional Court Berlin

Subsequent stages:

Regional Court Berlin

Branches / Areas of law:

Criminal law

Facts:

Two Roma families who had immigrated from former Yugoslavia in the 1990s (see Berliner Zeitung 2017) and been friends for many years got into a dispute. N., a member of the R. family, negligently injured H., a member of the H. family, while drunk (13 December 2015). H. reproached N. by phone while still in the hospital. N. laughed at him and mocked him. H. then flew into a rage and insulted N., among other things with the words: "I fuck your dead father", a very serious insult among Roma. A few days later, the two families had a talk and agreed to consider

the matter settled. On 25 December 2015, however, when two members of the R. family happened to meet H., they attacked him anyway and injured him. This caused the conflict to erupt again. After further telephone calls between members of both families, in which there were further insults, a member of the R. family made an attempt to bring members of both families together for a reconciliation meeting in a café on 26 December 2015. Some members of the R. family were armed with knives; one member, F.R., had a firearm. Some members of the H. family had brass knuckles; one member, D.H. (the later victim), had a hammer. When the members of the R. family realized that the members of the H. family would not give in so easily, they spontaneously decided to attack them. They fatally injured D.H., and three other members of the H. family were seriously injured. F.R., R.-B., and M.R. were convicted of murder, attempted murder, and aggravated and dangerous bodily harm. The defendants and the public prosecutor's office both appealed the verdict. The public prosecutor's office restricted their appeal to the verdict of guilt and punishment regarding the incident of 26 December, and more specifically to the conviction for manslaughter, which they considered to be erroneous in law. They sought a conviction for murder with base motives.

Ruling:

While the appeal of the defendants was dismissed, the Federal Court of Justice found that the lower court had wrongly rejected the existence of base motives and thus falsely ruled out a conviction for murder under specific aggravating circumstances, and reversed the sentence to the extent requested. First of all, the Federal Court of Justice stated, in accordance with its established case law, that a base motive is a motive that is on the lowest level according to a general moral evaluation. Such an evaluation has to be made according to the standards of the legal community of the Federal Republic of Germany and not according to the standards of an ethnic group that does not recognize the moral and legal values of this legal community. The German Federal Court of Justice measured the verdict of the Regional Court against these criteria. The Regional Court had not considered the defendants' anger to be a base motive, but as humanly

understandable in light of the previous disputes. Furthermore, it had not assessed the attacks against the family members H. and D.H., who were not involved in the insults, as an act with base motives, because in the view of the lower court they had taken the side of the family members involved and had thus approved of the insults. The Federal Court of Justice first reproved the Regional Court for not including all circumstances relevant to the assessment, and then stated that killing and severely injuring people can no longer be seen as an understandable reaction to insults against a deceased relative; rather, such a reaction could constitute a particularly despicable form of self-justice. Furthermore, it stated that the Regional Court did not consider that such a homicide -- that is, the killing of a third party merely for belonging to a rival family and appearing together with fellow members of that family -- could be seen as particularly despicable according to the standards of the German legal system, considering the disproportion between the cause and the act.

Main quotations on cultural or religious diversity:

- "At this, H. flew into a rage and insulted N. with the words: 'I fuck your dead[relatives]! I fuck your dead father!' This hit N. particularly hard, because such an insult was considered severe within the Roma ethnic group, to which both families belonged. Moreover, he had lost his father at an early age, and it was not appropriate for a younger person to insult an older person in his culture. After a discussion between various members of the two families two to three days later, it was agreed to consider the matter settled." (para. 2)
- "A motive is base if, according to a general moral assessment, it is on the lowest level and is therefore particularly despicable. Whether this is the case is assessed on the basis of an overall evaluation, which includes the circumstances of the offence, the circumstances of the offender, and his personality. Emotions such as rage, anger, resentment, hatred, and vindictiveness can only be considered as base motives if they are not humanly understandable, but rather an expression of the offender's base

attitude [...]. The standard for the evaluation of a motive is to be taken from the ideas of the legal community of the Federal Republic of Germany and not from the views of an ethnic group that does not recognize the moral and legal values of this legal community." (para. 16)

- "In addition, the Criminal Division did not take into account the fact that the extinguishing of human lives and the infliction of the most severe injuries in response to the verbal disparagement of deceased relatives can no longer be seen as an understandable reaction to the disgrace suffered; rather, this can be said to represent a particularly despicable form of vigilante justice". (para. 18)
- "Rather, the Regional Court should have considered in this context that the killing of persons merely because they belonged to the same family as those who had come into conflict with the accused in the run-up to the crime, and because they had appeared together with them, could be particularly reprehensible according to the standards of the legal system here due to the incongruity of the cause and the act." (para. 19)

Main legal texts quoted in the decision:

- Sections 211, para. 2; 212; 224; 226 German Penal Code

Cases cited in the decision:

- Federal Court of Justice, Order of 10 January 2006, S StR 341/05 (BGH, Beschluss vom 10. Januar 2006, 5 StR 341/05) (CUREDI33DE06)
- Federal Court of Justice, Order of 28 November 2017, 5 StR 480/17 (BGH Beschluss vom 28. November 2017, 5 StR 480/17)

Commentary

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The case has certain parallels with the CUREDI33DE013 case of 2005: two groups of men went at each other after trading insults. The quarrel ended with one dead

and several injured. The Federal Court of Justice had to decide on an appeal challenging the conviction of a perpetrator for murder instead of murder under aggravating circumstances. The Federal Court of Justice confirmed its case law; as in the 2005 decision, it allowed the appeal and classified the killing as murder for base motives. However, the reasoning is more succinct and, given the circumstances of the case, has somewhat different emphases. The Federal Court of Justice first reproduces its established findings on the definition of a base motive and reaffirms the necessity of an overall assessment of the circumstances, in particular when evaluating emotions. This is followed by the core statement that the yardstick for this overall assessment is the standards of the German legal community, not those of an ethnic group that does not recognize the moral and legal concepts of this legal community. The Federal Court of Justice disapproved of the fact that the lower court had either erroneously considered or neglected to even discuss important aspects of the crime that already fulfilled objective criteria for the assessment of base motives. Rather, it named the points in which the following two actions of the perpetrator, which both seem to be rooted in the family or clan values of the Roma, contradict German value standards. Firstly, insults against a close deceased person (in this case the father), even if they are severe, could never make killing understandable as a reaction to the humiliation suffered; rather, such a reaction seems a particularly despicable form of self-justice. On the other hand, the killing of a third party merely because he belongs to a rival family and makes an appearance as a member of that family is deeply despicable, as from a German perspective there is no proportionality between the cause and the act.

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

Specific legal literature addressing the case

- Berliner Zeitung. 2017. "Clan-Mordprozess von Wedding: Zwei Freisprüche, drei Verurteilungen", available at <https://www.bz-berlin.de/tatort/menschen-vor-gericht/clan-fehde-wedding-prozess-urteil-totschlag> accessed 2 April 2021.

General legal literature on the topic

- Schneider, Hartmut. 2021. "Section 211, recitals 108--114". In Günther Sander et al. (eds), *Münchener Kommentar zum Strafgesetzbuch vol. 4*, 4th edn. München: CH Beck.
- 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/München: C.F.Müller.

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