CUREDI033DE024

Question(s) at stake:

Whether attempting to kill a person because of a harmless compliment to the perpetrator's girlfriend amounts to murder under aggravating circumstances for base motives.

Outcome of the ruling:

Attempting to kill a person because of a harmless compliment to the perpetrator's girlfriend amounts to murder under specific aggravating circumstances for base motives because of the disproportionate nature of the cause and the act.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Equality between men and women
- Honour crimes
- Non-discrimination
- Proportionality

Tag(s):

- Chechen
- Muslim

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Country:

Germany

Official citation:

Federal Court of Justice, 5th Criminal Division, Judgment of 13 November 2019, 5 StR 466/19 (BGH Urteil vom. 13. November 2019 , 5 StR 466/19)

Link to the decision:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Sei

ECLI:

ECLI:DE:BGH:2019:131119U5STR466.19.0

Date:

13 November 2019

Jurisdiction / Court / Chamber:

Federal Court of Justice, 5th Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Bremen, Judgment of 26 February 2019 (LG Bremen, Urteil vom 26. Februar 2019)

Subsequent stages:

Not published

Branches / Areas of law:

Criminal Law

Facts:

The accused, a Chechen Muslim, had met with his girlfriend. After a meal together, she went to a supermarket to run an errand. There she was almost accidentally bumped into by I., who then remarked that she was beautiful.

When the girlfriend reported this to A., he became angry and wanted to find I. The two of them found I. still in the vicinity, where A. stabbed the unsuspecting I. Due to the intervention of third parties, A. had to let go of his victim and flee. When S., one of those who intervened, tried to prevent A. from escaping, A. fatally stabbed him in the heart. The first victim, I., survived.

A. was convicted of attempted and completed murder (section 212 German Penal Code).

The appeal of the first victim as private accessory prosecutor according to section 395 of the German Code of Criminal Procedure sought a conviction for attempted murder under specific aggravating circumstances due to the existence of insidiousness and base motives.

Ruling:

The Federal Court of Justice upheld the appeal of the private accessory prosecutor and quashed a large part of the verdict. Here, the court's statements on the existence of base motives are of particular importance. The Federal Court of Justice found that the court of first instance had correctly described the perpetrator's motive, which was that he believed he had to protect his girlfriend from being approached by other young men, that it was unbearable for him when others even looked at his girlfriend, and that in his view a woman had to obey her boyfriend and was not allowed to go out on the street without a male escort. To him, a woman's contact with another man represented a personal failure, a provocation, and a humiliation that had to be made up for.

The Federal Court of Justice held the view, however, that the court of first instance had assessed these motives incorrectly. It stated that the perpetrator's ideas about the relationship between man and woman were alien to the Basic Law (*Grundgesetz*), the German constitution. The Basic Law provides for equal rights for men and women and personal respect between the two. It was not

consistent with these principles to interpret I.'s compliment to the girlfriend as a serious provocation on the basis of A.'s claim to possession. Killing another person because of an act that is harmless according to German standards represents a blatant disproportion between the cause and the crime and thus a base motive.

Main quotations on cultural or religious diversity:

- "In this context, 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. 25)
- "An understanding of the relationship between man and woman such as that of the accused is alien to the conception of the human being in the Basic Law. It is incompatible with the values of German law, which is consistently based on equality and mutual personal respect, to interpret another man speaking to a woman as a serious provocation on the basis of a kind of 'claim of ownership'. Killing another person for an act that is harmless according to the standards of the local legal community is rather -- subject to the requisite overall assessment -- a base motive due to the blatant disproportion between the cause and the act." (para. 29)

Main legal texts quoted in the decision:

- Sections 22, 23, 211, 212, 224 German Penal Code

Cases cited in the decision:

- BGH, Urteile vom 22. Mai 2019 -- 2 StR 530/18, NStZ 2019, 520, und vom 9. Oktober 2019 -- 5 StR 299/19, NStZ 2020, 348--349.

Commentary

Terrible consequences of a harmless compliment

In the opinion of the Federal Court of Justice, the lower court had erroneously rejected the existence of both insidiousness and base motives. In the present context, only the statements of the Federal Court of Justice on base motives are of interest.

First of all, the Federal Court of Justice once again states, in line with established case law, that the baseness of motives is to be determined objectively according to the standards of the legal community of the Federal Republic of Germany, not according to the views of an ethnic group that does not recognize the moral and legal values of the German legal community.

While in many decisions on cases of homicide motivated by the ideas of ethnic minorities living in Germany, the courts focus on the fact that the perpetrator has arrogated to himself the right to decide on another person's life, especially a woman's, and that the killing represents a particularly despicable form of vigilante justice (cf. Federal Court of Justice, judgment of 28 November 2018, 5 StR 379/18; CUREDI33DE18), the present judgment emphasizes a different point, which makes it interesting for the CUREDI project, namely the Basic Law's image of humanity, which is based on the equality of men and women and mutual personal respect. It is incompatible with this image for a man to regard his wife or girlfriend as his property and therefore to feel provoked or offended if another man dares to approach this woman. One could also say that equal rights for women also mean that they can decide for themselves where they go, with whom they have contact, and, if necessary, how they react to an unwanted advance by another man. Apart from that, a man unintentionally bumping into a woman would never be considered offensive in Germany. Not even the woman herself would feel offended, much less her boyfriend. For this reason alone, the violent reaction of the perpetrator is completely disproportionate, and disproportionality between the cause and the act is often assessed as a base motive in case law (see for instance CUREDI33DE013) (Rissing-van Saan and Zimmermann, 2019; § 211, rec. 71 German Penal Code).

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

General legal literature on the topic

- Fischer, Thomas. 2023. *Strafgesetzbuch und Nebengesetze*. § 211, rec. 18. 70th edn. München: C.H.Beck.
- Rissing-van Saan, Ruth and Georg Zimmermann. 2019. "§ 211". In Gabriele Cirener et al. (eds), *Leipziger Kommentar Online*. Berlin: De Gruyter.
- Schneider, Hartmut. 2021. Section 211. *Münchener Kommentar zum Strafgesetzbuch* vol. 4, 4th edn. Günther Sander et al. (eds). München: C.H.Beck.

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