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

Exceptional Circumstances and Regional Values in a German Court Decision on Treacherous Murder

Question(s) at stake:

1) Whether the sentence handed down to a perpetrator who treacherously kills his wife's alleged lover can be mitigated based on the existence of exceptional circumstances. 2) Whether a crisis experienced by the perpetrator as a result of the values of his region of origin can constitute such exceptional circumstances.

Outcome of the ruling:

If a perpetrator who treacherously kills his wife's alleged lover goes through a crisis influenced by the values of his region of origin, the sentence imposed on him cannot be mitigated on the grounds of exceptional circumstances.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Honour crimes

Tag(s):

- Suspected adultery
- Treachery

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Germany

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Federal Court of Justice, 1st Criminal Division, Judgment of 10 May 2005, 30/05 (BGH, Urteil vom 10.05.2005, 1 StR 30/05)

Link to the decision:

https://openjur.de/u/346304.html

ECLI:

No ECLI number / ECLI number unknown

Date:

10 May 2005

Jurisdiction / Court / Chamber:

Federal Court of Justice, 1st Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Tübingen Regional Court, Judgment of 28 July 2004

Subsequent stages:

- Tübingen Regional Court (date of judgment not known)

Branches / Areas of law:

Criminal law

Facts:

On 24 August 2002, the accused, who is from Turkey, shot and killed his compatriot H.Y., who was standing with the accused's brother-in-law in a snack

bar, talking and drinking tea.

The accused approached the two men, drew a pistol from his pocket and fired four shots from a distance of two to four metres at the victim, who fell to the ground and died.

The accused stated that he was convinced his wife had been having an affair with H.Y. because he had learned that she had twice had tea with H.Y. in his absence. He added that this had caused him sleeplessness and frustration for many weeks. He considered the issue to be a matter of honour.

The court of first instance had convicted him of murder under aggravating circumstances because it considered his crime to be treacherous (*heimtückisch*). However, it reduced the sentence due to the existence of exceptional circumstances, which it saw in the exaggerated weight the defendant attached to his wife's possible adultery. The motive of honour, which usually leads to a conviction for base motives, was not clarified by the court. The public prosecutor's office appealed because it did not consider it appropriate to reduce the sentence on the basis of exceptional circumstances.

Ruling:

The Federal Court of Justice quashed the ruling of the Regional Court because it considered the assumption of unusual circumstances to be an error of law. The Federal Court found that the court of first instance should have considered all the objective circumstances of the crime when rendering its assessment.

However, the court of first instance had focused largely on the excessive importance the defendant had attached to his wife's possible adultery, which had been influenced by his origin and personal situation. The Federal Court of Justice found that the Regional Court had not sufficiently taken into account the normative requirements of the legal community of the Federal Republic of Germany, but had been guided by the views and values of the accused, who did not recognize the "moral and legal values of the German legal community". However, in the view of the Federal Court of Justice, the wife's behaviour had not given rise to the presumption of adultery. At most, she had violated the

husband’s view that all her contacts with men had to go through him. The perpetrator had carried out vigilante justice based on an objectively invalid reason. Consequently, the Federal Court concluded that there were no exceptional circumstances justifying a sentence reduction for the charge of treacherous murder. This held true even if the perpetrator, due to his life circumstances and intellectual abilities. was still attached to the ideas of honour and traditions of the region in Anatolia where he came from.

Main quotations on cultural or religious diversity:

- “Due to his origins and character, the accused had hardly had the opportunity to distance himself from his overvalued idea (*überwertige Idee*). He came from a country in which the role of men was particularly emphasized and where the traditional rules of coexistence continued to apply. To this day, the accused has not distanced himself from these values. As a result of these values and family structures, it was not possible for him to discuss personal problems, especially in the family sphere, with third parties, neither with his wife nor with relatives or colleagues […]. This lack of ability to communicate resulted from the accused’s background; accordingly, it was not possible for him as a man to talk to others, for example, about possible ‘relationships’, even of a sexual nature.” (para. 13, statement of the Regional Court)
- “As the Federal Public Prosecutor has rightly pointed out, the contested judgment does not meet the standards set by [the earlier decision] BGHSt 30, 105. In its overall assessment of the existence of extraordinary mitigating circumstances, the Regional Court did not sufficiently take into account the objective circumstances of the offence that it had established but instead focused predominantly on the defendant’s ‘overvalued idea’ of the extramarital relationship between his wife and H. Y., which was influenced by his origin and personal situation. In its overall assessment, it also did not sufficiently take into account the normative requirements of the legal community of the Federal Republic of Germany, but [instead] oriented

itself to the views and values of the accused, who does not recognize the moral and legal values of this legal community … On the basis of the testimonies of the witnesses from the victim's family and the testimony of the accused's wife, the criminal division was convinced that there was no extramarital relationship between her and H.Y. She had not given the accused any cause for jealousy, but had at most violated the idea that in order to contact his wife, other men had to go through him. Thus, for an objectively trivial reason, the accused took his pistol from the cellar and decided to shoot H.Y. in an act of vigilante justice if, as suspected, he found him at the snack bar. […] it cannot be assumed that there were extraordinary reasons for mitigation of guilt that could lead to a shift in the range of punishment. This applies even if the defendant, due to his lifestyle and intellectual abilities, was caught up in his ideas of honour and traditions of his Anatolian homeland, from which he was not able to break away despite his many years of residence in Germany." (para. 20)

Main legal texts quoted in the decision:

- Section 211 para. 2 German Penal Code

Cases cited in the decision:

- BGH NStZ 2005, 154
- BGH NStZ 2003, 482, 484
- BGH NStZ 2002, 369 (=5 Str 538/01 of 20 February 2002, CUREDI33DE004)
- BGH NStZ 1984, 20
- BGH NStZ 1982, 69
- Official Collection of the Decisions of the Federal Court of Justice in Criminal Matters (BGHSt 30, 105)

Commentary

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The perpetrator, who had stabbed an unsuspecting acquaintance to death at a snack bar because he believed that the latter was having an adulterous affair with his wife, was convicted of murder under aggravating circumstances by the Regional Court. The Court found that treacherousness, one of the legal criteria for murder under aggravating circumstances, was present. However, the Regional Court had not sentenced him to life imprisonment, as is the rule for murder with aggravating circumstances (Section 211 of the German Penal Code), but had reduced the sentence to 13 years of imprisonment on the grounds of “exceptional circumstances”.

In many cases in which the presumption of an honour killing is fair, a conviction for treacherous murder is handed down (Oberwittler and Kasselt 2011: 157), as it is easier to prove. However, based on the information available, the present case is more likely to be a partner killing. Unlike honour killings, where the perpetrator acts to restore not only his or her own honour but also that of the family, partner killings involve a lone actor seeking to regain personal honour. Furthermore, there is no perceived external pressure or societal expectation to influence the perpetrator’s actions (Oberwittler and Kasselt 2011: 20–22). Even though the perpetrator here referred to the act as a “matter of honour”, references to family and environment seem to be missing here.

Treachery means that the perpetrator deliberately takes advantage of the victim’s guilelessness and resulting defencelessness, as was the case here. In the case of treacherous murder, the Grand Panel for Criminal Matters of the Federal Court of Justice developed the so-called “legal consequence solution” (*Rechtsfolgenlösung* in German) in its famous 1981 judgment BGHSt 30, 105 (GSSt 1/81 of 19 May 1981). This means that if there are “exceptional circumstances”, the life sentence actually provided for murder under aggravating circumstances may be avoided and reduced in accordance with Section 49 of the German Penal Code. In this judgment the Federal Court of Justice describes crimes in which exceptional circumstances are present as follows: “A crime motivated by an emergency situation that appears to be hopeless, committed in great despair, out of deep compassion or out of ‘righteous anger’ (cf. BGH MDR 1961, 1027), as well

as acts which have their reason in a gruelling conflict caused by the victim and constantly rekindled or in severe insults of the perpetrator by the victim, which again and again violently move the mind (BGHSt 30, 105= GSST 1/81 of 19 May1981).” In its judgment, the Grand Panel for Criminal Matters of the Federal Court of Justice did not conclusively describe the cases of exceptional circumstances. However, it made clear that “exonerating factors, if they have the weight of exceptional circumstances, on the basis of which the imposition of a life sentence appears disproportionate, lead to the application of the sentencing range of Section 49 (1) no. 1 StGB” (BGHSt 30, 105, rec. 38)”. In the present case, the court of first instance had referred to the origin and personal situation of the Anatolian perpetrator, which had allegedly been decisive for the crime-inducing idea of his wife’s infidelity. The Regional Court saw this as sufficient reason to assume the existence of exceptional circumstances. The Federal Court of Justice, however, declared this to be erroneous.

This appears to be the first time that the Court had to comment on the significance of a perpetrator’s rootedness in the ideas of his or her region of origin in connection with the assessment of the circumstances as exceptional in the case of a treacherous murder. The Federal Court of Justice revisited, with slight modifications, the arguments also found in the case of base motives. Specifically, it highlighted that the lower court had not sufficiently taken into account the “normative requirements of the legal community of the Federal Republic of Germany, but (had) oriented itself to the views and values of the accused, who does not recognize the moral and legal values of this legal community”. According to the values of the German legal community, the mere act of drinking tea together with a person without the husband’s knowledge does not automatically allow for the conclusion that an adulterous relationship existed. Even if such a relationship had existed, it would not generally have justified the existence of “exceptional circumstances” in the case of treacherous murder.

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

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

- Burmeister, Jonathan. 2011. *Die schuldangemessene Bewertung von Ehrenmorden im deutschen Strafrecht: differenzierte Schuldmerkmale auf Tatbestandsebene bei sonstigen niedrigen Beweggründen*. Frankfurt am Main: Lang.
- Çakır-Ceylan, Esma. 2011. *Gewalt im Namen der Ehre – Eine Untersuchung über Gewalttaten in Deutschland und der Türkei unter besonderer Betrachtung der Rechtsentwicklung in der Türkei.* Frankfurt am Main: Lang.
- Elyafi-Schulz, Senan. 2012. *Das Phänomen des "Ehrenmordes" – Eine rechtliche Untersuchung unter Berücksichtigung der Täter- und Opferperspektive*. Marburg: Tectum.
- Erbil, Bahar. 2008. *Toleranz für Ehrenmörder?* Berlin: Logos.
- Kasselt, Julia. 2016. *Ehre im Spiegel der Justiz: Eine Untersuchung zur Praxis deutscher Schwurgerichte im Umgang mit dem Phänomen der Ehrenmorde*. Berlin/Freiburg: Duncker & Humblot/Max-Planck-Institut für ausländisches und internationales Strafrecht.
- Oberwittler, Dietrich and Julia Kasselt. 2011. *Ehrenmorde in Deutschland 1996–2005: eine Untersuchung auf der Basis von Prozessakten.* Köln: Luchterhand.
- Rengier, Rudolf. 2007. "Zur aktuellen Heimtückerechtsprechung 30 Jahre nach BVerfGE 45, 187". In Michael Hettinger, Wilfried Küper, and Thomas Hillenkamp (eds), *Festschrift für Wilfried Küper zum 70. Geburtstag*, 473–487. Heidelberg: Müller.
- Rissing-van Saan, Ruth and Georg Zimmermann. 2023. "§ 211: Mord". In Gabriele Cirener, Henning Radtke, Ruth Rissing-van Saan, Thomas Rönnau, and Wilhelm Schluckebier (eds), *Strafgesetzbuch Leipziger Kommentar: Grosskommentar, 211 bis 231*, 13th ed. Berlin: De Gruyter.

- Schorn, Martin. 2014. *Mord aus niedrigen Beweggründen bei fremden soziokulturellen Wertvorstellungen*. Baden-Baden: Nomos.

General legal literature on the topic from other disciplines

- Bodendieck-Engels, Hildegard. 2013. *"Ehrenmord" vor deutschen Gerichten: eine ethnologische Untersuchung von Strafprozessen*. Hamburg: Kovač.
- Kızılhan, Jan İlhan. 2006. *"Ehrenmorde": der unmögliche Versuch einer Erklärung; Hintergründe – Analysen – Fallbeispiele*. Berlin: Regener.

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