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

Cultural Considerations in Juvenile Justice: A Case Analysis of an Afghan Young Adult

Question(s) at stake:

Whether certain outcomes of an offender's upbringing, influenced by cultural customs in his or her country of origin, can be regarded as harmful inclinations in the context of juvenile criminal law.

Outcome of the ruling:

Certain outcomes of the offender's upbringing, influenced by cultural customs in his or her country of origin, can be regarded as harmful inclinations in the context of juvenile criminal law.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Bodily harm
- Sexual abuse (child/adult)

Tag(s):

- Afghan
- Juvenile criminal law
- New Year's Eve
- Fixing of penalties

Author(s):

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Country:

Germany

Official citation:

Regional Court Hamburg, 17th Grand Criminal Division, Judgment of 29 August 2016, 617 KLs 11/16 jug. (LG Hamburg, 17. Große Strafkammer, Urteil vom 29. August 2016, 617 KLs 11/16 jug.)

Link to the decision:

https://www.landesrecht-hamburg.de/bsha/document/JURE160018149

ECLI:

ECLI:DE:LGHH:2016:0829.617KLS11.16JUG.0A

Date:

29 August 2016

Jurisdiction / Court / Chamber:

Hamburg Regional Court, 17th Grand Criminal Division

Remedy / Procedural stage:

First stage

Previous stages:

None

Subsequent stages:

None

Branches / Areas of law:

Criminal law

Facts:

The 19-year-old Afghan defendant, who had been in Germany since October 2015, celebrated New Year’s Eve 2015 in Sankt Pauli, a district of Hamburg, where he consumed a significant amount of alcohol.

The victim and private accessory prosecutor also celebrated New Year’s Eve in a club in Sankt Pauli and ended up considerably drunk. It was not possible to determine precisely where the accused and the victim met, but it is certain that the two of them, as well as other young men, travelled a few stations by underground on the morning of 1 January and then continued on foot.

The private accessory prosecutor walked unsteadily and had to be supported by the accused and another young man. The accused, however, did not realize that she was impaired in her perception and believed that she was walking with the two men of her own free will. The group then sat down on a bench, where an argument ensued between the accused and the private accessory prosecutor, during which the private accessory prosecutor fell to the ground and the accused pushed her to the ground at shoulder height.

The intervention of a third party resulted in both of them getting up. The private accessory prosecutor then ran away and the accused followed her. A short time later, the private accessory prosecutor fell to the ground again. It could not be determined whether the private accessory prosecutor had fallen herself or whether the accused had pushed her down. However, the accused then tried to undress the private accessory prosecutor, despite her vehement resistance, and to increase his sexual arousal by biting her breast.

It could not be determined whether the accused also removed his clothes, but it is certain that he left semen on the private accessory prosecutor’s body and clothing. How long the assault lasted remains unclear. In any case, the accused left the private accessory prosecutor with her clothes open at an outside temperature of 5 degrees Celsius.

Ruling:

The accused was convicted of sexual assault and causing bodily harm. The court applied juvenile criminal law to the 19-year-old perpetrator because of his

delayed maturity. The Court justified this on the grounds that he had lived under the strong influence of his parents in Afghanistan, who had also chosen his wife for him and had not built up a life of his own. Even during the months he spent in Germany, he had not established an independent life for himself and was overwhelmed by his experiences in Germany. The Court considered it appropriate to impose a juvenile sentence of two years in prison on the offender. Such a sentence is imposed when the offender has shown harmful tendencies in the crime that cannot be counteracted in any other way. According to the Court, the harmful tendencies were expressed in the fact that the accused had never learned to deal with freedom in Germany due to his previous environment in Afghanistan. In particular, he had never learned in Afghanistan how to deal with women outside the strictly controlled family environment he had been exposed to in Afghanistan. The court saw this as a lack of character due to his upbringing would have led him, on the one hand, to misinterpret the behaviour of the private accessory prosecutor and to believe that she wanted something from him simply because she was accompanying him, and, on the other hand, to be unable to respect the will of the private accessory prosecutor in the fateful incident. However, this sentence was suspended in view of the positive prognosis that the perpetrator would not commit further offences in the future.

Main quotations on cultural or religious diversity:

- “The crime shows that the accused has not learned to respect the personal legal rights of other people and the limits of his own freedom. Rather, the highly controlled environment of the accused in his life so far meant that he has never learned to deal with the freedom he can enjoy in Germany. In particular, the accused did not adequately learn how to deal with women, an essential part of the adolescent maturation process. Rather, he was already married in his early teens so his sexual contacts were limited to his wife, who was also young. Contact with girls or women, which is otherwise a matter of free choice, did not take place outside of the strictly controlled family space so the accused could not gain any experience in this area. Thus, on the one hand, this character defect due to his upbringing led to a misinterpretation

of the behaviour of the private accessory prosecutor, who the accused thought ‘wanted something from him’ only because she accompanied him; on the other hand, it also led to an inability to respect the expressed opposing will of the private accessory prosecutor in the decisive situation.” (para. 157)

Main legal texts quoted in the decision:

- Section 177 para. 1 no. 1 (Criminal Code in the form applicable before 10 November 2016), 223 para. 1 German Criminal Code, 1, 5 para. 2, 17, 21 para. 2, 105 Juvenile Courts Act

Cases cited in the decision:

- Federal Court of Justice, Criminal Division, Order of 9 July 2015, 2 StR 170/15 (BGH, Beschluss vom 09.07.2015, 2 StR 170/15)

Commentary

Cultural Considerations in Juvenile Justice: A Case Analysis of an Afghan Young Adult

The accused, an Afghan national aged 18 or 19 at the most, fell within the category of young adults – i.e., persons who have reached the age of 18 but are not yet 21 according to German law (Section 1(2) of the Youth Courts Act). In such cases, courts first examine whether the person is still a juvenile or already an adult. If the court in question concludes that the accused is to be treated as a juvenile, this affects not only the criminal proceedings but also the possible sanctions.

In this case, the Court took into account the cultural background of the offender, both in the assessment of the maturity and in the choice and justification of sanctions.

The accused was sentenced under juvenile criminal law. The Court considered his background and development when justifying the delay in maturity under Section

105(1)1. of the Youth Courts Act. The accused had previously lived in the household of his parents in Afghanistan, where his parents had made all decisions for him and had also married him off for cultural and traditional reasons, while he himself had lived for the day without any prospects for the future. All these circumstances showed his immaturity in the eyes of the Court, which also stated that the accused had not matured during his flight and his time in Germany.

Since the Court considered the offender to be a young adult, the course was set that only sanctions prescribed for juveniles could be considered (Section 105 of the Juvenile Courts Act or *Jugendgerichtsgesetz*). Here, the Court considered it necessary to apply the most severe sanction – i.e., Youth Penalty or *Jugendstrafe* – in accordance with Section 17 of the Juvenile Courts Act. This is to be imposed if the offender has shown harmful tendencies which cannot be counteracted by less severe sanctions or if such a sanction is necessary in view of the seriousness of the offence.

The finding that harmful propensities existed was the second important point. Here, the Court addressed cultural differences. It saw the harmful inclinations as character defects linked to the accused's upbringing. The accused, according to the Court, had lived in an environment in which he had always led a highly controlled life, up to and including marriage to the woman chosen by his parents. He had not learned to deal with freedom. In particular, he had not learned that freedom also requires responsible action. Nor had he learned how to deal with women outside his immediate family. In determining the sentence, the Court then focused on the need to educate the offender so that he would not commit further crimes in the future.

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

General legal literature on the topic

- Kölbel, Ralf and Ulrich Eisenberg. 2022. *Jugendgerichtsgesetz*, 23rd ed. München: C.H. Beck.

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