CUREDI033DE003

Question(s) at stake:

Whether evaluating a motive as base has to be based on the views of the German legal community.

Outcome of the ruling:

The views of the German legal community are decisive for the evaluation of motives as base.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Homicide
- Revenge / Vendetta / Feud
- Aggravating circumstances

Tag(s):

- Base motives

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Official citation:

Federal Court of Justice, Judgment of 07 October 1994, 5 StR 319/94 (BGH, Urteil vom 07. Oktober 1994, 5 StR 319/94)

Link to the decision:

https://research.wolterskluwer-online.de/document/9c72a828-c3fa-485b-ae65-96ee159c2264

ECLI:

No ECLI number / ECLI number unknown

Date:

07 October 1994

Jurisdiction / Court / Chamber:

Federal Court of Justice (Bundesgerichtshof, BGH)

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court (Landgericht, LG) Bonn, Criminal Division with Lay Judges (Schwurgericht)

Subsequent stages:

- None

Branches / Areas of law:

Criminal law

Facts:

The following facts can be inferred from the parsimonious information in the decision: There was a blood feud between the Y clan and the B clan. Recently, B 1, a member of the B clan, had planned to kill Y 2, a member of the Y clan, but

had instead accidentally killed Se 1, a member of the Se clan who had not previously been involved in a blood feud with the B clan. The Se clan, which obviously wanted to avoid getting involved in a blood feud, pressured the Y clan. In the view of the Se clan it was up to the Y clan to exact blood revenge against the B clan for killing Se 1, because the crime was actually meant for Y 2 and therefore the honour of the Y clan was also affected. The Y clan accepted this argumentation and determined Y 1 as the perpetrator. The latter committed the crime and was convicted of murder (*Totschlag*, Section 212, German Penal Code) in the first instance. On appeal by the public prosecutor's office, the case went to the Federal Court of Justice. The Federal Court of Justice limited its examination to the existence of base motives.

Ruling:

As a rule, blood-revenge (vendetta) cases are to be regarded as murder under specific aggravating circumstances (*Mord*, Section 211, German Penal Code) because of base motives. The legal community, whose views are decisive when evaluating whether a motive is base or not, is the German legal community. Killing for blood revenge, whereby the perpetrator disregards the legal order and the right to life of a person to restore family honour, is regarded by the court as a base motive. Only in exceptional cases can a conviction for murder under specific aggravating circumstances be waived if the perpetrator is unable to recognize the baseness of a motive and act accordingly due to his roots in the value system of his region of origin. Because the court could not exclude such an exceptional case, it confirmed the murder conviction.

Main quotations on cultural or religious diversity:

I. Quotations of the reasoning of the first instance court in the judgment of the Federal Court of Justice

"In the case of foreigners, views (*Anschauungen*) of their homeland can therefore also play a role, which is why killing out of such values, as in the case of blood revenge, is usually not a base motive for perpetrators who are imbued with such a world of ideas... This circle of perpetrators also includes the accused whose

family, like himself, is imbued with the idea of blood revenge, which essentially includes the idea that the less the state imposes on the perpetrator the punishment he deserves in their eyes, the more likely it is that the clan of a murdered person will retaliate. In the present case, the defendant Esref Y was chosen by the Y family to carry out the killing of Mehmet B out of such a motivation. The fact that there was no blood relationship between the previous victim, Ali Riza Se, and the accused Y based on blood revenge is irrelevant for the assessment that the killing of Mehmet B by the accused Y is not to be regarded as having been carried out for base motives. In the case of blood revenge, the motivation of the perpetrator does not depend on his own person, but, as the division knows from its own experience, on the fact that the clan to which the perpetrator belongs has come to the conclusion that the preservation of the family honour requires the planned crime and that it then exerts moral pressure on the member of the clan who is to carry out the crime. In the present case, the Y family, at the urging of the Se family, due to the fact that Ali Riza Se had only been killed by mistake instead of the intended Abdurrahman Y, had come to the decision that the preservation of the family honour required the participation of the Y family in the killing of Mehmet B and had chosen the accused Esref Y for this purpose, who then committed the crime on the basis of this motivation." (para. 15)

II. Reasoning of the Federal Court of Justice

"The standard for the evaluation of a motive is to be taken from the ideas of the legal community in the Federal Republic of Germany before whose court the accused has to answer, and not from the views of an ethnic group that does not recognize the moral and legal values of this legal community […]." (para. 17).

"Killing for blood revenge, in which the perpetrator, for the sake of his 'personal honour and family honour', rises above the legal order and another human being, as it were, as the executor of a death sentence passed by him and his family, is to be regarded as particularly reprehensible and socially reckless. Particularly in a legal community that values the right to life of a human being so highly that it does not deny it even to a perpetrator who has incurred the most serious criminal

guilt imaginable, killing for the motive of blood revenge is as a rule highly reprehensible and justifies the assumption of base motives.” (para. 18)

“However, this assessment does not lead to a conviction for murder under specific aggravating circumstances with base motives if the perpetrator was not aware of the circumstances that constitute the base motives when committing the offence, or if it was not possible for him to mentally control his emotional impulses that determine his actions and to control them in terms of his will (see BGHR StGB § 211.2, base motives 2, 4, 10, 12, 15, 24, 28).” (para. 19)

“If the perpetrator, who comes from a foreign culture - which tolerates or even demands blood vengeance – was still so strongly dominated by the ideas and views of his homeland that he was unable to break away from them at the time of the offence due to his personality and the overall circumstances of his life, then, by way of exception, even in the case of a killing for blood vengeance, a conviction only for murder can be considered (cf. also BGH GA 1967, p. 1; BGH, 4 StR 665/76 and judgment 1979 - 1 StR 282/79; also BGH GA 1967, 244; BGH, order of 17 March 1977 - 4 StR 665/76 and judgment of 28 August 1979 - 1 StR 282/79)”. (para. 20)

“According to the findings of the Regional Court, it cannot be ruled out that the accused was unable to recognize the particular reprehensibility of his act, which justifies its assessment as murder under specific aggravating circumstances. He is a simply structured personality and still adheres to the traditional moral and value concepts prevailing in Eastern Anatolia, which has not changed even though his stay in Germany (UA 4). He was imbued with the idea of ‘blood revenge’ and had been ‘chosen’ by his family to carry out the crime; he felt obliged to kill the victim in order to restore the family honour, which reduced his personal freedom of choice at the time of the crime (UA 57, 58, 61, 62).” (para. 22)

Main legal texts quoted in the decision:

- Sections 211 (para. 2) and 212 of the German Criminal Code

Cases cited in the decision:

- Regional Court Bonn, Judgment of 26 November 1993, 92 Js 165/92 Ks 22 Y 3/93 (LG Bonn, 26 November 1993, 92 Js 165/92 Ks 22 Y 3/93);
- Federal Court of Justice GA 1967,244 (BGH GA 1967,244);
- BGH, Beschluss vom 17. März 1977 -4 StR 665/76;
- BGH Urteil vom 28 August 1979.1 StR 282/1979.

Commentary

Blood Revenge as a Base Motive

This ruling belongs to a group of homicide cases with a common element, i.e., the perpetrators were motivated by the feeling that their family honour had been violated. In the practice of the courts there are two subgroups within this category of crimes. The first one is homicide based on the motive of blood revenge. It is the result of the blood feud between two clans. Such blood feuds may last for decades if not terminated through reconciliation and may cause many victims on both sides. The second group consists of so-called honour killings in a stricter sense. In these cases, a woman is killed by members of her own family (fathers, brothers, other male relatives, and sometimes husbands) because her family regarded its honour violated by a behaviour of the woman that does not comply with the rules (ideas) of her family and her social surroundings as to sexual conduct. In some cases, men are also victims of such crimes when they are regarded as being involved in the behaviour of the woman violating the family honour.

Both of these motives – i.e., restoring family honour by blood revenge or by killing a woman because of her sexual behaviour – are dealt with in a very similar way in the German system of criminal law as both are assessed under the aspect of “otherwise base motives” (*sonst niedrige Beweggründe*). This term is contained in the catalogue of circumstances that turns murder into murder under specific aggravating circumstances (Section 211, German Penal Code). A base motive is established if a motive of the killing is, according to general moral ideas, at the

lowest level and, consequently significantly more reprehensible than murder and therefore particularly despicable (see para. 18 of this judgment). In the case of blood revenge or honour killing, the motive of protecting family honour is regarded as particularly despicable because the perpetrator sets himself above the legal order and above another human being as the executor of a death sentence imposed on the victim by him and his family to restore his personal honour and the honour of his family.

As family honour is not recognized as a legal or social value in German society anymore, homicides committed with a view to protecting family honour did not play any role in German courts until the 1960s, when immigration first from Southern Europe and later also from Turkey and Near Eastern states changed the situation. Since then, the courts' handling of the issue can be divided into three phases.

The first phase, from the mid-1960s (Federal Court of Justice, judgement of 26 April 1966, 5 StR 122/66, GA 1967, 244) until 1979 (the so-called first subjective phase):

According to established case law, a perpetrator must know the circumstances that establish the presence of base motives, but s/he does not have to comprehend this evaluation. It was regarded as necessary, however, for her/him to have been capable of such an evaluation according to her/his personality and that a personality disorder (*Persönlichkeitsmangel*) in some cases had to be taken into account in the moral assessment of a crime. Until 1979, courts argued that if this is true for psychopathic personalities, it is all the more true in case of foreigners still imbued by the values of their homelands – which are different from German value conceptions – from which they could not free themselves at the time of the commission of the crime. Although this line of argument was intended to frame a strong attachment to foreign values as a mitigating factor, putting perpetrators imbued by foreign value conceptions on an equal footing with psychopaths was soon seen as discriminatory.

The second phase from 1979 (Federal Court of Justice, judgment of 27 November 1979, 5 StR 711/79) until 1994 (the objective phase): The Federal Court of Justice ceased in 1979 to treat psychopathic personalities and foreigners equally. Instead, the Court stated that the overall assessment of the circumstances required to establish base motives also includes the living conditions and personality of the perpetrators. It then emphasized that “the special views and values to which the perpetrators are attached because of their ties to a foreign culture cannot be disregarded” (Federal Court of Justice, judgment of 27 November 1979, 5 StR 711/79). Such living conditions should therefore be evaluated as objective conditions. Thenceforth, the motive of protection of honour was not necessarily regarded as particularly despicable. Furthermore, whether the perpetrator had had the possibility to get to know German values was rendered immaterial. As a consequence, the motivation of preserving or restoring family honour, as a rule, was no longer regarded as a base motive, and blood revenge and honour killing cases were punished as murder if there was no other circumstance that changed murder to murder under specific aggravating circumstances.

The third phase (called the second subjective phase) from 1994 onwards:
The beginning of this phase was marked by the present case and encompasses the present moment, too. In this phase, the systematic position of the discussion of whether a motive has to be regarded as base changed from the objective level to the subjective level. According to the court, the criteria for the assessment of the motivation of a defendant who stands trial before a German court have to be based on the views of the German legal community and not on the ideas of an ethnic group that does not recognize the moral and legal values of the German community. Only in exceptional cases, if the perpetrator was not aware of the circumstances that account for the baseness (*Niedrigkeit*) of his motivation or if he could not control the emotions that determine his actions neither intellectually nor volitionally, he is not punished for murder out of otherwise base motives (*sonst niedrige Beweggründe*). (see in detail Saliger 2003, 22-25). It is, however, remarkable that still in 1997 a judgment of another division of the Federal Court

of Justice (Judgment of 26 June 1997, 4 StR 180/97) followed the case law of the objective phase. Quite a number of lower courts did the same and punished perpetrators for murder. It seems that it was not until the early 2000s – after further judgments of the Federal Court of Justice had confirmed the judgment of 1994 – that the 1994 change of the case law had a broader effect on the lower courts (Oberwittler and Kasselt: 155–163).

There are scant details on the case as it is an appeal on points of law in which only one point had to be examined, namely whether the first instance judges erred in denying the existence of base motives. In this judgment, the Federal Court of Justice introduced an important change in the legal reasoning about blood revenge. In more concrete terms, it stated that it was one of the exceptional cases in which the defendant, due to his background, might not have been able to understand the particular baseness of his crime and therefore had to be punished for murder and *not* for murder under specific aggravating circumstances.

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

Specific legal publications addressing the case

- Fabricius, Dirk.1996. “Anmerkung zu BGH, Urteil v. 07.10.1994 – 2 StR 319/94 (LG Bonn)”. *Strafverteidiger* 16: 209–211.

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

- Baumeister, Werner. 2007. *Ehrenmorde: Blutrache und Ähnliche Delinquenz in der Praxis bundesdeutscher Strafjustiz*. Münster u.a.: Waxmann.
- Krais, Julia. 2009. *Blutrache und Strafrecht: Einfluss des Blutrachemotivs auf Unrecht, Schuld und Strafzumessung*. Hamburg: Dr. Kovač.
- Kudlich, Hans and Ilker Tepe. 2008. “Das Tötungsmotiv ‘Blutrache’ im deutschen und im türkischen Strafrecht”. *Goltdammer’s Archiv für Strafrecht* 155 (2): 92–103.

- Nehm, Kay. 2005. “Blutrache – Ein Niedriger Beweggrund?”. In Jörg Arnold, Björn Burkhardt, Walter Gropp, Günter Heine, Hans-Georg Koch, Otto Lagodny, Walter Perron and Susanne Walther (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70. Geburtstag*, 419–429. München: C.H. Beck.
- Oberwittler, Dietrich and Julia Kasselt. 2011. *Ehrenmorde in Deutschland 1996-2005*. Köln: Luchterhand.
- Saliger, Frank. 2003. *„Anmerkung zu BGH, Urteil v.20.02.2002 – 5 StR 538/01 (LG Bremen)”. Strafverteidiger* 23(1): 22-25.
- Varol, Kadir. 2016. *Ehre - Ehrenmord - Blutrache: Eine dogmatische Untersuchung zum deutschen und türkischen Strafrecht*. Hamburg: Dr. Kovač.

Disclaimer

The translation of this decision judgment is the author's responsibility.

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