CUREDI033DE004

Question(s) at stake:

Whether the perpetrators of a homicide who acted, though reluctantly, on the order of a regional leader of the PKK (Partiya Karkerên Kurdistâne) and for fear of a loss of esteem in, and exclusion from, the Kurdish community fulfill the subjective requirements for establishing the presence of base motives .

Outcome of the ruling:

The judgment of the first stage that had denied the existence of the subjective requirements for establishing the presence of base motives was quashed and referred back to Bremen Regional Court.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Homicide
- Honour crimes

Tag(s):

- Base motives
- PKK

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Country:

Germany

Official citation:

Federal Court of Justice, Judgment of 20 February 2002, 5 StR 538/01 (BGH, Urteil vom 20. Februar 2002, 5 StR 538/01)

Link to the decision:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art

ECLI:

No ECLI number / ECLI number unknown

Date:

20 February 2002

Jurisdiction / Court / Chamber:

Federal Court of Justice, 5. Division

Remedy / Procedural stage:

Appeal

Previous stages:

- Regional Court Bremen, Judgement of 4 April 2001, 21 Ks 210 Js 37010/99

Subsequent stages:

- Regional Court Bremen, Judgment of 20 February 2003, 25 Ks 210 Js 37010/99, final

Branches / Areas of law:

Criminal law

Facts:

The three defendants are Kurds from Turkey, two of them had been living in Germany since 1985, the third came to Germany in 1997. All three of them had been active in the PKK to differing degrees. The victim, A, was also a Kurd who had participated in the armed struggle of the PKK until he was severely wounded and as a consequence paralyzed. He came to Germany as an asylum-seeker and some years later fell in love with D. The couple wanted to marry but D's father did not agree. In his eyes, a handicapped man was not a suitable husband for his daughter. Furthermore, he argued that members of the PKK are not allowed to marry. All efforts to separate the couple failed. D left the home of her parents and the couple married secretly. D's father regarded this as a violation of his honour. In his eyes, A was a member of the PKK and the PKK was responsible for his behaviour. He, therefore, urged the regional leader of the PKK to restore his honour. As the relationship between A and D was regarded as dishonourable behaviour in the Kurdish community and continued to be a topic of discussion, the regional leader of the PKK felt responsible to find a solution for the matter and several meetings were held between the family and PKK officials. Finally, the regional PKK leader ordered the three defendants to kill A and D. The defendants were shocked and tried to avert this order but, finally, gave in. The couple was lured into a car and brought to a secluded place, where the young man was hit on the head so hard that he suffered several skull fractures and run over by a car. He died some minutes later and the young woman was suffocated in mud.

The first stage convicted the defendants for murder (Section 212 of the German Penal Code), the public prosecutor appealed the judgment claiming a conviction for murder under aggravating circumstances (Section 211 of the German Penal Code) because of the existence of base motives.

Ruling:

The Federal Court of Justice specified the requirements that have to be fulfilled according to settled case law to establish the presence of base motives in a homicide. It stated that the criteria for the assessment of the motivation of a defendant who stands trial before a German court have to be based on the ideas of the German legal community, not on the ideas of an ethnic group that does not

recognize the moral and legal values of the German society. Only in exceptional cases – e.g., if the perpetrator was not aware of the circumstances that account for the baseness of his motivation according to German law or if he could not control the emotions that determine his actions neither intellectually nor volitionally – is he not punished for murder out of base motives (see for details CUREDI033DE003). Following this statement, the Federal Court of Justice explained that the judges of the first stage had not taken into consideration several circumstances that may be relevant for the assessment of the motivation. First, the defendants were convinced that the behaviour of the couple deserved a sanction, but they were shocked about the order to kill them. This shows that they also considered this punishment inappropriate according to their own value system. Secondly, if they had disobeyed this order, they would only have had to reckon with the loss of honour and expulsion from the Kurdish community, but not with danger to life and limb. Thirdly, two of the defendants had already been involved in a criminal proceeding for attempted vendetta some years earlier and could have understood that their ideas about the restoration of honour are not approved in Germany. Therefore, the Court of cassation referred the case back to Bremen Regional Court requesting to re-examine the case as far as the existence of base motives is concerned.

Main quotations on cultural or religious diversity:

- “The criteria for the assessment of motivation have to be based on the value conceptions of the legal community of the Federal Republic of Germany, not on the ideas of an ethnic group that does not recognize the moral and legal values of the German legal community (cf. BGHR StGB § 211 para 2 base motives 29; BGH, decision of 24 April 2001- 1 StR 122/01; Jähnke in LK 10. ed. § 211, xx 39). Only in exceptional cases – if the perpetrator was not aware of the circumstances that account for the baseness of his motivation, or if he could not control the emotions that determine his actions neither intellectually nor volitionally (cf. BGHR StGB § 211 para. 2 base motives 2, 4, 10, 12, 15, 24, 28) – can a conviction only for murder come into

consideration instead of murder under specific aggravating circumstances based on base motives." (p. 8-9).

- "[The Regional Court] did not take into consideration that A's violation of the rules of their [Kurdish] community and the party [PKK] in the eyes of the defendants certainly justified a sanction but not a homicide. Following their own values, the defendants were shocked about the order to kill the victims." (p. 9)
- "Moreover, the Regional Court did not take into consideration further circumstances that speak against the presumption that the defendants did not realize that their value conceptions, which required from them the restoration of their honour in this form, are not met with approval in the legal order of the Federal Republic of Germany." (p.10).

Main legal texts quoted in the decision:

- Sections 211 and 212 of the German Penal Code

Cases cited in the decision:

- Federal Court of Justice, Order of 24 April 2001, 1 StR 122/01 (Bundesgerichtshof, BGH, Urteil vom 24 April 2001, 1 StR 122/01)
- Official Collection of Criminal Judgments of the Federal Court of Justice, vol 35, 116,127. (BGHSt 35, 116,127).
- BGHR StGB (Collection of Criminal Judgments of the Federal Court of Justice) 211 II base motives, 2,4,10,12,15,24,28,29 (BGHR StGB 211 II niedrige Beweggründe, 2,4,10,12,15,24,28,29)

Commentary

The Honour of a Family and the Rules of the PKK

This case is not a typical honour crime because of the role of the acting persons. As a rule, perpetrators are members of the family of the victim herself or if a man is the victim, of the family of his partner. In rare cases we find hired killers but

they only carry out the deed. In the present case, however, the PKK is involved as the actor. The father did not want a man paralyzed after being wounded in battle to be his son-in-law, even though he was a respected PKK fighter. The reasons for this are not known. They may have resulted from concerns that the marriage would remain childless or that his daughter's economic situation would worsen. What is known is that the father felt his honour had been offended because the man had not asked him for the daughter's hand in marriage. Instead, he had first declared to the mother his intention to marry her. Of greater significance was that the daughter left the parental home and secretly married her boyfriend. This was a serious violation of the views of the family and of the local Kurdish community, where it became widely known. The husband was now considered a "kidnapper" in local Kurdish circles and thus lost his previous reputation (Oberwittler and Kasselt 2011: 138). The father had already told the local PKK leader before the marriage that the PKK was responsible for the young man's behaviour as a PKK member and demanded that the leader restore his honour. The PKK leader felt equally responsible and even after the daughter had left the parental home, there were several consultations between the family and local PKK officials (Oberwittler and Kasselt 2011: 138). It is uncertain whether the PKK officers regarded the man's relationship with the woman against the will of the family as a violation of her family's honour that led them to take action thus following the view that is common in many Kurdish communities, or whether the prohibition for Kurdish fighters to have sexual relations still applies after their status as fighters has ended. What is certain is that the local PKK leader eventually ordered three PKK members to kill the couple.

The Federal Court of Justice's reasoning in the judgement was met with criticism in the literature. Doubts about the appropriateness of the sanction were interpreted as a sign of rootedness in the culture of origin since the offence was nevertheless committed (Saliger 2003: 25). According to the Federal Court of Justice, the fact that the perpetrators had carried out the PKK's order even though they were aware of its reprehensibility should constitute a base motive. This is contradicted by Momsen (2003: 240), who argues that, according to previous

German jurisprudence, acting on the basis of integration into the command structure cannot lead to an increase in the wrongfulness of the act, as would lie in the assumption of base motives. The division of Bremen Regional Court that had to decide about the case after the referral of the Federal Court of Justice did not follow the judgment of the Federal Court of Justice. They avoided discussing the question of honour and convicted the defendants for murder again. In their view, the motive of the defendants was not the restoration of honour; instead, their actions were rooted in their inability to resist the order of the regional leader of the PKK due to their authoritarian education and the fear of being sanctioned by the PKK. Therefore, the court refused to consider their motives to be base (Oberwittler and Kasselt 2011: 140).

It is striking, however, that neither insidiousness nor cruelty, two other legal elements that change murder into murder under specific aggravating circumstances, seem to have been examined in the case.

The regional commander of the PKK who had given the order to kill the couple went underground shortly after the arrest of the defendants and never stood trial. The father and two brothers of the young women were also suspected of incitement to, or even complicity in, the crime but the available evidence was not sufficient to bring charges against them (Oberwittler and Kasselt 2011: 140).

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

Specific legal publications addressing the case:

- Momsen, Carsten. 2003. “Der Mordtatbestand im Bewertungswandel? Abweichende soziokulturelle Wertvorstellungen, Handeln auf Befehl und das Mordmerkmal der ‘niedrigen Beweggründe’ (§ 211 StGB)”. *Neue Zeitschrift für Strafrecht* (23): 237–242.
- Saliger, Frank. 2003. “Anmerkung zu BGH, Urteil vom 20.02.2002, 5 StR 538/01 (LG Bremen)”. *Strafverteidiger* 23: 21–25.

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 u.a.: 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 u.a.: 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? Soziokulturelle Motive im Strafrecht unter besonderer Berücksichtigung des türkischen Ehrbegriffs.* Berlin: Logos.
- Grünewald, Anette. 2010. "Tötungen aus Gründen der Ehre". *Neue Zeitschrift für Strafrecht* 30 (1): 1–9.
- Kasselt, Julia. 2016. *Ehre im Spiegel der Justiz – eine Untersuchung zur Praxis der deutschen Schwurgerichte im Umgang mit dem Phänomen der Ehrenmorde*. Berlin; Freiburg: Duncker&Humblot; Max-Planck-Institut für ausländisches und internationales Strafrecht.
- Kasselt, Julia and Dietrich Oberwittler. 2014. "Die richterliche Bewertung von Ehrenmorden in Deutschland: Eine empirische Analyse der Sanktionspraxis im Zeitraum 1996 bis 2005". *Monatsschrift für Kriminologie und Strafrechtsreform* 97 (3): 203–223.
- Oberwittler, Dietrich and Julia Kasselt. 2011. *Ehrenmorde in Deutschland 1996-2005.* Köln: Luchterhand.
- Schorn, Martin. 2014. *Mord aus niedrigen Beweggründen bei fremden soziokulturellen Wertvorstellungen*. Baden-Baden: Nomos.

General literature on the topic from other disciplines

- Bodendieck-Engels, Hildegard. 2013. *"Ehrenmord" vor deutschen Gerichten – eine anthropologische Untersuchung von Strafprozessen*. Hamburg: Dr. Kovač.

- Kızılhan, Jan Ilhan. 2012. *“Ehrenmorde”. Der unmögliche Versuch einer Erklärung. Hintergründe – Analysen – Fallbeispiele.* 2nd ed. Berlin: Regener.

Disclaimer

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