German Federal Court of Justice
(Bundesgerichtshof—BGH)
4th Criminal Senate

[MURDER BY DANGEROUS DRIVING]

Decision of the BGH of 16 January 2019, Case No. 4 StR 345/18

Judgment of the LG Hamburg of 19 February 2018, Case No. 621 Ks 12/17

Keywords: Homicide: Aggravated Murder; Causing death by dangerous driving; *Mens Rea*

The defendant, D, had been convicted by the Hamburg District Court of, among other things, one count of theft, one count of aggravated murder (*Mord*) and two counts of attempted aggravated murder as well as aggravated assault, and sentenced to an aggregate life sentence. The district court also awarded damages for pain and suffering to the mother of the victim who was killed, because she had suffered a nervous breakdown upon hearing the news that her son had been killed and serious long-term mental distress, but this aspect shall be omitted from the discussion. It is equally of no interest for our purposes that D was also put under a custodial addiction treatment order pursuant to s. 64 of the German Criminal Code on account of his alcohol abuse.

D had broken into a taxi in the early hours of the morning in order to steal the satnav and other electronic accessories; when he found a spare ignition key in the console he decided on the spot to steal the entire car. He was heavily drunk at the time, with a calculated blood-alcohol concentration range between 1.17 and 1.8 ‰ (= 1,170 and 1,800 ppm). The car was an automatic model, something D was not familiar with. Accordingly, he had difficulties at first driving the car, with sudden stops and starts. He had not turned the taxi's headlights on, either. This came to the attention of witness A, an off-duty police officer, who flashed his unmarked car's lights at D to alert him that something was wrong. D, who did not know A was a police officer but wanted to avoid detection at any cost, started speeding away from A, who took up the chase, which made D drive ever more dangerously, running over red lights, failing to brake at intersections and increasing his speed to a point where he thought no-one would pursue him any further. Indeed, after a while A, who had by then called his colleagues on duty for support, abandoned his efforts at keeping up with D, since he did not want to risk causing an accident himself.

In the meantime, a marked police car had been dispatched to the vicinity, and D passed that car shortly afterwards; the police immediately took up a high-speed pursuit of D, who had become increasingly confident driving the automatic. D, who saw the lights of the police car and heard the siren, decided to "up the ante" and drive even more recklessly. He wanted to avoid being caught by the police at any cost. He crossed a number of major multiple-lane intersections at a speed of about 80 – 90 mph before finally moving into the opposite lane of the oncoming traffic at a speed of around 100 mph; all of this happened within the Hamburg city limits – not on a freeway or

motorway – where an average speed limit of no more than 30 mph was in force. Due to the early hour, traffic was light but D had earlier passed several cars in the opposite lanes moving at around 30 mph or slightly more, so he was aware of possible oncoming traffic. At one point, D took a curve so fast that the car almost overturned and was saved only by its electronic failsafe systems. Finally, D collided head-on at a speed of almost 100 mph with the car driven by witness B, a taxi driver, who was taking two passengers, C and D, home. C, who was not wearing a seat-belt, was so seriously injured in the collision that he died at the scene. B and D were also seriously injured with potentially life-changing injuries. The defendant appealed.

HELD, DISMISSING THE APPEAL, that the LG had been correct in convicting D of aggravated murder and attempted aggravated murder by finding that D had acted with conditional intent (*bedingter Vorsatz*) to kill and with the intent to hide his identity as the thief of the taxi (*Verdeckungsabsicht*). The BGH left the question open whether D had also acted by using means which caused a common or public danger (*gemeingefährliche Mittel*) as found by the LG.

COMMENTARY[1]

It is necessary to refer to both the decision of the BGH and the judgment of the LG[2], because the BGH gave the appeal short shrift in a two-and-a-half-page decision, without a hearing and as manifestly unfounded pursuant to s. 349(2) of the Code of Criminal Procedure. Decisions under that provision are made unanimously at the reasoned request of the Federal Prosecutor-General and normally do not contain reasons; the Senate did, however, append one page of general comments related to the conviction for murder, also because it disagreed with the prosecution's view that D could not be held to have acted in *Verdeckungsabsicht* if, as the LG found, he did not mind if he himself was killed in an accident, i.e. may (also) have had suicidal motives. The judgment of the LG runs to 117 pages; it is extraordinarily detailed and in places highly technical in tracing the path D had taken that night, down to describing the progress through the different stages of the chase by fractions of seconds, as well as analysing the events from the point of view of A and the officers in the police car, using innovative means of evidence, such as, for example, the police car's dashcam recording, the speed recording of the last five seconds before the crash of the defendant's car's airbag system, and a simulation by an expert showing an approximate impression of the light and road conditions and at the speeds recorded, from the defendant's point of view as the driver at the time.

This may have been an instance of commendable clairvoyance on part of the trial court, because the same Senate of the BGH, only a few days after the judgment of the LG Hamburg, in its judgment of 1 March 2018 (4 StR 399/17) picked apart a judgment of the LG Berlin, which had convicted two drivers taking part in an unlawful *impromptu*

[2] The decision of the BGH is available via the judgments database search engine at www.bundesgerichtshof.de, using the case number as the search term. An anonymised copy of the district court judgment was provided to the author upon request by the Hanseatic Supreme Court at Hamburg (Contact: pressestelle@olg.justiz.hamburg.de) and is on file with the author. The Supreme Court advised at the time of writing that the judgment will be available in due course, for example, on the (commercial) judgments databases www.juris.de and Beck Online, where it can be found by using the court and the case number.

street race, in the course of which another person was killed in a collision, of aggravated murder based on conditional intent, with behaviour very similar to the present case, and remanded the case back for re-trial before a different chamber of the LG Berlin. The BGH at the time re-emphasised its stance that there was no generally accepted rule of straightforward inference from highly dangerous driving to a conditional intent to kill, especially if the offender was aware of also causing a risk to himself, and required a painstaking evaluation of the evidence relating to each individual offender's mindset without reliance on generalisations.

The central question in this case was therefore whether it was permissible to infer conditional intent to kill – i.e. knowledge by the offender of the lethal risk (cognitive element) and resigning himself to the manifestation of the risk, even if it appears undesirable (voluntative element) – from the evidence of D's highly risky behaviour. The BGH this time held that it was (see below). The other aspect was the nature of intentional homicide, i.e. plain or aggravated murder: Details of the German law on aggravated murder and the differing doctrinal approaches by the literature (s. 211 is a qualification of s. 212) and the BGH (s. 212 and s. 211 are two separate offences) and their consequences were explained in this journal in 2007 in a previous footnote related to a similar case decided by the same Senate of the BGH under juvenile criminal law (see *Case No. 4 StR 594/05*, 16 March 2006; 'Homicide: Insidiousness; Withdrawal from Attempt', (2007) 71 JCL 29). To recap briefly, in essence German law knows a 'plain vanilla' type of intentional murder similar but not identical to English law- because it does not recognise the constructive GBH liability of English law - , namely s. 212 of the Criminal Code (with a minimum sentence of five years and a maximum of 15 years, or in serious cases a discretionary life sentence), and an aggravated version, s. 211 of the Criminal Code, which requires the defendant's conduct to trigger one of a number of aggravating circumstances, among them acting in *Verdeckungsabsicht*, i.e. in order to cover up a previous offence, or commission by *gemeingefährliche Mittel*, i.e. by using means that cannot be controlled by the offender and may cause a risk to an unspecified number of people either by the very nature of the means (for example, a bomb) or by the particularly dangerous and indiscriminate use of an otherwise controllable means (as in this case, driving a car in a manner that puts any innocent bystander at serious risk who may happen to be in the path of the car). S. 211 carries a mandatory life sentence with a minimum term of 15 years; this can be *de facto* increased if the trial court finds that the defendant's guilt is especially severe (see Michael Bohlander, *Principles of German Criminal Procedure*, Hart, 2012, 210 f.). Whereas the aggravating factors of s. 211 cannot all be triggered by mere conditional intent, it is always sufficient for the basic *actus reus* element of causing the lethal consequence. It is worth noting that the offender does not have to appreciate the legal characterisation of the facts, as long as she has a layperson's understanding of their seriousness, dangerousness etc. *Verdeckungsabsicht* requires direct intent to cover up another, previous offence, whereas the intent to kill can be conditional (unless the death of the victim is the *only* way from the point of view of the offender of hiding her involvement in the previous offence, in which case direct intent to kill is usually required). The *mens rea* criterion of *gemeingefährliche Mittel* can, however, be fulfilled by mere conditional intent as to the quality of the acts making the means *gemeingefährlich* (see for more detail the criminal code commentary by Thomas Fischer,

Strafgesetzbuch, 65th ed., C.H. Beck, 2018, s. 211, marginal numbers (mn.) 68; 78 ff.; the *Leipziger Kommentar zum Strafgesetzbuch*, 12th ed., de Gruyter, 2018; s. 211, mn. 145; and the *Beck Online-Kommentar StGB*, 41st ed., C.H. Beck, 2019; s. 211, mn. 72.).

The BGH's decision, terse as it is, would seem to put an end to the debate, not least caused by the BGH itself, about whether and when highly reckless and dangerous driving causing death can be characterised as intentional homicide or even *Mord*. It is potentially also another nail in the coffin, as it were, of the BGH's increasingly teetering traditional but so far not explicitly abandoned view that it is impermissible simply to infer from objectively life-threatening actions that the offender accepted the lethal consequences, because of a natural inhibition threshold (*Hemmschwelle*) every person is said to have regarding the endangerment, and *a minore ad maius* the taking, of human life (the so-called inhibition threshold principle – *Hemmschwellentheorie*); see on the discussion Thomas Fischer, ibid., s. 212, mn. 7ff. at 13).

The recent trend observable in parts of mainland Europe to taking what is ultimately a fact-based and crime control driven rather than a purely doctrinal approach to a readier acceptance of conditional intent, based on evidential inference from utterly reckless behaviour resulting in the manifestation of a lethal risk, has also been conspicuous, for example, in the Netherlands (see the analysis of the Dutch case law by Hein Wolswijk/Alwin van Dijk in *id.* (eds.), *Criminal Liability for Serious Traffic Offences – Essays on Causing Death, Injury and Danger in Traffic*, Eleven International Publishing, 2015, 9 ff.) and Switzerland (Swiss Federal Court – *Bundesgericht*, Official Gazette of the Decisions of the Federal Court (BGE) at BGE 130 IV 58 at 60 ff. and BGE 133 IV 9, 15 ff.). Based on an alleged increase of high-profile incidents of street races, Germany introduced legislation in September 2017 to tackle the phenomenon, s. 315d of the Criminal Code, sub-section 5 of which provides for a maximum sentence of 10 years if the "racer" causes the death of another at least by negligence; however, cases of intentionally causing death will in any event be caught by s. 212 or s. 211, leading to a mere cumulative conviction based on s. 315d and s. 212/211 with the sentence being taken only from the sentencing range of the latter. The provision is rather intricate in its legal structure, (still) unclear in its application – especially in relation to the general principles of criminal law – and is widely seen as a piece of symbolic legislation with a weak evidence base, which will likely miss its policy aim (see the detailed analysis by Thomas Fischer, ibid., s. 315d) .

Looking at potential lessons for English law, it seems unclear, to say the least, whether English law as it currently stands could come to a similar conclusion regarding a conviction for murder. The so-called oblique intent required for murder under *R v Woollin* ([1999] AC 82), absent proof of direct intent, is the virtual certainty of the manifestation of the lethal risk and the appreciation by the offender of that virtual certainty, and her acting despite such insight. It becomes even more problematic when we look at the two attempt counts D was convicted of, because for those only direct intent to kill will suffice under English law, *Woollin* oblique intent being inapplicable to attempts. The offence of causing death by dangerous driving under ss. 1, 2A of the Road Traffic Act (RTA) 1988 is currently not capable of sustaining a life sentence: It still has a maximum sentence of 14 years despite government assurances in late 2017 that the

maximum would be raised to life (see www.gov.uk/government/news/life-sentences-for-killer-drivers - accessed on 12 March 2019). Yet, this seems to have been one of the legislative projects which fell prey to the fog of Brexit. It is questionable whether there could be a workaround by applying the law on constructive manslaughter: Firstly, the entire debate about the reform of causing death by dangerous driving and a life sentence would be superfluous if the manslaughter charge, which carries a discretionary maximum life sentence, was available, and secondly, it is doubtful whether the violation of public order rules such as traffic laws which are not on the face of it meant to protect the interests of individuals, would be a sufficient basic offence on which to build a constructive liability for a lethal result that does not need to be covered by any *mens rea*. It is furthermore unclear whether and under what circumstances a finding of gross negligence manslaughter could be made (see *Andrews v DPP* [1937] AC 576). Hence, it would appear that English law currently has no equivalent to, for example, the German practice, to treat persons who drive highly dangerously and put others at serious risk resulting in lethal consequences with the necessary severity.

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