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PSYCHOLOGICAL AIDING IN RED LEGION'S CASE

Complicidad psicológica en el caso Red Legion

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ABSTRACT

This paper is about criminal participation in a German case. The main aim is to know how psychological aiding works? For that, there is a brief description of criminal participation in general, including principal participation and aiding. After that, it is explained the background of the case. Also a detailed study of the Red Legion's sentence is done. This case included psychological aiding issues, as well as co-perpetratorship issues. Finally, the main conclusion from the case is: the mere presence at the crime scene in the knowledge of a criminal offense is not enough to punish the agent as a psychological aider.

RESUMEN

Este artículo trata sobre el estudio de una sentencia alemana relacionada a la participación delictiva. El objetivo principal es saber cómo funciona la ayuda psicológica. Para eso, se hace una breve descripción de la participación delictiva en general, incluida la participación principal y la complicidad. Después de eso, se explican los antecedentes del caso. Además, se hace un estudio detallado de la sentencia del caso de la Red Legion. Este caso incluyó problemas de complicidad psicológica, así como problemas de coautoría. Finalmente, la principal conclusión del caso es: la mera presencia en la escena del crimen, a sabiendas que se trata de un delito, no es suficiente para castigar al agente por complicidad psicológica.

KEYWORDS Participation in crime, Black Jackets, criminal law, Germany.

PALABRAS CLAVE Participación delictiva, Black Jackets, Derecho penal, Alemania.

INTRODUCTION

Participation in crime means that there are different ways to take part of a crime. An agent could be liable as perpetrator if he or she commits a crime directly (*Täterschaft*) or through another innocent person (*mittelbare Täterschaft*), also known as principal by proxy. Or, if two or more agents commit a crime together, they are co-perpetrators (*Mittäterschaft*). Those are the ways of perpetratorship. Also, it is possible to commit a crime if the offender attacks the legal interest (*Rechtsgut*) accessory through the main perpetrator. This is the case of aiding (*Beihilfe*) and abetting (*Anstiftung*). Those are the ways of accessorial liability (*Teilnahme*). This paper is about a specific of aiding. A wide concept of aiding is this: the aider (*Gehilfe*) is the person who helps the perpetrator to commit a crime. But, specifically, the aider is the one who “...intentionally assists another person in the intentional commission of an unlawful act.” (Ambos & Bock, 2013, p. 334). The differences are that the last concept requires intention (*Vorsätzliche*). This excludes the participation without intention or with negligence (*Fahrlässige*). Also, it does not need a complete crime, because it just needs an unlawful act. This means that it is not necessary that the principal perpetrator acts culpably. It needs an intentional and wrongful offense. It is only possible an intentional aiding to an intentional offense.

The aiding could be physical or psychological. The physical aiding is a through an action (*physische Beihilfe* or *aktive Hilfeleistung*). It acts directly over the reality. Meanwhile, the psychological aiding (*psychische Beihilfe*) acts indirectly over the reality, because it acts over the will of the perpetrator. Psychological aiding (*psychische Beihilfe*) means “*mental or emotional assistance*” to the perpetrator of the crime (Bohlander, 2009, p. 172). Nonetheless, both act indirectly over the crime, because there is always a need of the main offense committed by the principal.

The psychological aiding “*tiene efecto sobre a psiquis del autor y, a través del autor, sobre el hecho*” [has an effect on the psyche of the author and, through the author, on the offense] (Castillo, 2010, p. 529). There is a long distance between the criminal action of the aider and the principal offense, but there is still an intention of the aider to attack the legal interest through the actions of the main offender. That is why in Germany the psychological aiding is liable as a crime.

METHODS

This paper is a study of one case of the Federal Court of Justice of Germany (BGH). The main method used was the revision of jurisprudence, which aims to research about decisions of the judicial authorities (Courtis, 2006. p.127). The decision or court ruling is “*a legal resolution or judgment of a question raised in a concrete factual context.*” (Lomio, Spang-Hanssen & Wilson, 2011, p.240). This method is useful because it looks for “*sistematización, sugerencia de interpretaciones a partir de las normas vigentes, sugerencia de modificación de las normas vigentes*” [systematization, suggestion of interpretations based on the current law, and proposal of modification of the current law] (Courtis, 2006. p.127). In this case is to get a better understanding about the Panamanian criminal law.

This method was chosen because “*...el caso individual se subsume en el caso genérico contenido en la norma.*” [the individual case is subsumed in the generic case contained in the law.] (Courtis, 2006. p.128). In other words, the abstract rule is applied to a specific case. The method described by Courtis has the following steps:

“*a) describir sucintamente la situación de hecho que se tuvo por probada; b) describir la norma o normas consideradas aplicables a esos hechos y la interpretación que de ellas dio el tribunal; c) describir los argumentos dados para justificar esa interpretación; d) describir la resolución adoptada.*” [a] succinctly describe the factual situation that was considered proven; b) describe the law or standards considered applicable to those facts and the interpretation that the court gave them; c) describe the arguments given to justify that interpretation; d) describe the adopted resolution.] (Courtis, 2006. p.121)

The case studied was a decision given by the Federal Court of Justice of Germany (BGH) in 2016, about participation in murder, bodily harm and others crimes.

It is important to clarify this paper is not a study case research, which is “*A case study is an empirical inquiry that investigates a contemporary phenomenon within its real life context, especially when the boundaries between phenomenon and context are not clearly evident.*” (Woodside, 2010, p. 1) This paper is a study case of a single jurisprudence of the Federal Court of Justice of Germany to get a better comprehension of the psychological aiding.

RESULTS: RED LEGION CASE

i. Background

In this case, a group called Red Legion attacked other group called Black Jackets. According to a digital newspaper “*Nach der tödlichen Auseinandersetzung in der Nacht zum Samstag, bei der ein 22-Jähriger durch mehrere Messerstiche getötet wurde, hat die Polizei*

mehrere Tatverdächtige festgenommen." [After the deadly confrontation on the night of Saturday, in which a 22-year-old was killed by several knife wounds, the police have arrested several suspects.] (Stuttgarter Zeitung, 2012)

According to other newspaper:

“Drei junge Männer im Alter von 21 und 22 Jahren müssen sich wegen einer tödlichen Messerstecherei in der Nacht auf den 22. Dezember 2012 am Esslinger Obertor verantworten. Damals hatten mehr als 20 Mitglieder der Red Legion zehn Mitglieder der Black Jackets überfallen, um ihnen klarzumachen, dass Esslingen der Red Legion gehöre. Ein 22-Jähriger wurde durch mehrere Messerstiche getötet, sein Bruder und einige seiner Kumpel wurden schwer verletzt.” [Three young men between the ages of 21 and 22 years have to answer for the deadly stabbing in the night on December 22, 2012 at Esslinger Obertor. At that time, more than 20 members of the Red Legion had attacked ten members of the Black Jackets to make it clear that Esslingen belonged to the Red Legion. A 22-year-old was killed by several knife wounds, his brother and some of his buddies were seriously injured.] (Stuttgarter Nachrichten, 2014)

This case was about a territorial dispute between two violent groups: the Red Legion and the Black Jackets. It began as a fight, but finished in the commission of some crimes, included bodily harm and infliction of bodily harm causing death.

ii. Decision of the Federal Court of Justice

This case was about murder under specific aggravating circumstances (section 211), murder (Section 212), causing bodily harm by dangerous means (Section 224), infliction of bodily harm causing death (Section 227), and taking part in a brawl (Section 231), of the German Criminal Code (*Strafgesetzbuch* or StGB). To judge this case, also there were interpreted the section 11, 18, 27 and section 25.2 of the same code.

In a revision of the Stuttgart's Regional Court sentence (LG), the German 'Federal Court of Justice' (*Bundesgerichtshof* or BGH) changed the decision of condemning the defendant to a life term in jail. In this case, one group of 26 people (Red Legion) attacked other group of 11 people (Black Jackets). There was no criminal plan (*Tatplan*), but the attackers know the possibility of hurt and killing someone else, as it happened. (Editorial Beck, 2016, Rn. 136).

One offender stabbed a Black Jackets' member, and the collective attack started. The person who started the attack was standing next to the defendant. The participation of the defendant was: *“Der Angekl., der den Einsatz des Messers gesehen hatte, blieb bis zum Ende des Kampfgeschehens bei den Angreifern. Konkrete Angriffshandlungen des Angekl. konnten nicht festgestellt werden. Der Angekl. erlitt jedoch im Zuge seiner Verwicklung in Kampfhandlungen selbst eine Stichverletzung.”* [The defendant, who saw the use of the knife,

remained with the attackers until the end of the fighting. Concrete attacks by the defendant could not be determined. However, the defendant himself suffered a stab wound in the course of his involvement in combat operations.] (Editorial Beck, 2016, Rn. 136). There was no evidence the defendant was attacking other people, but his own injuries. So far the participation that was proved was that he was with the other attackers during the assault against the Black Jackets. But the defendant was condemned for LG because of these other elements:

“der Angekl. müsse sich die tödlichen Messerstiche als Mittäter zurechnen lassen. Er sei bei dem Aufspüren der „Black Jackets“ und deren Herausholen aus der Bar an vorderster Stelle und Sprecher gewesen und habe den Handlungsablauf federführend gestaltet. Er habe ein erhebliches Interesse an der Konfrontation gehabt. Ihm sei bewusst gewesen, dass A das Messer im Laufe der Auseinandersetzung möglicherweise erneut in lebensgefährlicher Weise einsetzen würde und dass auch weitere Tatgenossen bewaffnet sein oder ansonsten von tödlicher Gewalt Gebrauch machen könnten. Trotz dieser Erkenntnis habe er bewusst und willentlich an den weiteren Kampfhandlungen teilgenommen, hierdurch mögliche tödliche Folgen auf Seiten des Gegners billigend in Kauf genommen und dies durch seine Mitwirkung auch unterstützt.

[The defendant must be qualified as a joint principal for the deadly knife wounds, because having been at the forefront and spokesman in tracking down the “Black Jackets” and getting them out of the bar had been at the forefront and speaker and have made the plot responsible. He had a considerable interest in the confrontation. He was aware that in the course of the dispute A might use the knife again in a life-threatening manner, and that other comrades might be armed or otherwise use lethal force. Despite this knowledge he consciously and willingly participated in the subsequent fighting, thereby accepting possible fatal consequences on the part of the opponent endorsed and supported by his participation.] (Underline is not original). (Editorial Beck, 2016, Rn. 136).

Then, according to the LG there were not just his mere presence during the crime, but an active participation that must be punished because it was intentional psychological support for the other attackers. According to this, the defendant is a co-perpetrator because he had motivated the others members of his group to attack the Black Jackets’ members, and he was tracking and chasing them. May be he was acting with *animus auctoris*, because he wanted and accepted the consequence of his action for himself. But, he doesn’t have the domination of the act. This means that he didn’t control over, as Weigend says, *“whether and how the offense is carried out”* (Heller & Dubber, 2011, p. 266). He participated, but he neither controlled if the attack started nor how the attack had to be.

On its behalf, the Federal Court of Justice (BGH) changed the decision, for the following considerations:

“1. Die tödlichen Stiche können dem Angekl. auf der Grundlage der rechtsfehlerfrei getroffenen Feststellungen nicht als Mittäter nach § 25 II StGB zugerechnet werden.” [1. The stabs can be attached to the defendant on the basis of the findings made without error, but can not be attributed as co-perpetrator in accordance with § 25 II of the Criminal Code.] (Editorial Beck, 2016, Rn. 136). In accordance with Section 25.2 of the German Criminal Code *“If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).”* (Criminal Code, 1998, Section 25). This could be, joint principals by participation of everyone in the crime, or by division of the crime. However, *“Voraussetzung für die Zurechnung späteren fremden Handelns als eigenes mittäterschaftliches Tun ist ein zumindest konkludentes Einvernehmen der Mittäter.”* [A requirement for the accusation of later acting as a separate act of co-perpetration is an at least an implied agreement of the joint principals.] (Underline is not original) (Editorial Beck, 2016, Rn. 136). That agreement was not proved.

Based on the case, *“Die Tathandlung des Angekl. wurde nach den Feststellungen nicht von einem gemeinsamen Tatplan hinsichtlich des Mitführens von Waffen und der Tötung eines Gegners getragen.”* [The offense of the defendant was not, according to the findings, supported by a common plan of action for carrying weapons and killing an opponent.] (Editorial Beck, 2016, Rn. 136). There was no proving of a joint plan to do a crime, so it is not possible to call it as joint principals. Meanwhile, this plan must not be very well defined for the participants, but just in very basic ways. According to Thomas Weigend, *“That plan can also be developed nonverbally, spontaneously, and even while one offender is already in the process of committing the offense.”* (Heller & Dubber, 2011, p. 266).

The BGH concluded *“Dies alles ist nicht festgestellt. Damit entbehrt der Schluss des LG, auch der tödliche Messerstich sei auf Grund einer konkludenten Erweiterung des ursprünglichen Tatplans dem Angekl. zuzurechnen, einer tragfähigen Grundlage.”* [All this have not been stated by the Stuttgart’s Regional Court of Criminal Justice. Thus, the conclusion, the lethal knife stab is due to an implied extension of the original plan attributed to the defendant, has not a solid base.] According to BGH there was not a solid fact to ratify the conclusion of the Stuttgart’s Regional Court, because the criminal event was not an extension of the original plan, since there was not a common plan.

The second argument of the BGH is that there was not a criminal aiding. The aiding does not mean the aider’s assistance have a causal effect on the commission of the crime. To be

consider aiding “*erforderlich ist [...] dass sie die Haupttat zu irgendeinem Zeitpunkt zwischen Versuchsbeginn und Beendigung in irgendeiner Weise erleichtert oder fördert. Dies belegen die Feststellungen nicht.*” [it is necessary to ease or encourage the crime at any time between the beginning of the crime’s attempt and its termination. This has not been confirmed by the findings.] (Editorial Beck, 2016, Rn. 136). In accordance to Federal Court of Justice (BGH), the actions of the defendant do not help or boost neither the murder nor the bodily harms nor the rest of crimes.

There was not psychological aid (*psychische Beihilfe*), because “*Die bloße Anwesenheit am Tatort in Kenntnis einer Straftat reicht selbst bei deren Billigung dazu nicht aus*” [The mere presence at the crime scene in the knowledge of a criminal offense is not sufficient even with their approval] (Editorial Beck, 2016, Rn. 136). This means that a person can know about the crime, and can be present during the commission of the crime, but that is not enough to punish him as an aider. The knowledge of the crime, without any kind of action to help it to happen is not an action that can be labeled as a crime. The mere presence of a person during a crime it is not an attack to the legal interest. Neither directly nor accessory.

However, the Federal Court of Justice (BGH) said “*Die Hilfeleistung [...] kann zwar auch in der Billigung der Tat bestehen, wenn sie gegenüber dem Täter zum Ausdruck gebracht und dieser dadurch in seinem Tatentschluss bestärkt wird sowie der Gehilfe sich dessen bewusst ist.*” [The aiding to the crime [...] can also consist in the aider’s approval of the crime, if it is expressed to the perpetrator and this is confirmed in his determination and, the aider is aware of it] (Editorial Beck, 2016, Rn. 136). This means that any exteriorization of support during the commission of the crime that reinforces the will of the principal is a kind of criminal aid, and then, it must be punished. But this supporting must be known by the aider. For example, if a person doesn’t know the perpetrator has a gun (because he never had had a gun, and before the crime it is hidden) and the perpetrator says to him ‘come and help me to recover my property’. And the person goes and tells him in front of the victim: ‘if he doesn’t give you your property, punish him’ without knowing that the principal had a gun and to shot the victim was part of his plan. If the perpetrator shots against the victim there is no intention (*vorsatz or dolus*) in the aider’s action, and there is no criminal aiding. This happens because there is not aiding without intention.

In this particular, the Federal Court of Justice (BGH) alleged: “*Das hätte vorausgesetzt, dass der die Tat unmittelbar Ausführende den Angeklagte und dessen Billigung eines*

Tötungsdelikts wahrgenommen hat und dadurch in seinem Tatentschluss bestärkt oder ihm zumindest ein erhöhtes Sicherheitsgefühl vermittelt wurde. Beides ist indes nicht festgestellt.”[That would have presupposed that the person carrying out the action had taken charge of the defendant and his approval of a homicidal offense, thereby confirming his decision or at least being given an increased sense of security. However, both elements are not founded. After the comprehensive and particularly careful evaluation of evidence can be ruled out that the LG could make further findings.] (Underline is not original) (Editorial Beck, 2016, Rn. 136). From the facts and proves analyzed by Stuttgart’s Regional Court (LG), according to the Federal Court of Justice (BGH), there was no evidence that there were a try of reaffirmation of the will to kill or hurt, by the defendant. The defendant’s actions of have been at the forefront and spokesman in tracking down the “Black Jackets”, neither confirm the decision of the perpetrator or perpetrators, nor increased their sense of security to commit the crime.

At the third point considered, the Federal Court of Justices (BGH) agreed with Stuttgart’s Regional Court (LG) because to carry on a knife with him “*Denn es reicht für die Erfüllung der subjektiven Fahrlässigkeitskomponente aus, wenn der Täter die Möglichkeit des Todeserfolgs im Ergebnis hätte voraussehen können. Einer Voraussehbarkeit aller Einzelheiten des zum Tode führenden Geschehensablaufs bedarf es nicht*” [is enough to fulfillment of the subjective negligence, because, if the offender could have foreseen the possibility of the death success in the result of the crime. A predictability of all the details on the path to the crime is not required]. (Editorial Beck, 2016, Rn. 136).

With this subjective negligence the defendant put himself in a criminal situation. Meanwhile, it is not possible to say that his final intention was to kill, but it is realistic to say that anyone in that situation could foresee the result; this means, the killing of someone else. In this case, the defendant intentionally committed a bodily harm, but also caused the death of the victim with his intent-negligence’s action. He didn’t want to kill the victim, but he was aware of the possibility of that happened. In this kind of crime, for Professor Gerhold “[t]he offender must have *dolus based on the bodily harm and behave negligent based on the death and the death must be based on the typical danger of the intentional bodily harm.*” (Personal communication 11 January, 2019). This is different of murder stated in sections 211 and 212, because in section 227 the homicide happens without the intention of killing, but with the

intention of hurting. Though, the agent must have accepted the possibility of the murder when he is committing the bodily harm.

According to Gerhold “*the punishment is for a crime (Körperverletzung mit Todesfolge, § 227 StGB), that combines intention and intent-negligence. We call this crimes “Erfolgsqualifikationen”. For the participant we treat it like an intentional crime (§§ 11 II, 18 StGB).*” (Personal communication 11 January, 2019).

The general rule is “*that German unlike English law does not know of a concept of procurement of or assistance to negligence-based*” (Bohlander, 2009, p. 168). But this rule has an exception: the cases of intent-negligence (*bewussten Fahrlässigkeit*). In the intent-negligence the agent “*considera posible que realice el tipo legal, pero no obstante actúa en la confianza de que no lo realizará*” [considers it is possible to commit a crime, nevertheless acts in confidence that it will not happen] (Roxin, 1997, p. 1019). The agent, despite his awareness of risk, trusts that he can avoid the situation or the crime will never happen.

Finally, the defendant was found guilty of ‘infliction of bodily harm causing death’ according to Section 227 of the German Criminal Code (*Strafgesetzbuch or StGB*). The Federal Court of Justice (BGH) settled “*Der Angekl. war nach der rechtsfehlerfreien Wertung der StrK Mittäter der begangenen gefährlichen Körperverletzung in 8 tateinheitlichen Fällen.*” [The defendant according to StrK, was the co-perpetrator of the commission of bodily harm in 8 identical cases.] (Editorial Beck, 2016, Rn. 136). This means, according to Federal Court of Justice (BGH), the defendant is neither a co-perpetrator nor aider to a murder, but co-perpetrator of infliction of bodily harm causing death.

CONCLUSIONS

These are some conclusions:

- There is a problem to distinguish co-perpetrators from aiders. But the ‘theory of domination of the act’ is the last differentiation between these concepts.
- The co-perpetrationship (*Mittäterschaft*) requires a common plan (*gemeinsamen Tatplan*) for the co-perpetrators or at least an implied agreement of them.
- The crime can be due to an implied extension of the original plan attributed to the co-perpetrator, even if the original plan was not criminal.

- For a punishable aiding it is necessary to ease or encourage a crime (or at least an unlawful act) at any time between the beginning of the crime's attempt and its termination. This means the aiding is during the execution of the crime.
- In the psychological aiding (*psychische Beihilfe*) there is an intention of the aider to attack the legal interest, not directly, but through the actions of the main offender.
- The mere presence at the crime scene in the knowledge of a criminal offense is not enough to punish the agent as a psychological aider. Even with his or her approval of the crime, but without any kind of action to help it to happen.
- The mere presence to the crime scene can consist in a criminal psychological aiding if he or she expresses the approval of the crime to the perpetrator and this confirms the perpetrator determination. Psychological aiding also requires the aider's knowledge of his role in the determination of the perpetrator's crime. This means, he or she knows that he or she is confirming perpetrator's decision, or at least, given an increased sense of security to the perpetrator.

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