



FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

COURT VERDICT

3 StR 149/18

of

23 August 2018

in the criminal case

against

[text hidden]

for war crimes against humanitarian operations, etc.

In the sitting of the 3rd Criminal Tribunal of the Federal Court of Justice on 23 August 2018, which was attended by the following persons:

Hon. Mr [text hidden],
[text hidden]

as chairman,

Hon. Ms [text hidden],
[text hidden]

Hon.

[text hidden]

[text hidden]

[text hidden]

as associate judges,

Mr [text hidden], Federal Prosecutor at the Federal Court of Justice
as representative of the Office of the Federal Prosecutor,

Mr [text hidden], Attorney at Law
as counsel for the defence,

Mr [text hidden], Attorney at Law
as representative of the joint plaintiff [text hidden]

Ms [text hidden], Chief Clerk of Justice
as clerk of the office,

it was ruled that:

1. Following the appeal of the Federal Prosecutor General, the verdict of the Higher Regional Court of Stuttgart of 20 September 2017

a) that the defendant is guilty of a war crime against humanitarian operations in coincidence with severe deprivation of liberty, aiding in extortionary kidnapping and aiding in attempted severe extortionate assault in three uniform cases,

b) was quashed; the related findings are, however, upheld.

Within the scope of the annulment, the case shall be referred back to another criminal tribunal of the Higher Regional Court for a new hearing and decision, also on the costs of the appeal.

2. Further revision is rejected.

3. By law

Grounds:

1 The Higher Regional Court has sentenced the defendant to three years and six months imprisonment for aiding and abetting a war crime against humanitarian operations in coincidence with extortionary kidnapping, attempted severe extortionate assault in three uniform cases and severe deprivation of liberty. With his revision based on the complaints, the Federal Prosecutor General objects to the fact that the defendant was convicted merely for aiding and abetting in respect of severe deprivation of liberty and the war crime against humanitarian operations; in addition, he objects to the sentence. The appeal leads to the modification of the conviction and to the annulment of the sentence, but the findings on which the conviction is based remain.

I.

2 According to the findings of the Higher Regional Court, at the beginning of 2013 a group south of Damascus was active, which had not been further identified and which sympathised with Islamist ideas. At least some of its

members actively participated as fighters in the uprising against the government of Bashar al-Assad. Moreover, the members of the group took advantage of the turmoil of the uprising by using armed force to monitor the traffic flowing to and from a town near Damascus to search people and their vehicles for valuables and weapons and to seize them; by doing so, they wanted to emphasize their claim to power in the area.

3 On 17 February 2013, at a roadblock set up for this purpose, members of the group seized Mr [text hidden], a [text hidden] national, who was working as a civilian employee of the United Nations for a peacekeeping mission on the Golan Heights by threatening him with guns. They held him captive until he managed to escape in October 2013. While Mr [text hidden] was in their hands, they demanded - though without success - a ransom of seven million US dollars from the United Nations, later also from the [text hidden] government and his parents for his release.

4 The abductors initially held Mr [text hidden] for several months in a villa where they locked him up in a room on the first floor. The windows of the room were barred and the room door could only be opened from the outside. Mr [text hidden] was under constant surveillance and was only allowed to leave the room under supervision, for example to go to the toilet.

5 The defendant, who did not belong to the group, spent at least seven days in the villa between the beginning of March and the end of May 2013, without it being possible to determine the exact reason. He knew that in the course of the civil war turmoil the group had succeeded in capturing Mr [text hidden], a United Nations employee originating from the West. He also knew that the abduction would be used to extract a high ransom for the release of Mr [text hidden], and on the basis of the information known to him he also knew that the abductors would address their ransom demand to the United Nations, and also to the [text hidden] government and the family of Mr [text hidden]. He sympathised with Islamist ideas and supported the abduction of

Mr [text hidden] as well as the abductors' plans. Therefore he wanted to support them by acting according to their instructions and thereby contribute to the success of their plan.

6 For this purpose, he made himself available as a guard and, in accordance with the instructions of the abductors, assumed the task of keeping watch over Mr [text hidden] for at least seven days between the beginning of March and the end of May 2013 for a period of four weeks. As part of his role, it was known to him that Mr [text hidden] had been held uninterruptedly for more than a week and would continue to be held until the negotiations on his release were concluded, which were not foreseeable. As with all other guards, one of the defendant's duties was to bring Mr [text hidden] food twice a day, accompany him to the toilet or shower, and then lock him back in his room.

II.

7 The revision leads to a change in the conviction and, as a result, to the annulment of the sentence.

8 1. The Federal Prosecutor General rightly complains that the Higher Regional Court convicted the defendant of severe deprivation of liberty (Section 239(3) point 1 StGB) and war crimes against humanitarian operations (Section 10(1) sentence 1 point 1 VStGB) only on the grounds of aiding and abetting (Section 27(1) StGB). The findings, which were made without any legal errors, prove that the defendant should be regarded as the perpetrator of these offences.

9 a) The Higher Regional Court substantiated its decision as follows:

10 The defendant had only been an accomplice with regard to all the offences he had been charged with. Complicity (Section 25(2) StGB) was ruled out because he had only limited complicity in the events in relation to the entire

duration of the imprisonment of Mr [text hidden]. His complicity was limited exclusively to the performance of concretely defined duties as a guard of Mr [text hidden]. Within the loose hierarchy of the group, he only had a subordinate status. He had acted on instructions from third parties and had not been involved in the concrete planning or decision-making processes of the group, nor had he had direct knowledge of the particulars of the crime. Moreover, there is no tangible interest which the defendant may draw from the success of the offence. Finally, he had left the group at an early stage without any interest in the outcome of the ongoing negotiations on the release of Mr [text hidden].

11 From the fact that he had repeatedly locked Mr [text hidden] in his room, no direct perpetration of an offence (Section 25(1) Alternative 1 StGB) with regard to severe deprivation of liberty and war crime against humanitarian operations followed either. The direct perpetrator would indeed be the one who commits the offence himself, thus fulfilling all the elements of the offence. The defendant, however, cannot be assumed to have had "primary role in the deed" ("Tatherrschaft") solely because he repeatedly locked Mr [text hidden] in his room. He had not had it in his hands alone to decide on the liberty or confinement of Mr [text hidden], but had merely carried out a partial act which, together with other measures, had only secured his prior capture.

The same applied to the ongoing aggression against Mr [text hidden] as an employee of a humanitarian aid organisation carried out by means of deprivation of liberty.

12 b) These observations raise strong legal concerns with regard to serious deprivation of liberty and the war crime against humanitarian operations.

13 aa) They are based on an inaccurate understanding of direct perpetration of an offence in the sense of Section 25(1) Alternative 1 StGB. To that applies the following:

14 • According to Section 25(1) Alternative 1 StGB, those who commit the

offence themselves are punished as perpetrators, i.e. those who unlawfully and culpably carry out all the constituent elements of the offence in their own person. In its wording, the provision refers only to the sole offender; however, it also applies to the person who, together with others, is involved in the offence and, in so doing, unlawfully and culpably fulfils all the constituent elements of the offence. He too must be regarded as a direct perpetrator within the context of Section 25(1) Alternative 1 StGB, even if he acted under the influence of another or only in the interest of another (cf. BGH, judgments of 26 November 1986 - 3 StR 107/86, NStZ 1987, 224, 225; of 11 September 1990-1 StR 390/90, BGHR StGB Section 178(1), accomplice 1; of 22 July 1992 - 3 StR 35/92, BGHSt 38, 315, 316 et seq.; of 25 May 1994 - 3 StR 79/94, BGHR BtMG Section 29(1) point 1 import 34).

15 The Senate does not need to decide whether it is necessary to adhere to the fact that in "extreme exceptional cases" something different may be conceivable (according to BGH, judgment of 22 July 1992 - 3 StR 35/92, BGHSt 38, 315, 316; critical in this respect, for example, Roxin, perpetration of an offence and acting as a principal in an offence, 9th ed., p. 546 ff; Lackner/Kühl, StGB, 29th ed., Section 25 marg. no. 1, each with further references). Because an extreme exceptional case, which could stand in the way of the assumption of a direct perpetration of the offence by the defendant in spite of the personal fulfilment of all constituent elements of the offence, is obviously not present here.

16 bb) The principal role played by the defendant with regard to severe deprivation of liberty (Section 239(3) point 1 StGB) and the war crime against humanitarian operations (Section 10(1) sentence 1 point 1 VStGB) results from the fact that the defendant himself has fulfilled the constituent elements of these offences through his conduct.

17 (1) With regard to the underlying offence of deprivation of liberty pursuant to Section 239(1) StGB, the following applies:

18 The provision punishes interference with personal freedom of

movement by which the victim is deprived of the use of his personal freedom (BGH, judgment of 22 January 2015 - 3 StR 410/14, NStZ 2015, 338, 339). Behaviour in the sense of Section 239(1) StGB is unlawful, when a person is prevented from leaving his present place of stay (BGH, judgements of 6 December 1983 - 1 StR 651/83, BGHSt 32, 183, 188 et seq.; of 22 January 2015 - 3 StR 410/14, NStZ 2015, 338, 339). The elements of the offence comprise two methods of perpetration: confinement or deprivation of liberty in another way. The wording of the law highlights confinement by way of example as the most frequent form of perpetration; it happens when the mobility of the aggrieved party is eliminated by way of his being kept in an enclosed space which has external, not necessarily insurmountable devices which prevent him from leaving it (cf. MüKoStGB/Wieck-Noodt, 3rd ed., Section 239 marg. no. 21).

19 This is a continuous offence. The offence is committed with the occurrence of the deprivation of liberty and only ends when the victim regains his/her freedom of movement (cf. BGH, judgment of 11 June 1965-2 StR 187/65, BGHSt 20, 227, 228; LK/Schluckebier, StGB, 12th ed., Section 239 marg. no. 20; Lackner/Kühl, ibid. Section 239 marg. no. 8). Therefore, conduct which leads to deprivation of liberty also constitutes an offence.

20 In this case Mr [text hidden] had been locked up in a room by the abductors. The defendant fulfills the act of deprivation of liberty by keeping watch over Mr. [text hidden] and locking him up again and again in the room after an escort to the sanitary area.

21 Thus he also fulfilled the act of severe deprivation of liberty (Section 239(3) point 1 StGB). The deprivation of liberty lasting longer than one week is attributed to him in accordance with Section 25(2) StGB because he participated in the permanent offence as a direct perpetrator and as such together with the abductors as an accomplice (Section 25 (2) StGB) and he knew that Mr [text hidden] was deprived of his liberty for more than one week.

22 (2) Through his participation in the deprivation of liberty to the detriment

of Mr [text hidden], the defendant also committed the offence of war crimes against humanitarian operations (Section 10(1) sentence 1 point 1 VStGB). He thereby participated personally in an attack directed against Mr [text hidden] as a person protected by this provision. To that applies the following:

23 The notion of attack in the sense of Section 10(1) sentence 1 point 1 VStGB is, based on Article 9 of the Convention on the Safety of United Nations Personnel and Associated Personnel (BGBl. II 1997 p. 230, 235), to be interpreted broadly and covers every type of violence regardless of the type of weapons used; typical forms of attack include coercion, intimidation, armed robbery, kidnapping, hostage-taking, harassment, illegal arrests and detentions as well as acts of destruction and plunder of the property of humanitarian missions (cf. BGH, resolution of 11 August 2016 - AK 43/16, BGHR VStGB Section 10(1) sentence 1 point 1 Person to be protected no. 1; Werle/Jeßberger, Völkerstrafrecht, 4th ed, marg. no. 1480; MüKoStGB/Zimmermann/Geiß, 3rd ed., Section 10 VStGB marg. no. 17 et seq.; Bundestag Document no. 14/8524, p. 32). Thus, the (severe) deprivation of liberty perpetrated in this case by the defendant also constitutes an attack on a person protected by Section 10(1) sentence 1 point 1 VStGB.

24 c) Since the defendant was then to be convicted of severe deprivation of liberty (Section 239(3) point 1 StGB) and the war crime against humanitarian operations (Section 10(1) sentence 1 point 1 VStGB) as a perpetrator on the basis of the findings made without legal error, the Senate amended the conviction accordingly (Section 354(1) analogously StPO). Section 265(1) StPO does not contradict this. The defendant, who has largely confessed to the external events of the offence, could not have defended himself against the allegation on which the amended conviction was based and which - with the exception of extortionate kidnapping as an accomplice and the attempted severe extortionate assault - corresponds to that of the unaltered admitted accusation in any other way.

25 2. The amendment of the conviction leads to the annulment of the sentence. It cannot be ruled out that the Higher Regional Court would have imposed a higher sentence on the defendant on the basis of the amended conviction. However, the findings on which the sentence is based are not affected by the legal error and can therefore remain valid (Section 353(2) StPO). The new Criminal Tribunal is not prevented from making additional findings unless they contradict the previous ones.

26 3. With regard to the new main hearing, the Senate points out the following:

27 a) According to the legal practices of the Federal Court of Justice, the consequences of a conviction under aliens law are in principle not decisive grounds for determining a sentence. This was already recognised in relation to the earlier legal situation under aliens law - also for the mandatory expulsion provided for at that time - and now applies all the more against the background of the provision of Section 53(1) and (2) AufenthG, which has been in force since 17 March 2016, according to which, in the case of a decision for extradition, a balance must in general be struck between public interest from extradition (Section 54 AufenthG) and public interest from a remain decision (Section 55 AufenthG). A different assessment under penal assessment law may be justified if, in individual cases, additional circumstances arise which make the termination of the stay in Germany appear to be particularly harsh (ongoing case-law; cf. BGH, judgments of 5 December 2001 -2 StR 273/01, NStZ 2002, 196; of 26 October 2017 - 4 StR 259/17, BGHR StGB Section 46(2) Foreigners 8; Resolutions of 31 August 2007 - 2 StR 304/07, juris marg. no. 3; of 13 October 2011 - 1 StR 407/11, NStZ 2012, 147; of 11 September 1996 - 3 StR 351/96, NStZ 1997, 77; of 12 January 2016 - 5 StR 502/15, juris).

28 b) According to the legal practices of the Federal Court of Justice, media coverage of a criminal offence and the defendant - even if he may have an "aggressive and prejudicial" character - does not normally constitute decisive grounds for determining a sentence either (BGH, judgments of 7 September 2016 -1 StR 154/16, NJW 2016, 3670, 3672; of 7 November 2007 -1 StR 164/07, NStZ-RR 2008, 343, 344; cf. also BGH, resolution of 30 March 2011 -4 StR 42/11, juris marg. no. 24). However, the Criminal Tribunal can mitigate the sentence by taking media reporting into account if it goes far beyond the usual extent that every offender *has to endure* and has a particularly detrimental effect on the defendant (cf. BGH, judgments of 7 November 2007 - 1 StR 164/07, NStZ-RR 2008, 343, 344; of 7 September 2016 -1 StR 154/16, NJW 2016, 3670, 3672; resolutions of 30 March 2011 - 4 StR 42/11, juris marg. no. 24; of 14 October 2015 -1 StR 56/15, NJW 2016, 728, 730).

Names of the Judges