ANNEX 2 to

Prosecution Brief in Response to Defence Appeal

Public

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SPO Translations of

Spain, Supreme Court, 22 April 2005, STS 2493/2005 – ECLI:ES:TS:2005:2493
Spain, Supreme Court, 2 April 2019, STS 186/2019 – ES:TS:2019:1375
Germany, Bundesgerichtshof, 4StR 196/59, 3 July 1959
Germany, Bundesgerichtshof, 5 StR 434/55, 6 July 1956
Germany, Bundesgerichtshof, 30 August 2000, 2 StR 204/00
Germany, Bundesgerichtshof, 30 March 1993, 5 StR 720/92
Germany, Bundesgerichtshof, 12 May 2020, 1 StR 368/19
Italy, Judgment of the Supreme Court of Cassation, Fifth Criminal Section, 4 April 2022, no. 18396
Italy, Judgment of the Supreme Court of Cassation, Fifth Criminal Section, 9 November 2022, no. 3070/2022
Italy, Judgment of the Supreme Court of Cassation, Fourth Criminal Section, 11 July 2007, no. 39617/07
Poland, Judgment of the Supreme Court, IV KR 153/72, 10 August 1972
Poland, Decision of the Supreme Court, III KK 420/19, 20 February 2020
Netherlands, Supreme Court, 4 April 2023, Case No. 21/04302, ECLI:NL:HR:2023:493

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Judicial Authority
General Council

JURISPRUDENCE

Roj: STS 2493/2005 - ECLI: ES:TS:2005:2493
Cendoj ID: 28079120012005100570
Court: Supreme Court. Criminal Chamber
Location: Madrid
Section: 1
Date: 22 April 2005
Appeal No.: 433/2004
Resolution No.: 511/2005
Procedure: CRIMINAL - APPEAL IN EXPEDITED PROCEDURE
Rapporteur: Andres Martinez Arrieta
Type of Resolution: Judgment

S U P R E M E C O U R T

Criminal Chamber

Appeal No. 433/2004

JUDGMENT

In the city of Madrid, on the twenty-second of April, two thousand five.

In the appeal for cassation for violation of the law and procedural error filed by the representation of Arturo against the judgment issued by the Superior Court of Andalusia, located in Granada, Civil and Criminal Chamber, which dismissed the appeal filed by the representation of Arturo against the judgment issued by the Jury Court of the Provincial Court of Cádiz on 20 November 2003, convicting him of the crime of homicide, the members of the Second Chamber of the Supreme Court mentioned above have convened for the vote and judgment under the presidency of the first of the aforementioned and with the report of the Honourable Mr. Andrés Martinez Arrieta. The Public Prosecutor's Office is also a party, and the appellant is represented by Prosecutor Mr. Fernández Rodriguez.

I. BACKGROUND

First.- The Investigating Court No. 1 of Ceuta conducted proceedings under Jury Law 2/2003 against Arturo for the crime of homicide and, once concluded, forwarded the case to the Provincial Court of Cádiz, which issued a judgment on 20 November 2003. The judgment was appealed in Criminal Appeal No. 7/2004 before the Civil and Criminal Chamber of the Superior Court of Justice of Andalusia, which issued a judgment on 2 April 2004. The contested judgment states the following ESTABLISHED FACTS:

"1. On 1 September 2001, at around 10 o'clock in the morning, Arturo, of legal age, of Moroccan origin, undocumented, and with no criminal record, was wandering around the vicinity of Muelle de la Puntilla, near the Godino warehouses, in the city of Ceuta, accompanied by at least three other people, including Octavio.

2. At some point, after a dispute for unclear reasons, the accused Arturo approached Octavio and, after hitting him and knocking him to the ground, pulled out a knife or blade about 20 centimetres long and with a narrow blade, which has not been found and was concealed in his waist.

3. Arturo used the weapon to stab Octavio twice, once in the left shoulder and once in the abdomen. The latter, about 10 centimetres deep, penetrated the left side of the anterior abdominal wall, affecting both the anterior and posterior walls of the stomach, the head of the pancreas, and the vena cava, which was pierced, resulting in a 17-millimeter-long wound on the posterior part of the aforementioned vein.

4. After stabbing Octavio, the accused Arturo fled the scene upon being surprised by a bystander, Rafael, who was driving in the vicinity and immediately notified the Port Police of what had happen1ed.

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5. The victim Octavio managed to crawl to the entrance of the Godino warehouses, where he was assisted by the police and picked up by an ambulance from the 061-emergency service. He was immediately taken to the Insalud Hospital in Ceuta, where he underwent emergency surgery for the injuries sustained.

6. During the surgical intervention, the internal wounds were sutured, with the exception of the 17-millimeter wound in the vena cava, which could not be located due to its imperceptible nature, given its location at the posterior part and the critical clinical conditions of the surgical intervention, which posed an evident life-threatening risk and in which the patient's life was in danger.
7. The victim Octavio, after being transferred to the Intensive Care Unit, died around 18:00 due to extreme absolute hypervolemia caused by acute haemorrhage, due to the lack of suturing of the vein wound and the aggravation that occurred during the operation.
Second.- The sentence issued by the Civil and Criminal Chamber of the Superior Court of Justice of Andalusia, appealed before this Court, rendered the following judgment: "DECISION: Dismissing the appeal lodged by the defendant Mr. Arturo, represented by the Attorney of the Courts Mr. Juan Carlos Teruel López, against the judgment issued on 20 November 2003, by the Honourable Mr. Magistrate President of the Jury Court in the scope of the Honourable Provincial Court of Cádiz, Sixth Section of Ceuta, in a case against the aforementioned defendant for the crime of homicide, we must confirm and hereby confirm in all its pronouncements the mentioned judgment -whose dispositive part has been reproduced in the Fourth Background of this resolution- with the declaration ex officio of the costs incurred in this second instance.
Notify this Judgment, of which a certified copy will be attached to the corresponding file of this Court, to the parties, in the manner provided for in Article 248.4 of Organic Law 6/1985, of 1 July, of the Judicial Power, instructing them that they may file a cassation appeal against it before the Criminal Chamber of the Supreme Court, which, if applicable, must be prepared before this Civil and Criminal Chamber within a period of five days from the last notification thereof.
Once it becomes final, return the original case file to the Honourable Mr. Magistrate President of the Jury Court that issued the appealed Judgment, together with a copy of this resolution and, if applicable, of the one that may be issued by the Second Chamber of the Supreme Court, with the corresponding communication for execution and strict compliance with what has been finally decided."
Third. Once the judgment was notified to the parties, a cassation appeal was prepared by the representation of Arturo, which was announced and forwarded to the Second Chamber of the Supreme Court along with the necessary certifications for its substantiation and resolution, forming the corresponding file and formalising the appeal.
Fourth. Once the corresponding file was formed in this Court, the representative of the appellant formalised the appeal, alleging the following GROUNDS FOR CASSATION:
SOLE GROUND. It is formalised under the provisions of Article 849.1 of the Criminal Procedure Law, for the violation of the law committed by the Civil and Criminal Chamber of the Superior Court of Justice of Andalusia, by improperly applying Article 138 and failing to apply Articles 147, 148.1, 77, and 142.1, all of the Criminal Code.
Fifth. After being informed of the lodged appeal, the Court admitted it, and the proceedings were concluded for the scheduling of the judgment when it corresponded according to the rotation.
Sixth. After scheduling the judgment, the required voting took place on 14 April 2005.

II. LEGAL GROUNDS
SOLE GROUND. The challenged judgment convicts the appellant as the perpetrator of a homicide offense, against which the appellant raises a single ground, invoking Article 849.1 of the Criminal Procedure Law and alleging a legal error due to the improper application of Article 138 of the Criminal Code, arguing that, from the established facts, the break in the causal link and the absence of intent are evident. The appellant argues that the facts should have been classified as the offense of bodily harm in concurrent ideal competition with the offense of homicide by gross negligence. The appellant further states that criminal liability will be determined by the extent of intent and not by the actual result, so, according to the appellant, the result of death is not encompassed by the intent, and the appropriate classification would be derived from the ideal competition of an offense of bodily harm and an offense of homicide by negligence.
The ground is dismissed. The chosen appeal route is based on respecting the established fact, which does not allow for the classification that the appellant seeks in the appeal. The factual account declares, regarding the specific aspect relevant to the appeal, that the accused inflicted two stab wounds, one in the shoulder and another in the abdomen. This second wound affected the anterior and posterior walls of the stomach, the head of the pancreas, and the vena cava. It is added that the injured party was urgently transferred to a hospital where the wound in the vena cava was not located "due to being imperceptible given its location on the posterior part and the clinical conditions of maximum severity of the surgical intervention in which there was an evident vital risk and in which the patient's

life was in danger." The factual account concludes by referring to the death of the injured party, stating that it was "due to the lack of suturing of the vein wound and the aggravation that occurred during the operation."

The raised argument is presented somewhat inconsistently. It is not possible to affirm the causal relationship with the result of death and subsume it under negligent homicide while simultaneously denying that same causal relationship for the intentional commission of a person's death. The causal relationship is the same in both the intentional crime of homicide and the negligent one. If what the appellant disputes is the absence of intent regarding the result of death, the dismissal is appropriate because the factual account uses the term "struck" to refer to the appellant's action, indicating the voluntary nature of the directed action—specifically, one of the stabbings aimed at a location housing vital organs, with the necessary intensity to affect its structure, as stated in the established facts.

With respect to the factual account relied upon in the appeal, the subsumption under the crime of intentional homicide is correct, as it is objectively declared that there was an action, a typical result, and the precise causal relationship between the action (two stabbings directed at the victim, with the second aimed at vital organs) and the resulting death of the victim due to the performed action. The medical care provided to attempt to heal the protected legal interest does not interrupt the causal course of the aggressive action, which, on its own, caused the imputed result. The causal course can exceptionally be interrupted when a new action or omission, relevant and causal to the result, occurs, but this is not the case here.

The proven fact does not describe any medical negligence to consider it causally related to the death and, as a new causal course, sufficiently significant to interrupt the connection with the appellant's action. On the contrary, it is stated that the action caused the result and that death occurred as a consequence of the appellant's action. This is expressed when the factual account refers to the cause of death as the aggravation that occurred during the operation and the lack of suturing the vein wound, which "was imperceptible given its location in the posterior part and the extremely critical clinical conditions of the surgical intervention."

The action performed—inflicting two stabbings on the victim in the places mentioned in the proven fact—is evidently causal to the resulting death of the victim. This causality can be affirmed from any of the theories used to determine it, as it is evident that if the appellant's action were mentally suppressed, death would not have occurred. This typical result occurred as a consequence of the action, as stated in the factual account. The medical intervention, carried out under the declared conditions of maximum risk and severity, sought to improve the victim's condition and, if successful, would have led to the non-consummation of the criminal offense of homicide, in other words, an attempted homicide, but not a change in the subsumption to the offense of bodily harm.

Accordingly, the argument is dismissed.

III. RULING

WE RULE: THAT THE APPEAL FOR CASSATION filed by the legal representation of the accused Arturo, based on the violation of the law and procedural errors, against the sentence delivered on 2 April 2004, by the Civil and Criminal Division of the Superior Court of Justice of Andalusia, which resolved the appeal against the verdict rendered by the Jury Court of the Provincial Court of Ceuta in the case against the aforementioned accused for the crime of homicide, is declared to be without merit. We condemn the appellant to pay the costs incurred. Communicate this ruling and the subsequent one to the aforementioned Superior Court of Justice of Andalusia for the appropriate legal effects, with the return of the case.

Thus, by means of this judgment, which will be published in the Legislative Collection, we pronounce, order, and sign Carlos Granados Pérez, Andrés Martínez Arrieta, Miguel Colmenero Menéndez de Luarca, Juan Ramón Berdugo Gómez, and Gregorio García Ancos.

PUBLICATION: The above-mentioned judgment has been read and published by the Presiding Judge, the Honourable Mr. Andrés Martínez Arrieta, while conducting a public hearing on the date indicated, in the Second Chamber of the Supreme Court. As the Secretary, I hereby certify this.

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JUDICIAL AUTHORITY
GENERAL COUNCIL

JURISPRUDENCE

Roj: **STS 1375/2019 - ECLI:ES:TS:2019:1375**

(...)

Case resolutions: **STSJ, Civil and Criminal Chamber, Andalusia, Section 1, 16 April 2018 (rec. 8/2018),**
STS 1375/2019

S U P R E M E C O U R T

Criminal Chamber

Judgment No. 186/2019

Date of judgment: 2 April 2019

Type of procedure: APPEAL (P)

Procedure number: 10339/2018 P

Decision:

Date of Voting and Decision: 12 March 2019

Rapporteur: Honourable Mr. D. Alberto Jorge Barreiro

Origin: CIVIL AND CRIMINAL CHAMBER OF THE SUPERIOR COURT OF JUSTICE OF ANDALUSIA, CEUTA, AND MELILLA

(...)

PRELIMINARY LEGAL GROUNDS. 1. The Fourth Section of the Provincial Court of Cádiz, in a judgment rendered on 14 November 2017, convicted Darío and Calixto as criminally responsible authors of a homicide offense, without the concurrence of modifying circumstances of criminal responsibility, sentencing each of them to twelve years in prison, and jointly ordering them to pay Marí Juana 90,000 euros, the minor Jose Ángel 90,000 euros, Lourdes 70,000 euros, and Roberto 70,000 euros in compensation. Jose Ignacio was also convicted as the criminally responsible author of a bodily harm offense, without the concurrence of modifying circumstances of criminal responsibility, sentencing him to two years in prison and ordering him to compensate Darío in the amount to be determined in the execution of the judgment, once the forensic expert determines the days of recovery and, if applicable, the consequences of the injuries caused to Darío.

(...)

2. The facts underlying the conviction can be summarised as follows: in the early hours of 16 April 2016, on Avd. Segunda Aguada, Jose Ignacio, accompanied by his friend Marco Antonio, encountered the brothers Darío and Calixto. Upon seeing each other, a fight broke out, during which Jose Ignacio stabbed Darío in the stomach and twice in quick succession in the posterior level of the left axillary cavity, causing wounds approximately 3 and 1 cm in length that affected the cellular tissue and required stitches for healing. Marco Antonio punched Darío in the nose, causing both of them to fall to the ground. Darío then stabbed Marco Antonio, using a knife with a blade measuring 31 cm in length and 4 cm in width at its widest part, in the back with the intention of taking his life.

(...)

A) Darío's Appeal

FIRST. 1. In the first ground of appeal, the defence of the accused alleges, with procedural support from art. 5.4 of the LOPJ /Organic Law of the Judiciary/, the violation of the right to effective judicial protection and to a public trial with all guarantees.

(...)

The defence of the appellant argues, first of all, that there is a break in the causal link with evident legal relevance in the outcome; namely, that Jose Ignacio forced Marco Antonio, with the knife still in his back, to stand up and walk, even dragging him on the ground (page 99), and finally took the knife out of Marco Antonio's back (page 99), even hiding it in Marco Antonio's car. Due to all these subsequent actions, completely unrelated to Darío's conduct and which cannot be used to attribute a more serious outcome to him, the causal link is broken with respect to Darío's actions and the final result, denying civil liability ex delicto with respect to Darío. Alternatively, a reduction of the same is requested. In this regard, the reports of the forensic doctors Sánchez and Corbacho are cited. Their expert testimony, although not included in the videos, was not entirely conclusive and was full of doubts and hesitations, probably because in their report, based on what Darío declared, such issues were not considered. It is stated that the consequences of removing the knife were mere hypotheses since we would not know what would have happened if the knife had not been removed.

(...)

On the other hand, the Court of Appeals states that there is no break in the causal link due to the fact that when Jose Ignacio removed the knife that was stuck in Marco Antonio's body, a severe and rapid haemorrhage occurred as the triggering factor for death. The appealed judgment objects to this by pointing out that the expert evidence presented at the trial proves that, given the location and characteristics of the weapon used in the attack on Marco Antonio, the extraction of the weapon did not significantly influence his death. The conclusion reached is that there would only be a remote

possibility of survival, even if he had been in the hospital with prepared personnel ready to perform surgery.

For all these reasons, the Court of Appeals concluded that the judgment of the Provincial Court correctly assessed the evidence presented at trial, providing an ample, reasoned, and logical description of the evidence.

(…)

D E C I S I O N

Based on the foregoing, in the name of the King and by the authority vested in it by the Constitution, this court has decided:

1) To reject the appeals of cassation filed by the representatives of the accused Darío and the private prosecutors Lourdes and Roberto against the judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Andalusia, dated 16 April 2018, which partially overturned the judgment rendered by the Fourth Section of the Provincial Court of Cádiz on 14 November 2017, in the case involving the offences of homicide and bodily harm.

2) To impose on the appellants the costs of their respective appeals of cassation.

(…)

FEDERAL COURT OF JUSTICE
IN THE NAME OF THE PEOPLE
JUDGMENT

4 StR 196/59

dated
03 July 1959
in the criminal case
against

Legal remedy

Opposing party

Walter Eugen F., a butcher from M., district of R., born there on the ...,
the 4th Criminal Division of the Federal Court of Justice, in the session of 3 July 1959, in which the following participated:
Senate President Dr. Rotberg as Chairman,
Federal Judge Dr. Sauer
Federal Judge Hoepner
Federal Judge Prof. Dr. Lang-Hinrichsen
Federal Judge Dr. Flitner as associate judges,
Senior Public Prosecutor ... at the hearing, District Court Counsellor Dr. ... at the pronouncement as representative of the Federal Public Prosecutor's Office,
Court Clerk ... as court clerk,
found:

Judgment:

On the accused's appeal, the Judgment of the Berlin District Court of 6 January 1959 is set aside, together with the findings. The case is referred back to the District Court for a new hearing and decision, including on the costs of the appeal.

Reasons:

The accused was sentenced to one year in prison for negligent killing in conjunction with negligent bodily harm and negligent dangerous driving. The District Court revoked his licence to drive a motor vehicle.

According to the findings of the District Court, at 04:55 hours on 16 May 1958, the accused, who had a blood alcohol level of 1.41 %, turned his Volkswagen around in Motzstrasse in Berlin at the junction with Eisenacherstrasse in order to continue his journey home via Martin-Luther-Strasse. He had previously stopped on the right-hand side of the road. He did not switch off his direction indicator before turning. As he did not see the Isetta of W., a postal worker who had been heard as a witness,

approaching from Nollendorfer Platz on Motzstraße, the two vehicles collided. W. suffered bruises and the student K., who was riding with him, suffered a ruptured spleen. He was operated on the day of the accident. On ... 1958 he died as a result of the operation.

The accused's appeal alleges a violation of procedural rules and of substantive law. It was successful.

The complainant rightly indicated that the Regional Court did not hear a medical expert in the main hearing on the fact that the student K. died as a result of the operation, and thus failed to fulfil its duty of clarification (Article 244 para (2) StPO).

In this case, the examination of the attending physicians as witnesses and the hearing of an expert witness would have been an obvious way to clarify the matter. The fact that the student K., who had been injured on 16 May 1958, did not die immediately after the accident, but only on 25 May 1958, and apparently also not as a direct consequence of the accident, the rupture of the spleen, spoke in favour of this. In this regard, as the Regional Court could see from the files, the doctors involved in the coroner's inquest stated in their expert opinions that the "final cause of death" was to be considered as a paralysis of the small intestine, which occasionally occurred as a result of abdominal operations and sometimes resisted all treatment (sheet 12 of the main files). However, as emphasised in the title of this report, this is only a preliminary statement, which does not take into account the bacteriological findings. According to the report, an infection with Staphylococcus aureus is possible (sheet 40 of the main file).

According to established case law, however, the cause of a criminally significant outcome is to be regarded as any condition that cannot be disregarded without the outcome ceasing to exist, irrespective of whether other conditions have also contributed to the achievement of the outcome (see, inter alia, BGHSt */Decisions of the Federal Court of Justice in criminal matters/* 1, 332, 333; 2, 20, 24 with reference to the case law of the Reichsgericht; 3, 62, 63; 7, 112, 114). Thus, the act of the perpetrator remains causal even if the outcome only occurred as a result of the special mental or physical condition of the injured person, for example because of cardiac insufficiency (cf. RGSt */Decisions of the Reichsgericht in criminal matters/* 54, 349, 351) or also as a result of the careless behaviour of the injured person, who, for example, did not follow the doctor's instructions, or of a third party, e.g. the doctor who was guilty of medical malpractice in treating the injured person (cf. publication in RG JW 1936 p. 50 no. 19). However, there is no causal connection if the act of the perpetrator continues to have an effect until the outcome, because a later event eliminates this effect and brings about the outcome independently of the act to be judged (OGHSt */Official Collection of Decisions of the OGHBrZ in Criminal Matters/* 2, 286, 355).

The lack of clarification of the causal link in this case may have an impact on the assessment also of the question of culpability and, ultimately, on the assessment of the sentence. However, one cannot always speak of a foreseeable outcome only if the course of events that finally led to it was foreseeable, as occurred in the individual case. Rather, it is sufficient that the final outcome was foreseeable. If, on the other hand, the course of events is so far beyond the experience of life that the perpetrator could not have foreseen it, even with the care required by the circumstances of the case and which could be expected of him according to his personal abilities and knowledge, he is not criminally liable. This can be the case in particular if the actions of the perpetrator are aggravated by the conscious or unconscious actions of third parties, in this case e.g. the attending physicians (BGHSt3, 62, 64).

If in application of the above principles the causality of the bodily harm caused by the accident is to be affirmed for the subsequent death of the injured person and its foreseeability, as a prerequisite for the charge of negligence, the degree of personal culpability and thus the extent of the punishability of the accused may nevertheless depend on whether the traffic accident for which he is responsible alone led to the death or whether this consequence was caused only by the occurrence of special

circumstances for which the accused as such is not responsible, even if he could have generally foreseen their possible contribution.

If these considerations alone lead to the judgment being set aside and the case being remitted to the Trial Judge for a new hearing and decision, the Appellate Court may refrain from dealing with the appellant's other challenges and leave it to the Trial Judge to consider them.

Rotberg Sauer Hoepner Lang-Hinrichsen Flitner

FEDERAL COURT OF JUSTICE
IN THE NAME OF THE PEOPLE
JUDGMENT

5 StR 434/55

dated
06 July 1956
in the criminal case
against

IN THE NAME OF THE PEOPLE

In the criminal case against

the industrial engineer S. from Wasbüttel, Germany, district of Gifhorn, born on 24 February 1909 in Neubrandenburg,

accused of murder and other offences,

the Fifth Criminal Division of the Federal Court of Justice, in its session on 6 July 1956, delivered the following Judgment:

I. On the appeals of the accused and the Public Prosecutor's Office against the Judgment of the Hildesheim Jury Court of 4 March 1955, the following shall be ordered
1. The proceedings against the accused are dismissed for lack of *lis pendens* in so far as he was convicted of attempted murder in respect of the Italian T..
2. The Judgment shall be amended to the effect that the accused is convicted of one count of attempted murder in the cases of B. and R. against two persons,
3. The Judgment shall be set aside in the sentencing decision in cases B. and R. and in the overall sentencing decision, including the findings in this respect.
II. The remainder of the appeals are dismissed.
III. The case is referred back to the Jury Court in Hildesheim for a new hearing and decision, including on the costs of the appeals.

REASONS

The Jury Court sentenced the accused to a total of five years' imprisonment for three counts of murder and three counts of attempted murder. Both the accused and the Public Prosecutor's Office have appealed against this sentence.

A. Procedural requirements

I. In the case of T., the proceedings had to be discontinued because this case was not covered by the decision to open the investigation and therefore a procedural requirement has not been met. The trial was opened for the murder of the Italians C., Mazza and Gallo and for the attempted murder of the Italians B., R. and an unknown Italian from Morigo. The accused was found guilty of the murder of C., Mazza and Gallo and of the attempted murder of B., R. and T. T. is not identical with the unknown Italian from Morigo mentioned in the opening decision. On the contrary, the case of T. is mentioned in the findings of the main indictment, which means that T. was already known by name at that time but was not mentioned in the indictment or in the opening decision. It can also not be said that the entirety of the accused's actions towards the Italians on 24 April 1945 constituted a "single act" within the meaning of Article 264 StPO */Code of Criminal Procedure/*.

BUNDESGERICHTSHOF - Federal Court of Justice

IN THE NAME OF THE PEOPLE

2 StR 204/00

JUDGMENT
of
30 August 2000
in the criminal proceeding
against

1.

2.

regarding attempted murder

The 2nd Criminal Division of the Federal Court of Justice, at the hearing on 30 August 2000, with the following people participating:

Vice-President of the Federal Court of Justice
Dr. Jähnke
as Presiding Judge

the Judges at the Federal Court of Justice
Niemöller,
Detter,
Rothfuß,
Hebenstreitals
acting as Associate Judges,

Senior Public Prosecutor at the Federal Court of Justice
as representative of the Federal Public Prosecutor's Office,

Senior Court Registrar
as authenticating officer of the Registry,

hereby ruled:

1. On appeal by the Public Prosecutor's Office, the judgment of the Bonn Regional Court of 10 June 1999 is overturned, together with the findings, with the exception of those relating to the external course of events. The case is referred back to another Juvenile Division of the Regional Court for a new hearing and decision, including on the costs of the appeal.

2. The further appeal is dismissed.

By virtue of the law

Reasons:

I.

1. The Regional Court found both accused persons guilty of attempted murder and sentenced the accused S. to a juvenile sentence of seven years and six months, and the accused W. to a juvenile sentence of six years and six months.

On appeal, the Public Prosecutor's Office, represented by the Prosecutor General, argued that the substantive law had been violated and that both accused persons should be convicted of first-degree murder. The appeal was largely successful.

2. The Regional Court essentially found the following facts:

The two accused, the then 17-year-old R. S. and her then 20-year-old boyfriend Sa. W., lived together in a small house provided by R. 's foster mother, who lived in a larger house nearby with other foster children, including 15-year-old J. K. who lived in a larger house nearby. Over time, tensions arose between the accused and J. . In particular, the accused resented J. for having revealed R. 's pregnancy to the foster mother and for having once wrongly suspected her of having stolen DM 20.00 from the foster mother; she therefore looked for an opportunity to teach J. a "lesson". This opportunity arose when the foster mother went to a singing

festival in the village and J. was alone in her house. The accused went to her house in the evening, met her and started an argument. The two women got into a hair fight. The accused knocked J. to the ground and stabbed her 16 times with a folding knife. First, she stabbed her in the stomach and back. She then inflicted further stab wounds to her arms, left hand and neck. Finally, she stabbed her several times in the face "with intent to kill", one of which shattered her nose bone, and another which severed her upper jaw and broke three teeth. During the last stabbing, the knife became so stuck in her face that the accused was unable to pull it out. J. was still alive, but so badly injured that the accused thought she was dead.

The accused then ran home and told her boyfriend, the accused, that she had stabbed J. . They both then returned to the scene of the crime in order to remove the evidence of the crime. While the accused remained outside, the other accused entered the house and found J. lying motionless on her back with her head covered in blood. As she was making noises that sounded like gasping, the accused correctly assumed that she was still alive. He removed the knife from her face, washed his hands and looked for an object to kill the woman, who he assumed was already dying. He hit her on the head with a water bottle held in both hands, shattering her frontal bone. However, the gasping sound continued - J. was not yet dead. The accused then pulled a denim jacket over her face, threw himself on top of her with all his weight and then strangled her. He then tried to remove her body from the room, but soon gave up. J. died "either as a result of the beatings with the water bottle – which possibly shortened the process of dying – or after these" (beatings) "as a result of the knife wounds by bleeding to death".

II.

The appealed Judgment does not withstand legal scrutiny. The Judgment of guilt contains errors of law in favour of the accused; in the case of the accused S. , they concern the assumption of only an attempted crime of murder and the form of intent, and, in the case of both accused, the denial of the characteristics of murder.

1. With regard to the conviction of the accused S. , the legal examination shows that:

a) The Juvenile Division wrongly found the accused guilty only of attempted murder and not of consummated murder. In its reasoning, it stated: "Although each of the accused's "contributions to the crime" was in itself capable of causing the victim's death, it could not be determined "whether the death by haemorrhage occurred solely as a result of the stabbing by the accused S. or whether the beating with the water bottle interrupted the causal process she had set in motion". Therefore, according to the principle of *in dubio pro reo*, an assumption in favour of each of the accused had to be made that their contribution to the crime had not caused the death (UA p. 133).

This cannot be upheld. The Juvenile Division thus misunderstood the concept of causation, which is decisive in criminal law. Cause is any condition that has brought about the outcome; it is irrelevant whether, in addition to the offence, other circumstances, events or sequences of events have contributed to the outcome. The situation is different, however, if a subsequent event nullifies its effect and brings about the outcome alone, thus opening a new causal chain. On the other hand, the causality of the perpetrator's action does not exclude the possibility that further conduct, whether by the perpetrator, the victim or a third party, may have contributed to the outcome (established case law and the prevailing opinion in the literature, summarised with numerous references in BGHSt */Judgments of the Federal Court of Justice in criminal cases/* 39, 195, 197 following pages). The act of the perpetrator remains causal even if a third party acting later intentionally contributes to bringing about the same result, provided that he/she only builds on the actions of the perpetrator, i.e. this is the condition of his/her own intervention. This also corresponds to the established opinion in case law (cf. the references in BGH */Federal Court of Justice/,* loc. cit.) and literature (Lackner/Kühl, StGB */German Criminal Code/* 23rd edition before Article 13, marginal no. 11; Tröndle/Fischer, StGB 49th

edition before Article 13, marginal no. 18 a; Lenckner in Schönke/Schröder, StGB 25th ed. Preamble, Article 13 ff, marginal no. 77; Rudolphi in SK-StGB, Article 1, marginal no. 49; Jeschek in LK, 11th edition, Article 13, marginal no. 58; Baumann/Weber/Mitsch, Criminal Law AT, 10th edition, Article 14, marginal no. 33 et seq. and 36; Maurach/Zipf, Criminal Law AT Book 1, 7th edition, Article 18 IV, marginal no. 61 ff). Accordingly, whoever shoots someone with the intent to kill and thereby induces a third party to give the injured person a "shot in the arm" isalso to be punished for a consummated offence of murder (OGHSt 2, 352, 354 f; BGH in Dallinger MDR 1956, 526; Jähnke in LK 10th ed. Article 212 marginal no. 3).

Insofar as the First Criminal Division of the Federal Court of Justice in an earlier, isolated decision (BGH NJW 1966, 1823) reached a contrary finding (Hertel NJW 1966, 2418; Kion JuS1967, 499; Jähnke loc. cit. fn. 3), it is already doubtful whether a different legal opinion was expressed at all in the reasoning of this Judgment; statements by the same division in a more recent decision (BGH NJW 1989, 2479 following) make it clear in any case that it does not, or at least no longer, hold such a legal opinion. There is therefore no reason for an inquiry pursuant to Article 132 paragraph 3, sentence 1 GVG /Courts Constitution Act/.

Accordingly, the accused caused J. 's death by stabbing her. This is not affected by the fact that the accused, who arrived at the scene of the crime later, inflicted further injuries on the victim by hitting her with the water bottle, which were also capable of causing the death. It is irrelevant whether the stabbings or the beating with the water bottle would have caused the victim's death individually or whether J. died only as a result of the combined effect of the injuries inflicted on her by both accused. With the knife wounds inflicted by her, the accused had in any case created a condition for the victim's death; because without these injuries inflicted by the accused, it would not have come to pass that the accused intervened and – following the actions of his girlfriend – hit J. on the head with the water bottle. Therefore, there is no room for the assumption that by hitting J. , the accused had eliminated the causal effect of the stabbing by his girlfriend and instead set in motion a new causal process resulting in death.

The criminal guilt of the accused in the sense of a consummated crime of murder is also not invalidated from the point of view of a deviation of the actual causal course from the imagined one. Such a deviation is to be affirmed insofar as it must be assumed in favour of the accused that the injuries inflicted on the victim by the accused W. accelerated the occurrence of death. Deviations from the assumed course of causation are legally insignificant, however, if they remain within the bounds of what is foreseeable according to general life experience and do not justify a different assessment of the offence (BGHSt 38, 32,34 with references to case law and literature). This is the case here. The death of the victim is not the result of a chain of unfortunate circumstances which, beyond all probability, would exclude the accused's responsibility for the outcome. The deviation from the imagined causal chain is rather insignificant and does not justify a different assessment of the offence.

b) Furthermore, it is erroneous in law that the Chamber, in its legal assessment of the accused's actions, assumed only a conditional intent to kill; the reasoning of the Judgment states that her intent was "at least in the form of a *dolus eventualis* – a conscious acceptance of death – when the stabbings to the head began" (UA p. 132). This contradicts the finding that the accused acted "with the intent to kill", i.e. with direct intent, in the last stabs to the face (UA p. 32).

c) In addition to this, the denial of the murder criterion of base motives does not stand up to legal scrutiny.

The Juvenile Division stated that it was "obvious to conclude that the brutal manner in which the accused stabbed her in the face – in its eyes a particular humiliation – could indicate base motives"; this was also supported by "the contempt expressed in calling the victim a cunt". However, malicious

motives could not be established with certainty "when assessing the overall circumstances, as already stated in the appraisal of the evidence" (UA p. 132).

These statements are not sufficient to make it clear whether the judge's assessment in this respect is free from legal error.

This is already the case because the court did not make any findings on the motive for the accused's killing. The description of the facts in the reasons of the Judgment is silent on this point. What is stated is the reason why the accused decided to visit J. on the evening of the crime (UA p. 30: "... to talk to her in private about the 'snitched pregnancy' and the suspicion about the 20.00 DM", further UA p. 27: "... to give J. a thorough lesson once the opportunity arose ... ..."). But it has not been established which motives led the accused to the decision to kill.

Yet the Chamber refers to an "appraisal of the overall circumstances", which it claims to have carried out "already in the appraisal of the evidence". But this reference is meaningless. Because in the section of the reasoning of the Judgment in which the evidence is appraised, there are individual additional findings which can be significant for the conclusion as to the motive for the killing (UA p. 118: "a kind of punitive action"; UA p. 124: "punitive action"; UA p. 120: "act of retaliation"; "annoyance and dislike"; UA p. 119: "annoyance", "anger", "feelings of hatred") - but these are not evaluated there or elsewhere from the point of view of the motive for the killing.

The fact that the Chamber considered the brutality of the killing and the contempt for the victim expressed in the use of an expletive as possible indications of the existence of malicious motives does not prove that it made the required overall appraisal. This must include the history, occasion and circumstances of the offence, the offender's living conditions and his/her personality (BGHSt 35, 116, 127; BGHR StGB Article 211.2 malicious motives 11, 39) and thus extend to all external and internal factors relevant to the offender's motivation to act (BGHR StGB Article 211.2 malicious motives 23, 24, 31). In this appraisal, the development of the relationship between the accused and the later victim of the crime would have had to be taken into account above all, her inner attitude towards J. that developed from this, for which the evidentiary part of the reasons for the Judgment provides numerous indications, not least also the statement of the accused to a witness that "she", namely J. , "would kill her one day" (UA p. 120). In particular, it would have been necessary to discuss whether and, if so, to what extent the accused's hostile feelings and sentiments towards J. became effective as a motive for the killing and were to be evaluated against the background of the occasions that triggered them.

Such an overall appraisal is lacking. In the present case, it was not even semi-indispensable because, according to the findings, the accused only decided to kill in the course of the violent physical confrontation, i.e. spontaneously; because this does not have to stand in the way of the affirmation of malicious motives (BGHR StGB Article 211.2, malicious motives 11; BGH, Judgment of 19 July 2000 – 2 StR 96/00; on the then increased examination requirements, cf. 11 January 2000 – 1 StR 505/99).

2. The conviction of the accused W. also contains errors of law.

a) However, the assumption of only attempted murder is not legally objectionable in his case. The error of law in the assessment of the causality of the actions of the accused S. did not affect the assessment of his crime. The same applies to the Chamber's apparently presupposed but incorrect assumption that the victim's death could – alternatively – only be attributed to one or the other accused as a result of his/her actions (UA pp. 36, 129, 133). In any case, the court did not fail to recognise that the accused had caused the death of J. and would thus have committed a consummated crime of homicide if his actions had only accelerated the occurrence of her death, which was possibly already imminent (BGHSt 7, 287 f; 21, 59, 61; BGH NStZ 1981, 218 f; 1985, 26 f; BGH StV

1986, 59, 200; BGHStGB before Article 1 /causality, attacks, various 1; Eser in Schönke/Schröder, StGB 25th edition Article 212 marginal no. 3). It can be concluded from the statements in the Judgment that it was not possible to establish that the beating of J. 's head by the accused had the effect of accelerating the onset of death. This is expressed in the description of the crime in the Judgment by the fact that these beatings were only attributed to a "possible" shortening effect on the process of death (UA p. 36) and is based on the statements of the forensic expert who – as is also stated in the Judgment – had stated that the beatings "could" also have caused a significantly shortened life expectancy (UA p. 128 below). If the Chamber found itself unable to establish that the beatings with the water bottle had accelerated the death, this does not constitute an independent legal error in the appraisal of the evidence. Neither does the result contradict principles of experience, as the Chamber suggests, nor do the statements in the Judgment on this point contain gaps, as the Chamber also contests. The reference to the preparatory written report of the forensic expert is inadmissible in the context of the only objection raised, quite apart from the fact that the quoted section of the report does not provide any basis for the interpretation that the expert considered an acceleration of the onset of death as a result of the beatings to be certain.

However, if the Chamber could not rule out the possibility that J. would have died at the same time as she actually did, even without the accused's intervention, it had to assume this possibility in accordance with the principle of *in dubio pro reo* and could convict the accused – as it did – only of attempted murder.

b) On the other hand, the rejection of the intent to conceal as an element of the crime of murder is erroneous in law; in this respect, the Judgment is based on an error in the appraisal of the evidence.

In the context of the legal assessment, the Court merely stated that an intent to conceal on the part of the accused "could not be established as a determining factor of his actions, when the events as a whole are reasonably appraised" (UA p. 133). This is consistent with the description of the facts in the Judgment in that there are no findings as to the motive for the killing. The motive by which the accused was guided in his actions remains open. Insofar as it is stated that after he had removed the knife from J. 's head, washed his hands and re-entered the room, he looked for an object to stop the "noise coming from the victim" and to "kill" J. , who in his eyes was dying (UA p. 34), this alone proves the intent to kill, but does not provide any information on the motive for the killing. The same applies to the statement with the same content contained in the part of the Judgment appraising the evidence, according to which the accused only wanted to "put an end to it all" (UA p. 131), and also to its basis, namely the accused's statement during his police interrogation on 6 August 1998 that he had tried to crush J. 's larynx "because he wanted to put an end to it" (UA p. 68).

However, it is not explained why the Chamber considered that it could not establish the accused's motive for the killing. There is no justification for this. The issue of motive remains unaddressed. The appraisal of the evidence is incomplete in this respect. There were circumstances that needed to be discussed that could argue in favour of the accused continuing the work of killing started by his girlfriend in order to protect her from her crime being discovered:

On the one hand, he himself was not hostile towards J. and had no reason to be. On the other hand, he had a close relationship with the accused, with whom he lived, based on love, which led him to expect mutual help in difficult situations. When the accused told him after her return from the foster mother's house that she had stabbed J., he thought about "how he could help his girlfriend in this situation" and went back to the scene of the crime with her "to destroy the evidence of the crime" (UA p. 33). This statement, which is contained in the description of the facts, is repeated in the sentencing part of the reasoning and is expressed there in the words that the accused "wanted to protect R. from being discovered and keep her as his girlfriend" (UA p. 142). Admittedly, this refers to a time when the accused believed that J. was already dead; however, in view of his motivation, the conclusion was obvious that the same motive also determined him to complete the killing of the victim,

who was found seriously injured. This conclusion seems to have been drawn by the Court itself, because in the evidence section of the reasons for the Judgment it is stated that "in the second part of the act" the accused had "primarily carried out an act to help his girlfriend" (UA p. 118). In this context, however, the "action to help" the accused could only be an action to protect her from the discovery of her crime – no other interpretation is possible. Finally, the accused's confessional behaviour during the investigation also provided evidence in the same direction, which – as the Judgment makes clear in a detailed description of the police investigations – was characterised for long periods by a determined effort to take sole responsibility for the death of J. in order to prevent the accused's conviction and punishment. The fact that this was not done constitutes an error in the appraisal of the evidence and thus an error of law.

III.

1. The Judgment and the findings must therefore be set aside. The findings on the external course of events, however, remain valid to the extent that they are documented by the court in the reasons for the Judgment on pages 30 to 36 (beginning with the heading "The Actual Course of Events" and ending with the heading "Events after the Act"); this seems appropriate, because according to these findings, which were made without legal error, in connection with the legal assessment by the Division, it has already been conclusively clarified that the accused S. is responsible for consummated murder, whereas the accused W. is only responsible for attempted murder. Insofar as the Public Prosecutor seeks to convict the accused W. of consummated crime of murder, his appeal is unsuccessful.

2. For the new trial and Judgment, the Division points out as a precautionary measure that the assumption of significantly diminished culpability (Article 21 StGB) in the case of neither of the two accused has any basis in the findings made so far; of the acutely effective and latently present disturbing factors which, in the opinion of the expert and the Chamber following him, are supposed to have impaired the culpability of the accused (in the case of the accused S. a "temporary loss of impulse control", in the case of the accused W. immaturity, low ability to deal with conflict, stress and panic), none of them meets any of the initial characteristics described in Article 20 StGB.

Jähnke Niemöllers Detter

Rothfuß Hebenstreit

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGMENT

5 StR 720/92

dated

30 March 1993

in the criminal case

against

Information

Case: Two shots

References: BGHSt 39, 195; JR 1994, 466; JZ 1993, 1065; JuS 1994, 1009; MDR 1993, 670; NJW 1993, 1723; NStZ 1993, 386; StV 1993, 470

Court: Federal Court of Justice (BGH)

Date: 30 March 1993

Ref. no.: 5 StR 720/92

Type of decision: verdict

If the victim dies as a result of the effects from injury of two shots coinciding, each of which would have resulted in death on its own, both shots are the cause of the outcome (so-called alternative causality). If only the first shot was fired with intent to kill, the negligent killing in the second shot is subsidiary to the intentional killing.

Reasons

I.

The accused, then a lawyer, was sitting from afternoon until late evening with his close acquaintance and client S on the upper floor of his family home, where his practice was located, discussing professional and private matters, with both men drinking alcohol in considerable quantities. There was nobody in the house except them. At around 22:30 hrs, the accused said goodbye to his client on the upper floor or at the front door; in any case, he assumed that S had left the house. However, S remained in the house for unknown reasons. About ten minutes later, the accused heard noises from the ground floor in his practice room on the upper floor and suspected burglars in the house. He picked up his loaded revolver, cocked the hammer and went to the top of the stairs without turning on other lights. Despite the relative darkness, he saw a person on the bottom landing, a good three meters away, making no movements that indicated "an immediate attack." The accused did not recognize that this was S. He shot the person with conditional intent to kill and immediately returned to the upstairs rooms to await further developments. The shot penetrated S's chest and torso from top to bottom. Sternum, diaphragm and liver were penetrated. "S was not incapacitated by this shot, which was not immediately fatal, and he could possibly have survived with immediate medical treatment". He groped his way into the living room. About five minutes after the first shot, the defendant heard noises coming from the living room area upstairs. "Due to the injury he had suffered, S had probably fallen to his knees there or had already collapsed." The accused ran down the stairs to the first floor with the revolver in his hand, ready to be fired again. There he did not turn on a light source. He tore open the living room door and shot into this room without looking into the living room. The jury was not able to determine "that the accused saw a person in the room and deliberately shot that person. In his situation, however, he could have recognized that someone was in the room, and the shot could have hit that person - even fatally". This shot went through the chin and throat of S, got stuck in the back and was “also fatal in its way“. S died from multiple organ injuries caused by the two shots.

The jury found that the first shot was attempted murder according to Articles 212, 22 StGB /Criminal Code/ and the second shot negligent killing according to Article 222 StGB. From the point of view of natural unity of action, both shots were seen as a unity of action according to Article 52 StGB.

II.

This legal appraisal of the established factual events does not stand up to substantive legal examination in every respect.

1. The public prosecutor rightly objects that the accused was not convicted of (consummated) murder.

a) The findings of the jury are unambiguous in the essential points and – contrary to the view of the defence – to be understood in the following way: Each of the two shots was initially fatal in the sense that it alone – i.e. without the addition of further circumstances – would have resulted in the death of the victim. However, the victim died from "multiple organ injuries caused by the two shots", i.e. from a coincidence of the injuries caused by both shots.

It is therefore not in doubt which of the two possible acts caused the death (cf. on this case BGHSt 32, 25, 27; BGH, NJW 1966, 1823, 1824; BGH, GA 1958, 109; BGH, StV 1986, 59; BGH judgment of 31 October 1978 - 5 StR 599/78 -; RGSt 70, 257).

b) The defendant's first shot at the victim was the cause of his death.

According to the theory of conditio sine qua non (BGHSt 1, 332, 333), which is consistently applied in case law, any condition that cannot be ignored without the outcome being eliminated is to be regarded

as the cause of liability for a criminally significant outcome. It is irrelevant whether, in addition to this condition, other circumstances contributed to the outcome (BGHSt 2, 20, 24; BGH GA 1960, 111, 112; RGSt 1, 373, 374; 66, 181, 184; 69, 44, 47). However, case law has repeatedly stated that, in contrast, there is an interruption in the causal process if a later event eliminates the continued effect of an earlier cause and the outcome is brought about by that event with a new series of causes being opened up (cf. BGHSt 4, 360, 362; BGH NJW 1989, 2479, 2480; BGH NStZ 1985, 24; BGH GA 1960, 111, 112; RGSt 61, 318, 320; 64, 316, 318; 64, 370, 372; 69, 44, 47). However, the existence of such a case was not assumed in any of the decisions mentioned (BGH GA 1960, 111, 112 lacks sufficient clarification). Causality of the perpetrator's actions that justifies liability will not even be excluded by the fact that the behavior of the victim (BGH StV 1993, 73; RGSt 77, 17, 18) or – tortious or not tortious – behavior of a third party contributed to bringing about the outcome (BGHSt 4, 360, 361 f.; 33, 322; BGH NStZ 1985, 24; BGH judgment of 6 July 1956 - 5 StR 434/55 -: "mercy shot" by a third party after the accused fatally injured the victim with his shot; RGSt 61, 318, 320; 64, 316, 318; 64, 370, 372 f.). In particular, however, in cases in which the perpetrator has set a further additional condition for death after a lethal act, the first act is also a cause of death (BGHSt 7, 325, 328; 10, 291, 293 f; 14, 193, 194; BGH NJW 1989, 2480; cf. also BGH StV 1993, 75).

This also corresponds to the prevailing opinion in the literature. There the problem is treated under the terms "alternative causality", "double causality" or "alternative competition". This is the case when several conditions set independently of each other work together, which would have been sufficient on their own to bring about the outcome but have actually all become effective in the outcome that has occurred (Lenckner in Schönke/Schröder, StGB 24th ed. before Article 13 para. 82). In these cases – with different accents in the justifications – all conditions are attributed causality for the occurrence of the outcome (Jescheck in LK 10th edition before Article 13 marginal no. 53; Lackner, StGB 19th edition before Article 13 marginal no. 11; Lenckner loc ; Dreher/Tröndle, StGB 45th edition before Section 13, marginal no. 18; Blei, criminal law AT 18th edition, p. 103; Jakobs, criminal law AT 2nd edition p. 192 ff.; Roxin, criminal law AT vol. 1 p. 225 f.; Maurach/Zipf, criminal law AT part 1, 7th edition p. 250 ff.; different interpretation Mezger, criminal law 3rd edition 1949 p. 116).

According to this, with the first shot the defendant did not only commit attempted murder but consummated murder.

2. As a result, the jury did not err when finding the second shot, which represented another cause for the death of the victim, to be a negligent killing according to Article 222 StGB. However, this is subsidiary to intentional killing. The assessment by the jury of the crime in two acts as a single act in the legal sense does not in itself reveal any legal error. However, the negligent commission of an offense compared to the consummated intentional offense committed on the same object cannot be expressed in the guilty verdict. Rather, the negligent form of commission is subsidiary (Stree in Schönke/Schröder, StGB 24th ed. before Article 52 StGB marginal note 107; cf. also RGSt 16, 129).

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGMENT

1 StR 368/19

dated

12 May 2020

in the criminal case

against

1.

2.

3.

for re 1.: involuntary killing et al.

re 2.: intentional bodily harm et al.

re 3.: grievous bodily harm et al.

ECLI:DE:BGH:2020:120520U1STR368.19.

SPO Translation

Following the main hearing on 13 February 2020, the 1st Criminal Division of the Federal Court of Justice, with the following people participating at the hearing on 12 May 2020:

Presiding Judge at the Federal Court of Justice, Dr. Raum,

the Judge at the Federal Court of Justice

Dr. Fischer,

the Judges at the Federal Court of Justice

Dr. Bär,

Dr. Leplow

and the Judge at the Federal Court of Justice

Dr. Pernice,

Public Prosecutor at the Federal Court of Justice

acting as representative of the Federal Prosecutor's Office,

Attorney

– in the hearing of 13 February 2020 –

acting as defence attorney for the accused K. ,

Attorney

– in the hearing of 13 February 2020 –

acting as defence attorney for the accused R. ,

Attorney

– in the hearing of 13 February 2020 –

acting as defence attorney for the accused U.,

Attorney

– in the hearing of 13 February 2020 –

acting as representative of the private accessory prosecutor W. ,

Attorney

– in the hearing of 13 February 2020 –

acting as representative of the private accessory prosecutor B. ,

Senior Court Registrar

as authenticating officer of the Registry,

hereby ruled:

1. Following the appeal of the Public Prosecutor's Office and the accessory prosecutor W. , the judgment of the Passau Regional Court of 17 January 2019 as regards the accused R. is hereby set aside with the findings,

   a) regarding the conviction, insofar as this accused was convicted of intentional bodily harm in conjunction with participation in a brawl; however, the findings about the crime up to and including the execution of the two punches of the accused K. remain unchanged,

   b) regarding the entire sentence.

The further appeals of the Public Prosecutor's Office and the accessory prosecutor W. are rejected.

As the case is set aside, the matter is referred back to another juvenile division of the Regional Court for a new hearing and decision, including on the costs of the appeals that have been successful in this respect.

2. The appeal by the accessory prosecutor W. concerning the accused K. is rejected. In this respect, the accessory prosecutor shall bear the costs of the appeal and the necessary expenses incurred by the accused K. in the appeal proceedings.

3. The appeals by the accused K. and U. are rejected.

   The accused shall bear the costs of their appeals and the necessary expenses incurred by the accessory prosecutor W. in the appeal proceedings.

4. At her request and expense, the accessory prosecutor B. is granted *restitutio in integrum* to the time before the expiry of the deadline for justifying the appeal against the aforementioned judgment.

   The appeal by the accessory prosecutor against the aforementioned judgment is rejected as inadmissible.

The accessory prosecutor shall bear the costs of her appeal and the resulting necessary expenses incurred by the accused K. , R. and U. .

By virtue of the law

Reasons:

1. The Regional Court sentenced the accused R. to a suspended combined juvenile sentence of one year and nine months for intentional bodily harm in conjunction with participation in a brawl (" S. " set of facts) as an accumulation of offenses including physical assault against law enforcement officers and as a concurrence of offenses including insult in six coinciding cases. The accused's stay in a youth welfare facility "in fulfilment of the condition of the decision on suspension of the Passau Regional Court dated 9 August 2018" did not count towards the juvenile sentence.

2. The Regional Court sentenced the accused K. to a total of three years and six months in prison for negligent killing in conjunction with intentional bodily harm and participation in a brawl (" S. " set of facts) as an accumulation of offenses including illegal carrying of a firearm.

3. The Regional Court sentenced the accused U. – as well as the non-appellant Bu. – to a suspended juvenile sentence of one year for dangerous bodily harm in conjunction with participation in a brawl. Furthermore, it refrained from

considering the stays of the accused U. in a youth welfare facility as measures to avoid pre-trial detention on the basis of the "accommodation orders" of the Passau District Court dated 17 April 2018 and 12 July 2018 and the Passau Regional Court dated 26 September 2018 to count towards the juvenile sentence.

4. With the appeal filed in favor of the accused R. and justified by an error in substantive law, the Public Prosecutor's Office is seeking a conviction for attempted homicide, or at least a conviction for bodily harm resulting in death (Article 227 StGB /Criminal Code/), but in any case for dangerous bodily harm. The appeals of the father of the dead man, the accessory prosecutor W. , where he notifies of the violation of substantive law, are directed against the accused R. and K. . He seeks their conviction for bodily harm resulting in death (Article 227 StGB). The appeals by the accessory prosecutor B. , the mother of the deceased, are directed against the accused R. , U. and K. and are based on the fact that the assignments of error in substantive law were not implemented.

5. With his appeal based on an error in substantive law, the accused K. challenges the appraisal of the evidence for the " S. " set of facts and not ordering his placement in an addiction treatment facility. With his appeal based on substantive legal statements, the accused U. particularly objects to the assumption of harmful tendencies and not crediting his stays in a youth welfare facility to count towards the juvenile sentence.

6. The appeals by the Public Prosecutor's Office and the accessory prosecutor W. concerning the accused R. were successful to the extent evident from the operative part. The appeals of the accused K. and U. , the

accessory prosecutor B. and the appeal by the accessory prosecutor W. concerning the accused K. were unsuccessful.

A. Judgment of the Regional Court

7. The Regional Court essentially made the following findings and assessments as well as the following legal appraisal of the " S. " set of facts:

I. Findings

8. The 15-year-old accused R. had been told that his classmate M. – also 15 years old – had said that he (R.) couldn't really hit out; his punches were "pussy-like". At the instigation of the accused R. , they agreed to meet on 16 April 2018 at around 18:00 hrs " S. " in P. for a fight and to bring as many supporters as possible with them. Both tacitly assumed that there would be punches in the face with the associated consequences of injury, but in order to avoid serious injuries, especially dangerous behavior, kicks to the head in particular should be avoided.

9. At around 18:00 hrs, at least 22 sympathizers had gathered at the agreed place, at least seven on M. 's side and at least 15 on the accused R. 's side, including the 25-year-old, extremely muscular co-accused K. and his cousins, the 16-year-old co-accused Bu. , now convicted by a final judgment, and 14-year-old co-accused U. . The accused R. started the fight by hitting M. in the face with his flat hand or fist. Then they pushed and hit each

other, with the accused R. punching his opponent in the face at least two more times and possibly hitting him around the nose.

10. Even in the further course of the fight, the accused R. only suffered from minor abrasions. Bu. and the accused U. therefore feared that M. would end the argument victorious, as he was still fully capable of further assaults. Therefore, based on a tacit decision to act, they proceeded against him by mutual agreement, in order to influence the outcome of the fight through their intervention in favor of the accused R. . The accused U. jumped at M. from behind and clutched him to limit his ability to defend himself while Bu. punched the lower jaw and the cheek at least once. In addition, the accused U. punched him in the face from behind. M. was not significantly injured by these assaults. There was no loss of consciousness. M. pushed them both away and thus fended them off successfully.

11. Out of anger and indignation, and in order to deprive the injured party of any possibility to protect and defend himself, the co-accused K. , acting quickly and deliberately, and with the intention of injuring him, pulled a powerful punch against the left temple of the injured party with his right fist and a powerful punch with his left fist in the upper right abdomen, punches he later referred to as "2 punch KO". Realizing the effect of these beatings, he left it at that. It could not be ascertained

whether his punch against M. 's temple led to a loss of consciousness; it did, however, lead to a clouding of consciousness, which clearly impaired M. 's ability to defend himself against further attacks. Visibly dazed, M. was leaning with his back against the glass of a shop window.

12. The accused K. could and should have recognized from the force of his blows that at least the blow to the temple could put the injured party in a condition that could lead to his death – possibly in combination with existing injuries. He could also have recognized and should have reckoned with the fact that the accused R. would continue the fight because of his opponent's daze and reduced ability to defend himself, in order to end it as the winner after all, and to inflict such blows on him whichcould result in his death, possibly in conjunction with the injuries already sustained.

13. After the accused K. had withdrawn from the fight, the accused R. approached the clearly marked M. , who was no longer able to defend himself and merely held his fists in front of his temples to protect himself. He hit him in the head with at least three heavy punches with the intention of injuring him and in the knowledge that M. did not agree to the continuation of the fight because of the injuries he had already suffered and the resulting weakness.

14. M. collapsed unconscious a short time later. He had a loss of consciousness and a nasal bone fracture that was bleeding profusely and exclusively inwards. He choked on inhaled blood because the loss of consciousness had knocked out his swallowing and coughing reflexes.

15. It could not be determined which blow to the face had caused the nasal bone fracture. It was not caused by the violent blow to the temple by the accused K. . In any case, the cause of the loss of consciousness had not yet been set before the accused K. intervened. His blows either directly caused the loss of consciousness, which eliminated the swallowing and coughing reflex, or they did so indirectly because at least a clouding of consciousness occurred, which made M. unable to defend himself actively, but enabled the accused R. to inflict further powerful blows against his head. It could not be ascertained whether it was these blows that caused the loss of consciousness.

II. Legal appraisal

16. 1. In the opinion of the Juvenile Division, the intentional bodily harm by the accused R. during the initial fight was justified by the consent of his opponent (Article 228 StGB). A conviction for bodily harm resulting in death (Article 227 StGB) or negligent killing (Article 222 StBG) is ruled out, since it could not be determined that his punches at the end of the overall event were causal for M. 's death, or accelerated his death.

17. 2. a) The accused K. was guilty of negligent killing because his punch against M. 's temple was causal for his death and the outcome of death was objectively attributable to him; because with his punches, he had put M. in a state in which he was defenseless against the further assaults of the accused R. , and thus created a legally disapproved danger that materialized with the occurrence of death. The accused R. had further intensified the danger that existed in the form of an already manifest weakening of M. , which is why his intentional intervention does not prevent accountability.

18. b) The accused K. cannot be punished for bodily harm resulting in death (Article 227 StGB). It is true that his blow to the temple would have been the cause of death even if the subsequent blows to the accused R. had caused the loss of consciousness. However, there must be a specific risk connection between the bodily harm and the outcome of death in such a way that the fatal outcome is the very manifestation of the danger inherent in the bodily harm and unique to it. This presupposes that the death of the injured person was caused directly by the bodily harm committed by the perpetrator.

19. Even according to the principles of successive complicity, neither the previous beatings of the accused R. , U. and Bu. nor the subsequent beatings of the accused R. could be attributed to the accused K. . At the time of his intervention, their assaults had already ended. There were no

indications of a communicative act that would have produced agreement between him and the others.

20. c) Since the accused K. acted as a single perpetrator, criminal liability for a jointly committed bodily harm (Article 224, paragraph 1, no. 4 StGB) does not apply. The powerful punch against the temple, which clearly marked M. , was also not a method that poses a danger to life (Article 224, paragraph 1, no. 5 StGB), because it could not be proved that the blow was suitable to endanger M. 's life in concrete terms.

B. Appeal of the accused K.

21. The review of the judgment prompted by the assignment of error concerning substantive law did not result in any legal error to the detriment of the accused K. , even insofar as the order for placement in an addiction treatment facility (Article 64 StGB) was rejected. The findings are based on a legally error-free appraisal of the evidence. In particular, they carry the guilty verdict for negligent killing in combination with intentional bodily harm and – as in the case of the accused U. (cf. C.I.) – with participation in a brawl (" S. " set of facts).

I. Guilty Verdict of Involuntary Killing

22. 1. Criminal liability for negligent killing under Article 222 of the Criminal Code presupposes that the behavior of the perpetrator relevant to the facts of the case caused the death and that the outcome is based on negligence. The linking of several

contexts of action does not eliminate causality as long as the action of the perpetrator continues to have an effect until the outcome is achieved (cf. BGH /Federal Court of Justice/, judgment of 3 July 1959 – 4 StR 196/59 no. 6). Anyone who commits an objective breach of duty acts in negligence provided he/she was able to avoid it based on his/her subjective knowledge and abilities, and it was objectively and subjectively foreseeable that the breach of duty would bring about the outcome (longstanding jurisprudence; cf. BGH judgment of 4 September 2014 – 4 StR 473/13 no. 32 with further references).

23. 2. The Juvenile Division affirmed these requirements without any legal error.

24. a) The massive blows of the accused K. were causal for the death of M. according to both factual alternatives that were considered possible, i.e. also in the case of a mere clouding of consciousness caused by this.

25. b) The behavior of the accused K. was objectively and subjectively in breach of his duty of care because he also attacked M. , even though he knew that only a fight between the accused R. and M. had been arranged and that the accused Bu. and U. had not kept to this agreement.

26. c) The onset of the outcome was also objectively and subjectively foreseeable, as the Juvenile Division clearly demonstrated in its appraisal of the evidence. The defendant K. had to reckon with the fact that the co-accused R. would inflict further blows on the injured party in order to still end the fight as the winner. He also had to reckon with blows from other participants because his own intervention was already not in line with the agreed fight between R. and

M. , and before him Bu. and U. had already intervened, also by punching the victim in the head. It was objective and also foreseeable for him that their and his behavior would incite other supporters, but also the "initiator" R. , to engage in comparable actions, especially punches to the head, and that massive and repeated violence to the head of a human could lead to his/her death.

27. d) The Juvenile Division also correctly affirmed the causality in the sense of a continued effect of the perpetrator's actions up to the point of death in the form of a linking of action and causal connections (cf. BGH, judgment of 4 September 2014 – 4 StR 473/13, no. 43, 46 with further references: Restrictions on accountability only in the case of self-endangerment, self-damaging behavior or superior expertise; Fischer, StGB, 67th ed., before Article 13, marginal nos. 36 et seq., 38; Article 222, para. 2, 2c, 28) – in this respect with reference to the Judgment of the Federal Court of Justice of 30 August 2000 (2 StR 204/00, there no. 10).

28. According to their correct legal appraisal, the accused K. created a legally relevant danger through his breach of duty, which materialized in the death of M. ; the defendant R. took advantage of this outcome of a weakened opponent as a result of the bodily harm. The perpetrator's actions by the accused K. are causal within the framework of Article 222 of the Criminal Code even if a third party who acts later intentionally contributes to bringing about the same outcome by doing something that is aimed at the same result, provided that he/she only builds on the actions of the perpetrator, i.e. this is the condition of his/her own intervention.

/.../

/.../

E. Appeal by the accessory prosecutor W. regarding the accused K.

58. The appeal, with which the accessory prosecutor seeks a conviction of the accused K. for the crime of bodily harm resulting in death (Article 227 StGB /Criminal Code/) instead of negligent killing in combination with intentional bodily harm (Articles 222, 223 (1) StGB), is unfounded.

59. 1. According to the meaning and purpose of Article 227, paragraph 1 of the Criminal Code, there needs to be a closer connection than mere causality between bodily harm and the fatal outcome. The requirement is intended to counteract the risk of a qualifying death associated with bodily harm. It therefore only applies to those acts of bodily harm that involve the specific risk of resulting in the death of the victim. It was precisely this danger that must have been reflected in the fatal outcome (longstanding jurisprudence; BGH /Federal Court of Justice/, judgment of 9 October 2002 – 5 StR 42/02, BGHSt /Federal Court of Justice in criminal matters/ 48, 34, 37; of 2 February 1960 – 1 StR 14/60, BGHSt 14, 110, 112; of 30 June 1982 – 2 StR 226/82, BGHSt 31, 96, 99; of 16 March 2006 – 4 StR 536/05 no. 10 and of 7 November 2019 – 4 StR 226/19 no. 11). This restrictive interpretation – which is also necessary due to the increased possible minimum sentence – requires an act of assessment (BGH, judgment of 12 February 1992 – 3 StR 481/91 no. 9).

60. According to these principles, the intentional – as opposed to slightly negligent – action of a third party regularly interrupts the attributory nexus (cf. BGH, judgment of 29 June 1983 – 2 StR 150/83, BGHSt 32, 25, 27 f. on a similar case constellation; Fischer, StGB , 67th edition, Article 227 no. 5b).

61. 2. The latter is the case here. The Regional Court did not err when it was not satisfied that the beatings of the accused K. led to the (co-)decisive cause of death of loss of consciousness in the injured party – again based on the principle *in dubio pro reo* (Article 261 stop; cf. BGH, judgment of 29 June 1983 – 2 StR 150/83, BGHSt 32, 25, 27). Rather, it had to be assumed in favor of the accused K. that this cause of death was only created by the co-accused R. who acted with intent. According to the findings, which were made free of legal errors, his subsequent acts of bodily harm are not to be attributed to the accused K. .

62. a) It is true that those who did not inflict the injury themselves but who contributed to the outcome of the injury on the basis of a common crime plan with the will to control the act are also liable to prosecution under Article 227 of the Criminal. However, the prerequisite is that the action of the other perpetrator was fundamentally within the framework of mutual express or tacit consent and that the perpetrator is guilty of negligence with regard to the outcome (cf. BGH, decisions of 5 September 2012 – 2 StR 242/12 no. 14; of 21 August 2019 – 1 StR 191/19 no. 10; of 30 August 2006 – 2 StR 198/06 no. 8; of 9 June 2009 – 4 StR 164/09 no. 5 and of 4 February 2016 – 1 StR 424/15 no. 17 and 1 StR 344/15 no. 17; Judgments of 27 January 2011 –

4 StR 502/10 no. 55 and of 9 October 2002 – 5 StR 42/02, BGHSt 48, 34, 39).

63. However, the Regional Court could not determine such complicit cooperation. Rather, there is the special feature in this case with the accused K. and R. not having had a common plan of action – not even successively during the execution of the crime – which would justify an extended attribution in deviation from the principle that a deliberate intervention by a third party interrupts the specific nexus (cf. on the whole also BGH, judgment of 29 June 1983 - 2 StR 150/83, BGHSt 32, 25, 27 f.). The mere inner approval of the punches of the other is not enough; rather, what is needed is at least a tacit agreement on a work-sharing approach. However, as already stated, there was no such agreement (cf. above D.II. and D.III.); rather, the defendants K. and R. acted as sole perpetrators.

64. b) There is no other element of injustice in this case that would also justify attribution (cf. BGH, judgment of 12 February 1992 – 3 StR 481/91 no. 8 in the event that the beatings of the perpetrator would have already demonstrably resulted in the death of the victim, but the death occurred by means of strangulation by a third party who on behalf of the perpetrator and in his interest wanted to present the death of the victim, who was believed to be dead, as suicide). The interruption of the attributory nexus within the meaning of Article 227 of the Criminal Code due to the intentional actions of the accused R. cannot be overcome by the fact that up to his last violent act there was a uniform overall event that carried the conviction of

all the accused for participation in a brawl. Because a crime committed at the same time does not extend the elements of the offense from Article 227 of the Criminal Code.

65. 3. Finally, it must be left open whether the targeted, powerful punch by the battle wise accused K. against M. 's temple could represent an (abstract) method that poses a danger to life within the meaning of Article 224 (1) no. 5 of the Criminal Code. Because the appeal of the accessory prosecutor W. only requires the appealed judgment to be reviewed for the correct application of the penal provisions that entitles accessory prosecution (cf. BGH, judgment of 21 August 2008 – 3 StR 236/08, BGHR stop Article 400 para. 1 scope of review 4 no. 13). This does not include dangerous bodily harm within the scope of Article 395 para. 2, no. 1 of the Code of Criminal Procedure (cf. BGH, decision of 11 October 2011 – 5 StR 396/11 para. 3).

F. Appeal by the accessory prosecutor B.
regarding the accused K. , R. and U.

I. Restitutio in integrum

66. After missing the deadline to justify the appeal, the accessory prosecutor is to be granted *restitutio in integrum* because she was not at fault for missing the deadline to justify the appeal, as her legal representative submitted in timely fashion and credible manner.

II. Right to Appeal

/.../

[coat of arms]

THE ITALIAN REPUBLIC

In the Name of the Italian People

THE SUPREME COURT OF CASSATION

FIFTH CRIMINAL SECTION

Criminal cassation section V - 04/04/2022, no. 18396

Composed of the Distinguished Magistrates:

Dr. SABEONE Gerardo - President –
Dr. DE GREGORIO Eduardo - Adviser –
Dr. PEZZULLO Rosa - Adviser –
Dr. PISTORELLI Luca - rel. Councilor –
Dr. BRANCACCIO Matilde - Councilor –
passed the following:

JUDGMENT

on the appeal filed by:

D.B.A., born in (OMISSIS); D.R.,
born in (OMISSIS);
M.R., born in (OMISSIS); T.F., born in (OMISSIS);
against the judgment of 7/5/2021 of the Court of Appeals of Rome;
having reviewed the documents, the disputed decision, and the appeal;
having heard the report presented by Counselor Dr. Luca Pistorelli; having heard the Public Prosecutor represented by the Deputy Prosecutor General Dr. EPIDENDIO Tomaso, who concluded for the rejection of the appeals by D., D.B. and M., as well as, with regard to T., for the annulment with referral of the
judgment limited to the disciplinary treatment and for the rejection of the rest of his appeal as well;
having heard the lawyers for the civil parties Fabio Anselmo, Stefano Maccioni, Enrico Maggiore, Massimo Amoroso, Diego Perugini and Massimo Mauro, who concluded by requesting the rejection of the appeals;
having heard the lawyers for the defendants Eugenio Pini, Lara Capitanio, Piero Frattarelli and Giosue' Bruno Naso, who concluded by requesting the acceptance of the appeals filed in the interest of their respective clients.

CONSIDERED AS FACT

1. With the impugned judgment, the Court of Appeals of Rome confirmed the sentence of D.B.A. and D.R. for the crime of multi-aggravated manslaughter, as well as T.F. and M.R. for the crime of multi-aggravated ideological forgery. In partial modification of the first instance ruling and accepting the appeal of the public prosecutor, the Territorial Court also excluded the generic extenuating factors previously recognized against the M., D.B. and D. and recognized, against the last two, the additional aggravating circumstance of
futile motives, originally charged against them, but excluded by the trial judge, also providing for the consequent remodulation of the penalties imposed on the aforementioned defendants.

The case, as reconstructed by the impugned judgment, concerns the death of C.S., who after being arrested on (OMISSIS) for the sale of drugs, was accompanied to the (OMISSIS) Carabinieri police station for the completion of routine photographic and dactyloscopic identification procedures. There, following a dispute that arose with one of the military personnel due to his refusal to submit to the aforementioned procedures, the arrested person was violently beaten by D.B. and D. in the presence of the T. As a result of the injuries sustained on that occasion and the worsening of his condition, following the validation of his arrest, C. was transferred to the hospital (OMISSIS) in Rome, where he died six days after the incidents of (OMISSISI).
As for the causal link between the conduct attributed to the aforementioned D.B. and D. and the fatal event, the impugned judgment implemented the accusatory formulation according to which the injuries caused to the victim - and in particular the compound fracture of one of the sacral vertebrae with the involvement of the posterior roots of the sacral nerve – led to the onset of an atonic neurogenic bladder and anuria, with consequent bladder hyper distension due to the high urinary retention, which was not resolved during C.'s hospital stay due to the insufficiency of the drainage applied to him. A vagal stimulation followed which exacerbated the junctional bradycardia of the victim, ultimately causing the arrhythmia identified as the underlying cause of death.
With regard to the charge contested against M. and T., the Court instead considered it proven that the aforementioned defendants, in drafting the report relating to the arrest of C., falsely attested C.' waiver of legal representation, failing instead to mention what actually happened during the failed attempt to conduct the photographic and fingerprint identification, as well as, above all, the involvement of D.B. and of D. in the arrest operation. Specifically, according to the court, M. was the direct author of the misconduct, while T., aware of the mendacious content of the report, agreed to sign the document as requested by his superior.

2. All the defendants appeal independently against the sentence through their respective defence lawyers.

2.1 The appeal filed on behalf of D.B. presents seven grounds.

2.1.1 The first ground alleges incorrect application of the criminal law and flaws in the reasoning regarding the hearing arranged pursuant to art. 507 c.p.p (the Code of Criminal Procedure), during the first instance trial of the experts who conducted the evidentiary inquiry to determine the cause of C's death and the evaluation of the conflicting conclusions reached by them in the two different instances. In this regards, the appellant complains that the Court of Appeals, instead of ordering e new expert examination and assigning it to different experts, irregularly obtained a new evaluation from the same experts, who had conducted the investigations during the preliminary phase pursuant to Article 392 of the Code of Criminal Procedure. Moreover, this evaluation was not

carried out in the form of an expert report, but rather a mere collection of their new considerations during the trial examination. By so doing the trial judges would have essentially replaced the evidence legitimately obtained during the evidentiary proceedings with a “new” and irregularly obtained evidence, without taking into consideration the findings of the previous expert evaluation, in which any causal connection between the events that occurred after the arrest of C. and his death had been excluded.

(…)

7. The fourth reason for the appeal of D.B. is unfounded and at times inadmissible.

7.1 Indeed, the complaints regarding the failure to consider, as a possible cause of the injuries sustained by C., the fact that he had undergone kickboxing training on the evening of his arrest, are generic. In fact, the appellant does not provide any evidence, which might have been overlooked by the Court, to demonstrate that during training he sustained some injury compatible with the subsequently identified sacral lesion, or even that that evening he was engaged in contact activities of another kind. On the other hand, the judgment, which remained fully uncontested on this point, specified that none of the individuals who met him after the training and before his arrival at (OMISSIS) the station - from his parents to the carabinieri who arrested him, saw any signs of suffering consistent with the aforementioned injury. This implicitly and logically led to the conclusion that citing the training session was irrelevant.

7.2 On the contrary, criticism levelled at the judgment regarding the ascertainment of the causal link between the injuries reported by C. and the conduct attributed to the defendant, are unfounded.

The impugned judgement, like that of the first instance, reconstructed the entire causal chain that led to the death of C., attributing its origin to the conduct of D.B. and D., but recognizing that the final event was also determined by the combination of multiple supervening factors. The judgement considered that the synergy between these factors, along with what it identified as the root cause, contributed to the degenerative process that resulted in the fatal cardiac failure for the victim. In particular, based on the available evidence, the Court first ascertained that the blows inflicted by the two defendants on C, caused him to fall and hit the floor violently, establishing that the impact was the cause of the fracture of the sacral vertebra, later identified as the trigger of the subsequent causal sequence.

7.3 As mentioned, the trial judges did not exclude - and indeed they affirmed - that in the specific case, the structure of the causal explanation is complex and may also involve the negligent omissions of the medical staff and the progressive weakening of C.’s body caused by prolonged lack of nutrition and hydration (it is not well understood, however, what the appeal was intended to refer to, given its generic nature on the point, citing among the supervening causes, the conduct of “the other military" after the intervention of D.B.). To put it simply, they pointed out that such circumstances not only cannot be considered independent of the defendant's action, but also have not actually deviated from the original causal chain, having merely favoured or accelerated its course by not preventing it from developing, thus constituting in this sense mere contributing causes to the event.

In other words, the appellate Court ruled out the possibility that the omission, by subjects other than D.B. and D.,

of intervention that could hypothetically have prevented the progression of the causal chain triggered by them, could constitute a supervening cause that alone could suffice to interrupt the conditional relationship between their conduct and the final event.

7.4 And in this regard, the conclusions of the trial judges are consistent with the teachings of this Court, according to which the causal connection between the alleged harmful action and the resulting event is not interrupted by the intermediate omission of the conduct that hypothetically could have prevented the occurrence of the event itself, unless it constitutes an unpredictable fact or an entirely atypical development of the causal chain (ex multis Sec. 5, No. 45241 of 19/10/2021, D'Onofrio, Rv. 282285; Sec. 4, Judgment No. 25560 of 02/05/2017, Schiavone, Rv. 269976; Sec. 1, Judgment No. 36724 of 18/06/2015, Ferrito, Rv. 264534; Sec. 5, Judgment No. 35709 of 02/07/2014, Desogus, Rv. 260315; Sec. 5, Judgement No. 39389 of 03/07/2012, Martena, Rv. 254320; Sec. 5, Judgment No. 29075 of 23/05/2012, Barbagallo, Rv. 253316; Sec. 4, Judgment No. 41943 of 04/10/2006, Lestingi, Rv. 235537; Sec. 5, Judgment No. 17394 of 22/03/2005, D'Iginio, Rev. 231634).
If the conditions are met, this omission may potentially constitute the basis for asserting the concurrent liability of the negligent party, whereas in the specific case, the omissions attributed to the medical personnel (only vaguely mentioned by the appellant), such as the alleged refusal of the victim to eat properly, were not considered unpredictable or atypical developments of the causal sequence.

7.5 Even by resorting to the "risk theory", in its jurisprudential interpretation of which the appellant claims the trial judges failed to apply, the conclusions reached are no different than those outlined in the impugned judgement.

As is known, in the constant search for an efficient tool capable of containing the excessive expansive force of imputation of fact determined by conditionalism, even in the legitimacy jurisprudence an approach has been established, according to which the causal link between conduct and event is interrupted, when the supervening cause triggers a new and incommensurable risk, completely incongruous with respect to the original risk activated by the original conduct (Sec. 4, Judgment No. 22691 of 02/25/2020, Romagnolo, Rv. 279513; conf. 276238; 274829; Sec. 4, Judgment No. 3312 of 02/12/2016, filed 2017, Zarcone, 269001; Sec. 4, Judgment No. 05/05/2015 Sorrentino, Rv. 264365).

One may agree with reservation regarding the correctness, anchoring the imputation of the event to the author of the conduct, which nonetheless constitutes a necessary antecedent, to the objective unpredictability of the supervening cause. In this way, there is a tendency to transfer assessments of the ex-ante foreseeability of the event by the concrete agent, which pertain to the sphere of culpability and the limits of causality in negligent offenses, onto the posterior determination of the causal connection. Even if one were to limit the issue of objective imputation of the event solely to the examination of its concrete occurrence as the realization of the risk originally triggered by the conduct of D.B. and D., the reasoning of the judgment withstands the defensive objections. Indeed, the Court did not exclude - and in fact, as already mentioned, explicitly acknowledged - that the events following the causation of the injuries reported by C., influenced the causal sequence. In fact, it argued that the latter's death constituted the actual concretization of the danger caused by the harmful conduct, denying that these subsequent events generated a new risk compared to that originally caused by the defendants.
Moreover, the appellant's complaints on this point ultimately boil down to the objection that the causal chain triggered by the harmful conduct ended with the victim emptying the bladder, so that the cardiac crisis generated by its subsequent filling should be solely attributed to the negligent conduct of hospital health workers (omissis).

Even if we were to disregard the vagueness of the factual references evoked in the appeal, according to the defence's arguments, we would even have to deny the identification of the harmful conduct as a necessary causal antecedent of the fatal event, should even be denied, hypothetically determined by a totally autonomous and independent series of events, which would ignore the very causes of the hospitalization of the victim, regardless of their apodictic insignificance in the production of the outcome. To put it more simply, it is sufficient to highlight the point, as stated in both judgments of merit, that even the new abnormal filling of the bladder was a consequence of the sacral injury, and therefore, any negligent catheter maintenance is an event that occurs downstream of this event, thus not generating any new unforeseen risk compared to what has already occurred.

7.6 Furthermore, the objection claiming that the Court had excluded the relevance of the subsequent causes without evaluating whether their interruptive effect could potentially be achieved through their synergy, is also generic. In fact, it is an objection based on a purely conjectural hypothesis and moreover, it fails to deal with the actual argumentative development of the judgment, which has accurately reconstructed the sequence of events that occurred between the beating of C. by the defendants and his death, highlighting the intimate causal connection and the synergistic action in the production of the event.

7.7 Finally, the appellant further argues that the causal sequence and the event were not foreseeable by the defendant. Although this issue is raised in the context of the grounds of appeal - as indicated by its title – focused on the existence of the causal link, the appellant's objections also indiscriminately touch upon the issue of subjective elements.

Regarding the irrelevance of the predictability of the event for establishing the conditional link - especially in the perspective evoked by the appeal - it has already been addressed.

On the aspect of culpability, the articulated complaints are merely assertive since there is no argument presented as to why the causal sequence would have been abnormal compared to the nature of the conduct and its immediate injurious consequences. However, the appellant fails to consider the now well-established stance of this Court, according to which the subjective element of the crime of manslaughter is not constituted by intent and objective liability, nor by a mixed intent of both harm and negligence, but solely by the intent to inflict blows or cause injuries, as provided for in Article 43 of the Criminal Code, which prescribes the foreseeability of a more serious outcome with the intent to achieve a certain result. Therefore, the assessment related to the predictability of the event on which the existence of the crime in question depends, is within the same legislative provision, as it absolutely probable that a violent action against a person could result in the death of that person (ex multis Sec. 5, Judgment No. 287728706 of 24/05/2018, Picilli, not limited; Sec. 5, Judgment No. 44986 of 21/09/2016, Mule', Rv. 268299; Section 5, Judgment No. 791 of 18/10/2012, (dep. 2013), Palazzolo, Rv. 254386; Sec. 5, Judgment No. 40389 of 17/05/2012, Perini, Rv. 253357; Sec. 5, Judgment No. 35582 of 27/6/2012, Tarantino, Rv. 253536; Sec. 5, Judgment No. 16285 of 16/03/2010, Baldissin, Rv. 247267; Sec. 5, Judgment No. 13673 of 8/3/2006, Haile, Rv. 234552; Sec. 5, Judgment No. 13114 of 13/02/2002, Izzo, Rv. 222054).

Moreover, it is worth noting that even if one were to entertain the implicit criticism of this principle contained in the general invitation to this Court to seek the opinion of the Constitutional Court, the issue of foreseeability of the event in the present case is certainly beyond dispute. This is due to the manner in which the defendants assaulted the victim, delivering violent blows to the face and sacral area, thus causing internal injuries that anyone can

reasonably foresee as a predictable consequence of such actions. Consequently, it is predictable that these actions may trigger a degenerative process capable of having even lethal outcomes. It is irrelevant that the perpetrator should envision the exact specific causal course that has occurred, or that the victim should seek medical treatment and that such treatment could be negligently or incompetently omitted or not correctly provided.

[coat of arms] 07205-23

THE ITALIAN REPUBLIC

In the Name of the Italian People

THE SUPREME COURT OF CASSATION

FIFTH CRIMINAL SECTION

Composed of

CARLO ZAZA	President	Judg. No. sec. 3070/2022
MARIA TERESA BELMONTE	Rapporteur	P.U. 09/11/2022
ELISABETTA MARIA MOROSINI		R.G. 23291/2021
MATILDE BRANCACCIO		
MICHELE CUOCO		

pronounced the following

JUDGMENT

on the appeal filed by the defendant

MESSINA ALDO born in TRAPANI on 14/07/1955

As well as the civil parties

MINISTERO dell' INTERNO (Ministry of Interior)

Against the judgment of 10/12/2020 of the Court of Appels of PALERMO

Having reviewed the documents, the impugned decision and the appeal

After hearing the report delivered by Counsellor Maria Teresa BELMONTE

After hearing the closing arguments of the Public Prosecutor, represented by Deputy Attorney General Andrea VENEGONI, who concluded in favour of accepting the third argument put forward by the civil

parties, with the annulment of the corresponding civil ruling, and referral to the competent civil judge for valuation, along with any subsequent ruling, as stated in the submitted closing arguments.

(...)

CONSIDERED AS FACT

1. By a judgment of the Court of Palermo dated 12 March 2019, the former mayor of Ustica, Aldo Messina, was found guilty of the offenses under Articles 328 and 586 of the Penal Code because, through his omissive conduct, from March 2012 to 10 June 2013 (the date of the termination of his mayoral duties), he failed to take appropriate measures to ensure the minimum safety conditions of the Ustica port area, known as the "ex sirena" quay. This omission resulted in the death of two minors, Bartolomeo Licciardi and Fadi Sta, who, in the late evening of 9 August 2012, got into a car left parked in the port area with the keys inside. Due to Licciardi's inexperienced driving, he performed an imprudent reverse manoeuvre that caused the vehicle to plunge into the sea, resulting in their loss of life. The Court imposed a sentence to Aldo Messina deemed to be just (eight months of imprisonment for the offense under Article 328 of the Penal Code and two years of imprisonment for the offense under Article 586 of the Penal Code). Additionally, jointly with the civil liability of the Municipality of Ustica, Messina was ordered to compensate the civil parties (the parents of Bartolomeo Licciardi) for the damages suffered. The amount of compensation was to be determined separately, with an interim payment of €100,000 each, to be paid by the defendant and the civil liability party. Furthermore, the Court acquitted the defendant of the offense attributed to him under point a), limited to the conduct between August 2009 and February 2012, and excluded the liability of the Ministry of the Interior (also involved in the proceedings as a civil liability party), considering that the factual prerequisites for the Mayor of Ustica to act under Article 54 of the Consolidated Local Authorities Act (T.U.E.L.) were not met. The Court determined that the omissive conduct fell within the scope of the duties of a municipal administrator rather than those of a government official.

(...)

3.5. The last argument pertains to the crime referred to in section B), specifically regarding the existence of a causal link, where the Court of Appeals, in considering the assessment of the so-called lawful alternative behaviour, allegedly reached the illogical conclusion that, had the provisions stated in the impugned judgment been respected, the dual fatal event would certainly not have occurred. The Defence argues, in fact, that only the complete closure of the platform to vehicular traffic and parking would have

prevented the incident, an option that would, however, have resulted in the subsequent closure of the island's connections to the mainland. On the other hand, the two lower court judges do not agree on the identification of the neglected measure, with the Court referring to the notes from the Harbour Master's Office of 2012, and the Court of Appeals referring to the ordinances provided for in Article 54 of the Local Authorities Consolidation Act.

3.5.1. Furthermore, regarding the paradigm of foreseeability in the concrete actions of the actual agent, as established by the Joint Sections in relation to the so-called culpa in re illicita, of which Article 586 of the Penal Code is an expression, it is noted that, indeed, in abstract terms, it was foreseeable that the critical conditions present in the port area could lead to vehicles plunging into the sea while in transit. However, no one specifically raised the urgency of setting up barriers, and, on the other hand, the danger was eliminated three years after the tragic event, with expenses incurred by the Region amounting to hundreds of thousands of euros. In any case, it is argued that the reckless and inexperienced conduct of the two boys alone constitutes a supervening cause sufficient to cause the event.

(...)

6.2.1. Indeed, it is worth recalling that, according to consistent jurisprudential orientation, supervening causes capable of excluding the causal relationship are both those that trigger a causal process completely independent from the one determined by the conduct of the agent and those that, although part of the causal process related to such conduct (whether active or omissive), are characterized by absolute anomaly and exceptional circumstances, falling outside the realm of normal, reasonable probability (Section 4, No. 53541 of 26/10/2017, Rv. 271846 – By applying this principle, the Court considered the impugned judgment immune from censure, as it had ruled out the interruption of the causal link between the defendant's negligent conduct, consisting of driving a car downhill without engaging the handbrake, and the death of the victim, who was run over by that car. It was foreseeable that the vehicle could collide with people in its path and that someone might recklessly attempt to stop it and be hit by it). Similarly, pursuant to Section 4, No. 43168 of 21/06/2013, Rv. 258085, in a case of manslaughter due to the drowning of a child under the age of three, attributed to the manager of a pool with a waterslide that lacked adequate fencing and an efficient surveillance service, it was considered that neither the child out of parental control nor the culpable lack of supervision by the parents could be qualified as exceptional and unforeseeable events. In essence, for the purpose of assessing the possible interruption of the causal link between conduct and event, the concept of a supervening cause alone, sufficient to determine the event, refers not only to cases of a completely independent causal process but also to those where the process is not entirely detached from the antecedent, but is nevertheless characterized by a completely atypical causal path, one that is absolutely anomalous and exceptional, i.e., an event that occurs only in entirely unpredictable cases following the presupposed cause (Section 2, No. 17804 of 18/03/2015, Rv. 263581; cf. Section 4, No. 25689 of 03/05/2016, Rv. 267374).

To sum it up, the interruption of the causal link between conduct and event can be established when the supervening cause triggers a new and immeasurable risk that is entirely incongruous with the original risk activated by the initial conduct. Consequently, in terms of the causal relationship, even the negligent conduct of a subject, which finds its origin and explanation in someone else's negligent conduct, cannot be considered a supervening cause sufficient to determine the event (Section 4, No. 18800 of 13/04/2016, Rv. 267255).

(...)

6.2.2. It is quite evident, then, that if the interruptive effect of the causal link can be attributed to any circumstance that introduces a new or radically excessive risk compared to those that the guarantor is expected to manage, this is precisely what did not occur in the present case, for the reasons that have been extensively discussed, and were correctly evaluated by the appellate court, which ruled out a possibility that the reckless and unskilled conduct of the two victims - which hypothetically could have prevented the progression of the causal chain triggered by Messina's negligence - could constitute a sole supervening cause sufficient to interrupt the conditional relationship between the latter's conduct and the final event. The court maintained that the deaths of the two young individuals, due to the manner in which they occurred, constituted the materialization of the danger resulting from the omission. The Court denied that the subsequent events, specifically driving a car without a license, generated a new risk compared to the one originally caused by the defendant.

Therefore, the impugned judgment appropriately identified the causal link and acknowledged the materialization of the danger that due diligence would have prevented, given that the dangerous situation that had been present for years was precisely the one associated with unrestricted access to the platform. Consequently, the measures to be taken (as was already the case in 2009-2010) could only go in that direction, which, logically, would have prevented the same situation that occurred in this case. Specifically, it would have prevented people from freely accessing the platform by car, leaving it there, and walking away. Similarly, it would have prevented the boys from freely accessing the platform on foot.

The Court of Appeals conducted a comprehensive examination of the specific case, which led them, based on a consistent inferential reasoning in line with the aforementioned principles and supported by the highlighted factual elements, to identify the concrete culpability of the agent. In the absence of independent causes interrupting the causal link, the court also deemed the event to be rationally foreseeable and avoidable in the specific situation in which the defendant acted.

[coat of arms]

THE ITALIAN REPUBLIC

In the Name of the Italian People

THE SUPREME COURT OF CASSATION

FOURTH CRIMINAL SECTION

REPUBLIC OF ITALY
IN THE NAME OF THE ITALIAN PEOPLE 17
THE SUPREME COURT OF CASSSATION **39617/07**
FOURTH CRIMINAL SECTION

PUBLIC HEARING
OF 11/07/2007

JUDGMENT
N. ***1155***

Composed of the Distinguished Members:

	Dr COCO GIOVANI SILVIO	PRESIDENT	
1.	Dr CAMPANATO GRAZIANA	ADVISOR	GENEREAL REGISTER
2.	Dr BRUSCO CARLO GIUSEPPE	ADVISOR	N. 011255/2006
3.	Dr ROMIS VINCENZO	ADVISOR	
4.	Dr FOTO GIACOMO	ADVISOR	

Rendered the following

JUDGMENT / ~~ORDER~~

on the appeal filed by:

1) TAMBORINI CORRADO N. ON 06/04/1980

against the JUDGMENT of 09/30/2005

COURT OF APPEAL of MILAN

Having considered the acts, the sentence and the appeal

having heard in PUBLIC HEARING the report prepared by Advisor BRUSCO CARLO GIUSEPPE

/handwritten:/
Having heard the Attorney General Dr Antonio GIALANELLA, who found that the appeal should be rejected.

The Court observes:

I) TAMBURINI CORRADO filed an appeal against the sentence of 30 September 2005 of the Court of Appeal of Milan which confirmed the judgment of 26 November 2004 of the Court of Varese which had sentenced him as determined by the trial panel for the crime of manslaughter against ACQUATI FABIO.

The trial judges established that the accident which had caused the death of the injured party had occurred on 22 April 2000 in Buguggiate. The accused, driving a motorcycle, had hit ACQUATI who was riding a bicycle and who had entered the provincial road on which was travelling the accused without giving him way as he should have.

TAMBORINI's fault was recognized as he was speeding (about 100 km instead of 90 as per the speed limit) especially since the contested sentence finds that the speed should have been further reduced because of the presence of a road intersection.

II) As a basis for the appeal, TAMBORINI CORRADO put forward the following grounds for complaint:

- the violation of the articles 40 and 41 criminal code as well as the lack of motivation; the exceptional nature of the cyclist's conduct constitutes in fact a factor capable of interrupting the causal relationship between the agent's conduct and the event; according to the appellant, it results that the circumstance confirmed by the appeal judges according to which during the mentioned incident and in light of the conditions in the area the appellant would have maintained an inappropriate speed, becomes irrelevant;

- the obvious illogicality of the reasoning because the contested sentence would have first qualified the cyclist's conduct as unpredictable and, in another part of the sentence, as predictable.

III) The appeal is unfounded and must consequently be rejected.

The first ground of appeal once again brings to the attention of this Court the problem of the interpretation of art. 41 paragraph 2 of the Code of Criminal Procedure *("The supervening causes exclude the causal relationship when they alone were sufficient to determine the event").*

The terms of the decades-long debate on the interpretation to be given to this provision are known, the purpose of which, according to the predominant opinion, is to temper the rigor

deriving from the mechanical application of the general principle contained in the first paragraph of the art. 41 in question, which is considered to have accepted the conditional principle or the principle of the equivalence of causes *("condicio sine qua non"*): the nexus of conditioning exists, and the conduct can be considered the cause of an event, if it cannot be mentally eliminated without that the event is lost.

The doctrine states that if the second paragraph in question were interpreted in the sense that the causal relationship was to be considered excluded only in the case of a completely autonomous causal process, it would probably be a useless provision because, in these cases, one could achieve exclusion also through the application of the conditional principle.

Therefore, according to this orientation, it must be a process not completely detached from the antecedent but characterized - according to the various theories of causality (which in reality do not differ significantly on this subject; except perhaps the theory of "adequate causality") - by a completely atypical causal journey, of an absolutely anomalous and exceptional nature; of an event that does not occur except in completely unforeseeable cases following the assumed cause.

The example reported in the ministerial report on the criminal code is well known: the agent brought about a precedent of the event (he injured the injured person) but death was caused by the fire in the hospital where the injured person had been hospitalized. Which, in fact, not only does not constitute the typical causal path (such as, for example, death following injury) but creates a completely anomalous line of development of the conduct, unpredictable in the abstract and unpredictable for the agent who cannot represent it in advance as resulting from his action or omission (the latter aspect regards the subjective element but the problem, from the point of view of the objective element of the offence, arises in analogous terms).

This elaboration of the concept of supervening cause has been also reaffirmed, on several occasions, by the jurisprudence of legitimacy (cons., among many others, Cass., section I, 10 June 1998 n. 11024, Cerando; 12 November 1997 n. 11124, Insirello; section IV, 21 October 1997 n. 10760, Lini; 19 December 1996 n. 578, Fundarò; 6 December 1990 n. 4793, Bonetti; 12 July 1990 n. 12048, Gotta).

IV) The exceptional and unpredictable nature of the supervening fact is however a typical assessment referred to the trial judge who must logically evaluate his conviction on this point.

This happened in the case in question because the very nature of the place, according to the judges of first and second instance, made it foreseeable that vehicles would enter the favoured road therefore the precautionary rule required a driving behaviour based on greater prudence and to maintain a speed which, regardless of the imposed limit, would comply with the criteria set forth in art. 141 paragraph 1 of the highway code.

The motorcyclist who ran over the injured person - as the trial judges ascertained - not only failed to comply with this more prudent conduct but even exceeded the imposed limits which, due to the conditions on site, were inadequate.

It follows that the assessment of the trial panel is correct; an evaluation that therefore escapes the scrutiny of legitimacy being free from any illogicality.

V) The second ground of appeal is also unfounded. The trial panel found the cyclist's conduct predictable and there is no contradiction in the contested sentence which, in the part where it refers to the unpredictability of the same conduct, it actually reports an assessment by the expert appointed by the investigating judge evidently not shared by the appeal judge.

VI) The considerations set out above result in the rejection of the appeal with the appellant being ordered to pay the costs of the proceedings.

FOR THESE REASONS

The Supreme Court of Cassation, Criminal Section IV, rejects the appeal and orders the appellant to pay the costs of the proceedings

Thus, decided in Rome on 11 July 2007.

PRESIDENT
(Dr Giovanni Silvio Coco)
/signed/

REPORTING ADVISOR
(Dr Carlo Brusco)
/signed/

/stamp:/
SUPREME COURT OF CASSATION
Criminal Section IV
Deposited in the Registry

Today 26 October 2007

COURT REGISTRY CLERK
Maria Angelilli
/signed/

Judgement

of the Supreme Court

of 10 August 1972

File ref. no. IV KR 153/72

CONCLUSION up to date

The causal link between an act committed by the perpetrator and death of the person injured by the perpetrator is not interrupted by inclusion in the causal chain of circumstances being beyond the perpetrator's control if it has been determined that the result of death was comprised by the intent of the perpetrator (requisite or conceivable).

REASONS

(...)

Sentence

The Supreme Court, having reviewed on 10 August 1972 the case of Bolesław B. and Stanisław W., accused pursuant to Article 148 § 1 of the Criminal Code, under the appeal brought up by the prosecutor and the defendants against the judgment of the Regional Court in Olsztyn of 24 February 1972,

upholds the appealed judgement in force (...).

Reasons in fact

The Regional Court in Olsztyn, having reviewed the case of Bolesław B. and Stanisław W., who were accused that: on the day of 13 February 1971 r. in [the locality of] K., acting jointly and in agreement, as well as predicting the likelihood of killing Tadeusz B. and accepting this result, they used hazardous objects – a knife in the case of Bolesław B., and the metal buckle of a military uniform belt in the case of Stanisław W. – to inflict a number of bleeding injuries to the head, forearm and hand that resulted in severe exsanguination, which in conjunction with body hypothermia caused by loss of consciousness as a result of the sustained injuries and having left Tadeusz B. behind in low ambient air temperature, caused his death, i.e. accused of the criminal act punishable under Article 148 of the Criminal Code, by force of its judgement of 24 February 1972 ruled the defendants guilty of committing the alleged act and pursuant to Article 148 § 1 of the Criminal Code and Article 40 § 1 and Article 44 § 1 of the Criminal Code sentenced each of the defendants to the penalty of 12 years imprisonment and disqualification from public rights for a period of 4 years.

(...)

Reasons in law

The Supreme Court considered as follows:

(...)

Namely, having been hit with a fist in the face by defendant Bolesław B., Tadeusz B. fell down and as he was lying "with his face down to the ground" both defendants inflicted upon him a series of blows, most of them at parts of the back of his head: Bolesław B. – using a knife, and Stanisław W. – using the metal buckle of a military uniform belt, and afterwards the defendants walked away, leaving Tadeusz B. behind unconscious at the site of the act.

As a result of this beating, Tadeusz B. sustained, *inter alia*, five injuries of the occipita, three of which were contused wounds (inflicted with "the buckle") and two were incised wounds (inflicted with the knife).

The Court determined – based on the opinion of the Forensic Medicine Department of the Medical University in G. – that "the mechanism of death was more complex", and attributable to three causes: exsanguination caused by external haemorrhage from the injuries to the head and upper extremities, concussion and leaving Tadeusz B. unconscious in the conditions of severe exsanguination in low ambient air temperature and ground frost, which resulted in body hypothermia and was causally linked with Tadeusz B's death.

It follows from the account presented above that the primary – as it were: leading -cause of Tadeusz B.'s lethal outcome was first of all the injuries to the head sustained as a result of blows inflicted with the knife by defendant Bolesław B. and with the "buckle" by defendant Stanisław W.

Defendant Bolesław B. (who graduated from lower secondary vocational school for the deaf without speech and is a machine turner by occupation) had to realise that by hitting (together with Stanisław W.) Tadeusz B. in the head, and in particular by inflicting blows with a blade of a dagger-shaped knife, he could cause Tadeusz B. to die, and he accepted this outcome. This inference is consolidated by further behaviour of the defendant (as well as of Stanisław W.), i.e. leaving battered Tadeusz B. behind in the conditions posing a hazard to his life, and manifesting, in a gross manner, absolute indifference in respect of Tadeusz B.'s future fate.

Although – as can be seen from the reasons for the appealed judgement – the Regional Court followed a further-reaching thesis, namely concluding that the defendants were aware (predicting the results of) and wilfully accepted (agreeing to the results of) the consequences of their actions and neglectful inactions, nevertheless – in the opinion of the Supreme Court – to assume the defendant's guilt (with conceivable intent) pursuant to Article 148 § 1 of the Criminal Code it is sufficient to determine a causal link between the actions of the defendant and the lethal outcome of Tadeusz B. Noteworthy, according to the legal science doctrine and jurisprudence, the causal link, as the necessary condition of criminal liability for an *actus reus* (i.e. a causal act as stipulated in Article 148 of the Criminal Code) in an event of a neglectful inaction, must be demonstrated not only in the existence of this link

between the conduct of the perpetrator and their inaction (as is the case in formal acts), but also in merging thereof in such a way that it leads to irrefutable inference that the perpetrator predicted and agreed to the fact that the action they had not performed would have prevented the result which in fact did occur.

The Regional Court did not make a conclusive determination to this effect.

As mentioned above, however, it does not change the determination as regards the type and extent of the defendants' guilt, because in its further deliberations the Regional Court arrived at the conclusion – correct in view of the facts of the case – that the intent revealed in the actions of the defendants demonstrates their guilt and the legal qualification of their act.

Indeed, this is the essence of the case, as the causal link between an act committed by the perpetrator and death of the person injured by the perpetrator is not interrupted by inclusion into the causal chain of circumstances being beyond the perpetrator's control if it had been determined that the perpetrator's intent (requisite or conceivable) comprised the result of death.

Going back to the case in question, it should be added that the Regional Court rightly noted that the fact that no damage to larger blood vessels was found in the deceased cannot be taken as a circumstance against the assumption that the defendants could predict and agreed to a "lethal outcome" for Tadeusz B., given that the defendants beat him when it was dark – and additionally both were acting in the state of alcohol intoxication, which in a specific situation and contrary to their intentions could have increased the strength and reduce the aiming accuracy of their blows.

Consequently, in view of the entirety of the presented circumstances, it must be concluded that the appellant has not provided any reasonable grounds to challenge the correctness of the determination of accused Bolesław B.'s guilt and the legal qualification of his perpetrated act.

(...)

Ruling

of the Supreme Court

of 20 February 2020

File ref. no. III KK 420/19

CONCLUSION up-to-date

To assign criminal culpability to a perpetrator for a result, it is sufficient to determine that the perpetrator's actions have been one of the necessary conditions without the fulfilment of which the specific result would not have occurred in a given case. It means that the causal link required for the establishment of criminal liability exists also when other circumstances contributed to the creation of the result, even if they were beyond the perpetrator's control.

REASONS

(...)

Reasons in fact

P. G. is accused that in the night of 10 February 2018, in [the locality of] Ł., (...) voivodship, at P. street, acting with requisite intent he attempted to kill P. K. by inflicting thereupon at least 5 stab wounds to one shoulder, lower lumbar area of the back, the abdominal area in the epigastric region (penetrating wound into the abdominal cavity with evisceration of the gastrocolic omentum), as well as to the upper and lower leg, as a result of which the victim sustained bodily injuries in the form of a superficial stab wound on the left cheek, a stab wound to the right shoulder (deep wound penetrating in the direction of the humeral joint), a stab wound to the left lower lumbar area, a stab wound to the left epigastric region with evisceration of the gastrocolic omentum, a stab wound to the right thigh and a stab wound to the surface of the anterior-lateral aspect of the left lower leg, which caused in the injured person a disturbance of health and impairment of organ function of a degree other than severe; however, the accused did not achieve his objective as a result of an intervention of police officers and immediate medical aid having been provided to the victim; i.e. accused of the criminal act punishable under Article 13 § 1 of the Criminal Code in conjunction with Article 148 § 1 of the Criminal Code.

(...)

Reasons in law

The Supreme Court has noted as follows.

(...)

Contrary to the assertions of the claimant, the Appellate Court did consider – in a manner compliant with the standards stipulated by the provisions of Article 433 § 2 of the Code of Criminal Procedure

and Article 457 § 3 of the Code of Criminal Procedure - the allegation made in the notice of appeal based on the thesis of defective dismissal of an evidence motion to admit evidence in the form of an opinion of expert court forensic pathologist (see pp. 8 - 9 of the reasons for the appellate court judgement), rightly concluding that no objection of unclarity can be raised against the original opinion. The Supreme Court fully shares the determinations of the *ad quem* body and reminds the claimant that any unclarity in respect of this opinion in the appellate proceedings was only related to the fact that the court expert did not address the reasons for performing the second surgery. The Appellate Court was indeed right in considering this circumstance as irrelevant for its evaluation of the opinion as fully valid evidence material - and moreover useful for the determination of issues of importance for the resolution on the merits of the case, because the court expert demonstrated unequivocally that the reason for which he changed his opinion and arrived at the conclusion that the injuries of the victim caused a disease that posed a real threat to the victim's life, in the meaning of Article 156 § 1 pkt 2 of the Criminal Code, was the finding in the course of the second surgery of a damage to the lumen of the small intestine and the resulting spillage of faecal matter. The intestine injury, on the other hand, had in turn been caused by a sharp object and any other reason of this damage must be excluded, which was rightly determined by the Appellate Court and is confirmed by the medical documentation (par. 485).

In this situation, the reason of why the spillage of faecal matter was not noticed during the first surgery was not relevant in the context of the classification of bodily injuries sustained by the injured person as a result of acts committed by the convicted offender. It is indeed beyond any doubt that there is a causal link required by the criminal law between the actions of P. G. who inflicted the wound and the life-threatening condition resulting from the spillage of faecal matter. To hold the perpetrator criminally liable for a result, it is sufficient to determine that his actions constituted one of the necessary conditions without the materialisation of which the specific result would not have occurred in this case. It means that the causal link underlying the assignment of criminal liability also applies when other circumstances – even if beyond the perpetrator's control - contributed to the creation of this result (see judgement of the Appellate Court in Poznań of 13 December 2012, file ref. no. II AKa 256/12, LEX no. 1307473 and judgements of the Appellate Court in Warsaw of 8 July 2013, file ref. no. II AKa 151/13, LEX no. 1372470, and of 4 Sptember 2017 r., file ref. no. **II AKa 172/17**, LEX no. 2686679).

(...)

ECLI:NL:HR:2023:493[1]

Share pronunciation

Authority: High Council

Date statement: 04-04-2023

Date publication: 04-04-2023

Case number: 21/04302

Formal relationships: In cassation on: ECLI:NL:GHAMS:2021:2913
Conclusion: ECLI:NL:PHR:2023:169

Jurisdictions: Criminal law

Special characteristics: cassation

Content indication

Co-perpetration of unlawful deprivation of liberty in which the victim has died (art. 282.3 Sr). Causal connection between the behavior of the suspect and the dead victim? HR repeats relevant considerations from HR:2012:BT6362 with regard to the reasonable attribution of a consequence to the suspect. The Court has established the following. The Defendant and his co-perpetrators kept the victim deprived of his freedom, after the victim had been kept deprived of his freedom for some time by others that day and had been mistreated. The suspect was furious and wanted money from the victim, but the victim could not get any money. At some point, the victim was forcefully put in the car and the suspect and his co-perpetrators drove off with the victim. No one in the car would tell the victim where they were going. After the victim was taken away, he was assaulted several times by the suspect and his co-perpetrators. A firearm was also shown to him. After the victim had been deprived of his freedom by the suspect and his co-perpetrators for almost two hours, they arrived in the dark at a quiet place, namely a beach in Almere, where another firearm was shown to the victim. The suspect then pointed at the victim with a firearm and told him not to play pranks. The victim then fled into ice-cold water, after which the suspect and his co-perpetrators went looking for the victim because the suspect wanted the victim to come back and stand next to him again. The suspect and his co-perpetrators have not found the victim. The victim drowned after fleeing into the water.

The Court of Appeal has ruled that the death of the victim can reasonably be attributed (partly) to the suspect as a result of unlawful deprivation of liberty. The Court has based its judgment, among other things, on the fact that the victim was in an "extremely threatening and hopeless situation for him at that time" as a result of the behavior of the Defendant and his co-perpetrators, and that the victim apparently saw no other way out than to undertake a high-risk escape attempt by to enter the water, which killed him. That judgment of the Court

[1] Translation available at: https://uitspraken-rechtspraak-nl.translate.goog/?_x_tr_sl=nl&_x_tr_tl=en&_x_tr_hl=nl&_x_tr_pto=wapp&_x_tr_hist=true#!/details?id=ECLI:NL:HR:2023:493

of Appeal, which is partly based on those circumstances, does not show an incorrect interpretation of the law and is not incomprehensible.

Follows rejection. Connection with 21/04245.

LocationsRechtspraak.nl
SR-Updates.nl 2023-0081
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NJ 2023/142
RvdW 2023/457
JIN 2023/68 with annotation by mr. C. van Oort

Share Enriched pronunciation

Pronunciation

SUPREME COURT OF THE NETHERLANDS

PENALTY ROOM

Number 21/04302

Date April 4, 2023

JUDGMENT

on the appeal in cassation against a judgment of the Amsterdam Court of Appeal of 8 October 2021, number 23-003567-19, in the criminal case

in return for

[suspect],

born in [place of birth] on [date of birth] 1976,

hereafter: the suspect.

1. Proceedings in cassation

The appeal has been lodged by the accused. RJ Baumgardt, P. van Dongen and S. van den Akker, all lawyers in Rotterdam, have proposed grounds for cassation on their behalf. The script is attached to this judgment and forms part of it.

Advocate General PC Vegter concluded that the appeal should be dismissed.

Counsel for the suspect has responded in writing.

2. Assessment of the second ground of appeal

2.1

The appeal in cassation complains, among other things, about the opinion of the Court of Appeal that the death of [victim] as a result of the unlawful deprivation of liberty committed by the suspect and his co-perpetrators can (partly) be attributed to the suspect.

2.2.1

It has been proven against the accused that:

"on 1 December 2016 in Wormerveer, municipality of Zaanstad, and Almere and/or elsewhere in the Netherlands, together and in association with others, he deliberately kept [victim] unlawfully deprived of liberty, after all, he, the Defendant, and his co-perpetrators have

- forcing the [victim] into a vehicle that had entered the garage [A] or having it seated and
- who moved [victim] to Almere and
- who transported [victim] to a small beach on the Strandweg in Almere and
- let [victim] get out of the vehicle and
- shown a firearm to that [victim] and
- applied physical violence to that [victim] and
- created a threatening situation for that [victim],

after which that [victim] got into the water, as a result of which that [victim] died."

2.2.2

This finding of fact is based on the evidence as set out in the Opinion of the Advocate General under 7.

2.2.3

The court further considered the following with regard to the conviction:

"Unlawful deprivation of liberty

On December 1, 2016, [victim] arrived at garage [A] in [town] between 12:21 pm and 12:36 pm. [Involved person 1], the owner of the garage, pushed [victim] to the ground and against a container with tools, as a result of which [victim] was visibly in pain. [Victim] then had to take a seat in the cafeteria of the garage from [Involved person 1]. When [victim] wanted to leave the canteen at a certain point, [person concerned 1] yelled at him: "Stay seated". [Involved person 1] also saw to it that [victim] did not leave the canteen. In view of the aforementioned circumstances, in the opinion of the Court of Appeal there was a situation from which [victim] could not escape, so that there was unlawful deprivation of liberty and keeping [victim] deprived by [involved person 1].

(...)

[Victim] was held in the garage until, to be discussed in more detail below, the moment he was taken into the Chrysler. For this [the 7th person involved] (who has now also appeared in the garage) took the coat from [victim]. [victim] therefore left the garage without a coat.

(...)

At around 3:55 pm the Chrysler arrived in the garage with [suspect], [involved person 2] and an NN man. Tens of seconds before that there was contact between the telephones of [the 3rd person concerned] and [suspect]. After the overhead door opened for them, the Chrysler backed into the garage. In the garage, [suspect] hit [victim] and yelled at [victim], because he allegedly owed him money. [Victim] had to get into the Chrysler from [Involved person 1]; he

was forcefully put in the car. Subsequently, the Chrysler with [suspect] , [victim] , [involved person 2] and NN man drove away from the garage. (...)

At around 4:35 pm the Chrysler left the garage with [suspect] , [involved person 2] , the NN man and [victim] in the direction of Almere. [victim] did not know where they were going when they drove on the highway. The telecom data in conjunction with other evidence shows that [victim] had several telephone contacts with [involved person 4] and made an appointment with him at the [neighborhood] station in Almere to obtain money. Around 6:00 pm [Involved person 4] had a meeting with [Involved person 2] and the NN man at that location. They said they came for money. [victim] himself remained in the car with [suspect]. When [Involved person 4] did not give any money, the men left again.

After the meeting with [involved person 4], [suspect] showed a firearm to [victim] in the car, near the Almere-[wijk] station. This was a real weapon. [Suspect], [Involved person 2] and the NN man then drove with [victim] in the Chrysler to Strandweg in Almere-Haven. From 6:21 p.m., almost all connections of the telephone of [suspect] are handled via a transmission tower that (among other things) provides coverage to the beach with the island in front of it, which is located in the Gooimeer. In view of the further events, the Chrysler apparently stopped in the vicinity of the beach on Strandweg. Before he got out of the car with [victim], [suspect] showed a firearm to [victim] for the second time. He pointed this weapon at [victim]. In addition, [suspect] told [victim] that he, [victim], should not make jokes. [Suspect] then left the car with [victim]. [victim] was not wearing a coat at that time (after all, it had been taken off earlier that day), while - it must be assumed, given the time of year - it must have been cold. [footnote: According to the KNMI data (...) that day, measured in Lelystad, it was an average of 7.8 degrees Celsius, with a maximum temperature of 9.3 and a minimum temperature of 5.2 degrees Celsius.] [Involved person 2] and the NN man were in the car. At one point [victim] ran away. [Suspect] ran after [victim] with one of the two other men, so with [involved person 2] or the NN man, but they could not find him. The other man, so the NN man or [person concerned 2], came by car onto the beach to shine with the headlights. Then the car got stuck. [Suspect] wanted [victim] to come back because he wanted his money and did not want [victim] to “go into hiding”.

From the foregoing it appears that until the moment when he ran away from the beach, [victim] was unlawfully deprived of his freedom.

Death of [victim]

The last time that (presumably) [victim] used his telephone was when his telephone was used to call [person concerned 5] at 6:21 pm. When [victim] is called at 7:08 pm, he no longer answers.

On 6 December 2016, [Involved person 5] reported that [victim] may have been taken hostage or missing. On 7 December 2016, [Involved person 5] stated that he had not heard from him since that [victim] called him to help. This took longer than he was used to from [victim].

On December 8, 2016, a Telegram conversation takes place between '[suspect]', being [suspect], and one '[involved person 6]'. This conversation is about [victim] and goes as follows:

(...)

[Involved person 6] : You were there too

[suspect]: Yes, man, we took him with us

[suspect]: he also had to patch me up (court: pay)

(...)

[suspect] : now he is cold without a trace

[Involved person 6] : did he pay

[suspect]: no man, no one wanted to help

[Involved person 6] : you did demolish it (court: abused)

[suspect]: yes

[Involved person 6] : good or just a few blows

[suspect] : but he jumped into the water

[image firearm]

[suspect]: on him.

On December 22, 2016, the remains of [victim] were found in the water of the Gooimeer, near an island, which island is located opposite the beach on the Strandweg in Almere Haven where the Chrysler got stuck. The water temperature at that time was 6 degrees Celsius. Investigation has shown that [victim] did not enter the island. The findings in the NFI report pathology investigation in response to a possible unnatural death (section report) are as follows:

"Given the recent outside temperatures, the post-mortem changes may be consistent with a maximum post-mortem period of approximately 20 days (after which the victim was no longer seen alive) long stay in the water. Only limited lesions (subcutaneous bruises in the left eyebrow, the legs and the back of the trunk) were found. The injuries had occurred shortly before death as a result of external mechanical blunt force, such as bumping, falling or being beaten. They did not contribute to the death. The fluid in the chest cavities may have developed postmortem. However, it cannot be excluded that (part of) this fluid accumulation and the fluid accumulation in the stomach occurred in the context of drowning. The microscopic picture of acute emphysema can also occur in the context of drowning by 'gasping for air'. No toxicological contribution to the circumstances and/or death was found. As far as can be assessed in relation to the post-mortem changes, there were no indications of morbid organ abnormalities that could explain or could have been significant for the onset of death. The conclusion is that no anatomical or toxicological cause was found at the autopsy. In view of the situation at the time of the discovery, drowning should be considered as a possible

cause of death." insofar as can be assessed in connection with the post-mortem changes, no indications of morbid organ abnormalities that could explain or could have been important for the onset of death. The conclusion is that no anatomical or toxicological cause was found at the autopsy. In view of the situation at the time of the discovery, drowning should be considered as a possible cause of death." insofar as can be assessed in connection with the post-mortem changes, no indications of morbid organ abnormalities that could explain or could have been important for the onset of death. The conclusion is that no anatomical or toxicological cause was found at the autopsy. In view of the situation at the time of the discovery, drowning should be considered as a possible cause of death."

On the basis of the foregoing, viewed in conjunction, the court establishes that [victim] fled from [suspect], [involved person 2] and the NN man at the beach in Almere-Haven and entered the water. In this regard, the court considers the statement of [accused] in the Telegram message of 8 December 2016, to the effect that: "he jumped into the water", as an observation by an eyewitness. After all, the body of [victim] had not yet been found at that time. Now that only [suspect], [involved person 2] and NN-man were present on the beach with [victim], jumping into the water of [victim] was observed by one or more of them. The statement of [suspect] that he had heard this information "on the street" has not become plausible. It also does not fit in the context of the other statements that [suspect], with regard to his own behavior (taking along, assault, showing firearm), did to [person concerned 6] at that time. Furthermore, the file does not offer any leads to assume that [victim] entered the water for any other reason than to flee.

No anatomical or toxicological cause of death was found for [victim]. The postmortem changes may fit a maximum postmortem period of 20 days. The pathologist concludes that in view of the situation upon discovery, drowning should be considered as a possible cause of death. This conclusion is in line with what is described in the forensic literature with regard to drowning as a cause of death, namely that drowning as a cause of death cannot be determined by autopsy. However, an autopsy can rule out the possibility of other (morbid) conditions or a toxicological contribution, and indications of drowning can be found.

In view of all the foregoing, viewed in conjunction, and now that a possible alternative cause of death has not become plausible, the court assumes that after his flight into the icy water, [victim] did not come out alive as a result of drowning.

Causal connection between the deprivation of liberty and the death of [victim]

Finally, the question must be answered whether there is a causal connection in a criminal law sense between the unlawful deprivation of liberty by [suspect] , [involved person 2] and the NN man and the death of [victim] . In addition, it must be considered whether the death of [victim] can reasonably be attributed to the behavior of [suspect], [involved person 2] and the NN man, which they performed in the context of this deprivation of liberty. In its judgment of 27 March 2012, ECLI:NL:HR:2012:BT6362, the Supreme Court considered, insofar as relevant:

"Usually, when answering the question of whether there is a causal connection in a criminal sense, there is no doubt that in the chain of events the conduct of the suspect has been a necessary factor for the consequence that has arisen - and that consequence is therefore a condition sine qua non-connection to the conduct, which connection in principle serves as the lower limit of the causal connection -, but the main issue here is whether the consequence that occurred can reasonably be attributed to (the conduct of) the suspect."

As the Court of Appeal has already established above, [victim] entered the water while fleeing from [suspect], [involved person 2] and the NN man, after which he drowned. By their actions, being the unlawful deprivation of liberty of [victim], the suspects set in motion a series of events that eventually led to the death of [victim] . In particular, the court considers the following with regard to this action.

[Suspect], [Involved person 2] and the NN man went with the three of them in the Chrysler of [Involved person 2] to the garage, where [victim] was already being held deprived of his freedom in the canteen. They were numerically in the majority. [Suspect] was furious and hit [victim]. He wanted money from [victim], but [victim] had no money. [victim] was forcefully put in the car of [person involved 2] and then [suspect], [person involved 2] and the NN man drove away with [victim]. The moment they drove on the highway [victim] did not know where they were going and no one in the car wanted to tell him. [Victim] could not say too much when [Involved person 5] had him on the phone and the telephone was also taken from him later. [suspect] , [Involved person 2] and the NN man drove with [victim] to the station Almere [district] in order to collect money from [Involved person 4]. [Victim] stayed behind in the car with [Suspect], while [Involved person 2] and the NN man had a meeting with [Involved person 4], unknown to them, who, however, did not give any money. The court deduces from this that [victim] was kept in the car to prevent him from escaping the power of his assailants, whether or not assisted by [party involved 4]. After the meeting with [involved person 4], [suspect] showed [victim] a firearm. Subsequently, [suspect], [involved person 2] and the NN man took [victim] in the car to Strandweg in Almere, where a small beach is located. Supposedly at that time of year and at that time, a quiet place. It was dark, considering the time of arrival (around 6:21 PM on December 1). The court does not believe the statement of [suspect] that after the meeting with [involved person 4], [victim] had phoned a few boys and that they then had to drive to Almere Haven, because [victim] would have agreed to meet someone there . After all, it appears from the telecom data of [victim] that after the meeting with [involved person 4] he only called out to [involved person 4] and [involved person 5] and only got to speak to [involved person 5] (ZD1, p. 598). Furthermore, as appears from what has been considered above, [victim] was not the one who determined where to go. [Suspect] still wanted money from [victim], which money [victim] still did not have and which he could not get hold of. After all, "nobody wanted to help", said [suspect] in the aforementioned Telegram conversation. Apparently [victim] was also mistreated (apart from the blow he had already received in [suspect]'s garage) after he was taken away by [suspect], [involved person 2] and the NN man. The court hereby takes into account that [suspect] answers 'yes' to the question of '[involved person 6]': 'you did demolish it'.

Furthermore, [victim] has been diagnosed with injuries that occurred shortly before his death. [Suspect] again showed [victim] a firearm at the beach, pointed it at him and said that [victim] should not play any jokes. When [suspect], [involved person 2] and the NN man with [victim] arrived at the beach, they had already kept him deprived of his freedom for almost two hours. They had no intention of releasing [victim], as evidenced by the fact that the three of them went looking for him when he had run away. In addition, [suspect] stated: "I wanted my money. I wanted him to come back. I wanted him to be next to me. When he peers at him, he always goes into hiding."

Due to the nature of the crime, an unlawful deprivation of liberty may result in the victim attempting to escape. Depending on factors such as his fear of those detaining him, the degree of threat posed by the other circumstances of the unlawful deprivation of liberty, his assessment of what is to come and the possible panic in which he finds himself, the victim may or may not be able to not consciously taking risks on his flight.

As a result of the actions of [suspect], [involved person 2] and the NN man as described above, [victim] was in an extremely threatening situation that was also hopeless for him at that time.

It is against this background that he, apparently seeing no other way out, made a risky escape attempt by entering the water, which proved fatal.

Conclusion

The Court of Appeal is of the opinion that, in view of all that has been considered above, the death of [victim] can reasonably be attributed to [suspect], [involved person 2] and the NN man. The charged offense can therefore be legally and convincingly proved."

2.3

The question of whether there is a causal connection between the acts of the suspect and his co-perpetrators described in the conviction and the death of [victim] must be answered on the basis of the criterion of whether that death could reasonably be attributed (partly) to the crime as a result of those acts. The suspect can be attributed (cf. HR 27 March 2012, ECLI:NL:HR:2012:BT6362).

2.4.1

Among other things, the court has established the following. The suspect and his co-perpetrators kept [victim] deprived of his freedom on December 1, 2016, after [victim] had been deprived of his freedom for some time by someone else that day and had been mistreated. The suspect was furious and wanted money from [victim], but [victim] could not get any money. At some point [victim] was forcefully put in a car and the suspect and his co-perpetrators drove away with [victim]. No one in the car wanted to tell [victim] where they were going. After [victim] was taken away, he was assaulted several times by the suspect and his co-perpetrators. A firearm was also shown to him. After [victim] had been deprived of his freedom by the suspect and his co-perpetrators for almost two hours, they arrived in the dark at a quiet place, namely a beach in Almere, where a firearm was again shown to [victim]. The suspect then pointed the firearm at [victim] and told him that he "must not play

pranks". [victim] then fled into the ice-cold water, after which the suspect and his co-perpetrators went looking for [victim] because the suspect wanted [victim] to come back and stand next to him again. The suspect and his co-perpetrators have not found [victim]. [victim] drowned after he had fled into the water. The suspect then pointed the firearm at [victim] and told him that he "must not play pranks". [victim] then fled into the ice-cold water, after which the suspect and his co-perpetrators went looking for [victim] because the suspect wanted [victim] to come back and stand next to him again. The suspect and his co-perpetrators have not found [victim]. [victim] drowned after he had fled into the water. The suspect then pointed the firearm at [victim] and told him that he "must not play pranks". [victim] then fled into the ice-cold water, after which the suspect and his co-perpetrators went looking for [victim] because the suspect wanted [victim] to come back and stand next to him again. The suspect and his co-perpetrators have not found [victim]. [victim] drowned after he had fled into the water.

2.4.2

The court has ruled that the death of [victim] as a result of the unlawful deprivation of liberty can be (partly) attributed to the suspect. The Court of Appeal based that judgment, among other things, on the fact that [victim] was in an "extremely threatening and hopeless situation" as a result of the behavior of the suspect and his co-perpetrators and that [victim] against that background apparently saw no other way out than to make a risky escape attempt by entering the water, which proved fatal. That judgment of the Court of Appeal, which is partly based on those circumstances, does not show an incorrect interpretation of the law and is not incomprehensible.

2.5

The appeal in cassation fails to that extent.

3. Assessment of the other grounds for cassation

The Supreme Court has also assessed the other complaints about the Court of Appeal's ruling. The outcome of this is that these complaints cannot lead to the annulment of that judgment either. The Supreme Court is not required to state reasons for arriving at this ruling. When assessing these complaints, it is not necessary to answer questions that are important for the unity or development of the law (see Article 81 paragraph 1 of the Judicial Organization Act).

4. Decision

The Supreme Court rejected the appeal.

This judgment was rendered by Vice-President V. van den Brink as chairman, and Justices ALJ van Strien and MJ Borgers, in the presence of acting clerk HJS Kea, and pronounced in open court on 4 April 2023 .