

German Citation: “OLG Bamberg in SJZ 1950, 207” or “OLG Bamberg m. Anm. in SJZ (3) 1950, S. 207 – 210”.¹

Criminal Law

[207]

Provincial High Court and Court of Appeal [Oberlandesgericht] Bamberg

§239 Penal Code [StGB]

1. A judge does not act unlawfully who judges on the basis of the so-called “Treachery Act” or any other manifestly unfair national-socialist criminal law. In contrast, it is an unlawful act when one freely decides to report to the police the act of another that fulfills the requirements for an offence in terms of such a law. The informer is considered the indirect perpetrator of the result that the judge brings about lawfully through his judgment.

2. Despite the fact that an act is done in accordance with the authority of a positive law, it is unlawful in terms of § 239 Penal Code when it grossly offends the sense of fairness and justice of all decent people.

In October, 1944, the accused informed on her husband to the local leader of the NSDAP responsible for her area. In 1940, after her husband’s conscription into the army, she had turned towards other men and had conceived the desire to divorce him. Her husband visited her for a day when he was en route to his reserve unit and made derogatory remarks about Hitler and other national socialist political leaders. He expressed his regrets, “that Hitler did not go to the devil on

the 20th of July 1944”. The accused reported this to the local group leader because she believed that “a man who says such things is not fit to live among humans”. The report came to the attention of the district leader and led to a trial by court-martial. She repeated her incriminating testimony as a witness in the proceeding which culminated in her husband being sentenced to death. After more than a week in custody, he was placed on probation and sent to the front and so the death penalty was not carried out.

The trial court held that there was no doubt that the act of the accused did not constitute an illegal deprivation of liberty [§ 239] because it appeared that “the report and thus the detention of her husband were the result of his violation of valid legal provisions and within the framework of a properly carried out judicial process”. It is however a fundamental mistake to presume, as the trial court did, that the legality of the process and findings of a court-martial which resulted in the husband’s conviction confers the character of legality on the report of the accused that led to the initiation and prosecution of this process.

In informing, the accused put in place the first precondition of her husband’s detention. However, she did not cause the detention directly. Rather, the detention came about through the independent decision of the prosecuting authority and the deciding court. This is a case of deprivation of liberty by indirect perpetration. Admittedly, it is said in the literature that there is no such thing as a punishable indirect perpetration when the direct perpetrator acts lawfully (see in particular *Mezger* in ZStrW Bd. 52, 529 ff.). However, following *Ebermeyer-Rosenberg* (6th edition, comment 9 baa to § 47 Penal Code), the court of appeal concludes that one can commit a criminal offense by indirect perpetration even when the proscribed result is directly caused by an instrument to whom a particular justification is available, provided this particular justification, on

the one hand, carries sufficient legal weight to deprive the act of its continuing unlawfulness from the point of view of the instrument's particular position, but, on the other hand, cannot confer legality upon the result caused by the justified instrument. The very case at hand exemplifies the possibility of an act of criminal conduct by indirect perpetration with an intermediary who acts lawfully.

Those criminal courts--either civil special tribunals or courts-martial with jurisdiction over soldiers' offences--which, during national socialist rule, adjudicated matters to do with utterances that constituted an offense under the so-called "Treachery Act" of December 20th 1934 or even of § 5 of the Decree Regarding Special War Penal Law August 11th 1938, applied the positive law of these provisions in fulfilling their judicial duty in terms of § 1 The Court Act. These provisions explicitly served only the protection of the national socialist rulers and unquestionably were grossly unfair statutes. The largest part of the German people perceived these as terror statutes, particularly because of the criminal sanctions the laws threatened which permitted harsh punishments that could in the individual case be cruel. Nevertheless, these laws cannot be labeled as laws that violate the law of nature (which would compel the inference that the judge who applies them acts unlawfully himself and is thus culpable). For these laws did not prescribe any affirmative conduct which is prohibited per se by divine or human law in the opinion of all civilized nations. The provisions rather commanded on pain of punishment an omission, namely to keep silent. By this omission, commanded by the national socialist legislator under pain of criminal penalty, no one violated a duty to act over and above this statute. Thus, even when a judge renders judgment and punishes on the basis of such typically national socialist laws, he does not act unlawfully. This accusation could and should be made when he implements laws that are manifestly against the law of nature.

But one may not therefore conclude that the person is justified who, in the absence of a positive legal prescription, informed of his own free will against another in regard to “treacherous” utterances and thereby set in motion the application of these statutes. Unlike the judge, he doesn’t carry out a *duty* that is imposed upon him because of his particular submission to authority, one which actively requires the realization of the national socialist state’s right to punish grounded in these provisions. He acted instead by virtue of an *authority* to make a report that is granted to every citizen, an authority with no corresponding duty. Someone who intentionally made a report in awareness of its certain or probable serious consequences for its subject, especially in cases where the reported utterances spoke the truth, was condemned by the opinion of ethics and decency that survived among wide swaths of the German people even during national socialist rule. His report was unlawful in terms of the moral, solely authoritative, opinion of the people, which contradicted the interpretation propagated by those in power. It was thus also illegal in terms of § 239 German Penal Code [StGB]. An act is illegal in the terms of this offence even when it arises through an exercise of formal positive authority, provided the exercise of this authority has consequences so serious for another that it violates the sense of justice and fairness of all decent people.

Moreover, the accused acted intentionally. She knew from common experience that informing on her husband would lead to a punishment of at least imprisonment. At the least, she consciously took the risk of these consequences into account. Indeed, the conviction she expressed as the reason for her report—“a man who says such things is not fit to live among humans”—reveals that her intent was directed at the punishment of her husband. It thus supports the conclusion that

she acted with a specific intent thereby to cause the deprivation of her husband's liberty, if not his death.

Thus, her acts constitute all the elements of the crime of deprivation of liberty in terms of § 239 Penal Code [StGB].

Adjudication of 27. 7. 49 – Ws 152/49 –

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