

## Terror and Law – Is the German Legal System able to deal with Terrorism? - The *Bundesgerichtshof* (Federal Court of Justice) decision in the case against *El Motassadeq* -

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Germany was the first country to open trial against a person who has allegedly participated in the 9/11 terror attack in the US. Shortly after September 2001 intelligence services in- and outside Germany concentrated on Hamburg as one of the places where the pilots and their supporters planned the attack.<sup>1</sup> The Moroccan national *Mounir El Motassadeq* was the first who was arrested and charged by the General Federal Prosecutor<sup>2</sup> with (1) abetting murder in 3066 cases<sup>3</sup> and (2) with being a member of a terrorist organisation<sup>4</sup>. The trial took place before the Oberlan-

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<sup>1</sup> A second trial was opened against the Moroccan *Abdelghani Mzoudi* at the OLG Hamburg. He was released on bail on 11 December 2004 and has been found not guilty on 5 February 2004. The public prosecutor has appealed against the acquittal to the BGH.

<sup>2</sup> Cases of national security are to be prosecuted by the General Federal Prosecutor in Karlsruhe by virtue of Section 142a, 120 of the Organisation of the Courts Act (*Gerichtsverfassungsgesetz*).

<sup>3</sup> Punishable under Section 211 of the German Criminal Code.

<sup>4</sup> Punishable under Section 129a of the German Criminal Code, which reads as:

(1) Whoever forms an organization, the objectives or activity of which are directed towards the commission of:

1. murder, manslaughter or genocide (Sections 211, 212 or 220a);  
2. crimes against personal liberty in cases under Sections 239a or 239b; or  
3. crimes under Section 305a or crimes dangerous to the public in cases under Sections 306 to 306c or 307 subsections (1) to (3), 308 subsections (1) to (4), 309 subsections (1) to (5), 313, 314 or 315 subsections (1), 3 or 4, 316b subsections (1) or (3), or 316c subsections (1) to (3), or whoever participates in such an organization as a member,  
shall be punished with imprisonment from one year to ten years.

(2) If the perpetrator is one of the ringleaders or supporters, then imprisonment for no less than three years shall be imposed.

(3) Whoever supports an organization indicated in subsection (1) or recruits for it, shall be punished with imprisonment from six months to five years.

desgericht (Upper Regional Court – OLG) in Hamburg, where the accused resided at that time. He was sentenced by this Court in first instance to 15 years imprisonment – the first conviction for the 9/11 attack. The accused nevertheless appealed to the Bundesgerichtshof – BGH, Federal Court of Justice, and his conviction was quashed and a re-trial ordered at the Court in Hamburg.<sup>5</sup> In reaction to the BGH's decision *Motassadeq* was released from detention pending trial on 8 April 2004. The accused now awaits his re-trial on conditional bail.<sup>6</sup>

The reaction of the media to this release in particular was devastating. At first it seemed that the German criminal justice system was well capable to hand down to justice those who instigated the destruction of the World Trade Centre. German authorities seemed to move both swiftly and thoroughly. Has it all come down to tears now after the BGH has spoken? Reading the newspaper comments one could have this impression. The conservative *Frankfurter Allgemeine Zeitung* wrote the day after the decision on bail: "The release of the Moroccan *Motassadeq* shakes ... the trust in the ability to decide and the effectiveness of our judicial system"<sup>7</sup>. The political and emotional stakes are high. It is nevertheless necessary to take a sober and careful look at the reasoning of the BGH. The conflict which shows then is as old as criminal law itself: liberty versus efficiency.

## I. The Facts

There are two different sets of facts at this case. At first there are the facts established by the Prosecution which are the basis for the verdict of the Oberlandesgericht of Hamburg (1). Secondly there are the explanations given by the defence (2). Naturally both are in conflict with each other. Here is a short outline of both versions.

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(4) The court in its discretion may mitigate the punishment (Section 49 subsection (2)) in cases under subsections (1) and (3) in the case of participants whose guilt is slight or whose participation is of minor significance.

(5) Section 129 subsection (6), shall apply accordingly.

(6) Collateral to imprisonment for at least six months, the court may deprive the person of the capacity to hold public office and the capacity to attain public electoral rights (Section 45 subsection (2)).

(7) In cases under subsections (1) and (2) the court may order supervision of conduct (Section 68 subsection (1)).

A translation of the entire German Criminal Code is available at: <http://www.iuscomp.org/gla/statutes/StGB.htm> (visited 27 April 2004).

<sup>5</sup> BGH Decision of 4 March 2004, Case No. 3 StR 218/2003, reprinted in: *Neue Juristische Wochenschrift* (NJW) 2004, 1259.

<sup>6</sup> The re-trial will probably commence 16 June 2004

<sup>7</sup> FAZ 8 April 2004, p. 1.

The OLG found the following facts: *Motassadeq* started to study mechanics in the Technical University of Hamburg-Harburg in 1995. There he became acquainted to *Mohamed Ed Amir Atta*, *Marwan Alshehhi* and *Ziad Jarrah*, who died in the 9/11 attack as well as to *Ramzi Binalshib*, *Zakariya Essabar* and *Said Bahaji* who are all otherwise charged. In the following time they formed a religious Islamic group and their political and religious persuasions became more and more radical. At latest in the spring of 1999 they decided to prepare for a spectacular terror attack in the USA in order to painfully hit the hated US government. By flying planes into the World Trade Centre they wanted to target an emblematic building and at the same time kill a multitude of US citizens. In 1999 in order to win more support for their plans several members of the group travelled to Afghanistan and met Al Qaeda leader *Usama Bin Laden*. In the meantime the accused *Motassadeq* stayed in Hamburg covering up for his friends' trip to Afghanistan and blur any possible suspicion. In May 2000 the accused himself flew to Afghanistan in order to inform Al Qaeda officials about the progress of the planning. He returned 1 August 2000. Shortly after *Atta*, *Alshehhi* and *Jarrah* entered the USA and started the pilot-training there. In the meantime the accused organised in particular the financial side of the stay of his friends in the USA. The public prosecutor presented namely one money transferral of 5000 DM on the request and to the bank account of *Binalshib* for one of the later pilots. After the successful attack *Motassadeq* decided to remain in Germany and stay with his daughter and his pregnant wife.

The defence did not negate that the accused knew and met with the pilots of the 9/11 attack in Hamburg. It was also admitted that the accused spent some time in Afghanistan. However the reason for this stay, the defence claimed, had nothing to do with the attack. *Motassadeq* was trained there for the fight in Chechnya and learned to use a weapon just as is ordered by Koran.

## II. The Procedure

These two positions were brought forward at trial. The question then was, can the prosecutor's hypothesis be proven beyond reasonable doubt. Points of clear proof for an involvement of the accused with the attacks, there were mainly two: the trip to Afghanistan and the money transmittal. The purposes of both circumstances were unclear. In order for the judges to scrutinise the hypothesis of the prosecutor, *Binalshib* was subpoenaed to testify at trial. As a matter of fact this alleged terrorist was imprisoned in the USA. Not only did the US authorities disallow the witness to testify at trial but even an FBI agent, who appeared at trial was barred from elaborating on this point. In addition the German government ordered the German national intelligence service (Bundesnachrichtendienst - BND) to withhold any in-

formation<sup>8</sup> as regards *Binalshib*. The judges in Hamburg were thus left in total darkness as regards any testimony of *Binalshib* as the person who allegedly requested the money transfer. Nevertheless the Hamburg Oberlandesgericht convicted on the basis of information and evidence stated above.

The defence appealed against this conviction. This is not surprising for mainly three reasons. Firstly, in important criminal cases an appeal to the BGH is almost obligatory. In the legal practice it is seldom the case that a judgment is not being reviewed by the BGH unless there has been a deal. Secondly, however, any accused would have been ill advised not to appeal against this judgement. The evidentiary basis in this instance could hardly have been poorer. Furthermore, the legal question of how a court should deal with a situation where persons are not allowed to appear as witnesses, is always tricky as it is not explicitly addressed in the German Code of Criminal Procedure.<sup>9</sup>

### III. The Law

There are two issues that arise in procedural law. (1) What is to be done with non present witnesses and (2) what is the standard of proof needed for a criminal conviction. Both issues have to do with the overall notion of a fair trial.

#### 1. The procedural requirements

In German law criminal procedure is regulated by the Code of criminal procedure – Strafprozessordnung (StPO). This code however is influenced by the Grundgesetz (Basic Law) and the so-called “Justizgrundrechte”<sup>10</sup> therein as well as by human rights law, in particular as laid down in the European Convention on human rights (ECHR).

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<sup>8</sup> The Government can issue a so-called „Sperrklärung“ by virtue of Section 96 of the German Code of Criminal Procedure: “Submission or delivery of files or of other documents officially impounded by authorities or public officials shall not be requested if their superior authority declares that the publication of these files or documents would be detrimental to the welfare of the Federation or of a German Land. The first sentence shall apply mutatis mutandis to files and other documents held in the custody of a Member of the Federal Parliament or of a Land Parliament or of an employee of a Federal or Land parliamentary group where the agency responsible for authorizing testimony has made a corresponding declaration”.

<sup>9</sup> For an English translation of the code, see <http://www.iuscomp.org/gla/statutes/StPO.htm#96> (visited 27 April 2004).

<sup>10</sup> These are articles 101-104 Grundgesetz.

a. Non-present witnesses

(aa) The principle

Every procedural system has to deal with the problem of non present witnesses. The general rule is, that every witness for the prosecution has to be present at trial so that the accused can “confront” this witness. The “right to confront” a witness is explicitly stated in Article 6 § 3 d ECHR.<sup>11</sup> On the other hand the accused must have the right to call witnesses in his favour. This again is laid down in Article 6 § 3 d ECHR. The German Code of Criminal Procedure has a specific system as concerns the question of calling and questioning witnesses. In Section 244 II StPO the Trial Court is first of all called upon to inquire the truth of the matter.<sup>12</sup> This maxim is of overall importance to the realisation of the “Schuldprinzip”, i.e. the principle that the sentence needs to comply with the guilt.<sup>13</sup> In principle the truth can only be detected, if all witnesses for and against the accused were present and could be examined. A court is however not obliged to rely only on direct evidence. In the Anglo-American trial system, any such testimony would be excluded as “hearsay”.<sup>14</sup> Continental procedural systems rely on the professional experience of the judges to properly evaluate and weigh the evidence.

(bb) Exception

The BGH has developed a rather rough system of dealing with prosecution witnesses which are not present. This jurisprudence contrasts openly with the European Court of human right’s point of view in this regard. Whereas the ECourtHR has clearly stated, that a conviction must not be based on the testimony of a witness who could not be questioned by the defence<sup>15</sup>, the BGH in general upholds a conviction that is based mainly on the evidence on a police informer introduced at trial indirectly.<sup>16</sup> In the decision under review here the BGH refers to this jurisprudence

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<sup>11</sup> Compare ECourtHR *Barberá v. Spain*, Series A No. 211, para. 59.

<sup>12</sup> This is the essential aim of the entire trial process, compare e.g. BVerfGE 63, 45, 61.

<sup>13</sup> The BGH has stressed the connection between the “Schuldprinzip” and the fair trial principle in the decision at hand, NJW 2004, 1261.

<sup>14</sup> *Safferling*, Towards an International Criminal Procedure (2003), 306-309.

<sup>15</sup> See ECourtHR *van Mechelen v. The Netherlands*, Rep. 1997-III, para. 55, 63; see also *Renzikowski*, 54 *Juristenzeitung* 1999, 605.

<sup>16</sup> Compare BGHSt 42, 15, 25; BGH NJW 2001, 2245 and BVerfGE 57, 250, 292 – the difficulties of the German courts with the ECHR in this regard are explained by *Esser*, *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (2002), 677-681; also *Weigend*, 21 *Strafverteidiger* 2001, 63, 64.

stressing, that such information “needs to be scrutinised most thoroughly” (“...bedürfen der sorgfältigsten Überprüfung”)<sup>17</sup>. It is interesting to note that the BGH obviously believes that other evidence does not need to be questioned with the same level of thoroughness. However, in the case at hand, the situation is different. It is not the case that evidence which has been presented to the Court only in an indirect way needs to be evaluated. Here the testimony cannot be introduced at trial at all, not even indirectly. The evidence is entirely unavailable to the Court.<sup>18</sup> The fact that the witness in this case is not a prosecution witness but one of the defence does not change the situation. The search for the truth is materially hampered.

Section 244 III-V StPO gives a list of situations in which evidence does not need to be heard at trial even if the defence has thus requested. In the case at hand Section 244 III StPO is relevant as this norm is applicable to witness evidence. “An application to take evidence may be rejected only if the taking of such evidence is superfluous because the matter is common knowledge, if the fact to be proved is irrelevant to the decision or has already been proved, if the evidence is wholly inappropriate or unobtainable, if the application is made to protract the proceedings, or if an important allegation which is intended to offer proof in exoneration of the defendant can be treated as if the alleged fact were true”<sup>19</sup>.

The only reason to vote down the request of the defence to hear the witness *Binalshib* given in Section 244 III StPO would be that it is unobtainable evidence. However, this is only the case because of the unwillingness of the executive authorities to allow the witness to testify. Without this denial, no other reason given in the Code could apply. This very fact, the BGH stated, must be taken into account by the trial judges when they decide the case.<sup>20</sup>

#### b. Standard of proof

The possibilities of the trial judge to inquire the truth of the case influence the standard of proof. The question of standard of proof is addressed in Section 261 StPO: “The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.” In general a court convicts an accused, if the judges are convinced of the guilt of the accused to such an extent, that all rea-

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<sup>17</sup> BGH NJW 2004, 1261.

<sup>18</sup> BGH NJW 2004, 1261.

<sup>19</sup> § 244 III 2 StPO.

<sup>20</sup> BGH NJW 2004, 1261.

sonable doubts are silenced.<sup>21</sup> One can apply the Anglo-American formula that the guilt must be proven beyond reasonable doubt. Only then the presumption of innocence is disproved.<sup>22</sup> If, however, the judge was not in a position to establish all the significant facts, because he could not question a relevant witness, the very basis on which he is to base his conviction becomes slanted. He therefore (1) has to act very carefully and take into account that the hearing remained incomplete. The BGH calls this "besonders vorsichtige Beweiswürdigung".<sup>23</sup> In addition, the court might (2) have to apply the principle „in dubio pro reo".<sup>24</sup>

(aa) Weighing of evidence

In the judgement the BGH rejected the view, that in the case of non-disclosure of evidence by an official authority the fact that the accused seeks to establish by requesting the presentation of this evidence should be treated as if the alleged fact were true in accordance with Section 244 III 2 StPO.<sup>25</sup> The focus on just this one piece of evidence is wrong. Rather the judge has to look at the evidence before him in its entirety. It can therefore well be, that other evidence is weighty enough to carry a verdict of guilt. However, the more the result of the evidence can be harmonised with the defence case, the closer the non-disclosed evidence comes to the conduct and the more it could therefore serve to clarify the facts of the case, the more the court had to buttress a guilty verdict. This is even more so, when the evidence just points indirectly at the guilt of the accused. This concept is what the BGH calls "careful weighing of evidence".<sup>26</sup>

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<sup>21</sup> See *Meyer-Gofßner*, Strafprozessordnung (46th ed. 2003), § 261 MN 2; *Safferling*, Towards an International Criminal Procedure (2003), 259-60.

<sup>22</sup> The presumption of innocence is integral part of the German criminal procedural order according to Article 6 § 2 ECHR; the ECourHR is reluctant to explicitly stating what the standard of proof needs to be. Nevertheless it has repeatedly stated, that any doubt should benefit the accused; see ECourHR *Barberá v. Spain*, Series A No. 146, para. 77; *Ribitsch v. Austria*, Serie A No. 336, para. 32; *Avzar v. Turkey*, Rep. 2001-VII, para. 283; compare Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, 742-744.

<sup>23</sup> „Particularly careful weighing of evidence“, BGH NJW 2004, 1261.

<sup>24</sup> The BGH uses the German term „Zweifelssatz“, see BGH NJW 2004, 1261.

<sup>25</sup> See BGH NJW 2004, 1262 with reference to dissenting views by several authors.

<sup>26</sup> BGH NJW 2004, 1262.

(bb) *In dubio pro reo*

The principle “*in dubio pro reo*” comes in as part of the “careful weighing”. The often misconceived concept of “*in dubio pro reo*” is explained by the BGH: it is not an evidence-rule but a principle pertaining to the decision-making (“... *der Zweifelsatz [ist] keine Beweis-, sondern eine Entscheidungsregel...<sup>27</sup>*”). It comes into play after the weighing of evidence has taken place. If at that stage, the judge is not fully convinced of a fact that is relevant for the decision, he has to presume the fact that has the least impact on the accused.<sup>28</sup> The *in dubio*-principle is therefore not applicable to isolated elements of the evidence, but only after the evidence has been scrutinised in its entirety.

c. Fair trial

Why is all of this important for a criminal trial? The accused has a right to defend himself. This is an undeniable essential feature of fairness and can be found in all of the human rights treaties.<sup>29</sup> If the evidence that the accused wants to rely on in order to exonerate himself is withheld by executive authorities, the accused is trapped. The prosecutorial authorities are in an advanced position anyway. They have a powerful police and intelligence machinery at their service, whereas the defendant can rely only on a defence team. The inequalities as regards information can be dramatic.<sup>30</sup> The more complex and international the case is, the more serious this slant can be. By virtue of the principle of “equality of arms” both parties are to be brought on the same or at least a similar footing.<sup>31</sup> If then the accused is confronted with a charge by the authorities and the same executive power refrains to disclose exonerating evidence, the accused is left with nothing but his own word.

2. The standards applied to the case

The standard elaborated above needs to be applied to the case of *El Motassadeq*. Looking at the facts one finds two points which might prove the suspicion that the accused was involved into the planning of the terrorist attack on 9/11: this is his trip to Afghanistan and the transferral of the money to an account of *Binalshib*. The

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<sup>27</sup> BGH NJW 2004, 1262.

<sup>28</sup> See also *Meyer-Gofner*, StPO, § 261 MN 26 and *Safferling*, *Towards an International Criminal Procedure*, 260.

<sup>29</sup> Compare Article 6 § 3 d ECHR and Article 14 § 3 e ICCPR.

<sup>30</sup> See eg. *Rzepka*, *Zur Fairneß im deutschen Strafverfahren*, 2000, 347, 455.

<sup>31</sup> See also *Renzikowski*, *Festschrift für Lampe* (2003), 791, 802.

accused himself denied any involvement with the planning. He refers to *Binalshib* as the witness who could exonerate him and explain Afghanistan and the money. His story cannot be discarded as being totally unlikely. To clarify the witness would have had to be heard. As this was impossible because of the refusal of the US and the German authorities to cooperate, the evidence presented against the accused could not be seen as strong enough to carry a conviction. The OLG must have taken into account that a testimony of *Binalshib* could have reinforced the case of the accused.<sup>32</sup>

The BGH points to another danger that might arise in particular in a criminal case, in the outcome of which a foreign nation has a major interest. In a case like the one here, German courts are active in some sort of vicarious jurisdiction also on behalf of the foreign nation. If in such a situation the alien nation would be allowed to selectively grant legal aid, it would be in a position to guide the outcome of the trial as it wishes. From a point of view of fairness of the proceedings this cannot be tolerated.<sup>33</sup>

#### IV. Failure or Strength

The decision of the BGH is determined, maybe it can even be called an angry judgement. The resentment stems from the arrogance of intelligence services and governments both from the USA and Germany. Without the slightest sign of cooperation the trial runs the risk of becoming a travesty in evidence matters. The BGH felt the urge to establish a sign that German courts would not convict on rumours and mere suspicions. The standard of proof remains the same for shop-lifting as well as for alleged terrorists. The BGH resisted the attempt of governments to turn courts into obedient agents that would convict *ad libido*.

The security interests of societies are high as the fear of terror grows. Terrorism is a threat to society as well as a challenge to any criminal justice system.<sup>34</sup> Notwithstanding, a criminal trial must follow the rule of law. The secrecy of intelligence information might be necessary for preventive police activity and political decisions. To a criminal system of punishing an offender secrecy is foreign and poisonous. The fairness of a trial depends on publicity. It depends further on the equal opportunity of the accused to defend him/herself and call witnesses on his/her

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<sup>32</sup> See BGH NJW 2004, 1263.

<sup>33</sup> See BGH NJW 2004, 1262.

<sup>34</sup> One example: the criminal justice system of Northern Ireland was changed and the jury abolished in 1978 because it was felt, that it was inapt to cope with terrorism; see *Safferling, Towards an International Criminal Procedure* (2003), 214.

behalf. If the democratic courts would not carefully guard these principles, we would sooner or later all become dependent on the good will of the government instead of the rule of law. The consequence would be state terror. The BGH has in this regard in good tradition of European democratic courts not failed but strengthened the democratic legal system. It has proven to be a "bulwark of liberty".<sup>35</sup>

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<sup>35</sup> This I say in analogy to *Blackstones'* title for the English jury-courts, see *Lidstone* in Andrews (ed), *Human Rights in Criminal Procedure: A Comparative Study* (1982), 5.