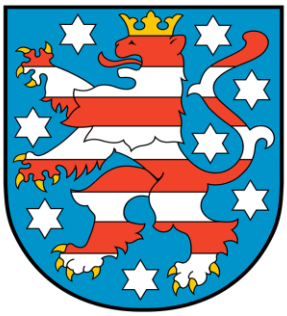

IN THE NAME OF THE PEOPLE!

Judgment

In the case against

1. Johann D., DOB…… , resident at….
2. Hans D., DOB…., resident at…..
3. Mary J., DOB…., resident at…..

for aggravated murder and other offences

The 5th Juvenile Chamber of the District Court at Erfurt, in the hearings on 24 and 25 January 2022, in which the following participated:

Presiding Judge at the District Court Müller,	presiding,
Judge at the District Court Meier and	
Judge at the District Court Schulze,	as assessors
Dr. Hinze and	
Ms Kunze	as juvenile lay assessors
Dr. Gabler	as public prosecutor
Prof. Dr. Ebert	as counsel for the accused Johann D.
Mr. Kühnert	as counsel for the accused Hans D.
Ms Schubert	as counsel for the accused Mary J.
Ms Kowalkowski	as court clerk

has found as follows:

1. The accused Johann D. is guilty of one count of attempted murder committed in the same transaction with one count of causing bodily harm by dangerous means.

   He is sentenced to imprisonment of two years and three months.

2. The accused Hans D. is guilty of one count of aggravated murder committed in the same transaction with one count each of causing bodily harm by dangerous means, endangering road traffic, criminal damage, and driving without a licence.

   He is sentenced to juvenile imprisonment of three years and six months.

3. The accused Mary J. is acquitted.

4. The accused Johann D. shall bear the costs of the proceedings.

   The State shall bear the costs of the proceedings and the necessary expenses regarding the accused Mary J.

   The Court waives the imposition of costs on the accused Hans. D.

Provisions applied:

Accused Johann D.:

§§ 212(1), 213, 224(1) Nos. 2 and 5, 52(1) and (2) StGB.

Accused Hans D.:

§§ 211(2) last alternative, 212, 224(1) no. 5, 315 c(1) no. 2(d), 303(1), 52(1) StGB, 21(1) no. 1 StVG; 3 JGG.

REASONS

I.

The accused Hans D. and Johann D. are brothers. Hans D. was 17 years old at the time of the offences; Johann D. was 25. The accused Mary J. is Johann D.'s girlfriend and was 23 years old at the time.

1.

Johann D. dropped out of the local high school when he was 17 and has been working in the car repair shop owned by witness Peter V. on and off ever since. He lives with the accused Mary J. in a flat in Güntergasse in Erfurt rented by Johann D.

Johann D. has two prior convictions for theft, the first one a fine of 100 daily units of 15 € imposed five years before the events in question (County Court Erfurt, Judgment of … docket no. …), the second one a term of imprisonment of 18 months imposed three years before the event (County Court Weimar, Judgment of …, docket no. …). The fine was paid in full and the prison term was also served in full. The convictions have not yet been expunged from his criminal record.

He was a good and reliable car mechanic, which is why Peter V. took him back after his prison term.

2.

The accused Hans D has no prior criminal record. He attends the local high school where he is doing well; he is liked by his classmates. He lives with his parents.

[*N.B.: This section is very short for a juvenile accused, due to the compact trial scenario. In a real-life case this would have been much more extensive, based on reports by the Juvenile Court Support Service etc.*]

3.

The accused Mary J. met Johann D. three months before he started to serve his prison sentence. She is a dog trainer and a volunteer in a care home for elderly people. Two years before the events in question, she had passed a first aid training programme.

She has no prior convictions.

II.

1.

Johann D. had his own vintage, second-hand sports car, which he had been tuning in his spare time. He had managed to install an airbag on the driver's side only at the time of the events. The car did not have any airbags when he bought it.

2.

On Friday, 26 March 2021, all three accused decided to have a joint night out to celebrate Johann D.'s pay rise he had received that morning. At around 8 pm, they drove to Johann D.'s favourite bar, the "Blue Moon" in the Kuhgasse in Erfurt, in Johann D.'s vintage car, to have a meal and a few drinks. Hans D. does not drink alcohol, so he had a few Cokes, while Johann D. had numerous beers.

At around 10.30 pm, Johann D. was quite drunk and had a blood-alcohol concentration of 1.2 ‰. He got into a heated argument with another guest, witness Wilhelm G., and his two friends, witnesses Robert L. and Benjamin K., none of whom he or the other accused had ever met before. After five minutes, the accused Hans D. and J. could persuade him to leave. After settling the bill, they went to Johann D.'s car. Johann D.'s walk was distinctly wobbly, and the two other accused kept telling him that he should not drive. The accused Johann D. angrily replied that he was fully capable of driving and that the two should shut up, while he opened the driver's door and put the key into the iginition.

In the meantime, G., L. and K. had come into the parking lot and saw Johann D.'s car. G. got a screwdriver from his own car and drew a long and deep scratch across the hood of Johann D.'s car. Johann D. became livid with rage, got out of his car, threw himself at G. and wrenched the screwdriver out of his hands, screaming at the latter: "I'm gonna kill you, you bastard!". The accused J. pushed G., shouting "You idiot! Why did you have to provoke him?! "

Johann D. stabbed at G.'s chest and stomach with the screwdriver several times but kept missing him. However, when G. slipped and fell to the ground, the accused J. fell over him and Johann D. ran the screwdriver through G.s neck, injuring an artery. G. started bleeding profusely from the neck. His two friends were deeply shocked and tried to staunch the flow of blood. They pushed away the accused J., who was leaning over G. with her hands on his neck. She then stood up and ran away.

The accused Hans D., who had no driving license yet at the time but had been driving cars off public roads under supervision on occasions to practice, pulled Johann D. off the ground and dragged him to his car. He put Johann D. in the passenger seat, got behind the wheel, neither fastening Johann D.'s nor his own seat belt for lack of time, started the engine with the key that was already in the ignition, and drove away at high speed without turning the lights on. When he heard the engine revving, L. ran to his own car to pursue Hans D. and Johann D., while K. stayed behind with G. to stop the bleeding; he managed to call an ambulance, which arrived seven minutes after Hans D. drove off. G. was taken to a nearby hospital and could be saved in an emergency surgery.

Hans D. did not have any proper driving experience and was careening wildly along the badly lit and winding inner city streets of Erfurt at an average speed of 130 km/h. He repeatedly disregarded

red traffic lights at major intersections without slowing down. His whole mind was focused on getting away so that he and his brother would not be identified and Johann D. would not be caught and have to go to prison again for the screwdriver attack on G. He was fully aware that the way he was driving would not allow him to react in time, if another car or a pedestrian were to come into his path. Yet, all he cared about is getting away, no matter what the cost, from L., who had barely been keeping up with them at a distance but could not read Johann D.'s numberplate.

All of a sudden, when turning a bend in the Zentralstraße, Hans D. saw 20 m ahead of him Olivia F., who was out on a late evening walk, stepping across the road at a traffic light which was showing green for pedestrians. Hans D. tried to brake but still hit Ms F. with a speed of 120 km/h. The impact threw her up in the air; she landed against a house wall, hitting it with her head with full force. She suffered multiple skull fractures and massive brain trauma and died instantly.

Ms F. had lost her husband just a year before the events; she was a single mother and the sole carer of three young children at the ages of three, five and ten.

Hans D.'s shock about hitting Ms F. and the violent braking manoeuvre made him lose control of the car. It collided with a wrought-iron lamp post at a speed of still 90 km/h, which stopped the car instantaneously. Because he was not wearing a seat belt, Johann D. crashed through the windshield, suffering severe fractures and cuts to his skull, neck, arms and ribs. Hans D. himself was cushioned by the driver airbag and only suffered fractures to five ribs and a severe whiplash trauma.

From the time the three accused had left the bar until the crash into the lamp post, 25 minutes had passed.

The accused J. was arrested by two police officers, witnesses Gregor D. and Katherina P., 15 minutes after the stabbing incident, in Franzenstraße, a street about two blocks away from the scene of the stabbing. Her brother, Stefan J., who is a paramedic, lives in that street.

When Johann D.'s employer, Peter V., found out what happened, he immediately dismissed him.

III.

The facts set out under II. have been established to the satisfaction of the Court by the full, credible and reliable confession of Hans D., the statement of Mary J.as far as the Court was able to follow it, the testimony of witnesses G., K., L., Stefan J., Oswald F. – Olivia F.'s brother –, Peter V., police officers D. and P., police detective Arthur Z., as well as the expert testimony of medical expert Dr Ellen A. and accident expert Ernst B. The first aid certificate of the accused J. and the judgments regarding the two prior convictions of the accused Johann D. were introduced into the record with the agreement of all parties according to § 249(2) StPO; the excerpt of the criminal record of all three accused was read out in court. The representative of the Juvenile Court Support Service, Peter M., was heard regarding the accused Hans D.

Johann D. exercised his right to remain silent, apart from confirming the facts under I. 1. above.

1.

Hans D. was a juvenile at the time of the offences. The Court is satisfied that his mental and moral development had reached a stage where he was perfectly capable of understanding the nature and consequences of his actions at the time and recognising their illegality and dangerousness. The Court draws this conclusion from the fact that he was almost 18 years old at the time, based on the statement of the accused in the hearing, and his answers to the questions by the Court, the prosecution and counsel, which have shown him to be an intelligent and otherwise responsible young man, in line with his good performance at school. The report of the representative of the Juvenile Court Support Service confirmed this evaluation.

2.

The sequence of events from the arrival of the three accused at the "Blue Moon" until the fatal crash have been established by the confession of the accused Hans D., the statement of the accused J. and the testimony of witnesses G., K., L., Stefan J., Oswald F., Peter V., police officers D. and P., and police detective Arthur Z.

Hans D. made a sincere and truthful confession.

The Court is satisfied that he feels deep remorse about his actions and tried to recall the events with as much precision as possible in the full awareness of the serious punishment awaiting him. He has in particular confirmed that he was in a panic but fully aware of the uncontrollable and possibly lethal risk his behaviour constituted, not least given his lack of driving experience, and that he was willing to do whatever was necessary to avoid his brother being caught and sent back to prison, even if that meant putting the lives of innocent bystanders at risk. He admitted that while he naturally hoped that nothing would happen, he was aware that the likelihood of a lethal outcome was great but that, influenced by the panic, he made the wrong choice of going ahead regardless.

He also confirmed that Johann D. must have already put the key in the ignition when he tried to drive off himself, because when Hans D. got into the driver's seat it was already there.

Mary J. in her statement confirmed the above description of events until she left the parking lot of the Blue Moon.

In her police interview immediately after her arrest, Mary J. told police detective Arthur Z. that she threw herself at G. and fell over him trying to separate him from Johann D., of whose short temper she was well aware. She was pressing G.'s neck to staunch the flow of blood. She asserted that she ran away to fetch her brother, Stefan J., but that she was detained by the police just before she could reach his flat. She also stated that she told the two officers arresting her that she was on her way to get her brother to help witness G, and this statement to them was confirmed by D. and P. She repeated this narrative in the hearing.

Witnesses G., K. and L. credibly and reliably confirmed the events at the Blue Moon and in the parking lot, including the utterances by Johann D that he was going to kill G., and that he kept stabbing at the victim's chest and stomach. However, they also related that Johann D. was visibly drunk and generally very aggressive. They independently confirmed with great precision and in corroboration of each other's testimony what Mary J. said to G., that she pushed, and fell across, G. before he was stabbed in the neck by Johann D, and that she then to all appearances tried to staunch the flow of blood by putting her hands on his neck before being pushed off by K. and L. and running away herself.

The Court does, however, not accept the accused J.'s account of her intentions for running away. While it accepts that her immediate intention was to attempt to stop the bleeding, her remaining narrative is unpersuasive and far-fetched, and hence must be qualified as a mere attempt to distance herself from the event and to protect herself from any possible perceived liability for the serious consequences for witness G. by leaving the scene of the crime and avoiding her identification. Running for two blocks from the scene of the crime to the flat of her brother, who is a paramedic, makes no sense when she as a trained first-aider would have known that only immediate medical intervention by properly equipped emergency responders would help witness G., especially since she did not even know if her brother was at home at all or awake at that time of night. She did not say that she had tried to call ahead on a mobile or to notify him in another way, either.

L. testified that he had extreme trouble keeping up with the car of the accused, even following it at a distance. He was an experienced driver at the time but had to slow down and occasionally stop in order not to create a risk to himself and others.

The blood alcohol level of Johann D. of 1.2 ‰ at the time of the stabbing was determined by the experienced medical expert Dr Ellen A. based on the specimen taken by the emergency responders at the scene of the crash which showed a value of 1.2. ‰. Given that only 25 minutes had passed since he had left the bar, that he had not consumed any more alcohol, and that the emergency services arrived very quickly afterwards, that value was very recent and if one were to accept a drop in blood alcohol of 0.2 ‰ per hour from the time he left the Blue Moon to the accused's benefit regarding the charge of drunken driving, it would have meant a mere drop of around 0.1 ‰ and hence the accused would still have had a level of 1.1 ‰. In any event, it was clear from his wobbly walk alone that he was seriously drunk.

Apart from the blood alcohol level, the Court has no cause to consider any other evidence that might be relevant for any impact on Johann D's. mental capacity at the time of the offence.

Dr A furthermore confirmed that the instant and only cause of death of Ms F. was the severe trauma from being hit by the car and thrown with massive force against the wall of a nearby house. She also clarified the extent of the injuries of both co-accused and that they are compatible, for Johann D., with being ejected and crashing through the windshield, and for Hans D. with the impact cushioned by the airbag. Other causes are not apparent in any event.

The experienced accident expert Ernst B., who has served in this role forensically for over 10 years in civil and criminal cases, has testified regarding the speed of the car when it hit the lamp post, based on the deformation of the chassis, and confirmed that it must have hit the post while still at a speed of at least 90 km/h, despite the frantic attempts at braking as described by Hans D. in his confession. He also confirmed that given the victim's body weight, the distance she was thrown through the air from the point of contact with the car and the severity and extent of her skull's deformation and other physical injuries, the car must have been travelling at about 120 km/h when it hit the victim.

Witness G. has been prosecuted for criminal damage of Johann D.'s car by summary order in separate proceedings before the County Court of Erfurt, as the prosecution stated in court and as the witness confirmed.

IV.

1.

Hans D. is guilty of aggravated murder, causing bodily harm by dangerous means, endangering road traffic, criminal damage, and driving without a licence, all committed in the same transaction, according to §§ 211(2) last alternative, 212, 224(1) no. 5, 315 c(1) no. 2(d), 303(1), 52(1) and (2) StGB, 21(1) no. 1 StVG.

The accused is responsible under § 3 JGG despite being a juvenile at the time. The Court refers to the findings under III. 1. above.

1.1.

The accused caused the death of Olivia F. by hitting her with his brother's car. He did so with conditional intent to kill, according to his own confession, because he wanted to avoid his brother being caught at all costs and was aware of the high degree of lethal risk his driving posed to innocent bystanders who might happen across his path. In his panic about his brother, he willingly accepted that this risk might materialise at any moment. He also acted with the intention to cover up his brother's involvement in the stabbing of G., i.e., to cover up another offence (§ 211(2) last alternative StGB), namely the attempted murder and bodily harm vis-à-vis G. This was possible because G., K. and L. had never met the three accused before and where thus unable to identify any of them; moreover no-one had been able to check the car's number-plate in the confusion and L. was unable to read it during the pursuit of Hans D.

1.2.

The Court does not find that the accused also used a means causing a public danger (§ 211(2) 7th alternative StGB) by driving the car in this manner. While the use of a car in scenarios of extremely dangerous driving similar to the current one has in principle been accepted as being capable of fulfilling the criterion of a means causing a public danger, the cases decided by the BGH so far differ in one important aspect from the present case, namely the possible or conscious advertence by the offender of the *actual* presence of a specific number of people in the direct danger zone. In the case underlying the judgment of the BGH of 16 August 2005 – 4 StR 168/05 – the offender had driven his car through a lively shopping street, and more to the point, through the outside seating areas of two cafés and across a sidewalk, all of which were frequented at the time. The judgment of 16 March 2006 – 4 StR 594/05 – dealt with a driver who had driven in the wrong direction on the motorway with suicidal intent and had actively sought a collision with an oncoming car, thereby also endangering another which was in the process of overtaking the first one. In the case of the LG Hamburg – trial judgment of 19 February 2018 | 621 Ks 12/17 – which comes closest to the present case, the trial court found that the accused had used a means causing a public danger, yet here again the accused had towards the end driven his car to the opposite lane of a carriageway and hence willingly created a more dangerous situation in which he had to countenance the *general possibility* of a collision – unlike the degree of specificity of the danger in 4 StR 594/05 – with an oncoming car at any time. The LG's reasoning at V.2.a.bb. on p. 105 of the judgment on the interpretation of the element "causing a public danger "must moreover be called rather formulaic: Its reference to the two above-mentioned cases as authority preceded by the word "compare" does not engage in sufficient depth with the difference just set out to the case before it. The BGH in its very short decision, dismissing the accused's appeal, of 16 January 2019 - 4 StR 345/18 – left the matter open, given that the conviction for § 211 StGB could be upheld based on another alternative from § 211(2) StGB which had also been applied by the trial court. In the

present case, the accused Hans D. "only" disregarded the speed limit, traffic signs and lights but did otherwise not increase the danger by taking additional risky action through perversely instrumentalising the overall inherent risk of participating in road traffic. This behaviour has moreover already been used to establish a broad conditional intent to kill anyone who might have entered the danger zone; thus it would seem questionable to use the same facts again to establish an enhanced form of intentional homicide. In the sense of strict construction of criminal statutes, courts must be aware of the danger of the double-counting of facts used for the basic version of an offence in order to establish an aggravated version of the same. In the absence of more specific and reasoned appellate guidance to the contrary it is thus difficult for the Court to conclude that by the same facts the accused Hans D. also acted with a "special degree of recklessness", emphasised in the two judgments of the BGH above to constitute the fundamental opprobrium of that particular alternative of § 211 StGB.

1.3.

The Court also rejects liability for insidious killing under § 211(2) 6th alternative StGB. While Olivia F. may be said to have been unaware of an impending attack on her life and hence defenceless, Hans D. did not knowingly exploit that situation in order to kill her, as is required by the alternative (Fischer, *Strafgesetzbuch*, 67th ed., 2020, § 211 mn 44). While the decision to exploit can be taken spontaneously, care must be taken to avoid stretching the effect of a constructed form of conditional intent to kill to support aggravated forms of killing (see also above IV. 1.2.). The intent to kill in the speeding cases is usually based on a generic imputation based on highly risky behaviour; that the accused in this case confessed to having had such a conditional intent does not change that picture. The fundamental rule still remains that any mens rea element must have been present at the time of the act and an intent formed at an earlier stage can change at any time. In this case, the accused attempted to brake as soon as he saw the victim, in other words he wanted to do anything but exploit her defencelessness. That he failed in his effort is not an argument to say he exploited the situation knowingly. In the Court's view, to argue that this constitutes insidious behaviour would mean stretching the envelope of the possible meaning of the term too far.

1.4.

The accused also caused serious injuries to his brother who was ejected from the car through the windshield in the crash and he did so with the same conditional intent as for the aggravated murder count (224(1) no. 5 StGB). This occurred on the basis of his highly dangerous driving which posed a direct and concrete danger to his brother's life, and this danger materialised directly in the injuries suffered in the crash. That he did not want to hurt his brother is a question of motive and neither here nor there for the matter of intent, because he undoubtedly realised that his dangerous driving did just as well endanger his brother's life to the same degree or even more than other persons, because the car might at any moment have crashed into a tree, lamp post or other obstacle without any third person's involvement. Because his brother was in the car, he had no way of escaping the danger. Whether the accused was aware in his panic that neither of them had fastened their seat belts is ultimately irrelevant because even with seat belts the risk for life and limb of the two accused was very high.

1.5.

The Court does not accept that these facts also qualify as the use of a dangerous instrument or tool under § 224(1) Nr. 2 StGB. While a car has been accepted in the appellate case law as a possible dangerous instrument (Fischer, op. cit., § 224 mn 10 – 11), the cases almost invariably deal with the use of a car against an external victim, not one sitting *in* the car. The car does not have to be driven *at* the victim by the offender, it is sufficient if, for example, the offender pushes the victim

in front of a moving car (RGSt 24,373). However, the general view is that the tool must be a movable object, usually – although not necessarily – wielded by the offender, and that pushing the victim towards immovable objects (walls, trees, posts, stationary machines etc.) does not make these into tools (Fischer, op. cit., mn 12). The quality as a tool may, however, be fulfilled in the case of passengers inside the car if the car, in the specific case, is used as a means to kill or injure them, i.e., *against* them, as in the following examples: Driver D intends to commit suicide and to take passenger P, his wife, with him (so-called extended suicide cases). It is irrelevant for the concept of "tool" whether P agrees to D's intentions. What matters is that if D accelerates the car to 120 km/h in order to crash it against a tree or a bridge pillar, then he is turning the car into a means to kill both of them, i.e., a tool. Equally, if D, who is wearing a seat belt and has a driver airbag, accelerates to 230 km/h on the motorway and then breaks abruptly in order for P, who is not wearing a belt and has no airbag, to be ejected through the windshield, the car is being used as a tool *against* P. In the present case, the last thing Hans D. intended was to use the car against his brother and he did not drive it in a way that it can sensibly be said to have been instrumentalised against him. The fact that § 315 c StGB may encompass the passenger as a person who can be endangered within the meaning of that provision (see 1.6. below) is neither here nor there for the interpretation of the concept of "tool"; that policy consideration has its pendant in § 224(1) no. 5 StGB.

1.6

By the same token, the accused Hans D., through his utterly reckless speeding on the badly lit and winding inner city streets at two-and-a-half the speed limit ultimately ending in the crash, caused a concrete danger to his brother's life and that of the victim F., as well as to his brother's vintage car, an object of significant value, i.e., of over 750 € (BGH NStZ 2011, 215), and he did so with the same conditional intent as for the murder count (§ 315 c(1) no. 2(d) StGB) . What was said with regard to the mens rea for § 224 StGB applies *mutatis mutandis*. The passenger of the car is encompassed by the protection of § 315 c StGB, as long as he is not complicit in the offence (Fischer, op.cit., § 315 c mn 15 b). There is no indication that the accused Johann D. consented to the danger, not least due to his drunken state, and in any event his consent would only be relevant if he or his car were the only person or object exposed to that danger.

1.7.

The same conduct qualifies as criminal damage in relation to the car under § 303(1) StGB.

1.8.

The accused had no driving licence and he knew that he was not allowed to drive without one (§ 21(1) no. 1 StVG).

1.9.

All offences were committed through the same transaction, i.e., the coherent course of events during the car chase (§ 52(1) StGB).

2.

Johann D. is guilty of attempted murder and causing bodily harm by dangerous means committed in the same transaction (§§ 212(1), 213, 224(1) Nos. 2 and 5, 52(1) and (2) StGB. He is not guilty of driving under the influence of drink (§ 316 StGB) as part of the same transaction.

2.1.

The accused caused serious arterial bleeding by stabbing G. in the neck with the screwdriver; the witness needed medical emergency care or would otherwise have died. The accused thus used a dangerous instrument and subjected the witness to a treatment that actually endangered his life (§ 224(1) Nos. 2 and 5 StGB).

2.2.

However, the Court is also satisfied that the accused acted with conditional intent to kill G., i.e., murder (§§ 212(1) StGB). The Court is aware that an automatic conclusion from risky behaviour and utterances about wanting to kill the witness made in a drunken state, with the added upset caused by the damage inflicted gratuitously on the accused's car by the victim, is not permissible. However, matters are different here: Added to the utterance that he was going to kill the witness, the accused was not lashing about with the screwdriver indiscriminately, but continuously focussed the direction of the stabbing towards the stomach and chest of the witness, both areas of the body where a stab with a screwdriver could easily cause lethal consequences. Furthermore, and more to the point, once the accused was able to stab the witness, who had slipped and could not move quickly due to the accused J. lying across him, he chose an even more dangerous spot, the witness' neck. A stab to the neck with a screwdriver is almost inevitably bound to sever or puncture a major artery or cause serious damage to the spinal cord, which is much more exposed in the neck than in the torso of the body, as anybody knows, hence also Johann D. at the time. Hence, on a holistic evaluation of the facts, the conclusion must be that the accused was so enraged, aided by his drunkenness, that he wanted to hurt witness G. seriously and did not care that by doing so he might kill witness G. Although the risk to witness G.'s life by stabbing him in the neck was objectively very high, the Court is unable, based on the accused's sudden emotional upset, the state of drunkenness and the rapid development of the events, to conclude with the necessary certainty that the accused had acquired a direct intent to kill.

2.3.

The Court does not find that the accused acted out of other base motives under § 211(2) 4th alternative StGB), i.e., a desire for revenge, even though some might say he "took the law into his own hand". This aggravating element typically requires a more sustained and considered motivation, such as, for example, in the famous *Bachmeier* case, when a mother smuggled a gun into a court hearing and shot the man accused of killing her daughter dead in open court (Fischer, op.cit, § 211 mn. 23) – yet, even in that case, the prosecution for § 211 StGB (which had been for insidious commission, not base motives) was abandoned and she was convicted of murder under § 212 StGB to a sentence of 6 years' imprisonment. Moreover, to accept this criterion in cases of an immediate snap reaction to a serious provocation would run counter to the policy considerations underlying the sentencing rule in § 213 StGB which is applicable in Johann D.'s case (see below under V. 2.).

2.4.

The accused had no defence, neither by way of self-defence under § 32 StGB, because the attack on his car was over, nor under § 33 StGB for excessive self-defence, because on the one hand the accused did not act out of confusion, fear or terror, but only out of sheer rage which is not covered by § 33 StGB even if it applies (BGH NStZ 1993, 133), and on the other hand, § 33 StGB does not apply to cases when there is no self-defence scenario (yet or anymore) according to the view of the BGH (NStZ 2002, 141) with which the Court agrees.

The accused was not acting in a state of insanity due to the intoxication (§ 20 StGB), because the normal indicative minimum threshold value of 3.00 ‰ (Fischer, op.cit., § 20 mn. 20 – 21) was not reached by far, and there are no factors which suggest that the accused was susceptible to such a loss of mental capacity at a significantly lower blood alcohol level for other reasons.

2.5.

The accused is not guilty of driving a car under the influence of drink by putting the key into the ignition (§ 316 StGB). Unlike in some instances under the previous but now obsolete case law, the provision requires that the car is actually set in motion. Even if the accused had turned on the engine, that would not have sufficed (BGHSt 35, 390; Fischer, op.cit., § 315c mn. 3 – 3b with further references).

3.

The accused Mary J. is neither guilty of aiding the offences of attempted murder and bodily harm by dangerous means committed by Johann D., nor of criminal insult or failing to render assistance by running away from the scene of the crime (§§ 212(1), 213, 27, 185, 323 c StGB).

3.1.

The Court could not reach the conclusion with the necessary certainty that the accused J. fell over G. with the intention of pinning him down so that Johann D, could stab him. It is more likely that she fell with him when he slipped after having pushed him away, and that she did the latter to deescalate the situation. This is corroborated by the fact that she immediately put her hands on his neck in an apparent effort to stop the bleeding.

3.2.

Her calling G. an "idiot" does not fulfil the criteria of a criminal insult under § 185 StGB, as it is generally close to a mere common incivility (Fischer, op.cit., §185 mn 10), and in the case at hand qualifies more as an expression of exasperation in the heat of the moment, caused by G.'s unwarranted, seriously provocative behaviour.

3.3.

The accused J. is not guilty of failure to render assistance, either (§ 323 c StGB). Given that when she ran away, witness G. was in the care of witness K. who put pressure on the wound and managed to call an ambulance, and in immediate vicinity of the Blue Moon with its patrons who could also provide assistance, even her status as a trained first-aider would not have made much of a difference, because the only thing that she could have done was press on the wound to staunch the blood. Her training did thus not equip her with any better abilities to provide assistance.

Her misguided and invented narrative about wanting the call her brother for help is irrelevant in this context and may have to do more with a feeling of moral blame than with an intent to evade the law as she may have interpreted it at the time.

V.

1.

Hans D. was a juvenile at the time and hence to be sentenced according to the principles of juvenile criminal law, which emphasise the education of the offender as the main aim. The sentencing frames of the general criminal law do not apply.

Educational and corrective measures in the sense of § 17(2) JGG are clearly not sufficient as a reaction to his crimes. There are, of course, no harmful tendencies present in the accused, but the gravity of his guilt demands a sentence of juvenile imprisonment. Multiple offences are to be punished by a unified sentence (§ 31 JGG).

The sentencing range for the unified sentence in this case is six months to ten years, due to the conviction for aggravated murder alone, which carries a mandatory life sentence for adults (§§ 211(1) StGB, 18(1) JGG). The length of the term shall be calculated to ensure that the necessary educational influence can be exerted (§ 18(2) JGG).

1.1.

There are few aggravating circumstances that are not caught by the general prohibition of double-counting enshrined for adult proceedings in § 46(3) StGB as understood in present-day appellate case law, which extends the effect of the prohibition from the mere elements of the offence to the general policy considerations underlying the criminalisation and sentencing range chosen by the legislator in the first place (see e.g. BGHSt 37, 153; BGH StV 1987, 62; 146). The fact that direct reliance on § 46 StGB is in general precluded in juvenile proceedings by § 2(2) JGG does not prevent the use of the generic rule on double-counting because it is a rule in favour of the accused and juveniles must not be treated worse than adults merely because of the educational paradigm of juvenile criminal law (Eisenberg/Kölbel, *Jugendgerichtsgesetz*, 21st ed., 2020, § 2 mn. 2 – 6; § 18 mn 8). The one substantive factor that is left in the case of this accused is the commission of several serious offences at the same time, two of them with very severe consequences for two people. However, the weight of this aspect is not too great because they were all committed by the same act in the legal sense. The fact that Ms F. was a recently widowed single mother with caring responsibilities for three young children, while certainly tragic, cannot be taken into account because the accused did not know that at the time, nor had he reason to know. The extremely dangerous manner of driving is already caught by the considerations for establishing the causation of death and the intent to kill and cannot be used twice. The same applies for the intention to cover up the accused Johann D.'s crime against witness G, which in the context of § 258(6) StGB on assistance in avoiding prosecution would after all even lead to impunity for the accused trying to help his own brother escape justice. The intent to kill was moreover conditional, not direct. Finally, the separate counts of criminal damage and driving without a licence pale in comparison to the other offences and the latter was a mere corollary to the panicked flight of the accused.

1.2.

On the other side, there are a number of compelling mitigating circumstances. Firstly, the accused has no prior record and is of otherwise good behaviour, as well as a well-liked and successful

student. Secondly, the offences stem from an, albeit misguided, sense of loyalty to his brother who had overreacted to an admittedly unprovoked serious provocation by witness G., which has led to the application of § 213 StGB in Johann D.'s case (see below V. 2.). The accused was clearly emotionally overwhelmed by the situation. Most importantly, the accused has given an early, full and frank confession, which on the one hand made the trial of his case much easier and helped avoid unnecessary secondary traumatisation of the victims and their relatives, and on the other hand was made in the full knowledge – not least, as the Court was told, on the advice of his own defence counsel – that doing so would in all likelihood lead to a conviction for aggravated murder under the recent case law of the BGH in so-called "racing cases", and hence very likely to an immediate sentence of imprisonment. The Court accepts that he feels genuine remorse. As far as the need for education is concerned, the case for a very harsh sentence is relatively weak because this was a one-off conflict situation which is unlikely to repeat and the accused has already notably matured under the impression of the consequences of what he has done. The civil law liabilities for damages which he will face are likely to be formidable and burden him for a long time, possibly his entire life. As a first-time offender, he is also more sensitive to the effects of imprisonment than someone who has served previous prison sentences.

At the end of the day, and after careful evaluation of the factors for and against the accused, the Court feels that a sentence in the lower half of the sentencing range is appropriate and sentences Hans D. to immediate juvenile imprisonment of 3 years and 6 months.

1.3.

The Court makes no order disqualifying the accused from acquiring a driving licence for a certain period of time (§§ 69a(1) last sentence StGB, 7(1) JGG). It would serve little purpose as an ancillary order to a sentence of immediate imprisonment for three and a half years. Although the wording of the law under §§ 69, 69a StGB and the prevailing view in the appellate case law (BGHSt 37, 373) would likely militate in favour of considering this case as a standard case of unfitness leading to a disqualification, the Court agrees with the opposing view that in juvenile cases the aim of education demands a more finely tuned response (Eisenberg/Kölbel, op.cit., § 7 mn. 73 with further references). The accused acted out of fear for his brother's freedom and in panic, in an emotional state of exception. No drink or drugs were involved; indeed, the accused as a rule did and still does not drink. His behaviour was not of a nature that would indicate a generic propensity to disregard the traffic rules as such. The Court is satisfied from his conduct in court that the events and the terrible consequences, which he knows are his fault, have already had a highly salutary impact on him. He will need to acquire a licence upon release from custody as soon as possible, in order to continue his education or find employment, not least to be able to deal with the expected civil liabilities facing him. It would be counter-productive to erect further hurdles on his path back into society.

2.

The accused Johann D. is guilty of attempted murder committed in the same transaction causing bodily harm by dangerous means. Both offences count as less serious cases for the purposes of sentencing.

According to § 52(2) StGB, the sentence is to be taken from the provision with the highest sentencing frame in the concrete case (Fischer, op.cit., § 52 mn. 3).

This is § 213 StGB in this case.

2.1.

The Court appreciates that the accused was seriously provoked by the criminal actions of witness G., who has been prosecuted for criminal damage. He damaged the vintage car into the repair of which the accused had put so much effort and which meant a lot to him; G.'s action was clearly meant to seriously provoke the accused and G. must doubtlessly have foreseen that this kind of provocation would be no small matter, regardless of Johann D.'s special emotional attachment to the car. Whether this is classified as a case of a serious insult or another less serious case in the sense of § 213 StGB does not need to be decided, as the arguments and the result would be identical.

The sentencing frame for § 213 StGB is one to ten years. This may be further reduced under § 49(1) StGB by the fact that the offence was merely attempted, § 23(2) StGB, to a range from three months to seven years and six months (§ 49(1) nos. 2 and 3 StGB). The Court sees no reason not to employ this reduction.

2.2.

The sentencing frame for § 224 StGB is six months to ten years, in less serious cases from three months to five years. The Court accepts the argument for a less serious case of § 224 StGB: The provocation which led to the application of § 213 StGB can typically be applied again, unless other circumstances militate against it (BGH StraFo 2021, 24 f.; NStZ-RR 2021, 277). The Court cannot see such opposing circumstances. Moreover, the contributory fault of the victim can be adduced to mitigate the frame (BGH NStZ-RR 2006, 140); however, in this case the only contribution by the victim, witness G., was the provocation.

The Court sees no reason to consider diminished responsibility under § 21 StGB; the usual minimum threshold value of 2.0 ‰ (Fischer, op.cit., § 20 mn. 21 – 21a) was clearly not reached, and there are no other factors that suggest the accused may have been susceptible to a reduction of mental capacity at a significantly lower blood alcohol level for other reasons.

2.3.

Within the frame of three months to seven years and six months, the general sentencing factors under § 46 StGB apply. The accused has two prior convictions, albeit for theft and hence not for offences in the category of which he has now been convicted. Nevertheless, he has already had the experience of a substantive term of imprisonment of 18 months and should thus have had a higher threshold for committing new offences, especially those involving not only financial but bodily harm to others. The situational factors of his offence have already been taken into account to establish a less serious case and hence have little additional weight. The accused lost his job at the car repair shop, in which he was quite successful, due to the offence which counts as a mitigating factor, even though it is not an unusual consequence.

Employing a holistic evaluation of all sentencing factors, the Court considers a sentence of two years and three months' imprisonment as commensurate with the gravity of the accused's conduct and degree of guilt.

2.4.

There is no reason to consider a driving disqualification under § 69(1) StGB. Although the offences were committed in a public parking space and a car was involved, any link to the accused's overall fitness to drive a car would be tenuous at best. It could have been any piece of property which the accused might have left there during his visit to the Blue Moon.

VI.

The decision as to the costs follows from §§ 464, 465(1), 466, 467 StPO for the accused Johann D. and Mary J.

The Court has decided not to impose costs on the accused Hans D., according to § 74 JGG.

He has no separate income and will be facing substantial liabilities arising from his offences. An additional financial burden will typically be counter-productive for the education of a juvenile accused (Eisenberg/Kölbel, op. cit., § 74 mn. 8 – 9a with further references). The BGH itself in case 4 StR 594/05 mentioned above approved of the application of § 74 JGG by the trial court (Decision of 16 March 2006 – 4 StR 594/05).

Müller Meier Schulze

This section is not part of the judgment.

The author would like to thank former Judge at the Federal Court of Justice and former member of the Court's specialist Senate for road-traffic-related offences, Mr Jürgen Cierniak, for his helpful comments on earlier versions of the judgment. The views expressed and any remaining errors are solely those of the author, who is moreover writing in a personal capacity.

Explanations of terms and abbreviations

§, §§	Section, sections
‰	Promille (per thousand – used as the measure for the blood-alcohol concentration)
BGH	*Bundesgerichtshof* – Federal Court of Justice
BGHSt	*Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Strafsachen*, cited by volume and page
JGG	*Jugendgerichtsgesetz* – Juvenile Court Act
km/h	kilometres per hour
LG	*Landgericht* – district court
Mn	marginal number
NStZ	*Neue Zeitschrift für Strafrecht*, cited by year and page
NStZ-RR	*Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, cited by year and page
RGSt	*Amtliche Sammlung der Entscheidungen des Reichsgerichts in Strafsachen*, cited by volume and page
StGB	*Strafgesetzbuch* – Criminal Code
StPO	*Strafprozessordnung* – Code of Criminal Procedure
StraFo	*Strafverteidiger Forum*, cited by year and page
StV	*Strafverteidiger*, cited by year and page
StVG	*Straßenverkehrsgesetz* – Road Traffic Act