HEADNOTE
to the Order of the Second Senate of 14 September 1989
2 BvR 1062/87

On the admissibility of diary-like notes of the accused as evidence in criminal proceedings.

FEDERAL CONSTITUTIONAL COURT
- 2 BvR 1062/87 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

Mr B…,

– authorised representative: …

against a) the Judgment of the Federal Court of Justice of 9 July 1987
- 4 StR 223/87 -

b) the Judgment of the Dortmund Regional Court of 21 October 1986
- Ks 9 Js 502/85 / 14 (Schw) B 3/86 -

the Federal Constitutional Court – Second Senate –
with the participation of Justices
Vice President Mahrenholz,
Träger,
Böckenförde,
Klein,
Graßhof,
Kruis,
Franßen,
Kirchhof

held on 14 September 1989:

The constitutional complaint is rejected. […]

REASONS:

A.

The constitutional complaint concerns the question whether diary-like notes of the 1

accused may be used as evidence in criminal proceedings.

I.

1. The Regional Court convicted the complainant of murder under specific aggravating circumstances [pursuant to § 211 of the Criminal Code] and sentenced him to life imprisonment, finding him guilty of having killed a woman in August 1985. The complainant had denied the charges; the trial court based the conviction on circumstantial evidence. It held, *inter alia*, that evidentiary indications could be drawn from the complainant's personality profile, as the complainant was found to have experienced strong aggressive resentments against women due to his inability to maintain a long-term relationship. These findings were in part based on the testimony of a court-appointed expert who had discussed certain diary-like notes with the complainant. According to the complainant, he had written the notes upon the recommendation of a psychologist. The notes had been secured by law enforcement authorities while investigating the room occupied by the complainant in his parents' house. The complainant […] had not discussed the contents of his writings with anyone outside the criminal proceedings. From the numerous documents secured, the court – against the objection of the defence – introduced three notes as evidence at the trial, by way of hearing the testimony of the court-appointed expert [who had examined the notes]. 2

In these notes, the complainant had written the following: 3

Note of 27 March 1984 4

> […] I do admit that I have a problem. I can't find a woman as a partner for my love life. That kills me. I would understand if there was something wrong with me or my body. But I'm a complete man.
>
> As it is, I would actually feel sorry for the girls if they were to suffer brutal rape. But I'm not sure how much longer this feeling will last...

Notes of December 1984

> I'm at the outpatient clinic because I was about to take the final step (commit The Act). What I'm trying to say is that I would very likely commit a sex crime if I hadn't agreed to therapy. Any extreme situation could trigger me to carry out The Horrible Act.
>
> Because I feel so much tension inside. The last extreme episode happened on Wednesday, 19 December 1984 at 7:00 p.m. I could practically feel how I had to fight, with every fibre of my being, the urge to commit The Act. Duration of the episode: 30 minutes – I don't know if the next episode will also end without harm, I actually don't think so. I think the surroundings prevented it, the car, the motorway.
>
> Had I encountered a woman in a deserted place, The Act would have been triggered, I'm sure.
>
> 23 December...

I am thinking again …

I saw a very beautiful girl, didn't feel my insecurities, would have actually spoken to her. But then there was, again, some other guy. Idiot. Smug guy. Rage, coming close to exploding aggression. I almost did it. I'm high. What I'm writing now doesn't count when I'm sober. I want to explain. I have a serious neurosis. At least that's what I think. It has to do with wanting a relationship with a woman. When I see a couple. Then I think, the next moment they're going to...

[…] 5

2. […] 6

3. Upon the complainant's appeal on points of law (*Revision*), the Federal Court of Justice reversed the sentencing decision, and dismissed the appeal for the rest […]. [...] 7

4. In the re-trial, the Regional Court sentenced the complainant to 14 years in prison, and ordered his confinement in a psychiatric hospital. The Federal Court of Justice dismissed the appeal on points of law lodged against this judgment as manifestly unfounded (§ 349(2) of the Code of Criminal Procedure). 8

II.

The constitutional complaint is directed against the initial judgment of the Regional Court and the first appellate decision of the Federal Court of Justice. [...] 9

III.

The Federal Minister of Justice and the Minister of Justice of the *Land* North Rhine-Westphalia submitted statements on the constitutional complaint. 10

[…] 11-12

B.

The constitutional complaint is unfounded. 13

I.

1. Based on the notion of self-determination, the general right of personality enshrined in Art. 2(1) in conjunction with Art. 1(1) of the Basic Law confers upon the individual the authority to, in principle, decide themselves whether and to what extent to disclose aspects of their personal life (cf. BVerfGE 65, 1, <41 and 42>, with further references). However, this right is not guaranteed without limitation. Restrictions may arise from overriding public interests, in particular where an individual communicates with others as a member of the community or influences them by way of behaviour and thereby affects the personal sphere of others or interests of the common good (cf. BVerfGE 35, 35 <39>; 35, 202 <220>). 14

2. Yet the Federal Constitutional Court does recognise an inviolable part of private life which is beyond the reach of public authority (cf. BVerfGE 6, 32 <41>; 389 <435>; 54, 143 <146>; established case-law). Even weighty public interests cannot justify an interference with this part of private life; its protection is not subject to a balancing of interests under the principle of proportionality (BVerfGE 34, 238 <245>). This follows, on the one hand, from the guarantee of the essence (*Wesensgehalt*) of fundamental rights (Art. 19(2) of the Basic Law), and results, on the other hand, from the inviolability of human dignity, which protects the core of one's personality. 15

3. Where information or an action affects the personal sphere of another person, it gains social significance and thus becomes a matter that may be subject to legal rules. Nevertheless, even events that unfold through communication with others may still enjoy absolute protection from state interference. Human beings necessarily exist in social contexts, including within the core of their personality. Thus, for determining whether a matter falls within the part of private life that is inviolable or within the part of private life where state interference may be permissible under certain circumstances, it is not sufficient to simply assess whether the matter has any kind of social significance or bears on social relationships at all; rather, the nature and intensity of this connection are decisive. This question is difficult to determine in the abstract; it can be answered satisfactorily only on a case-by-case basis, taking into account the particularities of each situation (cf. BVerfGE 34, 238 <248>). 16

4. In the present case, the Court only has reason to determine the scope of the core of private life in the context of criminal proceedings. In this regard, it must take into account formal as well as substantive aspects. 17

a) First of all, it is relevant whether the affected person wishes to keep a matter of their personal life secret. Where the affected person themselves does not consider confidentiality to be important, the core of private life is generally not affected. Yet the determination of what constitutes the core of one's personality right cannot be based solely on that person's intention to keep a matter secret. 18

b) Qualifying a matter as falling within the core of private life furthermore depends on whether it is highly personal in terms of content, and on how and to what extent the matter affects the sphere of others or interests of the common good. 19

c) Therefore, the Constitution does not require that the use of diaries or comparable private notes as evidence in criminal proceedings be excluded *per se*. The mere fact that information is recorded in a diary does not mean that it is automatically beyond the reach of the state. Rather, the admissibility as evidence in court proceedings depends on the nature of the notes' contents and their significance. If diary-like notes contain information on the planning of criminal acts that are about to be or have already been committed, and are thus directly connected to specific criminal conduct, they do not fall within the inviolable part of private life. This also means that, in the context of criminal prosecution, constitutional law does not necessarily give rise to a procedural obstacle that would preclude an examination of such documents to determine whether they contain information that could be admissible as evidence in court proceedings. However, this is subject to the exercise of utmost restraint, which must be ensured by suitable measures. […] 20

5. Where private notes do not partake in the absolute protection of the core of private life, their use as evidence in criminal proceedings still requires justification by an overriding public interest. In view of the notion of justice, the Basic Law attributes high standing to requirements relating to an administration of justice based on rule of law guarantees. The Federal Constitutional Court has repeatedly emphasised the undeniable need for effective law enforcement and the fight against crime; it has also repeatedly stressed the public interest in establishing the truth in criminal proceedings to the greatest extent possible, and has recognised the effective investigation of crimes, especially serious ones, as a fundamental responsibility of society under the rule of law (cf. BVerfGE 77, 65 <76> with further references). However, the fundamental right to the free development of one's personality is no less important. A fair balance between these tensions can only be found if the protection requirement under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law is used as an ongoing corrective to the interferences that seem necessary for the effective administration of justice. This means that it must be determined in every case which of these two constitutionally significant principles carries greater weight (cf. BVerfGE 34, 238 <249>). If, based on these standards, the use of the notes as evidence is not excluded from the outset, a further assessment is necessary in the next step. It must then be determined whether, in the specific case, the use as evidence in criminal proceedings is suitable and necessary for investigating the relevant crime, and whether the resulting interference with the private sphere of the affected person is proportionate in relation to the aim pursued. […] 21

II.

Due to a tie in the Justices' vote, the Court cannot find a violation of the Basic Law (§ 15(3) third sentence of the Federal Constitutional Court Act) regarding the use of the complainant's notes as evidence in the criminal proceedings against him. 22

1. According to the view of Justices Träger, Klein, Kruis and Kirchhof, which carries this decision, the complainant's notes were, in principle, admissible as evidence in criminal proceedings. It is not objectionable under constitutional law that the Federal Court of Justice, in light of the criminal charges at issue, found it permissible to use the relevant notes as evidence in order to determine the question of guilt and to make an appropriate sentencing decision. 23

a) The notes do not fall within the inviolable part of private life. The opposing view is already called into question by the fact that the complainant has documented his thoughts in writing. In doing so, he released them from the domain of inner thought, which he alone controls, and exposed them to the risk of access by others [...]. In any case, the contents of the notes extend beyond the author's legal sphere and substantially affect interests of the general public. It is true that the notes neither touch upon the specific planning of the crime nor describe the criminal act as such. However, the incidents reflected in the notes are connected to the crime in question in such a manner that they cannot be considered completely beyond the reach of the state. 24

[...] [The notes] address matters that, according to the findings of the trial court, explain the events leading up to the crime, the underlying causes and triggers, thereby providing the key to understanding the actual act. The close connection of the notes' contents to the suspicion that the author has committed a very serious 25

crime implies that the notes cannot be regarded as belonging to the part of personal life that enjoys absolute protection, which is beyond the reach of the state. In addition, the notes indicate that the complainant's personality traits pose specific dangers to others; on these grounds, too, the notes are not beyond the reach of the state in the context of criminal proceedings.

As was demonstrated in the course of the trial, the notes provided important insights into the complainant's personality for the trial court, allowing the court to make findings that were indispensable for a fair assessment of the charges. The responsibility, deriving from the rule of law, to establish the truth in criminal proceedings to the greatest extent possible (cf. BVerfGE 77, 65 <76> with further references) applies not only to the investigation of the facts of the case; based on the constitutionally guaranteed principle of culpability (*Schuldprinzip*) (cf. BVerfGE 57, 250 <275>), the responsibility to establish the truth extends to all aspects that are relevant for assessing the culpability of the accused under criminal law and for the purposes of sentencing. This follows, most notably, from the constitutional requirement that criminal punishment be commensurate with the offence and the culpability of the offender, which is firmly rooted in the state's duty to respect human dignity (cf. BVerfGE 45, 187 <228 and 229, 259 and 260>). As a general rule, investigations must therefore not be limited to the factual circumstances of the crime on which the charges against the accused are based; in the interest of reaching a fair judgment, the criminal investigation and trial must take into account the personality of the suspect, their prior history and their conduct after committing the offence (cf. § 46(2) of the Criminal Code). Where specific grounds for suspicion indicate a link to criminal conduct, all these circumstances, and the facts necessary to evaluate them, are very closely related to the actual criminal act. The requirement of an administration of justice committed to the rule of law and the notion of justice lends constitutional weight to these aspects; the inviolable part of private life does not protect such information and thus neither excludes it from criminal investigations nor prohibits its use as evidence. The requirement, deriving from the rule of law, that all relevant circumstances be investigated to the greatest possible extent in order to ensure a fair trial serves a public interest; it is therefore generally not at the suspect's disposal. Even where such investigations seek to reveal only exonerating circumstances – regarding the suspect or third parties –, it is not for the suspect to prevent or effectively deny such investigations. Accordingly, the Federal Constitutional Court has held, in its case-law, that constitutional law does not generally prohibit non-negligible interferences with physical integrity against the will of the accused in the event that the measures are necessary, when investigating serious crimes, to establish any special circumstances relating to the suspect's mental and emotional state that may be relevant for determining criminal responsibility (cf. BVerfGE 16, 194 <200 *et seq*.>; 17, 108 <117>). 26

Hence, allowing the use of private notes which contain information of the kind at issue in the present case in criminal investigations does not violate human dignity. This applies at least in cases where the documents in question can provide insight into the causes and context of the offence, thereby ensuring that the investigations – which are an indispensable part of criminal proceedings conducted in accordance with the rule of law – are carried out to the extent necessary to provide the basis for a fair assessment of the crime, as required by the substantive principle of culpability rooted in Art. 1(1) of the Basic Law. 27

b) However, the finding that the notes do not fall within the inviolable part of private life does not mean that the authorities are granted free access. The examination of private notes in the course of a criminal investigation, and their use as evidence, amount to an interference with the general right of personality of the suspect; these measures are therefore only permissible if they satisfy the requirements set out above (see I 5 above). 28

(1) Based on an overall assessment, and the required balancing between the effective administration of justice and the fundamental right deriving from Art. 2(1) and Art. 1(1) of the Basic Law (cf. BVerfGE 34, 238 <249 *et seq*.>), it is in principle unobjectionable under constitutional law to use private notes as evidence, in cases of serious crime, in order to determine whether the accused is guilty or to exonerate them if they are wrongfully accused, and to assess the culpability and dangerousness of the accused. In this respect, limitations to the right of personality derive from the protection of the general public and of the victims of the crime the accused is charged with as well as possible future victims, but also from the right of the offender to a fair trial. 29

(2) In the present case, the criminal courts' interference with the complainant's fundamental right to the free development of his personality, which results from the use of the complainant's notes as evidence, satisfies the principle of proportionality given the evidence available in those proceedings. It is not for the Federal Constitutional Court to review the challenged decisions in all detail; rather, it only reviews whether the challenged decisions strike a balance between the special need for protection of intimate personal notes and the interest in prosecuting the murder charges at issue, and whether the assessment criteria applied by the criminal courts are compatible with the Constitution. 30

The Federal Court of Justice assumed that the use of the notes as evidence interferes with the part of the complainant's personality that is protected under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. It accorded particular weight to this interference due to the intimate nature of the notes, and balanced the resulting adverse effects on the personal sphere against the interest in prosecuting the specific crime at issue. The Federal Court of Justice found that the principle of proportionality had not been violated in the present case because the notes substantially contributed to the successful investigation of [aggravated murder charges as] one of the most serious offences under the Criminal Code while also providing relevant information on exonerating circumstances; a violation of constitutional law is not ascertainable in this regard. In addition, the use of the notes as evidence not only served to prosecute the crime at issue, but also seemed to be indispensable for assessing the risk of the complainant committing other criminal acts in the future. This consideration, which is informed by the notion of preventive protection, supports the finding of the appellate court that the confidentiality interest of the individual, which in principle merits protection, must stand back behind overriding public interests (cf. BVerfGE 32, 373 <380 and 381>) in the present case. 31

2. The other four Justices [opposing the outcome of the decision] hold the view that the complainant's fundamental rights under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law were violated by the challenged decisions. […] They contend that, in the context of the criminal proceedings against the complainant, his private notes do fall within the absolutely protected part of private life. For this reason, the notes should 32

have been excluded from the reach of the state, except for a very preliminary examination to determine the notes' significance for the right of personality.

a) The manner in which the records were stored indicates that the complainant intended to keep them secret; in its judgment, the Federal Court of Justice presumed that the intention to keep the notes secret persisted, despite the fact that the complainant had agreed to the securing of the notes by law enforcement and to a discussion of their contents [with a court-appointed expert]. 33

b) The diary-like notes at issue here are, without exception, highly personal in nature. In the notes, the complainant provides an honest account of specific emotional stages he went through, without trying to paint himself in a positive light. In the notes, the complainant also reflects on his own personality profile, as he tries to gain a better understanding of himself through unsparing descriptions of his emotions, seeking to come to terms with the major problems that have caused him distress and, ultimately, to achieve peace of mind. This confrontation with his inner self occurred the way it did, and could only occur the way it did, because it unfolded in the isolation of an inner monologue, i.e. shielded from other people's sight and hearing, and it was supposed to remain there; this inner monologue did not lose its highly personal character simply because it was written down. There can be no doubt that thoughts are free – and that they must remain free from coercion and interference by the state so as not to affect individuals in the core of their personality. It is equally clear that the same level of protection must be afforded to an inner monologue that is written down, giving the inner self a voice and thus gaining a better understanding by way of confronting one's self. 34

By themselves, the notes – which were written seventeen and eight months before the crime was committed – do not as such affect the sphere of others or the community. They merely describe inner perceptions and emotions, and do not contain any information on the specific criminal act the complainant was later charged with. Nor can it be argued that a substantial connection to the sphere of the general public arises on the grounds that the crime committed could only be understood in light of the complainant's personality profile revealed in the notes. 35

Following this line of argumentation would mean that a connection between the notes and interests of the general public – which did not exist from the outset, i.e. was not inherent in the notes as such – would be construed in retrospect and from the outside. If a person, frightened by impulses to commit a crime, addresses this in an intimate inner monologue and if then, after that person failed to overcome these impulses, their inner monologue could be linked to a criminal act and thus be excluded from the absolute protection of the part of private life for the purposes of criminal proceedings, this would grant others access to that person's inner self in a manner that the affected person could neither foresee nor control. 36

If the mere possibility of gaining knowledge on the suspect's personality were considered sufficient grounds for denying absolute protection to such private notes for the purposes of criminal proceedings, the differentiation between the core part [that is inviolable] and the part of one's personality in relation to which a balancing of interests is permissible would be practically eliminated in the context of criminal proceedings. Since, in principle, any insight into the psychological condition of a suspect may provide additional information on their criminal responsibility and on 37

whether they committed the crime or not, this approach would mean that basically any suspicion against the affected person would be enough to eliminate the absolute protection of the core of private life.

These considerations also apply in cases where private diary-like notes are intended to be used exclusively as evidence in favour of the affected person. The accused has the unconditional, constitutionally protected right to remain silent when charged with a crime. To the same extent, constitutional law also protects the individual from being confronted in criminal proceedings, against their will, with a matter that touches on their innermost personal domain. This is imperative for protecting the right to self-determination regarding one's inner self, which is conferred upon every individual as part of human dignity. […] 38

C.

[…] 39

Mahrenholz Träger Böckenförde
Klein Graßhof Kruis
Franßen Kirchhof