

Helsinki Court of Appeal

Judgement

Number 12

Date

Case Number R12/1014

Decision Subject to the Appeal

Helsinki District Court, 2 March 2012, number 1927

Case

Aggravated Physical Assault

Appellants

District Prosecutor YYY

D

C

B

Adverse Parties

B

A

District Prosecutor YYY

D

C

Court of Appeal Hearing

Main hearing held 11 November 2013.

Appeal

The Prosecutor has demanded that A and B are sentenced for aggravated physical assault and that they are jointly obligated to compensate the state for expenses incurred by the presenting of evidence.

A and B have jointly and of one accord circumcised 4-month-old D without his other guardian's, C's, consent and without her knowledge in that A had performed the circumcision at B's request at his home. During the procedure, B has held D by his feet. The procedure, per se, had been performed correctly from a medical point of view.

B's or D's Catholic religion did not include the requirement of boys' circumcision. Furthermore, the custom in B's country of origin that boys are circumcised could not be considered as an acceptable reason for circumcision based on religious or cultural reasons, when considering that D was a Finnish child living in Finnish society with his Lutheran mother and had no bonds to such a culture or religion in which boys should be circumcised. Therefore, the

circumcision was not justified on the basis on D's identity. On the contrary, it would cause him inconvenience later in his life due to him being different because of the procedure as well due to the possible damage to the sense of feeling.

A's actions had been intentional and he must be sentenced as a perpetrator. He had been aware that the circumcision required both guardians' consent as well as acceptable religious or cultural grounds. Despite this, he had neglected to verify that the procedure had C's consent and the aforementioned grounds. Prior to the procedure, A had not personally attempted to contact C and had not enquired as to D's mother's nationality or religion. He should have, merely on the basis of the child's skin colour, deduced that the child's mother was white. Based on the circumstances, A must have deduced that the procedure did not have C's consent; at the very least, he should have inferred that with great probability, this consent had not been given. The circumcision was not an urgent procedure and it could have been postponed to such a time when the child's mother's consent for the procedure could have been verified. In A's case, this was not a forgivable mistake.

Since A's act was intentional, B must be sentenced for aggravated physical assault as a perpetrator and not as an intermediary.

The circumcision was performed using an edged weapon, it had caused a permanent bodily injury and it had possibly caused numbness to the genital area. The act was also an aggravated offense as a whole when considering that it was performed on a 4-month-old defenceless child at his home. This act constituted permanent interference with the child's bodily integrity, and it was clear that the procedure had caused D pain, at the latest, when the anaesthetic had worn off. On the same day after the procedure, D had been treated at the Helsinki Children's Hospital with pain killers. This was an irreversible procedure that affected the child's entire life.

A must be sentenced to a minimum of a 1 year and 2 months suspended prison sentence, and B to a 1 year 8 months suspended prison sentence.

D has, concurring with the Prosecutor's demands, demanded that A and B are sentenced for aggravated physical assault and the they are jointly obligated to pay D, in damages, €200 for ache and pain, €5000 for permanent damage as well as €3000 for suffering, all with legal interest as of the day of the act.

There were no acceptable religious or cultural reasons for D's circumcision. He had no such religious or social community, the attachment to which required circumcision, and circumcision was not a part of either parent's religion. He lived in Finland in a Finnish community, not in Nigeria in a Nigerian community. When considering acceptable reasons for a circumcision, the

starting point must be the child and the child's circumstances, not the child's parent's religious or cultural reasons, instead.

A's actions had to be considered exceptionally reprehensible when considering that the child's mother had not, despite requests, been present, nor had they been able to contact her prior to the procedure, and when considering that A had not been interested in the mother's nationality, her religion or even her name, even though the procedure was to be performed in Finland in Finnish student housing.

C has, concurring with the Prosecutor's appeal, demanded that A and B are sentenced for aggravated physical assault.

The specific preconditions with which circumcision in Finland could be considered permissible were not applicable in the case at hand. D was the child of a Lutheran mother and a Catholic father, and circumcision, therefore, was not a part of either of his parent's religion. Nor did D live in such a religious community in which circumcision was part of the male members' identity, nor in such a community in which circumcision was part of the cleanliness required of him. The procedure was not intended to promote D's well-being or development, nor could it be seen to have any positive impact in regard to the development of his identity or in joining a religious or social community. It was not relevant that circumcision was part of Nigerian culture in Nigeria, where there were regional traditions concerning the circumcision of both girls and boys. Neither procedure could be justified in Finland with Nigerian local customs.

When considering the justification of circumcision, the child's best interest was paramount, and no significance could be given to the fact that the circumcision was important to the parent, i.e. B in this case, based on his religion or other background.

A, as a physician of the Family Federation of Finland and through his profession and his experience, was well-aware of the prerequisites for permitted circumcisions in Finland, but had neglected his duty to verify that these preconditions existed. Based on the circumstances, he must have understood that the procedure did not have the other parent's consent. A had knowingly neglected to ask questions, based on which the procedure would have had to be considered forbidden. He had not, amongst other things, asked the mother's name, religion, nationality or culture, nor had he attempted to contact the mother prior to the procedure. A had not refused to perform the circumcision in a situation in which the mother had not been present, contrary to advance information.

This was a mixed-race child and the circumcision had been performed at the child's home in student housing.

B has demanded that the District Court decision is overruled and that the charge is dismissed and that he is exempted from all liability to compensation to D and the state. Secondly, B has demanded that his sentence is waived or that the pecuniary penalty is reduced and he is exempted completely or partially from liability to compensate D's legal representative's legal fees. B has further demanded that his own legal fees at the Court of Appeal are covered from state funds.

There had been acceptable religious or cultural grounds for the procedure, and it had not caused the child pain. D's circumcision was important to his father B on the basis of his Nigerian background as well as his Catholic faith. B had acted in D's best interest with D's benefit in mind.

The circumcision had been performed in a proper medical manner and using the correct pain relief. Apart from the injection of the anaesthetic as well as the normal sensations related to the healing process, the procedure had not caused D any pain. The compensation that the defendant admitted to in regard to ache and pain referred to these sensations.

The procedure had caused D no damage whatsoever. Even at a later stage, it would not cause teasing or discrimination, when considering that boys were circumcised in Finland for medical reasons, and there were children in Finland from various religions and cultural backgrounds. All in all, this was not a feature that would draw attention.

D's circumcision had also had C's consent. As a result of a discussion on the issue, C had said that she will approve D's circumcision. She had not, however, wanted to be present in person when the procedure was performed.

Nevertheless, the issue was legally unclear in Finland in that whether an, in itself, acceptable circumcision should be considered a crime on the basis that the procedure did not have the other parent's consent. Going against recommendations as well as against Section 5 of the Act on Child Custody and Right of Access could not necessarily be considered a crime. In practice, it was customary that one of the parents alone brought the child to a medical procedure that required both guardians' consent, giving the information that the procedure had both parents' consent.

B could not have understood that he was committing a physical-assault offense when hiring an experienced doctor to circumcise his son. He had erroneously thought that his act was legal and, therefore, his act was not intentional and he was, in any event, free from criminal liability. B had trusted

that a doctor would not do anything criminal or illegal to D. B was not, therefore, guilty of physical assault as an intermediary, either.

B was a first offender and his sentence could, therefore, be waived. B's actions were not as reprehensible as in normal physical-assaults offenses. He had no intention to cause any damage. On the contrary, his aim was to act in his son's best interest. All possible means were used to avoid causing pain, and a qualified physician had been hired to perform the procedure.

The sentencing was, in any event, too severe and it was disproportionate to B's guilt and the overall evaluation of the act. A just punishment would have been a maximum fine of 12 day fines. When deciding on the sentencing, it should have been taken into account that B had been kept in custody because of the act and had been subject to a travel ban for a long time.

In the event that B's appeal was successful, he should be exempted from all liability to compensate D's legal representative's legal fees to the state. Even in the event that his appeal was not successful, he should be exempted from the said liability partly or completely, since the District Court has dismissed the charge in regard to it being an aggravated offense, and the majority of the plaintiff's claims for compensation and the compensation liability in the situation in question were unreasonable.

Responses

In reference to his appeal, **B** has demanded that the Prosecutor's, D's and C's appeals are dismissed and that his legal fees in the Court of Appeal are compensated from state funds.

The District Court decision was correct in that the charge for aggravated physical assault was dismissed.

There had been acceptable religious and cultural reasons for the circumcision. Circumcision was a significant part of B's faith and culture, and the procedure was performed solely with D's best interest in mind. D is half Nigerian and he spent, and would spend, a lot of time with his father with Nigerians who live in Finland and with Catholics, and the circumcision increased his belonging to this group. D lived with both his mother and with his father, and whilst with his father, he was in contact with both his father's Catholic faith as well as his Nigerian cultural background, to which he also had a right. It was good and important for a boy to notice that he was similar to his father. Due to his faith and the custom in Nigeria, B had considered the circumcision important and justified to D.

There were so many circumcised boys and men in Finland and worldwide that D would not feel that he was different because he was circumcised. There had

been no proof of any damage to the sense of feeling. On the contrary, circumcision had many favourable health-related and sexual effects. Circumcision did not, furthermore, cause any kinds of problems in regard to cleanliness.

B was, at most, an intermediary. He had hired a doctor to perform the procedure, he did not perform the actual procedure in any way and did not, with his actions, cause D any pain.

This was not an act that could, as a whole, be considered an aggravated offense. The procedure had not caused D physical damage, or actual pain. It is estimated that a third of the male population in the world is circumcised and that with circumcision, health benefits could be achieved.

There were no grounds for the punishment to be increased.

D's claims for compensation in regard to suffering and permanent damage were excessive. In the event that B was sentenced for physical assault, the correct sum for ache and pain caused by the healing of a surgical cut was €200.

A has demanded that the Prosecutor's, D's and C's appeals are dismissed and that his legal fees [...], with legal interest, in the Court of Appeal are compensated from state funds.

A had performed the circumcision at the child's father's, B's, request. The procedure had been performed in a medically correct manner and using appropriate pain relief.

After arriving at the family's home for the procedure, A had asked B to call the child's mother so that she would come there and A would be able to discuss the circumcision with both parents. B had telephoned several times and had said that he could not reach the child's mother, and he had assured A that the circumcision had been agreed on with the mother and that both parents were in favour of it. Based on the child's name, A had deduced that both parents were of the same religious and cultural group.

The procedure was a very simple one, and A performed circumcisions only in situations where, based on legal practice, it was permitted. A did not perform circumcisions on boys older than some months. At the time, there was no reason to postpone the procedure.

After the correct performance of the procedure, A had asked that the mother be in touch with him in order for him to go over the care-related issues with

her as well. When A had gone to perform the follow-up check-up two days later, no-one had let him in.

Based on what B had told him, A was given the impression that circumcision was an integral part of B's religion and culture. A guardian's consent did not have to be in writing, and this was not, in practice, required. A had trusted B when he had said that D's circumcision also had the mother's consent, and nothing in the circumstances indicated that this would not have been the case. A could not be convicted for an intentional crime, since the procedure situation, as perceived by A, involved an error as to the other parent's consent. This constituted an error, as provided for in the Criminal Code, Chapter 4, Section 1, and, in any event, a "mistake as to a ground for exemption from liability" as provided for in Section 3 of the same Chapter.

There were no grounds for the claims for compensation for ache and pain. Any possible level of pain that had been caused to D and experienced during the healing stage had been relieved with pain killers. The sum of the claim for compensation was acknowledged to be correct.

The procedure had not caused D permanent damage. Internationally, a considerable number of boys have been circumcised, and the WHO recommended circumcision in the prevention of the spreading of HIV. Removing the foreskin did not result in the lack of sense of feeling or any other permanent damage.

Furthermore, there were no grounds for the sentencing of compensation for suffering. Circumcision was an integral part of D's religion and culture, at least when considering the religion and cultural heritage that he had through his father.

In reference to her appeal, the **Prosecutor** has demanded that B's appeal is dismissed.

In reference to his appeal, **D** has demanded that B's appeal is dismissed.

In reference to her appeal, **C** has demanded that B's appeal is dismissed.

C has not given her consent to D's circumcision, nor has she been aware of it.

Boys' circumcisions were a part of B's culture, since circumcisions were common in his country Nigeria. Circumcision was not, however, part of the Catholic faith.

Evidence and Testimonies

The same written evidence has been referred to as at the District Court. [C and D have also presented some additional written evidence]. At the Court of Appeal, the testimonies of C, B and A have been heard as well as witnesses E, F and G.

The Court of Appeal Decision

Setting the Question

Circumcising boys for reasons other than medical is an old, worldwide custom. It is particularly common in the Jewish and Islamic tradition, but it is also common in other cultures. The premise of the basic and human rights protection of family life covers the fact that a child's guardians have the right to decide on how they raise their child and have, therefore, the right to raise their child according to the demands of their religion and culture. A child's circumcision, however, constitutes interfering with a child's bodily integrity, and bodily integrity falls under the protection of basic rights.

In its preliminary ruling 2008:93, the Supreme Court has found that a male child's circumcision can be considered a relatively minor interference with a child's bodily integrity, and that under certain preconditions it should not be sentenced as physical assault or as incitement to physical assault. The primary precondition is that the procedure must be correctly and professionally performed. Consequently, the procedure will not cause any health-related damage or other permanent damage to the party concerned. This means that the circumcision must be performed correctly in a medical sense, in appropriate hygienic conditions and using pain relief that corresponds to the procedure. Furthermore, the child's guardians' right to decide on the circumcision on behalf of their child presupposes that the aim of the procedure is to promote the child's well-being and development. The procedure must not, furthermore, go against the child's best interest, when considered objectively (KKO:2009:93, Section 23).

In this case, it is undisputed that D's circumcision has been performed in a medically correct manner and without causing unnecessary pain. At the Court of Appeal, on the basis of the appeals, the question is whether there have been the religious, cultural and social reasons to justify the procedure. In particular, the question is what bearing the lack of the other guardian's consent has on the criminal-law deliberation.

Judgement

The child's father, B, is from Nigeria and he is a Roman Catholic. The child has also been baptized Catholic. Circumcision, as such, is not a Catholic tradition, nor does the Catholic Church support this custom or encourage it (C's exhibit 3, B's exhibit 2). Circumcision has, nevertheless, remained a common custom in, e.g., Sub-Saharan African countries and also in the Nigerian culture,

regardless of the position that Christianity has reached. As the District Court decision shows, even today, also the majority of Christian Nigerian boys, approx. 90%, are circumcised. In other words, this is not, as the Prosecutor and the plaintiff claim, merely a local custom.

When the parties concerned were heard, it became evident that B has maintained his cultural and religious identity after moving from Nigeria. As per Nigerian custom, he has been circumcised as a child. The child's mother, on the other hand, is Finnish and is not part of any religious group. Therefore, this has been a family where the child has been part of both parents' cultural sphere. The Court of Appeal finds that there have been the grounds related to B's religion and culture for D's circumcision and, therefore, the acceptable reasons, as per the aforementioned Supreme Court decision, and B has not intended to cause his child pain or ache or physical damage when having the circumcision performed. The procedure has not, furthermore, when considered objectively, gone against the child's best interest, since it has, per se, strengthened his bond with the community and culture on his father's side.

Based on the aforementioned, B cannot have been guilty of physical assault, at least not in a situation where he would, alone, have had the right to decide on the circumcision on the child's behalf. In this case, both parents have, however, been the child's guardians. The Court of Appeal accepts the decision of the District Court in as much as the District Court has found that the circumcision did not have the child's mother's consent. Therefore, it must be considered whether the child's circumcision that was commissioned by B, after all, regardless of the aforementioned, constitutes the criminal offense of physical assault due to the fact that the parents did not agree on the procedure being performed. There is no previous legal practice in regard to this issue. In its decision 2008:93, Section 6), the Supreme Court has, explicitly, stated that in the case in question, it had not had to take a stand on the relevance of this detail.

The Court of Appeal finds that the issue of the parents' disagreement can be approached, on the one hand, with the premise that the crucial factor is whether B has had the cultural, religious and social reasons, as defined in the Supreme Court decision, to have the child circumcised, and in the event that the parents disagreed, neither parent's opinion should be given precedence. On the other hand, the issue can be approached from the viewpoint that the right to interfere with a child's bodily integrity also requires that the guardians have jointly made the decision on the circumcision.

According to Section 5, Subsection 1 of the Act on Child Custody and Right of Access, "[t]he persons who have custody of a child are jointly responsible for the duties inherent in custody and make the decisions concerning the child

together, unless otherwise provided or ordered". The Court of Appeal finds that it is not unusual, as such, that in a bicultural family the guardians disagree on the culture and the traditions with which the child will be raised. According to the provision in the aforementioned Act, a child's circumcision is a decision that the parents should make together. The Court of Appeal finds, however, that in the criminal-law deliberation of this case, it is not relevant that the guardians have disagreed on having the procedure performed, and that B has made the decision to circumcise the child alone and that this decision has not, therefore, been made as per the Act on Child Custody and Right of Access. The act must not be sentenced as a physical-assault offense, since B has had the procedure performed as a guardian of the child, the procedure has been performed in a medically correct manner without causing the child unnecessary pain, it has interfered with the child's bodily integrity only to a minor extent, and it has been performed, from the child's perspective, for acceptable reasons related to his and his guardian's culture and religion, and since the procedure cannot be considered to go against the child's best interest. The Court of Appeal finds, contrary to the District Court, that B is not, through his actions described in the charge, guilty of physical assault.

In regard to A, the Court of Appeal accepts the decision of the District Court. Since B is not guilty of a crime in this case, A cannot be guilty of it, either.

The charges against B and A must, therefore, be dismissed and defendant B must be released from his sentencing and all liability to compensation.

[...]

DEFENDANT

B

JUDGEMENT

Amendments to the District Court decision:

DISMISSED CHARGES

1) Physical Assault 7 November 2009

LIABILITY TO PAY COMPENSATION

B is exempted from all liability to pay compensation to the state and to D.

[...]

DEFENDANT

A

JUDGEMENT

The District Court decision will not be amended.

LIABILITY TO PAY COMPENSATION

The state is obligated to compensate A's legal fees [...] with [legal interest] as of one month of the Court of Appeal judgement.

The Court of Appeal Decision:

Court of Appeal Senior Judge AAA
Court of Appeal Senior Judge BBB
Court of Appeal Senior Judge CCC

STATEMENT OF THE COURT MEMBER WITH A DIFFERING OPINION IN CASE R 12/1014

Court of Appeal Senior Judge AAA:

My difference in opinion pertains to the legal evaluation of the case.
I agree with the majority of the Court members on the chain of events.

I find, as the District Court did, that B is guilty of physical assault in the incident described in the charge, and that the charge against A must be dismissed based on the criminal-justice regulations on errors. Hereinafter, the clarifications and amendments to the District Court decision:

1 Setting the Question

In this case, it is a question of whether circumcision for reasons other than medical should be sentenced as physical assault, and whether something other than the justifying grounds that are provided for in the Criminal Code can be applied. It is, furthermore, a question of the doctor's, who performed the procedure, obligation to check and the significance of a possible error.

2 About the Interpretation

According to the Constitution of Finland, a court's administration of justice must be based on current law (Sections 2 and 3).

This case constitutes physical assault when the law is interpreted literally. The aim of the regulation of physical-assault offenses is to protect the bodily integrity of the individual. The premise is that an individual must have legal protection from both other individuals as well as from the public powers, and the requirement of legal protection in a constitutional state gives its citizens the protection of trust.

The question that arises next is whether there are justifying grounds in this case with which a child's bodily integrity can be interfered with. As justifying grounds, B has invoked cultural, religious and social reasons and has also referred to the Supreme Court preliminary ruling KKO:2008:93. I will first cover whether the said preliminary ruling has a guiding impact on legal practice in this particular case.

2.1 About the Preliminary Ruling

In the event that the criteria, as identified from the preliminary hearing as permitting the circumcision, are that the procedure would have to be correctly and professionally performed, that the guardians would be allowed to decide

on the circumcision without hearing the child and that the procedure should not, when considered objectively, go against the child's best interest, then in this case, the first criterion would be met. The second criterion would not be met, since the other guardian has, expressly, objected to the circumcision. Whether the third criterion, which is by nature mainly anticipatory and refers to the future, were met would be left to speculation and would be difficult to evaluate even at a later stage, since, e.g., there is no alternative to the child's life to which the child's future could be compared. In this regard, I find that B's act can have an irreversible affect on the child's world view and may indicate that the child belongs to a certain way of life and may, consequently, in this manner, have a guiding impact on the child's life.

The preliminary-ruling criteria are, however, more extensive than these aforementioned criteria. The preliminary ruling has pursued a relatively extensive cultural, social and religious acceptance in a case in which, amongst other things, the act has been acceptable in its own surroundings. The ruling has probably sought acceptance for the concept of justice of certain social groups; a concept that has, for its own part, defined the connections and life of these groups. The ruling has been given in a situation where legislation has not given a ruling on the conflicts between the general social structure of society and the concept of justice of these certain social groups. In this case, the background and the initial situation are different in that, e.g., the child lives in a community where children are not generally circumcised for non-medical reasons and the other guardian, the child's mother, has expressly objected to the circumcision.

The case-specific nature of the preliminary ruling, its starting point and its exceptionality in the legal systematics of a constitutional state are reasons why the legal instruction of the preliminary ruling regarding the justifying grounds must be given limited import, and its guiding legal impact pertains only to similar cases in relevant aspects. Therefore, the fact that the Supreme Court has, in its preliminary ruling permitted the interference with a child's bodily integrity does not mean that the legal system should be permitted to be flexible in other types of cases and to act in violation of the specific law. Therefore, the justifying grounds of the preliminary ruling cannot be applied to this case.

2.2 Other Possible Justifying Grounds

As justifying grounds, B has invoked his local African Catholicism and that its tradition has included circumcision and, therefore, his grounds have been the religious, moral and customary norms of his former place of residence. In the event that the moral guidelines of B's earlier home country were to be accepted as justifying grounds, whilst simultaneously ignoring, amongst other things, the other guardian's will and the child's current social surroundings,

this would lead to a certain vagueness in the administration of justice and in practice, therefore, there would be no uniform decision-making and predictability, which should be expected from a constitutional state. Consequently, the expectations of due process of law would not be fulfilled, either. A court of law cannot replace the leeway that exists within the norms of physical-assault with, e.g., principles that have been derived from freedom of religion. Furthermore, it is an entirely different issue to be legally bound to comply with the regulations of the Criminal Code than to feel morally obligated not to comply with them. Therefore, moral, religious and social reasons are not, in this case, justifying grounds.

3 Finding the Defendant Guilty and the Other Demands

I find that B is guilty of the physical assault of the said charge. I do not, however, find the offense an aggravated offense as a whole, albeit that the act has left permanent cosmetic damage and that the act has caused ache and pain. I sentence B to 70 day fines and obligate him to pay the demanded compensations and expenses.

In regard to A, I accept the ruling of the District Court. I find that A was misled about the circumstances and was misled to perform the actual act. It has become evident that B's aim has, in all eventualities, been to have the circumcision performed and that he could have gone even further in his deception in order to reach his goal. Therefore, the doctor's obligation to check can be seen as sufficient here, albeit that the attempts to check could have been more rigorous and extensive, B's actions notwithstanding. In regard to A's actions, it must be further pointed out that he also, whilst being misled, interpreted the legal instruction of the preliminary ruling rather broadly. A's case constitutes an error, as per Chapter 4, Section 1 of the Criminal Code, and, in any event, a mistake as to a ground for exemption from liability, as per Chapter 4, Section 3. Therefore, the charge against A and all other claims against him must be dismissed.

