

## **KKO 2008:93 Summary**

A had had his four years and six months old son B circumcised by a person unknown to the Court, but who was presumably a doctor. Both A and B were Muslims, and the circumcision was done because of religious and cultural reasons. The operation had taken place in the home of A's mother, and B had been topically anaesthetized. The public prosecutor brought charges for assault against A.

According to chapter 21 section 5 of the Finnish Criminal Code, a person who employs physical violence on another or, without such violence, injures the health of another, causes pain to another or renders another unconscious or into a comparable condition, shall be sentenced for assault to a fine or to imprisonment for at most two years.

### **Court proceedings**

#### **The Tampere District Court**

The Tampere District Court held that circumcision filled the essential elements of assault. Being only four months and six months old at the time of the circumcision, B was unable to give effective consent to the operation. As there was no medical reason for the irreversible operation and it had had no health benefits for B, A was incompetent of consenting to it as B's guardian.

The Court stated that according to the preliminary works of the Constitution of Finland concerning basic rights and liberties, acts that violated human dignity or other basic rights could not be justified by freedom of religion and conscience. Furthermore, the basic rights of a child, including personal integrity, could not be violated on the basis of the freedom of religion of another person. Female circumcision was stated to be forbidden in all situations. Even if non-medical circumcision of males was not explicitly mentioned in the preliminary works of the Constitution, the Court held that a lengthy tradition was not a justifiable reason to put boys in a worse position than girls concerning personal integrity. As there were no justifying grounds to the offence, the Court found that it was unlawful.

A had claimed that he didn't know that circumcision was punishable in Finland.

According to section 7 of the Constitution of Finland, the personal integrity of the individual shall not be violated, nor shall anyone be deprived of liberty arbitrarily or without a reason prescribed by an Act. As it is, there is no law nor judicial practice concerning non-medical circumcision of males in Finland. In 2003, the Ministry for Social Affairs and Health has proposed legalizing non-medical circumcision of males under certain conditions. It was known that the practice was worldwide and as far as is known, it is not prohibited anywhere. In addition, the Prosecutor-General had recently waived prosecution of a doctor who had circumcised six boys in 2001. Thus, the Court held it believable that A had been mistaken with regard to the permissibility of his act. On the whole, the Court found A's mistake was manifestly forgivable. The charges against A were dismissed.

#### **The Turku Court of Appeals**

The public prosecutor and B with his attorney complained of the District Court's decision.

Like the District Court, the Court of Appeals held that non-medical circumcision of males was a worldwide custom and that as far as it was known, it wasn't prohibited anywhere. There was no legislation of it in Finland. The Court of Appeals referred to the same provisions safeguarding personal integrity and freedom of religion as the District Court and it too held that a violation of personal integrity couldn't be justified on the basis of religious freedom. The Court of Appeals pointed out that non-medical circumcision of males had not been commented on in the preliminary works of the Constitution.

The Court of Appeals referred to a memorandum of a committee of the the Ministry for Social Affairs and Health (2003:39), according to which prohibiting non-medical circumcision of males would likely lead to the operations being carried out in unprofessional circumstances. As the custom was old and had thus far been allowed in Finland, it'd prevent certain religious and cultural groups from practicing their religion, which would presumably offend said groups. Accordingly, the committee found that non-medical circumcision of males would be ethically acceptable on the basis that it realized the religious conviction of certain communities, secured family ties and overall contributed to the affinity between a boy and the community that he lived in. However, the operation would only be permissible if it was carried out by a doctor.

The Court of Appeals found that A was not guilty of assault, on the grounds that the circumcision had been carried out duly and professionally and it had caused no suffering or permanent damage to B. It was done for religious and cultural reasons to advance the best interests of B. The Ministry for Social affairs and Health and the Association of Finnish Local and Regional Authorities had proposed that male non-medical circumcision should be carried out in public healthcare. Authorities had not intervened in the cases that had come to their knowledge. The charges against A were dismissed.

### **The Supreme Court**

The public prosecutor complained to the Supreme Court and demanded that A should be sentenced for assault.

The Supreme Court held that having the child circumcised by an unknown doctor for religious and cultural reasons with no medical grounds for the operation filled the essential elements of assault. As there had been no medical reason for the circumcision, A had been incompetent to give effective consent to the operation of his child. Violating the personal integrity of another without any medical or health related reasons is unlawful. Forced medical proceedings are permitted because of their acceptable grounds, in other words advancing the health or well-being of the person in question. According to the Supreme Court, in the present case it should be assessed whether religious, cultural and social reasons were such that they could justify the circumcision even if there were no medical reasons for it.

*The significance of male non-medical circumcision*

The Supreme Court stated that male non-medical circumcision is a worldwide custom, and as far as is known, it is not prohibited anywhere in the world. In Sweden, there's a special enactment concerning its prerequisites. It is estimated that around 200 boys a year are circumcised for non-medical reasons in Finland, and it has been requested that the operations should be carried out in the sphere of public health care.

The case is about the circumcision of a Muslim boy. Non-medical circumcision of boys between the ages of four and 13 is a deep-rooted tradition in the Muslim community, and it is even thought of as obligatory. Being circumcised is a significant part of the identity of Muslim men and it connects them to the religious and social community that they live in. Concerning the medical significance of circumcision, the Supreme Court stated that it is a fairly small and easy surgical operation. Nevertheless, there's a possibility of post-operational complications that may even be severe, especially if it is carried out unprofessionally. A non-medical circumcision has no health benefits.

### *Human and basic rights*

According to section 6(3) of the Constitution of Finland, children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development. When it comes to basic rights, children are independent subjects. In addition to section 7 of the Constitution, personal integrity is also safeguarded by section 10 as well as article 8 of the European Convention of Human rights. The provisions concern the right to private life and they encompass the right to decide over one's body and self. Article 8 encompasses such violations that can't be considered violations of article 3 of the Convention. Even relatively small medical operations can constitute a human rights violation if it's done without proper consent.

Article 8 safeguards also family life. It isn't explicitly stated in section 10 of the Constitution, but it encompasses the family life aspect too, in addition to private life. In principle, the right to family life includes parents' right to bring up their child in accordance with their culture and religious beliefs. However, the provision on family life doesn't permit actions that endanger the health and safety of the child. Neither does section 11 of the Constitution concerning freedom of religion permit offences that violate human dignity. In the preliminary works of the Constitution (Government Proposition 309/1993) it is stated that religious freedom can be restricted to safeguard the rights of others.

Finland has ratified the Convention on the Rights of the Child (New York, 20.11.1989) According to article 19 of the Convention, States Parties shall take all appropriate measures to protect the child from all forms of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, while in the care of parents or legal guardians. Furthermore, according to article 24(3), States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. On the other hand, according to article 30, children have the right to practice their own religion.

### *The Supreme Court's assessment*

The Supreme Court stated that the question was whether the child's right to personal integrity prevented the parents from consenting to irreversible surgical operations that have no medical grounds but are instead done for religious and cultural reasons.

The child's right to personal integrity is strong compared to its guardian's right to family life and freedom of religion. The guardian's aforementioned rights cannot justify actions that are disadvantageous to the health and well-being of the child. The purpose of the guardian's right to decide over matters that concern the child is to see to the best interests of the child. The guardian should be mindful of the constitutional provisions that restrict this right. Therefore, the assessment should be made based on the best interests of the child. The question is whether the breach of the child's personal integrity is of such nature that it cannot be justified by reasons relating to the religious and social interests of the child.

The Supreme Court held that circumcision, even if it is irreversible, is a rather harmless operation when it is carried out duly and in a professional manner. Even if it may cause some pain to the boy, there are no health-related or other disadvantages to the boy, and circumcision doesn't have a stigmatizing effect on him. It is notable that circumcision is sometimes performed due to medical reasons and therefore there are approved professional methods to do it.

In this case, non-medical circumcision can be considered advantageous to B. It was done because of religious reasons and it will likely advance B's best interests relating to developing his identity as well as connecting him to his religious and social community. Therefore, concerning the best interests of the child, non-medical circumcision in this case is considered justifiable and overall a relatively insignificant operation. There is no reason to consider it such an offence against the rights and best interests of the child that would be punishable as assault.

The public prosecutor claimed that accepting non-medical circumcision of boys would be sex discrimination, seeing as circumcision of girls is forbidden. In addition, it would be discrimination on the basis of religion, because other than Jewish and Muslim boys won't be subjected to non-medical circumcision. The Supreme Court stated that in reality, circumcision of girls is genital mutilation and it is thus a far more severe breach on personal integrity than that of boys. Female circumcision is not reasonably comparable to male circumcision in a criminal sense. Furthermore, allowing non-medical circumcision of boys is not religion-based discrimination solely because it's only included in the tradition of the aforementioned religions.

On these grounds, the Supreme Court dismissed the charges against A.

