

COLOGNE REGIONAL COURT (LANDGERICHT)

IN THE NAME OF THE PEOPLE

JUDGMENT

Wa.

151 Ns 169/11

In the criminal matter

Defendant: Dr. K.,

date of birth:

address:

for medical matters and criminal offences under the Non-Medical Practitioners Act
(*Heilpraktikergesetz*)

In response to the appeal of the public prosecutor's department against the judgment of the judge in Cologne of 21.09.2011, the First Minor Criminal Division of Cologne Regional Court in the hearing of 07.05.2012, sitting with the following persons:

Presiding Regional Court Judge

Herr Beenken

as presiding judge,

Bernd Boettcher, postal service,

Hans-Jürgen Neuenfeldt, post office clerk,

both as lay judges,

Public prosecutor Frau Müller

as the representative of the public prosecutor's department,

Court employee Frau Kuhlemann

as clerk of the Court Office,

held as follows:

The appeal on points of fact and law of the public prosecutor's department against the judgment of Cologne Local Court (*Amtsgericht*) of 21.09.2011 is dismissed.

The costs of the proceedings and the necessary expenses incurred by the defendant shall be borne by the public treasury.

Grounds:

I.

The public prosecutor's department charges that the defendant, in Cologne on 04.11.2010, physically mistreated another person and injured that person's health by means of a dangerous instrument (sections 223 (1), 224 (1) no. 2, second alternative, Criminal Code (*Strafgesetzbuch*, StGB):

On 04.11.2010, in his practice inin Cologne, the defendant under local anaesthetic carried out the circumcision of J., who at the time of the act was four years old, using a scalpel, at the wish of J.'s parents, although there was no medical indication for the operation. The defendant sewed up the child's wounds with four stitches and gave the child further treatment on a house call on the evening of the same day. On 06.11.2010 the child was taken by his mother to the children's casualty department of Cologne University Hospital in order for post-operative bleeding to be treated. The bleeding was stopped there.

Cologne Local Court acquitted the defendant in its judgment of 21.09.2011 (528 Ds 30/11) at the cost of the public treasury. The Cologne public prosecutor's department appealed against this judgment in due form and time. The appeal was unsuccessful.

II.

In the trial, the factual basis of the charge made by the public prosecutor's department was confirmed. The defendant admitted the events in full. In addition, the court established that the child's family is of the Islamic faith. The defendant carried out the circumcision for religious reasons at the wish of the parents. It is clear on the basis of the expert witness's report obtained by the court that the defendant's work was clinically free of defects. There was no error in treatment. In addition, according to the expert witness, in Central Europe, at

all events, there is no need to carry out circumcisions as a preventative measure.

III.

For legal reasons, the defendant was acquitted.

The actus reus of section 223 (1) StGB is fulfilled. The requirements of section 224 (1) no. 2, second alternative StGB are not fulfilled. The scalpel is not a dangerous instrument within the meaning of the provision if - as here - it is used by a doctor in accordance with its intended use (...)

The circumcision of a boy unable to give medical consent, correctly performed by a doctor for religious reasons with the consent of the parents, is not excluded from the definition of the offence on the basis of what is known as "social adequacy". Exner (...) has developed a contrary view, but this is unconvincing. In this view, the parents and/or the circumciser are not excused under section 17 StGB. Exner also considers that the occasioning of the circumcision by the parents has no effect of justification, since the parents' right to religious upbringing of their children, when weighed against the right of the child to physical integrity and to self-determination, has no priority, and consequently their consent to the circumcision conflicts with the child's best interests. Nevertheless, the action, which violates the child's best interests and is not excused, is socially inconspicuous, generally accepted and customary in history, is therefore removed from being formally determined as criminal.

In the correct view, social adequacy has no independent significance in addition to the requirement for the disapproval of conduct to be part of the definition of the offence. Instead, the social adequacy of conduct is merely the reverse of the fact that it is impossible to pass a legal judgment of disapproval. It does not have the function of cancelling an existing judgment of disapproval (...)

Nor was the defendant's act justified by consent. There was no consent by the child, who was four years old at the time, and since the child was not old enough to understand the situation, there was no question of such consent being given. There was consent by the parents, but this was not capable of justifying the commission of the elements of bodily harm.

Under section 1627 sentence 1 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB), custody only covers measures of upbringing which serve the best interests of the child. Under what is probably the prevailing view in the literature (...), the circumcision of a boy who is not

capable of giving consent is not in the best interests of the child, either under the aspect of avoiding exclusion within the relevant religious and social environment or under the aspect of the parents' right of upbringing. The parents' fundamental rights under Article 4 (1), 6 (2) of the Basic Law (*Grundgesetz*, GG) in turn are limited by the fundamental right of the child to physical integrity and self-determination under Article 2 (1) and (2) sentence 1 GG. It is possible that the result even follows from Article 140 GG in conjunction with Article 136 (1) Weimar Constitution (*Weimarer Reichsverfassung*), which provides that citizens' rights are not limited by the exercise of the freedom of religion (...). At all events, Article 2 (2) sentence 1 GG itself places a limit inherent in the Basic Law on the fundamental rights of the parents. When the fundamental rights affected are weighed, account must be taken of the principle of proportionality. Circumcision for the purpose of religious upbringing constitutes a violation of physical integrity, and if it is actually necessary, it is at all events unreasonable. This follows from the evaluation of section 1631 (2) sentence 1 BGB. In addition, the child's body is permanently and irreparably changed by the circumcision. This change conflicts with the child's interest of later being able to make his own decision on his religious affiliation. Conversely, the parents' right of upbringing is not unreasonably adversely affected if they are required to wait to find out if the boy later, when he is of age, decides himself to be circumcised as a visible sign of his affiliation to Islam. (...) Schwarz (...) sees the consent, taking account of criteria of constitutional law, as constituting justification, but he only considers the parental rights under Articles 4 and 6 GG, but not - as is necessary - the child's own rights under Article 2 GG. For this reason alone, his opinion is not convincing.

But the defendant acted under an unavoidable mistake as to the wrongful nature of the act, and thus without criminal liability (section 17 sentence 1 StGB).

The defendant acted subjectively in good conscience, as he credibly showed in the hearing. He firmly assumed that as a devout Muslim and a skilled doctor he was permitted to carry out the circumcision of the boy at the wish of the parents for religious reasons. He will also certainly have assumed that his actions were lawful.

The defendant's mistake as to the law was unavoidable. It is true that the defendant did not enquire as to the legal position, but in this case this cannot be held against him. For obtaining informed legal advice would not have resulted in a clear result. In the case of undecided questions of law which are not unanimously decided in the literature, especially when the legal position as a whole is very unclear, an unavoidable mistake of law is assumed to apply (...) This is the case here. The question of the lawfulness of circumcisions of boys on the basis of the consent of their parents is answered differently in case law and the literature. As is shown by the above remarks, there are court decisions which, albeit

without discussing the essential questions in more detail, at the same time proceed on the basis that skilled circumcisions carried out by a doctor are permissible, and also opinions in the literature which answer the question differently from this court, and certainly not without justification.

IV.

The decision on costs is based on section 473 (1) Code of Criminal Procedure (*Strafprozessordnung*).

Beenken

Presiding Regional Court Judge

Translation by Margaret Marks, transblawg.eu

Translator's note: large numbers of references to the literature have been omitted and marked '...'