

ECLI:NL:RBDHA:2020:5469

Shared ruling



Femmes for Freedom

Authority

Court of Appeal The Hague

Date of ruling

19-06-2020

Publishing date

19-06-2020

Case number

09/765060-19

Judicial areas

Criminal justice

Special characteristics

First instance - full Court

**Indication as to
content**



Femmes for Freedom

The Court convicts the suspect to 80 hours community service for sedition and

incitement to commit violence against persons or their properties because of

their gender. The Court deems that it has been proven that the suspect has

committed sedition and incitement to commit violence against women by giving a web lecture that

contained the text "circumcision is mandatory for men and recommended for women. For women it is

not mandatory. The wisdom behind this is that the penis is cleansed from impurities that are present

on the foreskin and for women it diminishes lusts"; he declared the aforementioned text; the

aforementioned (web) lecture had been placed on the website of the As-Soannah mosque and was

open to viewing at this website. No violation article 10 ECHR [European Court of Human Rights] now

that the infringement has been provided by law, the statutory prohibition serves a legitimate purpose

and in a democratic society the infringement is required. This is a case of a pressing social need and

the requirements as to proportionality have been met. The Court is of the opinion that in this case

the right to freedom of (religion and) speech cannot outweigh the right of women to protection

against violence and discrimination. The Court deems the conviction of the suspect to be proportional

to the objective intended and hence required in a democratic society within the meaning of article 10

section 2 ECHR.



Found on

Rechtspraak.nl

Extensive ruling

Judicial ruling

Court of Appeal THE HAGUE

Criminal Justice

Full Court criminal division

Public Prosecutor's office registration number: 09/765060-19

Date of judicial ruling: 19 June 2020

Conflicting statements

(Promis judgment) [ruling motivated by the considerations of the Court]

On the grounds of the indictments and resulting from the investigation at the hearing the Court of Appeal has passed the following sentence in the case of the public prosecutor against the suspect:

[the suspect],

born at [date of birth] 1987 in [place of birth],

[address]

1 The investigation at the court hearing

The investigation was performed at the Court Hearing of 18 December 2019 (pre-trial review) and 5 June 2020 (substantive hearing).

The Court has heard and become aware of the claim of the public prosecutor mr. W. Bos and of the defence brought forward by the suspect and his lawyer mr. Y. Özdemir.

2 The indictment

The suspect was accused of the following:

1.

having incited in public any person to a criminal offence during or around the period from 1 May 2015 up to and including 24 January 2019 in The Hague, at least in The Netherlands, by:

giving a (web) lecture during which he articulated the text "circumcision is mandatory for men and recommended for women. For women it is not mandatory. The wisdom behind this is that the penis is cleansed from impurities that are present on the foreskin and for women it diminishes lusts"; this (web) lecture had been placed on the website of the As-Soennah Mosque, named [website] and it was open to viewing on the aforementioned website;

2.

that during or around the period of 1 May 2015 up to and including 8 November 2018 in The Hague, at least in The Netherlands he verbally, in public incited any person to commit violence against persons or their properties, notably (all) (Islamic) women, because of their gender,

that he gave a (web) lecture during which he articulated the text "circumcision is mandatory for men and recommended for women. For women it is not mandatory. The wisdom behind this is that the penis is cleansed from impurities that are present on the foreskin and for women it diminishes lusts"; this (web) lecture had been placed on the website of the As-Soennah Mosque, named [website] and it was open to viewing on the aforementioned website;



3 Consideration of the evidence

3.1

Introduction 1

In summary the suspect is accused of having articulated a message whereby he incited any person to commit a criminal offence (female circumcision, fact 1) thus inciting any person to commit violence against women because of their gender (fact 2).

In the on-line study environment [website] of the As-Soennah mosque in The Hague in the autumn of 2015 2, a video clip lasting 54 minutes and 34 seconds was placed 3 in which the suspect teaches about the subject 'Characteristics of the natural predisposition', also known as the 'Fitra'. This is a part of a multi-volume course about purity and cleanliness in Islam 4. This clip had been recorded by the suspect in the Summer of 2015. 5 In this clip the suspect translates fragments from a book about simplified jurisprudence in the light of the Koran and the Soennah and his lecture includes the following 6.

"As has been said circumcision is mandatory for men and recommended for women. For women it is not mandatory. The wisdom behind this is that the penis is cleansed from impurities that are present on the foreskin and for women it diminishes lusts"7

In April 2018 this statement was noticed by the national media. On 27 April 2018 the video clip that contained this statement was shown and discussed in the programme *Nieuwsuur* 8 and subsequently on 28 September 2018 in the programme *De Nieuwe Maan* 9. Subsequently on 8 November 2018 this was reported by [claimant]. Subsequently she called upon others to report the offence as well. In total over 130 reports were sent to police station Hoefkade in The Hague. On 16 May 2018 the board of the As-Soennah Mosque placed a message on [website] that the video clip had been removed from the website. 10

The Court has to answer the question whether the suspect was guilty of incitement of any person to commit a criminal offence by making this statement (fact 1) and whether he incited any person to commit violence against (Islamic) women (fact 2).

3.2

The position of the public prosecutor

The public prosecutor has responded with regard to consideration of the evidence regarding the charges.

According to the public prosecutor the statements had been made in public because the mosque did not impose specific requirements on those who could or who could not access the on-line course material. It was also accessible for the journalists of *Nieuwsuur*. This renders the course material publicly accessible and places it in the public domain within the meaning of the articles 131 and 137d of the Dutch Criminal Code. The suspect participated in the realisation of the on-line course material, so that it can be assumed that his intentions were aimed towards dissemination of the material in the public domain.

Furthermore the public prosecutor declared that the statements made by the suspect are directed towards an audience that (in part) want to gain more knowledge about Islam, interpretation of relevant scriptures and the consequences of those scriptures for their daily lives. By telling this interested audience that female circumcision is recommended, the suspect created the impression that this is commendable. In view of the fact that the suspect is a professional, a learned teacher who has connections with one of the larger mosques in The Netherlands, the recommendation made has impact and the suspect is guilty of inciting any person to commit a criminal offence, assault at the least.

This is also a case of incitement of any person to commit violence against persons because of their gender, because the suspect distinguishes according to gender by the aforementioned motivation for female circumcision, notably diminishing feelings of lust and because of the fact that female circumcision is an entirely different (and punishable) intervention in comparison with male circumcision. Because of the suspect's function within the mosque it can be assumed that he was conscious of the meaning of the recommendation he articulated and that he at least accepted the reasonable chance that his statement would incite any person to commit violence against women.

3.3

The position of the defence

The lawyer advocated acquittal with respect to both charges.

With regard to fact 1 the lawyer brought forward that there was no case of incitement in the context in which the statement was made, because it cannot be proven that the suspect tried to influence persons to commit criminal offences; neither was the statement of such a nature that anyone could be incited by it. The participants in the on-line course are not persons who are impressionable and the statement that is brought forward in the charges is part of a video that lasted 54 minutes and 34 seconds in total, the larger part of which does not pertain to circumcision but other subjects are discussed in this video. The part that does pertain to circumcision has been translated (on the spot) from a scientific book, from which the suspect himself did not draw conclusions. The suspect did not express words of commendation, admiration, glorification or justification of female circumcision.



Furthermore the lawyer brought forward that it cannot be proven that the suspect committed intentional sedition. First and foremost it is not clear to which the charges brought specifically pertain and moreover the statement is not a commendation made by the suspect himself. It is a quote from an Arab book about simplified jurisprudence. Moreover the suspect himself does not approve of the content of the text.

Furthermore the lawyer took the view that the statement had not been made in the public domain because it could not be heard by the public in a public space. According to the defence the mosque's on-line lessons should be deemed a private group. Moreover it is not clear how many persons were reached by the video.

With respect to fact 2 the defence brought forward that the statements made by the suspect do not come under criminalisation within the meaning of article 137d of the Dutch Criminal Code, because these statements were made in the context of a scientific treatise. Therefore the lawyer requested to lend a restrictive interpretation to this article. Moreover it was brought forward that article 137d of the Dutch Criminal Code is intended for the protection of minorities or vulnerable groups and that women cannot be categorised as such.

3.4

The evaluation of the charges

On the grounds of the means of evidence mentioned under 3.1 it has been established that the suspect articulated the statement mentioned in the charges.

Publicity of the statement

In order to establish judicial findings for both facts the statement must have been made in the public domain. In order to decide whether a statement was made in the public domain it is essential to determine whether the statement was made under such circumstances and in such a way that it is directed towards the public and can be viewed and/or heard by the public.

The administrative president of the As-Soennah mosque has stated that everyone can register per e-mail in order to access the on-line course material on [website]. The study programme of the mosque is offered on line because requests to this effect have been made from all over The Netherlands. 11

The Court is of the opinion that by utilising the Internet a conscious choice had been made for a medium with an extensive public outreach. This is not altered by the fact that Internet users have to send an e-mail and therefore were not confronted with the suspect's statements unsolicited. Access to the actual content of the statement against which the charges were brought, was free. In contrast with the arguments put forward by the defence according to the Court the requirement of accessibility in the public domain has been met. The suspect recorded the film deliberately in order to place it on the Internet, so that it can be assumed that this has been his intention.

Incitement of any person to commit a criminal offence? (fact 1)

Concerning this the Court takes the following considerations as a proposition.

Criminal sedition is incitement of any person to commit a criminal offence or violent behaviour against public authorities. This means the incitement of any thought or fact, attempts to establish the opinion that this should be desirable or necessary and to induce the desire to effect that fact. Sedition can take the form of a request or an incitement or it can be phrased in a more compelling form. Sedition can also be implicit in the expression of high, moral appreciation of an act. The sedition has already been completed once the statement has been made by the perpetrator. It is not required that the sedition has had any result or that the fact to which the sedition pertains actually occurs or that it has been established whether the criminal offence can reasonably be expected to occur.

Any criminal offence

This case concerns female circumcision and in The Netherlands this is punishable as a form of assault on grounds of articles 300 up to and including 304 of the Dutch Criminal Code.

Context of the statement

Whether in this case an incitement was expressed can - among other things - depend on the words in which the statement is phrased, the apparent intention of the statement, the context in which the statement was made, the place where and the occasion at which the statement was made and the target audience at which the statement was manifestly aimed.

The Court is of the opinion that the statement made by the suspect, in view of the phrasing, cannot reasonably be understood other than as a commendation of female circumcision and that the suspect therefore incited any person to commit a punishable offence. In this context the term 'recommended' used by the suspect in his phrasing with respect to female circumcision, is not subject to different interpretations. In a linguistic sense the words "*the circumcision is recommended for women*" can only be understood to be a commendation of female circumcision, even when subsequently is said that this circumcision is not mandatory. That the suspect meant to say that 'recommended' should be interpreted as 'non-mandatory' and that he himself does not advocate female circumcision as he stated in Court, has not in any way become clear in the video clip.

The statement should also be considered in the light of the nature and the content of the course about purity and prayer in Islam and the capacity in which the suspect gave that course.



Femmes for Freedom

Because the statement was made during a course about purity the suggestion was raised - and according to the suspect it should be interpreted in this way according to the scholar he quoted - that female circumcision diminishes female lust and therefore contributes to purity. In doing so the suspect placed female circumcision in a positive light.

The suspect studied theology in Saudi Arabia for four and a half years and since the Spring of 2015 he worked at the As-Soennah mosque. He studied the Quran from a young age. ¹² The suspect stated further that he also answered (simple) questions within the mosque if people asked him how to structure their lives in a practical sense on the basis of his lessons. From all of this it follows that in the video the suspect spoke with expertise and with the authority of the As-Soennah mosque.

Moreover it is a matter of public knowledge that female circumcision still takes place within certain cultural contexts and that it is considered legitimate in certain countries with Islamic legislation. Although the suspect stated not to have had the intention of promoting female circumcision, - because of his theological background and his function within the mosque - he should have been able to understand that others would interpret this statement as a commendation of female circumcision; at least he deliberately accepted the reasonable chance that others would interpret the aforementioned statement in this way. That there are no indications in the file that the statement had been interpreted in this way by those who followed the course is irrelevant for this evaluation.

As opposed to the arguments of the defence according to the Court there is no context to restrict the seditious character of the statements. This is all the more relevant now that these statements had been placed on the website of the As-Soennah mosque, a mosque that is known to strictly adhere to doctrine. The suspect should have taken into account that a part of his audience were specifically looking for information about a strict interpretation of the scriptures and could not assume that all his attendees were to understand that the commendation would not be worth disseminating.

The suspect also pointed out that he quoted from a scientific book, that he only wanted to provide information and that he did not advocate female circumcision himself. Especially in his role as teacher it should have been his task to explain very clearly to his audience that female circumcision, other than this quote wants you to believe, is not to be recommended. At the very least he should have placed the quote in the context it had according to him - as he said at the hearing: a minority viewpoint under scholars that neither he nor the mosque condoned. By not distancing himself from the quote he suggested that female circumcision was considered desirable in the As-Soennah mosque.

Based on the aforementioned the Court is of the opinion that fact 1 has been proven legally and satisfactorily.

Inciting any person to commit violence against women?

The Court already ruled that the statement made by the suspect can only be interpreted as an incitement to any person to commit female circumcision. Thereby the concept of incitement within the meaning of article 137 is implicit as well.

Subsequently the Court should consider the question whether the suspect thus incited any person to commit violence against women because of their gender. In this respect the Court considers the following.

There is a case of 'inciting violence' within the meaning of article 137d of the Dutch criminal code if statements outline a distinction that can reasonably be expected to result in violence and discrimination of a group of people. This includes every form of distinction, every exclusion, constraint or preference that has as its objective or may result in circumvention or violation of the recognition, the enjoyment or the exercise of equal human rights and equal fundamental freedoms.

Evaluation of the present case

It is a matter of public knowledge that female circumcision - as opposed to male circumcision - is a form of mutilation and assault and is therefore a criminal offence within the meaning of the articles 300-304 of the Dutch criminal code. The Court is of the opinion that the phrasing expressed by the suspect implies that the statement undeniably is aimed towards women. Subsequently stating that behind female circumcision lies the wisdom that this diminishes feelings of lust would be tantamount to an incitement to commit violence against women on the grounds of their gender by carrying out circumcision according to the Court.

On the grounds of the aforementioned the Court is of the opinion that it has also legally and satisfactorily been proven that the suspect has committed the offence mentioned under fact 2.

3.5

The judicial finding of facts

The Court states that the following facts have been proven:

1.

during the period from 1 May 2015 up to and including 16 May 2018 in the Hague, he incited to commit a criminal offence by verbally, in public:

giving a (web) lecture during which he articulated the text "circumcision is mandatory for men and recommended for women. For women it is not mandatory. The wisdom behind this is that the penis is cleansed from impurities that are present on the foreskin and for women it diminishes lusts"; this (web) lecture had been placed on the website of the As-Soennah Mosque, named [website] and it was open to viewing on the aforementioned website; the aforementioned (web) lecture was placed on the website of the As-Soennah Mosque [website] and could be viewed there;

2.

that he incited, in public, verbally, any person to commit violence against persons or their properties, notably women, because of their gender during the period from 1 May 2015 up to and including 16 May 2018 in the Hague by

giving a (web) lecture during which he articulated the text "circumcision is mandatory for men and recommended for women. For women it is not mandatory. The wisdom behind this is that the penis is cleansed from impurities that are present on the foreskin and for women it diminishes lusts"; this (web) lecture had been placed on the website of the As-Soannah Mosque, named [website] and it was open to viewing on the aforementioned website;

Any typographical and linguistic errors that may have been present in the indictment have been corrected in the judicial finding of facts. According to the discourse at the hearing the defence of the accused has not been prejudiced by this.



4 The criminality of the proven offences

4.1

Introduction

The question that the Court has to answer in this context, is whether a conviction of the suspect, in view of the circumstances of this case, contravenes the right to free speech, which is warranted by such articles as article 10 of the European Convention on Human Rights (ECHR) for the protection of human rights and the fundamental freedoms.

4.2

The point of view of the public prosecutor

The public prosecutor took the position that the actions of the suspect are a violation of the law, because the requirements that warrant a limitation of the freedom of speech have been met. For this purpose it was brought forward that female circumcision violates the Dutch values and norms and that this concerns a topical and highly serious social problem. According to the public prosecutor in this context it is of importance that the audience of the on-line lecture may have included young people who can easily be influenced by the message conveyed by the suspect in his capacity of teacher with the authority of one of the larger mosques in The Netherlands.

4.3

The position of the defence

The lawyer brought forward that the statement made by the suspect should be regarded as a contribution to a social debate and that he therefore had stayed within the line of what is admissible. The Court understands that thus an argument had been brought forward to the effect that the charges do not constitute a criminal offence. In support of this argument it was brought forward that the suspect is not a preacher but that he teaches about purity in Islam and that the statement should be considered in this scientific context. As a teacher the suspect quoted opinions and interpretations from scientific texts. There are dozens of movements within Islam, each of which have their own viewpoint about ways of practising and in this context the suspect has expressed the opinion of someone else which is, according to objective standards, an expression of religion. According to the defence the statement will not have brought about extensive or disruptive consequences now that no response in the form of practising female circumcision has ensued.

4.3

The evaluation of the Court

In order to evaluate whether a contravention of the suspect's freedom of speech is justified, it should be determined whether the law provides for such a contravention, whether the contravention serves a legitimate purpose and, in fine, whether in this case the contravention (a conviction) is required in a democratic society. This last criterium includes the questions whether this is a case of a compelling social need and whether the contravention is proportional to the objective intended.

The articles 131 and 137d of the Dutch Criminal Code have been established by law in a formal sense, the scope thereof can be assessed and it can be presumed that the suspect is aware of the prohibitive provisions laid down in these articles. There is also a legitimate objective of the contravention, notably the protection (of the rights) of others, notably the prevention of the assault of women by circumcision of their genitalia. Therefore the first two questions are answered in the affirmative by the Court.

As for the evaluation of the third question it is paramount, especially in the interest of the democratic constitutional state, that the utmost diligence should be exercised when expressions of opinion are prohibited. It should be prevented that prosecution of expressions of opinion contributes to an atmosphere of social intolerance and therefore effects the opposite of that what the fundamental right of freedom of expression of opinion intended. Therefore a limitation of this right should fulfil a compelling social need (pressing social need) and it should be proportional to the objective intended (requirements as to proportionality). Of interest in this context are the special circumstances of the case and the interaction between the nature of the statement and the potential effect that this statement has, as well as the context within which such a statement was made.

The Court deems a conviction of the suspect for this statement in a democratic society required, in view of the fact that in these statements circumcising females was recommended in public and a severe assault would ensue if this recommendation were to be followed. Because of the phrasing used by the suspect, the context determined previously by the Court and the possible effect that this statement - accessible to all - will have, the Court is of the opinion that in this case the right to freedom of (religion and) speech cannot outweigh the right of women to protection against violence and discrimination. The Court deems the conviction of the suspect not disproportional to the objective intended and therefore this conviction is required in a democratic society within the meaning of article 10 ECHR, second paragraph thereof.

On the aforementioned grounds the Court is of the opinion that article 10 ECHR has not been violated and therefore cannot impede a conviction of the suspect with regard to the facts stated to be proven under 1 and 2.



5 The criminality of the suspect

The suspect is also punishable because no facts or circumstances have become plausible that exclude his punishability.

6 The sentencing

6.1

The claim of the public prosecutor

The public prosecutor has demanded that the suspect be sentenced to a suspended prison sentence for the duration of 1 month with a probationary period of two years and community sentence of 120 hours, in the alternative 60 days of detention. In his claim the public prosecutor relied on a verdict of the Court of Appeal Overijssel, which concerned a ruling for inciting people to commit violence during a demonstration.

6.2

The position of the defence

The lawyer did not take a position with respect to any sanctions to be imposed.

6.3

The ruling of the Court

The sanctions hereinafter are in accordance with the severity of the offence committed, the circumstances under which this occurred and based on the person and the personal circumstances of the suspect, as they have become clear during the investigation at the trial. In particular the Court takes the following into consideration.

In the function of teacher the suspect made statements in an on-line video of the As-Soannah mosque about female circumcision in a way that can only be considered to be seditious and an incitement to commit violence. Under the guise of science he pretended that circumcising women is to be recommended. The words of the suspect will be taken seriously, especially because of his position of teacher at one of the larger mosques in The Netherlands. With this statement he incited any person to commit violence against women and in doing so he crossed the line of the admissible concerning one of the fundamental rights within our democratic society, notably freedom of speech.

By contrast the Court in session gained the impression that the suspect now seems to understand that the freedom to make statements, specifically as a teacher with some influence, finds its limitations in the acts prohibited in such articles as the articles 131 and 137d of the Dutch Criminal Code. The suspect has indicated that it is not his personal opinion and at the hearing he explicitly distanced himself from the viewpoint that female circumcision would be commendable.

Furthermore it is clear that in his personal life he has experienced the consequences of the - justifiable for that matter - commotion about his statements in the national media, because since this incident he is no longer employed as a teacher.

The Court has taken note of the criminal record of the suspect of 8 May 2020, which proves that he has no earlier convictions for committing a criminal offence.

The Court also takes into account that the statement of the suspect was on-line as of the Autumn of 2015 until May 2018 and that this sentence is passed as late as June 2020. In the interim the suspect has not come into contact with the police and the judiciary in relation to criminal offences committed nor is there any evidence that the suspect has made similar statements. Under these circumstances the Court, as opposed to the public prosecutor, is of the opinion that a suspended sentence with a probationary period is no longer appropriate.

Having weighed everything the Court is of the opinion that a non-suspended sentence of 80 hours community service is a response that is both appropriate and required.

7 The articles of law applicable

The sentence to be imposed is based on the articles 9, 22c, 22d, 57, 131 and 137 of the Dutch Criminal Code.

These regulations have been applied as they were legally applicable at the time of the proven offences or at the time of this ruling in accordance with the law.

8. The ruling



The Court of Appeal:

states that it has been proven legally and satisfactorily that the suspect has committed the charges on the indictment; this has been declared proven in the aforementioned under 3.5 and that the proven facts consist of:

with respect to fact 1:

incitement to commit a criminal offence in public, verbally

with respect to fact 2:

in public, verbal incitement to commit violence against persons or their properties because of their gender

declares the charges against the suspect proven and the suspect punishable for these charges;

declares not proven that which has been charged in this case more or otherwise than has been declared proven in the aforementioned and acquits the suspect of same;

sentences the suspect to:

community service for the duration of **80 (EIGHTY) HOURS;**

should the suspect fail to carry out the community service appropriately the Court of Appeal orders that civil imprisonment will be imposed for the duration of **40 (FORTY) DAYS.**

This sentence was passed by

mr. E.A.G.M. van Rens, chairman

mr. F.A.M. Veraart, judge,

mr. J. Barenzen, judge

in the presence of mr. L. Konings, clerk of the Court

and delivered at the public hearing of this Court of 19 June 2020.

mr. Barenzen is unable to sign this verdict.

mr.

1 When hereinafter reference is made to an official report - unless stated otherwise - reference is made to an official report given under oath of office, drawn up in the legal form by one or more duly authorised investigating officer(s). Where reference is made to pages of the file, this concerns the pages of the official report of the investigation Tulle/DH1R019006 of the Criminal Police The Hague Centre with appendices (numbered page 1 up to and including 69).

2 Record of the questioning of witness [name], page 44

3 Official report of findings, page 36

4 Official report of findings, page 37

5 Record of the questioning of suspect, page 66

6 Record of the questioning of suspect, page 65

7 Official report of findings, page 37

8 Official report transcription programme *Nieuwsuur*, page 30

9 Official report of findings, page 34

10 A written text, notably a screenshot of a message from the [website], attached as appendix to the record of the questioning of witness [name], page 50

11 Record of the questioning of witness [name], page 44

12 Record of the questioning of suspect, page 64