PROVINCIAL CRIMINAL COURT

NINTH SECTION,

BARCELONA

Ordinary Procedure Roll nº 3/2012

Report num.

First Instance Criminal Court n° 9 of Vilanova i la Geltrú (Barcelona)

SENTENCE Nº

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In the city of Barcelona, on the thirteenth of May, two thousand and thirteen.

Public hearing before the Ninth Section of this Barcelona Provincial Criminal Court, this case proceeding from Record num1/11, of First Instance Criminal Court nº 9 of Vilanova i la Geltrú (Barcelona), brought in respect **of two crimes of female genital mutilation** against the defendant **A.**,of legal age, born on the … of 1978 in Gambia, national of Gambia, daughter of …, in possession of an NIE nº (Foreigner Identity Number), residing in …, of unknown solvency, on bail for this case, represented by the Court solicitor Ms Elena Lleal Barriga and defended by her lawyer, Ms …; and against the defendant **B.** of legal age, on the … 1969, born in … (Gambia), son of …, national of Gambia, in possession of an NIE number, resident of …, of unknown solvency and in this case, represented by the Court solicitor, Ms Patricia Sande Sucarrats and defended by his legal representative, Ms … The Public Prosecuter´s Office has appeared before the court as the interested party in prosecuting with the magistrate Mr José María Torras Coll writing the apparent unanimous opinion of the court, after discussion and voting.

FACTS IN ISSUE

FIRST-Between the dates previously established a public hearing was held in the case referred to in the title of this report, in which the evidence presented by the interested parties was admitted and deemed pertinent, resulting in what can be seen in the trial record.

SECOND-The Public Prosecuter´s Office, submitting their opening statement as their closing speech, described the deeds to which this procedure refers to as legally and penally constitutive of two crimes of female genital mutilation, set out and penalized in article149. 2 of the Criminal Code, without there being any circumstances to modify criminal responsibility whose considered perpetrators, are criminally liable, in accordance with article 28 of the same legal text. For the accused, A. and B., at that time parents of the victims, the girls, C. and D., minors, a sentence of SEVEN YEARS OF PRISON was requested for each one of the crimes under investigation, as well as ordering them to pay half the costs each.

THIRD-On behalf of the defendant, A., and in a similar course of action, her Legal representative submitted her opening statement as her closing speech, requested the defendant be acquitted, with all pronouncements in her favour, or, secondarily, for exemption from criminal liability on the grounds of unavoidable mistake as to the unlawfulness of the offense as set out in article 14.3 of the Criminal Code.

FOURTH-In a similar course of action, the court-appointed guardian of the defendant B., submitted an opening statement as her closing speech, and, in the first instance, requested her client be acquitted with all pronouncements in his favour, having denied participating in criminal acts, and as a secondary measure, asked for her client to be exonerated on the grounds of unavoidable mistake as to the unlawfulness of the offense, as article 14.3 of the Criminal Code, states that in this case, the author is exempt of criminal liability, and in full compliance with the applicable provisions to take into

consideration the modifying circumstances of the criminal liability, she upheld a mitigating factor of redressing the grievance, as set out in article 21.5 of the Criminal Code, as said defendant gave his consent to Dr. Pere Barri from the Instituto Dexeus in Barcelona to carry out, at the correct clinical time, a reconstruction of the clitoris operation for both minors, with the following effect: a reduction in his sentence.

The defendants were granted their turn to speak, they gave statements they deemed advisable in their defense, with which the trial finished and was ready for sentencing after discussion and voting.

FACTS AS FOUND

I- The accused, A. and B., both of legal age, and nationals of Gambia, with no previous convictions and legally resident in Spain, are parents, besides others, of the minors, C., born on the … of 1999 and of the girl D., born on the … of 2004, which makes up the family unit, residing in the period in question in the locality of … (Barcelona).

II- On an unspecified date, but understood to be between the 5th and 10th of July of 2010 and the 20th of January of 2011, said defendants, agreed, either directly or via unknown third parties, but who effectively contributed to such an end, to remove the clitoris from both minors, motivated by religious and cultural beliefs, with both of the accused being fully aware that such practices are prohibited in their country of residence, and without the aforementioned minors having left national territory during said period.

III- As a result of the deeds described, both minors had injuries consistent with the absence of the clitoris gland, which, while not making sexual intercourse impossible, alters any sexual pleasure derived from this.

IV- IV-Via a resolution made dated the 14th of December of 2012 by Servei d´atenció a la Infancia i Adolescéncia of Barcelona, File nº 45788/ED-76848-2012, as a precautionary measure, the minors, C. and D. were declared to be in a defenseless state, whereby they were removed from their homes and their parents lost all custodial and inherent rights over their children.

FUNDAMENTAL POINTS OF LAW, FIRST

FIRST Prior considerations.

The Public Prosecuter´s Office brought charges against the defendants, at the time, parents of the injured minors, who suffered clitoris ablation, sustaining that the defendants are the perpetrators of this deed, criminally liable, each of them, of two crimes of female genital mutilation, set out and punishable as in article 149.2 of the Criminal Code.

Clitoris ablation constitutes a cultural secular tradition which is deep-rooted in certain countries, especially in Africa.

Greater pluralism, religion and ideology that the phenomena of migratory flow entails show one of the problems that from a criminal sentencing dimension cannot remain without an answer.

The conflict that arises between that laid out in the law in the host community and the beliefs and traditional, religious or cultural conceptions in certain migratory social groups which, in turn, are icons of identity and difference, are at the heart of pluralism and interculturality.

Therefore, a power struggle inevitably arises, that is between the host community, and the individual immigrant, between the authorities and the values of the individual, between the social and collective values and the personal experiences of man.

Nevertheless, the state cannot endorse, on the grounds of liberty of conscience or on the basis of tradition and protecting customs, all deeds that, according to individual criteria, are in line with their own conscience, as this would be detrimental to legal principles of fundamental importance and transcendence which constitute a universal framework, such as life, physical, and sexual integrity. There are numerous legal instruments which the international community has at its disposal in defense of Human Rights, such as the Universal Declaration on Human Rights, the UN Convention on the elimination of all kinds of discrimination against women, whose article 5 stresses the elimination of prejudices and customary practices based on the concept of inferiority or superiority of the sexes, the Convention on Childrens´ Rights, the UN Declaration on the elimination of all kinds of Intolerance and Discrimination on the basis of religion or beliefs, that protects the rights of children against abuses committed in the name of a determined belief or culture, the General Assembly Resolution 56/128, on Traditional and Customary practices that affect the wellbeing of the Woman or Child. Moreover, within the remit of the European Union, the European Parliament Resolution on female genital mutilation (2001/2035 (INI) of 20th of September of 2001 was preceded by a report on female genital mutilation which concluded that said mutilation constitutes a violation of Human Rights, being an act of violence against women which directly affects their integrity as people, making it imperative that the European Union make a firm and decisive commitment to defend potential victims against this crime, protect and shelter them, stressing the interfamily violence aspect of genital mutilation, and calling on the member states to pursue, condemn and punish those who carry out said practices, applying a comprehensive strategy which takes into account the regulatory, sanitary and social dimensions of immigrant population integration, urging them to implement precautionary and preventative measures, (such as in "ad exemplum "whereby when there are reasonable foundations to suspect somebody of harbouring the intention of carrying out an ablation operation in their country of origin he or she is forbidden to leave the host country as a precautionary measure, and is ordered to have the minor involved examined by a forensic doctor, gynaecologist or specialist, without delay so as to determine the state of her external genital organs, supported by article 4 of Law 8/1995 of 27th of July for the Care and Protection of Children and Adolescents, in accordance with the United Nations Convention on Childrens´ Rights of 20th of November of 1989,the European Charter on Childrens´ Rights, promoting greater and more prevalent interest in the child as the main guiding principle and inspiration for the decisions and actions concerning children made by the judicial authorities, article 15 of the EC., regarding the fundamental right of all people to physical integrity, who under no circumstances can be subjected to degrading treatment, article 13 of the L.E. Criminal(Ley Enjuiciamiento Criminal -Spanish Criminal Proceedings Law) in harmony with article 158.4 of the Criminal Code, applicable, according to article 4.3 of the Civil Code and the adoption of administrative rules in relation to health centres, education establishments, social workers and doctors, emphasizing the preventative labour of social action targeted at minors, but without stigmatizing the immigrant community.

Bearing this in mind, the Spanish parliament, by means of the L.O. (Spanish Ley Organica/Fundamental Law)11/2003, of the 29th of September, explicitly incorporated into our justice system, as a new independent and specific crime, genital mutilation or ablation, described in article 149.2 of the Criminal Code, and in keeping with its preamble, explains that with the social integration of foreigners in Spain new realities arise to which the legal system must give an answer because genital mutilation of women and girls constitutes a practice that must be combated and erradicated, with maximum force without there being any justification on supposedly religious or cultural grounds.

Nevertheless, respect towards such customs and traditions has a limit when aberrant and unacceptable behaviour occurs which is unacceptable for our cultural setting and, to this end, this behaviour is described as criminal. Moreover, as happens in most occasions, the parents or members of the immediate family of the victims are those who force them to undergo these types of aberrant mutilations. For this reason, special disqualification as the main punishment is required in order to protect children from future aggression or indignity.

Female genital mutilation consists in surgically removing all or part of the female genitals, it is a practice that is widely extended throughout the African continent and in some countries in the Middle East and there have been incidents in western countries due to migratory movements or when the children and women visit their country of origin on holiday.

Sexual ablation is the mutilation of parts of the external genitalia of the female in order for them to avoid feeling sexual pleasure, with the aim of them remaining a virgin at the time of wedlock, since, if this is not the case, the women may be rejected. It is also carried out to avoid supposed promiscuity on part of the woman and to fully ensure that she will only bear children with the husband. Female Genital Mutilation (FGM), is the official WHO (World Health Organization) term used to refer to this practice.

There are three types of female genital mutilation, the removal of the whole of or part of the clitoris (named clitorididectomy), the removal of the clitoris and part or all of the minor labia, which is known as excision, and ablation of the labia majora to create raw, irritated skin surfaces that are sewn up afterwards so that the vagina is covered, leaving a small hole to let urine flow out and for menstruation, which is named infibulation.

Needless to say, the consequences of this mutilation are obvious and even horrific, not only on a physical level, especially the acute pain, emotional shock, painful sexual intercourse, retention of urine, complication in giving birth, ulceration of the genital region, hemorrhages and infections that may even provoke sterility, with a high rate of mother-fetal mortality as, in practice, it is typically carried out without using anaesthetic, with rudimentary instruments, glass, pieces of metal (cans), penknives, scissors or any device that can be used for cutting, without asepsis, without having been previously disinfected, without any hygiene measure and with inadequate instruments, making do with vegetables to cover the wound or resorting to ointments considered to have medicinal properties.

These physical consequences go hand in hand with psychological problems, such as psychological disturbances, anxiety, depression and sensations of humiliation and fear and in the domain

of sexuality, the victim often suffers from frigidity, with reduced and substantially limited possibilities of feeling pleasure, which may even reach anorgasmia. It has been confirmed that clitoris ablation is the removal of happiness. In the patriarchal world of some African societies, sometimes, sex is not conceived as pleasurable, but, as a vehicle exclusively for reproduction.

There are multiple reasons why female genital mutilation is usually invoked for millennial and ancestral traditions, some are social, others have a traditional slant, or as a distinctive sign of sex, (fostering feminity) to give the girl a social life and a determined role and function within marriage. It is considered a sign of compliance, obedience and having undergone this mutilation, as the sexual desire of the victim is reduced, the chances of infidelity are minimalized as her independence and sexual freedom have been reduced, that is, by interfering in the free development and exercise of her sexuality. Also it is targeted at the strictly reproductive function of the woman and it is often carried out in the period before puberty, in girls from six to twelve years old, making female genital mutilation into a type of rite of passage ceremony that contains a highly atavistic element.

Criminal justice reform, apart from incorporating said crime, as independent, as a variant of the grievous bodily harm offence with explicit criminal classification, in turn, modifies the L.O.P.J.(Ley Organica Poder Judicial/act of parliament governing the judiciary)(art.23.4,section g) granting jurisdiction(devoted to the universality principle of world justice, extraterritorial justice) to the Spanish courts so that they are made aware of the crimes in relation to female genital mutilation provided that the perpetrators are located in Spain.

As declared in the preamble of the law 3/2005, of 8th of July which modifies the L.O.P.J, the fact that the sexual mutilations are a traditional practice in the countries of origin of some of the immigrants in the countries of the European Union means there is no excuse for not preventing, pursuing and severely punishing such violation of human rights.

Therefore, the United Nations Convention for the Elimination of all forms of Discrimination against Women foresaw the individual states would adopt adequate measures, even of a legislative nature to modify or abolish laws, regulations, uses and practices that typify discrimination against women and the reform of the L.O.P.J is in keeping with this, by making it possible to pursue the practice of female genital mutilation beyond Spanish borders when the crime is carried out abroad, as happens in most cases, when those immigrants resident in Spain take advantage of trips or stays in their countries of origin.

There can be no doubt that the classification of this type of aberrant behaviour which seriously undermines the dignity of the person is praiseworthy. Under the pretext of a rite of passage, the woman is relegated or passed over as a mere instrument of the man for him to maintain sexual relations, an object of his.

It is not feasible to justify such practices under the plea of a conflict of conscience, since otherwise this would be detrimental to the principle of obeying rules and would permit anarchical behaviour.

Therefore, within the scope of liability, the mistake as to the unlawfulness of the offense defense, described in article 14.3 of the Criminal Code, whether this be as an unavoidable error or avoidable error,{60}, is commonplace and often repeated.

Therefore, the invalidity of this supposed justification is based on a self-styled alibi which alludes to the absence of territorial authority of the Spanish courts, claiming that the operation was carried out beyond Spanish frontiers, which reveals and proves the infractor had prior knowledge of external allegiance rules. Moreover, the clandestine nature of the deed indicates the perpetrator was previous aware it was illegal which thereby invalidates the self-styled mistake as to the unlawfulness of the offence defense , even more so when the infractor is not a recently arrived immigrant from his country of origin, but a foreign citizen that satisfies the requisites for the adequate integration test due to his prolonged stay in Spanish territory and degree of social and cultural adaptation to the host community.

As the people who carry out these practices belong to ethnic or cultural groups with social integration deficiencies, their cultural baggage and different values systems mean European societies are obliged to make a careful, calm and pondered assessment of liability, starting from the allusion in the preamble of the rule itself as regards the unjustifiable nature of such practices and which categorically declares any attempt to find justification in this despicable behaviour as unviable, without fully blaming the perpetrators when it is plain that they have been living in cultural and social isolation, indicating that the rules for mistake as to the unlawfulness of the offense in article 14.3 of the Criminal Code may be applicable, in which case it may be proposed that what there is, is not so much unsoundness of mind, or knowledge of unlawfulness, so much as a failure to acknowledge or embrace the value systems embodied in the law.

The crime may be committed with criminal intent, intent in the first degree, by indirect intent, recklessness or second degree intent, in the latter case how far the members of the most immediate family of the minors subjected to the ablation act as their legal sponsors is relevant in the case of resorting to the doctrine of commission by omission.

SECOND *Specifying the offences*

By applying precedent to this situation, and, taking into consideration article 741 of the Criminal E.L., the evidence presented in the oral proceedings, this adjudicating court does not harbour the slightest doubt as to whether the defendants perpetrated the crime, whether as first degree perpetrators, or as effective accomplices for the mutilation injuries caused to their daughters, minors, under legal protection as laid out in articles 28 and 29 of the Criminal Code. Regarding, the sentence applicable in this case, we can refer to article 149.2 of the Criminal Code, or, if applicable, criminal liability will be classified as failure to act as set out in article 11 of the Criminal Code, by exposing their daughters to the inevitable danger which the aberrant and despicable genital injuries cause.

Indeed, and as care has been taken to follow doctrine and jurisprudence, STS (Sentencia de Tribunal Supremo/Supreme Court Sentence) of 31st of October of 2012, the actions described can be classified for sentencing in the legal supposition set forth in article 149.2 of the Criminal Code, whose application is contingent on the following requisites:

1° - Danger or injury resulting from the deed.

2º- Failure to act in relation to the deed whereby hypothetically the result may have been avoided.

3º- that the one failing to act can be described as an active participant in the crime is a fundamental requisite in special crimes.

4º - that the one failing to act was in conditions to voluntarily carry out the act that would have avoided or impeded the result and

5º -that the failure to act supposes the infraction of a legal duty to do so, whether this be as a consequence of a specific legal duty or a contractual one, whether because the negligent party has put at risk a right upheld by law by means of a deed or previous failure to act. Facts, all of which concur in this case.

THIRD Regarding *evaluation of the evidence*.

The task of judging, needless to say, is exceedingly difficult, especially arduous and extremely complex, significantly in this trial, as questions that we have already explored in which greater cultural, religious or ideological pluralism together with the migratory flow phenomena itself show one of the problems that from a sentencing dimension cannot remain unanswered. The conflict that arises between that laid out by the law in force in the host community and the beliefs, traditional, religious and cultural concepts of some determined social migratory groups which are, in turn, icons of identity and difference, at the heart of plurality and interculturality, give rise to an inevitable tension between power, the host state, and the individual immigrant, between authority and individual values, between the social and collective values and the personal experiences of man.

Nevertheless, as previously stated, the state cannot endorse, on the grounds of liberty of conscience, or protecting tradition and customs, all deeds that according to individual criteria are in line with their own conscience, as this would be detrimental to legal principles of fundamental importance and transcendence which constitute a universal framework, such as life, physical and sexual integrity as such deep-rooted and secular customs cannot take precedence or come before respect for the dignity of the person or universally recognized and accepted fundamental rights, let alone when those affected are girls, minors, and the accused, their parents, that is, those who are called for antonomasia to preserve their dignity, integrity and to guarantee the free development of their personality, including their sexuality.

The defendant, A., originating from Gambia, born in a settlement there, via her interpreter of her native language in the plenary proceedings, stated that she came to Spain in the year 1998, that she is the mother of said minors, and they settled, together with her husband, also on trial, B., in the locality of …, and remained on Spanish territory until the year 2007 when they travelled to their country of origin, accompanied by said minors and that in the period understood to be between the 5th of July of 2010 and the 20th of January of 2011 they were living at the aforementioned residence, in Spain.

From the documentary evidence as well as from the evidence given by a gynaecology expert, on 5th of July of 2010, in the course of carrying out a paediatric check-up on the girls, no anomaly was detected, as during the examination the external genital organs were observed as being normal, that is complete.

However, on the 20th of January of 2011, in the course of another gynaecological examination, clitoris ablation was observed, that is it had been removed in both the girls.

The defendant stressed that during said period she had not travelled to Gambia, but remained with the girls in Spain, residing in the aforementioned residence. The accused was evasive and reluctant with her responses, and said she did not know anything about what had happened to the girls. She denied having participated in any genital mutilation act caused to her daughters. She resorted to the argument that she did not know that such a practice was forbidden and that it constituted criminal behaviour.

She then remarked that she never discussed this with her husband.

On being cross-examined as to whether she, when she was young, had been subject to clitoris ablation, she responded in a confused, rambling and rather ambiguous manner as she stated that if they had carried out such a deed on her, she was unaware of it, which is no less than surprising. The defendant stated, on being cross-examined about her educational and cultural level that she did not know how to read or write and no other relation lived with them, that she was the most active of the household, the one who did the household chores, the one in charge of the upbringing of the children, having done cleaning jobs, occasionally or sporadically in a house.

For his part, the defendant, B. admitted having resided in Spain for 22 years, with his residential status, his residence for administration purposes, fully regularized, the same as with his wife. He confirmed that on 5th of July 2010, he was residing in Spain and that when the removal of the clitorises of his daughters, minors, was detected, he was at the same residence in Spain.

He denied having participated in any act of clitoris ablation on his daughters, stating he was against said practice.

He said his wife had made a comment to him in relation to the paediatrician having detected the genital ablation.

He sustained that the ablation did not take place in Spain and attributed it to the trip made to Gambia with the girls, who stayed a while there alone, from the year 2007 until the year 2009, while the parents came back to Spain.

He said that he was not personally in charge of bathing or the personal hygiene of the girls, but his wife took charge of these tasks, he said his wife bathed them and that he had seen her.

The defendant stated that he went to the clinic of Dr. Pere Barri to ask about the feasibility of reconstructing the clitoris of both minors, meaning he was completely prepared to allow them to be operated on when the right clinical time arrived.

He concluded by saying he knew nothing about the double genital mutilation for which he is being tried.

The witness evidence has been extremely illustrative and clear for the court to arrive at a clear and convincing belief as to the guilt of both defendants.

Indeed the witness, Ms E., at that time, midwife, testified in the plenary process, reiterating what she had stated in the preliminary enquiry, that she saw the gynaecological examination carried out on the minors, that there was no anomaly in the genital organs of the girls and they were found to be complete. Furthermore, she stressed the lack of cooperation of the mother who was reluctant and unwilling for the examination to proceed, putting up a certain amount of resistance.

The witness stressed that this examination was carried out by the social services, as a preventative measure. She said that the girls came accompanied by their mother, the defendant, and they had appointments on two occasions, without ever appearing.

The witness, F. stated that she intervened, as a clinic assistant, on the 5th of July 2010, in the clinical examination of the girls, who was accompanied by their mother. She said the girl she saw spoke little, was ostensibly reticent to being examined, reluctant and that it was difficult to carry out the examination.

On her part, the gynaecologist Ms Gloria Valdevira, in the plenary proceedings, stated that on the 5th of July of 2010 she carried out the genital examination on the minors, which were carried out by the social services against the risk that they could travel to their country of origin where the genital mutilation could be carried out.

The doctor said that she found it difficult to put the children on the examining table and after overcoming their initial resistance, she found their external genital organs to be normal and complete.

Nevertheless, on the 20th of January 2011, an anomaly was detected, said external genital organs appeared mutilated, as stated in the report issued after the examination.

In the same way, Dr.Rabanal and Dr. Luisa Ortega Sánchez, medical expert witnesses, confirmed in the report rendered on the 27th of January 2011, regarding the gynaecologic exploration practised on the aforementioned minors, the suspicions of the Social Services that the minors could have undergone female circumcision during a vacation or visit to their home country.

Both doctors detected that the abovementioned girls had no clitoris, and that they did not present scars, which meant that the mutilations were not recent. They also stated that the mucous area is an area that generally scars very well, therefore complicating the establishment of the date of the mutilations.

Both doctors were conclusive at dismissing that the absence of clitoris could be due to a congenital defect, as this is very uncommon and improbable in two sisters.

They added that the girls presented, in the genital area, a small hypertrophic line, that there was no clitoris "button", and underlined that the agenesis was very uncommon and impossible in two sisters. Both witnesses confirmed that it was impossible to confirm the exact date on which the

mutilations were practised, and concluded that a genital mutilation cannot pass unnoticed by a professional.

Furthermore, in the same line, Dr. Mercè Utges declared before the plenary, confirming thereby the report recorded in the file on pages 91-92 and 185-187 of the cause, which dismissed the eventuality of a congenital malformation as the cause of the absence of clitoris in the examined children. She added that there was no scar and that the approximate date of the mutilation cannot be confirmed with accuracy, but could be any time between the 5th of July of 2010 and the 20th of January 2011.

Whatever the case, she concurred with her colleagues in that the circumcisions were recent and may have been practised during the before mentioned time lapse. The doctor reiterated the risks of genital mutilation practices, which are normally carried out in secrecy, in inappropriate places, with unsuitable instruments, with no aseptic measures, and with high risk of infections and bleeding, with risks of complications, and that this clearly depends of who, when, where, and with what type of instruments such female circumcisionpractices are carried out.

Thus, the forensic medical reports, rendered on the 27th of January of 2011, ratified by the plenary, that appear on pages 91 and 92 and 185, 186 and 187, seem defining, regarding the confirmation that the minors, C. (11 years old) and D. (6 years old), do not present a clitoris within their external genital organs, and specify that it is extremely rare that two members of the same family should present agenesis. Furthermore, it is noted that the absence of inflammation and scars on the minors' genitals suggests that such injuries are not recent, but are unable to establish the exact date on which they were carried out.

In turn, Dr. Pere Barri, expert surgeon, specialist doctor at the Clinic-Institute Dexeus in Barcelona, expert in the reconstruction of female genitals since 2007, who has been operating at the correspondent Foundation, declared that the reconstruction was possible, but should be carried out at the adequate clinical moment. He said that the parents of the mutilated girls, the accused, went to his Clinic, together with their lawyer and talked about the positive results achieved. The Dexeus Institute in Barcelona offers clitoris reconstruction to all immigrant women who have suffered a partial circumcision.

This consists in a surgical operation that returns sensitivity to this female organ. This type of surgery was first practised in Spain be Pere Barri Soldevilla, a doctor from the Department of Obstetrics, Gynaecology and Reproduction of the Dexeus Institute. Doctor Barri learnt the clitoris reconstructive technique at the Bichat-Claude Bernard Hospital in Paris, where he worked under the orders of surgeon Pierre Folbes, father of this method which has made female genital regeneration possible. This technique is backed by the excellent results obtained in the surgery of over one thousand women who have suffered clitoris circumcision.

Any woman who has undergone a circumcision, is of adult age, and is conscious of the loss of her sexual life, may undergo the surgery.

The technician, Mr.Llorenc Pere Olivé, assigned to the Department of Immigration of Catalonia, claimed that one of the countries where female genital mutilation is practised is precisely Gambia, country of origin of the accused. He added that it is an execrable and unjustifiable practice due to cultural or traditional reasons, and is considered an ancestral customary practice. He referred to the 2001 action protocol, which is aimed at preventing risks of female genital mutilation due to the migration flux phenomenon, and by which institutional prevention campaigns are carried out in the police, health and education areas, as well as through the corresponding Social Services.

Thus, having stated the above, this Court shall conclude, in view of the body of evidence collected in this trial, that such provisional plea of not guilty, which is the presumption of innocence, has been annulated with the evidence presented.

In effect, the medical documentary evidence, non-mandatory reports by specialised doctors, paediatricians, gynaecologists, midwives, are conclusive that on the 5th of July of 2010, during a paediatric-gynaecologic exploration, there was no anomaly detected in the external genital organ composition of the minors, which were still complete, normal, and intact.

It has also been underestimated that the mutilations could have passed unnoticed by the doctors and health professionals, as any non-expert would be able to perceive the absence, as it is visible. Nonetheless, on the 20th day of January of 2011, the elimination, removal, absence of the clitoris gland was noticed in both girls, which situates the clitoris circumcision practice during the aforementioned time lapse, ruling out the possibility of a congenital malformation.

Certainly, the absence of inflammation and scars complicates the establishment of the date in which the genital mutilations took place, but there is no doubt that they took place during the aforementioned time period and, although the accused, the parents, have confirmed that in that period they did not travel to Gambia but instead stayed in Spain, there may be no doubt to the jurisdiction of this Court.

Presented this way, the conclusion that is verified is that, with no place for doubt, due to the graveness and contingency of the incriminatory information assessed, the genital organs of the minors were intact in the examination carried out during the first exploration, and the absence of the clitoris was confirmed during the second exploration, due to its circumcision beforehand, with no better precision, the information contained in the medical reports that have been confirmed and submitted to contradiction as the implicated doctors appeared before the plenary, as has been aforementioned. In this sense, it is so certain that it reaches the axiomatic canon of "certainty beyond any reasonable doubt".

Certainly, this constitutes, as the expert form Catalonia affirmed, one of the first apparent cases of female genital mutilation practiced in Spain that has reached a trial, as there is no record that such type of surgery is carried out in secrecy in Spain, and that the common practise is that the parents travel back to their country of origin to circumcise their daughter's clitoris.

The ignorance or lack of knowledge that female mutilation is a crime, as argued by the accused parents, may not bar the viability of the criminal action exercised, as it can be inferred, by logic and reason, by postulation of the Public Prosecutor that the daughters of the accused, with residence in Vilanovai la Geltrú (Barcelona), who lived with their parents, underwent the circumcision in Spanish territory, as there is no evidence that they left the country between the 5th of July 2010, when the last gynaecologic revision was carried out and demonstrated that both children had their clitoris whole, and the 20thof January 2011, date when the doctors detected the circumcision in both minors.

The truth is that the genital mutilation in the minors was discovered thanks to the introduction of the risk prevention protocol for such execrable practices that was approved in Catalonia in the year 2001, in order to prevent and end with the aforementioned practice, which includes, in addition to a campaign addressed to risk groups designed to raise awareness and sensitiveness, periodic gynaecologic revisions to girls whose parents belong to African ethnic risk groups. Furthermore, contrasted and supported studies show that the territorial dispersion of the immigrants in Spain, and in Catalonia in particular, has contributed to the avoidance of ghettos, high concentrations, and social isolation, that could complicate their social integration and

adaptation in the host society. In this sense, the institutional campaigns carried out in Catalonia are known in regard to the so-called "Newcomers".
It is true that both accused have explained to the Court that, although these protocols exist, no representative from the education, social or medical field implied, ever informed them that circumcision was considered a crime in Spain. The father declared that he was not in charge of such things, while the mother has disassociated herself from her minor daughters' genital mutilation, claiming that she is illiterate and comes from a small village in Gambia and that she was not even aware if she has undergone circumcision herself.
Thus, she stated during the plenary that "If I had it done as a child, I do not remember", and confirming that her only studies were various verses from the Koran that she memorized as a child in order to be able to pray, and that during her residence in Spain she has only worked for a year as a cleaner.

However, the accused mother has lived in Spain for over fifteen years and has worked as a cleaner, and, it is known that the media, newspapers, radio and television, have made sure that they notified that female circumcision is an illegal and criminal practice.
The father has lived in Spain for 22 years, has held several employment positions, and the Courtroom believe that he is socially integrated, has a Spanish NIE (Foreign Identification Number), as has his wife. This is, their administrative situation for living in Spain is legal.

The doctors and health personnel that carried out the first genital examination on the minors have claimed that both the minors and their mother were against the examination, and the gynaecologist stated that the mother "did not seem to understand why we were there".

The accused acknowledged that they were unaware of who may have circumcised their two daughters, but added that between 2007 and 2009, the minors were living with their family from Gambia, while their parents were working in Spain.

This argument clashes with the medical and expert reports that situate in genital intervention, the genital mutilation, during the second semester of 2010.

Furthermore, the actions, incorporated as documentary evidence and neither refuted nor contradicted, included information provided by the Cohesion and Identity department of Vilanovai la Geltrú Town Council, published on the 3rdof October of 2008, which states that on the 22ndof April of 2008, an interview was carried out with the accused, A., in which she was informed of the preventive requirements of the public Prosecutor's Office, and she declares to those responsible, technicians from the local Department, that she would not carry out such female circumcision practices and had talked to her husband about it.
At the time, the accused was told and illustrated upon such practices being a crime, and could even go to prison, even if the practice was carried out outside of Spain, and she was informed of the sense and reach of the action Protocol to prevent female genital mutilation, especially in children aged between 6 and 12 years of age. In addition, she was informed that she shall contact the authorities immediately whenever she planned to leave Spain and that before travelling to her home country, the children would be examined by the gynaecologist/paediatrician and, once they returned, again.
The accused confirmed that, as a mother, she would not practice female circumcision upon her daughters, although the report shows that she left the interview annoyed, angry.
The report states that, during the last interview, the accused verbalized that she was in favour of such genital mutilation practices.

Thus the case, and, in words of the High Court, the consigned facts being clear and conclusive, with no obscurities, in a supposed that is very similar with what is presently on trial, with regards to the uncertainty of the exact date or dates on which the mutilations took place indubitably in the mentioned time lapse, the exact date in which the aforementioned actions took place being something peripheral and incidental, due to irrelevance.
And with regards to the predicted co-perpetration of the parents, as the High Court states, the early age of the children when the circumcisions were carried out is to be taken into account, with attention to their respective dates of birth, when they underwent the genital mutilations and that they lived with their parents, and in such a situation the authorship is clear, bearing in mind the wide concept of author as defined in the Spanish code of Criminal Procedure in article 27 and concordats.

FOUR. About *the error of prohibition and its inoperability and inefficacy.*

By what makes the provided circumstance exonerative from criminal responsibility allegedly founded on the error of prohibition of article 14,3 of the Spanish Code of Criminal Procedure, it is discarded that it should concur as an invincible error, or vincible, considering it not applicable, in view of the undergone test.
In effect, the Defence of the accused implicitly suggests that female genital mutilation is an ancient ancestral practice in their country and does not discredit the physical integrity of women, but complies to a tradition, with an initiation ritual that eases the integration of a girl into society.

Thus, it is brought forth that the error of prohibition is produced when the author believes to be acting lawfully, --STS 336/2009 of the 2nd of April--. The error of prohibition is made up, as the contrary of the conscience of the unlawfulness, as an constitutive element of guilt, and requires the author of the criminal infraction to ignore that his/her conduct goes against the law or, expressed in other words, to act in the belief of acting lawfully with the consequence of excluding criminal responsibility.
This may not be extended to the assumption that the authors believed that the criminal sanction was not as serious, nor the assumption of not knowing which law was being infringed. Only in the cases in which the error of prohibition is avoidable, there shall be an adequate criminal responsibility as stipulated in article 14 of the Spanish Code of Criminal Procedures.

Without doubt, one of the mostly accused factors in current society, including Spanish society, is the high level of interculturality as a consequence of the strong migration currents to countries of higher life expectancy, motivated by the desire to live a better life that in poorer countries. It is a flight from no-hope to hope. Such groups come from other cultures and have different rituals and customs from those of the receiving country. Both the recurrent and sentence proper, states the High Court, in the scheduled sentence, refer to this situation with regards to the female circumcision by asserting that it is a cultural practice in their country of origin. This may not be an excuse to elaborate a theory of the "error of prohibition in cultural practices the accused belong to", because the respect of traditions and cultures has the inviolable limit of respect of human rights that act as lowest common denominator enforceable in every culture, tradition and religion. Female circumcision is not culture, but mutilation and female discrimination. To such effects, the Exposition of Reasons of the Spanish Organic Act 3/2005,

of the 8th of July, that agreed to pursue extraterritorially the practice of female genital mutilation, shall be recalled.

"... Female genital mutilation constitutes a serious attack against human rights. It is a violent activity against women that directly affects their integrity as persons. Mutilation of genital organs in children and young adults shall be considered as an "inhuman and degrading" treatment, including it, with torture, in the prohibitions of article 3 of the European Convention on Human Rights".

In case of decrees, the accused have been living at the same time in Spain, the women, since the year 1998, and the man, for approximately the last 22 years, the latter understanding Spanish, as this Court could appreciate and perceive due to communication, although, to cover full guarantees during his interview, he required an interpreter to translate, having carried out many jobs, and both were totally integrated in Spanish culture or at least knew the culture, as the minors went to school and the mother would attend the tutor meetings and had visited the Social Services in urgent situations, due to compelling needs, which was where she was informed that female circumcision was considered a crime.

Furthermore, the accused did not want her daughters to be examined at any point, which meant that she knew that the genital anomaly resulting from the double mutilation that the minors underwent could be detected. She was in charge of washing them, cleaning them, and did not say anything, nor did she inform the authorities, hiding the mutilations.

Both parents had a specific and innate position of guarantors of their daughters, minors, and the responsibility of omitting their functions makes the criminal guilt feasible.

Thus, the theory of the error of prohibition shall not be accepted, and it has not been possible to appreciate in the accused mother a qualitative situation that differs from that of the accused father, which could provide shelter to an avoidable error of prohibition, since although she says to have been born in a village or settlement, she has not just arrived in Spain, but has been living, specifically, in Catalonia since the year 1998. Therefore, it is reasonable to believe that although she was not completely integrated, there is no place for doubt that her social integration must be of importance.

As the Procurator Department presented in the final report, article 3,2 of the Spanish Organic Law 4/2000 of the 11thof January, regarding Rights and Freedom of foreigners in Spain, modified by the Spanish Organic Law 2/2009 of 11thDecember, declares that "The rules regarding foreigners fundamental rights shall be interpreted conforming the Universal Declaration of Human Rights and the treaties and international agreements on the same matters which are in force in Spain, with no possibility of claiming the profession of religious beliefs or ideological or cultural convictions of whatever type in order to justify the realization of actions in contradictions to the same". And specifically, on female genital mutilation, the Exposition of Reasons of the Spanish Organic Law 3/2005, of 8thof July, which modifies the Organic Law 6/1985 of 1stof July, of the Judiciary, in order to pursue extraterritorially the practice of female genital mutilation, declares that "The fact that sexual mutilations are a traditional practice in some countries from where some foreigners originate, and who live in countries of the European Union, shall not be considered as an excuse to not prevent, pursue, and punish such infringements of human rights". The Convention on the Elimination of All Forms of Discrimination against Women, in article 2.f, states that those States involved adopt the necessary measures, including those of statutory provision, in order to modify or revoke laws, regulations, uses, and practices that constitute discrimination against women. In sum, it may be

pointed that the limit to the respect to indigenous cultures is in the respect to Human Rights, universally known, and that act as least common intercultural denominator.

FIVE. ***On the mitigating circumstance of repairing the damage based on the surgical reconstruction of the clitoris, as a modifiable circumstance of criminal responsibility.***

With regards to the mentioned mitigating circumstance of repairing the damage, that the defence of the accused has proposed to the Court by invoking article 21,5 of the Spanish Code of Criminal Procedure. Even when the theory results suggesting this may not be considered as a modifiable circumstance from the criminal responsibility, considering that the accused affirms, and, apparently the co-defendant also, would have strictly chosen and would agree that both children could undergo the surgical intervention of clitoris reconstruction, at the adequate clinical moment, practiced by the specialist expert Dr. Pere Barri, surgeon expert, trained in Paris in such specialisation. In addition to the results that could be achieved from such operations, the truth is that such initiative may not transcend nor influence the behaviour of the accused submitted to criminal reproach, as this is a "post-facto" circumstance, "ad futurum", and, strictly speaking, does not constitute, as such, a solution to the damage, nor does it entail a restorative effort by the offender, as this does not diminish the effects of the damage caused before the celebration of the oral trial, nor may it be applied by analogy, as what truly supports the mitigating circumstance, be it ordinary, qualified, or very qualified, is the objective amendment of the damage before the oral trial, and not a promise or agreement, more or less firm, of later amendment, as the criteria appreciated is primarily restrictive, nor may it be understood that the suggestion made may save the fate of formal, morphologic, or descriptive similarity in order to identify any circumstance of analogous meaning, and, in other means, the behaviour of the parents, as such, is stated by the law, as they should look after the life, health and physical and psychical integrity of their children and protect their personal, emotional, vital and sexual development, in order to achieve complete indemnity.

SIX. ***Penalty***

Another issue is that such behaviour, as contrition or regret, may have its repercussion in the individualisation and appointment of the punishment, ex article 66 and concordats of the Spanish Code of Criminal Procedure.

Therefore, each of the accused shall receive, for each of the two crimes of female genital mutilation that they have been accused of and are condemned, and having a clean criminal record, the punishment of six years of prison for each of the two female genital mutilation crimes that they have been accused of hereby.

SEVEN. ***About*** **the disqualification punishment for the exercise of parental rights**

With regards to the main punishment of special disqualification for exercising parental rights, guardianship, conservatorship, physical custody or fostering, contemplated in article 149, number two of the Spanish Code of Criminal Procedure, being the case that it is not of imperative imposition, but has a voluntary character, this is, of optional punishment, in the cases where the legislator stipulates, "if the Judge finds it adequate for the minor's interest". It seems that such punishment was not postulated expressly by the Procurator's Department, and, hence, was not object of effective dialectical discussion in the centre of the process, nor in the oral trial.

Therefore, bearing in mind the principle of contradiction, of defence and communication, and, since the minors have not been examined nor heard in this trial, the Court considers that it may not pronounce in this punishment the disqualification of an excessively restrictive application, without this prejudicing the Procurator Department, while the children are minors, to ensure the necessary measures of guardianship for the interest of the minors which is prevalent and priority and the best protection. In effect, such inherent responsibilities of the condition of parents is ontologically consubstantial to the basic parental rights, as an inexcusable function, in order to guarantee the wellbeing of the children, minors, their security, emotional stability, ease the harmonic development of their personality, educate and provide the minor with an integral training as a person, with total respect towards their dignity, including their sexuality, pursuant to the provisions of article 236 and concordats of the Family Code of Catalonia, that regulates as a special local regulation. In respect thereof, conform Resolution of the 14th of December of 2012, sentenced by the Infant and Youth Attention Service of Barcelona, File 45788/Ed-76848-2012, the situation of homelessness of the minors, C. and D., was declared with caution, with the immediate assumption of their guardianship which implicates the corresponding suspension of the parental exercise and inherent rights of the parents, therefore they are not exposed to any risk situations.

EIGHT. ***On civil responsibility.***

It goes without stating judgement in the matter of "ex delicto" civil responsibility, considering, as is known, that the principle of initiative, the rogatory principle and the ultra petita principle rule in this area, and, since the Prosecutor Department has not requested compensation in such a sense, such action prevents the Court to declare in this respect, as it is not feasible to do so officially, without the excitation of the party. (Articles 109, 110, 166 and concordats of the Code of Criminal Procedures).

NINE. Costs .

The costs shall be borne by those responsible of the crime, as stated in article 123 of the Spanish Code of Criminal Procedure and articles 239 and 240 and concordats of the Spanish Criminal Prosecution Act, by which the accused shall assume the borne of the costs between them, each assuming half of the costs.

Having reviewed the abovementioned articles and remainder of general and pertinent applications, in name of His Majesty THE KING

SENTENCE

That the Jury **SENTENCES AND CONDENMS THE ACCUSED, A.** and **B.**, adults, with no criminal records, already detailed, as the authors, each one of them of **TWO CRIMES OF FEMALE GENITAL MUTILATION, FEMALE CIRCUMCISION,** above described, with no grounds for modifiable circumstances for criminal responsibility, and shall each serve **SIX YEARS OF PRISON** for each of the two crimes for which that have been accused of and condemned, and each party shall borne the costs of this trial by equal parts.

Furthermore, and to the interest, notify immediately, with advance copy by Fax, this resolution, enclosing the notary public's testimony, with attention to the enclosed filed document, to the Child and Youth Service Department, and the Social and Family Wellbeing Department of

Catalonia, in order for it to be taken into account in the correspondent Files of the minors affected by the circumcisions, concerning acknowledgment of receipt in order to hereby evidence in the present actions.

Notify the hereby resolution to the parties, foreseeing that they shall be able to file an appeal by law infraction during the next five days.

Thereby, the present shall be joined to the case number certification, which we pronounce, command, and sign.

PUBLICATION.-The above sentence has been reviewed and published by the judge writing for the court, declared in public hearing, on the day of the date. I hereby attest.