

COPY

District Court of Kanta-Häme

Judgment

16/112863

22 March 2016

Case number
R 16/214

Chair District Court Judge M.L.
Members District Court Judge T.L.
 District Court Judge R.V.

Prosecutor District Prosecutor J.H.

Defendant H.

Case War crime

Instituted 8 March 2016

Punishment requested by the Prosecutor

1. War crime
 2400/R/0000001/16
 The Criminal Code of Finland Chapter 11(5)
 Rome Statute of the International Criminal Court (Treaties of Finland 56/2002)
 article 8

2 April 2015 International

H. has, in connection with war or another international or domestic armed conflict, committed an act defined as a war crime under article 8 of the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002).

During the period November 2014 to September 2015, H. served as a sergeant in the Iraqi army. He belonged to the Iraqi Special Operations Forces (ISOF) unit and the Iraqi Counter-Terrorism Battalion (ICTB), which formed part of the ISOF and was involved in combat operations against the group known as ISIS/ISIL. On 2 April 2015 H. published on his Facebook profile, which was under the name H.A., a photo taken on 19 March 2015, in which he is depicted with the severed head of an enemy soldier apparently killed in combat or in a bomb attack. The image was published on a public Facebook profile, meaning that it would have been freely accessible to any of Facebook's more than a billion users.

H.'s conduct amounted to treating the person photographed in an inhumane and degrading way, causing an outrage to their dignity. H.'s conduct is punishable as a criminal offence under article 8(2)(b)(xxi) and primarily article 8(2)(c)(ii) of the Rome Statute of the International Criminal Court.

Response

H. has denied the war crimes charge. H. acknowledges that he did post the photograph referred to in the charge, taken during a domestic armed conflict, on his public Facebook profile. This act is not a war crime as defined in article 8 of the Rome Statute of the International Criminal Court. In order for the act in question to be an international war crime, it would have had to cause a severe outrage to personal dignity.

2 (9)

This cannot include minor acts, such as publishing a photograph, as the person depicted in the photograph has not, as such, been subjected to any crime.

H. is depicted in the photograph, which shows a severed male head. H. did not cause the head to become severed from the body, instead he took the head from where it was found to 'safety' and buried it, as there were dogs running loose in the location where the head was found. Prior to burying the head, H. and his group took a photograph of themselves, with the head visible in the photograph. The photograph did not depict any act of violence, setting it apart from photographs depicting the severing of heads or other acts degrading corpses.

In this instance, the head was severed in a suicide bomb attack perpetrated by the ISIS fighter, and H. did not attempt to use the photograph to demonstrate that he was in any way involved in the severing of the head. H. was a member of Shia groups/the Iraqi national armed forces.

H.'s conduct was in no way an attempt to outrage the victim's dignity. H. had his photo taken with the dead person's severed head, but having a photo taken and publishing the photo are do not fall within the scope of the actions defined in article 8 of the Rome Statute of the International Criminal Court. Mutilation of a dead person's corpse, severing of the head or other body part, or otherwise actively interfering with the corpse could be actions as defined in Article 8(2)(b)(xxi) of the Rome Statute of the International Criminal Court. Their purpose could be to violate and degrade the dead person.

H. published the photograph to communicate to his own social circle that ISIS troops could be defeated and the war ended. The objective was to console victims of ISIS and support their families, as well as to encourage those fighting in tough conditions. It was not a matter of war-time propaganda or cultivating terror and fear, as ISIS troops did actively in Iraq. The photographs were not directed at the enemy. The action was not intended to communicate the poster's superiority or ruthlessness to the enemy. H. did not in any way try to use the photograph to communicate that he or any member of his group had caused the head to become severed from the body. The photograph was only intended to communicate to his close friends and family that the enemy had not managed to defeat H. in battle.

Article 8(2)(c)(ii) of the Rome Statute of the International Criminal Court does not refer to persons who have taken active part in hostilities, but who have become *hors de combat* following their death in combat.

In the regulation in question, *hors de combat* refers to a person who is still alive. The subsection in question is, therefore, not applicable in this instance.

If H. is regarded as having committed an act as defined in the Rome Statute of the International Criminal Court, the issue would, at most, be one of a petty war crime, as referred to in Chapter 11 Section 7 of the Criminal Code of Finland. The conduct in question is not unlawful under Iraqi law. On the other hand, the Iraqi army's armed forces have, at least to some degree, committed to adhering to the laws of war and international law. Neither the Criminal Code of Finland, the Rome Statute of the International Criminal Court nor even the interpretation guidelines provided for the Rome Statute of the International Criminal Court directly describe the conduct at hand as prohibited.

H. was born and grew up amidst war and violence. The conditions in which H. was raised differ significantly from those found in Finnish culture. Aspects relating to the cultural background of the victim, as well as that of the person committing the act, must be taken into account when considering what constitutes conduct that severely degrades or violates dignity.

Evidence

3 (9)

The Prosecutor's documentary evidence:

- 1) Collection of images taken from H.'s Facebook profile (preliminary investigation record 2400/R1/16 appendix 1, pp. 26–32).
- 2) Collection of photographs stored on H.'s mobile phone, four photographs (preliminary investigation record appendix 2, pp. 33–37).
- 3) Statement from the Finnish Immigration Service dated 8 January 2016.
- 4) Expert statement from M.P. dated 26 January 2015.
- 5) Statement from A.P. dated 10 March 2016.

H.'s documentary evidence:

- 1) Collection of images taken from H.'s Facebook profile (preliminary investigation record 2400/R1/16 appendix 1, pp. 26–32).
- 4) Expert statement from M.P. dated 26 January 2015.

Prosecutor's witness:

- 1) Expert A.P.

Grounds for the judgment

Attribution

Through his conduct as described in the charge, H. has, at the very least, committed a war crime during a domestic armed conflict.

Grounds for the attribution

The events

According to the undisputed account presented on this matter, during the period November 2014 to September 2015, H. served as a sergeant in the Iraqi army.

He belonged to the Iraqi Special Operations Forces (ISOF) unit and the Iraqi Counter-Terrorism Battalion (ICTB), which formed part of the ISOF and was involved in combat operations against the group known as ISIS/ISIL. On 2 April 2015 H. published on his Facebook profile, which was under the name H.A., a photo taken on 19 March 2015, in which he is depicted with the severed head of an enemy soldier apparently killed in combat or in a bomb attack. The image was published on a public Facebook profile, meaning that it would have been freely accessible to any of Facebook's more than a billion users.

Based on the grounds set out in his response, H. has denied having committed a war crime in the context of this case.

The photographs in the collection of images from H.'s Facebook profile and stored on his mobile phone, presented as documentary evidence in the District Court, show H. crouching down on the ground, with an assault rifle pointed at the ground in his hand, looking at the camera, and on the ground close by in front of him is the head referred to in the charge. It is not easy to determine whose head this is from the photographs.

The aforementioned photograph published on H.'s Facebook profile attracted comments featuring statements praising him, such as 'beloved hero' and 'you are the most shining of heroes'.

H. is not even alleged to have partaken in the severing of the head from the body of the person referred to in the charge, or to have otherwise played any role in its removal from the body.

Regulations applicable to the matter and other applicable rules of law

4 (9)

Under Chapter 1(7)(1) of the Criminal Code of Finland, Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence). Under Section 1(1)(2) of the Decree on the Application of Chapter 1(7) of the Criminal Code of Finland, when applying Chapter 1(7) of the Criminal Code of Finland, crimes considered international crimes include war crimes, as defined in the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002).

Chapter 11(5)(1) of the Criminal Code of Finland specifies in greater detail the acts punishable as war crimes, carried out in connection with a war or other international or domestic armed conflict or occupation. Under subsection 2 of the same section, also a person who commits another act defined under article 8 of the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002) or in another manner violates the provisions of an international agreement on war, armed conflict or occupation that is binding on Finland or the generally recognised and established laws and customs of war in accordance with international law shall be sentenced for a war crime.

Under Chapter 11(7)(1) of the Criminal Code of Finland, an offender must be sentenced for a petty war crime if the war crime, considering the

consequence caused or the other relevant circumstances, is petty when assessed as a whole.

Under Section 1 of the Act on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute (1284/2000), the provisions of the Statute of the International Criminal Court, done in Rome on 17 July 1998, insofar as they are of a legislative nature, shall be in force as applicable law in accordance with the commitments of Finland. The aforementioned act came into force on 1 July 2002.

Under article 8(2) of the Rome Statute of the International Criminal Court, in the statute, 'war crimes' shall refer to, amongst others:

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the acts detailed in the paragraph mentioned, including: xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment.

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts, detailed in the paragraph mentioned, committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. These acts include: ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment.

Under article 9(1) of the Rome Statute of the International Criminal Court, the interpretation guidelines shall assist the Court in the interpretation and application of article 8, amongst others. According to the preparatory work concerning Chapter 11(5) of the Criminal Code of Finland (HE 55/2007 vp p. 26), the interpretation guidelines defined in the Rome Statute of the International Criminal Court should also be taken into account in the application of regulations concerning war crimes in the Criminal Code of Finland.

5 (9)

According to the interpretation instructions for the definitions of crimes under the Rome Statute of the International Criminal Court (Ministry for Foreign Affairs of Finland publications 1/2004), elements of war crimes based on outrages upon personal dignity under article 8(2)(b)(xxi) and (c)(ii) include the severity of the humiliation, degradation or other violation being of such degree as to be generally recognised as an outrage upon personal dignity. According to the interpretation guidelines, the elements of the crime under section c(ii) include such person or persons being either *hors de combat*, or being civilians, medical personnel or religious personnel taking no active part in the hostilities. Regarding both of the aforementioned points, the interpretation instructions state that for the crimes in question, 'persons' can include dead persons, and it is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other outrage upon personal dignity, and that the relevant aspects of the cultural background of the victim are taken into account in the instructions.

The situation in the area in which the events took place

Military Researcher A.P., who is familiar with the conflicts in the Middle East, served as an expert at the District Court and stated that in March 2015 the Tikrit area in Iraq was in a state of domestic, civil war-like conflict as maintained by ISIS, although there were also some characteristics of international conflict.

Furthermore, documentary evidence in the form of P.'s statement dated 10 March 2016, the statement from the Finnish Immigration Service dated 8 January 2016, and M.P.'s expert statement dated 26 January 2015 indicate, and it can be inferred that during the time of the events mentioned in the charge, the area in which the events took place, in Tikrit, Iraq, was the site of a domestic armed conflict, as referred to in Chapter 11(5) of the Criminal Code of Finland.

Additionally, P.'s statement and description reveal several factors, including that the area in which the events took place, photographs of heads removed from their bodies could be regarded as signs of victory intended for a person's own social circle, and as indicators of a person's own ability and renowned ruthlessness against the enemy. Thus, the aim of these photographs is to strengthen an individual's position within an armed group, or to increase internal cohesion within an armed group by demonstrating that its members, if necessary, form a brutal team. The aim of posting these photographs is, thus, to send an enemy, such as ISIS, a clear message that where necessary, the party depicted in the photographs is able to carry out such acts. This is done primarily by soldiers and fighters of lower ranks. Those at higher levels turn a blind eye to such practices to some degree. On social media, photographs spread very quickly. In the cultural environment in the area where the events took place it may be acceptable to post photographs such as those in question. According to P., in the Finnish defence forces, such actions would not be acceptable in any circumstances.

Furthermore, M.P.'s expert statement dated 26 January 2015 states that the purpose of photographs featuring severed heads of opponents is to threaten the enemy with revenge. The objective may not necessarily have been professional propaganda, but rather to record personal war mementos for the fighters.

Assessment and conclusions

6 (9)

On the basis of H.'s response and both the collection of images from H.'s Facebook profile and the photographs stored on his mobile phone, which were submitted as documentary evidence, the District Court finds that H. has acted as described in the charge.

On his Facebook profile, H. published a photo in which he is depicted with the severed head of an enemy soldier.

H.'s conduct is directed at the personal dignity of the person depicted, and it is humiliating and degrading. His conduct is of such degree as to be generally recognised as an outrage upon personal dignity.

As stated above, according to the interpretation instructions to be taken into consideration concerning the definition of crimes in the Rome Statute of the International Criminal Court, the term ‘person’, in the context of war crimes causing an outrage upon personal dignity in the Statute may also refer to dead persons. Taking this into account, the District Court is of the view that the acts referred to in article 8(2)(c)(ii) of the Rome Statute of the International Criminal Court may also be the acts referred to therein when directed at persons who have become *hors de combat* following their death in combat. In this respect, the District Court also refers to the wording of article 8(2)(c), which also makes reference to members of armed forces who have become *hors de combat* for another reason.

As previously stated, the District Court is of the view that at the time of the events, the area in question was the scene of domestic armed conflict, for which reason article 8(2)(b)(xxi) of the Rome Statute of the International Criminal Court, which was also referred to in the charge, shall not be applicable in the matter at hand.

Based on the above, the District Court is of the view that H.’s conduct as mentioned in the charge fulfils the definition of a war crime given in article 8(2)(c)(ii) of the Rome Statute of the International Criminal Court, which is binding on Finland.

In this matter, H. has not presented grounds considered acceptable for taking and publishing the photograph in question. Nor is H.’s conduct made acceptable from the perspective of the attribution by the opponents of those he represented previously having acted in a similar way. It is of no relevance to the matter whether H.’s conduct is punishable under Iraqi law.

H. knew that by publishing the photograph in question publicly on his Facebook profile, it would be freely viewable by a very large number of Facebook users. H. must, at the latest at that point, have realised that his conduct would outrage the dignity of the dead person referred to in the charge.

Based on the aforementioned grounds, the District Court is of the view that H.’s conduct entailed inhumane and degrading treatment of the person photographed and referred to in the charge, causing an outrage to their dignity, as referred to in article 8(2)(c)(ii) of the Rome Statute of the International Criminal Court. H.’s conduct therefore amounts to a war crime under Chapter 11(5)(2) of the Criminal Code of Finland.

Taking into account the consequences caused by the action mentioned in the charge and other relevant circumstances, the war crime in question cannot be considered petty, as referred to in Chapter 11(7) of the Criminal Code of Finland, when assessed as a whole. The matter at hand is not, therefore, a petty war crime.

7 (9)

On the grounds mentioned, the District Court concludes that H. is, through his conduct as described in the charge, guilty of a war crime in this matter.

No other conclusion may be reached based on the circumstances invoked by H..

Criminal sanction

Under Chapter 11(5) of the Criminal Code of Finland, a person shall be sentenced for a war crime to imprisonment for at least one year or for life.

According to the criminal records extract, H. has no record of prior crimes. Taking into consideration this, the nature of the crime he is charged with, his culpability, and that due to this matter H. has been held on remand since 7 January 2016, he is sentenced to a suspended custodial sentence, close to the lower limit of the scale of sanctions.

Liability for damages

This matter has not resulted in any evidence costs for the District Court.

The fee to be paid to H.'s defence counsel from state funds, at an amount to be approved by the District court, shall be borne by the state under Chapter 2(11) of the Criminal Procedure Act.

Release

The Prosecutor has not demanded H.'s continued detention. Considering this and the sentence at hand, there are no conditions on which to continue H.'s detention as a result of this matter.

District Court of Kanta-Häme**Operative part**

16/112863

22 March 2016

Case number
R 16/214**Defendant**

H., ...

Attributed crime

1. War crime

2 April 2015

The Criminal Code of Finland Chapter 11(5)(2)

Rome Statute of the International Criminal Court

(Treaties of Finland 56/2002) article 8(2)(c)(ii)

Criminal sanctions

Imprisonment

Imprisonment for one year and one month

Period of detention 7 January – 22 March 2016

The sentence is a suspended sentence.

The probation period will end on 22 September 2018.

The suspended sentence may be enforced if the convicted party commits a crime during the probation period for which they are sentenced to an unconditional custodial term, and for which a charge is brought within a year of the end of the probation period.

Liability for damages

M.M., attorney-at-law, designated as H.'s defence counsel, is to be paid from state funds a fee of EUR 4,631, and reimbursement for costs amounting to EUR 483.20, with VAT of EUR 1,130.02, totalling EUR 6,244.22, which will be borne by the state.

Other statements

The Defendant will not continue to be held in detention for this matter. He is to be released immediately, unless there is some other reason for his continued detention.

Appeal

This decision may be appealed to the Court of Appeal or to the Supreme Court for a precedent.

Validity

This judgment is final.

Signature

[SIGNATURE]

District Court Judge M.L.

This copy is accurate and the
judgment final.

At the District Court of Kanta-Häme 27 September
2017

[SIGNATURE]

DISTRICT COURT SECRETARY