IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No.43 of 2019
No.45 of 2019

BETWEEN: The Queen
Appellant

and

10

A2
Shabbir Mohammedbhai Vaziri
Respondents

RESPONDENTS' SUBMISSIONS

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

20 **Part II: Statement of Issues**

2. In the phrase "excises, infibulates or otherwise mutilates" in s45(1)(a) of the *Crimes Act 1900* (NSW), does the term "otherwise mutilates" mean to injure to any extent?
3. Does the term "clitoris" in s45(1) of the *Crimes Act* include the clitoral hood/prepuce?

Part III: Section 78B Notice

4. The respondents do not consider that notice is required pursuant to s78B of the *Judiciary Act 1903* (Cth).

30

Part IV: Facts

5. The respondents adopt the submissions of the co-respondent, Kubra Magennis ("MS"), in relation to the facts (MS [5]-[9]).

Armstrong Legal
Level 35
201 Elizabeth St
Sydney NSW 2000

Telephone: (02) 9261 4555
Fax: (02) 9261 4165
Email: jsutton@armstronglegal.com.au
Ref: John Sutton

6. As noted by the appellant, at Appellant's Submissions ("AS") [15]), C1 expressed some uncertainty as to what had been done to her. As the CCA observed, "[s]he did not see the procedure and was describing what it felt like" (CCA [625], see also CCA [621]-[624]) **CAB 520-521**). C2's evidence was more problematic (see AS [16]-[19] and see also CCA [626] **CAB 625**). While the appellant relied on various intercepted communications as admissions on the part of A2, ultimately, it was likely that it was only the co-respondent, Ms. Magennis, who knew with any precision what had been done in the course of the ceremony.

10

7. The statement at AS [7] that, at trial, the Crown alleged that members of the Dawoodi Bohra community undertake a practice "which involves cutting or nicking of the clitoris", does not fully reflect the Crown case. The Crown case at trial also relied on the evidence of Dr. X as to the "static" nature of khatna (CCA [17], **CAB 356**). Dr. X's evidence was that the procedure in Dawoodi Bohra community involved the removal of an amount of tissue the size of a lentil from the clitoris or prepuce (CCA [265]-[266] **CAB 420**, see also CCA at [296]-[297] **CAB 427-8**; and CCA [606], **CAB 516**). As noted at MS [57], the CCA held that the evidence of Dr. X had been erroneously admitted as expert testimony (a conclusion which the
20 appellant does not here challenge).

Part V: Argument

8. The respondents adopt the submissions of the co-respondent, Kubra Magennis (MS [10] – [65]) and make the following additional submissions.

<u>The appellant's approach</u>

9. The appellant urges a context based approach to interpretation, primarily seeking support outside the text of the subject provision and the Act itself. In doing so the
30 appellant seeks to read the provision as prohibiting "female genital mutilation" where that expression is not used in the provision. The appellant then seeks to define that term, relying on select extrinsic material surrounding the introduction of the *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW). The result is

to supplant the language used by the legislature, substituting another term and "entering into the impermissible territory of relying on extrinsic material to provide the meaning of that ... term rather than the context and purpose of the provision in question" (CCA [514] **CAB 491**). That exercise is further undermined by an absence of clarity as to the meaning of that term in the extrinsic material.

10. As the CCA observed, the provision does not use the expression "female genital mutilation". Nor does it use terms such as "injures" or "damages" (CCA [495] **CAB 486**; see also MS at [28] in relation to other parts of the *Crimes Act* that use express statutory language proscribing acts that cause "any injury"). The provision creates an offence which has, as an element, the bringing about of a particular result, rather than merely proscribing a particular action (cf AS [48]).

11. The danger in supplanting the language of the text and seeking to define non-statutory terms has been identified in a number of decisions of this Court. In *News Ltd v South Sydney District Rugby League Football Club* (2003) 215 CLR 563, Gleeson CJ said at [19]:

> While the use of the term "boycott" may be a convenient method of exposition of some aspects of the operation of s 4D, and may be a useful means of explaining part of what it was intended to achieve, that term itself does not have a precise meaning, and there is a danger that argument might be directed towards seeking to find the meaning of "boycott" rather than the proper task, which is finding the meaning of the statutory language.

See also *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at [23]-[26]; *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at [7].

12. The appellant's submissions rely on references to "incision" in the extrinsic material to identify the purpose of the provision (see AS [52], quoting the Explanatory Memorandum; see also at AS [48]). The Explanatory Memorandum referred to "practices involving the incision, and usually removal, of part or all of the external genitalia" and potential complications from such practices. Having regard to the context in which the reference to incision was made, the Explanatory Memorandum is of limited assistance to the appellant. In any event, the CCA accepted a cut could result in scarring or nerve damage amounting to "mutilation" (CCA [522] **CAB 494**).

Authorities in relation to construction relied on by the appellant

13. The appellant relies on statements of principle in this Court concerning the proper approach to statutory construction. A review of those decisions demonstrate that the statements were made in circumstances distant from the present case, with the interpretation and use of extrinsic material generally forming a relatively minor aspect of the exercise.

10 14. The appellant seeks to draw support from this Court's decision in *Monis v The Queen* (2013) 249 CLR 92.[1] *Monis* provides limited support to the appellant. The passage from *Monis* relied upon by the appellant was expressed to apply "particularly in the case of general words", suggesting a more limited application in the context of the meaning of a word such as "mutilates". *Monis* also reinforces the significant role to be given to surrounding words within a provision (in relation to the word "offensive" when used in an offence provision in conjunction with the words "menacing" and "harassing"): see *Monis* at [310]. This is more supportive of the approach urged by the respondents.

20 15. In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384,[2] too literal an interpretation would have required an insurer to give the insured entity notice of the upcoming expiration of a policy, even in circumstances where the insurer already considered the relevant policy to have been cancelled and had given notice to this effect. This result was avoided by reading the relevant provision in the context of other provisions of the Act. The extrinsic material was confirmatory of this result (and consonant with common sense and logic): see generally at 407 – 410.

16. Similarly, in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR
30 355,[3] the conclusion that the section in question was not to be given its grammatical

---

[1] AS[37], referring to *Monis* at [309]
[2] Relied on by the appellant at AS[39], footnote [12].
[3] AS[39], footnote 12

meaning was reached by reading that section together with other provisions of the Act. In doing so the section was able to be read in manner which provided consistency of operation and purpose with respect to the Act as a whole.[4]

17. In *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064[5] Kiefel CJ, Bell and Nettle JJ (at [20]), ascertained statutory context and purpose from considerations within the relevant statute. The extrinsic material provided confirmation of what those matters of statutory context and purpose revealed. This clear delineation of approach is evident from the outset of the joint judgment: "As will be explained, context and purpose favour the former [approach to construction] *and* it appears consistent with relevant extrinsic materials" (at [1], *emphasis added*). The focus of the interpretative exercise in *SAS Trustee* was the Act itself, including the interaction between provisions and the use of like statutory terms. [6]

18. In *Taylor v Owners - Strata Plan No 11564* (2014) 253 CLR 531,[7] neither the majority justices (French CJ, Crennan and Bell JJ), nor the dissentients (Gageler and Keane JJ), approached the matter through reliance on extrinsic materials in a manner comparable to the approach of the appellant here. Gageler and Keane JJ referred to the relevance of legislative history, but observed that relevant extrinsic material was "at too high a level of generality to illuminate" (at [55]). Their Honours went on to state (footnotes omitted, *emphasis* added):

> [65] Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always." Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. *The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.*

---

[4] See particularly at [80].
[5] AS[39], footnote 12
[6] See at [20]-[29]. With respect to the use of the extrinsic materials, their Honours said, at [33] (*emphasis* added): "Finally, *although it is not a strong point*, that construction of s 10(1A) *appears consistent* with the legislative history of the Act and the extrinsic materials."
[7] AS[39], footnote 14.

See also the reasons of French CJ, Crennan and Bell JJ at [39]), referred to at MS[36].

19. In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, while Kiefel CJ, Nettle and Gordon JJ observed, "[t]he starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose",[8] their Honours immediately noted that "[t]his is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction". In the result their Honours concluded the word in question, "intend" was to be given its "natural and ordinary meaning" (at [26]); see also per Edelman J at [68]. Gageler J, who was in dissent, commenced from the standpoint that the word in issue, "intend", did not plainly apply, or not apply to the facts, with the result that the purpose (which was readily identifiable), was determinative (at [32], [43]).

Ordinary parlance remains a powerful consideration

20. The appellant appears to accept that the proposed definition of "mutilates" represents a significant departure from *any* manner in which that word might be used in common parlance: see, for example, AS at [39]. The use (or, more accurately, possible range of uses) of a particular term in ordinary parlance is, however, a significant consideration in the constructional exercise, particularly where the legislature has not included a statutory definition of the term and the extrinsic material does not provide clarity.

21. As noted by the co-respondent (MS at [41]), the requirement of certainty is an important aspect of the rule of law. This Court (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) said in *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at [48], "it is fundamental to criminal responsibility ... that the criminal law should be certain and its reach ascertainable by those who are subject to it".

---

[8] *SZTAL* [14], referred at AS[39], footnote 14,

The lack of coherence in the extrinsic materials

22. The numerous aspects of the relevant extrinsic materials that support the approach adopted by the CCA in its construction of 'otherwise mutilates' are discussed at MS[18]-[24]. While the respondents find support in that material, it is to be emphasised that reliance on that material is not necessary for the acceptance of the respondents' and the CCA's construction. In contrast, the appellant is not only dependent on extrinsic materials but seeks to have select parts of those materials given determinate significance. Insofar as the appellant submits that '[t]he procedures named in the Second Reading Speech shed no real light on what other forms of the practice of female genital mutilation the verb "mutilates" was intended to capture (AS at [51]), this highlights the difficulty for the appellant, and not the respondents.

The statutory construction of 'clitoris' in s 45(1)(a) of the *Crimes Act*

23. The respondents adopt the arguments set out in the submissions of the co-respondent (MS[51]).

24. This issue is significant as a result of the manner in which the Crown case was pleaded and the evidence that the clitoral head is "more readily impaired or rendered imperfect due to the concentration of nerve tissue" while "the same may not be true of the clitoral hood (or prepuce)": CCA [497] **CAB 486.**

25. The point is underscored here, where ultimately, it was unlikely that there was any contact with the clitoral head (see MS at [56],[60]).

This Court should not order a re-trial

26. In addition to the submissions of the co-respondent, Kubra Magennis, in relation to the reasons for not ordering a retrial in the event the appellant's argument on the correctness of the trial judge's directions is accepted (MS [52]-[65]), the respondents make the following submissions.

27. The respondent, A2, served the entirety of her sentence (15 months imprisonment, with a non-parole period of 11 months, served by way of home detention), which expired on 8 September 2017: *R v A2; R v Magennis; R v Vaziri (No. 24)* [2016] NSWSC 737 at [121].

28. The respondent, Mr. Vaziri, (who also received a sentence of 15 months with a non-parole period of 11 months), served almost 6 months of his sentence in full-time imprisonment (from 18 March – 13 September 2016) prior to his release on bail pending the outcome of the appeal in the CCA: *R v Vaziri* [2016] NSWSC 1283. Mr Vaziri was subject to strict bail conditions, akin to home detention, for a period of approximately 13 ½ months, until the conclusion of the hearing of the appeal before the CCA on 25 October 2017. At the conclusion of the hearing, Mr. Vaziri's bail conditions were varied, removing the conditions akin to home detention. Nonetheless, Mr. Vaziri remained on bail for a further period of approximately 9 ½ months until the CCA gave judgment on 10 August 2018.

29. The CCA, in light of its resolution of the conviction appeal and the entry of acquittals on all counts, did not determine Mr. Vaziri's appeal against sentence. That appeal was on the ground of parity based on the fact that he received a more severe sentence as an accessory after the fact (full-time imprisonment) compared to the sentence imposed on the principals (home detention): CCA at [1189]-[1190], **CAB at 680**.

30. Whilst, as a general observation, the objective seriousness of offences under s.45 of the *Crimes Act* cannot be disputed, the absence of any evidence of serious injury or impairment, also weighs strongly against the ordering of a retrial.

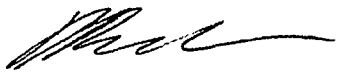
Part VI: Cross Appeal/Notice of Contention

31. Not applicable.

Part VII:

32. It is estimated that the respondents' oral argument will take 30 minutes to present.

Dated 3 May 2019



Hament Dhanji

Tel: (02) 9390 7777

Fax: (02) 9261 4600

Email: dhanji@forbeschambers.com.au

David Randle

(02) 9224 5600

randle@7gbc.com.au