IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S43 of 2019
No. S44 of 2019
No. S45 of 2019

BETWEEN:

The Queen
Appellant

and

A2
Kubra Magennis
Shabbir Mohammedbhai Vaziri
Respondents

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. The appellant certifies that this outline is in a form suitable for publication on the internet.

Part II:

What meaning does "mutilates" convey in the context of female genital mutilation?

2. This is the relevant question for the purposes of construing s 45 of the *Crimes Act 1900* (NSW): see AB 481 [480]; 493 [519]; AS [42]; RS Magennis [16].

3. In the context of female genital mutilation, "to mutilate" connotes the infliction of injury to female genitalia, intentionally and for non-medical reasons: AS [43]-[45]. Thus, mutilation in the context of female genital mutilation includes the cutting or nicking of female genitalia. See, for example:

   i. Family Law Council, *Report on Female Genital Mutilation*, June 1994 ("Report") at [2.01]-[2.02], [2.41] (JBA 646, 654).

   ii. Family Law Council, *Female Genital Mutilation: Discussion Paper*, 31 January 1994 ("Discussion Paper") at [2.01], [2.30] (JBA 591, 598).

iii. Queensland Law Reform Commission, *Female Genital Mutilation*, Report No 47, September 1994 at 7 (JBA 806).

What was the intended meaning of "otherwise mutilates" in s 45 of the Crimes Act?

4. Female genital mutilation is so centrally relevant, as a matter of context, to s 45 of the *Crimes Act* that the intended meaning of "otherwise mutilates" must be the meaning that those words convey in the context of female genital mutilation.

5. Section 45 of the *Crimes Act* was enacted to prohibit the practice of female genital mutilation. This is clear from:

   i. The language of s 45 and the references to specific practices of female genital mutilation ("excises" and "infibulates") (see AB 493 [519]; JBA 13);

   ii. The heading to s 45 (JBA 13);

   iii. The long title to the *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW) ("1994 Act") (JBA 26); and

   iv. The Explanatory Note to the 1994 Act (JBA 721).

6. The practices proscribed by s 45 were intended to extend to all forms of female genital mutilation, including injury by cutting or nicking:

   i. The Discussion Paper and Report of the Family Law Council recommended that all forms of female genital mutilation, including ritualised circumcision, be prohibited by legislation. The need for clarity and putting the illegality of the practice "beyond doubt" was emphasised: see Discussion Paper at [5.17], [5.22], [527] (JBA 612-614); Report at [6.41], [6.80] (JBA 692, 703).

   ii. The Second Reading Speech for the 1994 Act evinces an intention to enact a clear prohibition on female genital mutilation: see JBA 762 (line 29). 763 (line 5), 764 (line 24). It refers to a number of recommendations for clear law reform "to abolish the practice" and to "make clear that FGM constitutes a criminal act": JBA 762 (lines 38, 45).

7. The proposition that the legislature intended to enact only a partial prohibition on recognised practices of female genital mutilation is not supported by the extrinsic material. That "infibulation, clitoridectomy and sunna" are referred to in the Second Reading Speech as the "three forms of FGM" does not meaningfully assist the task

of construing the words "otherwise mutilates" in s 45: see JBA 763 (line 20); AS [50]-[51]; RS Magennis [22].

8. Given the contextual and purposive matters outlined, it was erroneous for the Court of Criminal Appeal to prefer, for the purposes of s 45 of the *Crimes Act*, the literal meaning of "mutilates" (that is, its common or most usual meaning in ordinary parlance) to the meaning of "mutilates" in the context of female genital mutilation: AB 486 [495], 491 [514], 493 [521]; see also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14], [38] (JBA 459, 466); *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at [20], [64] (JBA 418, 425).

9. If "mutilates" in s 45 is construed to mean the infliction of injury *simpliciter*, there was no error in the directions given to the jury by the trial judge: see AB 99. Those directions conveyed that it was necessary for the Crown to prove only injury by cutting or nicking: AS [59]; Reply [2]-[3].

Meaning of "clitoris" in s 45 of the Crimes Act

10. The word "clitoris" in s 45 is a global term referring to the clitoral anatomy, which includes the clitoral ridge; clitoral hood; clitoral shaft; clitoral glans; and prepuce (or clitoral hood): see AB 404 [209], 412 [240].

Orders if appeals succeed

11. If the appeals succeed, orders for a new trial of the respondents are appropriate in the circumstances. There is evidence to support the charges: see AS [9]-[32]. There is also a significant public interest in the due prosecution of the offences under consideration: *R v Taufahema* (2007) 228 CLR 232 at [49], [51] (JBA 545-546). Noting that orders for a new trial are permissive, the interests of justice do not require the entry of verdicts of acquittal in these cases: *Dyers v The Queen* (2002) 210 CLR 285 at [23] (JBA 149).

Dated: 12 June 2019

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