IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S43 of 2019

No. S44 of 2019

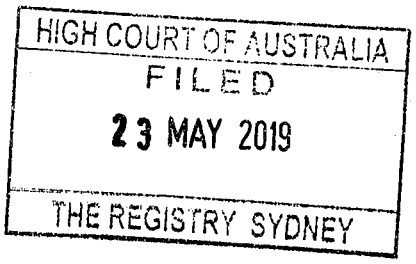
No. S45 of 2019

BETWEEN:

The Queen

Appellant

and



A2

Kubra Magennis

Shabbir Mohammedbhai Vaziri

Respondents

APPELLANT'S REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

Trial judge's direction on meaning of "otherwise mutilates" in s 45(1)(a)

2. The trial judge's direction to the jury as to the meaning of "otherwise mutilates" in s 45(1)(a) of the *Crimes Act 1900* (NSW) was threefold: (i) injury "to any extent" was sufficient; (ii) proof of "serious injury" was not required; and, thus, (iii) a nick or cut, as had been alleged by the Crown, was "capable of constituting mutilation" (Joint Core Appeal Book (**AB**) 99). In the appellant's submission, that direction, understood in the context of the trial, appropriately emphasised that the offences against s 45(1)(a) could be made out if the jury accepted the Crown's case that the clitoris of C1 and/or C2 was cut or nicked. Proof of some more serious injury, or of a particular kind of damage, was not required (Appellant's Submissions (**AS**) [59]).

3. The Court of Criminal Appeal (**CCA**) took – and the respondents, in seeking to defend the CCA's reasoning, take – issue with steps (i) and (ii) of the trial judge's direction. The CCA concluded that "otherwise mutilates" in s 45(1)(a) does not encompass injury *simpliciter*: the extent of the injury required is that the body part in

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question be rendered imperfect or irreparably damaged (AB 492-493 [514], [521]; Submissions of Respondent Magennis (**RS Magennis**) [14]). It followed that, in circumstances where there was no medical evidence of, for example, scarring to the skin or damage to nerves, a cut or nick as alleged by the Crown was not capable of constituting mutilation (AB 509-511 [586], [590]-[591]). On that basis, acquittals were entered in respect of the counts charging offences against s 45(1)(a). By these appeals, the appellant challenges the CCA's critical conclusion as to the proper construction of s 45(1)(a) (cf RS Magennis [10]).[1]

Legislative purpose of s 45

10 4. The respondents accept that the purpose of s 45 of the *Crimes Act* "was, and is, to prohibit FGM" (RS Magennis [16]). But, the respondents contend, it was not intended that all recognised forms of female genital mutilation would be proscribed. In attempting to chart the boundaries of the intended scope of the provision, the respondents say of the Second Reading Speech that the "principal concern" was to prohibit female genital mutilation "insofar as it involved removal of all or part of the external female genitalia" (RS Magennis [18]-[19]). If that be right, it is a narrower legislative concern than that to which the CCA gave effect (see AS [50]). It was accepted, for example, that nerve damage could amount to mutilation for the purposes of s 45, notwithstanding that there may not, in the usual case, be any
20 removal or excision of genitalia (AB 484 [492], 492 [515]).

5. The respondents seem now to accept that the three forms of female genital mutilation expressly referred to in the Second Reading Speech ("infibulation, clitoridectomy and sunna")[2] correspond to the words "excises [and] infibulates" in s 45(1)(a), with the result that the Second Reading Speech "does not elucidate the purpose of including the term 'otherwise mutilates' in the offence provision" (RS Magennis [21]-[22]). Yet the respondents submit that the words "otherwise mutilates" were included in s 45(1)(a) "to ensure the offence extended to other forms of serious or significant damage to the external female genitalia that do not involve the removal of tissue" (RS Magennis [22]). There is no sound basis in the extrinsic material for the
30 kind of qualitative limit on the injury or damage captured by s 45 which is suggested by the respondents.

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[1] See also the articulation of Ground 1 before the CCA: AB 318, 323 (particularly Ground 1(a)), 328.
[2] New South Wales Legislative Council, *Hansard*, 4 May 1994 at 1860.

6. The respondents contend that s 33 of the *Interpretation Act 1987* (NSW) has "no work to do" in this case because "[i]t cannot be said that the CCA's construction ... does not promote the purpose of the provision" (RS Magennis [45]-[47]). This assumes the correctness of the submission that the purpose of s 45 was to prohibit only "serious or significant injury to the female genitalia" (RS Magennis [45]). Further, the *relative* coherence of potential meanings of statutory language with an identified legislative object or policy is relevant to the task of statutory construction.[3] It cannot be the case that, so long as the construction preferred by the CCA is not antithetical to some prohibition on female genital mutilation, no constructional choice arises.

7. At its highest level of abstraction, the respondents' submission seems to be that the legislative objective and policy of s 45 is entirely contained within its terms read literally: "what the legislature regards as FGM is that which is prohibited by the provision" (RS Magennis [16]). Either that contention seeks, wrongly in the appellant's submission (see AS [37]-[40]), to confine the constructional task to the four corners of the text of s 45 or the contention simply, and unhelpfully, directs attention back to the question of what is prohibited by the provision. In the context of female genital mutilation, the word "mutilates" permits of a meaning that extends to the infliction of injury to female genitalia including, relevantly, by cutting or nicking that does not render the genitalia imperfect or irreparably damaged (AS [43]-[45]). The respondents do not seem to dispute that such a meaning is open when the word "mutilates" is used in the context of female genital mutilation.

Injury or damage that is "serious or significant"

8. As noted, the respondents contend that s 45(1)(a) of the *Crimes Act*, on its proper construction, captures only serious or significant injury or damage to female genitalia (RS Magennis [14], [22]). It is said that "otherwise mutilates" should, in effect, be read *ejusdem generis* with the words "excises" and "infibulates" (RS Magennis [28]; Submissions of Respondents A2 and Vaziri (**RS A2/Vaziri**) [14]). This submission is misconceived for the reasons given by the CCA and the trial judge (AB 78-79 [228]-[232], 492-493 [517]-[519]). The expression "*otherwise* mutilates" (emphasis

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[3] See AS [39]; *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [66] per Gageler and Keane JJ; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [38] per Gageler J; *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at [20] per Kiefel CJ, Bell and Nettle JJ.

added) makes clear that "mutilates" is not to be understood by reference to, or as constrained by, a genus arising from the preceding words.[4] The respondents also say that the word "mutilates" carries "a strong connotation of very significant or serious injury" (RS Magennis [29]). This submission relies on the connotation of "mutilates" in common or ordinary parlance to the apparent exclusion of the meaning of "mutilates" in the context of female genital mutilation, despite the respondents seeming to accept that female genital mutilation is an important contextual matter (RS Magennis [11]). The appellant does not ask this Court to strain or supplant the language of s 45 (cf RS Magennis [29]-[41]; RS A2/Vaziri [9], [11]). The construction of s 45(1)(a) advanced by the appellant is available, when the terms of the provision are understood in context and in light of the legislative purpose, and accords with the apparent statutory object and policy.

9. The respondents are critical of the appellant for focussing on the means by which mutilation might occur – for example, cutting or nicking – rather than on the notion of mutilation (RS Magennis [24], [40]; RS A2/Vaziri [10]). But, as the respondents submit elsewhere, "mutilates" in s 45(1)(a) refers to a particular action (RS Magennis [20]). To condition the application of the offence provision on the seriousness or significance of the injury or damage that results from the action proscribed is not warranted and nor should it be thought to have been intended. The extent and permanence of injury or damage that, in fact, results from a female genital mutilation procedure in a given case can be arbitrary (see AS [48], [54]; cf RS Magennis [41]; RS A2/Vaziri [21]). That is why the legislature sought, by s 45 of the *Crimes Act*, to enact a clear prohibition on all forms of female genital mutilation (see AS [46]).

Orders for re-trial

10. In the appellant's submission, unless the interests of justice require the entry of acquittals or there is no evidence to support the charges, this Court should make an order for a new trial.[5] The evidence in support of the charges was described in some detail at AS [9]-[32]. At trial, there were two competing explanations of events that were, for the most part, agreed to have happened. Resolving that competition, and, in doing so, assessing the believability of each explanation in light of the available evidence, remains an appropriate matter for a jury.

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[4] See *Crowe v Graham* (1968) 121 CLR 375 at 388 per Windeyer J.
[5] See *Spies v The Queen* (2000) 201 CLR 603 at [104] per Gaudron, McHugh, Gummow and Hayne JJ.

11. The respondents submit that this Court should draw an inference adverse to the Crown from the new evidence admitted by the CCA. It is said that, because the clitoral head of each complainant was not visualised by Dr Marks in medical examinations prior to the trial, it may be inferred that it was not possible for the clitoral head to have been cut or nicked at the time of the alleged offences (RS Magennis [60]). The fallacy of this submission is that it equates an inability to visualise the clitoral head with an inability to retract the clitoral hood. Dr Marks' evidence was that she could not see the clitoral head of C1 or C2. She did not give evidence that she could not, or tried but failed to, expose the clitoral head by retracting the clitoral hood (AB 409 [227]-[228], 442 [339]-[340]). Thus, this Court is not in a position to infer that, at the time of the alleged offences, the clitoral hood of each complainant was unable to be retracted.

12. The CCA did not find that, if the appellant's construction of s 45(1)(a) of the *Crimes Act* were accepted, the evidence at trial was insufficient to found a verdict of guilty in relation to those offences.[6] The suggested "problems with the available evidence" are not of a kind that would lead this Court to disallow a new trial (AB 524 [635]).[7] In the appellant's submission, an order for a retrial is appropriate, noting that whether a retrial is, in fact, brought is matter for the judgment of the Director of Public Prosecutions.[8] The discretionary considerations identified by the respondents do not outweigh the public importance of duly prosecuting these serious offences.

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[6] Cf *Gerakiteys v The Queen* (1984) 153 CLR 317 at 321 per Gibbs CJ (Wilson J agreeing); 322 per Murphy J, 330 per Brennan J, 331 per Deane J. Whether actual bodily harm could be made out on the evidence was not fully argued before the CCA and the CCA did not express a concluded view: AB 524 [634].

[7] See *Stanoevski v The Queen* (2001) 202 CLR 115 at [61] per McHugh J; *Dyers v The Queen* (2002) 210 CLR 285 at [23] per Gaudron and Hayne JJ.

[8] See *Stanoevski* (2001) 202 CLR 115 at [51] per Gaudron, Kirby and Callinan JJ; *Dyers* (2002) 210 CLR 285 at [23] per Gaudron and Hayne JJ, [88] per Kirby J, [135] per Callinan J; *R v Taufahema* (2007) 228 CLR 232 at [144] per Kirby J.