THE QUEEN v A2 (S43/2019)
THE QUEEN v MAGENNIS (S44/2019)
THE QUEEN v VAZIRI (S45/2019)

Court appealed from: New South Wales Court of Criminal Appeal
[2018] NSWCCA 174

Date of judgment: 10 August 2018

Special leave granted: 15 February 2019

On 12 November 2015, A2 (the mother of the two complainants, known as C1 and C2) and Kubra Magennis were found guilty of two counts of female genital mutilation. This was contrary to s 45(1)(a) of the *Crimes Act 1900* (NSW) ("the Act"). Shabbir Vaziri was found guilty of two counts of being an accessory to those offences.

The offences committed by A2 and Magennis related to separate ceremonies occurring when each of the complainants was aged about seven. The Crown alleged that A2 and Magennis were part of a joint criminal enterprise to perform a ceremony known as "khatna". This involved Magennis cutting (or nicking) each complainant's clitoris in the presence of both A2 and other family members. The Crown alleged that the ceremonies were cultural in nature, being part of the practices followed by an ethno-religious community known as the Dawoodi Bohra community, of which each of the Respondents was a member.

The conduct giving rise to Vaziri's accessorial liability comprised attempts by Vaziri, as the head cleric and spiritual leader of the Dawoodi Bohra community in Sydney, to encourage other Dawoodi Bohra community members to deceive investigators concerning the community's attitude to female genital mutilation.

On 18 March 2016 each of the Respondents was sentenced to an aggregate sentence of 15 months' imprisonment with a non-parole period of 11 months. This was later ordered to be served by way of home detention in relation to A2 and Magennis. Vaziri's sentence however was to be custodial, but he was granted bail pending the appeal to the Court of Criminal Appeal ("CCA").

Upon appeal, the Respondents challenged the trial judge's ruling that the term "otherwise mutilates" in s 45(1)(a) of the Act meant physical injury to the clitoris *to any extent* for non-medical reasons, and that a nick or cut is capable of constituting mutilation. They also challenged his ruling that the word clitoris included the prepuce (or clitoral hood).

On 10 August 2018 the CCA (Hoeben CJ at CL, Ward JA and Adams J) unanimously allowed the Respondents' appeals. Their Honours found that the extrinsic materials relied on by his Honour did not permit a construction of the word "mutilates" that departed from its ordinary meaning. They went on to find that its ordinary meaning connotes an injury or damage that is more than superficial and one which renders the body part in question imperfect or irreparably damaged. It followed therefore that his Honour had misconstrued the meaning of "mutilates" and that he had misdirected the jury as to an essential

element of the offence. The CCA accepted however that a cut or nick could, in a particular case, amount to the mutilation of the clitoris. The error however was contained in his Honour's direction that it included the words "to any extent". This suggested that even a minimal injury would suffice.

The CCA also concluded that the trial judge had erred in finding that the term "clitoris" in s 45 of the Act included not only the clitoral head but also the clitoral hood (or prepuce).

In each of these matters the grounds of appeal are:

- The CCA erred in construing the words "otherwise mutilates" in s 45(1)(a) of the Act as requiring injury or damage that "renders the [labia majora or labia minora or clitoris of another person] imperfect or irreparably damaged in some fashion.

- The CCA erred in construing the terms "clitoris" in s 45(1)(a) of the Act as not including the clitoral hood or prepuce.