IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M75 of 2019

BETWEEN:

THE QUEEN

Appellant

- and -

AKON GUODE

Respondent

APPELLANT'S SUBMISSIONS

Part I: Suitability for internet publication

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

Part II: Statement of issue on appeal

2.1 This appeal raises the following issue for resolution:

> Whether in assessing the level of culpability of an accused for offences of murder and attempted murder it is a relevant consideration that the prosecution accepted a plea to infanticide when all charges arose out of the same act and were thus included on the same indictment.

Part III: Notice under section 78B of the Judiciary Act 1903 (Cth)

3.1 The appellant certifies that it does not consider that notice is required to be given under section 78B of the *Judiciary Act* 1903 (Cth) in respect of this appeal.

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Part IV: Citation of reasons for judgment of both the primary and the intermediate court.

4.1 The reasons for sentence of the Honourable Justice Lasry (Supreme Court of Victoria) are cited as *R v Akon Guode* [2017] VSC 285. **[CAB 324-340]**

4.2 The application for leave to appeal against sentence (determined by a single judge pursuant to s 315 of the *Criminal Procedure Act* 2009) by the Honourable Justice of Appeal Weinberg (Victorian Court of Appeal) is cited as *Akon Guode v The Queen* [2017] VSCA 311. **[CAB 365-373]**

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4.3 The unreported decision of the Victorian Court of Appeal is cited as *Akon Guode v The Queen* [2018] VSCA 205. **[CAB 375-399]**

Part V: Statement of the relevant facts

5.1 The respondent was charged on indictment F12848704.1 with one charge of infanticide which carries a maximum penalty of 5 years' imprisonment. The respondent was also charged with two charges of murder which carries a maximum penalty of life imprisonment and one charge of attempted murder which carries a maximum penalty of 25 years' imprisonment. **[CAB 7-13]**

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Circumstances of offending[1]

5.2 On 8 April 2015, the respondent left her home in her vehicle with her four youngest children, Aluel Chabiet aged 5 years, twins Madit and Hangar Manyang aged 4 years and Bol Manyang, aged 17 months. The respondent told her eldest daughter she was going to visit the children's grandmother and had told a friend she was taking Aluel to a medical appointment.

5.3 The respondent did not take her child to the appointment or to visit their grandmother. The respondent drove the vehicle along Manor Lakes Boulevard, Wyndham Vale five
30 times, driving past Lake Gladman four times. She remained in the vicinity of the lake for over 2 and a half hours. On the last occasion that she drove past the lake, the

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[1] The circumstances of the offending are summarised by the sentencing judge in his Reasons for Sentence – see *R v Akon Guode* [2017] VSC 285 at [7]-[29] ("the RFS") - **[CAB 326-330]** and *Akon Guode v The Queen* [2018] VSCA 205 at paragraphs [11]-[23] ("the judgment below") - **[CAB 378-382]**.

respondent performed a U-turn and drove over the nature strip towards the edge of the lake. The respondent accelerated towards the lake and made at least three deliberate turns of the steering wheel before driving into the lake.

5.4 Bystanders and emergency services attended the scene. Efforts were made to recover all four children from the lake, however one of the twins was pronounced dead at the scene. The respondent's youngest child and the remaining twin were conveyed to hospital and pronounced dead on arrival. The respondent's eldest child was conveyed to hospital and made a full recovery.

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Sentence

5.5 On 30 May 2017 the respondent was sentenced on the charge of infanticide to 12 months' imprisonment (with an order for cumulation of 6 months), 22 years' imprisonment in relation to each charge of murder (with an order for cumulation of 3 years upon one charge) and 6 years' imprisonment in relation to the charge of attempted murder (with an order for cumulation of 1 year). This resulted in a total effective sentence of 26 years and 6 months imprisonment with a non-parole period of 20 years' imprisonment. **[CAB 342]**

20 Appeal

5.6 The respondent sought leave to appeal against sentence on the ground the sentence was manifestly excessive. On 30 October 2017, leave was refused by Weinberg JA.[2]

5.7 The respondent elected to renew her application for leave to appeal against sentence. On 16 August 2018, the Court of Appeal[3] allowed the appeal against sentence and re-sentenced the respondent to 12 months' imprisonment on the charge of infanticide (with an order for cumulation of 6 months), 16 years' imprisonment on each charge of murder (with an order for cumulation of 12 months against one charge) and 4 years' imprisonment on the charge of attempted murder (with an order for cumulation of 6
30 months). This resulted in a total effective sentence of 18 years' imprisonment with a non-parole period of 14 years. **[CAB 401-402]**

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[2] *Akon Guode v The Queen* [2017] VSCA 311 - **[CAB 364-373].**
[3] ("the Court below").

Part VI: Statement of appellant's argument

6.1 The difference in result as between the Court below and the other two judges who considered this matter (namely, Lasry J who sentenced the respondent and Weinberg JA who refused leave) can only be described as stark. The sentencing judge and a single Justice of Appeal (upon the leave application) saw no error in a total effective sentence of 26 years' and 6 months' imprisonment with a non-parole period of 20 years constituted by individual sentences of 22 years' imprisonment for each charge of murder and 6 years' imprisonment for the attempted murder. The Court below, on the other hand and as has been recorded above, reduced the total effective term by eight and a half years, imposing a new total effective term of 18 years' imprisonment with a non-parole period of 14 years. The Court of Appeal reduced each individual murder sentence to 16 years' imprisonment and the attempted murder sentence to 4 years' imprisonment.

6.2 The scope of the reduction ordered by the Court below is of such magnitude that it cannot be explained or justified simply on the basis of a difference in impression (even if it is assumed that the sentencing and leave judge's 'impressions' were otherwise than reasonably open).

6.3 It is submitted here that the extent of difference as between the conclusions reached by Lasry J and Weinberg JA, on the one hand, and the Court below, on the other, is of such magnitude that it may only be explained on the basis of principle. Here, it is submitted, the nature of such principle is plainly evident and relates to the presence of infanticide on the indictment.

Irrelevance of infanticide

6.4 The respondent's case both at plea and in the Court below was that her level of culpability for the commission of murder and attempted murder should be viewed through the "prism" of infanticide.[4]

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[4] See, for instance, the judgment below at paragraph [61] - **[CAB 393]** and Plea Transcript at T, 44(3), 94(12), 101(4)-104(28) and 107(8) - **[CAB 59, 111, 118-121 and 124].**

6.5 The appellant's submission at plea[5] and in the Court below[6] was that:

(a) the mental state of the offender affected all four charges;

(b) in respect of infanticide, it led to a lesser maximum penalty;

(c) in respect of the murders and attempted murder, it led to a consideration of the principles set out in *R v Verdins.*[7]

6.6 The learned sentencing Judge appropriately sentenced the offender upon the basis that there was a realistic connection between the offender's mental state and the offending, such as to enliven the principles in *R v Verdins.*[8]

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6.7 It is important to recognise that it was the mental state itself that led to the *Verdins* principles being applicable to the charges of murder and attempted murder, not the laying of a charge of infanticide and accepting a plea to it.

6.8 It may safely be concluded that the Court below considered it relevant to an assessment of the length of the respondent's sentences imposed on the murder and attempted murder charges that the prosecution had accepted a plea of guilty to infanticide in respect of the death of the child Bol.

20 6.9 At paragraph [61], the Court below observed as follows:

> "In our view, the real relevance of the charge of infanticide lies not so much in its presence on the indictment vis-à-vis the charges of murder (and attempted murder), but in the prosecution's acceptance – in laying that charge and accepting a plea to it – that the balance of the applicant's mind was disturbed due to a depressive disorder consequent on her giving birth to the child Bol. That acceptance must, we consider,

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[5] Plea Transcript at T, 111(18)-112(5) - **[CAB 128-129]**.

[6] Respondent's Written Case at paragraphs [3.2], [3.3] and [3.12] - **[CAB 357 and 360]**.

[7] *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

[8] The RFS at [57] - **[CAB 335].** It is noted that the sentencing Judge's reference to the *Verdins* principles being enlivened as a result of the plea to infanticide having been accepted, as opposed to the *Verdins* principles being enlivened simply as a result of her mental state, does lead to some ambiguity in the asserted approach of the sentencing Judge. However, in the context of the sentence imposed, no more should be read into this sentence than that an acceptance of the plea to infanticide was an acceptance of the relevance of the evidence of the respondent's mental state to the other three charges so as to enliven a consideration of the *Verdins* principles. Importantly, the sentencing Judge does not make reference to the infanticide being on the indictment.

influence any assessment of the applicant's moral blameworthiness on all of charges that she faced."[9]

6.10 At paragraph [65] the Court below stated:

> "As we have indicated, however, the prosecution's acceptance of a plea to infanticide is not irrelevant to a consideration of the applicant's other offending. Indeed, the opposite is true." **[CAB 395]**

6.11 At paragraph [67] the Court below said:

> "In alike vein, we consider that the charges of murder and attempted murder must be viewed in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act* 1958, and by the prosecution's acceptance of a plea to infanticide with respect to Bol, by which it acknowledged that all four offences were committed in circumstances arising from, or causally connected to, a disorder consequent upon the applicant recently having given birth to Bol." **[CAB 396]**

6.12 The prosecution's acceptance of a plea to the offence of infanticide in respect of the death of the child Bol was an irrelevant consideration. Guilt of infanticide requires a lack of balance in the accused's mind consequent upon a disorder that has a particular provenance. The extent of the relevant disorder productive of the imbalance of mind will only be as good as the evidence that is led to support it. Crucially, however, the legislative definition of infanticide does not stipulate any particular level or threshold of imbalance that must be exceeded before the offence is committed.

6.13 True it is that if an accused can establish, and/or the prosecution accepts, that an accused's mind lacks balance in the relevant sense at the time she kills her child of 2 years or under, the *legislature* affords such an accused a much reduced maximum penalty (5 years' imprisonment as distinct from imprisonment for life). But this reduced maximum says nothing about any extent or level of imbalance.

6.14 Thus in a case such as the present where the accused's single act has resulted in the killing of three persons and the attempted killing of another, but where infanticide arises in the instance of only one death, it is not *the fact of infanticide* (or any

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[9] The judgment below at [61] - **[CAB 393]**.

acceptance thereof) that is relevant to any assessment of the state of the accused's mind when it comes to consideration of the other charges. Rather, it is the strength and quality of *the evidence that is said to support* the charge of infanticide – evidence that may be strong, weak or middling, as the case may be – that must be brought to bear upon any assessment of the accused's state of mind vis-à-vis those other charges.

6.15 If, as it is submitted must be the case, the respondent's level of culpability on the charges of murder and attempted murder is to be assessed by reference to the strength and quality of the relevant expert evidence rather than the simple fact of the prosecution's acceptance of any charge of infanticide, then the existence of such acceptance is truly an irrelevant consideration. If this is so then it was in error for the Court below repeatedly to refer to, and thus consider persuasively material, the prosecution's acceptance of a plea to infanticide in respect of the child Bol when it came to the Court's assessment of the respondent's level of culpability on the other charges.

6.16 Unless the crucial distinction between the presence of the charge of infanticide on the indictment and the evidence that is led to support its existence is kept in mind, there is a perceptible risk that the fact of the reduced maximum penalty applicable to infanticide will permeate or percolate into consideration of the respondent's position vis-à-vis the murder and attempted murder charges when, in reality, the reduced maximum is of no consequence to this latter issue. An attractive, but ultimately erroneous, form of reasoning may be to say that because only a 5-year maximum applies in the instance of the killing of Bol, because the other victims also happened to be the children of the deceased, the respondent's sentence on the other charges should be viewed, say, through the "prism" (as it were) of that particular maximum penalty. Some may find this form of reasoning to be attractive because they consider it perhaps unprincipled that the legislature in a case such as the present did not see fit – as was apparently recommended by the Victorian Law Reform Commission[10] – to broaden the scope of infanticide to cover the respondent's deceased children such as Madit and Hangar.

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[10] See the judgment below at [64] - **[CAB 395]**.

6.17 But, with respect, to reason thus would indeed be erroneous, for the setting of the relevant maximum is a matter for the legislature and not the prosecution or the Court.

The evidence of the respondent's depression and its relevance to sentence

6.18 The gist of the evidence of the respondent's compromised mental state arising out of her having given birth to Bol is summarised adequately in the judgment of the Court below[11] and in the sentencing judge's reasons for sentence.[12] In short, the respondent suffered from post-natal depression assessed as mild to moderate in severity. The respondent's depression was realistically connected with her offending and was of sufficient seriousness so as to justify some moderation of her moral culpability, specific deterrence and general deterrence. The sentencing judge was prepared, furthermore, to accept that "subject to the treatment that may be offered to… [the respondent]… in custody and… [her]… willingness to accept it,… [the respondent's]… imprisonment is likely to have an adverse effect on… [the respondent's]… mental health."[13]

6.19 The source of this evidence was Dr Sullivan. Indeed it was his evidence that gave rise to acceptance of the plea to infanticide. As expressed in his first report and as recorded in the judgment below at paragraph [35], Dr Sullivan opined as follows:

> "In my opinion, at the time of the incident with which [the applicant] is charged, I consider that she was suffering from a depressive illness which was a consequence of having given birth to Bol within the preceding two years. In my opinion, the balance of her mind was disturbed by depression." **[CAB 385 and 280-288]**

6.20 Whilst this evidence was sufficient to allow for acceptance of a plea to infanticide, the issue – insofar as the sentences for murder and attempted murder were concerned – was whether *this evidence*, and the sentencing judge's findings more generally, meant that it was not reasonably open to the sentencing judge to impose the sentences that he did.

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[11] See the judgment below at [33]–[38] and [68]–[69] - **[CAB 384-386 and 396-397]**.
[12] The RFS at [49]–[59] - **[CAB 333-335]**.
[13] See the RFS at [59] - **[CAB 335]**.

6.21 The issue raised in this argument may helpfully be tested by a form of inversion. It may be asked whether unless the Court below has permitted regard for the reduced maximum for the offence of infanticide to permeate its consideration of the murder and attempted murder sentences (which, it is submitted, must have been the case in light of the Court's having considered relevant *the mere prosecution's acceptance of infanticide*), how could the Court possibly have arrived at the sentences that it imposed for murder and attempted murder, even allowing for everything else that could reasonably be said in mitigation in respect of these offences? To repeat: the respondent was at least guilty of two charges of murder and one of attempted murder concerning children who were, by virtue of their ages, vulnerable and in respect of whom the respondent stood in a clear relationship of trust.

6.22 Making matters worse, the offences occurred after what appeared to be a degree of deliberation and planning. It was no sudden, impulsive act. With respect, there could be no other rational explanation in a case of such objective gravity that could explain the sentence of the Court below unless the Court has done what the respondent in fact asked be done, that is to say, unless the Court has viewed the cases of murder and attempted murder through the "prism of infanticide" with all that such an approach might be thought to entail. No doubt the "prism of infanticide" includes within it that particular charge's applicable maximum. It might be asked what other explanation could there be for the ordering of only 12 months' cumulation upon the 16 years imposed for Charge 3 when, by force of Part 2A of the *Sentencing Act* 1991 (Vic.), there was a presumption of cumulation.

6.23 In examining the approach taken by the Court below and the effect the presence of a charge of infanticide may have had, one might consider rhetorically how the Court below might have approached the sentencing exercise if by some twist of fate, the child Bol had not been in the vehicle. Absent a charge of infanticide, the Court below would have been required to give consideration to the respondent's mental state in the appropriate way. Dr Sullivan's evidence would have assumed the same significance. However, the Court would not, and could not have done so through the filter of a charge of infanticide.

6.24 The presence of a charge of infanticide should similarly not have affected the considerations for sentencing on the murder or attempted murder charges.

Part VII: Orders sought by appellant

7.1 The appellant seeks the following orders in this appeal:

a) the appeal be allowed;

b) the order of the Court of Appeal of the Supreme Court of Victoria made on 16 August 2018 allowing the respondent's appeal to that Court, be set aside;

c) the sentences imposed by the Court of Appeal and any other order consequent upon the imposition of such sentences be quashed; and

d) the matter be remitted to the Court of Appeal for further hearing according to law.

Part VIII: Time required for presentation of appellant's oral argument

8.1 The appellant estimates 1½ hours is required for presentation of the appellant's oral argument.

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