IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No.43 of 2019
No.45 of 2019

BETWEEN:

The Queen
Appellant

and

A2
Shabbir Mohammedbhai Vaziri
Respondents

RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Part I: This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions in oral argument

1. An offence against s45(1)(a) is committed by doing something which "excises, infibulates or otherwise mutilates" the relevant part of another person (Joint Book of Authorities '**JBA**' 21). That is, the offence is constituted by an act and a result. Consistently with this s45(2) refers to "the person mutilated". See also s45(5). Section 45(1)(b) in referring to *acts* in s45(1)(a) is inconsistent with a reading of "excises, infibulates or otherwise mutilates" as a unitary concept (of female genital mutilation).
2. Conformably with the above, the respondent, A2 was charged that she "mutilated the clitoris of" C1 and C2 (Core Appeal Book ('**AB'**) 2).
3. The text does not support a construction prohibiting an act of engaging in "female genital mutilation". To read s45(1) as prohibiting engagement in a religious or cultural practice of "female genital mutilation" renders s45(3) otiose. (The difficulty of defining "female genital mutilation", a term not used by the legislature, is a separate issue.)
4. The word "mutilates" is found in an expression "excises, infibulates or otherwise mutilates" and suggests a serious level of injury. Section 45 itself is found in Division 6, "Acts causing danger to life or bodily harm" of Part 3, "Offences against the person".
5. Textual indicators strongly support a construction inconsistent with that of the appellant. To read s45(1) as referring to "injury to any extent" would criminalise acts consented to by an adult woman which result in a graze or bruising to the genitalia (where unintended but the possibility of injury to any extent was foreseen (Magennis Submissions ('**MS**') [20]), or potentially foreseen, such as by genital piercing or waxing.
6. While the starting point is the text of the statute "at the same time regard is [to] be had to its context and purpose" - *SZTAL v Minister for Immigration and Border Protection*

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(2017) 262 CLR 362 at [14] (JBA 459, RS [19]), A2 and Vaziri Submissions ('**RS**') [19]). As the CCA correctly observed, "[t]he question is what is meant by "mutilates in a statutory provision that does not use the term "female genital mutilation" as part of the description of the offence (CCA [494]; AB485). The long title to the amending Act and the heading to the offence provision set the "context as being that of female genital mutilation" but this "begs the question of what is meant by "mutilation in that context" (CCA [480] AB 481). The second reading speech describes "FGM" as "a number of practices involving the mutilation of female genitals for traditional or ritual reasons" (JBA 762.29). The minister, having observed that it will "be an offence for anyone to perform FGM in this State, said "[t]he three forms of FGM in order of severity are infibulation, clitoridectomy and sunna" (JBA 763.20). See also JBA 764.20. Sunna, in this context, is the removal of the clitoral prepuce. The Family Law Council did not suggest there was any doubt as to this (cf Appellant's Submissions ('**AS**') [51], JBA 646).

7. The appellant submits "the 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" (AWS [51]). This leads to the conclusion (supported by the text) that the legislature chose to define what is prohibited by reference to the result (rather than prohibiting a practice by reference to an expression of uncertain reach, "female genital mutilation"). At the least it demonstrates the extrinsic materials point in different directions.

8. The second reading speech, while noting the Family Law Council's recommendations, did not suggest that the form of the provision was based on that report or indicate an intention adopt the report's recommendations (see at JBA 762.45; cf AS [49],[52]; cf Johnson J at [199], AB 69, [207], AB 73). Nor does the Explanatory Note evince such an intention (JBA 721). The reference there to "incision" in the context of "[p]rocedures involving the incision, and usually removal" of part or all of the external genitalia" suggests more than transient interference. In any event "incision" was not used in the provision itself. While that paragraph makes reference to practices, the following paragraph confirms (consistently with the terms of the provision) the object of the Bill was to criminalise acts with a particular result. Neither the second reading speech nor the Explanatory Note suggest parliament was intent on (or even considered) proscribing conduct resulting in transient effects. Rather they suggest a concern with injury of a qualitatively different kind to that here. (See JBA at 764.21, JBA 721.33)

9. The Family Law Council report, in contrast to the second reading speech, speaks of four kinds of practice but acknowledges there may be others (JBA 646-648). However, even when referring to "ritualised circumcision" the distinction is drawn between a procedure which is "wholly ritualised" and one which involves scraping or nicking to clitoris which causes bleeding (JBA 646). Here no injury to the clitoris was established. There was no evidence bleeding or any lasting pain: CCA [30], [31], [42], [169], **[621]**, **[625]**, AB 359, 362-3, 394-5, **520-2**; as referred to at MS [56].

10. Nor can the respondents' construction be said to "not promote the purpose or object of the legislation" (s33 of the *Interpretation Act 1987*, JBA 36; cf AS [50]). This is particularly so having regard to the fact that the act alleged here was "on any view" an assault (CCA [524], AB 494). In any event, as was said in *Milne v The Queen* (2014) 252 CLR 149 at [38], a "[p]urposive construction does not justify expanding the scope of a criminal offence beyond its textual limits" (Magennis WS [29]).

11. The construction exercise "begins, as it ends, with the statutory text", acknowledging the text "from beginning to end is construed in context": *SZTAL v Minister for Immigration* (2017) 262 CLR 662 at [37], JBA 465. Even if it could be said a potential range of meanings are available, the clearer the natural meaning the more difficult it is to depart from it: *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at [64]; JBA 425. "Construction is not speculation and it is not repair": *Taylor v Owners of Strata Plan 11564* (2014) 253 CLR 531 at [65] JBA 519. Having regard to the text, to adopt a meaning of "mutilates" based on selected secondary materials undermines the requirement of legal certainty, and ultimately the rule of law (MS [41]).

12. It is not sufficient for the appellant to succeed on Ground 2.1. The trial judge's directions were in error based on the CCA's conclusion at [515], [522] (AB 492, 494).

13. Further, the appellant undertook to prove mutilation to the clitorises of the complainants. The CCA was correct in its interpretation. The new evidence established that there was no injury to the clitoris (cf Appellant's Reply at [11]). The evidence was that in order to see the clitoral head the clitoral hood has to be retracted, which "would be painful" (CCA [339], AB 442).

14. Finally, even if the appellant were to make out either ground of appeal, a retrial would not be ordered (RS, [26] – [30] and MS [52] – [65])

Dated: 12 June 2019

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Hament Dhanji

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David Randle