The Queen v A2; The Queen v Magennis; The Queen v Vaziri [2019] HCA 35 (16 October 2019)

Facts and background

This was an appeal to the High Court of Australia by the Crown against the orders made in the NSW Court of Criminal Appeal (CCA) on 10 August 2018. The original trial in the NSW Supreme Court (Criminal Division) found the three defendants guilty of female genital mutilation under s 45(1)(a) of the *Crimes Act 1900* (NSW) (the Act).

Three persons were charged upon indictment of having mutilated the clitoris of two girls, on separate occasions. They were also charged with the alternative count of assault occasioning actual bodily harm.

The facts of the case involved the mother and Ms Kubra Magennis, a trained midwife and nurse, and Mr Shabbir Mohammedbhai Vazari, the spiritual head of the Dawoodi Bohra community. They were all members of this community, which adheres to Shia Islam.

Section 45(1)(a) of the Act provides that a person who "excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person" is liable to imprisonment. At trial, competing submissions were made regarding the meaning of “mutilates” in s 45(1)(a) of the Act.

In a pre-trial hearing, Johnson J directed the jury that the word “mutilate” in the context of female genital mutilation means, “to injure to any extent”. His Honour directed that it is not necessary “for the Crown to establish that a serious injury resulted… a nick or cut is capable of constituting mutilation” in the context of the alleged offence. There were also directions given as to the meaning of “clitoris”, and whether “otherwise mutilates” should be given ordinary meaning or take account of the context of female genital mutilation.

The mother of the two complainants (C1 and C2) and Magennis were found guilty on two counts of female genital mutilation. Vaziri was found guilty of two counts of being an accessory to those offences.

On appeal, the CCA overturned the original convictions on the substantive grounds that the trial judge had erred in his directions to the jury as to the meaning of the terms “mutilates” and “clitoris” in s 45(1)(a). The CCA concluded that the word “mutilates” should be given its ordinary meaning for the purposes of s 45(1)(a), requiring some imperfection or irreparable damage “that is more than superficial” to have been caused. The CCA also held that the term “clitoris” does not include the clitoral hood or prepuce.

Other successful grounds for appeal concerned errors in the admission of evidence and that there had been a miscarriage of justice due to fresh evidence. As a result, the jury’s verdict was unreasonable or unsupported by the evidence.

Special leave was granted to appeal the decision of the CCA to the High Court of Australia on two grounds:

Date of publication: August 2023

1. That 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”; and
2. That the CCA erred in construing the term “clitoris” in s 45(1)(a) of the Act as not including the clitoral hood or prepuce.

Reasoning

Meaning of “otherwise mutilates”

The essential difference in approach between the trial judge and the CCA as to the meaning of “otherwise mutilates” in s 45(1)(a) of the Act is that the latter applied the grammatical or literal meaning of the word “mutilates”, whereas the trial judge considered that the meaning should take account of the context in which the word is used.[1]

In the present case, Keifel CJ and Keane J preferred the broader construction, concurring with the trial judge’s view that the word should be understood as part of the broader umbrella term, “female genital mutilation.” Keifel CJ and Keane J reasoned that this broader construction, as advanced by the Crown, would best promote the purpose or object of s 45 of the Act, being the “outlawing of female genital mutilation in all its injurious forms”; and that this purpose is evident from extrinsic materials, in particular the report on the practice of female genital mutilation in Australia published in June 1994 by the Family Law Council (the FLC Report).[2]

Therefore, Keifel CJ and Keane J held that “otherwise mutilates” is to be taken to mean to “injure to any extent” with respect to the practice of female genital mutilation. It followed that “the trial judge did not misdirect the jury” in construing the meaning of the word “mutilate”, and that the trial judge’s direction was both legally correct and consistent with the FLC report.[3]

Meaning of “clitoris”

As with the meaning of “otherwise mutilates”, the trial judge construed the meaning of “clitoris” broadly, having regard to the context and purpose of s 45(1). Although the legislature had identified three particular areas (labia majora or labia minora or clitoris) and had not used a broader term such as “genital area”, his Honour was satisfied that, as a matter of construction, “the clitoris and the prepuce of the clitoris are so closely interrelated that the prepuce may be regarded as part of the clitoris although, for technical purposes, it may also be regarded as part of the labia minora.”[4]

The CCA found that the medical dictionary definitions differentiated between the clitoris and prepuce. It reasoned that where the legislature has identified separate anatomical parts of the genital area with some precision, that it must be taken to be distinguishing between them. The CCA held that given “this is a penal statute, precision in identifying the relevant body part is important,”[5] and concluded that the trial judge had erred in this aspect of his summing up.[6]

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[1] *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 (16 October 2019) 3, [13].
[2] Ibid 3, [13].
[3] Ibid 18, [59].
[4] *R v A2 [No 2]* (2015) 253 A Crim R 534,573 [270].
[5] *A2 v The Queen* [2018] NSWCCA 174,[526].
[6] *A2 v The Queen* [2018] NSWCCA 174, [527].

Keifel CJ and Keane J held that it is an offence to alter any part of the female genitalia, and that the approach of the trial judge as to the construction of the term is preferred as it promotes the purpose of s 45(1) of the Act.[7]

Concurring and dissenting opinions

Nettle, Gordon, and Edelman JJ agreed with the judgment of Kiefel CJ and Keane J and provided some additional reasons for preferring the construction of s 45(1). Bell and Gageler JJ dissented that the extrinsic material did not support the meaning that the phrase "female genital mutilation" had acquired at the time that the Act was amended.

Orders

It was a 5:2 decision of the High Court with no clear decision that the appeals should be allowed, and the orders of the CCA be set aside. The matter was remitted back to the CCA for determination of the ground of appeal alleging that the jury's verdict was unreasonable or unsupported by the evidence, considering the proper construction of s 45(1)(a).

Update

The NSW Court of Appeal heard the matter on the papers on 7 February 2020, confirming that the appeal against the convictions is allowed and that the convictions be quashed. The Court of Appeal ordered that there be a new trial for each of the appellants, on the basis that it is the most effective option for remedying any potential miscarriage of justice. The formal arraignment was held on 6 March 2020. The Director of Public Prosecutions (DPP) decided not to proceed to retrial and withdrew all charges.

[7] *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 (16 October 2019) 21, [67].