Judgment Summary
Supreme Court
New South Wales
Court of Criminal Appeal

A2 v R; Magennis v R; Vaziri v R [2018] NSWCCA 174

Hoeben CJ at CL, Ward JA, Adams J

The Court of Criminal Appeal has allowed an appeal brought by the appellants A2, Magennis, and Vaziri against their respective convictions for offences relating to female genital mutilation.

Following a jury trial in the Supreme Court, A2 (the mother of the two complainants) and Kubra Magennis were convicted of offences of female genital mutilation, and Shabbir Vaziri, the leader of the local Dawoodi Bohra community of which all appellants were members, was convicted of being an accessory to those offences. The offences of female genital mutilation that were found to have been committed related to separate ceremonies involving each of A2's daughters, when each child was aged about seven. The Crown case was that A2 and Magennis were part of a joint criminal enterprise to perform a ceremony known as "khatna" on each of the children, which involved Magennis cutting or nicking the clitoris of each child, in the presence of their mother (A2) and other family members. Magennis maintained that the ceremony was one in which the 'skin sniffed the steel' (an implement touching the vulva) but did not involve any cut or nick to the clitoris.

Although there was no medical evidence at the trial of any damage to the clitoris of either child, the tip of the clitoral head could not be seen during the medical examinations.

On appeal, the Court of Criminal Appeal granted leave to the appellants to adduce new expert evidence, which established that the tip of the clitoral head was visible in each complainant. The Court held that this new evidence demonstrated a potential miscarriage of justice, as the case had been left to the jury on the basis that one possible reason why the tip of the clitoral head could not be seen was that it had been removed.

There were numerous grounds of appeal. Among others, the Court upheld the first ground of appeal relating to the proper statutory interpretation of the relevant offence provision of the *Crimes Act 1900* (NSW), as to the meaning both of "otherwise mutilates" and "clitoris" in s 45(1)(a).

On the principal count, taking into consideration both the new evidence and the evidence as a whole, the Court of Criminal Appeal held that it would not have been possible for a jury, properly instructed, to conclude beyond reasonable doubt that the clitoris of either complainant had been "mutilated" and hence that verdicts of acquittal should be entered.

On the alternative counts, of assault occasioning actual bodily harm contrary to s 59 of the *Crimes Act*, having examined all of the evidence that would be available on a trial confined to those allegations, the Court determined not to order a new trial.

The Court entered verdicts of acquittal in respect of each of A2, Magennis, and Vaziri. It was therefore not necessary to consider Vaziri's sentence appeal.

The Court emphasised the need for legislative amendment to make clear (if that be the intent of the legislature, as seemed apparent from the materials in evidence) that ritualised female circumcision is to be prohibited in this State.