



Supreme Court New South Wales

Medium Neutral Citation:

R v A2; R v Magennis; R v Vaziri (No. 23) [2016] NSWSC 282

Hearing dates:

5 February 2016, 18 February 2016

Decision date:

18 March 2016

Before:

Johnson J

Decision:

In the case of each Offender, an aggregate sentence of 15 months' imprisonment with a non-parole period of 11 months was set. The Court referred each Offender for assessment as to suitability to serve the sentence by way of home detention.

Catchwords:

CRIMINAL LAW – sentence – offences of female genital mutilation committed against two young girls – s.45 Crimes Act 1900 – maximum penalty seven years' imprisonment - offenders convicted following jury trial – offences committed by mother of victims and midwife – community religious leader convicted as accessory after the fact – where mutilation constitutes nick or cut to clitoris of each girl – offences of considerable objective seriousness – breach of trust – abuse of professional vocation – attempts to deflect police investigation – no evidence of permanent scarring or lasting injury – genuine remorse expressed by mother of victims – importance of general deterrence for offences of this kind – where Offenders' community in Australia and internationally has declared after trial that FGM should no longer be practised – where proceedings have contributed to the international movement toward the eradication of FGM – sentence of imprisonment appropriate – consideration of non-custodial alternatives – offenders referred for suitability assessment for home detention

Legislation Cited:

Crimes (Sentencing Procedure) Act 1999

Crimes Act 1900

Surveillance Devices Act 2007 (NSW)

Telecommunications (Interception and Access) Act 1979 (Cth)

United Nations Convention on the Rights of the Child

(1989)

Cases Cited:

Douar v R [2005] NSWCCA 455; 159 A Crim R 154
Muldrock v The Queen [2011] HCA 39; 244 CLR 120
R v A2; R v KM; R v Vaziri (No 2) [2015] NSWSC 1221
R v A2; R v KM; R v Vaziri (No. 4) [2015] NSWSC 1306
R v FA (District Court of NSW, 5 June 2015, unreported)
R v Isaacs (1997) 41 NSWLR 374
R v Pogson [2012] NSWCCA 225; 82 NSWLR 60
R v Zamagias [2002] NSWCCA 17
The Queen v Olbrich [1999] HCA 54; 199 CLR 270
Vartzokas v Zanker (1989) 51 SASR 277
Veen v The Queen [No. 2] [1988] HCA 14; 164 CLR 465

Texts Cited:

Ashworth and Zedner, "Preventive Justice", Oxford University Press, 2014

Category:

Sentence

Parties:

Regina (Crown)
A2 (Offender)
Kubra Magennis (Offender)
Shabbir Mohammedbhai Vaziri (Offender)

Representation:

Counsel:
Ms NL Williams (Crown)
Mr RF Sutherland SC (Offenders A2 and Vaziri)
Mr S Bouveng (Offender Magennis)

Solicitors:
Office of the Director of Public Prosecutions (Crown)
Armstrong Legal (Offenders)

File Number(s):

2012/280081 (A2)2012/285455 (Magennis)2012/285639 (Vaziri)

Publication restriction:

REMARKS ON SENTENCE

- 1 **JOHNSON J:** In 1994, the Parliament in this State enacted s.45 *Crimes Act 1900* for the purpose of prohibiting female genital mutilation ("FGM"). The offence was punishable by imprisonment for seven years. In 2014, Parliament increased the maximum penalty for offences under s.45 to imprisonment for 21 years. The events giving rise to this case occurred at a time when the maximum penalty was seven years' imprisonment.
- 2 Since 1994, there has been one case (in June 2015) where an FGM offence proceeded by way of a plea of guilty in the District Court.
- 3 The present prosecution arises out of events between 2009 and 2012. Those events concerned what happened to two young sisters when each of them was about seven years old. Those girls have been referred to for the purpose of these proceedings as C1

and C2, not out of any disrespect, but so that their identities were protected.

- 4 At a trial which took place between September and November 2015, a jury convicted the three Offenders of FGM offences or offences associated with FGM. The mother of the two sisters, referred to as A2 so as not to identify the young girls, was convicted of mutilating the clitoris of each young girl with those events occurring in about 2009 (in the case of C1) and in 2012 (with respect to C2).
- 5 The Offender Kubra Magennis was convicted of mutilating the clitoris of each of C1 and C2. It was the Crown case that Kubra Magennis performed these acts upon each girl at the request of their mother, A2.
- 6 The Offender Shabbir Vaziri was found guilty of being an accessory after the fact of the offence of mutilating the clitoris of each of C1 and C2.
- 7 For the purpose of these proceedings, the Court has been called upon to make legal determinations in a range of areas where little (if any) precedent exists. The jury at the trial of the Offenders was the first in Australia to determine the question of guilt of persons charged with FGM offences.
- 8 It is now the task of this Court to pass sentence upon the Offenders. As will be seen, the unusual and effectively novel circumstances of this case pose questions for this Court not often confronted in sentencing criminal offenders.

Facts of Offences

- 9 The starting point is to make findings of fact for the purpose of sentence concerning the offences. The primary constraint is that the view of the facts adopted by me, for the purposes of sentencing, must be consistent with the verdicts of the jury: *R v Isaacs* (1997) 41 NSWLR 374 at 377-378. The Court may not take a matter into account on sentence, in a way that is adverse to the interests of an offender, unless those facts have been established beyond reasonable doubt. On the other hand, if there are matters which the offender relies upon to reduce penalty, it is enough if those matters are proved by the offender on the balance of probabilities: *The Queen v Olbrich* [1999] HCA 54; 199 CLR 270 at 281 [27]-[28].
- 10 It is appropriate, at the outset, to say something about the police investigation in this case.
- 11 The events giving rise to this trial came to light when information was received by police and child protection authorities prior to 29 August 2012 concerning the commission of suspected FGM offences. As a result, an investigating approach was devised where a police officer and social worker (both female) would speak to each of C1 and C2 separately whilst at school on 29 August 2012, without notice to their parents. Each interview was video-recorded and became part of the evidence-in-chief of each child at trial. Accordingly, the jury was able to see what each girl was asked, and how each responded to questions about sensitive events, without any opportunity for others to influence what each child was to say at the interview.

- 12 Thereafter, contact was made with A2 and her husband and they were invited to attend to speak to police and child protection officers.
- 13 Police had secured warrants, lawfully obtained under the *Surveillance Devices Act 2007 (NSW)* and the *Telecommunications (Interception and Access) Act 1979 (Cth)*. As a result, conversations were recorded in various locations (involving, in particular, A2). Telephone conversations, between a variety of people, were recorded over a period between 29 August and 2 October 2012. The conversations which were recorded took place in a mixture of languages - English, Gujarati, Hindi and Lisan al-Dawat. A thorough process of translation was undertaken so that there was no real issue at trial concerning the transcripts (in English) which were placed before the jury without objection.
- 14 The electronic evidence formed a critical part of the investigation, providing evidence of the spontaneous and unguarded statements of each of the Offenders (and others) concerning what had been done to C1 and C2 and how persons were to respond to the investigation.
- 15 The methods used by police were thorough and commendable in the context of investigation of FGM offences which, it has been said, are difficult to detect, investigate and prosecute.

The Trial Issues

- 16 The areas of contest at the trial of the Offenders were relatively confined. There was no dispute that at the places and times alleged in the indictment, the Offender Kubra Magennis used a metal instrument to come into physical contact with the genital area of each of C1 and C2. On each occasion, the Offender A2 was present and she had requested Kubra Magennis to so act. Each girl was lying on a bed naked from the waist down during the event.
- 17 Before the trial, I had ruled that the term "mutilate" in s.45 means to injure to any extent: *R v A2; R v KM; R v Vaziri (No 2)* [2015] NSWSC 1221. The written directions to the jury on the elements of the offences included the following:

"3 The word 'mutilate', in the context of female genital mutilation, means to injure to any extent. It is not necessary for the Crown to establish that serious injury resulted. In the context of this trial, a nick or cut is capable of constituting mutilation for the purpose of this alleged offence.

4 The word 'clitoris' includes the clitoral hood (or prepuce)."

- 18 The issues in dispute were as follows. The Crown said that, on each occasion, what was happening was a form of FGM where some injury was caused by the Offender Magennis to the clitoris of each child. The defence denied that any injury was caused to either child, with the cases of the Offenders being conducted upon the basis that, in the case of each girl, this was a form of symbolic ceremony where metal (said to be forceps) were laid upon the outside of the child's genital area, but that no injury was caused to either child.

The written directions to the jury identified the disputed issues to be determined by the jury as being "*whether the use of an instrument by Kubra Magennis caused a cut or nick to the clitoris*" of each child.

20 In light of the evidence of telephone conversations to which Shabbir Vaziri was a party, senior counsel appearing for him conducted the trial upon the basis that the charges of being an accessory after the fact to the s.45 offences stood or fell upon the basis of the jury's determination of the principal issue, namely, whether injury to the clitoris to any extent had been identified upon each girl.

21 By their verdicts, the jury clearly rejected the claim that what was occurring was some symbolic ceremony not involving the infliction of any injury to each child. The facts which I now proceed to find are consistent with the verdicts of the jury.

The Dawoodi Bohra Community

22 Each of the Offenders are members of the Dawoodi Bohra community in Sydney. The Dawoodi Bohra community is a world-wide subset of Shia Islam. As will be seen, there are Dawoodi Bohra communities in many parts of the world. The principal centre for the community is Mumbai in India, where its religious leadership is based. There is a substantial Dawoodi Bohra community, as well, in Eastern Africa, in particular, Kenya.

A2 and Kubra Magennis

23 A2 was born (in 1977) and raised in Kenya. She entered into an arranged marriage in 2000 and came to Australia with her husband in about 2001. She has four children, including C1 and C2.

24 Although there was no evidence before the jury as to this, there is evidence in the presentence report before me which indicates that A2 herself (whilst in Kenya) was subjected as a little girl to "*khatna*", described in the presentence report "*as a rite of passage for girls in this culture when they reach seven years of age*". A2's own experience sheds light upon her own approach when it came to C1 and C2, as each of them approached seven years of age. Although she did not give evidence at the trial, it is apparent from all the evidence in the trial and on sentence, that she is an intelligent and well-educated woman, having qualified as a pharmacist.

25 Kubra Magennis was born in Kenya in 1943 and came to Australia in 1977, after a period residing in the United Kingdom. She is, by training and occupation, a nurse and midwife. She gave evidence at trial before the jury. Clearly, the jury rejected her evidence that these were symbolic acts only without infliction of any injury.

26 Consistent with the verdicts of the jury, I am satisfied to the criminal standard that Kubra Magennis inflicted injury to the clitoris of each girl. I am satisfied that she was selected by A2 to undertake these procedures because of her training and expertise as a nurse and midwife and her membership of the Dawoodi Bohra community.

The Offences

In about 2009 or 2010, C1 was taken by her mother, A2, to a house in Wollongong where Kubra Magennis carried out the FGM procedure on her. For this purpose, C1 was required to lie on a bed naked from the waist down.

- 28 Present in the room were A2, who requested Kubra Magennis to carry out the procedure, together with C1's grandmother (A5) and, from time to time, the woman who owned the home in Wollongong (A3, C1's paternal grandaunt). Despite their efforts in evidence to minimise their knowledge of what was occurring in the bedroom, I am satisfied that each of A3 and A5 was well aware of what was happening and why. Each was aware that "*khatna*" was being performed involving the infliction of injury.
- 29 Kubra Magennis used a metal instrument for the purpose of cutting or nicking the clitoris (including the clitoral hood or prepuce) of C1. The precise nature of the instrument used for this purpose has not been established. C1 described it as "*like a silver tool-ish thing*" which "*looked a bit like a scissor*" (T120). Kubra Magennis maintained that she used forceps which had been provided to her by A2. I am satisfied that whatever instrument was used, it was able to cut or nick the clitoris and that it was so used upon C1.
- 30 In her interview on 29 August 2012, C1 said that "*khatna*" involved "*a little cut ... in your private part*" and that this was what happened to her.
- 31 I am satisfied that what was done to C1 accorded with the description given by A2 in a conversation she had with her husband, A1, which was lawfully recorded by surveillance device on the afternoon of 29 August 2012. In the course of a conversation concerning "*khatna*" or female circumcision, A1 asked "*In us do they cut skin ... or do they cut the whole clitoris?*" A2 replied, "*No ... they just do little bit ... just little*" (Exhibit AH, pages 8-9).
- 32 Further light was shed upon what was done to C1 in the evidence given at the trial by Kubra Magennis. She recounted an occasion, when she lived in London in the 1960s, when the wife of a Dawoodi Bohra cleric approached her (Magennis) as a midwife, to perform "*khatna*" on a girl (T1534-1635). According to Kubra Magennis, the cleric's wife explained "*khatna*" - "*We have a skin nick ... you are a midwife, you are intelligent, you know exactly the vaginal parts ...*". Kubra Magennis denied that she had carried out such a procedure then or at any other time. I am satisfied, however, that what was described in this incident explains "*khatna*" as performed in this case, as well as why Kubra Magennis was asked to carry out the procedure utilising, as it did, her skills as a midwife.
- 33 When interviewed by investigating officials in August 2012, C1 said that it hurt when this procedure was carried out upon her. She was told to have a shower and she did so.
- 34 After the procedure was carried out on C1, she was told by her mother not to discuss it with anyone. This aspect was confirmed in a recorded conversation in A2's motor vehicle on the afternoon of 29 August 2012, when she remonstrated with C1 and C2 (referring to the interviews with the girls which had taken place earlier that day):

"You told them everything. I told you not to say, any one. I told you not to say. Now we are in trouble because of this. I told you this is a big secret. This is what she came to find out. Now we are in trouble because of that. We told you my child this is a big secret, never tell anyone."

- 35 In 2012, a similar procedure was undertaken on C2 at her parent's house in Sydney. Once again, Kubra Magennis performed the procedure in the presence, and at the request, of A2. Once again, C2's grandmother (A5) was present when the procedure was undertaken.
- 36 C2 was asked to lie on a bed and she was naked from the waist down. I am satisfied that the procedure undertaken on C2 involved a cut or nick to the clitoris (including the clitoral hood or prepuce). Apart from her youth, I note that C2 has a mild intellectual disability. When interviewed in August 2012 by investigating officials, she said that what had happened to her had *"hurt ... in [her] bottom"*.
- 37 The medical evidence at trial did not demonstrate that any substantial injury, with long-term physical consequences, had been inflicted to either girl. Further medical examinations carried out after trial indicated that there was no sign of physical injury. These post-trial examinations, of course, were made years after the procedures were carried out on each of C1 and C2.
- 38 In expressing these findings concerning the infliction of injury, I have taken into account the very substantial body of evidence adduced by the Crown at trial, extending far beyond the accounts given by each young girl and the trial medical evidence. In particular, there was electronic evidence of conversations involving the Offenders and others, obtained by the use of lawfully obtained surveillance device warrants or telephone interception warrants.
- 39 It is sufficient to note that this electronic evidence provided powerful support for the Crown case that what happened to each girl involved *"khatna"* or female circumcision, with some injury being inflicted for that purpose. That electronic evidence was clearly inconsistent with the performance of some symbolic ceremony where a metal object was placed on the outside of each girl's genital area, with no infliction of injury.

Shabbir Vaziri

- 40 The Offender Vaziri was born in India in 1956. In 2009, he came to Australia with his family to take up the position as Sheikh or religious leader at the Dawoodi Bohra Mosque at Auburn. He occupied that position until it was terminated by the Dawoodi Bohra leadership in Mumbai in February 2016.
- 41 The Offender Vaziri was found guilty by the jury of being an accessory after the fact to the FGM offences committed upon C1 and C2. Between 12 August 2012 and 9 October 2012, he assisted A2 and Kubra Magennis by encouraging them, potential witnesses and other members of the Dawoodi Bohra community to lie to police, or to not disclose relevant information to police. In addition, the Offender Vaziri was himself involved in putting forward false information to police. He gave that assistance so that A2 and Kubra Magennis could escape arrest, trial or punishment for their offences.

42 The Crown case against the Offender Vaziri was contained largely in the recorded telephone conversations. Clearly, the jury was satisfied, as am I, that the Offender Vaziri knew that FGM offences had been committed against each of C1 and C2.

43 The conversations revealed an understanding on his part as to the nature of *"khatna"* and the fact that it was illegal in this State. He was aware of the fact that the Offender Magennis had carried out the procedure in each case. He took active steps to promulgate a false story, whereby investigating authorities were to be informed that what had happened was a type of check up by the Offender Magennis of each girl to see if any FGM procedure had been undertaken on them following a journey to Eastern Africa (the *"Africa checking story"*).

44 The electronic evidence demonstrated the creation of the *"Africa checking story"*, and its further dissemination with each Offender being involved in that process, together with others, including A1, the husband of A2.

45 Some examples of the Offender Vaziri's conduct will serve to illustrate the nature of his offences.

46 The significance of the Offender Vaziri to the FGM investigation is demonstrated by his very early involvement in telephone conversations on the afternoon of 29 August 2012. Soon after 3.00 pm that day, A1 called Vaziri to tell him that *"There has been a little problem"*, with police and a social worker having gone to C1 and C2's school to speak to them. A1 tells Vaziri, *"It seems that [C1] has already told that one everything that khatna has happened here"*. A1 asks Vaziri, *"I want to know that, what reply should I give to these people? What to tell?"*.

47 In the course of that conversation, the *"Africa checking story"* was hatched. The Offender Vaziri enquired of A1 whether A1's family had been to India in recent times. The two men agreed that Africa should be the place nominated in the conversation. The Offender Vaziri said (Exhibit AA. Tab 3):

"This is my idea. May tell that 'In fact we had gone for the birthday and we, um, had left at our neighbours who, who has a travellers lodge over there, and do not have the knowledge as to what has happened."

48 Over a number of conversations between different people, the *"Africa checking story"* was developed as a means of explaining why the Offender Magennis had been touching the genital areas of the two girls, and also to provide a possible (false) explanation if injuries were detected in the girls.

49 A1 and Vaziri spoke again in the evening of 29 August 2012 along similar lines. A1 updated Vaziri on what was happening, including the involvement of Kubra Magennis.

50 The importance of the involvement of Vaziri is illustrated by a telephone conversation between A2 and Kubra Magennis at about 5.50 pm on 29 August 2012 which included the following:

Magennis: *"What does this Elder Brother [Vaziri] say?"*.

A2: *"We phoned the Elder Brother immediately. That one says 'Do not confess at all that you have got done here'"*.

- 51 At 5.13 pm on 30 August 2012, Vaziri rang Kubra Magennis and discussed the investigation. She told Vaziri that she had telephoned Sheikh Zafar (in India) and she had told him *"At my age, I do not want to go to sit in a gaol"*.
- 52 At 6.17 pm on 1 September 2012, Yamanisab (from the Dawat office in Mumbai) rang Vaziri and discussed the investigation. In the course of the conversation, Vaziri explained that the *"Africa checking story"* was being used.
- 53 Soon after 4.00 pm on 10 September 2012, Vaziri spoke to another member of the Dawoodi Bohra community by telephone. The two men discussed a police canvass being undertaken amongst members of the Dawoodi Bohra community. A female member of the community had told police that *"I haven't done [khatna]. We do not believe in this"*. Vaziri and the other man agreed that if everyone answered in that way *"All avenues close for them"* and *"they [the police] shut down"*.
- 54 Again, on 10 September 2012, Vaziri spoke by telephone to a female member of his community. She told him that police had come that day to speak to her about *"khatna"*.
- 55 She said:
- "Female: I was so scared. They asked me about circumcision khatna. I wanted to avoid that word. Then they translate into English.*
- Vaziri: What did you say?*
- Female: I said I do not know meaning. You do this ... they said you do the child for seven years. Who do? I said I did not know. Not any idea. That's what I said Sir.*
- Vaziri: Very good. Very good.*
- ...
- Vaziri: ... If they ask you again, you have to say them, I am not saying ... mean we do not do it. ... You should say we do not do."*
- 56 In a later conversation on 10 September 2012, the Offender Vaziri said to a Dawoodi Bohra community member, *"If someone asking you or your wife, this should be your answer. We do not believe in it"*.
- 57 As mentioned earlier, senior counsel for Vaziri conducted the trial upon the basis that the real issue concerning his guilt was the *"injury"* issue. This approach was understandable given the content of the recorded telephone conversations.

The Objective Seriousness of the Offences

- 58 Assessment of the objective seriousness of FGM offences involves consideration of the degree of physical injury caused, any ongoing physical or psychological injury, the age of the person upon whom the FGM procedure has been performed and the relationship between the offender and the victim. Other factors may also be relevant depending upon the circumstances of the case.
- 59 Offences under s.45 are not confined to any particular age group.
- 60

Section 45 prohibits excision, infibulation or other forms of mutilation of specified parts of the female genital area, including the clitoris. A case of excision or infibulation is likely to be objectively more serious than a case of mutilation not involving those features. The World Health Organisation (WHO) FGM classification reflects this form of hierarchy, with excision and infibulation being two of the four categories: *R v A2*; *R v KM*; *R v Vaziri (No. 2)* at [204].

61 The present case is one of mutilation to the clitoris in the form of infliction of injury, by way of a cut or nick to the clitoris (including the clitoral head or prepuce) of each girl. This case represents an example of Type 4 FGM, involving a harmful procedure to the female genitalia.

62 As noted in *R v A2*; *R v KM*; *R v Vaziri (No. 2)* at [239], s.45 is directed to procedures undertaken in a delicate, sensitive and intimate part of the female anatomy, usually of young girls. It is necessary to keep in mind that FGM offences involve infringements upon the rights of children to physical integrity, and violations of the *United Nations Convention on the Rights of the Child (1989)*. In addition, the 1993 Vienna World Conference on Human Rights classified FGM as a form of violence against women.

63 The medical evidence indicates that there is no permanent scarring or other residual physical injury to either C1 or C2.

64 The Court should proceed upon the basis that there are likely to be some adverse psychological consequences for each girl as a result of the commission of these offences. Given their present ages, this aspect cannot be quantified, but the existence of ongoing psychological harm is to be expected in a case such as this.

A2

65 A2 was the mother of each girl. She was in a position of particular trust with respect to each of them. It was her obligation to protect each girl and not to cause some procedure to be carried out upon them involving injury. Each girl was very young (about seven years old) and vulnerable. C2 was especially vulnerable as she has an intellectual disability.

66 The breach of trust implicit in offences by a mother upon young girls is a significant factor in the assessment of objective seriousness of the offences. The fact that A2 herself had had such a procedure carried out upon her when she was seven years of age, may serve to explain how she came to request such procedures to be performed upon her own daughters. However, that aspect provides limited assistance to A2.

67 A2 is a well-educated and intelligent woman with professional training. She had lived in Australia for a number of years before the commission of the offence upon C1 in about 2009. The laws and norms applicable to A2 were those of Australia and, in particular, the State of New South Wales. I am satisfied that A2 was aware that the procedures undertaken on C1 and C2 were unlawful.

68 Having regard to these factors, I conclude that A2's offences are of considerable objective seriousness.

Kubra Magennis

- 69 The Offender Magennis had lived in Australia since the late 1970s. She was a nurse and midwife. She was selected to undertake the FGM procedures for that reason. Her abuse of her professional vocation aggravates her offences against C1 and C2.
- 70 It was the case that A2 asked the Offender Magennis to perform these procedures, but this does not assist the Offender Magennis. I am satisfied that the Offender Magennis was well aware of the laws applicable in New South Wales which prohibited procedures of this type.
- 71 Like A2, the offences of Kubra Magennis are of considerable objective seriousness.

Shabbir Vaziri

- 72 The Offender Vaziri was in a primary position of responsibility in the Dawoodi Bohra community in Sydney at the time of the commission of the offences. He was the religious leader of the community.
- 73 Rather than honestly assisting the investigating authorities to ascertain what had happened and why, he played a leading role in the creation of a false story for the purpose of deflecting investigation of the offences, which he well knew had been committed. Further, he encouraged and directed members of the Dawoodi Bohra community to give false accounts to police whilst the offences were being investigated.
- 74 It does not assist the Offender Vaziri that he may have accepted culturally that procedures of this type could occur in the Dawoodi Bohra community. I am satisfied that he was well aware that conduct of this type was contrary to the criminal law of this State. He used his position of authority and responsibility to seek to undermine and deflect the law, rather than to promote it.
- 75 His offences extended over a period of weeks and involved a course of conduct on his part.
- 76 An assessment of the objective seriousness of the offences of A2 and the Offender Magennis is also relevant to an assessment of the Offender Vaziri's offences, given that his crimes involved him as an accessory after the fact to the primary offences of the other Offenders.
- 77 I conclude that the accessorial offences of the Offender Vaziri are of considerable objective seriousness.

Subjective Circumstances of Offenders

A2

- 78 A2 was about 32 years old at the time of the offence against C1, and about 35 years old at the time of the offence concerning C2. She is now 39 years of age.
- 79 A2 has no criminal history. She has an older brother and two younger sisters. Her parents continue to reside in Kenya. She graduated in pharmacy from the University of Nairobi in 2001. Since coming to Australia she has worked, from time to time, as a

pharmacist.

80 I have mentioned aspects of A2's upbringing and education earlier in these remarks. A2 has two daughters younger than C1 and C2. She has made clear, in documents before the Court on sentence, that she does not intend to have "*khatna*" carried out on these girls. There is evidence before the Court that Family and Community Services officers have assessed A2's family and have concluded that none of the children need to be removed from the care of their parents (Exhibit 10). This is a significant factor on sentence.

81 A report of Mr Roderick Lander, psychologist, dated 2 February 2016 was received on sentence with respect to A2. She expressed concern to Mr Lander of the impact upon her children if she received a full-time custodial sentence. Mr Lander did not identify any psychological issue with A2, apart from elevated levels of depressive and anxiety symptoms resulting from these proceedings.

82 Mr Lander noted that A2 continues to receive strong support from her family and husband, and that she has a strong affiliation with her religious community and appears to have a single-minded dedication to the care of her children.

83 A number of character references describe A2, amongst other things, as a dedicated mother and a soft-spoken person.

84 Reference will be made shortly to issues concerning the attitude of A2 towards C1 and C2 as victims of these offences.

Kubra Magennis

85 Kubra Magennis was about 66 years old at the time of the offence upon C1, and about 68 years old at the time of the offence involving C2. She is now 72 years of age. She has no criminal history.

86 As mentioned earlier in these remarks, Kubra Magennis was born in Kenya and came to Australia in 1977. She had lived and worked in the United Kingdom for a period before then.

87 Kubra Magennis has two children from her first marriage. She has remarried and lives with her husband. She has the ongoing support of her husband and her daughter from her first marriage.

88 Kubra Magennis worked in Australia as a nurse and midwife between 1995 and 2007, although she has since retired.

89 The evidence establishes that Kubra Magennis suffers from a number of significant health problems.

90 A report of Dr Hashim Kachwalia, cardiologist, dated 10 December 2015 addresses a number of health issues including hypertension, diabetes mellitus (which is difficult to control), significant renal impairment, stroke and osteoarthritis which restricts her mobility. She has been an inpatient for different conditions in 2010 (stroke) and 2015 (multi-organ dysfunction) followed by renal failure. She has mobility problems and there are significant cardiac risk factors.

- 91 A report of Dr David Rosen, neurologist, of 20 January 2016 concluded that she will require close monitoring and management of cerebrovascular risk factors, including her diabetes mellitus and hypertension to minimise the risk of stroke. Dr Rosen noted that Kubra Magennis is at risk of falling and injuring herself and requires management of her multi-factorial gait disorder. Dr Rosen expressed the opinion that a full-time custodial sentence would give rise to particular difficulties in the management and treatment of the serious health issues affecting the Offender Magennis.
- 92 In a report dated 22 December 2015, Dr Patrick Wong, her treating general practitioner, outlined the range of medical problems experienced by Kubra Magennis and observed that it would be difficult to implement the complex treatment plans required in a custodial setting.
- 93 A report of Dr Stephen Ong, ophthalmic surgeon, dated 1 February 2016 diagnosed a right superior retinal artery occlusion and bleeding on the retina due to systemic diabetes. Dr Ong expressed the opinion that if Kubra Magennis is unable to attend ongoing, 12-weekly ophthalmic care, there is a strong likelihood that she will experience loss of vision which is unlikely to be reversible.
- 94 A report of Dr Jacqueline McMaster, neurosurgeon, dated 2 February 2016 concerned the leg and back problems which she experiences, and the forms of treatment which are likely including injections and the prospect of surgical intervention in the form of a spinal fusion.
- 95 A report of Dr Andrew Jeffreys, consultant nephrologist, dated 7 December 2015 lists the Offender's medical problems, including chronic kidney disease, diabetes, radiculopathy, and acute renal failure secondary to sepsis in 2014, which required dialysis for two months. He confirmed the picture emerging from other reports that she required ongoing monitoring and treatment to minimise further deterioration. Reports of Mr Matthew Jessimer, clinical psychologist, dated 13 January 2016 were tendered at the sentencing hearing. Mr Jessimer stated that Kubra Magennis currently meets diagnostic criteria for major depressive disorder. He stated that there were various symptoms of generalised anxiety disorder which appeared to relate to the current legal situation. He stated that Kubra Magennis was very concerned about the impact of imprisonment upon her range of significant health issues.
- 96 A number of character references were tendered which spoke of her general good character, in the various contexts in which the authors had associated with her.

Shabbir Vaziri

- 97 Shabbir Vaziri was 56 years old at the time of the offences. He is now 59 years of age. He has no criminal history.
- 98 Vaziri was born in India and came to Australia in 2009 with his wife and two older sons. Whilst serving as Sheikh at the Auburn Mosque, his residence and finances were supported by members of the Dawoodi Bohra community.

A report of Dr Jacqueline McMaster dated 2 December 2015 stated that the Offender Vaziri had undergone surgery in August 2015 to remove a tumour. He requires ongoing assessment to determine that there is no recurrence.

100 A medical assessment was undertaken concerning Vaziri by Dr Gulzar Hussein on 17 December 2015. Dr Hussein noted that he required treatment for hypertension and ongoing assessment concerning the surgery undertaken in August 2015.

101 A number of character references spoke highly of the work undertaken by Vaziri amongst the Dawoodi Bohra community in Sydney.

Expressions of Contrition and Remorse and the Effect of the Offences on C1 and C2

A2

102 At the sentencing hearing on 5 February 2016, an unsworn letter from A2 was tendered in which she said *"I take this opportunity to sincerely and deeply convey my heartfelt apology for having attended a ritual which has been found to be illegal. I also regret the difficulties this has caused my children, my husband, the Court and police. It is with profound sorrow I would like to assure that such an incident will not recur"*.

103 I indicated that I would give limited weight to this expression of contrition which arose after trial. I noted, as well, that there was no evidence of A2 having apologised to her children, C1 and C2, for what occurred to them. In raising this issue, I had in mind that even on the defence case (which was rejected by the jury), the placing of a metal object on the naked body of a child would itself be unlawful as an assault. So much was accepted by defence counsel.

104 I noted further that, to the extent that there was a report of Alison O'Neill, psychologist, tendered on behalf of A2 which involved a further psychological examination of C1 on 13 January 2016, the report did not constitute a form of victim impact statement concerning C1. Rather, the focus of attention was upon the possible impact on C1 if her mother was imprisoned. I should observe that Ms O'Neill had examined C1 for the purpose of issues surrounding compellability of C1 and C2 as witnesses, the subject of my judgment *R v A2; R v KM; R v Vaziri (No. 4)* [2015] NSWSC 1306 at [131]ff. Understandably, C1 expressed real concern to Ms O'Neill at the prospect of her mother being sentenced to full-time imprisonment.

105 During the adjournment between 5 and 18 February 2016, the legal representatives for A2 arranged for a meeting between A2 and each of C1 and C2, in the presence of Ms O'Neill.

106 In a further report dated 15 February 2016, Ms O'Neill outlined what had happened. In her presence, A2 apologised to each of C1 and C2 orally and in writing. Ms O'Neill reported that C1 listened attentively to her mother, and appeared to have a thorough understanding of the meaning and purpose of the apology, but that C2 did not. C1 advised that she understood that her mother was apologising for the *"khatna"* ceremony and the Court process. C1 said that her mother had apologised before and

that hearing the formal apology then “sort of” helped but she could not explain how or why. In the absence of her mother, C1 said that the apology helped “a tiny bit”. C1 said that “her mother did not need to apologise because the situation had been hard for them both”. Ms O’Neill spoke about “the responsibility resting with adults and not with her as a child”.

107 Ms O’Neill stated that the impression gained was that A2’s apology to her daughters was sincere and that it was of some help to C1, but not C2. She noted that C2’s intellectual disability affected this aspect. Ms O’Neill concluded that “The most helpful part of the sessions for [C1] is that it will likely serve as a reference point for her in the future, when reflecting about her role and the issues, her mother’s apology, and if she has any outstanding questions for her mother as she matures into womanhood”.

108 The written apology provided by A2 to C1 should be mentioned. It stated:

“When you were seven I had a khatna ceremony performed on you.

This has been a practice in our culture for about fourteen centuries.

The police arrested me and I was charged and you gave evidence. I am very proud of you, you did the right thing and upheld the law when you were asked to do so.

The courts have found that in putting you through the khatna ceremony you were injured and I was responsible. I accept this decision.

I now unreservedly apologise to you. I thought I was doing what was required culturally but I accept that is wrong and breaches the law in NSW.

I want you to know that there is no way that your sisters, [the third and fourth daughters], or anyone else I come into contact [with] will go through a khatna ceremony of any description if I can prevent it.

I am very proud of you and the way you have dealt with everything you have been through with the police and courts.

Again, I am very sorry to have put you through this.

My love always.”

109 Observing C1 in her 29 August 2012 interview, and in the witness box, indicated that she was and is an intelligent, thoughtful and caring person. This impression is confirmed by Ms O’Neill’s recent reports and the earlier psychological reports which related to her. She told the investigators on 29 August 2012 that what had happened to her had also happened to her sister, C2. As the eldest daughter in the family, it may be confidently expected that C1 will help, support and protect her younger sisters. Her strength and fortitude in the events which have transpired since August 2012 should be acknowledged by the Court.

110 A letter along similar lines, with some variations, was provided to C2. In her own way, C2 has shown strength in the events surrounding this case since 2012.

111 Although the steps taken by A2 following the sentencing hearing on 5 February 2016 may be seen as being responsive to the expression of the Court’s concern on 5 February 2016, I am satisfied that the apologies by A2 to C1 and C2 are genuine and

demonstrative of remorse on her part. There is evidence that she has accepted responsibility for her actions. Further, the steps taken by A2 provide a measure of understanding for her children, in particular for C1.

- 112 I accept that A2 is a loving mother for all her daughters. I consider it highly unlikely that she will take any step adverse to the health and best interests of her children, including her two younger daughters. I am fortified in this conclusion by the approach of the Department of Family and Community Services, which has accepted that the family should remain together.

Kubra Magennis

- 113 There has been no expression of remorse on the part of Kubra Magennis. It is clear that the jury did not accept her evidence on the critical issues as to what was done to each of C1 and C2.

Shabbir Vaziri

- 114 Shabbir Vaziri did not give evidence at the trial.
- 115 At the sentencing hearing on 5 February 2016, an unsworn letter from him was tendered, in which he expressed sadness that *"In my eagerness to save my community members from embarrassment of having done something that may be regarded as illegal, I advised them in a manner that did not best serve the law of the land and the investigation that the police were conducting"*. He stated that he was *"overcome with remorse and regret this and hope the court is able to look at my situation with kindness"*.
- 116 In the course of submissions on 5 February 2016, I indicated that I would give little weight to this expression of contrition made after trial.
- 117 I noted, as well, that there was no indication from Vaziri (or the other Offenders) that he (or they) had taken or would take steps to discourage the performance of *"khatna"* in the Dawoodi Bohra community. What followed next in this regard will be referred to shortly.

Issues of Personal and General Deterrence

Personal Deterrence

- 118 The fact that A2 came to commit these offences, against the background of herself being subjected to *"khatna"* as a seven-year old girl in Kenya, gives rise to consideration as to the role of personal deterrence on sentence. The fact that she is an intelligent woman with a professional qualification living in the Australian community did not, of itself, give rise to a change in thinking on her part when it came to her elder daughters, C1 and C2.
- 119 However, the process of investigation and conviction and, in particular, the steps she has taken more recently with respect to C1 and C2 as reported by Ms O'Neill, serve to reduce significantly the role of personal deterrence in her case. It, nevertheless, remains a factor on sentence.

Kubra Magennis committed these offences utilising her skills as a nurse and midwife, against a background of what I accept was her cultural adherence to the practice of “*khatna*” in the Dawoodi Bohra community.

- 121 Given her age and ill health, I do not consider that she constitutes a real threat to the community by way of the risk of her performing “*khatna*” on anyone else. During the recorded telephone conversations, Kubra Magennis said that she would not carry out procedures of this sort again. The process of investigation, prosecution, conviction and sentence will, in my view, fortify the conclusion that she is most unlikely to offend again in this respect. Personal deterrence is thereby reduced in its significance on sentence.
- 122 The evidence at the trial indicated the adherence by Shabbir Vaziri to long-standing cultural practices of the Dawoodi Bohra community involving “*khatna*”. Personal deterrence remains a relevant consideration with respect to him. He has not personally forsaken his beliefs in this respect.
- 123 It may be suggested that the steps being taken by the Dawoodi Bohra community in Australia and internationally (involving edicts concerning “*khatna*”) may provide some assistance to Shabbir Vaziri. As will be mentioned shortly, the world is being informed of the rejection by the Dawoodi Bohra community, in a wide range of places, of the practice of “*khatna*”. However, I am not satisfied that these steps were personally driven by Shabbir Vaziri.
- 124 Personal deterrence remains a factor on sentence in his case.

General Deterrence

- 125 As things stood following the verdicts of the jury in November 2015, there was a very substantial role to be played by way of general deterrence on sentence of these Offenders.
- 126 This remained the case at the sentencing hearing on 5 February 2016. There was no sign that any of the Offenders had taken any steps to bring about a change in attitude on the part of the Dawoodi Bohra community to the practice of “*khatna*”. Discussion with counsel during the hearing on 5 February 2016 emphasised the absence of any evidence of such steps being taken by, or on behalf, of the Offenders.
- 127 In advance of the resumed sentencing hearing on 18 February 2016, the position changed. Evidence was adduced on 18 February 2016 from Tafazzulhusen Ismal Shamsi, a trustee of the Dawoodi Bohra Trust in all States of Australia, except Victoria.
- 128 Put shortly, there is evidence that a form of guidance or edict had issued from the Anjuman-e-Burhani (Sydney) on 9 February 2016 noting that “*Khafd (also known as khatna and female circumcision)*” had been interpreted in this case as being within the meaning of FGM and s.45 *Crimes Act 1900* and that, as a result “*Khafd is illegal, whether it is carried out within any of the States of Australia or overseas*”. The document declared that “*All parents and guardians are hereby directed in the strictest terms not to carry out khafd under any circumstances*”.

The evidence before the Court on 18 February 2016 revealed that similar edicts had issued from the Trusts administering and managing the affairs of the Dawoodi Bohra communities in:

- (a) Melbourne, Australia;
- (b) Molndal, Sweden;
- (c) London, Bradford, Nottingham, Manchester, Birmingham and Leicester in the United Kingdom.

130 Each of the edicts, which were issued in these cities to the relevant Dawoodi Bohra community, included a recital as follows:

"Further, it is noted that a number of members of the Dawoodi Bohra community in Sydney, Australia have been convicted in November 2015 by the Supreme Court of New South Wales for undertaking khafd, which emphasises the seriousness of the crime".

131 Each edict directed that "khafd" must not be performed, nor should children be taken overseas for the purpose of "khafd" being performed.

132 Apart from the making of these edicts in the different places referred to, there is evidence that the actions of the Dawoodi Bohra communities in these places has received substantial media coverage including, importantly, in India. As I have said, Mumbai is the principal centre for the world-wide Dawoodi Bohra community and the place of residence for its religious leader, the 53rd Dai al-Mutlaq, Syedna Mufaddal Saifuddin.

133 An electronic article published in the "Mumbai Mirror" on 11 February 2016 included the following under the heading "Fight Against Khatna Gets a Shot in the Arm from Down Under":

"The Jamaat in Australia issues an edict outlawing female genital mutilation, infusing fresh blood in the fight waged by Dawoodi Bohra women here".

The article continued:

"The crusade of Dawoodi Bohra women in the country against female genital mutilation (FGM) - or Khatna, as it is known in the community - has found fresh inspiration from overseas, with the Jamaat in Australia directing all Bohras there to stop the practice.

A decree stating as much was sent out on Tuesday, by the Anjuman-e-Burhani (Sydney), the Trust that manages the affairs of Australia's Dawoodi Bohra Jamaat. It directs all parents and guardians 'in the strictest terms not to carry out khafd (Khatna) under any circumstances', in concurrence with the law of the land which bans FGM of any kind.

The development comes at a time when many women from the community here in India which has 1.5 million followers, have raised their voice against the hoary ritual, which they say amounts to child abuse. An online petition under the name of 'Speak Out on FGM' has garnered more than 50,000 endorsements so far, by people both within and outside the community.

The Bohras, a sub-sect of Shia Islam, are the only community in India known to practise FGM, in which the hood of the clitoris is cut at the age of six, causing the girls immense physical and psychological trauma. According to a survey, more than 80% of Bohra women have been circumcised.

The notice in Australia further instructs them not to take anyone out of the country to perform Khatna: 'Should you engage in this illegal act, you will be doing so against specific warning of Anjuman-e-Burhani (Sydney), and the consequences of breaking the law will be solely yours'.

...

Masooma Ranalvi, who is spearheading the anti-FGM campaign in India, told Mumbai Mirror that such a move will boost confidence among Dawoodi Bohra women who have been affected by this practice. 'This is a very strong, clear message. The community leadership should take this opportunity to issue such clear edicts to Dawoodi Bohras all over the world. In the US and the UK, already there are very strong anti-FGM laws. A message from the Jamaats there will go a long way in showing that we truly believe in remaining loyal to the law of the land we live in'."

- 134 Further electronic articles in India publicising the edicts appeared in "*The Covai Post*" dated 12 February 2016 and the "*IB Times*" dated 16 February 2016.
- 135 Since 18 February 2016, a number of other Dawoodi Bohra communities have taken similar steps by issuing edicts to their communities. This has been done in the United States in Los Angeles, Houston, New York, Dallas, San Diego and San Antonio. Similar action has been taken in New Zealand, Ireland and Norway. Very importantly, an edict along similar lines was issued on 16 March 2016 by Anjuman-e-Said-ee (Nairobi), a society organising and conducting the affairs of the Dawoodi Bohra Jamaat of Nairobi in Kenya. A large Dawoodi Bohra community resides in Kenya, where both A2 and Kubra Magennis were born.
- 136 These further developments point to an ongoing pattern of attitudinal change in the Dawoodi Bohra community, against a background of centuries old adherence to the practice of "*khatna*". Although it is a matter for Governments and Courts far flung from this State, it is hoped that the current movement will flow through to the Dawoodi Bohra communities in India as well.
- 137 In *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346, Simpson J (as her Honour then was) said at 413 [35] that "*in considering general deterrence it is necessary to consider the class or pool of individuals at whom deterrence is directed*".
- 138 In circumstances where the issue of general deterrence in this case commences, at least, with the Dawoodi Bohra community, it may be said that the steps taken in Australia and internationally very substantially serve the purpose of general deterrence. Authoritative statements have been made, in no uncertain terms, forbidding the practice of "*khatna*" in those communities. Further, and very importantly, these steps had been publicised internationally with major prominence in India, where the centre of the Dawoodi Bohra community is based and where a powerful movement has developed, and continues to grow, amongst women in the Dawoodi Bohra community urging the cessation of the practice.
- 139 To the extent that the Crown submitted to this Court that the steps contained in these edicts may, at a later time, be reversed, I am satisfied that events have moved well past the point of no return. The formal and public acceptance by Dawoodi Bohra communities in different countries has served to fortify the movement towards

eradication of this form of FGM in Dawoodi Bohra communities throughout the world. In this way, an important purpose of the criminal law and the principles of sentencing has been advanced.

140 Insofar as the principle of general deterrence operates to seek the prohibition and eradication of FGM in all its forms and in all communities, the steps which have now been taken in the Dawoodi Bohra community serve that general purpose as well. This may be seen as a vindication of the processes of the criminal law.

141 I keep in mind that the effectiveness of these steps will lie in the genuineness of the intent which is said to lie behind them, and the acceptance of members of the Dawoodi Bohra community that the message being conveyed should be followed. I accept that the steps taken to this point are genuine so that there is every reason to expect that members of the Dawoodi Bohra community will follow the edicts of their religious and community leaders, all of which is intended to promote the safety of children in their community.

Determining Appropriate Sentences

142 In approaching the question of sentence in this case, it is helpful to keep in mind the purposes of sentencing as identified in s.3A *Crimes (Sentencing Procedure) Act 1999*. That section states:

"3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence,*
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,*
- (c) to protect the community from the offender,*
- (d) to promote the rehabilitation of the offender,*
- (e) to make the offender accountable for his or her actions,*
- (f) to denounce the conduct of the offender,*
- (g) to recognise the harm done to the victim of the crime and the community."*

143 The purposes of sentencing, as contained in s.3A, are well recognised as involving different, and sometimes conflicting, purposes: *R v Pogson* [2012] NSWCCA 225; 82 NSWLR 60 at 85 [112] (citing *Veen v The Queen [No. 2]* [1988] HCA 14; 164 CLR 465 at 476-477).

144 I shall refer to each of these purposes, with the first purpose (the need for adequate punishment) to be considered last.

Prevention of Crime by Deterring the Offender and Others from Committing Similar Offences (s.3A(b))

145 I have referred earlier to the issues of personal deterrence and general deterrence in the context of this case.

146

The conviction of the Offenders, and the imposition of sentences upon them, will serve to make each of the Offenders accountable for his or her actions.

Denouncing the Conduct of the Offender (s.3A(f))

- 154 The imposition of sentence upon the Offenders will serve to denounce the criminal conduct of each of them.

Recognising the Harm Done to the Victims of the Crimes and the Community (s.3A(g))

- 155 There has been limited recognition, on the part of each of the Offenders, of the harm done to the victims, C1 and C2, by reason of these offences. The evidence suggests there has been increased recognition on the part of A2, culminating in the process of apology to each girl, referred to earlier in these reasons.
- 156 In the case of Kubra Magennis and Shabbir Vaziri, the recognition of the harm done to the victims has not reached the level which applies to A2.
- 157 It is necessary for the Court to consider, as well, the need for a sentence to recognise the harm done to the community by reason of the offences.
- 158 Harm done to the community, through offences of this type extends beyond the individuals affected and the harm done, in this case, to the Dawoodi Bohra community. The general community is harmed as well by the commission of FGM offences against young children who form part of it.

Ensuring that the Offender is Adequately Punished for the Offences (s.3A(a))

- 159 It is necessary to draw together the various factors, for the purpose of passing sentence on each Offender which ensures that each one is adequately punished for his or her offences. The sentences to be imposed must be proportionate to the objective seriousness of the offences. As well, the sentences must take into account the subjective circumstances of each Offender and other matters relevant to sentence, including the purposes set out in s.3A.
- 160 There is no other sentencing decision which provides real assistance to the Court concerning these Offenders. The sentence imposed in the only other FGM case in this State arose in circumstances which are significantly different to the present cases. In *R v FA* (District Court of NSW, 5 June 2015, unreported), his Honour Judge Blackmore SC imposed a suspended sentence with respect to an offence of procuring FGM under s.45(1)(b) as it then stood, in circumstances where the offender took his infant child to Indonesia with the procedure being carried out by a nurse at a clinic. The offender made full admissions to police and pleaded guilty at the earliest opportunity. In the circumstances of that case, a suspended sentence of imprisonment was considered appropriate.
- 161 In the present cases, each Offender went to trial, as was his or her right. Clearly, there is no discount to be applied for pleas of guilty. I accept that the Offenders facilitated the administration of justice in the way, in which the trial was conducted (confined to one issue), so that each is entitled to call in aid on sentence ss.21A(3)(l) and 22A *Crimes (Sentencing Procedure) Act 1999*. I have taken that aspect into account in each case.

- 162 With respect to each Offender, I have set out my reasons as to why his or her offences were of considerable objective seriousness. Although the physical injury caused to each girl was at the lower end, there are other features in each case which bear upon the assessments which I have expressed.
- 163 Each Offender has a number of subjective circumstances operating in his or her favour. A2's own background and personal experience of "*khatna*" is important, together with evidence which demonstrates her capacity and devotion as a mother generally. She is a vital member of her family, entrusted with the upbringing of her young children.
- 164 Kubra Magennis has a range of significant health issues which affect her and these are relevant on sentence, as is her age.
- 165 Shabbir Vaziri has health issues which are relevant as well to an assessment of his subjective circumstances.
- 166 I have expressed views already with respect to issues of personal deterrence and general deterrence and these need not be repeated.
- 167 Three issues arise at this point:
- (a) the Court must consider, with respect to each Offender, whether, having considered all possible alternatives, that no penalty other than imprisonment is appropriate: s.5(1) *Crimes (Sentencing Procedure) Act 1999*;
 - (b) if the Court determines that imprisonment is appropriate, it is necessary to determine the length of any sentence, without regard to the manner in which it is to be served: *R v Zamagias* [2002] NSWCCA 17 at [25]-[26]; *Douar v R* [2005] NSWCCA 455; 159 A Crim R 154 at 165-166 [70]-[71];
 - (c) once the length of sentence of imprisonment has been determined, the Court is then to consider whether an alternative form of imprisonment is available, and whether that alternative should be utilised: *R v Zamagias* at [25]; *Douar v R* at 166 [72].

A2

- 168 With respect to the offences of A2, I am satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. After taking into account all relevant objective and subjective factors and the purposes of sentencing, I am satisfied that the terms of imprisonment which are appropriate with respect to A2 are as follows:
- (a) for the offence against C1, imprisonment for a period of 12 months;
 - (b) for the offence against C2, imprisonment for a period of 12 months.
- 169 As there are two offences and two separate victims, I am satisfied that there should be some measure of accumulation as between the two sentences, so that the total head sentence will involve a sentence of 15 months' imprisonment.
- 170 The third step involves consideration as to whether the sentences of imprisonment should be suspended, or whether the Court should consider the service of the sentences by way of home detention or intensive correction order. In considering these

options, it is necessary to keep in mind that each of these steps involves a substantially less onerous sentence than one of immediate imprisonment. The Court must exercise discretion to determine whether, in the circumstances of the case, a discretionary exercise in favour of the Offender should be made.

- 171 In my view, the imposition of a suspended sentence under s.12 *Crimes (Sentencing Procedure) Act 1999* is not appropriate with respect to A2. Nor am I satisfied that the Court should consider the use of an intensive correction order under s.7 of that Act.
- 172 A Court that has sentenced an offender to imprisonment for not more than 18 months may make a home detention order, directing that the sentence be served by way of home detention under s.6 of that Act. Before taking that course, the Court must obtain an assessment report as to the suitability of the Offender for home detention: ss.74ff *Crimes (Sentencing Procedure) Act 1999*.
- 173 Section 76 of that Act provides that home detention is not available for certain offences. I am satisfied that an offence under s.45 *Crimes Act 1900* is not excluded by operation of s.76. Nor does A2 have a history which excludes her from consideration for home detention under s.77 of the Act.
- 174 If A2 is sentenced by way of an immediate custodial sentence, I am satisfied that there would be significant hardship for her children, including C1 and C2. A sentencing outcome which would see these children (who are victims of these offences) being punished in a practical way, would not serve the interests of justice in this case. As I have noted, the relevant authorities have determined that the children may continue to reside safely with A2 and her husband. The evidence indicates that she is generally a caring mother for her children.
- 175 The use of home detention would involve a penalty on A2 which would permit her, whilst serving her sentence, to continue to exercise her duties and responsibilities towards her family. This is an important factor in the exercise of discretion as to the use of home detention in her case.
- 176 I propose to refer A2 for assessment as to suitability for home detention after imposing the period of imprisonment which I have foreshadowed.

Kubra Magennis

- 177 I turn to consider the three identified questions with respect to Kubra Magennis. Having considered all relevant objective and subjective factors, and the purposes of sentencing, I am satisfied that no penalty other than imprisonment is appropriate in her case.
- 178 In determining the term of imprisonment which is appropriate, although different objective and subjective factors apply in her case to that of A2, I am satisfied that the period to be imposed should be the same as that which I have stated with respect to A2.

In relation to the offence against C1, a sentence of 12 months' imprisonment is appropriate. For the offence against C2, a sentence of 12 months' imprisonment is appropriate. There should be an element of partial accumulation so that the total head sentence will be one of imprisonment for 15 months.

- 180 If this point was reached, counsel for Kubra Magennis submitted that the Court should consider alternatives to immediate imprisonment, including a suspended sentence, home detention or an intensive correction order (T116.15-23, 18 February 2016). I am satisfied that a suspended sentence is not appropriate in the circumstances of this case. Nor do I consider that the use of an intensive correction order is appropriate in the case of Kubra Magennis.
- 181 I am satisfied that the Court should consider, in the exercise of discretion, an order requiring the sentence of imprisonment to be served by way of home detention. In the case of Kubra Magennis, I have in mind the very substantial health issues which surround her, together with her age, and the difficulties identified in the medical evidence relating to her management in the correctional system.
- 182 After imposing the sentence of imprisonment upon her, I propose to make an order referring Kubra Magennis for assessment as to suitability for home detention. Once again, I express my satisfaction that she is not excluded from that sentencing option by anything contained in ss.76 and 77 of the Act.

Shabbir Vaziri

- 183 The offences of Shabbir Vaziri are accessorial in nature. He was not present at the time of the commission of the FGM offences upon the two young girls. However, as I have explained earlier, his offences are of considerable seriousness. They involve the religious leader of the Dawoodi Bohra community in Sydney seeking to deflect the police investigation and encourage the making of false statements concerning the practice of "*khatna*" in his community.
- 184 Turning to the three identified questions with respect to Shabbir Vaziri, I express my conclusion that, having taken into account all relevant objective and subjective factors and keeping in mind the purposes of sentencing, no penalty other than imprisonment is appropriate in his case.
- 185 Although there are different objective and subjective factors which bear upon the determination of sentence for Shabbir Vaziri, I am satisfied that the period of the sentence which should be imposed in his case ought be of the same duration as applied to A2 and Kubra Magennis.
- 186 A sentence of imprisonment for 12 months is appropriate for his offence of being accessory after the fact to the FGM offence on C1. A sentence of 12 months of imprisonment is appropriate for his offence of being an accessory after the fact to the FGM offence on C2. Some measure of accumulation is appropriate so that the total effective sentence will be one of 15 months' imprisonment.

If this point was reached, senior counsel for Shabbir Vaziri requested the Court to consider alternatives to immediate incarceration, including the suspension of the sentence or the use of home detention or an intensive correction order (T124.32, 18 February 2016).

- 188 I am not satisfied that the use of a suspended sentence is appropriate in all the circumstances of this case. Nor do I consider that the use of an intensive correction order is appropriate.
- 189 With respect to the option of home detention, I note that Shabbir Vaziri lives with his family in Sydney, although his employment as religious leader at the Auburn Mosque has been terminated. I take into account that he has health difficulties, which is relevant to the exercise of discretion. As Shabbir Vaziri is to be sentenced as an accessory after the fact to the FGM offences, the use of home detention for the principals is a relevant factor on sentence. I am satisfied, in all the circumstances of the case, that it is appropriate to seek an assessment as to the suitability of home detention in the case of Shabbir Vaziri.
- 190 I note that the period of imprisonment, in the case of each Offender, does not exceed the statutory limit of 18 months for the purpose of consideration of home detention: s.6(1) *Crimes (Sentencing Procedure) Act 1999*.
- 191 Having indicated the sentences for each offence, I propose to proceed by way of aggregate sentence in each case. Each Offender will be sentenced to imprisonment for a term of 15 months. It is necessary to fix a non-parole period as s.44 *Crimes (Sentencing Procedure) Act 1999* applies. I propose to fix a non-parole period of 11 months in each case. I have rounded this figure down slightly from a mathematical calculation of 75% of the head sentence. To that limited extent, there is a finding of "special circumstances" for each Offender.

Orders

A2

- 192 A2, would you please stand. Having been found guilty by the jury on 12 November 2015, you are convicted of each of the offences under s.45 *Crimes Act 1900* with respect to C1 and C2.
- 193 For these offences, I impose an aggregate sentence of imprisonment for 15 months.
- 194 I fix a non-parole period of 11 months.
- 195 Having imposed this sentence of imprisonment, for the purpose of s.80(1) *Crimes (Sentencing Procedure) Act 1999*, I refer you for assessment as to your suitability for home detention.
- 196 To allow that assessment to be undertaken, I stand over the sentencing proceedings to 2.00 pm on 22 April 2016.

197

I note that the referral for assessment, for the purpose of s.80(2) of the Act, stays the execution of the sentence and also the operation of s.48 of the Act in relation to the sentence.

198 I continue your bail on existing terms for the purpose of the adjournment until 2.00 pm on 22 April 2016.

Kubra Magennis

199 Kubra Magennis, would you please stand. Having been found guilty by the jury on 12 November 2015, you are convicted of each of the offences under s.45 *Crimes Act 1900* with respect to C1 and C2.

200 I sentence you to an aggregate term of imprisonment for 15 months.

201 I fix a non-parole period of 11 months.

202 Having imposed this sentence of imprisonment, for the purpose of s.80(1) *Crimes (Sentencing Procedure) Act 1999*, I refer you for assessment as to your suitability for home detention.

203 To allow that assessment to be undertaken, I stand over the sentencing proceedings to 2.00 pm on 22 April 2016.

204 I note that the referral for assessment, for the purpose of s.80(2) of the Act, stays the execution of the sentence and also the operation of s.48 of the Act in relation to the sentence.

205 I continue your bail on existing terms for the purpose of the adjournment until 2.00 pm on 22 April 2016.

Shabbir Vaziri

206 Shabbir Vaziri, would you please stand. Having been found guilty by the jury on 12 November 2015 of each offence, I convict you of the offences of being an accessory after the fact to offences under s.45 *Crimes Act 1900* committed upon C1 and C2.

207 I sentence you to an aggregate term of imprisonment for 15 months.

208 I fix a non-parole period of 11 months.

209 Having imposed this sentence of imprisonment, for the purpose of s.80(1) *Crimes (Sentencing Procedure) Act 1999*, I refer you for assessment as to your suitability for home detention.

210 To allow that assessment to be undertaken, I stand over the sentencing proceedings to 2.00 pm on 22 April 2016.

211 I note that the referral for assessment, for the purpose of s.80(2) of the Act, stays the execution of the sentence and also the operation of s.48 of the Act in relation to the sentence.

212 I continue your bail on existing terms for the purpose of the adjournment until 2.00 pm on 22 April 2016.

213 I request that the assessments to be made with respect to each Offender for the purpose of suitability for home detention be provided to the Court by 20 April 2016.

214 Before concluding these remarks, I wish to make a final observation. The maximum penalty for these offences, at the time of their commission, was imprisonment for seven years. Parliament has trebled the maximum penalty for FGM offences now contained in ss.45 and 45A *Crimes Act 1900* to imprisonment for 21 years. That maximum penalty applies to offences committed after 20 May 2014. Had the maximum penalty for the present offences been 21 years' imprisonment, a significantly different sentencing outcome would have resulted in these cases. I mention this for two reasons. Firstly, the sentencing outcome in this case (as opposed to sentencing principles) will have little relevance for FGM offences committed after 20 May 2014. Secondly, the substantially increased maximum penalty stands as an important legislative guidepost for the purpose of sentence: *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 at 132 [27]. It is well established that an increase in the maximum penalty for an offence must be reflected in sentences imposed by the Courts: *Muldrock v The Queen* at 133 [31].

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Decision last updated: 18 March 2016