IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M75 of 2019

BETWEEN:

THE QUEEN

Appellant

– and –

AKON GUODE

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Suitability for publication on the Internet

1. The respondent certifies that this submission is in a form suitable for publication on the Internet.

Part II: Issue on appeal

2. The issue identified by the appellant does not arise for consideration. The parties are in agreement that the prosecution's acceptance of a plea to infanticide was not a relevant consideration *per se* in imposing sentence on charges of murder and attempted murder. However, that acceptance did have relevance to the imposition of sentence for the offences other than the offence of infanticide, but only in an indirect manner.

3. Indeed, both parties are in agreement that:
   (a) the Crown accepted the three reports and evidence of Dr Danny Sullivan as accurate;
   (b) the Crown accepted that, at the time of the offences, the balance of the respondent's mind was disturbed consequent upon her giving birth to Bol;
   (c) the *Verdins*[1] principles therefore applied; and
   (d) the learned sentencing judge properly viewed mercy as a significant sentencing consideration in all the circumstances of the case.

[1] *R v Verdins & Ors* (2007) 16 VR 269.

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4. The parties disagree, however, as to whether the Court below went beyond paragraph 3 above in mitigating the respondent's individual sentences for murder and attempted murder on account of the respondent's plea to infanticide.

5. It is clear from the reasons of the Court below that the Court did not have regard to the conviction for infanticide in an impermissible way.

6. The circumstances of this case are such that the appeal should therefore be dismissed.

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

7. The respondent certifies that the respondent does not consider that notice is required to be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Material facts in contention

8. There are no factual issues in contention (though the appellant's submissions omit some material facts). The plea hearing proceeded on the basis of an agreed summary of facts, and further, the appellant accepted the opinion of forensic psychiatrist Dr Danny Sullivan regarding the respondent's mental state at the time of the offending.[2]

9. *Inter alia*, Dr Sullivan concluded that the respondent was suffering from a major depressive disorder with severe symptoms, likely as a result of the birth of Bol some 16 months earlier (at which time the respondent had suffered a significant postpartum haemorrhage requiring a blood transfusion and life-saving surgery).

10. The respondent was a single mother of seven children, including four of pre-school age. She was utterly overwhelmed. She began regularly sleeping all day.[3] She told others she felt that she was dying, and reported dizziness and headaches. Shortly prior to the offending, she was seen huddled over the steering wheel of her car with her face in her hands. One of the children was hysterical; another was hanging off the front seat.

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[2] Dr Sullivan authored three reports which were tendered on the plea (**CAB 279-288, 289-294 & 319-322**). Dr Sullivan also gave *viva voce* evidence at the plea hearing (**CAB 70-99**).

[3] *The Queen v Akon Guode* [2017] VSC 285, [41]-[43] (**CAB 332**); *Akon Guode v The Queen* [2018] VSCA 205, [31] (**CAB 383-384**).

Subsequently, as the respondent stood near the car in the lake, she was unresponsive, moaning or wailing.

11. Unsurprisingly, the learned sentencing judge found there was a causal connection between the respondent's impaired mental functioning and the offences.[4]

Part V: Respondent's argument

Relevance of a single judge's refusal to grant leave

12. To the extent that the appellant seeks to call in aid the refusal of Weinberg JA to grant leave to appeal, the respondent notes that His Honour gave the matter 'anxious consideration',[5] and did not have the benefit of having heard oral argument in relation to the matter. Notably, subsequently, following oral submissions, the appeal was allowed, unanimously, by three judges of the Court of Appeal.[6] Further, Weinberg JA had referred in his reasons to a number of cases which are not at all comparable to the present case in terms of either the circumstances of the offending or the offender.

13. In any event, where an application for leave to appeal is heard and refused by a single Judge of Appeal under s 315(1) of the *Criminal Procedure Act* 2009, s 315(2) entitles the applicant to have the application determined by two or more judges. In those circumstances, and in accordance with the relevant practice direction of the Court of Appeal, the normal course is for an applicant not to request an oral hearing of his or her leave application, but rather to have it determined on the papers.[7] (Indeed, Victoria Legal Aid does not fund oral leave applications, save in exceptional circumstances.) There are therefore clear policy reasons why it would be imprudent to give any weight to a single judge's refusal to grant leave on the papers.

14. In any event, the appellant's contention that the Court below must have erred, due to the large discrepancy between the sentence imposed at first instance and on appeal, is inherently flawed. There has never before been a case such as this. It is novel. No person has ever been convicted of both infanticide and murder (or attempted murder) in respect

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[4] *The Queen v Akon Guode* [2017] VSC 285, [56]-[57] (**CAB 334-335**).
[5] *Akon Guode v The Queen* [2017] VSCA 311, [39] (**CAB 373**).
[6] See sections 280 and 315 of the *Criminal Procedure Act* 2009 (Vic).
[7] Supreme Court of Victoria Practice Note SC CA 1 Criminal Appeals, [14].

of the same action or course of conduct, therefore having the same state of mind in respect of all offences committed within that action or course of conduct.

Relevance of the plea to infanticide

15. The four offences for which the respondent fell to be sentenced were committed simultaneously, by the same act (in driving the vehicle), and therefore the respondent's mental state was identical in respect of all four offences. By the Crown's acceptance not only of the respondent's plea of guilty to infanticide, but also the expert evidence which underpinned that acceptance, the Crown acknowledged that at the time of the commission of all four offences the balance of the respondent's mind was disturbed because of a disorder consequent on her giving birth within the preceding two years. That mental state was not only an element of the offence of infanticide, but it was also a highly significant mitigating factor in respect of the other three charges on the indictment, reducing the respondent's moral culpability, and the need to give full effect to the sentencing principles or objectives of denunciation and general and specific deterrence. It was also relevant to the exercise of mercy, which the learned sentencing judge extended to the respondent.

16. This was the way the matter was argued by defence counsel on the plea, and it is the way the learned sentencing judge reasoned.[8] The legitimacy of such reasoning as a matter of law had been accepted at all stages by the Crown;[9] indeed, in this Court the appellant maintains the respondent's impaired mental functioning may be relevant to sentence in that very way. Yet this was precisely the manner in which the Court below reasoned. The Court did not view the individual sentences imposed on Charges 2-4 through the 'prism' of the *maximum penalty* for infanticide.[10] Rather, the significance of the presence of the charge of infanticide on the plea indictment lay in the agreed factual position that, at the time the respondent drove her car into the lake, the balance of her mind was impaired, and that impaired mental functioning had implications for a number of relevant sentencing factors. So much is patently clear from the judgment of the Court below. For example, see the excerpts referred to in paragraphs 17 to 23 below.

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[8] *The Queen v Akon Guode* [2017] VSC 285, [56]-[58] (**CAB 334-335**) & [77] (**CAB 339**).
[9] *Akon Guode v The Queen* [2018] VSCA 205, [44] (**CAB 388**). The Crown argued at first instance that general deterrence should not be moderated in the circumstances of this case, but took no issue with the fact that, as a matter of law, impaired mental functioning could lead to a moderation of general deterrence as a sentencing factor. The Crown took no issue with the sentencing judge's findings in this regard on appeal.
[10] Appellant's Submissions dated 4 July 2019 herein, [6.16]

17. At paragraphs [33]-[34] (**CAB 384**), immediately prior to considering the evidence of Dr Sullivan in detail, the Court below stated (in part):

> By its acceptance of the plea to infanticide with respect to the child Bol, the prosecution accepted that, at the time that the applicant carried out the conduct that caused his death, 'the balance of her mind was disturbed' because of 'a disorder consequent on her giving birth to that child within the preceding [two] years...The prosecution's position accorded with psychiatric opinion, rendered by Dr Danny Sullivan, who is....a respected consultant forensic psychiatrist.

18. At paragraphs [45]-[46] (**CAB 388-389**), in summarising the defence submissions at the plea, the Court below stated (in part):

> Counsel for the applicant submitted that all of the applicant's offending arose in a context of her deteriorating mental health combined with increasing personal pressures from many sources. The offending occurred in a 'single episode'; one in which it was accepted that the applicant was suffering from a depressive illness which was a consequence of having given birth to her youngest child, Bol, within the preceding two years, and in circumstances where the balance of her mind was disturbed by depression. It was contended that the 'entirety of her conduct needs to be examined and considered in that context'.
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> The applicant's counsel submitted that her offending, although grave, 'must be seen contextually, through the prism of her poor mental health that is an essential part of the (accepted) plea to infanticide'...There is an implicit acknowledgment, it was submitted, of the applicability of *Verdins* when considering the charge of infanticide, since the 'very charge itself refers to a disturbance of the mind'. The applicant's moral culpability is reduced, and the weight to be given to specific deterrence is moderated. Further, it was submitted that general deterrence also falls to be moderated, since the 'unique constellation of pressures and compromised mental health make [the applicant] a poor vehicle via which to discourage others from offending in this fashion'.

19. In summarising the defence submissions in the Court below at paragraphs [54]-[55] (**CAB 391**), the Court below stated (in part):

> [C]ounsel for the applicant submitted that an understanding of the state of mind and motives of the killer are highly relevant to the sentencing task. In the present case there was a 'constellation of factors' that bore on the imposition of sentence, the applicant's disturbed mind necessarily being relevant to an assessment of the seriousness of the offending. The murders in the present case having been committed with a disturbed mind, in circumstances where the applicant could not cope with the extreme difficulties she encountered, provide a 'stark contrast' to the motivations lying behind most crimes of murder.
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> Counsel for the applicant submitted that terms of imprisonment approximating 22 years are generally imposed in cases of murder where the kinds of mitigating features in this case are absent. The applicant's moral culpability was reduced by reason of her mental condition, so that the need for general and specific deterrence, denunciation, punishment and community protection, were all lessened.

20. At paragraph [56] (**CAB 392**), the Court below stated:

> In oral submissions, the Director confirmed the prosecutor's acceptance of Dr Sullivan's opinion that, at the time that she drove her children into the lake, the applicant was suffering from a depressive illness which was a consequence of having given birth to Bol within the preceding two years, and that the balance of her mind was disturbed by depression at the relevant time.

21. At paragraph [61] (**CAB 393**), the Court below stated:

> Much of the discussion in this case concerned the ramifications of joining charges of infanticide and murder (and attempted murder) on the indictment; and more particularly, whether the charges of murder needed to be viewed through the 'prism' of infanticide. In our view, the real relevance of the charge of infanticide lies not so much in its presence on the indictment vis-à-vis the charges of murder (and attempted murder), but in the prosecution's acceptance – in laying that charge and accepting a plea to it – that the balance of the applicant's mind was disturbed due to a depressive disorder consequent on her giving birth to the child Bol. That acceptance must, we consider, influence any assessment of the applicant's moral blameworthiness on all the charges that she faced.

22. At paragraphs [65]-[69] (**CAB 395-397**), the Court below concluded (*inter alia*):

> [T]he prosecution's acceptance of a plea to infanticide is not irrelevant to a consideration of the applicant's other offending. Indeed, the opposite is true. At the risk of repetition, the prosecution conceded that the second limb of s 6(1) was engaged. It was thereby conceded that at the time that the applicant drove into the lake intending to kill the child Bol, 'the balance of her mind was disturbed because of...a disorder consequent on her giving birth to that child...
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> [T]he charges of murder and attempted murder must be viewed in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act* 1958, and by the prosecution's acceptance of a plea to infanticide with respect to Bol, by which it acknowledged that all four offences were committed in circumstances arising from, or causally connected to, a disorder consequent upon the applicant recently having given birth to Bol.
>
> Given the state of the evidence, it cannot be denied that the applicant's mental functioning at the relevant time was impaired by a clinically significant mood disorder, which very likely was causally associated with the applicant's behaviour in driving her children into the lake. Major depression impaired the applicant's capacity to exercise appropriate judgment, and her capacity to think clearly and make calm and rational choices. Indeed, the uncontradicted psychiatric opinion is that the applicant's capacity to appreciate the wrongfulness of her conduct at the time was impaired, and the intent of her behaviour was obscured.
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> Those factors holding sway, we consider the applicant's moral culpability to be significantly reduced, so much rendering denunciation less important in the exercise of the sentencing discretion than would otherwise be the case, and affecting the punishment that might be considered just in all of the circumstances. Moreover, given the manner in which the applicant's condition diminished her capacity to exercise appropriate judgment and to think clearly and make calm and rational choices, and adversely affected her capacity to appreciate the

> wrongfulness of her conduct, we think that both general deterrence and specific deterrence should be significantly moderated as sentencing considerations.

23. The Court below then concluded that, in those circumstances, and giving proper weight to all of the relevant factors, the sentences imposed at first instance on Charges 2-4 were simply too great. They were manifestly excessive. In expressly reaching that conclusion, the Court below stated at paragraph [72] (**CAB 397-398**):

> [T]here is substance in the submissions of the applicant's counsel that sentences of 22 years' imprisonment on each of the two charges of murder are of the order of sentences generally reserved for cases unattended by the powerful mitigating features of this case. Had adequate weight been given to the applicant's mental condition and other factors in mitigation, we consider that significantly more lenient sentences would have been imposed on each of those charges...

24. It is therefore clear from the reasons of the Court below that their Honours did not fall into error either in the manner alleged by the Crown or at all.

25. Moreover, the Court below did not find that the sentencing judge had erred in his approach in that regard. To the contrary, the Court below adopted that same approach, but reached a different conclusion as to the appropriate sentence in the circumstances of the case.

Lesser sentence

26. The unique constellation of mitigating factors pertaining to the respondent demonstrate the correctness of the conclusion of the Court below. Beyond the significance of her impaired mental functioning at the time of the commission of all four offences for which the respondent fell to be sentenced, the matters set out at paragraphs 27 to 35 below operated to mitigate the respondent's sentence such that a lesser sentence was warranted.

27. Disadvantaged background:[11] The respondent had had an extraordinarily difficult life. She was raised in South Sudan, and during the civil war witnessed her husband being murdered, before she was raped until the point of unconsciousness. She was subsequently married to her husband's younger brother, as was the custom, before fleeing from South Sudan with her three young children (leaving her second husband

[11] *The Queen v Akon Guode* [2017] VSC 285, [32]-[45] (**CAB 330-333**); *Akon Guode v The Queen* [2018] VSCA 205, [24]-[32] (**CAB 382-384**) & [70] (**CAB 397**).

behind), taking 18 days to walk to Uganda. She spent time in refugee camps, before ultimately being granted refugee status in Australia in 2005. In Melbourne, her husband's married cousin Joseph Manyang commenced a relationship with her, leading to the birth of four further children, and to her ostracism from her community. At the time of the offending, the respondent was a single mother caring for seven children. She spoke little English and had severe financial problems.

28. Previous good character:[12] The respondent had no prior criminal history.

29. Deportation:[13] In all likelihood the respondent will be deported from Australia upon her release, away from her family to a third-world country. This adds to the burden of her imprisonment and amounts to a significant additional punishment.

30. Protective custody:[14] Further increasing the burden of her imprisonment, the respondent had been and would continue to be incarcerated in protective custody. She had been assaulted in prison. She had few visitors (with only her eldest child being permitted to visit her), and is further isolated by her lack of proficiency in English.

31. Additional hardship:[15] The burden of the respondent's imprisonment is increased further still by her anxiety regarding the fact that her eldest daughter, Akoi, (herself not long an adult) has been forced to assume the responsibility of raising her three younger siblings due to the respondent's incarceration.[16]

32. Effect on mental health:[17] The learned sentencing judge concluded that, subject to the treatment that may be offered to the respondent in custody and her willingness to accept that treatment, gaol is likely to have an adverse effect on the respondent's mental health.

33. Rehabilitation prospects:[18] His Honour found that there is no real prospect of the respondent becoming involved in any further criminal activity, and that she is not a person from whom the community will need to be protected.[19]

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[12] *The Queen v Akon Guode* [2017] VSC 285, [48] (**CAB 333**).
[13] *The Queen v Akon Guode* [2017] VSC 285, [65]-[68] (**CAB 336-337**); *Akon Guode v The Queen* [2018] VSCA 205, [47] (**CAB 389**) & [70] (**CAB 397**).
[14] *The Queen v Akon Guode* [2017] VSC 285, [47] (**CAB 333**).
[15] *The Queen v Akon Guode* [2017] VSC 285, [46] (**CAB 333**).
[16] Plea transcript, 8 March 2017, 89-90 (**CAB 104-105**).
[17] *The Queen v Akon Guode* [2017] VSC 285, [59] (**CAB 335**).
[18] *The Queen v Akon Guode* [2017] VSC 285, [64] (**CAB 336**).

34. Mercy:[20] The learned sentencing judge deemed it appropriate to extend mercy to Ms Guode, considering that principle to be 'significant' in this case. It is a rare case of murder which calls for the application of the principle of mercy, let alone that that factor is significant.

35. Plea of guilty:[21] Significantly, the respondent pleaded guilty. At the time of the committal hearing, she was facing a charge of murder in relation to Bol. The matter ultimately resolved on the basis that she was guilty of infanticide, not murder, in respect of Bol. In those circumstances, her guilty pleas were to be accorded significant weight.[22] Her guilty pleas clearly had a substantial utilitarian value.

36. The Court below was, with respect, undoubtedly correct in concluding that the sentences imposed on Charges 2-4 were manifestly excessive, and that lesser sentences should be imposed on those charges. Moreover, the Court below did not proceed upon an incorrect basis in law.

37. By reason of the matters set out above, the appeal should be dismissed.

Part VI: Notice of cross-appeal/contention

38. The respondent has not filed a notice of cross-appeal or a notice of contention.

Part VII: Time estimate

39. The presentation of the respondent's oral argument is expected to take approximately one hour.

Dated this 2nd day of August 2019

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[19] *The Queen v Akon Guode* [2017] VSC 285, [64] (**CAB 336**).
[20] *The Queen v Akon Guode* [2017] VSC 285, [71] (**CAB 338**).
[21] *The Queen v Akon Guode* [2017] VSC 285, [49] (**CAB 333**) & [60]-[62] (**CAB 335-336**); *Akon Guode v The Queen* [2018] VSCA 205, [70] (**CAB 397**).
[22] See *Cameron v The Queen* (2002) 209 CLR 339.