

DIEHM & ANOR V DIRECTOR OF PUBLIC PROSECUTIONS (NAURU)
(B15/2012)

Court appealed from: Supreme Court of Nauru [2011] NRSC 24

Date of judgment: 29 November 2011

The appellants, who are husband and wife, were charged with rape. At the relevant time they lived in the Married Quarters of the Nauru Phosphate Corporation on Nauru. The husband is of Australian origin. The wife is a Kiribati woman. The complainant, who is a relative by marriage of the wife, was at the time aged 21. She is a native of Tarawa in Kiribati, where her child lives. At the relevant time the complainant was staying with the appellants following a quarrel with her boyfriend.

The prosecution alleged that the rape occurred in the early hours of 14 June 2011 and that afterwards, the complainant had telephone contact with her mother, who then called the police. Two police officers, Senior Constable Deireragea and Constable Dillon Harris attended the appellants' residence. The evidence on what was said when they knocked on the door was the subject of dispute between the husband's evidence and that of SC Deireragea. At some point during the conversation the complainant appeared inside the house in plain view of the police officers. The husband was arrested and taken away by the police and about 15 minutes later police returned to arrest the wife. After that the house was searched and photographs were taken, without a warrant ("the first response group"). Later that day another search of the house took place, with a warrant issued after 9.00am.

The Chief Justice found that the first appellant had non-consensual intercourse with the complainant on a mattress on the lounge room floor at the appellants' house and that the second appellant aided and encouraged him to do so, brandishing a knife at time to ensure the complainant complied.

The defence case was that there was no mattress in the lounge room, that no intercourse had taken place on it; that no knife had been used; that there had been prior consensual sex with the husband in the absence of the wife, but that the complainant fabricated the rape claim as she did not get the reward she wanted, namely a return air ticket to Tarawa, to help to get her child back and travel to Australia. The defence also argued that at a time, or times unknown, including during the illegal search, items had been positioned for the purpose of taking photographs.

SC Deireragea gave evidence, but no other officers from the first response group ended up giving evidence. PC Harris was due to be called by the prosecution to give evidence but was not available on the day. The appellants submit that the failure to call PC Harris mattered because his signed formal Police Report differed from the testimony of SC Deireragea as to who opened the front door and what was said at the front door. When SC Deireragea gave evidence it was still expected by the defence that PC Harris would be called. The appellants submit that the account which the prosecution ultimately asked the Court to find in closing submissions was not the account to which SC Deireragea had testified in a number of ways. Further PC Harris had the opportunity to observe the state of the premises, when he took part in the first, illegal search.

The grounds of appeal include:

- The prosecution failed to call material witnesses and to make those persons available for cross examination by the Defence, when the prosecutor's duty of fairness required that to be done and when the said failure resulted in an unfair trial and a miscarriage of justice, the said witnesses being Constable Dillon Harris and the other members of the first response group who performed a search of the house without a warrant.
- His Honour the Chief Justice erred by failing to call Constable Harris of his own motion, giving the Defence leave to cross examine him, pursuant to s100 of the *Criminal Procedure Act 1972* (Nauru) and/or s48 of the *Courts Act 1972* (Nauru).
- No adequate notice was given to the Defence of the case which the prosecution ultimately invited the Chief Justice to find, and which his Honour did find, regarding the alleged making of statements by the First Appellant to Acting Sergeant Deireragea and Constable Harris which were said to constitute implied admissions and corroboration of the complainant's testimony, and the Defence was denied a proper opportunity to be heard on that case.
- In all of the circumstances, a reasonable tribunal of fact could not have concluded beyond reasonable doubt that the Appellants were guilty of rape.