IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B15 of 2012**

BETWEEN: **TERRENCE JOHN DIEHM**
First Appellant

and

TEKENA DIEHM
Second Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (NAURU)
Respondent

RESPONDENT'S SUBMISSIONS (REDACTED)

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. This appeal raises the following issues;
   a. Did the failure of the prosecution to call certain witnesses give rise to a miscarriage of justice?
   b. Was the Learned Trial Judge obliged to exercise his discretion to call witness Constable Dillon Harris of his own motion?
   c. Was there any failure by the prosecution to provide the defence with adequate notice of the case it must meet? If so, did it give rise to a miscarriage of justice?
   d. Should the Appellants be permitted to pursue grounds of appeal on matters not raised during the trial?
   e. Was the verdict unsafe and unsatisfactory in all the circumstances?

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f. What orders are appropriate in the event that the Court decides in favour of the Appellants?

Part III:

3. It is certified that consideration has been given on behalf of the Respondents as to whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903. It was considered that no such notices should be given.

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Part IV:

4. But for those portions of the Appellants' narrative that contain argument, no matters set out within the Appellants' narrative of facts are contested.

Part V:

5. The Appellants' statement of applicable constitutional provisions, statutes and regulations is accepted.

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Part VI:

Introduction

6. Following a judge alone trial before His Honour Chief Justice Eames, the Appellants were convicted of one charge each of rape. The prosecution case was that on 14 June 2011, the First Appellant committed an act of sexual intercourse with the complainant without her consent whilst the Second Appellant was present and armed with a knife. It was put that the Second Appellant was guilty as a principal offender, either as an aider and abettor or a procurer.

30 7. The issue in dispute at trial was whether the act alleged by the complainant happened at all. The only direct evidence of this came from the complainant. The First Appellant gave evidence that it did not occur. The core matter for His Honour to determine was whether he could accept beyond reasonable doubt the account of

the complainant as it pertained to the act of sexual penetration, and her lack of consent to that act.

8. His Honour accepted the evidence of the complainant, whose credit was buttressed by unchallenged evidence of recent complaint, and whose account corroborated by the following;

   a. Her distress; and

   b. Lies told by both Appellants in consciousness of guilt.

9. Both Appellants now seek that their convictions be quashed and that the verdicts of 'not guilty' be entered, or alternatively that the matter be remitted for re-trial.

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Did the failure to call Constable Dillon Harris as a witness give rise to a miscarriage of justice?

10. The prosecution must call all available material witnesses unless there is some good reason not to do so. (*Dyers v R* (2002) 210 CLR 285)

11. A decision by a prosecutor not to call a particular person as a witness will only constitute a ground for setting aside the conviction if, when viewed against the conduct of the trial as a whole, it is seen to give rise to a miscarriage of justice. (*R v Apostilides* (1984) 154 CLR 563, at 575)

12. Both Appellants have contended that the failure to call Constable Dillon Harris
20 ('Harris') led to a miscarriage of justice (Appellants' submissions page 11 line 15). The Appellants rely on the following matters in support of that contention;

   a. That being a sexual assault case, the existence or otherwise of corroboration for the complaint was an important issue;

   b. That alleged lies told by the Appellants in consciousness of guilt were capable, if proven, of amounting to such corroboration (Appellants' submissions 10 line 6);

   c. That Senior Constable Deireragea ('Deireragea') gave evidence that the Appellants told a lie;

   d. That the evidence of Harris was relevant to the credit of Deireragea (AB10
30 line 12);

   e. That the failure to call Harris denied the defence evidence that could have been used to undermine the credit of Deireragea and therefore the prosecution submission that a lie had been told.

13. It is not in dispute that;

a. Harris was a material witness;

b. Harris was not called to give evidence on the trial;

c. In accordance with the common law principles applicable to the running of the trial, that it was dangerous to act on the uncorroborated evidence of the complainant (*Kilby v R* (1973) 129 CLR 460);

d. That alleged lies told in consciousness of guilt were capable, if proven, of amounting to corroboration;

10 e. That the acceptance of the evidence of Deireragea was a prerequisite to finding that there were lies told by the Appellants;

f. That Deireragea's evidence was also relevant for her observations of the complainant's distress; and

g. This distress was also capable of corroborating the rape allegation.

14. It is submitted that when viewed in the circumstances of the case as a whole, there was no miscarriage of justice.

15. In the absence of Harris being called as a witness, His Honour was entitled to consider the effect that the prosecutor's failure to call a particular person as a
20 witness would appear to have had on the course of the case (*Apostilides* at 575). That His Honour took this matter into account is apparent from the following;

a. His Honour accepted the evidence that the conversation constituting the alleged lies told in consciousness of guilt took place in the presence of Harris (AB184 line 1);

b. His Honour accepted that the absence of evidence from Harris was of relevance in assessing whether Deireragea's evidence was 'measured and credible' (AB184 line 5);

c. His Honour regarded it as a 'matter of fairness' that he assess the effect of Harris' absence by reference to his statement of tendered at committal
30 (AB184 line 21). In making reference to a document not tendered in evidence at trial, His Honour was properly ensuring that the impact of Harris' absence on the prosecution case was fairly determined;

d. In making this assessment His Honour noted Harris' statement that '...Decima then informed Mr. Diehm that there was a report at his dwelling regarding a lady locked up in his dwelling' (AB184 line 26). His Honour concluded that Harris' absence denied the defence the chance to explore that conflict between the evidence of the two officers;

e. His Honour asked the Director 'whether he could responsibly invite the court to reject Terry Diehm's account of what was said, and invite me to accept that of Senior Constable Deireragea having regard to what is contained in the statement of the untested witness'. (AB184 line 31)

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16. Having been alert to the fact that a material witness was not called by the prosecution, and then having given proper consideration as to the impact of that witness' absence, His Honour concluded that the 'prosecution case would have been strengthened if Constable Dillon Harris had corroborated his colleagues evidence' (AB184 line 41).

17. There was no miscarriage of justice in this case because His Honour concluded that the failure to call Harris harmed the prosecution case. His Honour found the evidence of Deireragea 'measured and credible' despite the absence of Harris, not because of it.

20 18. An examination of the entirety of Harris' statement (AB206) demonstrates that the Appellants were not disadvantaged by his absence. The statement does say, inconsistent with the evidence of Deireragea, that;

a. It was the First Appellant that answered the door; and

b. That Deireragea 'informed Mr. Dihm (sic) that there was a report at his dwelling regarding a lady being locked up in his dwelling'.

19. The statement also however contains the following matters which, if given in evidence at trial, would have assisted the prosecution case;

a. That the First Appellant was dressed in only a towel and no shorts at the time of police attendance;

30 b. That during the time the First Appellant was at the door the Second Appellant approached and 'Decima then asked if there was a lady at their dwelling namely [redacted] and Mrs Dihm (sic) stated that [redacted] was staying with them and had gone out to which she lied';

c. That 'while Sgt Decima was having a conversation with Mr. and Mrs. Dihm (sic) I saw a lady come out to the living area and Sgt Decima then asked who that lady was and Mrs. Dihm stated that it was [redacted]' (AB207 Line 1);
d. That the complainant was distressed at the time of police attendance (AB207 line 7);
e. That Harris was present when a complaint of sexual assault was made;
f. That the Second Appellant upon arrest stated to Deireragea that 'sex, it's only sex'. This is arguably an admission to an element of the offence;
g. Observations as to the state of the scene upon examination; and
h. Evidence capable of confirming the continuity of various exhibits.

20. Rather than being disadvantaged by the absence of Harris, the failure by the prosecution to call him as a witness weakened the prosecution case and represented a considerable forensic advantage to the Appellants. As such, his absence did not give rise to a miscarriage of justice.

Was the Learned Trial Judge obliged to exercise his discretion to call Harris of his own motion?

21. It is contended that His Honour erred by failing to call Harris of his own motion, then giving the defence leave to cross examine him. (AB200 line 1)

22. It is conceded that His Honour possessed a discretionary power to call a witness of his own motion, but that discretion is not 'unfettered' as argued (Appellants' submissions page 17 line 29). The power under the *Criminal Procedure Act* 1972 (Nauru) is enlivened only where that person's evidence 'appears essential to the just decision in the case'.

23. The power pursuant to section 48 of the *Courts Act* 1972 (Nauru) is not expressly qualified. In determining the exercise of that discretion, however, it is relevant to have regard for the common law position that 'save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence'. (*Apostilides* at 575)

24. It is submitted that such a step was not required in the present case to ensure a fair trial. The witness was not necessary to establish some unique matter relevant to the prosecution case, nor did he provide exculpatory evidence essential to ensure the

defence was properly put. As noted above, his absence was accounted for in His Honour's assessment of the prosecution case.

25. His Honour's choice not to call Harris of his own motion was a proper exercise of discretion consistent with the requirements of justice in the trial.

Did the failure to call members of the 'first response group' as witnesses give rise to a miscarriage of justice?

26. It is contended similarly that the failure to call 'other members of the first response group who performed a search of the house without a warrant, after the arrest of the Appellants' resulted in an unfair trial and a miscarriage of justice. (AB199 line 30)

27. The Appellants submit that the failure to call these witnesses has given rise to a miscarriage of justice based upon the following;

   a. The evidence of those witnesses were relevant to the credit of Deireragea (Appellants submissions page 16 line 19); and
   b. In particular, the witnesses were relevant to the truth of Deireragea's evidence that the mattress and knife had not been moved (Appellants submissions page 16 line 23).

28. It is not in dispute that;

   a. That despite the indication provided by the Director in opening the case (AB11 line 24), no member of the 'first response group' aside from Deireragea was called to give evidence;
   b. The evidence may have been relevant in determining whether Deireragea found a knife on the kitchen bench at the direction of the complainant;
   c. That the knife was found as stated by Deireragea was circumstantial evidence in support of the complainant's contentions.

29. It is submitted however that the failure to call the 'first response group' witnesses did not give rise to a miscarriage of justice when viewed against the conduct of the trial as a whole.

30. That His Honour had proper regard to the effect of the absence of those witnesses upon the trial, is apparent from the following observations;

   a. 'It is not clear to me whether Sen Const Deireragea was part of the first response group that performed a search of the house. I have not been told who comprised that group. I have little information about what they were

doing. According to the complainant, the knife was seized, in her presence, but it has not been tendered' (AB186 line 38);

b. 'I have no explanation for the absence of all this evidence. Most likely the search was unlawful, being conducted without a warrant under section 79 of the *Criminal Procedure Act* 1972' (AB187 line 7);

c. 'These are very serious omissions. They mean that I must take particular care before I decide that a knife was used at all' (AB187 line 11);

d. 'In the absence of these other police officers from the witness box only Sen Constable Deireragea can answer Terry Diehm's allegation that the first group of police who searched the house, fabricated evidence and moved items around.' (AB187 line 21);

e. 'If the search was unlawful, I must ask myself, might that not add weight to the allegation of other police improprieties?' (AB187 line 37); and

f. 'I am, however, denied corroborative evidence about the circumstances in which the complainant searched for and located the knife, and of the demonstrations as to its use which the first group of police asked her to give. I cannot compare that demonstration with her evidence in court. (AB188 line 1).

31. His Honour concluded that a knife had been used as alleged by the complainant. (AB188 line 17).

32. His Honour had proper regard for the negative impact on the prosecution case caused by the absence of evidence from the 'first response group'. Indeed their absence compelled His Honour to infer that the search was likely to have been illegal. This matter was properly taken in to account in assessing the evidence in relation to the knife.

33. The First Appellant contended that the 'first group of police who searched the house fabricated evidence and moved items around' (AB187 line 32), and further that the 'knife evidence' was fabricated (AB187 line 35). There is no evidence to suggest that the presence of the 'first response group' witnesses would given evidence corroborating either of those contentions. There is no suggestion beyond speculation that they would have provided support for 'a successful defence that the police rearranged the scene'. (Appellants submissions page 16 line 15)

34. Rather than disadvantage the Appellants, the witness' absence substantially reduced the volume of evidence suggesting that items were legitimately located, and that items were photographed without being moved first. The witness' absence provided a substantial forensic advantage to the Appellants.

35. Having had proper regard to the inadequacies identified in the evidence presented, His Honour was entitled to accept the evidence of the complainant and Deireragea that there had been a knife.

36. Further, and contrary to the submission of the Appellants, how the police found the scene was not a 'central issue' in the case. (Appellants submissions page 14 line 16). In rejecting the allegation by the First Appellant that the knife had been planted, His Honour correctly noted that 'planting it on a bench would have added nothing'. (AB188 line 13)

37. It was never in dispute at the trial that the complainant was present at the residence of the Appellants at the relevant time. That the premises had a knife on the kitchen bench, or that a mattress was in a particular room, did little to confirm that there had been an act of sexual intercourse involving the complainant at the relevant time.

38. In the circumstances, it is submitted that there has been no miscarriage of justice that has arisen from the prosecutor's failure to call the 'first response group' witnesses.

Was there a failure to adequately disclose the prosecution case?

39. It is contended in the filed grounds that there was no 'adequate notice' that the prosecution intended to argue that certain statements of the First Appellant were to be relied on as implied admissions. The Appellants claim they were denied a 'proper opportunity to be heard on that case'. (AB200)

40. Specifically, it is alleged that adequate notice was not given as to which of the apparently differing accounts of 'what was said at the front door' was to be relied upon by the prosecution. It is presumed that this complaint refers to the evidence of Deireragea and the statement of Harris tendered at the committal.

41. It is submitted that the Appellants were afforded an opportunity to meet the case against them.

42. First, no complaint is made that the pre-trial disclosure was conducted other than in accordance with the requirements of the *Criminal Procedure Act* 1972.

43. Second, the only evidence at the trial about the conversation 'at the front door' came from Deireragea (AB51) and from the First Appellant (AB114). On the evidence before the Learned Trial Judge, there were no 'differing accounts' as between prosecution witnesses. The only evidence upon which the prosecution could rely to establish that lies were told in consciousness of guilt was the evidence of Deireragea.

44. Third, it is apparent from the conduct of the defence that the Appellants were fully aware of the significance of the evidence of Deireragea on this point. Deireragea was cross-examined and directly challenged on her version of the conversation on multiple occasions (AB59 line 9, line 30, AB60 line 9).

45. That the Appellants had adequate notice of both the fact that the evidence was to be led and its potential relevance to the case against them is also evident from the forensic choice made to adduce evidence from the First Appellant contradicting the version of the conversation as given by Deireragea (AB100 line 15).

Unsafe and unsatisfactory

46. In the Appellants' grounds as included in the Notice of Appeal, it is put that 'in all the circumstances, including the absence of witnesses of the persons referred to in paragraph 2 hereof, a reasonable tribunal of fact could not have concluded beyond reasonable doubt that the Appellants were guilty of rape'. (AB200)

47. In appeals pursuant to section 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) against a conviction by a judge, sitting without a jury, the considerations which limit the right of an appellate court to interfere with the findings of a jury have no application. (*Amoe v Director of Public Prosecutions (Nauru)* (1991) 57 A Crim R 244, at 247).

48. In such an appeal the High Court is empowered to give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance. It is for the Court to form its own judgment of the facts so far as it is able to do so. (*Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, per Dixon J at 107)

49. The Court must however act on the principle that unless the trial judge has failed to use or has palpably misused his or her advantage in seeing and hearing the witnesses, it ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. (*SS Hontestroom v SS Sagaporack* (1927) AC 37 at 47.

50. It is submitted that in the circumstances of the current case, the Appellant's contention that 'no reasonable tribunal of fact could have found the Appellant's guilty' is unsustainable. (Appellants' submissions page 17 line 25)

10 51. The core issue in the case was the credibility of the complainant. The prosecution case depended upon acceptance beyond reasonable doubt of her allegation that she had been forced at knifepoint to have intercourse with the First Appellant. The First Appellant gave evidence denying the event had occurred at all.

52. The Learned Trial Judge had the benefit of observing the complainant giving evidence. He was 'impressed' by her evidence and found it to be 'measured, if anything understated' (AB191 line 9). Her credit was buttressed by her contemporaneous complaint to police about the rape.

53. His Honour had proper regard for the common law principle that it was dangerous to act on the uncorroborated evidence of a complainant in a sexual assault case.
20 (AB180 line 35). There was evidence capable of amounting to corroboration of the complainant's account, namely;

a. The lies of both Appellants said in consciousness of guilt; and
b. The distress of the complainant as observed by Deireragea.

54. His Honour also had the benefit of observing the First Appellant giving evidence, which he described as 'quite fanciful'. (AB189 line 24)

55. The primary challenge to the complainant's credit was the evidence of Rose Igii. She said that the complainant had asked her to approach the Appellants and say that if they agreed to pay for her airline ticket, the complainant would withdraw the case (AB127 line 6). His Honour accepted despite the denials of the complainant that
30 she had made such a request of Igii.

56. The approach to Igii was not however accompanied by a recanting of the allegations. Nor did Igii provide evidence to suggest that the complainant was

similarly motivated at the time of the initial complaint. His Honour was entitled to act on the evidence of the complainant notwithstanding the evidence of Igii.

What is the significance of the failure to raise these matters at trial?

57. The Court will not ordinarily entertain an appeal by a party on the basis of a point of law which that party did not advance below. As the High Court held in *Metwally v University of Wollongong (No. 2)*:

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

58. It is noted that in the course of the trial;

a. No application for the adjournment of the case was made to secure the attendance of the witness Harris;

b. No application for either an adjournment or a stay was made when it was apparent that the members of the 'first response group' would not be called;

c. No application was made for any written statement to be admitted into evidence pursuant to section 146 of the *Criminal Procedure Act* 1972 (Nauru);

d. No complaint was made that that the prosecution had not given adequate notice of their intention to rely on certain statements as consciousness of guilt; and

e. No application was made inviting the Learned Trial Judge to exercise his discretion to call any witness of his own motion.

What orders are appropriate in the event that the Court decides in favour of the Appellant?

59. The Respondent does not submit that should the Court find in favour of the Appellants on one or more grounds, that the Court exercise its power pursuant to section 38(2) of the *Appeals Act* 1972 (Nauru) to determine that no miscarriage of justice has occurred.

60. In those circumstances, it is submitted that the convictions should be quashed and a re-trial ordered.

61. The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court which has quashed the conviction must decide whether the interests of justice require a new trial be had. In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case. (*Director of Public Prosecutions for Nauru v Fowler* (1984) 154 CLR 627 at 630)

62. It is submitted for the reasons earlier espoused that the evidence at the original trial was 'sufficiently cogent to justify a conviction' and as such an order for a new would be appropriate in the circumstances contemplated.

Part VII:

63. The Respondent has not filed a notice of contention or notice of cross-appeal.

Part VIII:

64. It is estimated that the presentation of the Respondents' oral argument will take one hour.

Dated: 21 June 2013

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