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

APPELLANTS' SUBMISSIONS

Part I:

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

Part II:

2. The learned trial judge, acting on his own motion, informed himself from a Police Report not in evidence, being a Report of a police officer who was not called as a witness but whom His Honour described during the trial as an "essential witness". The Defence had been led to believe that this officer and other police officers who conducted an illegal search of the scene would be called by the prosecution, but they were not. The issue is whether the prosecution breached its duty of fairness by failing to call those witnesses, whether the Court erred in referring unilaterally to the Police Report without calling the author of that Report and whether having regard to the failure to call all members of the first response group a reasonable tribunal of fact should have entertained a reasonable doubt as to guilt.

Part III:

3. It is hereby certified that consideration has been given on behalf of the Appellants 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.

FIRST AND SECOND APPELLANTS

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Part IV:

4. The internet citation for the verdict is [2011] NRSC 24, and sentencing: [2011] NRSC 27. There is no other report of the verdict or sentencing remarks of the primary judge.

Part V:

5. The Appellants are husband and wife. At the material time, they resided at No. 48 Married Quarters of the Nauru Phosphate Corporation or NPC 48 MQ: AB50 *l* 26, AB87 *ll* 15-17, AB93 *l* 35. He is an Australian by origin. She is a Kiribati woman: AB51 *l* 2. The complainant is a relative of the Second Appellant (not by consanguinity): AB173 *ll* 26-7, AB10 *l* 18, AB12 *l* 34 – AB13 *l* 8, AB49 *ll* 7-12. The complainant was aged 21: AB172 *l* 30. She is a native of Tarawa in Kiribati, where her child lives: AB13 *ll* 9-12, AB18 *ll* 18-24, AB36 *ll* 5-17, AB93 *l* 40 – AB94 *l* 6, AB176 *ll* 25-32, AB183 *l* 35.

6. The complainant was brought to the residence of the Appellants on Sunday 12 June 2011 by police, following a quarrel during which she hit her boyfriend - she did not want to go home because she was afraid of her father and of having to explain it to him: AB10 *ll* 15-19, AB12 *l* 13 – AB13 *l* 3, AB25 *ll* 29-31, AB96 *ll* 11-21, AB172 *ll* 34-6. The complainant went out to an all-night party, and returned to the Appellants' residence during the morning of Monday 13 June 2011. Thereafter, subject to going out for a drive with the Appellants, she remained at the Appellants' residence until the early hours of Tuesday 14 June 2011: AB172 *l* 40 – AB178 *l* 39, AB21 *l* 13 – AB22 *l* 13, AB104 *ll* 12-13.

7. 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 the Second Appellant aided and encouraged him to do so, brandishing a knife at times to ensure that the complainant complied: AB189 *ll* 15-16, AB191 *ll* 14-17.

8. The Director of Public Prosecutions ("DPP") alleged that the rape occurred in the early hours of 14 June 2011: AB171 *l* 6, AB172 *ll* 12-14, AB11 *ll* 31-4, AB1. There was no finding about whether it was before or after midnight, other than to assume it was either late on 13 June or in the early hours of 14 June: AB177 *l* 44 – AB178 *l* 1.

9. Of the complainant, the Chief Justice stated at AB189 *ll* 15-16: "I accept her version of events surrounding the rape which she alleges took place". By this statement, His Honour was not necessarily accepting all of her testimony, which he had summarised at AB172-177. But His Honour at least accepted that the First Appellant had intercourse with the complainant on a mattress on the lounge room floor, the Second Appellant had brought the complainant into the lounge room from a bedroom by threatening her with a knife, the First Appellant was aware of that and that the Second Appellant encouraged her husband to have intercourse continuing to hold a knife at certain points: AB191 *ll* 14-17.

10. His Honour seems to have found there was telephone contact between the complainant and her mother, the mother telephoned the police and Senior Constable Deireragea and Constable Dillon Harris were dispatched to the Appellants' residence: AB180 *l* 13 – AB181 *l* 6, AB183 *ll* 15-17. These things were not admitted: AB101 *ll* 17-25.

11. If His Honour accepted that there were three such telephone conversations made by daughter to mother, the third one coming after the alleged rape had occurred, there is no clear and explicit finding to that effect. His Honour did assume that there were "complaints" made by the complainant to her mother before the alleged rape: AB181 *ll* 1-6, AB183 *ll* 14-17. And he assumed or found that when she spoke to her mother the complainant "was in fear and was expecting police to be called" (AB181 *ll* 4-5) and was "distressed and fearful": AB183 *l* 15. There was a specific finding that the complainant exhibited distress to SC Deireragea later in the evening: AB183 *ll* 20-21.

12. There was a log report, the first paragraph of which was tendered by the prosecution as exhibit D: AB130. The first paragraph was authenticated by Probationary Constable Joni Ratabwiy who testified that she was on duty and took a call from the mother, and entered into the log the time 12.15 am as well as the words that the mother "*needed police assistance to check her daughter ... [who] called her a minutes ago [sic] and told her she was locked up in the house by [the Appellants] at NPC MQ 48*": AB130; AB87 *ll* 20-32, AB88 *l* 11 - AB89 *l* 6. His Honour seems to have assumed that the log report was authentic: AB180 *ll* 15-19, AB184 *ll* 18-19; but he did not make a clear and explicit finding that a call from the mother to police was made at 12.15 am.

13. When SC Deireragea and PC Dillon Harris arrived at the house, there was evidence, which His Honour seemed to accept, that they knocked for ten minutes: AB50 *ll* 33-6, AB54 *l* 10, AB181 *ll* 33-4, AB184 *ll* 8-14. The First Appellant testified he knew it was the police who were at the door because the complainant had said her boyfriend must have sent the police: AB100 *ll* 10-13, AB112 *ll* 8-14. But it was not put to the First Appellant in cross examination that there was knocking for ten minutes: AB112 *l* 9 - AB113 *l* 3.

14. Of the conversation which ensued at the door, His Honour found that both Appellants lied about who was (or was not) inside: AB183 *l* 31 – AB185 *l* 13. His Honour said at AB185 *ll* 7-10, "*I accept ... that [SC Deireragea] asked if they knew [the complainant] and one or other [of the Appellants] said 'No. There's no one else here', and, importantly, that they both said 'no' when asked 'Is she with you in the house'* ". He further found that the Second Appellant had also lied by saying "She left earlier in the afternoon": AB185 *ll* 1-2.

15. The evidence on this issue had been the subject of a "major disagreement" between the First Appellant and SC Deireragea: AB183 *l* 31. The First Appellant testified he had opened the door and was asked whether there was a Nauruan girl "locked up" in the house and he had replied, correctly, that there was no one locked up in the house: AB99 *l* 35 – AB100 *l* 17, AB112 *l* 9, AB113 *l* 36 – AB114 *l* 1, AB183 *ll* 31-40. On the other hand, SC Deireragea was adamant that the Second Appellant opened the door and the words "locked up" were not used at all: AB50 *l* 36 – AB52 *l* 9 and AB59 *ll* 3-31, AB181 *ll* 33-42, AB184 *ll* 17-19.

16. The Chief Justice seemingly did not make a finding as to whether the words "locked up" were used, nor who opened the door. After noting at AB184 *ll* 16-19 that the police log recorded the words "locked up", His Honour went on at *ll* 26-28 to quote from the contents of the Police Report of PC Dillon Harris: "*Sgt Decima [Deireragea] then informed [the First Appellant] that there was a report at his dwelling regarding a lady locked up in his dwelling. [The First Appellant] then stated that there was no*

lady locked up inside her [sic] dwelling". His Honour went on to say that, even if the words "locked up" had been used, SC Deireragea's denial that those words were used was not "a deliberate lie by Deireragea, but more likely a mistake": AB185 *ll* 6-7.

17. The Police Report of PC Dillon Harris, which had not been tendered at trial, did not say that the First Appellant told any lie to the police.

18. At some point during the conversation at the door, the complainant appeared inside the house in plain view of the police officers: AB51 *ll* 39-40. The First Appellant was arrested and escorted away by police and, about ten to fifteen minutes later, police officers returned to arrest the Second Appellant: AB34 *l* 35 – AB35 *l* 4, AB54 *l* 11 – AB55 *l* 4, AB58 *ll* 34-5.[1] SC Deireragea went to arrest the Second Appellant whilst the other officer remained in the car with the complainant: AB54 *ll* 26-38.

19. After that, in the early hours of 14 June 2011, His Honour found that the house was searched and photographs were taken, without a warrant: see AB186 *l* 30 – AB187 *l* 10. There was evidence (but no finding) that PC Braga Namaduk, SC Deireragea and PC Dillon Harris took photographs on that occasion: AB55 *ll* 3-8, AB60 *ll* 29-39, AB68 *l* 22.

20. His Honour found that during this illegal search the complainant directed police to a knife in the kitchen (AB187 *l* 40, AB177 *ll* 10-11, cf AB182 *ll* 19-23, cf AB186 *ll* 24-8) and that a demonstration with the knife took place which produced laughter all-round: eg AB179 *l* 27, 187 *l* 17 – AB188 *l* 4). There was evidence (but no finding) that a knife was seized and taken away along with a laptop (AB61 *ll* 1-9, AB83 *l* 13). No knife was tendered at trial nor was a photograph despite the fact that a photograph of a knife had allegedly been taken: AB186-8.

21. His Honour expressly declined to make a finding about all the items that the police may have located and photographed: AB186 *l* 43 – AB187 *l* 5. But His Honour did find that a knife had been found as well as used as the complainant had testified: AB187 *l* 40, AB188 *l* 17.

22. The learned primary judge accepted that a mattress was observed during the illegal search: AB179 *ll* 27-8, AB182 *l* 20, AB189 *ll* 15-16. He seems to have found that the mattress had been continuously in place on the lounge room floor since the alleged rape: AB188 *ll* 13-15. This was certainly not common ground.

23. SC Deireragea did not testify that she noticed a mattress on the lounge room floor either during the initial conversation or when SC Deireragea returned to arrest the Second Appellant. She was at the door when the initial conversion took place: AB68 *l* 34 – AB69 *l* 4, AB69 *ll* 20-2 & 28-30, AB76 *ll* 14-19. The lounge room was in plain view of the front door: cf AB139 (which was taken by police from that door though some time later). SC Deireragea went inside the house at that time (AB53 *ll* 12 & 37), as she must have done also when she returned to arrest the Second Appellant (AB54 *ll* 26-38). PC Dillon Harris also entered the house during the initial conversation, according to the uncontroverted testimony of the First Appellant: AB99 *ll* 37-8, AB100 *ll* 15, 20-1 & 31-7.

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[1] There was evidence that PC Dillon Harris relieved the First Appellant of his house keys: AB116 *l* 39.

24. The Defence case was that no mattress was in the lounge room, that no intercourse had taken place on it and that no knife had been used, there had been prior consensual sex with the First Appellant in the absence of the Second Appellant, but the complainant fabricated the rape claim as she did not get the reward she desired, namely a return air ticket to Tarawa, help to restore her child back to her and travel to Australia: AB176-7, 189, AB36 *l* 1 to AB38 *l* 10, 40 line 13 AB40 *ll* 13-29, AB94 *l* 15 to AB95 *l* 28, AB98 *ll* 13-35, AB108 *l* 17 to AB110 *l* 29, AB116 *l* 22 - AB117 *l* 26. This was rejected. But it was common ground that the complainant was told that she would have to pay her own airfare to Australia: AB23 *ll* 13-15.

25. The Defence case was that at a time or times unknown, including during the illegal search, items had been positioned for the purpose of taking photographs, including the knife, the mattress, two panties, other clothing, a towel, a laptop and some evidence of drinking: AB115 *l* 20 to AB117 *l* 26. This argument was rejected as regards the knife and the mattress and was not ruled on as regards the other items: AB186-8.

26. The officers present during the illegal search were referred to at the trial as the "first response group". The Chief Justice observed at AB186 *ll* 38-40 that:

> *"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..."*

27. But there was ample evidence that SC Deireragea went back to the residence after the arrest of the Second Appellant, and that PC Dillon Harris was present as was PC Braga Namaduk: AB182 *ll* 18-26, AB54 *l* 17 – AB55 *l* 29, AB60 *ll* 29-39, AB68 *ll* 21-2. They at least must have been part of the so-called first response group.

28. During the demonstration, the complainant had a telephone conversation with Cecilia Boata: AB187 *ll* 24-7. Cecilia Boata testified to hearing laughter and to being told that one of the police officers was holding the knife and imitating what happened before and the complainant and police were laughing about it: AB123 *l* 6 – AB124 *l* 20. Cecilia Boata knew that they were at the Appellants' house because the complainant had told Cecilia Boata in a telephone conversation shortly prior that the police were taking her back to the house to get the knife: AB187 *ll* 23-4, AB122 *ll* 8-10. The complainant denied that she had had two telephone conversations, though she also "did not remember having a second conversation": AB38 *ll* 33-36, AB39 *ll* 4-8, AB43 *ll* 1-5, AB179 *ll* 7-8 & 24-5. The DPP did not put to Cecilia Boata in cross examination that she only had one telephone conversation with the complainant (AB124 *ll* 7-36) and His Honour assumed there were two telephone conversations between them: AB187 *ll* 17-27. The complainant denied that she had been laughing (AB179 *ll* 7-8 & 24-5, AB38 *ll* 30-32, AB43 *ll* 1-5), but the Chief Justice assumed that the evidence of Cecilia Boata as to laughter was correct: AB187 *ll* 17-27.

29. It not in dispute that, subsequently, the complainant was taken to the hospital for a medical examination which was conducted by Dr Maribel Castanedo. Although the complainant testified in chief that the examination was at about 1.00 am or 2.00 am on 14 June 2011 (AB35 *l* 13), she conceded under cross examination that the examination

took place "in the morning": AB35 *l* 34.[2] Dr Castanedo also conceded that she examined the complainant at 10.00am on 14 June 2011: AB91 *l* 25, AB92 *ll* 17-18.

30. The medical revealed no injuries consistent with forcible rape or of sexual intercourse having taken place, with no semen or blood found: AB178 *ll* 41-3, AB91 *l* 16.

31. Later during the day on 14 June 2011, another search of the house took place, with a warrant which had been issued after 9.00 am: AB66 *ll* 17-33, AB68 *l* 17 , AB83 *ll* 3-7. The Appellants were still in custody at that time: AB110 *ll* 7-8. At this search, photographs were taken by PC Dan Botelanga: AB61 *ll* 17-19, AB66 *l* 35 – AB67 *l* 8; AB67 *ll* 19-27.

32. His Honour noted that "*Constable Dan Botelanga took photographs that were tendered*": AB186 *l* 34. SC Deireragea had seemed to be under a different impression about that (see paragraph 80 below).

33. About one week later, the complainant said to Rose Igii to tell the Appellants that the rape complaint would be withdrawn if they bought her a ticket to Tarawa (Kiribati) and that Rose Igii should otherwise keep the matter a secret: AB126 *l* 30 to AB127 *l* 32; AB188-9. Over the complainant's denial (AB179 *ll* 13-14), the Chief Justice found that the offer was made by the complainant: AB189 *l* 7. The DPP did not cross examine Rose Igii.

34. On 27 June 2011, the DPP signed a Disclosure Certificate containing copies of prosecution evidence (AB5-6). It stated on the first page:

> "*In the cause of Article 10(3) of the Constitution of the Republic of Nauru 1968, section 146 of the Criminal Procedure Act 1972 and in pursuance of natural justice. The State hereby serves the following documents and exhibits, by way of Disclosure of the Prosecution Case.*"

35. It also contained the statement on the second page that the documents "*are supplied to you to enable you to instruct counsel and/or to prepare your defence*" (AB6). Amongst the attachments were "9 pages of photographic evidence" at Tab [18] (AB item 3.18). These pages contained sets of up to nine (9) photographic images printed out in colour on each page, being digital images merged into Word documents. There was no marking to identify who took the photographs or when.

36. Also provided with the Disclosure Certificate was an unsigned copy of a Police Report of PC Dillon Harris dated 14 June 2011, at Tab [10] (AB206-8). That Report recited:

> "*This statement made by me accurately set [sic] out the evidence which I would be prepared to give in court as a witness. The statement is true to the best of my knowledge and knowing that if it is tendered in evidence I shall be liable to prosecution if I wilfully stated in it anything which I know to be false or do not believe true.*"[3]

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2 Cf His Honour's summary of her evidence at AB178 *ll* 38-9.

3 This wording was adapted to the objective of ensuring the admissibility of the statement at committal under s 166 and at trial under s 146 of the *Criminal Procedure Act* 1972 (Nauru).

37. The committal hearing (Preliminary Inquiry) was held in the District Court of Nauru on 22 and 24 August 2011. At that hearing, the Appellants were represented by Miniva Depaune, a Nauru pleader. Oral evidence was heard from the complainant and the rest of the prosecution evidence resulted from the tender of documents, including a prosecution Brief of Evidence: see AB items 4-6. This Brief included a signed version of the Police Report of PC Dillon Harris dated 14 June 2011 (AB184 *ll* 21-2, AB2-4; AB item 5.13) and nine pages of photographic evidence the same as those disclosed with the Disclosure Certificate dated 27 June 2011: AB77 *ll* 25-33; AB item 5.2.

38. Following the committal, the District Court was required to forward the evidence before it (including the Report of PC Dillon Harris and the nine pages of photographic evidence) to the Registrar of the Nauru Supreme Court, pursuant to s 179 of the *Criminal Procedure Act* 1972 (Nauru). The Magistrate who committed the Appellants to stand trial, Mr Peter Law, was also the Registrar of the Supreme Court.

39. Mr Aingimea (a Nauru pleader) was subsequently retained to represent the Appellants at the trial. On about 21 November 2011, he was served by the DPP with a Notice of Additional Evidence (AB7) enclosing inter alia a booklet of 31 photographs which had the name and signature of PC Dan Botelanga on the front and his name on the index: AB133-4. That was similar to the booklet tendered as exhibit A at trial: AB133-165. All of the photographs in the booklet are reproductions of images which had been included with the earlier Disclosure Certificate, but not all of the images disclosed on 27 June 2011 were reproduced in the booklet.

40. The Defence was never provided with a photograph of the knife allegedly taken, nor shown the knife itself: AB101 *l* 32 – AB102 *l* 4.

41. At the trial, the prosecution called seven (7) witnesses: the complainant, her mother, Decima Deireragea (police officer), Dan Botelanga (police officer), Leweni Mocevakaca (pharmacist), Joni Ratabwiy (prob. police officer) and Maribel Castanedo (gynaecologist).

42. During his Opening, the DPP did not mention by name the witnesses he would call, other than the complainant, though it was clear that the DPP intended to call her mother: AB9-11. In addition, the DPP said (AB11 *ll* 24-8):

> "*We will also be calling the evidence of police officers who in response to a phone call from the mother ... went to the residence of the 1st and 2nd accused and what they saw when they got there, like wise we have four more witnesses police officers also who went to process the crime scene and take photographs and the search*".

43. In referring to the police officers who went to the scene in response to the phone call, the DPP must have been intending to refer to SC Deireragea and PC Dillon Harris.

44. At the end of the first day of the trial, after SC Deireragea had been excused, the DPP announced in response to a query by His Honour:

"I've only got ... the officer who actually took the photo's for the crime scene, people went to process the crime scene, then I have the Doctor and the pharmacies chemist" (AB64 *ll* 7-9).

45. On the morning of the second day, the DPP informed the Court that the remaining witnesses would be a witness described as a doctor, PC Dan Botelanga described as a police photographer, Leweni Mocevakaca described as a pharmacist and Joni Ratabwiy if the Defence put in issue the timing of the call out to the residence: AB64 *ll* 30-40. The evidence of Leweni Mocevakaca (pharmacist) or Maribel Castanedo (doctor) had not been opened nor was that of Prob PC Joni Ratabwiy.

46. After that announcement, Mr Aingimea asked that PC Dillon Harris be called, and re-iterated that he had asked the DPP to make sure he was called. His Honour added:

"Yes ... Dillon was an essential witness". (AB65 *l* 3)

47. Later on day two, after three more prosecution witnesses had been completed (namely PC Botelanga the police photographer, Leweni Mocevakaca the pharmacist, and Prob PC Joni Ratabwiy), the DPP announced that there was a problem with calling PC Dillon Harris. This was reflected in the following exchange (AB89 *ll* 17-28):

DPP: *"Your Honour my friend did ask that Constable Dillon be called. I have just been informed that Constable Dillon is at the moment indisposed he is involved in a domestic dispute and is considerably under the influence of alcohol, the police were unable to bring him to court this morning.*

CJ: *Alright what are you suggesting I do? Counsel has asked to have him here for cross examination.*

DPP: *Yes Your Honour, well I would in the circumstances ask for a very short adjournment for me to ascertain whether Dr Maribel Castanedo is available ...*

CJ: *Alright we'll take a short break but as far as Mr Dillon is concerned he's obviously not going to be available so you might want to consider over the break what you want to do about that.*"

48. By the time of this exchange, it was plain that Dr Castanedo would be the last prosecution witness if nothing else happened. But after Dr Castanedo's testimony, the DPP did not make any application concerning PC Dillon Harris. The DPP said nothing more about the matter before closing his case: AB93 *l* 14.

49. As it turned out, no officers from the first response group ended up giving evidence other than SC Deireragea: AB187 *ll* 31-3. PC Botelanga admitted he was not a member of the first response team: AB68 *ll* 17-22; as he worked on the day shift from 9.00 to 5.00 am: AB66 *ll* 17-19. Prob PC Joni Ratabwiy merely took a telephone call at the station and placed a call out to SC Deireragea and PC Dillon Harris to attend the report: AB87-9; AB130.

Part VI:

50. **Prosecution's failure to call material witnesses** It is appealable error if:

(1) a prosecutor fails to call a material witness and unfairness occurs as a result amounting to a miscarriage of justice; or

(2) in all of the circumstances including having regard to the absence of particular witnesses, no reasonable tribunal of fact could have been satisfied of guilt beyond reasonable doubt.

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See: *Richardson v R* (1974) 131 CLR 116; *Whitehorn v R* (1983) 152 CLR 657; *R v Apostilides* (1984) 154 CLR 563; *RPS v R* (2000) 199 CLR 620 [29]; *Dyers v R* (2002) 210 CLR 285, 292-3, 326-7; *MFA v R* (2002) 213 CLR 606; *McInnis v R* (1979) 143 CLR 575, 579, 581, 594; *Driscoll v R* (1977) 137 CLR 517, 542-3.

51. The learned Chief Justice erred in convicting the Appellants because PC Dillon Harris and other members of the "first response group" were not called as prosecution witnesses in breach of the principle in sub-paragraph (1) of the preceding paragraph.

20 52. The DPP conveyed by his Opening that PC Dillon Harris would be called for the prosecution. The Defence had already come to expect that. His Police Report was served on the Defence under cover of a Disclosure Certificate that represented (by referring to s 146 of the *Criminal Procedure Act* 1972 (Nauru)) that his evidence would be relied on one way or another at the trial.[4] His Police Report dated 14 June 2011 was tendered by the prosecution at the committal. Such steps served to inform the Defence as to what witnesses it need not call: ss 170(3) and 197 of the *Criminal Procedure Act* 1972 (Nauru).

53. The Defence expectation was reinforced during the trial. On the second day, as soon
30 as there was a hint of a possibility that the DPP might not call him, Mr Aingimea objected and His Honour commented that PC Dillon Harris was an "essential witness". The enquiries the DPP (thereafter) undertook acknowledged that it was incumbent on the DPP to call him.

54. It was not until, or very close to, the end of the prosecution case that it became clear that the prosecution would not in fact be calling him. By the time when there was any occasion to object, three prosecution witnesses had already given their evidence including SC Deireragea who had been excused: AB64 *ll* 2-3. By the time the DPP announced the results of what he had "just been" informed concerning the
40 indisposition of PC Dillon Harris, three more prosecution witnesses had completed their evidence.

55. Despite an invitation from His Honour to the DPP to think about what he wanted to do about PC Dillon Harris, the DPP made no application for an adjournment. The DPP simply called its final witness and then closed its case. There was no reason why the trial could not have been adjourned, even for one day, to permit PC Dillon Harris to regain sobriety.

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4 Section 146 relates to admission of written statements at the trial. Section 166 is the mirror provision governing admission of written statements at the committal.

56. PC Dillon Harris was an "essential witness" because he was present during the initial conversation at the door of the Appellants' house, standing right next to SC Deireragea (AB51 *l* 21). The evidence of PC Dillon Harris about that would have been relevant to the issue of corroboration, because it was a sexual assault case: AB180 *ll* 35-6. His Honour instructed himself correctly that lies told in consciousness of guilt can constitute corroboration: AB181 *ll* 16-17, referring to *Edwards v R* (1993) 178 CLR 193.

57. The question whether the First Appellant lied in consciousness of guilt also fed into, and was influenced by, a finding about the credit of SC Deireragea: AB183 *l* 30 – AB184 *l* 6, AB189-191. Her testimony was independently relevant on the question of the distress (which also went to corroboration: AB181 *ll* 8-9) she said she observed and the circumstantial evidence she said she was shown. Yet, the credit of SC Deireragea stood to be affected by the evidence of PC Dillon Harris inter alia as to what was said at the front door.

58. The failure to call PC Dillon Harris mattered because his Police Report differed from the testimony of SC Deireragea as to what was said at the front door.

59. The account of SC Deireragea in chief about that (AB50-52) was:

- the Second Appellant came to the front door;
- SC Deireragea asked the Second Appellant questions to the effect "is there anyone else in the house?";
- the Second Appellant responded that it was only her and the First Appellant;
- an exchange between them to like effect was repeated a number of times;
- *then*[5] the First Appellant approached;
- SC Deireragea asked them both the same question and got the reply to the effect "there's no one else here";
- SC Deireragea then asked if they knew the complainant and if the complainant was with them in the house and they both said no;
- she "repeatedly" asked them if there was anyone else in the house and if the complainant was with them in the house and each time they both said "there's no one else here".

60. SC Deireragea went on to add, "before" she had asked the Second Appellant where the complainant was and if they knew the complainant and the Second Appellant responded the complainant had left that afternoon: AB52 *ll* 2-3. Under cross examination, SC Deireragea denied that the words "locked up" were used and denied that the First Appellant opened the door: AB59 *ll* 9-11 & 28-31, AB60 *ll* 9-11.

61. In contrast, the Police Report of PC Dillon Harris only spoke of two statements by SC Deireragea (AB2). The first one was put to the First Appellant *who opened the door* to the effect that the police were there because of a report regarding "a lady being locked up in his dwelling", to which the First Appellant replied that there was no lady locked

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5 SC Deireragea testified that the First Appellant was *not* with the Second Appellant when the latter opened the door, but he only approached after there had been some exchanges between SC Deireragea and the Second Appellant. Cf His Honour's summary of her evidence at AB181 *ll* 33-4.

up in the dwelling. The second one was "if there was a lady at their dwelling namely [the complainant]?" to which the Second Appellant replied that the complainant "was staying with them and had gone out to which she lied". PC Dillon Harris recorded in his Police Report that the first statement was put only to the First Appellant who had opened the door when the Second Appellant was sitting at the dinner table. It was only after the First Appellant had said that "there was no lady locked up" inside the dwelling that the Second Appellant approached and then the second interrogatory was put and answered by her.

62. On this account, like that of the First Appellant himself (AB99 *ll* 34-5, AB112 *l* 9, AB113 *ll* 36-39), the First Appellant did not tell a lie in consciousness of guilt - there was no lady locked up inside the house because the complainant was there of her own free will.

63. The failure to call PC Dillon Harris led to a miscarriage of justice because his account recited in a signed formal statement was inconsistent with that of SC Deireragea. The Police Report purported to be accurate and complete, because it contained a statement to that general effect designed to ensure that the document could be tendered as a "written statement" at the trial under s 146 of the *Criminal Procedure Act* 1972 (Nauru).[6] His evidence could have made a difference to the fact in issue as to whether a lie was told, as well as credit, but he was not called.

64. Procedural fairness also required the Appellants to be given notice of the case against them: *Taylor v Taylor* (1979) 143 CLR 1.

65. His Honour's finding (AB 185 *ll* 6-10) was a version about which the Appellants had not been given notice. The first time the Defence had notice that this was the case being put was during the DPP's closing address: AB184 *ll* 31-9.

66. If it could be said that the Defence was on notice of two different accounts of what was said at the front door, the Defence was not notified of how it was said that the conflicts between the two accounts were to be resolved.

67. When SC Deireragea was giving her evidence, it was still expected by the Defence that PC Dillon Harris would be called. It was not apparent at that time that the prosecution case would ultimately be one that eschewed all or any (and if so which) part of the account disclosed in the Police Report of PC Dillon Harris. When the decision was announced shortly before or around the time of the close of the prosecution case that PC Dillon Harris would not be called, it was only then that the prosecution could be said to have given notice that the prosecution case preferred (parts of) the account to which SC Deireragea testified.

68. Even then, the account which the DPP ultimately asked the Court to find in closing submissions was not the account to which SC Deireragea testified in two main ways.

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[6] Similarly, the said words laid the foundation for tender of the written statement at the committal under s 166 of that Act. Contrary to His Honour's assumption at AB184 *l* 23, the written statement was not a "deposition" because it was made before the committal in the absence of the Appellants, and was not signed by the Magistrate. However, nothing turns on that.

69. First, SC Deireragea testified emphatically that the words "locked up" were not used. But the prosecution case put in closing addresses was that it did not matter whether or not the words "locked up" were used: AB184 *ll* 31-9, AB185 *ll* 6-7. That was said to be so because in any event there were said to be *further* questions which were met by lies by the Second Appellant and, to at least one question ("Is she with you in the house"), by the First Appellant. This approach found favour with His Honour, who considered that, if the words "locked up" had been used by SC Deireragea, her denial that she had used them was not a "deliberate lie" but was "more likely a mistake". Resort to that rationalisation as well as the terms of it ("more likely") show that the question whether or not the words "locked up" were used at all was material.

70. Second, SC Deireragea had also been emphatic that the Second Appellant opened the door, not the First Appellant (as he had testified). His Honour did not make a finding resolving the conflicting evidence about that. His Honour said at AB185 *l* 6: "Even if I accept that the words 'locked up' were used *at some point* by Deireragea..." (emphasis added). His Honour may thereby have been considering the possibility that the words "locked up" were used in a subsequent interchange, not the initial one. But SC Deireragea had not testified to that effect. Neither was such a possibility consistent with the account contained in the Police Report of PC Dillon Harris which, like the account of the First Appellant, was to the effect that the words "locked up" were used at the very outset when the door was opened by the First Appellant. Of course, as His Honour accepted at AB180 *ll* 23-5, given that the police log added some credibility to the view that the words "locked up" were used by police, then the log tends to support the view that the door was opened by the First Appellant and that he responded that there was no one locked up inside. That is because it is reasonable to expect that the police would have started the conversation by saying why they were there, and there was no evidence that the Second Appellant responded to a statement by police as to why they were there.

71. Who opened the door was clearly material. If the First Appellant was correct about that, it was more likely he did not tell any subsequent lie in consciousness of guilt or at all. And SC Deireragea's testimony would have been incorrect, perhaps deliberately so, because her immediate impression on 14 June 2011 was that it was only the Second Appellant who told a lie, not the First Appellant: AB52 *ll* 12-13.

72. By not making a finding that the door was opened by the Second Appellant, His Honour did not have to confront such difficulties. But they underscore that the case which ultimately found favour with His Honour was materially different from SC Deireragea's account.

73. The accommodation within the prosecution case of these troublesome facts (that the First Appellant opened the door and that there was a question asked to him and answered correctly by him about whether anyone was "locked up") led to what was in substance a new case of which notice had not previously been given and in any event led to an unsafe conclusion. That there was no prior notice is shown by the fact that His Honour asked the DPP the question during closing addresses as to how the DPP could responsibly invite the Court to accept the account of SC Deireragea "having regard to what is contained in the statement of the untested witness": AB184 *ll* 31-4.

74. Had the DPP called PC Dillon Harris before closing its case, that denial of procedural fairness or miscarriage of justice could have been remedied. But that did not happen.

75. If PC Dillon Harris had been called by the prosecution, he either would have confirmed that his Police Report was complete and accurate or, if he did not, the Defence could have cross examined him using his Police Report as a prior inconsistent statement. The Defence could not have used that Report in cross examination of SC Deireragea. Even if it could, the Defence did not know when SC Deireragea was in the witness box that PC Dillon Harris was not going to be called.

76. Or there could have been other conclusions of fact that accommodated the differences. For example, SC Deireragea might have asked a question(s) which the First Appellant and PC Dillon Harris did not hear (AB183 *ll* 35-6, AB114 *l* 25) and/or SC Deireragea might have misinterpreted answers or taken an unfair view of answers to double barrelled questions. Such matters were not explored as much as they might have been or at all and certainly were not able to be explored with PC Dillon Harris.

77. The above was not the only reason why fairness required that PC Dillon Harris be made available for cross examination. He had the opportunity to observe the state of the premises, not only during the initial conversation at the door but also when, as a member of the first response group, he took part in the illegal search during the early hours of 14 June 2011.

78. The Defence was entitled to expect that the prosecution would call the officers who had been part of the first response group who conducted that illegal search. The DPP opened in terms that suggested that PC Dillon Harris and SC Deireragea would be called, as set out above. The DPP's Opening continued: "*We will also be calling the evidence of police officers who in response to a phone call from the mother ... went to the residence of the 1st and 2nd accused and what they saw when they got there*" (AB11 *ll* 24-6, emphasis added). This conveyed that SC Deireragea and PC Dillon Harris would give evidence about what they saw during the initial conversation and/or during the search they conducted that night.

79. But the DPP did not thereby suggest that SC Deireragea and PC Dillon Harris were the only officers who would testify about having processed the crime scene. He went on "*likewise we have four more witnesses police officers also who went to process the crime scene and take photographs and the search*". The words "four more witnesses police officers" suggested that there would be four more police officers in addition to SC Deireragea and PC Dillon Harris, because the DPP did not say the names of the "four more witnesses" nor open the content of their evidence. The DPP's statement at the end of day one did not entirely clarify the matter either, because the DPP said that his remaining witnesses were "*the officer who actually took the photo's for the crime scene, people went to process the crime scene, then I have the Doctor and the pharmacies [sic] Chemist*": AB64 *ll* 7-10. It was not made clear that the DPP would not be calling any other member of the first response group (other than SC Deireragea).

80. SC Deireragea seemed to testify that at least some of the photographs contained in exhibit A were taken by PC Braga Namaduk during the illegal search: AB60 *ll* 35-39, AB61 *ll* 17-19, AB62 *ll* 21-24. That gave or underscored an impression that the

photographer from the illegal search would be one of the officers yet to be called. It was not until PC Botelanga was in the witness box, on day two, after SC Deireragea had been excused the day before, that it was revealed that PC Botelanga participated in the day shift search when he took all of the photographs contained in exhibit A and the other photographs that had been disclosed, and that none of the photographs taken in the illegal search had been disclosed: AB66-83, but see esp AB66 *ll* 14-15 & 31-34, AB67 *ll* 19-27, AB68 *ll* 16-27, AB77 *l* 25 – AB79 *l* 33, AB82 *l* 39 – AB83 *l* 11.

81. If the DPP did not intend to call all or any officers of the first response group, it was reasonably to be expected that this would have been communicated in the Opening in unequivocal terms. When cross examining the complainant and SC Deireragea, the Defence did not know that they would be the only witnesses who would be available to be cross examined about how the scene appeared when the police first arrived and when the first response group searched the house.

82. How the scene was found by police was, and was always going to be, a central issue.

83. The exchange at the outset of the trial (AB9 *ll* 5-13) telegraphed the intention of the Defence to cross examine the first response group about rearranging the scene. It was a constant theme in the cross examination of prosecution witnesses: AB39 *ll* 14-27, AB43 *ll* 6-20, AB60 *ll* 12-26, AB80 *l* 14 – AB81 *l* 7. That is quite apart from the testimony of the First Appellant himself: see eg AB115 *l* 20 to AB117 *l* 26.

84. The evidence about the search conducted by the first response group was relevant to the prosecution case insofar as physical items said to have been found by police in particular locations in the house (or photographs of those items) was circumstantial evidence consistent with the testimony of the complainant. As part of that, the prosecution assumed an onus of excluding the contention that the scene had been interfered with. This emerged from:

(1) the Opening itself (including "what they saw when they got there");
(2) from the tender of exhibit A;
(3) the testimony in chief of SC Deireragea (AB 54 *ll* 17-18, AB55 *l* 28 – AB58 *l* 28) and PC Botelanga (AB67 *l* 16 to AB77 *l* 22) as to the items they observed and what they were shown by the complainant; and
(4) in the case of PC Botelanga, his denial in chief that he or "any of the officers" positioned the mattress in place so he could take photographs: AB68 *ll* 7-9.

85. His Honour also questioned the First Appellant at length about the contention, and treated it as an issue at least as regards the mattress and the knife: AB114 *l* 22 to AB115 *l* 26, AB186-8 esp AB188 *ll* 13-15, see also AB63 *ll* 7-16.

86. The failure to call any of the members of the first response group (other than SC Deireragea) was unfair because the prosecution positively relied on that evidence for its prejudicial effect, yet the prosecution prevented the Defence from testing that evidence by failing to call all members of the first response group. The Defence were thereby deprived of a fair opportunity of cross examining them about how the scene had been found during the illegal search to show that the scene was then found in a different manner from that depicted in the photographs and testified to by SC Deireragea and PC Botelanga.

87. The failure to call PC Dillon Harris was also unfair because he had entered the house during the initial conversation at the door. The effect of the DPP's Opening was that PC Dillon Harris and SC Deireragea would testify as to "what they saw when they got there". But there never was any prosecution testimony about the state of the lounge room *when SC Deireragea and PC Dillon Harris got there* (nor when she went back to arrest the Second Appellant), a failure which was unexplained. The absence of PC Dillon Harris denied the Defence the opportunity of eliciting from him a recollection of what he then saw which was inconsistent with the evidence given by SC Deireragea and PC Botelanga as to what they saw later.

88. SC Deireragea had been emphatic that when they first arrived she and PC Dillon Harris had knocked at the door for ten (10) minutes before it was answered: AB50 *ll* 33-6, AB54 *l* 10, AB181 *ll* 33-4, AB184 *ll* 8-14. His Honour treated this evidence as unfavourable to the Appellants. However neither that allegation, nor any inference sought to be derived from it, had been put to the First Appellant in cross examination: AB112 *l* 9 - AB113 *l* 3 (cf AB100 *ll* 10-13).

89. During the later searches, the police supposedly observed things in plain view which one would not expect persons guilty of rape to want to advertise to the police. Thus:

(1) SC Deireragea testified that the First Appellant came to the door wearing only a towel (AB51 *ll* 32-37, AB59 *ll* 24-27), which the First Appellant denied: AB100 *ll* 22-26, AB115 *l* 30;

(2) SC Deireragea testified that, during the subsequent illegal search, she observed a mattress on the lounge room floor: AB55 *l* 28 – AB56 *l* 20; and a laptop lying on a chair facing the mattress which laptop she seized: AB57 *ll* 32-34;

(3) PC Botelanga testified that, during the later daytime search, he observed and photographed the mattress, two panties (one pair on the dining table), and pink clothing on the floor next to the mattress: exhibit D3 (AB168); exhibit A (AB 136-9), AB68 *ll* 30-33;

(4) One of the photographs which PC Botelanga testified to taking showed a towel draped over a chair (ex A, AB139), the positioning of which may have been intended to substantiate (1) above;

(5) The First Appellant denied these things were there: AB115 *l* 27 – AB117 *l* 26[7];

(6) SC Deireragea had not testified to observing the panties or clothing;

(7) It was also conceded by His Honour "no evidence has been led that either woman had worn or had removed panties": AB187 *ll* 4-5; see AB29 *ll* 26-29, AB32 *l* 14, AB97 *l* 26. Nor was the clothing on the floor next to the mattress said to have been worn or removed by anyone: AB117 *ll* 21-24. The First Appellant said it was an old skirt they used for cleaning: AB117 *ll* 11-14 & 24-26. The Second Appellant and complainant were wearing their clothes when they first saw the police, when the complainant apparently took all of her clothes with her (AB32 *l* 14, AB51 *ll* 32-3, AB52 *ll* 22-3, AB100 *ll* 28-37).

90. The fact that His Honour expressly refrained from ruling on whether some of the above items had been planted shows at least that the possibility of the police

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[7] The First Appellant said the laptop was on a table because the two speakers were providing music: AB115 *ll* 17-20.

positioning evidence could not be excluded beyond reasonable doubt: AB179 *l* 43 to AB184 *l* 5. Yet, the matter of (say) the panties must be probative of the question of the positioning of the mattress if not also the knife.

91. If the mattress, the towel, the panties and the other clothing on the floor had not been in the alleged locations when the door was opened to SC Deireragea and PC Dillon Harris, these items were likely to have been positioned there by police after the Appellants were arrested and taken away. It was not the prosecution case that the Appellants had removed these items before the door was opened. That was not put to the First Appellant in cross examination, nor even when this is supposed to have happened such as when the police allegedly knocked for ten minutes (a fact which was also not put to the First Appellant). On the contrary, the prosecution case was that "everything was untouched before we took the photographs": AB60 *l* 26.

92. In those circumstances, a successful defence that the police rearranged the scene will have meant that it was impossible for the events as described by the complainant to have occurred.

93. Evidence that other members of the first response group could have given would also have been relevant to the credit of SC Deireragea, and in turn to that of the complainant and the First Appellant. SC Deireragea testified in chief to observing the mattress and the laptop and, under cross examination, that everything was untouched. His Honour's rejection of the contention that the mattress and knife had been positioned was regarded as damaging the credibility of the First Appellant: AB188 *ll* 6-15. So too then must the evidence about the mattress and the knife have been regarded as buttressing the credit of SC Deireragea and the complainant as well as circumstantial evidence supportive of the complainant's account: eg AB182 *ll* 25-8, AB187 *ll* 40-4. The credit of SC Deireragea was independently relevant because of her testimony as to lies and distress which went to corroboration, the acceptance of which as to distress was regarded by His Honour as damaging the credit of the First Appellant: AB183 *ll* 19-24.[8]

94. SC Deireragea was therefore important to the prosecution case, apart from the fact that she was the only member of the first response group called. If it could not be concluded that lies were told in consciousness of guilt, the only corroboration will have been the evidence of SC Deireragea as to the distress she observed at the front door when the complainant came into view. There was no evidence of injuries consistent with forcible rape: AB178 *l* 41.

95. The sincerity of SC Deireragea could not be tested by a comparison of her testimony with the evidence of the other members of the first response group. If any rearrangement of the scene if it had been done by officers other than herself, it might have been impossible for SC Deireragea to testify about that or it would have been a simple matter for her not to volunteer what she knew about that unless she had been asked the direct question, or to frame her responses very carefully. PC Botelanga could not testify to what happened in his absence during the night shift. The opportunity to question the first response group was all the more vital as the mature

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[8] That conclusion was itself one that turned at least in part on rejection of the evidence of the First Appellant that the complainant had been laughing before the police arrived, a matter as to which SC Deireragea could have no personal knowledge.

prosecution position was that none of the photographs taken by the first response group were tendered at trial or ever disclosed to the Defence pre-trial. Nor was the knife tendered.

96. There was also appealable error in the sense referred to in paragraph 50(2) above as:

(1) It should be inferred from the unexplained failure to call all members of the first response group that evidence unfavourable to the prosecution would have been given by those who were not called with respect to the state of the scene and, in PC Dillon Harris' case also, on the conversation at the front door: *Dyers v R* (2002) 210 CLR 285, 291 [6];

(2) The drawing of that inference adverse to the prosecution with respect to the state of the scene is supported by the unexplained failure:

(i) to tender or disclose photographs said to have been taken by the first response group;

(ii) by SC Deireragea to testify that she observed the mattress on the lounge room when she was at the front door or when she returned to arrest the Second Appellant;

(3) Having regard to the said *unexplained* failures, a reasonable tribunal of fact would have entertained a reasonable doubt as to the guilt of the accused, and no reasonable tribunal of fact could have found the Appellants guilty.

97. **Court's informing itself about and/or failure to call PC Dillon Harris** The Court erred in failing of its own motion to call PC Dillon Harris, when it became apparent that the prosecution would not. The Court had an unfettered discretion to do so: s 100 of the *Criminal Procedure Act* 1972; s 48 of the *Courts Act* 1972 (Nauru). The exercise of that discretion miscarried: *House v R* (1936) 55 CLR 499, 505.

98. His Honour rightly regarded PC Dillon Harris as an "essential witness" not only because of the conversation at the front door but also because he was well placed to testify about the state of the scene. The DPP opened that he would be called. To remove any doubt when it became apparent later in the trial that the prosecution might not call him, the Defence objected and required that the witness be made available for cross examination. It was only towards or at the end of the prosecution case that it was clear that the prosecution would not call him and not seek an adjournment. His Honour took the step of reading the Statement of PC Dillon Harris, without having been invited to by the parties: AB184 *ll* 21-4. The Defence was prejudiced by not having the opportunity to cross examine PC Dillon Harris.

99. It is a denial of procedural fairness for a Judge to inform him- or herself from matters not in evidence, or draw conclusions about the evidence of a witness by reference to material not in evidence, without giving the parties an opportunity to respond: *Kuhl v Zurich* (2011) 243 CLR 361, 387 [69]. Judges as well as Counsel are bound by Browne v Dunn: *Bale v Mills* [2011] NSWCA 226 [64].

100. Because the learned Chief Justice read and referred to that Statement without giving the Defence an opportunity to be heard, the Appellants were denied procedural fairness. It appears that His Honour assumed that the Statement was not received into evidence.

101. His Honour might have used the Statement as a medium for arriving at some perceived consistent middle ground between the accounts of SC Deireragea and PC Dillon Harris as to what was said at the front door. If His Honour did so, it required the latter to be called as a witness, because the version which His Honour arrived at was not the only possible resolution of the two accounts. Nor was the above characterisation of the effect of what His Honour did the only way of viewing it. Another way of viewing it is to say that His Honour rejected the account of PC Dillon Harris or part of it.

102. This was an exercise in the Court informing itself from matters that were not in evidence without giving the Defence an opportunity to be heard. It was also an exercise where PC Dillon Harris was owed a *Browne v Dunn* duty, or else it was incumbent on His Honour to call PC Dillon Harris of its own motion if the DPP would not. For those reasons also, the only proper exercise of discretion for the Court was to call PC Dillon Harris if the prosecution would not. So too was it necessary to remedy the previous denial of procedural fairness by the prosecution failing to put the Defence on notice with regard to the particular prosecution case about what was said at the front door, and to afford the Defence a reasonable opportunity to test the prosecution evidence about what was found at the scene.

103. **Extension of time** The Appellants filed in this Court on 12 March 2012 within fourteen (14) days after receiving the transcript from the Court on Monday 27 February 2012. What was filed was an affidavit with a draft Notice of Appeal, and a summons seeking an extension of time. On the advice of the Registry, the Notice of Appeal was independently filed on 15 March 2012, seeking the extension of time within its terms. The outcome of the extension of time should abide the outcome of the appeal, as the prospects of the appeal are strong and the application will take substantially longer if heard before the issues in the appeal have been fully agitated. There is a strong public interest in the appeal, because the appeal raises police integrity questions, as well as important principles of trial practice and procedure of universal application. Delays since filing have not been substantial or contumelious and have been contributed to by (inter alia):

(1) difficulties of getting in, locating and/or understanding the provenance of documents before the Court below and before the District Court;
(2) difficulties of fully understanding the transcript (and procedures adopted pre-trial and during the trial) before and even access to the photographs was provided, and having regard also to some omissions in the transcript;
(3) the release of a revised transcript by the Supreme Court on 2 October 2012, following our request made in July 2012;
(4) delays in finalising the Index to the Appeal Book occasioned by the above and by the work travel commitments of Mr Aingimea;
(5) ongoing failure of RONPHOS (a State controlled corporation) to pay wages and other benefits due to the First Appellant under the terms of his employment which was terminated because of the conviction.

Part VII:

104. The legislative provisions relevant to this appeal (copies of which are attached) are:

- ss 7, 347 and 348 of the *Criminal Code of Queensland* in the form in which that Code stood as at 1 July 1921;
- s 13 and Second Schedule of the *Laws Repeal and Adopting Ordinance* 1922-1936 (Nauru);
- ss 4 and 5 of the *Customs and Adopted Law Act* 1971 (Nauru);
- ss 100, 146, 164, 166, 170, 179, 197, 199 and 203 of the *Criminal Procedure Act* 1972 (Nauru);
- s 48 of the *Courts Act* 1972 (Nauru);
- s 85(1) of the *Nauru Constitution* 1968;
- ss 37-43, and 47-53 of the *Appeals Act* 1972 (Nauru);
- ss 5 & 8 of the *Nauru (High Court Appeals) Act* 1976 (Cth).

105. These provisions still have the force of law in Nauru, in that form.

Part VIII:

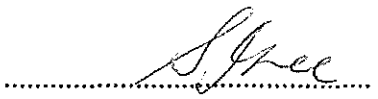
106. The orders sought are:

(1) The time limited for filing the Notice of Appeal be extended to 15 March 2012;
(2) The appeal be allowed;
(3) The convictions of the Appellants be quashed;
(4) The warrants of committal dated 30 November 2011 be set aside;
(5) A verdict of not guilty be entered for each Appellant, alternatively the matter be remitted for re-trial;
(6) The Respondent pay the Appellants' costs of and incidental to this appeal to be assessed if not agreed.

Part IX:

107. It is estimated that the presentation of the Appellants' oral argument will take 2.5 hours.

Dated: 4 February 2013



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