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' REPLY

Part I:

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

Part II:

1. Because it is conceded that Harris was a material witness, the convictions cannot stand unless the verdicts must have been the same if the DPP had called Harris.[1]

2. The First Appellant denied that he told a lie at the door. Harris, in accordance with his formal Report, would have testified that *the First Appellant* opened the door and denied that there was anyone *locked up* inside the house. It would be remarkable if that were rejected, if Harris had been called, as it was against interest. Once accepted, it will have meant that Deireragea was wrong on two facts she was adamant about.

3. The First Appellant's statement is not corroboration if he did not lie on his case.[2] If the Second Appellant lied, it would have been difficult to exclude the possibility that it was in consciousness of guilt. It was "important" to His Honour that he could find that "both" Appellants lied: AB 185 *l* 4. Harris may not have been accepted if he testified that the Second Appellant said to Deireragea "Sex it's only sex". Deireragea did not testify to that. Anyway, it is consistent with the Defence case: cf AB97 *ll* 35-6.

4. If there was no admission of guilt, distress was the only corroboration. Distress carries little weight as corroboration due to risks of feigning and equivocality.[3]

5. Even if Harris and Deireragea testified to distress and recent complaint, they would not have to be accepted in whole or at all. The submissions about how Harris would have aided the prosecution case only underscore the procedural unfairness of His Honour informing himself from the Police Report of his own volition.

6. No complaint of rape was made before the First Appellant's arrest. The complainant testified she told the police officers "nothing" at the door.[4] She went on, that she told

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1 McInnes v R (1979) 143 CLR 575, 580.2, 582.8, 594; Driscoll v R (1977) 137 CLR 517, 525-6, 543.1.
2 R v Edwards (1993) 178 CLR 193, 208-211.
3 R v Brdarovski (2006) 166 A Crim R 366 [42].

FIRST AND SECOND APPELLANTS

GADENS LAWYERS

Level 25, 240 Queen St
Brisbane Qld 4000
Tel: 07 3231 1666
Fax: 07 3229 5850

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the "*police officers*" that the Appellants were going to or had done something wrong or bad to her. Her testimony as to when she said this is unclear, though the first time she said she referred unequivocally to rape was when she "told the police officers in the car": AB34 *l* 16. The tenor of Deireragea's testimony was that the things said by the complainant were said after Deireragea took her to the police car, with Harris remaining at the door.[5] If only Deireragea took her to the car, the complainant did not complain of rape for the first time to both police officers when she got in the car.

7. Ms Boata testified that she had been called by the Second Appellant at about 2.00 am to be told that the First Appellant had been taken away by police "not knowing the reason": AB121 *ll* 16-23. The First Appellant also testified that the police said nothing as to why they were taking him to the station: AB100 *ll* 21-2, AB101 *l* 9. As the DPP did not challenge this evidence of either witness, it was not open to accept that Deireragea told the First Appellant that she was arresting him for rape.[6] If so, it was likely that a rape complaint was only made at the station. Calling Harris would not have altered this, by juxtaposition. Harris would have testified to things said (AB3 *ll* 5-8) which Deireragea and the complainant seem to say were said only in the car.

8. Therefore it is incorrect to say that the evidence of distress was strong and that there was unchallenged evidence of recent complaint. Given the above inconsistencies, and the unchallenged evidence of Ms Boata and the First Appellant, the complainant did not have to be cross examined specifically on what she initially said to police though it had been put to her that she fabricated the rape allegation.[7] Anyway, Mr Aingimea gave Deireragea the opportunity to comment on whether the statement of the complainant was taken only at the police station instead of in the car: AB59 *ll* 32-9.

9. There was also evidence, accepted by His Honour over the complainant's denials, to show that the complainant was not in distress but was angry that she had not received the desired reward.[8] This included the testimony of Ms Igii as to the bribe offered by the complainant, and that of Ms Boata as to laughter by the complainant and police. That it was material to the Defence to explore this laughter further with absent witnesses is underscored by the fact that His Honour took a benevolent view of the laughter and of the complainant's false denial about it: AB187 *ll* 17-21.

10. The mother's testimony contained variances with other prosecution evidence. It is not clear that His Honour accepted all of it nor was he bound to.[9] It was not relied on as corroboration or recent complaint, but as going to state of mind: AB181 *ll* 4-5.

11. Significantly, the complainant did not testify to referring explicitly to sex or forced sex in the first two calls to her mother, whereas the mother did but only in the *first* call -

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4 AB33 *l* 37 to AB34 *l* 34. The DPP went on to announce that he understood that "eiki" can mean "No I don't know" or "No I don't remember".

5 AB52 *l* 23, AB53 *ll* 17-8 & 21-2, AB59 *ll* 32-39.

6 It is not clear whether His Honour made a finding that Deireragea then told the First Appellant that.

7 Cooper v R (2012) 293 ALR 17 [85]; MWJ v R (2005) 222 ALR 436 [41].

8 Phipson on Evidence 7th ed (1930), p141. Conversely, the credit of the First Appellant did not have to be undermined by his testimony that the complainant had been laughing prior to the police arriving: cf AB183 *ll* 19-21 & AB181 *ll* 26-7. That testimony was not logically inconsistent with Deireragea's testimony of observing distress. Even if the complainant had exhibited distress to the police, they could not have seen her demeanour before the door was opened.

9 Supra note 7.

the second call to her was about the doors being locked.[10] His Honour preferred the mother as to the first call: AB181 *ll* 2-3.

12. Also, complainant testified that she placed the first call to her mother at about 10.00 pm (AB25 *l* 21; AB174 *l* 25), whereas the mother put the first telephone call "after midnight, after 1 o'clock quarter past one" (AB45 *l* 26) and said a second call was received about 10 minutes after the first one (AB47 *l* 1; AB179 *l* 45[11]) and that she called the police at about 1.30 am: AB48 *l* 11. The log noted 12.15am: AB130. The First Appellant testified that he estimated it was about 12.45 am when the police arrived: AB111 *ll* 33-4. It was not clear how His Honour resolved these differences. If there was a first call to her mother at about 10.00pm, and the police were called at 12.15 am, there is a period of two hours between the first call to her mother and the mother's conversation with Ratabwiy. Either a second call to her mother was not placed ten minutes after the first call, or the mother took a long time to call the police. The complainant was precise with times, testifying that it was "about 30 minutes, 35 minutes" from the time she called her mother from the bedroom (second time) until police arrived: AB41 *l* 36 to AB42 *l* 3.[12]

13. The evidence of the state of the scene after the door was opened to police but before the day search did anything but strongly support the prosecution. The *testimony* of how police found the scene during that window of time assumed importance because photographs had been taken during the illegal search, but on the mature prosecution case had not been tendered or disclosed, without explanation. The only photographs were those said to have been taken during the subsequent day search, after officers had already been through the house. The DPP did not even show the complainant those photographs to have her confirm that they were accurate: AB55 *l* 31 to AB56 *l* 10.

14. Deireragea did not testify that she saw the ***mattress*** (or other incriminating items apart from the towel) when she first came to the house, despite the lounge being in plain view of the door and Deireragea going inside the house.[13] If the DPP had instructions that she had then seen the mattress and other items, he would have led that evidence from her. He had opened that the officers would testify to "*what they saw when they got there*". Deireragea was at pains to say that she had knocked for ten minutes, they could not see inside the house as the windows were covered, and the First Appellant came to the door wearing a towel only. Deireragea said she saw the mattress during the illegal search, but that did not necessarily mean that it had not been positioned there by police. Her statement at AB60 *l* 26 was equivocal, including because the question it responded to was about whiskey. The complainant also testified to seeing the mattress during the illegal search, but declined the opportunity to swear unequivocally that the mattress had been there all the time: AB43 *ll* 11-12.

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10 First call: AB25 *l* 17 to AB26 *l* 16 & AB174 *ll* 25-31; AB44 *l* 21 to AB46 *l* 12 & AB179 *ll* 35-44. Second call: AB26 *l* 20 to AB27 *l* 22 and AB174 *ll* 36-41; AB46 *l* 34 to AB47 *l* 25 and AB179 *l* 45 to AB180 *l* 4.

11 The complainant was silent as to the gap between the first and second calls, but in the Opening, it was said to be 10-20 minutes: AB10 *l* 7.

12 The complainant had also said she had made her third alleged telephone call to her mother from the toilet after the alleged rape: AB32 *ll* 23-4; AB176 *ll* 3-4. She testified that she was in the toilet for about 20-30 minutes until she heard voices and went outside to see the police at the door: AB32 *ll* 30-6: AB176 *ll* 3-8. The First Appellant had denied she went to the toilet at that time: AB117 *ll* 34-8.

13 See [18] and [23] of primary outline and also AB53 *l* 13, AB62 *ll* 10-20.

15. Deireragea did not testify to seeing the ***panties*** at any time (nor other clothes). Botelanga was not asked about the panties in chief either. The photographs tendered by the prosecution as Exhibit A did not include the photographs showing the panties which had been disclosed. The prosecution did not assume an onus of showing that the panties were in the lounge, which tends to confirm that the DPP suspected that the panties may have been positioned by police. Harris, if he testified, would have said that "the victim's clothing" was confiscated as an exhibit during the illegal search: AB4. If the complainant had clothes which were there then and they were confiscated, the photographs at AB138 and 168 (said to have been taken during the day shift) must have been panties and clothes that had been positioned by police.

16. Like Deireragea (AB61 *ll* 1-4), Harris reported that the ***laptop*** was seized during the illegal search. But Deireragea testified that the laptop was lying on one of the chairs facing the mattress: AB57 *ll* 33-4. Harris said that the laptop when seized "was at the living area on the table": AB4. If Harris had testified, the juxtaposition of his testimony with hers would indicate that laptop had been moved by police. The First Appellant had testified that the laptop was being used to play music: AB117 *ll* 18-20.

17. If the panties and laptop had been positioned, so too could other items including the ***towel***. The First Appellant did not change in the lounge room: AB100 *ll* 25-30.

18. As to the ***knife***, the effect of the complainant's[14] and Deireragea's[15] testimony was that the complainant informed police that she *had seen* the knife in the kitchen, when on her case that would have been impossible. This is significant because: the charge required the threat of force; neither the knife nor the photograph of it were disclosed; of the absence of Harris (who did not say that the knife was seized during the illegal search: AB4) in juxtaposition with Deireragea (who did: AB61 *ll* 1-4).

19. Because the DPP changed tack after Deireragea's testimony, it seems likely that the DPP thought that the juxtaposition of Harris' evidence with Deireragea's and other prosecution evidence would have damaged the prosecution case. The DPP's decision was calculated to or had the objective effect of securing a tactical advantage.[16]

20. The DPP has not assumed an onus of offering a valid reason for refusing to call Harris or any other member of the first response group, other than obviating the need for repetitious evidence. That is inconsistent with the matters raised above. The DPP would not have opened his case in the way he did if he thought that the other officers would have been unnecessarily repetitive, an explanation which was not offered by the DPP below.

21. Nor was the DPP motivated by the explanation offered unilaterally by His Honour at AB187 *ll* 7-9. The DPP was quite happy to lead oral evidence of the illegal search. The issue of the illegal search had been opened up by the Defence. The exclusion of illegally obtained evidence is discretionary: Bunning v Cross (1978) 141 CLR 54.

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14 AB39 *ll* 18-27; AB63 *ll* 7-16; AB179 *ll* 10-11.

15 AB57 *l* 5; AB60 *ll* 19-20; AB63 *ll* 7-9; AB186 *ll* 24-28.

16 Richardson v R (1974) 131 CLR 116, 120.9; Whitehorn v R (1983) 152 CLR 657, 663.9, 664.5, 674.8.

22. The requirements of fairness meant that *the DPP* was bound to call Harris as the Appellants wished to cross examine him.[17] It was only when Botelanga was in the stand that there was indication that he was the one and only photographer to be called, that he worked on the day shift and that all of the photographs which had been disclosed to the Defence were asserted to be taken by Botelanga.[18] Even then, it was only when the prosecution case was closed that it was clear that Harris would not be called. No Police Reports were served about the illegal search, except Harris'.

23. The Court's power to call Harris is not enlivened only by application. His Honour's statutory discretion was unfettered in the sense that it is not limited to exceptional circumstances. But they existed as His Honour referred unilaterally to the Police Report. Anyway, this was and goes beyond a case where the Appellants were deprived of a chance of acquittal. In all of the circumstances, including the absence of witnesses, it was not open to find the Appellants guilty beyond reasonable doubt.[19]

24. It was open to draw inferences: from Deireragea's failure to testify to seeing the mattress when the door was opened (if not from what she did say) *that the mattress was not then in the lounge*;[20] from the prosecution's unexplained assertion that they did not tender or disclose photographs that had been taken during the illegal search, *that they would not have assisted the prosecution case*; and from the absence of first response group officers, *that their evidence would not have assisted the prosecution.*[21]

25. If these inferences were not to be drawn, there needed to have been an overwhelming case against the Appellants otherwise. The prosecution case did not otherwise rise to that level as it all came down to the testimony of a complainant: who on two material topics lied on oath; who did not testify to making an explicit warning of potential rape to her mother; who did not account for a two hour delay before police were allegedly called by her mother; whose mother did not inform police that her daughter was in fear of rape; who only made a rape allegation after the First Appellant's arrest; who regarded the investigation as humorous; and who offered a bribe evincing the state of mind alleged to have been the reason for falsification of the allegation of rape.

26. Verdicts of acquittal are more appropriate. The evidence adduced did not, and could not, prove the offence charged.[22] The DPP believed the absent witnesses would damage the prosecution case.[23] The prosecution should not be permitted the opportunity to propound a different case or to supplement defects.[24]

Dated: 5 July 2013

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Name: Stephen Lee
Telephone: 07-32214221
Facsimile: 07-32115410
Email: sjlee@qldbar.asn.au

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17 Richardson v R (1974) 131 CLR 116, 120-1, 122; Whitehorn v R (1983) 152 CLR 657, 664, 674, R v Apostolides (1984) 154 CLR 563, 576; MFA v R (2002) 213 CLR 606 [81]; Dyers v R (2002) 210 CLR 285 [6], [11]-[12].

18 See [80] of primary outline, and see the lingering uncertainty about the provenance of photographs at AB77 *l* 25 to AB80 *l* 1.

19 Whitehorn v R (1983) 152 CLR 657.

20 R v GEC [2001] 3 VR 334; R v Martin (2002) 134 A Crim R 568 [22].

21 Dyers v R (2002) 210 CLR 285 [6].

22 Crampton v R (2000) 206 CLR 161.

23 Whitehorn v R (1983) 152 CLR 657.

24 DPP (Nauru) v Fowler (1984) 154 CLR 627, 630.