IN THE HIGH COURT OF AUSTRALIA **No B19 of 2011**

BRISBANE OFFICE OF THE REGISTRY

BETWEEN: **JULIAN RONALD MOTI**
Appellant

and

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THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of Issues

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2. This appeal raises the following issues:
   (a) Whether the Court of Appeal was correct in deciding that the judge at first instance erred in concluding that the exceptional remedy of a permanent stay of the indictment was the only way the court could deal with the payments to witnesses; and

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(b) Whether an Australian court can adjudicate upon the actions of a foreign state acting within that state's territory.

Part III – Section 78B Notices

3. Notices pursuant to s.78B *Judiciary Act 1903 (Cth)* have been sent to the Attorneys-General of the Commonwealth and the various States and Territories.

Part IV – Relevant Facts

4. As to paragraph 6 of the appellant's submission, it is accepted that the Australian High Commissioner to the Solomon Islands, Mr Cole, on a number of occasions requested the AFP to investigate the appellant, and that the motivation was largely based upon his view that the appellant was unsuitable to be appointed Attorney General in the Solomon Islands. However it is not accepted that "constant pressure" was applied to the AFP. There was no evidence that Mr Cole had any involvement in the investigation after it was begun by the AFP. There was evidence that the AFP determined to consider the matter on its merits and independently of the apparent interest of Mr Cole.[1] Moreover there was no evidence that the investigation of the appellant by the AFP was in any way improperly motivated.

5. The motive of the AFP in investigating the conduct of the appellant is in any event not a relevant matter in this appeal. There is no basis upon which

[1] R v Moti [2009] QSC 407 at para.[47]

this honourable court should interfere with the factual findings about the motivation of the AFP in conducting the investigation into the appellant's conduct.

6. As to paragraph 8 of the appellant's submissions, the use of the word "rendition" is inappropriate in circumstances where the deportation effected by the Solomon Island authorities was effected as a result of a decision made by the Executive of the Solomon Islands independently of any Australian officer and independently of any Australian influence and in preference to the extradition request that had been made and pressed by Australian officers in Honiara. The evidence was that the appellant was deported by the sovereign government of the Solomon Islands. The facts as found by the judge at first instance were that the Australian Government continued to press for extradition after the new government was sworn in, in the Solomon Islands, and that the Australian Government continued to pursue its request for extradition even after Australian diplomats at Post in Honiara became aware of the Solomon Islands Government's decision to deport the appellant.[2]

7. As to paragraph 10 of the appellant's submissions, it is not correct to say that "*FA Bond and Ms Bootle were aware of the plan to deport the applicant (sic) in deliberate breach of his rights*". The Australian post in Honiara was informed that the Solomon Island government had legal advice that the deportation was not illegal.[3] It is true that Ms Bootle cabled DFAT about the deportation and raised the issue of its legality.

[2] Ibid; para's [40] and [41]
[3] See Appeal Book Vol.2, pp. 628-629; 677 [para.5]; 684 [para. 12], and 685 [para.15].

Nevertheless her evidence was to the effect that it was not appropriate for her to question with the Solomon Island government the legality under Solomon Island law of the proposed deportation.[4] Her view was that this was a decision for the Solomon Island authorities and she could not interfere in such a matter. While both Federal Agent Bond and Acting High Commissioner Heidi Bootle had views that the deportation was contrary to the appellant's rights to appeal within 7 days, neither of them were legally qualified. There was no obligation on them to express their inexpert views to the sovereign government of the Solomon Islands government on their own laws, and it would have been wrong of them to do so. In evidence before Mullins J, Ms Bootle said:

> *"We - we're not lawyers and it's not our job to interpret the law. It's certainly not our job to interpret the Solomon Islands law, and it wouldn't be good diplomacy either to interpret their law and put that back to them".*[5]

8. Further as to paragraph 10 of the appellant's submissions, whilst it is true that FA Bond attended a number of meetings with Solomon Island authorities his evidence was that he did so as an observer.[6] This evidence was apparently accepted by the primary judge.[7]

9. Further as to paragraph 10 of the appellant's submissions, it is not accepted that Federal Agent Bond gave the appellant's document of identity to Solomon Islands Deputy Commissioner of Police Marshall at the airport. The primary judge found that "it was clear that Mr Bond was careful to limit his role at the airport to an observer of the events until the plane

[4] See Appeal Book Vol. 1, p. 359, line 30.
[5] See Appeal Book Vol. 1, p.359, lines 35-38.
[6] See Appeal Book Vol. 2, p. 676, para [4], and p.684 [para.12], and p. 692.
[7] R v Moti [2009] QSC 407 at para. [42].

carrying the applicant departed".[8] It is, however, accepted that at some earlier point the document was given to someone in the Solomon Islands police or other agency.

10. Further as to paragraph 10 of the appellant's submissions, while it is accepted that Federal Agent Bond attended a meeting on 27 December 2007 with the Solomon Islands Permanent Secretary for Commerce (responsible for the Immigration portfolio), Mr Wickham, and the then lawyer advising the new Solomon Islands government, Mr Suri (subsequently appointed Attorney-General of the Solomon Islands) and that he was told that the Solomon Island government had legal advice to the effect that the proposed deportation was not unlawful and that he did later pass on the fact that he had been given that information to Deputy Commissioner Peter Marshall at the request of Wickham, it is relevant to note that the same advice had been directly communicated to Marshall by the Solomon Islands government separately from Mr Bond.[9]

Part III: Brief Statement of the Respondent's Argument

Ground 1: Payments to Witnesses

Mullins J fell into error in dealing with the issue of the payment to witnesses

11. Contrary to the argument of the appellant, the Court of Appeal was correct in identifying the two critical errors made by the trial judge when she

[8] R v Moti [2009] QSC 407 at para. [31], and see Appeal Book Vol.2, p. 679 para. [11]; p.687, para. [19].
[9] See Appeal Book Vol. 1, pp. 96, lines 10- 40.

decided that the payments to members of the complainant's family[10] amounted to an abuse of process warranting a permanent stay. First, there is a critical difference between paying a person to provide a statement in the first place, and making payments for living expenses, however extravagant, to ensure that the witness is in a position to give evidence at future proceedings after the witness has provided a statement and not to induce the witnesses to provide a statement in the first place. Whilst the payments were outside the current AFP guidelines they were not in breach of any guideline and importantly they were not illegal. Indeed, Holmes JA in the Court of Appeal considered that ensuring that the witnesses gave evidence was not, *per se*, unethical.[11] Second, there was no basis upon which Mullins J could have found that the process of the court itself was being wrongly made use of so as to justify a finding that the payments to the complainant's family amounted to an abuse of the court's process.[12]

12. Contrary to the submission of the appellant in para.22 of his outline, the judge at first instance in para. [67] of her judgment made no conclusion that the payments were illegal or unauthorized. As Holmes JA in the Court of Appeal observed in para. [34] of her judgment, Mullins J did not make any finding that the payments to the witnesses in Vanuatu by the AFP were improper.

13. Contrary to the submission of the appellant in para.23 of his outline, the Court of Appeal did not consider that "illegality" was a necessary

[10] Ibid, para. [84]. Mullins J did not find that the payments to the complainant justified a stay of the prosecution.
[11] R v Moti [2010] QCA 178 at para. [34].
[12] R v Moti [2010] QCA 178 at para. [37].

precondition before the payments could be a basis for a permanent stay of the indictment. Rather, the Court of Appeal held that the absence of illegality was one of the matters that the primary judge ought to have considered and which she failed to properly consider.

14. In truth, the fact that the payments to the witnesses were not illegal is an important factor weighing against the granting of a permanent stay, as the Court of Appeal correctly found. In this regard it is important to note that payment of witnesses in this case pales in significance in comparison to the serious and illegal conduct of police officers and customs officers in Ridgeway v The Queen[13]. In Ridgeway this honourable court refused to find that the conduct complained of made the institution or continuation of proceedings an abuse of process.[14]

15. Importantly, the law has recognized that the payment of money to witnesses does not as a matter of principle amount to an abuse of process. There is not any recognised principle that the payment of money to witnesses, which is otherwise not illegal, for the very purpose of ensuring that an accused person is brought to trial, through proper legal processes, amounts to an abuse of process.

16. There was very little discussion by the primary judge as to how the payments had the capacity to render any trial an abuse of process in circumstances where there was a strong Crown case that the appellant had committed serious criminal offences such that the only remedy was to grant a permanent stay of the trial. There is a significant public interest that

[13] (1994-1995) 184 CLR 19
[14] At 40 and 14

prosecutions for serious offences that have a reasonable evidential foundation are brought to trial. This is a very important consideration. It is the constitutional function of the courts to exercise jurisdiction: "In all but the most exceptional of circumstances justice will be denied when courts close their doors to a supplicant. Exceptional circumstances will only exist where the judicial function cannot be acceptably performed" per Kouriakis J in Police v Pakrou[15] in reliance upon the following: Duncan v Crews[16]; Jago v District Court (NSW)[17]; Williams v Spautz[18]; Batistatos v RTA (NSW)[19]. The judge at first instance fell into error by not paying heed to this principle.

17. The granting of a permanent stay of the prosecution effectively immunised the appellant from prosecution for the serious crimes alleged against him. This was the use of a remedy of last resort[20]. There were other ways in which the court could have expressed its reprobation as to the conduct of police in meeting some of the demands of the complainant which would

[15] [2008] SASC 364 at [73]
[16] (2001) FLR 250 at 257-8
[17] (1989) 168 CLR 23 at 47
[18] (1992) 174 CLR 509 at 519
[19] (2006) 226 CLR 256 at 303-4, [158]-[161] per Kirby J
[20] *Jago v The District Court* (1989) 168 CLR 23 at (47-48) Brennan J said at 47-48

> "An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process. ... When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. **But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. That is a lofty aspiration but it is not the law.**"

have stopped short of preventing the lawful process of trial occurring.

18. It is important to note that the AFP did not strive to meet the complainant's demands and that of her family "at any cost" or "whatever the price"[21]. As Holmes JA observed at para. [35] of her judgment, limits were set by the AFP, resisting demands for the family to be relocated Australia or France.

19. The assertion in the appellant's submissions, para.26, subparagraph. (a) that the payments were made *"in the context of a politically motivated prosecution"* cannot be supported. The facts found were to the contrary. The primary judge expressly rejected the suggestion that the AFP investigation and the prosecution of the appellant were so motivated.[22] The Court of Appeal correctly observed that there was no error identified in that finding.[23] There is no warrant in these proceedings to overturn the primary judge's findings of fact in this regard.

20. In respect of the other matters raised by the appellant in para.26 of his outline, the following needs to observed:

    (a) There is no basis to assert that the payments were made without lawful authority. The payments were made as a result of an executive decision within the authority of the AFP;

    (b) Whether or not the disclosure of the quantum of the payments, and the documents revealing the basis for their calculations, was

[21] These terms are used in para's.29 and 12 respectively of the applicant's summary of argument.
[22] R v Moti [2009] QSC 407 at para.[47]
[23] R v Moti [2010] QCA 178 at para.[51]

belated and incomplete, this could not be the basis for a permanent stay;[24]

(c) The AFP was anxious to secure the attendance of the complainant and the witnesses who resided in Vanuatu for the trial of the serious charges against the Appellant. These witnesses were not compellable under Australian law to attend the trial. This was a legitimate aim. As discussed in para.19 above, the AFP did not meekly give in to all demands made by these witnesses.

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21. The Court of Appeal correctly decided that it was not open on the evidence for the trial judge to conclude that the payments brought the administration of justice into disrepute. As Holmes JA observed, a court's decision not to grant a permanent stay did not amount to approval of the payments made by the AFP.[25] Her Honour correctly observed that at the highest, the payments were of questionable wisdom *"which falls short of establishing that the process of the Court is itself being wrongly made use of".*[26] This was a direct application of legal principle identified in Ridgeway v The Queen[27].

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Ground 2: Deportation to Australia

Question of fact

22. Whether Australian authorities were a party to the alleged unlawful conduct said to describe the deportation of the appellant, or connived at it

[24] R v Moti [2010] QCA 178 at para.[33]
[25] Ibid, Holmes JA, para.[37]
[26] Ibid, Holmes JA, para.[37]
[27] (1995) 184 CLR 19 at para's 40 and 43

(to use the language of McHugh JA in Levinge), is a question of fact, not of law. In essence, in relation to this ground, the appellant asks this Court to overturn findings of fact made by the primary judge. The hearing before the primary judge lasted eleven days, involved the taking of evidence from eleven witnesses, and three thousand and seventy-four pages of exhibits. This Court is in no position to review the totality of the evidence. This Court ought not to undertake that type of review especially in this case where the credibility of witnesses such as Federal Agent Bond and Deputy Commissioner Marshall, amongst others, is in issue,[28] and in circumstances where there is no reason such as faulty logic or questionable rationality has been demonstrated on the part of the primary tribunal of fact.

23. The primary judge made a clear finding that the Australian authorities did not connive in nor collude with the Solomon Islands authorities to execute an unlawful deportation.[29] The Court of Appeal correctly upheld that finding. As Holmes JA observed, mere knowledge on the part of the Australian authorities in the Solomon Islands that the deportation *might* be illegal under Solomon Islands law does not equate to active involvement in procuring deportation, in preference to extradition.[30] This is consistent with the decision of the New South Wales Court of Appeal in Levinge.[31]

24. Importantly, the evidence tends to establish that those Solomon Islands officials advising the Solomon Islands Government involved in the

[28] There is a decision which draws a distinction between reviewing facts where credibility is in issue and cases where it is only a matter of reviewing conclusions from evidence which has been accepted below.
[29] R v Moti (2009) QSC 407 at para.[45]
[30] R v Moti [2010] QCA 178 at para.[50]
[31] Levinge v Director of Custodial Services (1987) 9 NSWLR 546 @ 565D

deportation, namely Permanent Secretary of the Ministry of Commerce (and responsible for the Immigration portfolio) Mr Wickham and Mr Suri, the then legal advisor to the Government of the Solomon Islands (and later the Attorney-General of that government), believed that the deportation was lawful. Further, they considered that the magistrate's court decision obtained by the appellant was invalid.[32] It was not for the Australian authorities to question these conclusions with the Solomon Islands authorities. Australia had to respect the sovereignty of the Solomon Islands Government which had unambiguously made its intentions known: it no longer wished the appellant to remain in the Solomon Islands. He did not have citizenship there. His employment had been terminated. He was an Australian citizen and his right to remain in the Solomon Islands was not a matter that the Australian authorities could determine. No basis in law has been identified which might have provided a basis for the Australian authorities to insist that the appellant not be deported.

25. All of the evidence supports a conclusion that the decision to deport was a decision of the Solomon Islands Government alone. This decision was made in circumstances where an extradition request had been made by Australia. The indisputable evidence was that even after the decision to deport had been made by the Solomon Islands Government, Australia persisted to press for extradition.[33]

26. In respect of para.29 of the appellant's submissions, the following should be observed:

[32] See Appeal Book Vol. 2, p. 628, para. [3], line 40.
[33] See Appeal Book Vol. 1, p. 396, lines 10-40.

(a) The Solomon Islands authorities considered that the magistrate's order was invalid as it did not restrain the appropriate minister responsible for the deportation;

(b) The new Solomon Islands \government deported the Appellant on their own policy grounds, one of which is that it was determined that he was an undesirable alien.

27. In respect of para.30 of the appellant's submissions, the following should be noted:

(a) The issuing of the travel documents and the payment of living expenses for the Solomon Islands officers who accompanied the appellant is dealt with separately below;

(b) Whether or not the travel documentation was given to Solomon Islands police at the airport or somewhere else does not matter. As the primary judge commented at para. [31] of her judgment, the travel documents had to be given over to give effect to them;

(c) Federal Agent Bond passed on the same legal advice to Deputy Commissioner Marshall that had already been given to him: see para.7 above;

(d) Federal Agent Bond's presence at the various meetings was as an observer only, as the primary judge discussed at para. [42] of her judgment. Mr Bond was not receiving secret information about the

decision to deport the Appellant; the new Solomon Islands Government had publicly stated this on a number of occasions;

(e) While Mr Bond initially agreed to accompany the Appellant at the request of the Solomon Islands authorities, he was subsequently directed not to travel by the Australian Government.

28. It is accepted on the evidence that Federal Agent Bond and Acting High Commissioner Bootle thought that the deportation may have been unlawful, but it would have been improper for Australia to provide contrary advice to employees of the Solomon Islands Government than the advice given by their own government[34]. The Solomon Islands had its own sovereign government. The decision to deport was a decision of that government. There is no evidence that the Australian Government ever encouraged the Solomon Islands Government to deport the appellant rather than to extradite him.

29. It is submitted that Holmes JA was correct in holding that mere knowledge on the part of the Australian Government that the Appellant's deportation might be contrary to the laws of the Solomon Islands does not amount to active involvement in the deportation.[35] The various descriptions used in the various cases set out by Holmes JA clearly indicate a level of activity and encouragement beyond what occurred in this case.

[34] R v Moti (2009) QSC 407 at para's [40] and [41]. See footnote 5 for evidence.
[35] R v Moti, supra, para.5

Acts of a foreign state within that state not justiciable

30. The legality of the conduct in the Solomon Islands, under Solomon Island law of the government of the Solomon Islands in connection with the decision to deport the appellant and the deportation itself is not justiciable in an Australian court.

31. There is a great deal of authority to support the proposition that it is not appropriate for an Australian court to examine the question of the legality of the actions of the Solomon Islands' Government in the Solomon Islands in deporting Mr. Moti. The principle is that courts will not adjudicate upon the validity of acts and transactions of a sovereign state within the sovereign's own territory: Attorney-General (UK) v Heineman Publishers Australia Pty Ltd (No 2)[36]; McCrea v Minister for Customs[37] and following Mokbel v Attorney General for the Commonwealth and Another [38] This is well established principle and it is applied in the United Kingdom (see Buttes Gas v Hammer[39]) and in the United States of America (Oetjen v Central Leather Co.[40] adopted and approved in Heinemann). In the light of this principle and its rationale it is submitted that the primary judge was correct in declining to determine the legality of the actions of the Solomon Island Government in deporting the appellant.

32. The decision in Regina v Horseferry Road Magistrates' Court, Ex parte

[36] (1988) 165 CLR 30 at 40-41
[37] 212 ALR 297 at [40]
[38] (2007) 162 FCR 278 at 292.
[39] [1982] A.C. 888 at 933
[40] (1918) 246 U.S.297 at 304

Bennett[41] does not affect a change in the rule articulated immediately above. In that case there was a finding of complicity by the local authorities. In the present case there was a finding that there was no complicity by Australian authorities in the decision to deport the appellant or in his deportation.

33. It is submitted that it is not open for the courts to adjudicate on the issuing of the travel documents to the appellant and the accompanying Solomon Islands officers, as this was an act of the executive in relation to dealings with a foreign power, and can be characterized as "political in nature", or a matter of policy.

Part IV: Costs

34. The Respondent does not seek costs of the application, in accordance with the general rule of costs in criminal proceedings on indictment.

Part V: List of Authorities

Ridgeway v The Queen (1994-1995) 184 CLR 19

Police v Pakrou [2008] SASC 364

Duncan v Crews (2001) FLR 250 at 257-8

Jago v District Court (NSW) (1989) 168 CLR 23 at 47;

Williams v Spautz (1992) 174 CLR 509 at 519;

Batistatos v RTA (NSW) (2006) 226 CLR 256 at 303-4, [158]-[161] per Kirby J.

Levinge v Director of Custodial Services (1987) 9 NSWLR 546 at 565D.

[41] [1994] 1 AC 42

Attorney-General (UK) v Heineman Publishers Australia Pty Ltd (No 2) (1988) 165 CLR 30 at 40-41

McCrea v Minister for Customs 212 ALR 297 at [40]

Mokbel v Attorney General for the Commonwealth and Another (2007) 162 FCR 278 at 292.

Buttes Gas v Hammer [1982] A.C. 888 at 933

Oetjen v Central Leather Co. (1918) 246 U.S.297 at 304

Regina v Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 AC 42

David Syme and Co Ltd v Lloyd (1985) 1 NSWLR 416 at 421C

NRMA Insurance Ltd v B and B Shipping and Marine Salvage Co Pty Ltd (1947) 47 SR (NSW) 273 at 282

Part VI: Oral Argument

35. The respondent seeks to supplement this summary with oral argument.

John Agius SC for both Counsel

Craig Chowdhury

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On behalf of the Commonwealth Director of Public Prosecutions

Dated: 6 June 2011