HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL AND BELL JJ

TERRENCE JOHN DIEHM & ANOR — APPELLANTS

AND

DIRECTOR OF PUBLIC PROSECUTIONS (NAURU) — RESPONDENT

Diehm v Director of Public Prosecutions (Nauru)
[2013] HCA 42
30 October 2013
B15/2012

ORDER

1. *An extension of time to appeal be granted.*

2. *Appeal dismissed.*

On appeal from the Supreme Court of Nauru

Representation

S J Lee for the appellants (instructed by Gadens Lawyers)

P J Hannebery for the respondent (instructed by Department of Justice and Border Control – Republic of Nauru)

CATCHWORDS

Diehm v Director of Public Prosecutions (Nauru)

Criminal law – Practice and procedure – Duties of prosecutor – Duty of prosecutor to call all material witnesses – Appellants convicted of rape – Only one of two police officers who attended scene called to give evidence – Whether failure of prosecutor to call second officer occasioned miscarriage of justice.

Criminal law – Practice and procedure – Statutory power and duty of trial judge to call witness of own motion – Scope of duty – Whether evidence of uncalled witness "essential to the just decision of the case".

Criminal law – Evidence – Depositions – Statement of uncalled witness not in evidence – Trial judge referred to statement to determine effect of failure to call witness – Whether reference to statement occasioned breach of natural justice.

Words and phrases – "essential to the just decision of the case", "fair trial", "material witness", "miscarriage of justice".

Criminal Code (Q), ss 7, 348.
Criminal Procedure Act 1972 (Nauru), ss 100(1), 188.
Laws Repeal and Adopting Ordinance 1922 (Nauru), s 12.

FRENCH CJ, KIEFEL AND BELL JJ.

Introduction

1 On 14 June 2011, the first and second appellants, who are husband and wife respectively, were charged with the rape, on that day, of a woman regarded by custom as the wife's niece, contrary to ss 7 and 348 of the *Criminal Code* (Q) ("the Code"). The Code as it stood on 1 July 1921 is applied as the law of the Republic of Nauru by virtue of s 12 of the *Laws Repeal and Adopting Ordinance* 1922 (Nauru). Each of the appellants pleaded not guilty in the District Court of Nauru on 2 August 2011. Following the entry of their pleas of not guilty and a preliminary inquiry in the District Court of Nauru, the appellants were committed to trial in the Supreme Court of Nauru. The trial was by judge alone, as required by s 188 of the *Criminal Procedure Act* 1972 (Nauru) ("the CPA"). The charges were tried by Eames CJ between 23 and 28 November 2011. The appellants were represented by a person who appeared as a "pleader", having completed a course conducted by the judiciary in Nauru. He had no law degree and was not admitted as a legal practitioner. On 29 November 2011, the trial judge delivered reasons for judgment in which he found both appellants guilty as charged[1]. On 15 March 2012, the appellants instituted an appeal in this Court against their convictions pursuant to the *Nauru (High Court Appeals) Act* 1976 (Cth) ("the Nauru Appeals Act").

2 The appellants complain primarily of the failure of the prosecutor to call certain police witnesses and make them available for cross-examination, the failure of the trial judge to call a particular witness on his own motion, and the trial judge's reference in his judgment to a statement prepared by that witness which was not in evidence. The appellants have sought an extension of time to appeal against their convictions. That extension should be granted.

3 The appeal should be dismissed. The prosecution has a duty to call all material witnesses. The decision whether or not to call a particular witness is a matter for the discretion of the prosecutor. No miscarriage of justice is shown to have arisen from the failure by the prosecutor to call any of the police witnesses he could have called. While the trial judge had a statutory power to call a witness not called by the prosecution[2], in this case he had no duty to do so. Absent any miscarriage of justice flowing from the prosecution's failure to call the witnesses, it cannot be said that any miscarriage of justice flowed from the failure of the trial judge to exercise that power. His Honour's consideration of a

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1 *Republic v Diehm* [2011] NRSC 24.

2 CPA, s 100(1).

written statement, not in evidence, prepared by a police officer who was not called was evidently undertaken in order to determine whether the failure to call that officer could have given rise to a miscarriage of justice. The parties had notice of his Honour's reference to that document during closing argument. It was clear that his Honour did not treat the statement as evidence and that there was no breach of procedural fairness or miscarriage of justice flowing from his reference to it.

The trial — the prosecution case

4 The record of the proceedings in the Supreme Court of Nauru, which was before this Court, did not include any information in the Supreme Court setting out the charges against the appellants as required by s 180(1) of the CPA. No point was taken in this Court about that deficiency. The only initiating process on the record was the charge laid in the District Court of Nauru. In particular, there was no record of a list of prosecution witnesses, although witness depositions were evidently provided to the appellants prior to the trial.

5 The prosecution case, as opened to the Supreme Court by the Director of Public Prosecutions, was that the first appellant was the principal and the second appellant an accessory to rape constituted by intercourse to which the complainant had consented, but in which her consent was given only by virtue of threats or intimidation.

6 The prosecution alleged that, on Sunday, 12 June 2011, the complainant was taken by the police to the appellants' residence following a quarrel with her boyfriend at a house in a place called "Location". She arrived at the appellants' house in the afternoon, drank beer for a time, and left at about 8 pm to have drinks with friends back at Location. She returned to the appellants' residence at about 8 am on Monday, 13 June and went to sleep. She woke up at about 3 pm when the appellants' children arrived home after school. The complainant and the second appellant began drinking together. In the course of conversation, the second appellant suggested to the complainant that she should have sex with the first appellant. This suggestion was rejected. Later, after the first appellant returned from work, the appellants and the complainant went for a drive around the island. When they returned, the children were no longer at the house. They continued drinking. The first appellant then left the house to take clothes to the children. While he was away, the second appellant again suggested to the complainant that she should have sex with the first appellant, a proposition that was again rejected.

7 The prosecution alleged that, following the second appellant's repeated suggestion, the complainant became uncomfortable as she thought the appellants were planning something. At some point in the evening, she borrowed the first

appellant's phone and went into the children's bedroom. She made two phone calls to a girlfriend, Eriana, asking her friend to come and pick her up but her friend was not able to do so. Eriana was not called as a witness in the case. The complainant's next phone call was to her mother. She complained that the second appellant was trying to force her to have sex with the first appellant. She called her mother from the same room about 10 or 20 minutes later. During her phone call she was seated on the floor with her feet against the door to the bedroom. The second appellant forced open the door and entered the room with a knife in her left hand. The prosecution case was that the knife was held up to the complainant's face and that she was told to go into the living room. There was a mattress on the floor of the living room and the first appellant was lying on it. The second appellant then told the complainant to lie on the mattress next to the first appellant. Both appellants then removed the complainant's clothing. The first appellant got on top of the complainant and had sexual intercourse with her. The second appellant sat on a settee brandishing her knife and urging the first appellant on. After the first appellant had had sexual intercourse with the complainant, the second appellant performed cunnilingus on her. The complainant then got up, picked up her clothes and the telephone and went into the toilet, where she made a further call to her mother. She told her mother that she was too late and that the appellants had got what they wanted.

8 The prosecutor told the Court that he would be calling the complainant, the police officers who went to the appellants' residence in answer to the mother's call and four more officers who "went to process" the crime scene, took photographs and searched it. The complainant's mother was also to be called as a witness.

9 The complainant, who was the first witness called by the prosecution, gave evidence, through an interpreter, generally along the lines of the prosecution case as opened. She said that on the afternoon of Monday, 13 June, after the appellants and the children had come home, the first appellant took the children to Location. The second appellant remained. While the two of them were drinking whisky together, the second appellant told her that the first appellant had had sex with a number of women. She asked the complainant if she would be happy to have sex with him. Later, the second appellant said she was only joking.

10 After the first appellant returned, they all drank whisky together for two or three hours. They then went for a drive at about 5 pm. They returned to the appellants' house. The first appellant then said that he was going back to Location to take some clothes there for the children. The trial judge was to find

that the decision was made abruptly to ensure that the children did not come back to the house overnight[3].

11 When the first appellant returned, he asked the complainant if she would like to go to Australia with him and his wife. He said she would have to pay her own fares. The complainant's evidence thereafter went on to describe the sequence of events for which the appellants were charged and her retreat with the first appellant's mobile telephone into a toilet at the appellants' home after those events.

12 The complainant said that, after telephoning her mother from the toilet, she switched the phone off. She stayed in the toilet for 20 to 30 minutes and then heard people talking outside. Two police officers, who had responded to the call by her mother, had arrived at the front door of the appellants' house. She came out and saw the officers. They were talking to the appellants. When she saw the police she began crying and they asked her to follow them outside. She told the officers that the appellants had "done something wrong to me." She said that she explained to the police officers what the bad thing was when she got into the police car. She told them that the first appellant had tried to have sex with her while the second appellant had a knife in her hand. The officers took her and the first appellant away in their car, dropped him off at the police station[4], went back to the house and picked up the second appellant and took her to the police station, and then took the complainant to the hospital.

13 The complainant denied an allegation put to her in cross-examination that she had had consensual intercourse with the first appellant on two occasions on 12 June. She also said in cross-examination that when she returned to the appellants' house with the police she pointed out the mattress, which was still on the floor in front of the television. She denied that she had pulled the mattress into that location herself.

14 The complainant was cross-examined about telephone conversations she had after the events of 14 June 2011. In one of the conversations she was said to have told the caller, Cilia Boarta, who was called as a defence witness, that she was at the house helping police to look for the knife with which she was threatened. She said she did not remember the conversation. However, she did remember seeing the knife in the kitchen and telling the police officers to go and look for it there. She denied having a telephone conversation with someone

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3 [2011] NRSC 24 at [135].

4 Referred to in some parts of the transcript as the "correctional centre".

called Rose Igii, also called as a defence witness, in which she had allegedly offered to withdraw the charges if the appellants bought her an airline ticket.

15 The complainant's mother gave evidence of the telephone conversations she had had with her daughter. She also spoke through an interpreter. She confirmed that her daughter had said that she was going to be forced to have sex with the first appellant. During the second telephone call, she could hear the second appellant's voice calling out to her daughter to open the door. She then called the police and told them to go to the appellants' place. She told them her daughter was afraid to leave the room and go to the lounge room because the doors of the house were locked. The last call from her daughter came about half an hour or 20 minutes after she had called the police. She told the complainant that the police were on their way.

16 The prosecution then called one of two police officers who had attended at the appellants' house, Senior Constable Decima Deireragea, who was evidently an acting sergeant at the time. She said she was on duty in a police vehicle with Constable Dillon Harris at about midnight on 14 June 2011 when they were contacted by a colleague from the police station to say a report had been received from the complainant's mother.

17 Senior Constable Deireragea said she and Constable Harris drove to the appellants' house. When they arrived there everything was locked up and the curtains were closed. They knocked on the front door several times and for about ten minutes no one answered. The second appellant then opened the front door. Senior Constable Deireragea said that she asked the second appellant if there was anyone else in the house. The second appellant replied that only she and her husband were there. The first appellant then came to the door. He was wearing just a towel around his waist. Senior Constable Deireragea asked both of them if the complainant was in the house. They both said no. The second appellant told her that the complainant had left the house that afternoon. The complainant then appeared behind the two appellants. When Senior Constable Deireragea asked the second appellant who was the person behind them, the second appellant turned around and said "oh that's [the complainant] that's her". Senior Constable Deireragea asked the second appellant why she had given false information. The second appellant then started to raise her voice. Both appellants then turned back and went inside the house. The complainant then identified herself to the police officers. She was shaking and crying. She looked scared. She came outside the house.

18 According to Senior Constable Deireragea, the complainant said her mother was to blame for what had happened. She said she was forced to have "sexual intercourse with a 66 year old man". The second appellant had forced her to have sexual intercourse with the first appellant and had threatened her with

a knife. The second appellant held the point of the knife to her neck. Senior Constable Deireragea said that she was in the police car with the complainant when she said this. She had taken her out of the house to make her feel more comfortable about giving a statement. Senior Constable Deireragea told the Court that she then entered the house and told the first appellant that he was going to be arrested for rape. Constable Harris was standing at the front door while she did so. Senior Constable Deireragea told the second appellant that they would take the first appellant to the police station and would be back for her.

19 Senior Constable Deireragea testified that after she and Constable Harris had taken the first appellant to the police station, they drove back to the house with the complainant. The second appellant was then taken to the police station. The police returned to the house with the complainant. Photographs were taken by another police officer, Constable Namaduk, who arrived later. The complainant showed the police officers where the incident had occurred in the lounge room. There was a mattress on the lounge room floor. The complainant showed the police officers a knife in the kitchen area. It was on top of a shelf. The knife had a black handle about four or five inches long and a blade about eight inches long. There was a laptop computer lying on one of the chairs in the lounge room facing the mattress, which the police seized. The complainant showed the police around the house including a small room in which she said she had tried to lock herself. Senior Constable Deireragea said in cross-examination that she had no search warrant at the time they revisited the house with the complainant.

20 In cross-examination, Senior Constable Deireragea was asked if Constable Harris had inquired, on first arriving at the house, whether or not the appellants had a Nauruan lady locked up in their house and whether they had answered "no" to that question. Senior Constable Deireragea denied that either she or Constable Harris had asked that question.

21 On the second day of the trial, 24 November 2011, the prosecutor informed the Court that he intended to call the complainant's friend whom she had phoned before phoning her mother, a pharmacist, and a gynecologist, Dr Castanedo, who was tied up with an operation. The appellants' pleader then said:

> "My apologies Your Honour, just also I'm asking that there's another police witness PC Dillon, yes I've asked my learned friend also to make sure he was on."

The transcript records his Honour as saying:

> "Yes, police PC Dillon was an essential witness".

The prosecutor said that Constable Harris was being called to court.

22 The prosecutor called Constable Dan Botelanga, who had searched the house and taken photographs from about 2.30 pm on Tuesday, 14 June 2011. He had attended at the house with two other officers, Senior Constable Dacor, who did a sketch of the house, and Sergeant Scarist, who took notes. Constable Botelanga was operating under the authority of a search warrant. He recalled seeing a mattress in the living room. In his examination-in-chief, he said that there had been police officers at the house earlier that day, namely Senior Constable Deireragea, Constable Harris and Constable Namaduk, who also took photographs. He did not know what had happened to their photographs. He said that in one room they found some sex toys and DVDs, and some pills. He denied that he and the other officers had moved any items around so they could take photographs. He was specifically referred to a pair of women's panties on the floor. The next witness was Dr Leweni Mocevakaca, a senior pharmacist at the hospital. He gave evidence identifying tablets seized at the house as containing sildenafil citrate, for the treatment of erectile dysfunction. He gave evidence of the duration of their effectiveness after being consumed.

23 The next witness was a probationary constable, Joni Ratabwiy, who took the call from the complainant's mother in the early hours of 14 June 2011.

24 When Constable Ratabwiy's evidence was completed the following exchange took place between the prosecutor and the trial judge:

> "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
>
> Court: 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 to come and give evidence
>
> Court: 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".

25 The Court resumed after the above exchange and heard evidence from Dr Castanedo. The girlfriend whom the complainant had called from the appellants' house was not called as a witness. The prosecution closed its case. It

was at this point that the question of whether Constable Harris was to be called as a witness should have been resolved. That would have been consistent with the general rule that the prosecution must offer all its evidence before the accused is called on to make his or her defence[5]. However, the question of Constable Harris was simply not addressed. On that topic a puzzling silence descended upon the record. There is no record on the transcript of any reference to Constable Harris at this point.

The trial — the defence case

26 The appellants' representative opened the case for the defence briefly. The witnesses for the defence were the first appellant and two women who had had conversations with the complainant after the event.

27 The first appellant testified that he had had consensual sex with the complainant previously, on 21 May 2011. At that time the complainant had asked that the appellants, who were due to go to Australia for holidays on 13 July 2011 for a family reunion, take her with them. She said she had had a baby but had sold it. She wanted to get the baby back. The complainant had been told that she would have to pay her own way.

28 Turning to the events of 12 June 2011, the first appellant said that the complainant had been brought around to the appellants' house between 9 am and 9.30 am. He was told that she had been bashed by her boyfriend and had rung the police, who had brought her around to the appellants' place. The first appellant went to work until midday. The complainant drank beer in the afternoon and went to bed that evening. The first appellant said he went to bed between 7.30 pm and 8 pm. When he woke on the morning of Monday, 13 June, the complainant had gone. The first appellant went to work. At lunchtime he picked up the second appellant and their son from pre-school. When they got back to their home, the complainant was there. The first appellant went back to work. He picked up another child from school at about 3 pm, and on his return home found his wife and the complainant drinking whisky together. At about 4.30 pm he took the children to Location so they could have a sleep-over with their friends.

29 The first appellant said that after he returned home, he started drinking beer. The second appellant went for a shower at about 6 pm. The complainant suggested he and she have intercourse, which they did. Later, after his wife had

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5 *R v Soma* (2003) 212 CLR 299 at 309 [29] per Gleeson CJ, Gummow, Kirby and Hayne JJ; [2003] HCA 13.

finished her shower, the three of them went for a drive. They got back to the appellants' house at about 7.30 pm. Later that night, at about 11.30 pm, the complainant, according to the first appellant, said that the appellants hated her, they wouldn't help her with her baby and they wouldn't take her to Australia. The second appellant then took the complainant to their daughter's bedroom at about ten to midnight. About 15 minutes later, the first appellant told his wife to go and check on the complainant because she was very drunk. He could hear his wife asking the complainant to open the door. He heard the complainant give a little yelp or scream and then both of them came out about five minutes later, laughing and joking. The complainant asked for more whisky. The first appellant gave her a tumbler. At about this time the police came knocking on the door.

30 The first appellant said that when the police arrived Constable Harris asked him if he had a Nauruan girl locked up in the house. The first appellant said that he replied, "There's no one locked up in this house." He said his wife was standing back over near the dining room table and Constable Harris was about one and a half paces inside the house. Senior Constable Deireragea was outside the house. She asked the second appellant if they had somebody locked up and mentioned the complainant by name. The first appellant said that when the police arrived the complainant had told the appellants that her boyfriend had sent the police. She ran into the hallway. However, when the police mentioned her name she came out of the hallway and onto the porch. She wasn't crying. The first appellant said that when the police arrived he was wearing a green lava-lava with the word "Kiribati" on it and underpants underneath. He denied that he was wearing a towel at the time as claimed by Senior Constable Deireragea.

31 In cross-examination, the first appellant said that he thought the police had come to the house in connection with the incident between the complainant and her boyfriend. He believed that Constable Harris was related to the complainant. Asked whether he told the police officers that the complainant was not in the house, he said:

> "Because they said you've got a girl locked up in the house and I stated no we have no one locked up and they asked my wife and she said no and before we could say anything [the complainant] walked out of the passage way".

Pressed on what Senior Constable Deireragea had said, the first appellant said that he felt the officers were not telling the truth. He maintained that he just told the police officers there was no Nauruan girl locked up in the house. He did not consider the complainant as a Nauruan girl because he thought of her as "a Kiribas", that is, someone from the Republic of Kiribati. He did not hear any officer ask simply whether there was anyone else in the house.

32 Two other defence witnesses were called. Cilia Boarta gave evidence of two telephone conversations with the complainant in the early hours of 14 June 2011 after the first appellant had been taken away by police. She said that in the first of those conversations the complainant had told her that the police were coming back to try and get fingerprints from a knife in the kitchen. In the second telephone conversation, the complainant told her that she and the police were at the house "imitating" what had happened with the knife. According to the witness, there was laughter in the background.

33 Another defence witness, Rose Igii, gave evidence of a conversation with the complainant about a week after the alleged offences. She said the complainant told her in the course of that conversation to pass on to the appellants that if they bought her a ticket to Tarawa she would withdraw the case. The witness said that when this offer was conveyed to the appellants they would not accept it. The complainant had denied this conversation. The prosecution did not cross-examine Ms Igii.

34 The defence case then closed. There was no further request for Constable Harris to be called.

Constable Harris' witness statement

35 An unsigned copy of a statement of Constable Harris, entitled "Police Report", had been provided to the defence prior to trial under cover of a Disclosure Certificate. It was among a number of witness statements and potential exhibits provided "by way of Disclosure of the Prosecution Case". It was not tendered in evidence. Absent agreement, it could not have been admitted. It began with a statement that at about 2400 hours on 14 June the police had received a complaint "regarding a young lady locked up in a dwelling house". Constable Harris said that he and Senior Constable Deireragea went to the appellants' house, knocked on the door several times and called upon any person inside the dwelling. The statement continued:

> "We were then attended by a Mr Terrance Di[e]hm Australian nationality and when Mr Di[e]hm opened the door i saw Mr Di[e]hm was wearing only a towel and no shirt, inside the living area and a lady was sitting at the dinner table.
>
> Sgt Decima then informed Mr Di[e]hm that there was a report at his dwelling regarding a lady being locked up in his dwelling.
>
> Mr Di[e]hm then stated that there was no lady locked up inside her dwelling, the lady who was sitting at the dinner table then approached us and asked why was the police at their dwelling; i saw that the lady was

> intoxicated with alcohol due to her reddish eyes and strong smelt of alcohol coming from her breath, Sgt Decima asked Mr Di[e]hm who this lady was and he Mr Di[e]hm stated that she was his wife."

The statement then recounted that Senior Constable Deireragea had asked if the complainant (whom she named) was at the dwelling. According to the statement, the second appellant said that the complainant was staying with them and had gone out. Constable Harris then saw a woman come out to the living area. Senior Constable Deireragea asked who she was, and the second appellant said that she was the complainant. The appellants went into the living area lounge and sat on the couch, leaving the two officers at the front door. The complainant then approached and Constable Harris heard her say that "it was too late he (Mr Di[e]hm) had already got what he wanted". According to Constable Harris' statement, the complainant was crying and scared. Senior Constable Deireragea then told the complainant not to be frightened and to tell her what had happened. Constable Harris waited for Senior Constable Deireragea while she was talking to the complainant and after a "few seconds" the Senior Constable directed him to arrest the first appellant. He did so and told the first appellant to put some clothes on as the police would be taking him in.

36 Constable Harris' statement said that after taking the first appellant to the police station to be detained both officers returned to the dwelling and informed the second appellant that she would be arrested for aiding her husband. The second appellant was very drunk and when they told her about the rape she said to Senior Constable Deireragea, "Sex its only sex".

37 The statement went on to report that Constable Harris, Senior Constable Deireragea, Constable Namaduk and the complainant returned to the appellants' house to get the complainant's clothes and so Constable Namaduk could take photographic evidence at the crime scene. Photographs were taken and various parts of the house searched. Pornographic videos and two vibrators were found. Subsequently, according to Constable Harris' statement, he and fellow officers took the complainant to hospital for a medical checkup.

The trial — closing addresses

38 The prosecutor and the appellants' pleader delivered their closing addresses on 28 November 2011. A transcript of those addresses was before this Court. In the course of his closing submissions, the prosecutor referred to the appellants' statements to Senior Constable Deireragea and Constable Harris that the complainant was not at their house. He accepted the trial judge's observation that he relied on that evidence heavily as evidence of consciousness of guilt. His Honour referred to Constable Harris as the corroborator to Senior Constable Deireragea and said:

"He did not give evidence for the reasons we know."

39 The trial judge then informed the parties that he had looked at Constable Harris' statement the previous night. He said:

> "I know that it's not strictly before me, but as a matter of fairness I thought I should raise this."

He then referred to the part of Constable Harris' statement in which he said Senior Constable Deireragea told the first appellant that there had been a report that there was a woman locked up inside his house. The trial judge linked that with the evidence of the probationary constable who received the mother's telephone call and who recorded in the log that she had been told by the mother that the complainant was locked up in the house. His Honour observed:

> "Now we've got a drunken Constable Dillon Harris who is unfit to give evidence before the court. How can the prosecution invite the court to rely on the evidence of Senior Constable Deireragea, however honestly it might have been given. How can you as Director invite the court to accept that evidence and reject [the first appellant's] account in light of this statement of Senior Constable Harris?"

His Honour posed the question:

> "How can I be satisfied beyond reasonable doubt, that the conversation was not one which was capable of being interpreted as 'we're asking you if someone is locked up in the house' and they were replying 'no there's no one locked up in the house'."

The prosecutor responded that Senior Constable Deireragea's version of events made more sense than the version in Constable Harris' statement. His Honour asked the prosecutor how he could ignore the fact that Senior Constable Deireragea's version was inconsistent with that of the witness who was not called. The prosecutor submitted that even if the appellants' version of the initial question were accepted, Senior Constable Deireragea's evidence was that she had asked them three times about the complainant. They could easily have responded that the complainant was in the house.

40 The appellants' pleader said that Senior Constable Deireragea's evidence of what had been said should not be accepted without Constable Harris' confirmation of it. He also submitted that Constable Harris would have given evidence going to the complainant's state of intoxication at the time of the police visit.

41 The submissions and exchanges in closing addresses did not include any suggestion by the trial judge or either of the representatives at the bar table that anything should then be done to arrange for Constable Harris to be called as a witness. The focus of the argument was whether his absence meant that the trial judge could not be satisfied beyond reasonable doubt on matters vital to a verdict of guilty against the appellants. This was reflected in the way that the trial judge dealt with Constable Harris' statement in his judgment.

The judgment

42 The trial judge reviewed the evidence carefully and comprehensively. He noted that the police log of the phone call from the complainant's mother to the police station did not report a complaint of rape or threatened rape[6]. The log recorded that the complainant's mother "needed police assistance to check her daughter [who] has called her a minute ago and told her that she was locked up in the house by the couples Mr and Mrs Diehm"[7]. His Honour observed that the report that the complainant was locked up in the house added some credibility to the evidence of the first appellant that he was asked by the police officers whether there was a Nauruan woman locked up in the house. On the other hand, the fact of the phone call being made added credibility to the complainant's evidence that she was not consenting to anything and regarded herself as somehow in peril[8].

43 The trial judge found the complainant was distressed after the events said to constitute the offences. She had been distressed and fearful when speaking to her mother. His Honour accepted Senior Constable Deireragea's account of the significant degree of distress exhibited by the complainant and of her appearance of being fearful. The first appellant's denial of that distress damaged his credibility[9].

44 The trial judge referred to the conflict between the evidence of the first appellant and that of Senior Constable Deireragea as to what was said when the police arrived at the house and, in particular, the first appellant's assertion that the officers asked whether there was a Nauruan locked up in the house. His Honour noted that the conversation between Deireragea and the first appellant took place

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6 [2011] NRSC 24 at [49].

7 [2011] NRSC 24 at [47].

8 [2011] NRSC 24 at [49].

9 [2011] NRSC 24 at [72]–[76].

in the presence of Constable Harris, who had been due to give evidence but did not, because of his involvement in a personal domestic dispute and because he was too drunk to come to court[10]. The trial judge found the evidence of Senior Constable Deireragea to be measured and credible[11]. His Honour dealt with the absence of Constable Harris and his written witness statement in the following way[12]:

> "More importantly, I have examined the statement of Constable Dillon Harris, which was tendered at committal. No application was made to tender his deposition from the committal, pursuant to s 199 of the *Criminal Procedure Act* 1972, but it is a matter of fairness that causes me to refer to it.
>
> In his statement he recorded 'Sgt Decima then informed Mr Diehm that there was a report at his dwelling regarding a lady locked up in his dwelling. Mr Diehm then stated that there was no lady **locked up inside her (sic) dwelling**' [his Honour's emphasis].
>
> The absence of Constable Dillon Harris has denied the defence the chance to explore that conflict in the evidence of the two police officers. I queried with Mr Kurisaqila whether he could responsibly invite the Court to reject Terry Diehm's account about what was said, and invite me to accept that of Sen Const Deireragea, having regard to what is contained in the statement of the untested witness.
>
> The Director submitted that Deireragea asked questions which specifically referred to another person being in the house, and to [the complainant] being in the house, and whether or not the words 'locked up' had been used it was plain that the Senior Constable put clear questions which were met by lies."

45 The trial judge did not receive Constable Harris' statement in evidence, nor did he treat it as such. Counsel for the appellants submitted to this Court that the trial judge had regarded it as a matter of fairness that he assess the effect of Constable Harris' absence from the witness box by reference to the statement which had been tendered at committal, but not at trial. His Honour did not expressly frame his consideration by reference to any prosecutorial duty to call a

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10 [2011] NRSC 24 at [77]–[79].

11 [2011] NRSC 24 at [80].

12 [2011] NRSC 24 at [83]–[86].

material witness, nor by reference to his own power to call a witness. It can be inferred that he undertook the exercise in order to determine whether any miscarriage of justice would flow from the failure to call Harris.

46 The appellants, in their submissions concerning Constable Harris' statement, relied upon his statement that what was first put to them when the police arrived at their front door was that they had a woman locked up in the house — an accusation which was denied and the denial of which would not have been untruthful.

47 The trial judge observed that the prosecution case would have been strengthened if Constable Harris had given evidence to corroborate Senior Constable Deireragea's evidence. He said he made "full allowance for his absence when weighing the evidence of Deireragea."[13] He observed that the defence could no doubt have made much of discrepancies between the evidence of Harris and that of Deireragea, but the failure to call Constable Harris as a witness did not cause his Honour to have any doubt that the second appellant had expressly said "[s]he left earlier in the afternoon" when asked specifically about the complainant[14]. His Honour found no reasonable alternative explanation than that was a deliberate lie on the part of the second appellant and was told in consciousness of guilt. Even if the words "locked up" had been used at some point by Senior Constable Deireragea, the trial judge would not regard her evidence about what was said as a deliberate lie but more likely a mistake. He accepted that she had asked the appellants if they knew the complainant and that 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?"[15] His Honour concluded[16]:

> "Whilst making full allowance for the absence of Constable Dillon Harris, I consider those responses by Terry Diehm were lies told in consciousness of guilt."

48 His Honour found that the complainant must have been significantly affected by alcohol at the time but was capable of communicating, walking

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13 [2011] NRSC 24 at [87].

14 [2011] NRSC 24 at [87].

15 [2011] NRSC 24 at [88].

16 [2011] NRSC 24 at [89].

unaided, and participating in a medical examination[17]. The second appellant was also significantly affected by alcohol but she too was capable of communicating with police and walking[18]. His Honour did not consider that the evidence disclosed that either appellant was so affected by alcohol as to be incapable of forming the intention to commit or to aid and abet rape[19].

49 His Honour referred to deficiencies in the police investigation concerning the knife which the second appellant was said to have used to threaten the complainant. Although the appellants' representative did not have the opportunity to cross-examine police officers in the "first response group", comprising Senior Constable Deireragea, Constable Harris and Constable Namaduk, which had examined the premises, the trial judge attached little credibility to a suggestion by the first appellant that the knife had been planted[20].

50 His Honour found the most troubling aspect of the prosecution case was the failure of the prosecution to cross-examine Rose Igii on her claim, which was denied by the complainant, that the complainant had offered to withdraw the case if the appellants purchased an airline ticket for her[21]. Although his Honour found the complainant's evidence to be generally reliable and believable, he found no reason to disbelieve that of Ms Igii. He then posed the question whether that evidence was "sufficient to raise a reasonable doubt about the guilt of the accused"[22]. In context, his Honour was referring to the effect of Ms Igii's evidence on the prosecution case as a whole, rather than indicating a view that it was for the defence to raise a reasonable doubt. Indeed, later in his reasons his Honour specifically stated that the first appellant had "no obligation to raise reasonable doubt"[23].

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17 [2011] NRSC 24 at [95].

18 [2011] NRSC 24 at [96].

19 [2011] NRSC 24 at [97].

20 [2011] NRSC 24 at [113].

21 [2011] NRSC 24 at [115]–[116].

22 [2011] NRSC 24 at [120].

23 [2011] NRSC 24 at [125].

51 On the assumption that the complainant had made the offer attributed to her by Ms Igii, his Honour said that it was necessary that the rest of the complainant's evidence be very carefully scrutinised. He said[24]:

> "Having given it such scrutiny, I remain satisfied that her evidence, corroborated as it has been, carries a strong ring of truth. She was an impressive witness, who did not exaggerate. I accept her version of events surrounding the rape which she alleges took place."

52 His Honour reviewed the first appellant's evidence, which he described as "quite fanciful" and "riddled with implausible accounts of his sexual encounters with the complainant"[25]. The first appellant's evidence that the complainant had asked him for sex in May 2011 "[j]ust for pleasure, not money" stood in stark contrast to her statement of disgust to the police that "I just had sexual intercourse with a 66 year old man."[26] The appellants' decision to take clothes across to their children at Location on the evening of Monday, 13 June 2011 indicated "that a sudden decision had been made to keep them out of the house overnight."[27]

53 His Honour was satisfied beyond reasonable doubt that both the appellants had engaged in non-consensual sexual intercourse with the complainant, the first appellant penetrating the complainant's vagina with his penis and the second appellant aiding and encouraging him to do so, holding a knife to ensure that the complainant complied[28].

54 The appellants were sentenced to three years and two years imprisonment respectively, dating from 30 November 2011[29].

The grounds of appeal

55 The grounds of appeal were concerned with:

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24 [2011] NRSC 24 at [124].

25 [2011] NRSC 24 at [126].

26 [2011] NRSC 24 at [126].

27 [2011] NRSC 24 at [135].

28 [2011] NRSC 24 at [140].

29 *Republic v Diehm* [2011] NRSC 27.

- the failure of the prosecutor to call as witnesses Constable Harris and other police officers who carried out the first warrantless search of the appellants' house; (Ground 2)

- the failure of the trial judge to call Constable Harris as a witness of his own motion; (Ground 3)

- the trial judge's reference to the witness statement of Constable Harris; (Ground 4)

- the absence of notice to the appellants of the prosecution case with respect to the first appellant's answers to Senior Constable Deireragea and Constable Harris when they first came to the appellants' home on 14 June 2011; (Ground 5 — this ground was not pressed)

- the consequence in all of the circumstances that a reasonable tribunal of fact could not have concluded beyond reasonable doubt that the appellants were guilty of rape. (Ground 6)

The jurisdiction and powers of the High Court in criminal appeals from Nauru

56 Section 5(1) and (2) of the Nauru Appeals Act confer on this Court jurisdiction to hear and determine appeals from the Supreme Court of Nauru. The Nauru Appeals Act confers that jurisdiction in cases in which the Agreement between Australia and Nauru relating to appeals to the High Court from the Supreme Court of Nauru, signed on 6 September 1976, provides that such appeals are to lie[30]. Article 1 of the Agreement provides that appeals are to lie to the High Court from the Supreme Court in respect of the exercise by the Supreme Court of its original jurisdiction in criminal cases as of right by a convicted person against conviction or sentence. As was explained in *Ruhani v Director of Police*[31], the jurisdiction thus conferred upon the Court is original jurisdiction conferred pursuant to s 76(ii) of the Constitution[32]. The history and

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30 Nauru Appeals Act, ss 3, 5, Schedule.

31 (2005) 222 CLR 489; [2005] HCA 42.

32 (2005) 222 CLR 489 at 499 [7] per Gleeson CJ, 512 [52] per McHugh J, 530 [118] per Gummow and Hayne JJ.

background relating to the making of the 1976 Agreement and the passing of the Nauru Appeals Act are also explained in *Ruhani*[33].

57 The powers of the Court on such appeals are set out in s 8 of the Nauru Appeals Act, which applies to the exercise of the Court's jurisdiction under that Act generally:

> "The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court."

As was pointed out in the judgment of this Court in *Amoe v Director of Public Prosecutions (Nauru)*[34] in hearing an appeal from the Supreme Court of Nauru against conviction[35]:

> "the Court is not limited to those grounds for setting aside a conviction which are contained in the common form criminal appeal legislation found in each of the Australian States."

That observation was made in the context of the Court's consideration of a ground of appeal that the conviction appealed against was unsafe and unsatisfactory. The fact that the trial was heard by a judge alone and the general expression of the appellate jurisdiction meant that less deference would be accorded to the trial judge's verdict than that which would be accorded to the verdict of a jury. Their Honours said[36]:

> "The Court must, of course, act on the principle that, unless the trial judge has failed to use or has palpably misused his or her advantage in seeing and hearing the witnesses, it 'ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own

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33 (2005) 222 CLR 489 at 502–503 [22]–[23] per McHugh J, 524–525 [95]–[99] per Gummow and Hayne JJ.

34 (1991) 66 ALJR 29; 103 ALR 595; [1991] HCA 46.

35 (1991) 66 ALJR 29 at 31; 103 ALR 595 at 598.

36 (1991) 66 ALJR 29 at 31; 103 ALR 595 at 598.

> comparisons and criticisms of the witnesses and of their own view of the probabilities of the case'. But where any question arises as to the proper inference to be drawn from the facts, it is the duty of this Court to form an independent judgment on that question, since the Court 'is in as good a position to decide [the question] as the trial judge'." (citations omitted)

58 The present appeal does not involve a contention in terms that the conviction was unsafe and unsatisfactory, but does involve the assertion in the final ground that in all the circumstances a reasonable tribunal of fact could not have concluded beyond reasonable doubt that the appellants were guilty of rape. That assertion, however, was based upon the narrow factual question whether there was a mattress on the lounge room floor when the front door of the appellants' house was opened to Senior Constable Deireragea and Constable Harris.

59 It may be noted that the *Appeals Act* 1972 (Nauru) confers a right of appeal against convictions from the Supreme Court to this Court and purports to confer jurisdiction on this Court to hear and determine the appeal. Section 38(1) confers general powers on the Court which reflect those set out in s 8 of the Nauru Appeals Act. Section 38(2) of the *Appeals Act* 1972 (Nauru) contains a proviso in the following terms:

> "The High Court may, notwithstanding that it may be of the opinion that the point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred."

Those provisions are contained in an enactment of the Nauru Parliament. They were not referred to in argument, nor was there any suggestion that this Court should dismiss the appeal on the basis that, notwithstanding one or more of the grounds might be decided in favour of the appellants, no substantial miscarriage of justice had occurred. The question for this Court is whether, on the basis of any of the grounds of appeal, a miscarriage of justice has occurred.

Failure to call material witnesses

60 The appellants submitted that Constable Harris was a material witness and that the prosecution's failure to call him as a witness was a breach of its duty which deprived the appellants of a chance of acquittal. They argued that a similar consequence flowed from the failure to call the police who attended the premises as part of the first response team and who examined the premises without the benefit of a search warrant. This can only have been a reference to Constables Harris and Namaduk, who attended the premises with Senior

Constable Deireragea and the complainant, took photographs and found the knife which the complainant said had been used to threaten her.

61 A loss of a chance of acquittal was said to have arisen from the failure to call Constable Harris because of the appellants' inability, in his absence, to challenge evidence upon which the trial judge acted in finding that the first appellant's responses to Senior Constable Deireragea were lies indicating a consciousness of guilt. The appellants also said that they had lost a chance to exploit a discrepancy between Harris' evidence and that of Senior Constable Deireragea on whether the complainant had given a statement to Deireragea in the police car, after which Deireragea arrested the first appellant for rape. That discrepancy was said to go to the issue of whether there had been a recent complaint and whether the complainant was distressed in a way that corroborated her evidence.

62 A further discrepancy, linked to the failure to call Constables Harris and Namaduk as members of the first response team, was said to be relevant to the warrantless search and the location of items seized from the house as potential exhibits. That was said to go to the allegation that the police had positioned physical evidence to support the complainant's account of what had happened.

63 It is well established that the prosecutor in a criminal trial conducted under the adversarial system of criminal justice must act "with fairness and detachment and always with the objectives of establishing the *whole* truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one"[37]. The objective of a fair trial requires the prosecutor to call all available witnesses unless there is some good reason not to do so. Mere apprehension that testimony of a particular witness will be inconsistent with the testimony of other prosecution witnesses is not a good reason for not calling that witness[38]. Nor is it a good reason that the witness is regarded as "in the camp of" the accused[39].

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37 *Dyers v The Queen* (2002) 210 CLR 285 at 293 [11] per Gaudron and Hayne JJ; [2002] HCA 45, quoting *Whitehorn v The Queen* (1983) 152 CLR 657 at 663–664 per Deane J; [1983] HCA 42 (their Honours' emphasis).

38 (2002) 210 CLR 285 at 293 [11] per Gaudron and Hayne JJ.

39 *MFA v The Queen* (2002) 213 CLR 606 at 629 [81] per McHugh, Gummow and Kirby JJ; [2002] HCA 53.

64 In *R v Apostilides*[40] this Court set out a number of propositions applicable to the conduct of criminal trials in Australia which are generally apposite to the conduct of a trial before a judge sitting without a jury in Nauru[41]:

1. The prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the prosecution.

2. The trial judge may, but is not obliged to, question the prosecutor in order to discover the reasons which led the prosecutor to decline to call a particular person. He or she is not called upon to adjudicate the sufficiency of those reasons.

3. While at the close of the prosecution case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he or she cannot direct the prosecutor to call a particular witness.

4. When charging the jury, the trial judge may make such comment as he or she then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. Any such comment will be affected by such information as the prosecutor has provided relating to the reasons for his or her decision.

5. Save in the most exceptional circumstances, the trial judge should not call a person to give evidence — this principle is qualified for Nauru by s 100 of the CPA, which authorises the court to call a witness and requires it to do so when it appears to the court "essential to the just decision of the case".

6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

65 As Dawson J had earlier explained in *Whitehorn v The Queen*, a prosecutor is bound or under a duty to call all available material witnesses in the sense that a failure to exercise the discretion, resulting in the denial of a fair trial

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40 (1984) 154 CLR 563; [1984] HCA 38.

41 (1984) 154 CLR 563 at 575 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

to the accused, may result in the setting aside of the conviction. His Honour said[42]:

> "It is in this context that it is possible to speak of a Crown Prosecutor being bound, or under a duty, to call all available material witnesses. It is not a duty owed by the prosecutor to the accused which is imposed by some rule of law; rather it forms part of a description of the functions of a Crown Prosecutor."

The use of terms such as "bound" and "duty" and "required" does not detract from the discretionary character of the prosecutor's function in relation to the calling of witnesses. That discretionary character was affirmed in *R v Soma*[43]:

> "what is now clear is that it is for the prosecution to decide what witnesses will be called and 'determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused'. That power is not unconfined. In particular, if an accused objects to the course which the prosecution takes in presenting its case, the objection must be resolved by applying principles which include the general rule that the prosecution must offer all its proof before the accused is called on to make his or her defence." (footnote omitted)

66 There was no dispute at trial or on this appeal that Constable Harris was a material witness. Nor was there any dispute that he was unable to be called on the second day of the trial because he was "considerably under the influence of alcohol". Only one further witness was called following that advice to the Court by the prosecutor. That was Dr Castanedo. The prosecutor then closed his case without calling Constable Harris. He did not request an adjournment for the purpose of calling him. Nor, at that time, did the appellants' representative. Had he done so, there is no reason to believe that the trial judge would not have granted it. It would have been an entirely appropriate exercise of his Honour's discretion. The absence of any such application may have reflected a forensic assessment. It may have reflected a judgment by the prosecutor that Constable Harris' reliability was questionable. It may have reflected an inadequate appreciation, by either or both of the representatives, of the relevant legal principles. These are matters of speculation. The key question is whether the

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42 (1983) 152 CLR 657 at 674.

43 (2003) 212 CLR 299 at 309 [29] per Gleeson CJ, Gummow, Kirby and Hayne JJ. See also *Stanoevski v The Queen* (2001) 202 CLR 115 at 127 [47] per Gaudron, Kirby and Callinan JJ; [2001] HCA 4.

failure to call Constable Harris resulted in unfairness to the appellants constituting or giving rise to a miscarriage of justice.

67 The respondent submitted that the central issue in the case was whether the conduct alleged by the complainant happened at all. The only direct evidence that it happened was from the complainant. The first appellant had denied the incident. The trial judge accepted the complainant's evidence, which was corroborated by evidence of her distress given by Senior Constable Deireragea and the finding that the appellants lied when asked by police about her presence at their home.

68 The appellants submitted that, when viewed in the circumstances of the case as a whole, the failure by the prosecution to call Constable Harris gave rise to a miscarriage of justice. The trial judge, having considered Constable Harris' statement, formed the view that the failure to call him harmed the prosecution case. He accepted Senior Constable Deireragea's evidence as "measured and credible" despite the absence of Constable Harris[44]. The respondent pointed to aspects of the Harris statement which would have strengthened the prosecution case:

(a) that the first appellant was dressed in only a towel and no shorts at the time of police attendance;

(b) that during the time the first appellant was at the door, the second appellant approached and Senior Constable Deireragea asked if there was a lady at their dwelling, namely the complainant, and the second appellant stated that the complainant was staying with them and had gone out;

(c) that while Senior Constable Deireragea was having a conversation with the appellants, Constable Harris saw a lady come out of the living area and Senior Constable Deireragea then asked who that lady was and the second appellant stated that it was the complainant;

(d) that the complainant was distressed at the time of police attendance;

(e) that she complained of sexual assault in the presence of Constable Harris;

(f) that the second appellant upon her arrest stated to Senior Constable Deireragea, "Sex its only sex", which was arguably an admission to an element of the offence;

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44 [2011] NRSC 24 at [80].

(g) observations made by Constable Harris as to the state of the scene upon examination; and

(h) evidence capable of confirming the continuity of various exhibits.

69 The submissions made by the respondent should be accepted. The failure to call Constable Harris did not give rise to a miscarriage of justice, having regard to the matters canvassed in the trial judge's judgment and the circumstances set out in the respondent's submissions.

70 The appellants also contended that the failure to call Harris and other police officers involved in the first post-arrest examination of the appellants' house, apparently carried out without a search warrant, deprived them of the ability to challenge evidence relating to the location of physical items said to have been found at the house. These items appeared in photographs which were taken by Constable Botelanga. The appellants submitted that in this respect the failure to call Constable Harris was significant because he had entered the house during the initial conversation with the appellants at the door and had seen the state of the house at that time.

71 According to the police photographs taken by Constable Botelanga during the second search of the premises, there was a mattress on the lounge room floor, a laptop on a chair facing the mattress, two pairs of panties, one on the dining table and one on the floor, and a towel draped over a chair next to the mattress. The appellants submitted that the possibility could not be excluded that some of these items had been planted. Had the other police officers involved in the first response group, ie Constables Harris and Namaduk, been called, their evidence would have been relevant to Senior Constable Deireragea's evidence and that of the complainant and the first appellant.

72 The respondent did not dispute that evidence from Constable Harris and Constable Namaduk may have been relevant in determining whether Senior Constable Deireragea found a knife on the kitchen bench at the direction of the complainant, which was circumstantial evidence in support of the complainant's allegations.

73 However, the suggestion that the response team could have supported a contention that police had re-organised the scene of the alleged offences is speculative at best. The trial judge had regard to their absence and, in doing so, was entitled to accept, as he did, that the kitchen knife was used as described by the complainant. There was no miscarriage of justice arising in that connection from the failure to call Constables Harris and Namaduk.

Whether the trial judge should have called Constable Harris as a witness

74 The question whether, absent consent or statutory authority, a trial judge in criminal proceedings can call a witness of his or her own motion has been considered on a number of occasions in this Court, the earliest of which was in *Titheradge v The King*[45], said by the majority in *Shaw v The Queen*[46] to have denied the existence of such a power[47], a view adopted by Dawson J in *Whitehorn*[48]. However, in *Apostilides*[49], in a unanimous joint judgment to which Dawson J was party, the Court noted that Gibbs CJ and Brennan J had reserved their opinion on the question in *Whitehorn* and that Murphy and Deane JJ did not feel it necessary to discuss it. Having considered the authorities, the Court then set out the six general propositions, already quoted, including proposition five that[50]:

> "Save in the most exceptional circumstances the trial judge should not himself call a person to give evidence."

75 In the present case, there is statutory authority for the trial judge to take such a course. That authority is to be found in s 100(1) of the CPA, which provides in the relevant part:

> "Any Court may at any stage of any proceeding under this Act, of its own motion or on the application of any party, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall, unless the circumstances make it impossible to do so, summon and examine or recall and re-examine any such person if his evidence, or further evidence, appears to it essential to the just decision of the case".

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45 (1917) 24 CLR 107; [1917] HCA 76.

46 (1952) 85 CLR 365; [1952] HCA 18.

47 (1952) 85 CLR 365 at 379 per Dixon, McTiernan, Webb and Kitto JJ.

48 (1983) 152 CLR 657 at 675–684.

49 (1984) 154 CLR 563.

50 (1984) 154 CLR 563 at 575.

There follows a proviso dealing with the rights of counsel to cross-examine any such person and making provision for adjournments to enable such cross-examination to be prepared.

76 The CPA was evidently taken from a standard model for a procedural statute which had been developed for former British dependencies, the Fiji Islands, Kiribati, Solomon Islands and Tuvalu, and also for the former Anglo-French condominium of Vanuatu[51]. Provisions in terms very similar to those of s 100 have for many years appeared in criminal procedure statutes in India, Singapore and Malaysia. One such provision is s 540 of the Indian *Code of Criminal Procedure* (Act No V of 1898), which was repealed and re-enacted as s 311 of the Indian *Criminal Procedure Code* 1973. The Supreme Court of India has treated the section as providing, in its first part, a broad discretion to summon witnesses which must be carefully exercised and, in the second part, a mandatory test not involving the exercise of discretion[52].

77 A similar provision is also found in s 283 of the *Criminal Procedure Code* (Act No 15 of 2010) of Singapore. The verbal formula is almost identical. It has predecessors in the *Criminal Procedure Code* (Cap 21, 1936) of the Straits Settlements, the *Criminal Procedure Code* (Cap 132, 1955) of the Colony of Singapore, and s 399 of the *Criminal Procedure Code* (Cap 68, 1985 Rev Ed), which was repealed and re-enacted as the current provision. In the Supreme Court of Singapore in *Azman Bin Jamaludin v Public Prosecutor*[53], the Chief Justice of Singapore, after referring to some of the Indian decisions, said of s 399[54]:

> "The local decisions on s 399 of the CPC (as well as the Indian decisions ...) show that the first limb confers a discretionary power on the trial judge, whilst the second limb mandates his exercise of the power to summon or recall a witness if it is essential to the justice of the case."

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51 Colvin, "Criminal Procedure in the South Pacific", (2004) *Bond University Law Papers* at 5–6, available at <epublications.bond.edu.au/law_pubs/19>.

52 *UT of Dadra & Haveli v Fatehsinh Mohansinh Chauhan* [2006] INSC 491 at [8]; see also *Ram Jeet v The State* AIR 1958 All 439 at 440 [4], a decision of the Allahabad High Court, cited with approval by the Supreme Court of India in the above-mentioned case; *Jamatraj v State of Maharashtra* AIR 1968 SC 178 at 181 [10].

53 [2011] SGHC 250.

54 [2011] SGHC 250 at [13].

The Chief Justice expressly noted that the section represents a departure from the position under English law.

78 In Malaysia, an almost identical provision is found in s 425 of the *Criminal Procedure Code* (Act 593), which has its ancestry in s 425 of the *Criminal Procedure Code* (FMS Cap 6) of the Federation of Malaya. That provision was considered by the Supreme Court of Malaysia in *Ramli bin Kechik v Public Prosecutor*[55]. The Court referred to the decision of the Indian Supreme Court in *Jamatraj v State of Maharashtra*[56] and held[57]:

> "If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section. Where the court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them".

79 It is not necessary for present purposes to undertake any exhaustive exposition of the scope and operation of s 100. The provision appears to have a long history. Its departure from the very restrictive approach of the common law may have reflected a perception of conditions, including the limited availability of competent legal representation, in those colonial and post-colonial jurisdictions for which it appears originally to have been designed. There is no reason to suppose, however, that the discretionary element of s 100(1) should not be informed by a principle of restraint, having regard to the risks which necessarily attach to a trial judge calling a witness. As to the obligation imposed by the section, it is not enlivened unless the calling of the witness appears to the court to be essential to the just decision of the case. For the reasons already given, the failure by the prosecutor to call Constable Harris was not shown to have given rise to a miscarriage of justice. That being so, it could not be said that his evidence was essential to the just decision of the case.

The trial judge's reference to the witness statement

80 The trial judge's reference to Constable Harris' statement was done on notice to the parties in the course of closing submissions. Both parties had had notice of the content of the statement from a time prior to the commencement of

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55 [1986] 2 MLJ 33.

56 AIR 1968 SC 178.

57 [1986] 2 MLJ 33 at 34.

the trial. The statement was not put in evidence, nor used in evidence. There was no breach of natural justice in the trial judge's reference to it.

Whether the verdict was unreasonable

81 This ground was based on a narrow factual argument about the presence of a mattress in the lounge room of the appellants' house. The appellants submitted that if the mattress was not in the lounge room at the time when the front door of the house was opened to police, the offences could not have been committed as alleged. The first appellant had denied that there was a mattress in the lounge room. The appellants submitted that it was open to infer the mattress was not there having regard to Senior Constable Deireragea's failure to say it was and from her testimony about knocking for ten minutes. No weight, it was said, could be placed on any other of the evidence relating to the mattress. It was said that Senior Constable Deireragea's testimony about the warrantless search did not establish that she was present for the entire time. Constable Botelanga's testimony and the photographic evidence spoke to a later point in time. Further, it was open to infer that the evidence of Constable Harris and Constable Namaduk and the photographs said to have been taken during the warrantless search would not have assisted the prosecution because of the unexplained failure to adduce that evidence.

82 These are argumentative considerations which do not overcome the trial judge's acceptance of the corroborated evidence of the complainant that the first appellant had raped her with the assistance of the second appellant. They do not establish a basis for saying that it was not open to the trial judge to conclude as he did, beyond reasonable doubt, that the offences had been committed.

Conclusion

83 For the preceding reasons, this appeal should be dismissed.