IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

No. B 19 of 2011

BETWEEN:

JULIAN RONALD MOTI (Appellant)

and

THE QUEEN (Respondent)

10 **APPELLANT'S SUBMISSIONS**

Part I: Certification

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

Part II: Concise statement of issues

2. This appeal raises the following issues:

   (a) Is it open to conclude that a prosecution based on the evidence of witnesses who are being paid by the executive, in amounts far exceeding expenses associated with giving evidence, and in response to demands and threats to withdraw from the prosecution, is an abuse of the processes of the court?

20 (b) Where a person is forcibly brought into the Australian jurisdiction, without extradition proceedings, in breach of deportation laws and a court order of a foreign country, with the knowledge and connivance or involvement of the Australian executive, does the principle established by the House of Lords in *R v Horseferry Magistrates' Court; Ex Parte Bennett (No 1)*[1] allow an Australian court to grant a stay of proceedings?

   (c) What constitutes connivance or involvement for the purposes of the application of this principle?

   (d) Did the Court at first instance err in failing to hold that the Australian executive involved itself or connived in the unlawful rendition of the appellant
30 to Australia?

[1] [1994] 1 AC 42 ('*Bennett*'). The principle was recognised in Australia in *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546.

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Part III: Section 78B notices

3. At the special leaving hearing, the respondent indicated that it would file s 78B notices which would be necessitated by a matter it intended to raise by way of contention. The appellant considers that no further s 78B notices will be necessary.

Part IV: Reported reasons for judgment of Court below

4. The reasons for judgment of the Court of Appeal are reported as *R v Moti* (2010) 240 FLR 218. The reasons for judgment of the learned primary judge are reported as *R v Moti* (2009) 235 FLR 320.

Part V: Relevant facts

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5. Committal proceedings in Vanuatu: In 1998 the appellant was charged in Vanuatu with seven counts of unlawful sexual intercourse with a 13 year-old girl. The substance of the allegations was that the appellant had maintained a relationship with the complainant over several months in 1997. The appellant was originally committed for trial on these seven counts, then this decision was quashed on appeal. At a fresh committal proceeding in 1999 the appellant was discharged on all 3 counts he faced.

6. The appellant's potential appointment as Attorney-General of the Solomon Islands: The Australian Federal Police (**AFP**) were aware of the allegations against the
20 appellant in 2001.[2] In October 2004 the Australian High Commissioner to Solomon Islands, Mr Cole, raised concerns about the prospect of the appellant being appointed Attorney-General of Solomon Islands, having regard to the appellant's perceived disposition toward Australian policies and interests in the Pacific region. Mr Cole then applied continuous pressure on the AFP to investigate the appellant for a possible breach of Australia's child sex tourism laws, because the existence of an investigation would assist efforts to prevent the appellant's appointment. The AFP began an investigation in March 2006. The appellant was appointed Attorney-General of Solomon Islands on 19 September 2006.

7. Investigation by the AFP: After gathering evidence in Vanuatu, the AFP referred a
30 brief of evidence to the Commonwealth Director of Public Prosecutions in June 2006. On 1 October 2006 the Attorney-General's Department issued a request to Solomon Islands for the appellant's extradition to Australia. This request was formally rejected by the Government of the Solomon Islands in September 2007.

8. The rendition of the appellant to Australia: On 13 December 2007 the Solomon Islands government of Prime Minister Sogavare was defeated in a no-confidence motion. New Prime Minister Mr Sikua was elected on 20 December 2007. On 11 December 2007, a cable from Australia's Attorney-General's Department to its High

[2] The case against the appellant was entered on the AFP computer database in 2001: see case note of Shane Morris dated 24 November 2004.

Commission in Honiara noted that the new government, then in opposition, would prefer to deport the appellant rather than extradite him, and warned diplomats not to express a preference for either deportation or extradition, in order to minimise the potential for the appellant to raise an abuse of process claim.

9. On 14 December 2007, the AFP's Senior Liason Officer in Honiara, Peter Bond (**FA Bond**), was informed that a new Government would prefer to deport rather than extradite the appellant to avoid 'tying up the legal system' in appeals. On 21 December 2007 Canberra sent a further extradition request. On 24 December 2007 a deportation order was made. On that date Solomon Islands police officer Mr Kalita and Solomon Islands immigration officer Mr Guporo met FA Bond at the High Commission and obtained visas which would allow them to escort the appellant to Brisbane. On 25 December 2007 the appellant obtained an order from the Magistrates' Court staying the deportation order on an interim basis and restraining the Director of Immigration and the Commissioner of Police from interfering with the appellant or approaching his home in order to deport him.

10. Between 24 and 27 December FA Bond attended a number of meetings with officials of the Solomon Islands government concerning the proposed deportation. On these dates FA Bond and Ms Bootle from the High Commission authored numerous communications which noted the appellant's right of appeal against his deportation under the Solomon Islands Deportation Act, and the restraining order which the appellant had obtained. FA Bond and Ms Bootle were aware of the plan to deport the applicant in deliberate breach of his rights, and in a deliberate attempt to prevent him from going to Court in pursuit of those rights. On the morning of the appellant's arrest on 27 December 2007, FA Bond attended a meeting with Mr Wickham, Permanent Secretary of Immigration, and Mr Suri, a lawyer advising the Sikua Government. Solomon Islands police and immigration officers were told at that meeting to ignore any Court orders the appellant had, and that the appellant could 'appeal from Brisbane.' Later that morning FA Bond passed on to Deputy Police Commissioner Marshall, who was the senior police officer overseeing the deportation, the advice which had been given at that meeting that the proposed deportation was legal. Later that day the appellant was arrested at his home and driven to the airport by police and immigration officers. FA Bond handed the appellant's document of identity to Mr Marshall and he was escorted onto the flight. The appellant was arrested on arrival at Brisbane airport by AFP officers.

11. Payments to prosecution witnesses: In January 2007 the complainant's father requested immediate financial assistance for the compainant and her family, and that they be relocated to Australia. He told the AFP that his daughter may reconsider her commitment to the prosecution. On 24 December 2007 the complainant requested to be brought to Australia with her family, and said she would withdraw from the prosecution if this were not done. Between December 2007 and January 2008 the complainant made numerous other threats to withdraw from the prosecution. In January 2008, the complainant came to Australia for medical treatment and remained here, and the AFP conducted an assessment of the family's needs and sought legal advice about making payments to the compainant and her family. Advice was received that payments could be made for 'subsistence'. In February 2008 the AFP

began paying a monthly allowance of $AUD2,480 to the compainant, $AUD1,290 to her brother, $AUD480 to her father and $AUD2,475 to her mother. The minimum wage in Vanuatu was AUD$240 per month. Between February 2008 and November 2009 the appellant was paid a total of $67,576, while her parents and brother received $81,639.[3]

12. Proceedings in Australia: The appellant has been committed for trial on an indictment charging him with seven counts of engaging in sexual intercourse with a person under the age of 16 years, whilst outside Australia, contrary to section 50BA of the *Crimes Act 1914* (Cth).

10 **Part VI: Appellant's argument**

Ground 1: The witness payments

The exercise of discretion to grant the stay at first instance was open

13. Appellate review of the exercise of the power to stay a proceeding is to be conducted in accordance with the principles set out in *House v R*.[4]

14. The question posed by the making of the witness payments was a novel one, and fell to be considered by reference to the general principles underlying the notion of abuse of process. In *R v Rogers*,[5] Mason CJ said:

> "The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories.[6]
>
> 20 ...
>
> [T]here are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute."[7]

15. In the Courts below, the appellant's argument in respect of the payment to prosecution witnesses relied predominantly on the second aspect to abuse of process identified by Mason CJ. In relation to this aspect, Lord Steyn said in *R v Latif*:[8]

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[3] These were the figures cited by the learned primary judge. Other documents showed that the witnesses in Vanuatu were to receive $50,940 for the calendar year 2008 and $66,468 for the year 2009: see AFP Minute headed 'Review of witness support arrangements' by John Askew dated 21 May 2009. Without disclosure of the documentation evidencing the payments, the appellant is not in a position to resolve these discrepancies.
[4] (1936) 55 CLR 299. See *R v Carroll* (2002) 213 CLR 635 at 657 [73] (Gaudron and Gummow JJ).
[5] (1994) 181 CLR 251.
[6] At 255, citing *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536 (Lord Diplock). See also *R v Carroll* (2002) 213 CLR 635 at 651 (Gleeson CJ and Hayne J).
[7] At 256.
[8] [1996] WLR 104 at 112G.

> "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed...[9] [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful."

16. The principles grounding the Court's jurisdiction to relieve against an abuse of process were correctly set out by the learned primary judge.[10] Her Honour's reasoning reveals no error in their application. It was open to Mullins J to conclude, in all the circumstances, that the payments made brought the administration of justice into disrepute. Two errors were wrongly attributed to Mullins J by Holmes JA (with whom Muir and Fraser JJA agreed):[11]

(a) a failure to recognise that the payments were not designed to, and did not, 'procure evidence'; and

(b) a failure to pay sufficient regard to the fact that the payments were not illegal.

The purpose of the payments

17. Mullins J accurately set out the chronology of the AFP investigation.[12] Her Honour clearly recognised that witness statements were taken from the complainant and her family before the question of payments arose. She found that the payments had been made for the purpose of ensuring that the witnesses '*remain willing* to give evidence against the appellant,'[13] and to keep the charges against him on foot. This language adverts to the very distinction the Court of Appeal held Mullins J had failed to draw.

18. Further, the Court of Appeal erred in treating this distinction as decisive. The payments went well beyond providing subsistence, and were made in response to demands with threats. The impropriety of the means being employed to sustain the prosecution raised the question of the integrity of the administration of justice. It cannot be said that payments which induce initial cooperation are improper, while payments which secure ongoing cooperation, whatever the circumstances and whatever the price, are not.

19. There are no fixed categories of cases amounting to an abuse of process,[14] and the considerations which inform the exercise of the discretion to stay proceedings cannot be rigidly confined.[15] Mullins J rightly concluded that the only available inference

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[9] His Lordship cited *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42.
[10] See: *R v Moti* (2009) 235 FLR 320 at [78]-[82]. Hereafter, for convenience, the judgment of Holmes JA will be referred to as the judgment of the Court.
[11] *R v Moti* (2010) 240 FLR 218 at [38].
[12] *R v Moti* (2009) 235 FLR 320 at [7] and [54]-[68].
[13] *R v Moti* (2009) 235 FLR 320 at [87] (emphasis added); see also [73].
[14] *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266-267 [14]-[15] (Gleeson CJ, Gummow Hayne and Crennan JJ).
[15] *R v Carroll* (2002) 213 CLR 635 at 651 (Gleeson CJ and Hayne J).

was that the AFP's decision making relating to the payments to the witnesses in Vanuatu was directed at the continuation of the prosecution against the appellant.[16] The significance of this conclusion is to be assessed in light of all of the circumstances of the case. These circumstances, including the political motivation underlying the AFP investigation, the means of the appellant's rendition to Australia, the age of the allegations and the fact that they had been dealt with according to the law of Vanuatu, tell of a prosecution being pursued by the executive at any cost. It was open to Mullins J to conclude that the Court should not countenance the means being employed to keep the prosecution on foot.[17]

10 ***The legality of the payments***

20. To the extent that it is relevant, there was no error in the consideration by Mullins J of the legality of the payments.

21. As a preliminary point, it is far from clear that the witness payments were legal. For the payments to be legal the respondent would need to show that they were an "*efficient, effective, economical and ethical*" use of Commonwealth funds that was "*not inconsistent with the policies of the Commonwealth.*"[18] None of the evidence adduced at the hearing of the stay application demonstrated satisfaction of these criteria. Rather, the evidence showed that the payments, at least to the complainant's family, were outside any existing guidelines for witness support.[19] No other
20 Commonwealth policy was said to support the making of the payments. Further, the evidence showed that the payments, although justified as 'subsistence' payments, clearly exceeded subsistence levels.[20] Payments made to cover rent were misappropriated by the witnesses, who also used them to fund their business interests. The quantum of the payments was ultimately being determined by what was necessary to keep the prosecution of the appellant on foot. In these circumstances it could not be said that the payments represented an efficient, economical or ethical use of Commonwealth resources.

22. The statutory authority for the payments was a question raised in the course of argument by Mullins J.[21] The respondent submitted in response that the payments
30 were lawful, by reference to the *Financial Management and Accountability Regulations 1997* (Cth). Her Honour went on to deal expressly with this submission in her reasons.[22] Accordingly, the conclusion that the question of 'legality' was not adequately considered at first instance cannot be sustained.

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[16] *R v Moti* (2009) 235 FLR 320 at [88].
[17] *R v Moti* (2009) 235 FLR 320 at [87].
[18] These are the requirements imposed by section 44 of the *Financial Management and Accountability Act 1997* (Cth) and regulation 9 of the *Financial Management and Accountability Regulations 1997* (Cth) for the 'proper use' of Commonwealth resources.
[19] *R v Moti* (2009) 235 FLR 320 at [61] and [84].
[20] *R v Moti* (2009) 235 FLR 320 at [71].
[21] T 11-74.
[22] *R v Moti* (2009) 235 FLR 320 at [67].

23. The question for Mullins J, which her Honour correctly identified, was the underlying propriety of the witness payments, rather than their 'legality' as such.[23] Neither a breach of a statutory provision nor the commission of a common law offence by prosecuting authorities are necessary preconditions for an abuse of process to arise. To hold otherwise would be to confine the considerations relevant to the notion of an abuse of process in a manner contrary to principle.[24] However, 'illegality' seems to have been treated as a necessary precondition by the Court of Appeal.

24. At one point in her reasons Holmes JA also seemed to recognise propriety as the central question, although her Honour went on to say that Mullins J did not make any finding that the payments were improper.[25] This conclusion was erroneous. Mullins J held that the payments to the complainant's family were an affront to the public conscience which brought the administration of justice into disrepute.[26] These conclusions entail a finding that the payments were improper.

25. Why a supposed absence of illegality in the witness payments was ultimately treated as a decisive consideration is not apparent from the reasons of the Court of Appeal.

Correct approach to the issue of witness payments

26. The witness payments enlivened the jurisdiction to stay the prosecution for the following reasons:

    (a) they were exceptional,[27] and made in the context of a politically motivated prosecution. This undermines public confidence in the fair and equal administration of justice;

    (b) they were in direct response to demands made with menaces;

    (c) although the payments were justified on the basis that they were necessary for the 'subsistence' of the witnesses, they clearly exceeded subsistence levels;[28]

    (d) the evidence showed that the payments were used to support the witnesses' lifestyles and business interests;

    (e) the evidence, including the following statements from AFP documents (neither of which were referred to by the Court of Appeal or by Mullins J), showed that amount of the payments was 'flexible', and was set having regard to what was necessary to keep the prosecution on foot:

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[23] *R v Moti* (2009) 235 FLR 320 at [67]. See *Bennett* [1994] 1 AC 42 at 74G (Lord Lowry).
[24] See note 6 above.
[25] *R v Moti* (2010) 240 FLR 218 at [34].
[26] *R v Moti* (2009) 235 FLR 320 at [87]-[88].
[27] At first instance and before the Court of Appeal the respondent conceded that the payments were exceptional, and relied on this in support of an argument that the payments were not an abuse of process or, in the alternative, that a conditional stay of proceedings rather than a permanent stay would be appropriate as payments of this type were not endemic. Some reference to these arguments is made in *R v Moti* (2010) 240 FLR 218 at [30] and in *R v Moti* (2009) 235 FLR 320 at [75].
[28] *R v Moti* (2009) 235 FLR 320 at [71] and [75].

"Bottom line is that we need to keep [the complainant] on side because without her statement there is no case against Moti"[29]

"If pushed/hesitant – there may be some flexibility within the upper financial range to modify some support arrangements";[30]

(f) the payments were made outside any lawful authority;

(g) the payments were not effectively monitored, allowing for example monies intended for payment of rent to be misappropriated by the witnesses without any sanction;

(h) the payments establish a precedent for witnesses to demand with threats financial support in exchange for their evidence; and

(i) the disclosure of the quantum of the payments and the documents revealing the basis for their calculation was belated and incomplete.[31]

27. Whether the administration of justice is brought into disrepute is to be considered from the perspective of right-thinking people.[32] The political motivation behind the investigation of the appellant was regarded by the Court of Appeal as irrelevant to whether the witness payments brought the administration of justice into disrepute.[33] The respondent readily conceded that the witness payments were unprecedented and unlikely to be repeated in other cases. Why was such a radical exception being made by the prosecution in the appellant's case? The right-thinking person would correctly perceive a link between the political genesis of the prosecution, the delay, the means by which the appellant was brought to the jurisdiction, and the extraordinary payments being made to keep the prosecution on foot. The right-thinking member of the community would have regard to all of the evidence, such as the following statement from FA Bond, in a way in which the Court of Appeal did not:

"In light of today's events, the removal of Moti from the Solomon Islands to Australia via deportation is now in danger of not becoming an option. The situation is now critical. Should circumstances result in Moti's release from custody and he assumes the position of Attorney General the consequences will be disastrous for Australians, Australian interests, and RAMSI."[34]

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[29] Email from AFP officer Anne Dellaca dated 13 March 2007.

[30] AFP Minute headed 'Operation ROUGE: General discussion points witness support', dated around 1 February 2008.

[31] See note 2 above. The learned primary judge rightly took into account the AFP's attitude to disclosing the extent of and basis for the payments in considering whether a stay was warranted: see *R v Moti* (2009) 235 FLR 320 at [68]-[70], [88] and [91]. Disclosure pursuant to the *Criminal Code 1899* (Qld) of the documents concerning the witness payments was resisted by the AFP and the Commonwealth DPP, until it was ordered by Martin J on 16 September 2009: see *R v Moti* [2009] QSC 293. As the learned primary judge noted, disclosure was still being made after final submissions had been made on 6 November 2009.

[32] The expression is from Lord Diplock's judgment in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536. It was approved as a correct statement of the law by this Court in *Walton v Gardiner* (1993) 177 CLR 378 at 393 (Mason CJ, Deane and Dawson). See also *Rogers v R* (1994) 181 CLR 251 at 256; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at [6]; and *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty* Ltd (2009) 260 ALR 34 at [56].

[33] *R v Moti* (2010) 240 FLR 218 at [32].

[34] Email from FA Bond to Brett Jackson dated 16 October 2006.

Ground 2: the unlawful rendition of the appellant

28. In *Bennett* the House of Lords held that the courts should refuse to try an accused who had been brought to the jurisdiction in disregard of legal procedures, by a process to which the executive authorities had been a knowing party.[35] In Australia, the same principle was recognised in *Levinge v Director of Custodial Services (NSW)*.[36] In that case, McHugh JA stated the relevant test as being whether the prosecuting authorities were a party to, or connived in, the unlawful expulsion.[37]

29. The removal of the appellant from Solomon Islands to Australia:

    (a) breached a statutory right of appeal against his deportation;[38]

    (b) breached a Magistrates' Court order specifically restraining the authorities from effecting his deportation; and

    (c) amounted to a disguised extradition, in the sense that it was clearly for the improper purpose of ensuring the appellant faced charges in Australia,[39] and involved the deliberate circumvention of extradition procedures.[40]

30. The Australian authorities knew in advance of the plan to deport the appellant in breach of his rights, and were aware that the purpose was to deny him recourse to the courts. Despite this, Australian officials encouraged and assisted the appellant's unlawful rendition to Australia by:

    (a) arranging travel documentation for the appellant and the escorting officers who held him under arrest;

    (b) arranging and paying for the escorts' accommodation in Brisbane;

    (c) FA Bond handing travel documentation to Solomon Islands police at the airport;

    (d) FA Bond, on the morning of the deportation, passing on to the Deputy Chief Commissioner of the Solomon Islands police force, Mr Peter Marshall, 'legal advice' to the effect that the planned deportation was lawful, when he knew full well that it was not;

    (e) FA Bond attending numerous meetings at which the plan to deport the appellant unlawfully was discussed, without demurrer from him;

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[35] [1994] 1 AC 42 at 62 (per Lord Griffiths; Lord Bridge, Lord Lowry and Lord Slynn agreeing; Lord Oliver dissenting).
[36] (1987) 9 NSWLR 546. *Bennett* and *Levinge* were referred to in *R v Truong* (2004) 223 CLR 122 at 161.
[37] (1987) 9 NSWLR 546 at 558A and 565D.
[38] Contrary to section 5 of the Deportation Act (SI), which provides for a right to appeal within seven days. This variety of illegality was present in *R v Mullen* [2005] QB 520.
[39] See affidavit of Heidi Bootle at [12]. Statement to Parliament by Prime Minister Sikua, 24 December 2007.
[40] To this end the authorities in the Solomon Islands co-operated with the AFP to ensure the appellant's delivery to police waiting at Brisbane airport: see *Schlieske v Minister for Immigration* (1988) 84 ALR 719.

(f) FA Bond offering, to accompany the appellant on the flight to Brisbane. The offer was made to Mr Wickham, the Permanent Secretary of Immigration, on 24 December 2007;

(g) FA Bond telling one of the immigration officers who arrested the appellant to "do it quickly because the plane would be waiting"; and

(h) liaising with the AFP in Brisbane to co-ordinate the arrest of the appellant on arrival, having passed on flight details.

31. The respondent continues to maintain that the conduct of the Solomon Islands Government is not justiciable in Australian Courts, despite the judgments in *Habib v Commonwealth of Australia*[41] and *Re Ditfort, Ex Parte Deputy Commissioner of Taxation*.[42] In this regard, Mullins J accepted the respondent's submission.[43] The Court of Appeal made no decision on the question. It is obvious that the conduct of the Solomon Islands Government must be examined in order to determine whether Australia connived at it.

The Australian authorities adopted a policy of acquiescence

32. From at least early December 2007, the Australian Government was aware that if the Opposition in the Solomon Islands formed government, it might seek to deport the appellant to Australia rather than extradite him, because deportation would be faster and would allow for less scope for the appellant to challenge his removal in Court.[44] Australian officials were specifically directed in advice from Canberra not to discuss the means of the applicant's return with Solomon Islands officials, and not to express a preference for extradition or deportation.[45] The advice was expressly linked to the possibility of the appellant seeking a stay of a future prosecution in Australia as an abuse of process.

33. Two points may be made about this advice. First, it is wrong. The approach it endorses amounted to connivance in the unlawful deportation. Second, the advice was not followed, because the Australian authorities involved themselves in the appellant's rendition in the ways listed above.

34. The term 'connivance', used in *Levinge*[46] and *Bennett*,[47] means acquiescence or the turning of a blind eye. It contemplates that a wrongdoer might derive assistance or encouragement from another's deliberate forbearance from opposing or condemning

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[41] (2010) 183 FCR 62.
[42] (1988) 19 FCR 347 at 367-373 (Gummow J).
[43] See *R v Moti* (2009) 235 FLR 320 at [43]. The appellant submitted that the conduct of Solomon Islands was justiciable, and referred to *Hicks v Attorney General* (2007) 156 FCR 574 and *Kuwait Airways Corp v Iraqi Airways Company* [2002] 2 AC 883. The judgment of Mullins J does not refer to these cases.
[44] See cable from Lorraine Kershaw dated 11 December 2007 and Overseas Liaison Communication by FA Bond, 17 December 2007.
[45] Cable from Lorraine Kershaw dated 11 December 2007
[46] (1987) 9 NSWLR 546 at 558A and 565D (McHugh JA).
[47] [1994] 1 AC 42 at 74E (Lord Lowry).

their actions.[48] Leading up to the appellant's arrest, Australian officials were regularly briefed on the plan for his unlawful removal. FA Bond was present at a series of critical meetings at which the plan to expel the appellant was discussed. He oversaw the entire exercise. He was in the vicinity of the appellant's house when he was arrested and he was at the airport when he departed. Putting aside the very significant active steps he and other Australian officials took to encourage and facilitate the rendition, his presence alone conveyed tacit assent.

35. The Australian Government's policy of shutting its eyes to the violation of the appellant's rights was itself a breach of the principle recognised in *Bennett* and *Levinge*. The position taken by the Australian authorities was perhaps best summarised in the following internal email from the Australian Head of Mission in Solomon Islands:[49]

> "As you will be aware from our reporting, and from other sources, a Sikua-led government seems likely to deport Julian Moti as soon as they can. While the Deportation Act suggests this may take a bit longer than they expect (the Minister has the discretion to deport but not before the matter has been considered by a court) a determined government could still have Moti on a plane pretty quickly. I know this is not necessarily our preferred outcome but I would still hope we can avoid making a fuss. We all want him gone after all and it would be a shame to risk an early misunderstanding with the new government."

36. The principle recognised in *Bennett* and *Levinge* reflects an underlying concern to ensure the obedience of the executive to the law. The principle is a vital one.[50] It is critical that subtle forms of collusion are caught by the principle, along with more overt acts of assistance. Where a State indicates a willingness to circumvent lawful extradition procedures in the return of a foreign national, it would otherwise be all too easy for the State in which the person is wanted to turn a blind eye. The Courts must be particularly vigilant where, as here, the authorities are content to receive the fruits of illegal conduct, but are conscious of the need to avoid the appearance of involvement.

Context in which the policy of acquiescence was developed

37. The Court's task in considering whether the conduct of the Australian executive amounted to collusion in the appellant's unlawful rendition should be placed in context. There was an abundance of evidence before the court at first instance demonstrating the desire of the AFP to secure the appellant's return by deportation, from when that first became a possibility in October 2006. For example:

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[48] This is not a unique concept in the law. The law of aiding and abetting recognises that a principal might be encouraged by the presence of a secondary party, where by that presence the secondary party conveys assent and concurrence: *R v Lowery and King (No 2)* [1972] VR 560 at 561.

[49] Email from Peter Hooton to Graeme Wilson, 17 December 2007.

[50] See *Levinge* (1987) 9 NSWLR 546 at 464G-565C (McHugh JA, quoting from Brandeis J in *Olmstead v United States* 277 US 438 (1928)). See also *R v Pollard* (1992) 176 CLR 177 at 202-203 (Deane J).

(a) AFP Commissioner Keelty publicly called for the Solomon Islands to deport the appellant in October 2006;[51]

(b) a Ministerial Brief dated 24 October 2006 an AFP officer stated:[52]

> "[t]he AFP and Attorney-General's Department (AGD) continue to explore options for Mr Moti's extradition or deportation from SI to Australia in respect of child sex tourism charges;

(c) an email dated 17 October 2006 records the Director of the extradition unit of the Attorney General's Department as saying:

> "[w]e were hopeful that Moti's alleged immigration offences in the Solomons would result in his deportation back to Australia – this would be preferred over lengthy extradition proceedings. "[53]

38. Further, there was evidence of an awareness on the part of Australian authorities that extradition proceedings against the appellant were unlikely to succeed in court.[54]

39. None of this evidence was given significance by Mullins J, and it was not referred to by the Court of Appeal, despite the fact that it provided important context for the events of December 2007, and the background against which the conduct of Australian officials would be interpreted by the new Solomon Islands Government.

Errors in the approach taken by the Court of Appeal to the unlawful removal ground

40. The Court wrongly characterised the appellant's challenge to the learned primary judge's conclusions on the question of the unlawful removal as an argument for a different finding of fact.[55] Whether the conduct of the Australian Government amounted to connivance or collusion involves a legal characterisation of the facts; an assessment of whether they answer a particular description.[56] This is a question of law. The Court of Appeal erred in failing to conclude, on the facts founds by the learned primary judge, that the Australian authorities were involved in, or connived at, the appellant's deportation.

41. In any event, the ultimate task of the Court of Appeal was to decide whether the learned primary judge's decision was correct,[57] having regard to the materials which were before the court below.[58] A mistake as to the facts is a reviewable error on an

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[51] See bundle of news articles dated 11-12 October 2006.
[52] Ministerial Briefing by AFP officer Paul Jevtovic, National Manager IDG dated 24 October 2006.
[53] Email from Anthony Seebach, Director, Extradition Unit, Attorney-General's Department, dated 17 October 2006.
[54] See, eg, email from Peter Bond dated 6 October 2006. See also the refusal of extradition by the Solomon Islands Government, which referred to specific sections of the Extradition Act (SI): AB 2824.
[55] *R v Moti* (2010) 240 FLR 218 at [48].
[56] See *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450 (Gleeson CJ, Gummow and Callinan JJ).
[57] *Australian Iron & Steel Pty Ltd v Luna* (1969) 123 CLR 305 at 320 (Windeyer J).
[58] *Mickelberg v R* (1989) 167 CLR 259 per at 267 (Mason CJ).

appeal in respect of the exercise of a discretion in accordance with the principles set out in *House v R.*[59] Accordingly, the Court of Appeal was entitled to look beyond the learned primary judge's findings of fact, and to review those findings to correct error.

42. The fact-finding exercise undertaken at first instance was in some respects deficient, and these deficiencies were simply not addressed on the appeal.

Treatment of the evidence of Australian involvement in the courts below

43. One powerful piece of evidence to which no reference was made by the Court of Appeal or by Mullins J concerned a conversation between FA Bond and Deputy Commissioner of the Solomon Islands Police Peter Marshall on the morning of the appellant's arrest and deportation. In his evidence, FA Bond admitted he had passed on to Mr Marshall 'legal advice' from Solomon Islands Government officials to the effect that the planned deportation of the appellant was legal.[60] Contemporaneous documents authored by FA Bond demonstrate unequivocally that knew the deportation was unlawful. Yet the spurious legal opinion he conveyed to Mr Marshall was expressed without reservation.[61] It occurred after FA Bond had attended a meeting at which the direction was given to Solomon Islands police and immigration officers to 'ignore any Court orders' the appellant had, and a legal opinion was expressed that the appellant could appeal against his deportation 'from Brisbane.'

44. FA Bond's conduct could only have conveyed approval and encouragement of what was about to occur. It was a particularly important piece of evidence in light of the Court of Appeal's finding that the Australian Government had 'rigorously abstained from expressing any view on what the Solomon Islands Government proposed.'[62]

45. Before the primary judge Mr Akao, a Solomon Islands police officer, gave evidence that while he was on his way to arrest the appellant together with an immigration officer, he saw FA Bond who said: "do it quickly because the plane would be waiting."[63] FA Bond did not recall what he had said, and speculated about what he might have said.[64] The learned primary judge made no finding as to whether the words were spoken, but described it as a 'casual conversation' of no significance.[65] This is an error. The words attributed to FA Bond conveyed approval of the immanent unlawful arrest, and would amount to concurrence and encouragement. A finding was required on whether the words were spoken. A failure to make such a

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[59] (1936) 55 CLR 299. See *R v Carroll* (2002) 213 CLR 635 at 657 [73] (Gaudron and Gummow JJ).
[60] T 6-44- 6-45.
[61] T 6-45.
[62] *R v Moti* (2010) 240 FLR 218 at [50].
[63] Statutory declaration of Selwyn Akao at [9], adopted in evidence at T 3-13, repeated under cross-examination at T 3-20 – T 3-21.
[64] T 6-74 – T 6-75.
[65] *R v Moti* (2009) 235 FLR 320 at [27].

finding in this case reveals an erroneous understanding of the relevant test and the failure to take a relevant consideration into account.[66]

46. The finding which should have been made was that Bond said the words Mr Akao heard him say. Mr Akao's account of the conversation was clear and unwavering.[67] FA Bond said did not recall saying the words attributed to him. When invited to categorically deny that he had said the words, he declined to do so.[68]

47. Further, FA Bond was not to be relied upon on contentious matters. Much of his evidence was vague, and he seemed to have very little recollection of matters which were not otherwise evidenced by documents which were specifically brought to his attention. Some of his answers were grossly implausible. For example, FA Bond denied in his oral evidence that he was ever concerned with the appellant's deportation, and insisted that he was only ever interested in his extradition.[69] These denials were contradicted by abundant documentary evidence of his concern for the appellant to be deported since that first emerged as a possibility in October 2006.[70]

48. FA Bond's credibility was put in issue in the proceeding at first instance. With ample justification, it was put to him in cross-examination that he had lied to the Court.[71] Despite this, no finding as to FA Bond's credibility was made. The conclusion to draw from FA Bond's evidence was that, where necessary, he was willing to lie rather than concede matters which may have put the prosecution of the appellant at risk. He was well aware of the potential implications for the appellant's prosecution if he could be shown to have been involved in the unlawful conduct of the Solomon Islands Government.[72]

49. Another significant fact disregarded in the courts below is that FA Bond had initially agreed to accompany the appellant on the flight to Brisbane.[73] It was powerful evidence of Australian concurrence in the planned unlawful rendition. FA Bond's offer to accompany the appellant was made at a time when he knew that the appellant's statutory right to review of a deportation order by a Court would be breached.[74] The offer was later withdrawn after the AFP received advice citing the decision in *Levinge*.[75] The withdrawal of the offer, however, was not accompanied by any opposition to the course of action being proposed by Solomon Islands Government officials. The withdrawal of the offer was because of a concern to avoid the appearance of co-operation. It did not disturb Australia's underlying concurrence.

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[66] See *Minister for Immigration and Multicultural Affaires v Yusuf* (2001) 206 CLR 323 at [75] (McHugh, Gummow and Hayne JJ).
[67] T 3-20 - T 3-21.
[68] T 6-75 L1.
[69] T 7-6, L1-20; T 7-8; and T 7-16.
[70] See, eg, emails from Bond dated 13 October 2006 and 16 October 2006 (part of which is quoted in paragraph 27 above.
[71] T 3-49.
[72] See, eg, email to Jared Taggart dated 24 December 2007 at 12.05pm.
[73] See email from Peter Bond to Jared Taggart, 24 December 2007 at 12.21pm.
[74] See email to Jared Taggart from Peter Bond, 24 December 2007 at 12.05pm.
[75] See Attorney-General's Department file note dated 24 December 2007.

50. The conduct of Australian officials, and in particular FA Bond, was calculated. It involved no 'venial irregularity.'[76] It was unworthy conduct which should not be endorsed by the Court.[77]

The treatment of Australian involvement in facilitating travel arrangements

51. The provision of travel documentation for the appellant and his escorts was an obvious act of overt assistance by Australian authorities, and one which was necessary to facilitate the rendition to Australia. Mullins J and Court of Appeal held that this action could not be treated as an act of involvement or complicity without giving adequate reasons.[78] The learned primary judge characterised the provision of the travel documents as a 'response' to the decision made by the Government of the Solomon Islands.[79] The Court of Appeal and Mullins J appeared to treat the issuing of the travel documents as an action beyond judicial scrutiny. This approach is erroneous.[80] There is no sound reason in principle why the provision of travel documents in these circumstances could not constitute involvement in the unlawful removal. It was clearly an act which was necessary to effect the deportation and it was done with full knowledge of all of the illegalities it involved. There is no warrant in the relevant authorities to treat this kind of assistance as legitimate or beyond curial opprobrium.

52. The learned primary judge cited evidence given by Ms Bootle, who at the relevant time was Deputy High Commissioner to Solomon Islands, that it would be extraordinary for an Australian post not to give a foreign official a visa upon request.[81] For a number of reasons, this evidence provided no basis for judicial deference to the decisions of the executive.

53. First, and most fundamentally, the propriety of the actions of the Australian executive in facilitating the appellant's travel back to Australia and that of his arresting officers was to be assessed by the Court. It was not a matter which could be determined by the opinion of an individual diplomat which was given in evidence.

54. Secondly, the *Bennett* and *Levinge* line of authorities do not admit of an exception based on comity between nations or diplomatic etiquette. To admit of such an exception would be to substantially undermine the jurisdiction those cases establish.

55. Thirdly, this was an extraordinary situation. What was being planned amounted to the kidnapping of an Australian citizen. Australian officials, including Ms Bootle, had advanced notice of that plan. In these circumstances it is not acceptable for Australian authorities to defend their role in the appellant's unlawful removal by

[76] *Bennett* [1994] 1 AC 42 at 77 (Lord Lowry).
[77] Ibid. See also *R v Truong* (2004) 223 CLR 122 at [135]-[135] (Kirby J).
[78] *R v Moti* (2010) 240 FLR 218 at [50], where the only reason given by Holmes JA was that the appellant was an Australian citizen; *R v Moti* (2009) 235 FLR 320 at [45].
[79] *R v Moti* (2009) 235 FLR 320 at [45].
[80] See *Re Ditfort, Ex Parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370 (Gummow J); *Habib v Commonwealth of Australia* (2010) 183 FCR 62.
[81] *R v Moti* (2009) 235 FLR 320 at [17].

relying on normal diplomatic practice. It might be considered usual where an Australian citizen is to be unlawfully arrested for an Australian post to provide consular assistance for that person to obtain legal recourse. It might also be considered usual, and proper, for an Australian post to protest. Here, the Australian officials were clearly content for the appellant's unlawful arrest and expulsion to proceed. As the appellant was being arrested at his home Ms Bootle, who was at the time Acting High Commissioner, communicated the following to Canberra, on the basis of information she was receiving from FA Bond, who was near the scene:

> "Unfortunately it's turned into a bit of a shambles at the Moti residence. Djokovic is apparently there protecting Moti – not sure with what authority – pulling out legal documents/court order etc. (Interim order referred to in cable attached). Local police have all gone limp – despite previous stated intentions to push him on the plane regardless – they don't seem to be prepared to remove him forcibly. So, they're still at the house."

56. Finally, Ms Bootle's evidence was undermined by documentary evidence which showed that the Australian Government had implemented a policy of restricting access to visas for travel to Australia for members of Solomon Islands Parliament.[82] The restrictions were for political reasons, and were linked to the refusal of Solomon Islands to return the appellant to Australia. Shortly before the change of Government in Solomon Islands, DFAT recommended in a submission to the Minister that the visa restriction policy should be ended 'in light of what the Solomon Islands Government does about Julian Moti.'[83] In the face of this evidence, it cannot sensibly be maintained that refusing visas to the appellant's escorts would have constituted an extraordinary diplomatic affront.

Approach to the question of Australian complicity

57. Mullins J placed emphasis on the fact the decision to deport the appellant was a decision of the Solomon Islands Government.[84] Her Honour reasoned that:

> "*As* the decisions that resulted in the deportation of the applicant were those of the Solomon Islands Government, the fact that the Australian Government did not in the circumstances object to the deportation of the applicant, who was an Australian citizen, to Australia (and to that end responded to the decisions of the Solomon Islands Government by providing travel documents for the applicant and the escorting officers) cannot be characterised as connivance or collusion with the Solomon Islands Government ...."[85] (Emphasis added).

58. There are a number of difficulties with this passage. First, it involves a *non sequitur.* From the mere fact that the decision to deport the appellant was a decision of the Government of Solomon Islands, it does not follow that the conduct of Australian authorities could not be characterised as connivance or collusion. The decision to deport a person will always ultimately be a decision for the host nation, as it was in

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[82] See AFP Minute by FA Bond dated 11 July 2007, under heading 'expected reaction.' See also T 9-23.
[83] DFAT Ministerial Submission dated 19 December 2007.
[84] *R v Moti* (2009) 235 FLR 320 at [40] - [45].
[85] *R v Moti* (2009) 235 FLR 320 at [45].

cases such as *Bennett* and *R v Mullen*.[86] Accordingly, the fact that the decision was made by the Government of Solomon Islands cannot be of any special significance. Her Honour's emphasis on the sovereignty of Solomon Islands suggests that her reasoning on the question of complicity was tainted by her acceptance of the respondent's submissions concerning non-justiciability.

59. Secondly, to characterise the Australian contribution as a 'response' to a decision is misleading, as Australia's willingness to co-operate in facilitating the appellant's return was signalled in advance. Moreover, that characterisation is not an answer to the appellant's claim that Australia's facilitation of his rendition was improper.

10 60. Before the primary judge, the appellant argued that common law concepts of complicity should be applied in elucidating the meaning of the concepts of "connivance", "involvement", "concurrence" and being a "knowing party" which are referred to in the disguised extradition cases. Her Honour rejected this argument, saying, without elaboration, that it was inappropriate when analysing the conduct of sovereign nations, and was inconsistent with *Bennett*, *Mullen* and *Levinge*.[87] Her Honour's remark that common law concepts of complicity were inappropriate in the analysis of the conduct of sovereign nations again suggests her Honour was misled by the submissions made by the respondent at first instance concerning non-justiciability. The sovereignty of Solomon Islands was a prominent consideration in the reasoning
20 of Mullins J. It is not, however, a significant consideration in the application of the principle recognised in *Bennett* and *Levinge*.

61. It is submitted that the courts below misconstrued the notion of complicity employed in the cases. Neither the Court of Appeal nor the learned primary judge expounded on the meaning of this kind of complicity. Both judgments seem to require active involvement *resulting in* or *causing* the deportation before an abuse of process could arise. Such a test is erroneous. As submitted above, the Australian authorities clearly connived in the unlawful expulsion of the appellant by their acquiescence. However, Australian complicity was by no means limited to acquiescence. Reference to common law concepts of aiding and abetting would have assisted the Courts below in
30 considering whether Australia was 'involved in' or a 'a party to' the unlawful expulsion. The law of aiding and abetting in particular provides a helpful exposition of the kind of complicity with which the disguised extradition cases are concerned. According to that law the complicity of a secondary party can be established by:[88]

(a) intentionally helping the principal in the first degree commit the crime; or

(b) intentionally encouraging the principal by words, presence and behaviour to commit it; or

(c) intentionally conveying to him by words, presence and behaviour that you are assenting to and concurring in his commission of the crime.

[86] [2000] QB 520.
[87] *R v Moti* (2009) 235 FLR 320 at [44].
[88] See *R v Lowry and King (No 2)* [1972] VR 560 at 561 (Smith J).

62. The conduct of Australian officials in this case meets any and all of these descriptions.

Part VII: Applicable constitutional and statutory provisions

63. The applicable constitutional and statutory provisions are attached as an annexure.

Part VIII: Orders sought by the appellant

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64. The appellant seeks the following orders:

(1) The appeal be allowed.

(2) Proceedings on the indictment against the appellant are permanently stayed.

Dated this 6th day of May 2011.

20 .....

Mr Robert Herd, Solicitor per
Ian Barker QC and PJ Doyle
Counsel for the Appellant