HIGH COURT OF AUSTRALIA

30 October 2013

TERRENCE JOHN DIEHM & ANOR v DIRECTOR OF PUBLIC PROSECUTIONS (NAURU)

[2013] HCA 42

Today the High Court unanimously dismissed an appeal from a decision of the Supreme Court of Nauru, which had found the appellants guilty of rape following a trial by judge alone.

The first and second appellants, who were husband and wife respectively, were convicted of the rape of a woman regarded by custom as the wife's niece. The husband was charged as the principal in and the wife as an accessory to the rape. The complainant had consented to intercourse but it was alleged by the prosecution that her consent was given only by virtue of threats or intimidation.

The complainant gave evidence that she came to the appellants' house following a quarrel with her boyfriend. Over the course of the following day, the wife repeatedly suggested to her that she have sex with the husband, and she repeatedly rejected that suggestion. On the second evening, she became uncomfortable and went into the children's bedroom to make phone calls to a friend and to the complainant's mother. During that phone call, the wife forced open the door and held a knife to the complainant's face. She was led to the living room where the husband was lying on a mattress. The husband had sexual intercourse with her and the wife performed cunnilingus on her.

The complainant's mother notified the police and two police officers attended the scene. One of those police officers testified that she asked both appellants whether the complainant was in the house, and they both said no. The second officer was not called to give evidence, but his police report stated that the question was whether "a lady" was "locked up" in the house. The first appellant testified that he had been asked if he had a girl "locked up" and had truthfully denied that he did. The trial judge referred to the second officer's statement, although it was not in evidence, in order to determine whether the failure to call that witness could give rise to a miscarriage of justice.

The husband and wife appealed to the High Court pursuant to the *Nauru (High Court) Appeals Act* 1976 (Cth). They argued that a reasonable tribunal of fact could not have concluded beyond reasonable doubt that the appellants were guilty of rape without the testimony of the second officer. They submitted that the prosecutor should have called the second officer as a witness, or the trial judge should have called him of his Honour's own motion. They also objected to the trial judge's reference to the statement of the second officer, which was not in evidence.

The High Court unanimously dismissed the appeal. It held that the failure to call the second officer did not give rise to a miscarriage of justice, having regard to the other evidence which strengthened the prosecution case. It further held that the statutory obligation of the trial judge to call a witness under s 100(1) of the *Criminal Procedure Act* 1972 (Nauru) was not enlivened because his evidence was not essential to the just decision of the case, and that the trial judge's reference to the police report was to determine the effect of the failure to call the second officer and occasioned no breach of natural justice. The verdict was not unreasonable.

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- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*