

IN THE SUPREME COURT
REPUBLIC OF NAURU

Criminal case 39/2011

REPUBLIC OF NAURU

v

TERRY DIEHM AND TEKENA DIEHM

JUDGE: Eames, C J
WHERE HELD: Nauru
DATE OF HEARING: 23-25, 28 November 2011
DATE OF JUDGMENT: 29 November 2011
CASE MAY BE CITED AS: Republic v Terry Diehm & Tekena Diehm
MEDIUM NEUTRAL CITATION: [201120122014] NRSC 24

Criminal law - Rape - s. 348 and s. 7 of the *Criminal Code of Queensland Act 1899* - Corroboration - Consciousness of guilt - Distress of complainant - Failure of prosecution to call relevant evidence - Whether evidence sufficient to prove guilt beyond reasonable doubt - Accused found guilty of rape.

APPEARANCES:

For the Plaintiff

Wilisoni Kurisaqila (DPP)

For the Defendant

David Aingimea (Pleader)

CHIEF JUSTICE:

1. The accused are both charged with rape contrary to s. 348 and s. 7 of the *Criminal Code of Queensland Act 1899*. The State alleges that on the 14th day of June 2011 they raped the complainant (PW1) at Nauru. Although I will use the complainant's name in delivering judgment in open court, I will not publish her name in my written judgment when revised for publication, but will refer to her as "the complainant".
2. This rape trial is governed by the common law. None of the substantial legislative reforms concerning the conduct of sexual offence trials that were introduced in Queensland in 1997, and in other Australian states over recent decades, apply in Nauru.
3. Under the common law a complainant could be cross-examined generally as to whether she was promiscuous. She could also be cross examined about claims that she had had sexual relations with the accused on previous occasions, that she was a prostitute, or as to other sexual acts that were part of the surrounding circumstances to the present complaint. Her denials of those allegations could be rebutted by evidence called by the defence: see, as to those propositions, *Bull v The Queen* (2000) 201 CLR 443 at 454-455.
4. There was no special common law rule that prohibited questioning of this kind. Evidence of other sexual behaviour would be excluded only if it was logically irrelevant to a fact in issue in the trial: see *Gregory v The Queen* (1983) 151 CLR 566 at 571.
5. In this case the pleader for the accused cross examined the complainant and adduced evidence when she denied suggestions that she was a prostitute, was generally promiscuous and had previously had sexual intercourse with the accused Terry Diehm. Mr Diehm enthusiastically attacked her credit when he gave evidence. I will return to deal with the evidence in detail.
6. The common law, as described in *R v Flannery* [1969] VR 31 at 33, requires that the prosecution prove beyond reasonable doubt, as to each accused, either that the

- accused was aware that the woman was not consenting, or else, that the accused realised that she might not be, but decided to have intercourse with her whether she was consenting or not. That is how the prosecution puts its case against both accused.
7. Rape is defined by s.347 of the Criminal Code. The Prosecution relies on that part of the definition that says rape is having carnal knowledge with a person without her consent, or if with her consent, then “if the consent was obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm”.
 8. Were I to conclude that the complainant was not, in fact, consenting then the accused would still not be guilty if, pursuant to s.24 of the Criminal Code, he or she held an honest and reasonable belief, although mistaken in fact, that the woman was consenting. In this case, the accused Terry Diehm denies that the sexual acts occurred at all, which the complainant alleges took place, on a mattress in the lounge room of the home of the accused. Accordingly, the question of having a mistaken but honest and reasonable belief in consent on that occasion, does not arise with respect to Terry Diehm. No evidence raises the possibility that Tekena Diehm had an honest and reasonable, but mistaken, belief that the complainant was consenting to sexual intercourse with Terry Diehm.
 9. Applying those principles, the Prosecution alleges that Terry Diehm performed the act that constituted the offence of rape, and that Tekena Diehm is a principal offender either, pursuant to s.7(c) and (d), by virtue of her aiding and abetting her husband to rape the complainant, or else, pursuant to s.7(d), by virtue of her counselling or procuring her husband to commit the offence. The prosecution alleges that when the occurrence of sexual intercourse took place on a mattress in the lounge room of the house in the early hours of 14 June 2011, each accused knew that the complainant was not consenting, or else, knowing that she might not be consenting decided to continue to have or aid and abet or counsel or procure sexual intercourse with her, whether she was consenting or not.
 10. S.116(1) of the *Criminal Procedure Act* 1972 requires that I now set out the points for determination, my decision as to those matters and my reasons for decision. As

provided by s.115 I will summarise my written judgment, without reading it in its entirety, save where necessary to read particular passages.

11. In doing so, it is first necessary to summarise the prosecution case and to highlight the issues that have been raised in challenge to the prosecution case. In putting it that way, and in referring to the evidence called by the defence and produced by way of cross-examination I will keep in mind at all times that the defence does not have to prove anything. Nor does the defence have to create reasonable doubt. It is the prosecution that must remove all reasonable doubt from my mind if it is to obtain convictions.
12. The complainant is aged 21. She gave evidence of events occurring from Sunday 12 June 2011 until shortly after midnight on Tuesday 14 June 2011. In that time she was in the company of the two accused at various times.
13. On Sunday 12 of June she had been and her house at Location and had an argument with her boyfriend. She hit him and he told her to go away. She went to the home of her aunt, the second defendant Tekena Diehm. She asked if she could stay a while. Tekena said she would ask her husband Terry for permission. Terry said she could stay. She started drinking beer by herself. This was two or three o'clock in the afternoon. She had 5 cans of beer. She later returned to Location at about 7 or 8 pm. She stayed all night with her friends, but later said that she had not drunk much overnight, and had slept. Next morning she returned to the Diehm house on Monday at about 8 am, and she was let in by her niece, Tiria (or Cecelia). The complainant had a shower and a short sleep. After she woke she was watching TV and was doing so when Terry and Tekena and their kids came home. The complainant started drinking whisky and coke with Tekena. Then Terry took the kids away to Location to play at a friend's house. While he was away, Tekena told the complainant that Terry had had sex with many girls. The complainant asked why she was telling her that, and Tekena said "I just wanted to let you know what my husband has been doing". The complainant went inside, had a shower and went to sleep. She slept in what she called the children's room and awoke not long afterwards and was then watching television

with Terry and Tekena. The complainant was watching TV and Tekena asked her if she wanted to drink, which she did. The complainant was drinking whisky and coke. The children were to be taken to Location to play at a friend's house. Terry took the kids away and Tekena and complainant stayed at the house. The children had come from school before they were taken off to Location. Whilst she was drinking with Tekena, Tekena told her about ladies she had done something with. She said that her husband had had many girls who had had sex with him. The complainant said to her, "Why did you tell me all this?" and Tekena said "I wanted to let you know what her husband had been doing" or on another version " So you know what kind of person Terry is". She was not asked to explain what she meant by "ladies she had done something with".

14. Before Terry had arrived back Tekena asked the complainant "Are you happy to have sex with Terry?" The complainant said "No." Later on Tekena said to her "It's only a joke. I can't do this because you are my niece." She said that what she had said about the complainant having sex with Terry was only a joke. It was not long after that that Terry came back, having dropped off the kids.
15. All three drank together for two to three hours. The complainant then suggested they go for a drive, and the three of them went off in Terry's car. They took alcohol with them. They went to Anabare, where she got out of the car to take fresh air. Terry and Tekena remained in the car and they were arguing. The complainant was outside the car for twenty minutes drinking whisky. It was now about 7pm. The others called her back and said they had to take the children's clothes to them. So they went back to their house. Inside the house they sat down again drinking and Terry left to take the clothing to the children and then returned. Whilst he was away Tekena again repeated what she had said earlier. She said "will you have sex with my husband?". The complainant said no. Tekena said "If you don't want to, you can do whatever you like." They were both drinking whisky together.
16. When Terry returned they all talked together and Terry asked the complainant whether she would like to go to Australia with them. She said that she would. Terry

said that if she looked for funds for her own airfare he would help her when she got to Australia to be able to stay in Australia. The complainant said she was thinking about what was happening. Was I going to sell myself? She said she was thinking that it appeared as though they were going to take her to Australia and that must be why Tekena asked her if she would have sex with her husband.

17. The complainant said she was afraid. She got up from the chair and took Terry's mobile phone off the table and went into the children's bedroom. She closed the door but it would not lock. She was feeling afraid. She lay down with her back on the ground and her feet against the door. She called her friend Eriana and asked her to come and help her because these people are going to force me. She said "Please Eriana come and help me because these people are going to do something to me." Eriana asked her where she was and she told them she didn't know exactly but it was topside. Eriana said how could she get there without transport and the complainant suggested she go to a friend and get his motor bike. The complainant rang her back about twenty minutes later. Eriana said there was no working motorbike. The complainant said that she was so scared that she was crying when she was speaking to Eriana. She then said to Eriana it's alright I'll ring my mother.
18. Eriana was not called as a witness by the prosecution. No explanation was offered for her absence.
19. The complainant rang her mother about 10pm. She said Mummy why don't you come and pick me up because Tekena is going to do something bad to me. Her mother said how did you get there, why did you get there? She said I can't go back to my house because I'm afraid of my father. Her mother said that she should give the telephone to Tekena so she can talk to her. The complainant told her mother "I can't give the telephone to her because I'm afraid". Her mother said "why. Why are you afraid. Just give her the telephone". She replied I can't, I'm very scared. The complainant said Tekena then came to the door and tried to push it open and asked what she was doing. Why don't you come out and drink? The complainant said that she would. She had switched off the phone. She then told Tekena to go away, and she'd join her later. She

then rang her mother again and said come and pick me up because I'm really afraid. Her mother insisted that she give the phone to Tekena. Her mother said "I can't ring the police because I pity Tekena's children." She didn't tell the complainant what she meant by that. The complainant said her mother did ask what she was afraid of and she said I'm afraid of Tekena because there's something she's going to do. Her mother did not ask what she was going to do. She just said give the phone to Tekena.

20. When she was speaking to her mother the second time she was still on the floor with her feet on the door and again Tekena came to the door and was pushing it and saying "open the door". But as Tekena kept pushing, the door was opening as the complainant's body was being pushed from the door. Tekena managed to move sideways through the door as it was opening, entering with her right shoulder through the door first. She had nothing in her right hand. When she got fully through the door the complainant saw that she had a knife in the left hand and it was pointing towards the complainant and at that point the door was open.
21. Tekena told the complainant to stand up. The complainant said that she was afraid and Tekena then asked her to go the lounge room, which she did. When she got into the lounge room Terry was lying on a mattress naked. Tekena asked her to lie with her husband she was standing very close to the complainant. Tekena then sat on the couch in that room and the complainant lay down beside Terry. She did so because she was afraid, she said. She said "I thought she might kill me."
22. Tekena then told her husband to get on top of the complainant and he did so and pulled off her lava lava and her blouse. He tried to put his penis into her, he opened her legs and tried to put his penis in and he succeeded. He started going up and down until he was no longer erect. That was maybe two or three minutes. When Terry was on top of the complainant, Tekena was sitting on the couch which was behind their heads and higher than them. When she was lying on her back the complainant could not see Tekena but when she turned to her side she could see her and Tekena was playing with herself, she still had the knife in her hand. The knife was pointing towards the complainant and Terry. The complainant said Tekena told Terry to keep

on fucking me. She had taken her lava lava off and was playing with herself, with her hand on her vagina. When Terry's erection stopped he got off, Tekena was angry when he did so. She was saying in English why did you get off her I haven't finished playing with myself. Terry said he couldn't keep his penis erect.

23. The prosecution contends that the failure to maintain an erection was consistent with the effects of Viagra having started to wear off. The expert evidence was that it has an effective life of about 3 hours. Mr Kurisaqila submitted that the Viagra tablet might have been taken after they returned from the drive, following the decision to remove the children. Thus, its effects might have been wearing off by midnight. Terry Diehm was not asked whether he had taken Viagra this night, but he denied that sexual intercourse had occurred since 5pm that day, 7 or 8 hours before the alleged rape, thus his denial can be assumed. Tekena then got off the couch and approached the complainant on the mattress and she started licking her vagina, that was not for very long. While she was doing that she had one hand on herself. At that point she had nothing in her other hand. Terry said "it's my turn again I've got my erection back" Tekena said "It's my turn now. You've already had your turn". Then Tekena got up and went back to the couch. Terry was lying on the mattress. The complainant got her lava lava and went to the toilet. Whilst on the way to the toilet she picked up the phone again. The phone had been taken from her by Tekena earlier and placed on the table.
24. The complainant rang her mother and just said "It's too late", then switched off the phone. She stayed in the toilet crying until she heard a lot of people talking outside. She had been in the toilet for twenty to thirty minutes. She hurried outside and saw police at the door speaking to Terry and Tekena.
25. I pause at this point. In cross examination, and in the evidence of Terry Diehm, the following alternative version of events was described.
26. Again I emphasise, that the defence does not have to prove anything; I am simply highlighting the factual issues that emerged in the trial.

27. Terry Diehm swore that he did not have sexual intercourse with the complainant on the evening of 13th June or early 14th June, not in the lounge room or anywhere else. However, he had had consensual sexual intercourse with the complainant on two previous occasions, both times in the house while his wife was present, but in the shower or asleep, and unaware of what was taking place. His wife had never been involved in any sexual activities with the complainant, and he and his wife had never engaged in a threesome with another woman.

28. Terry Diehm said that the complainant was to his knowledge a prostitute, and had been so when he first met her in Tarawa. The first occasion he had sexual intercourse with her was when his wife brought her home for drinks on 20th May 2011. At about 3am on 21 May his wife went to bed and the complainant came and sat with him on the couch, rubbed his penis, and told him to take his clothes off, which he did. She said Tekena was asleep and said "I want to get on top of you". They had sex and the complainant said "This is for pleasure, not money". After finishing sex, she asked if he could help her get her baby back, which she said she had sold for \$20,000. She later asked Tekena if she and Terry would take her to Australia, where they were going in July, but they said if they did she would have to buy her own ticket. The suggestion that she had sold her baby was not put to the complainant in cross-examination.

29. The second occasion of consensual sexual intercourse was at about 5pm on Monday 13 June, that is about 7 hours before the alleged rape in the lounge room. On that occasion the complainant and Cecilia had been cooking together at about 12.15pm, and he went to work. He picked up the children later and brought them home. His wife and the complainant were drinking whisky together. He had taken the children and also Cecilia to Location at about 4.30pm, to the residence of Mr James Igii. He returned home at about 5pm and had two beers with them, and then Tekena went to have a shower. The complainant said "Let's have sex before Tekena comes out of the shower". They did so. When his wife returned after her shower they all sat at the table and drank. At about 6.30 the complainant suggested they go for a drive, which they did to the location the complainant had described. They returned home at about

7.30pm He had a beer and then his wife went to the toilet. While she was gone, the complainant wanted to have sex with him. He knew there was about 10 minutes available. He said "I can't get hard" She said "Ill suck your penis. He said "no, that's enough. His wife returned and they kept drinking. The complainant kept asking about, them taking her to Australia and about her baby. He said "I'm not paying". He went off to watch football on TV. He said that the complainant was so drunk she dropped her mug at about 10pm. She then drank from the bottle. At about 11.30 she fell off her chair and lay on the floor with her head in Tekena's lap, saying "youse two hate me. You won't take me to Australia". His wife took her to Cecilia's room (also described as the children's room), the same room the complainant said she had gone to).

30. Later he asked his wife to check on her. He heard his wife saying "Open the door, we don't hate you. Then both women came into the lounge room from the back room. They were laughing together. He hid the whisky, and took it off the table. The complainant asked where he had hidden it, and just then there was a knock on the door. It was the police. When the complainant realised it was police she said "My boyfriend sent them" and she ran and hid. Until she saw the police she had been laughing.
31. With that discussion of the evidence a number of critical point of disagreement emerge. In assessing the two accounts, regard must be had to the fact that there is no onus on either accused to prove that the version of events of Terry Diehm is correct. The Prosecution must prove beyond reasonable doubt that it is not.
32. Credibility is an important factor. Because this trial is governed by common law principles, I direct myself that it is dangerous to act on the uncorroborated evidence of a complainant in a sexual assault case. I will return later to the question of corroboration, but for the moment I note that a complaint made by the complainant to anyone else that she had been raped or sexually assaulted cannot constitute corroboration. However, evidence that she was distressed is capable of constituting corroboration.

33. Some disputed issues emerge at this point:

- Was the complainant a prostitute?
- Did the complainant have consensual sex with the complainant on previous occasions?
- Would it matter if she was a prostitute, and did have sex with Terry Diehm on previous occasions, if on his account they did not have sex at all in the late hours of 13 June or early hours of 14 June? She denied those allegations about being a prostitute and having previous sex with Terry Diehm, but would her account of rape be any more or less credible if I accepted those contentions to be true?
- Was the complainant frightened at any time during the evening, or was she happy and laughing shortly before the police arrived?
- Was the removal of the children and Cecilia a sudden decision, suggesting a plan to have the complainant alone in the house? (I note that when Cecilia was called by the defence she said she left to go to Location at about 4.30 pm on Monday 13 June, but she was not asked any questions on that issue by Mr Kurisquila, nor about her whereabouts on 20 and 21 May, and whether she knew if the complainant had been at the house on those days).
- If, as both the complainant and Terry Diehm say, Tekena Diehm called out to the complainant "Open the door", can that mean anything else than that the complainant had somehow closed the door and barred entry? Was the door capable of being locked from the inside? If not, is the evidence of being asked to open the door consistent with her account of having pressed her feet against the door to keep it shut? Is that consistent with her account of fear, or more consistent with Terry Diehm's account that she was angry, saying that they hated her. On his account Mrs Diehm also said "Open the door, we don't hate you"? As I shall discuss, the complainant's mother heard Tekena say "open the door", she did not say she heard her say "We don't hate you".
- What support is there for the complainant's claim that a knife was used by Tekena Diehm?
- Was the reliability of the Complainant's account affected to any and what extent by her degree of intoxication?

34. I return then to the narrative, keeping those questions in mind. The complainant's evidence continued. She came out of the toilet when she heard the voices at the door. One of the police asked "who is that?" and she started crying, she was happy to see them. She said to the police, these people did something bad to me. She said that she told the police that Terry was going to do something bad (or had done a bad thing) while Tekena had a knife in her hand. She told the police that Terry was trying to have sex with her while Tekena had a knife in her hand.

35. She was taken to the hospital for a medical examination at about 1 or 2am. There was no evidence of injuries consistent with forcible rape. The doctor said she could not tell

from her examination whether the complainant had or had not had sexual intercourse. There was no semen.

Cross Examination

36. She denied that there was an occasion on 21st of May where she had had sex with Terry at his house. She denied that she had sex in order for him to pay her ticket to Tarawa. She denied that she needed his help to get her child back from Tarawa. She denied that she was a prostitute. She said that her sisters were.
37. When she was in the police car she rang her friend Cecilia and said to her that Terry and Tekena were in jail because they've done something wrong to me. She denied that she was laughing when she spoke to Cecilia. She denied that she spoke to Cecilia again by phone.
38. The police asked her where the knife was. She said that she'd seen the knife in the kitchen and to look there.
39. She denied having said to Rose Igii that if Terry and Tekena paid her ticket she would withdraw her complaint. She said at no time did she say that. She denied that she'd fallen unconscious because she was so drunk. She said she was not drunk. She said she and Tekena between them had drunk a whole bottle of whisky and half of a second bottle. Earlier she'd had five VBs. When she was at Location on Sunday night until Monday morning she'd had two cans of beer and fell asleep.
40. She said she was afraid when Tekena was pushing the door, she rang her mother and said that the mother could pick her up. She had no thought of ringing the police, only her mother. Between the time she rang her mother and the police arriving was about thirty five minutes. She denied that she had sex on two occasions with Terry that night. She denied that she'd had a shower that night after her first sexual encounter. She denied that she'd received a phone call from Tiria Boato (Cecilia).
41. When she did the re-enactment with police she pointed out the mattress on the lounge room floor.

42. She denied that she had fabricated these allegations because the Diehms had not paid for an airline ticket as she had requested.

Witness: Complainant's mother

43. She is the mother of the complainant. On the 14th of June she was at home and got a phone call after midnight from her daughter. She said she was at Terry's place and there was something happening there, that she was being forced to have sex or was going to be forced to have sex. It was after 1am, her mother asked her to give the phone to Tekena so that the mother could talk to her. Her daughter said she couldn't because the phone was in the room with her.
44. The mother said that her daughter was crying and sounded scared. The mother kept asking why she did not give the phone to Tekena and she kept saying that she was scared. Then the phone went off, it was turned off. The mother wanted to call her daughter back but she had no credit in the mobile phone. 10 minutes later her daughter called again, she was crying and said I'm afraid. She told the mother that she was afraid to go out of the room because both doors are locked. Her mother said the only way I can help is to call the police, and her daughter agreed. The mother said she could hear Tekena in the background saying "open the door. Open the door" then the mobile was turned off again.
45. She called the police and told them to go to Terry's place because her daughter was there. She told the police it was difficult for her daughter to leave the house because the doors were locked. She called three more times to the police. Then she received a call from her daughter who said "It's too late". This was about twenty minutes to half an hour after she had phoned the police. She told the daughter the police were on the way but she didn't respond.
46. As I have said, the mother's evidence was not challenged at all.
47. The mother's phone call to police was logged at 0015 hours, just after midnight. The Probationary Constable who took it, Joni Ratabwi, recorded that the mother "needed police assistance to check her daughter, namely [the complainant], has called her a

minute ago and told her that she was locked up in the house by the couples Mr and Mrs Diehm Australian citizen not stating his name at NPC MQ 48 settlement.”

48. Sgt Deireragea and Constable Dillon were assigned the job.
49. The phone call log does not report a complaint of rape or threatened rape. The report of “locked up” adds some credibility to the evidence of Terry Diehm that he was asked is there a Nauruan woman locked up in the house. On the other hand, the mere fact of the phone call being made adds credibility to the complainant’s evidence that she was not consenting to anything, and regarded herself as somehow in peril, sufficient to agree that the police should be called in.
50. Before I deal further with evidence of the next witnesses I want to highlight some principles of law to which that evidence has particular relevance.

Corroboration

51. Because this case is to be decided on common law principles, I must direct myself that it is dangerous to act on the uncorroborated evidence of a complainant in a sexual assault case. The complaints made to the police who first attended the scene constitute complaints made at the first reasonable opportunity, but they cannot as a matter of law constitute corroboration, as it is not evidence that comes from a source independent of the complainant (see *Kilby v R* (1973) 129 CLR 460). Evidence of recent complaint is an exception to hearsay rules.
52. However, recent complaints are relevant as going to the credit of the complainant, showing that she had made similar complaints, at the time, to those she now makes. It is unnecessary for me to decide whether the evidence of the complainant’s mother could constitute a recent complaint about rape, since the complaints made to her occurred before the alleged rape, or possibly in the preliminary stages of its occurrence. The complaints did include a warning of potential rape. I will not assume that they amount to recent complaint of rape. Her evidence was, however, directly relevant to facts in issue, namely, whether her daughter was in fear and was expecting police to be called. The mother’s evidence was not challenged by Mr Aingimea, at all.

53. Evidence of distress can constitute corroboration. As I shall summarise, Senior Constable Deireragea swore that the complainant showed such signs of distress.

Consciousness of guilt

54. The Prosecution also relies on the evidence of Senior Constable Deireragea for another reason. The state contends that the answers given to police by both accused were lies told in response to queries whether anyone else was in the house, lies told in consciousness of their guilt of rape. Lies told in consciousness of guilt constitute corroboration: they also can amount to an implied admission of guilt: See *Edwards v R* (1993) 178 CLR 193.

55. Before I could come to that conclusion I would have to be satisfied that they did tell lies and did so because they were conscious of their guilt of rape or at least of some sexual crime. I would have to exclude innocent explanations for the lies, such as panic, embarrassment, fear and so forth.

Distress

56. If I accept the evidence of Sen Const Deigerega there is strong corroboration in this case, by virtue of the evidence of distressed condition of the complainant she said she saw.
57. I now deal with other witnesses who are relevant to each of those issues.

Senior Constable Decima Deireragea

58. She attended the house on the 14th of June following the mother's phone call. Eventually after about 10 minutes Tekena opened the door and her husband was with her. She asked is there anyone else in the house and Tekena said just herself and her husband. She asked again and got the same reply. Terry Diehm came up and she asked both of them "Is there anyone else in the house?" and they both said no.
59. She asked them if they knew PW1 (naming the complainant), they said "No, there's no one else here". She asked, "Is she with you in the house" and they both said no. Tekena said "she left earlier in the afternoon" Her husband was standing beside her

when she said that. Both said, she's not here.

60. Tekena was wearing a lava lava and a blouse and Terry was wearing a towel around his waist with no shirt. Then a lady appeared from behind them and she asked "who's that?" and Tekena said "that's [naming the complainant]".
61. Senior Constable Deireragea asked "why did you give false information?" and Tekena raised her voice and said "that's her, that's [naming the complainant]".
62. She spoke to the complainant who was standing with her arms folded across the chest, she was shaking and crying. She was wearing a lava lava. She looked very scared. She said her mother was to blame; she had called her mother to come and get her but "it's too late now they have done the job" she said that Terry had forced her to have intercourse. She said her mother was the one to blame.
63. She said, "I was forced to have sexual intercourse with a 66 year old man. I was forced with a knife". She said Tekena had forced her to have sexual intercourse with her husband Terry; she held a knife to her neck.
64. The senior constable said that when they arrived she knocked on the front door and tried to open it but it was locked and the rest of the house was secured, all of the curtains were closed and the windows locked.
65. She said that she returned to the house later, with the complainant. The complainant said that she had been threatened with a knife. She went to the lounge-room and showed where the incident had occurred. She pointed out the mattress. The complainant told her that Tekena had grabbed the knife from the kitchen and held it to her throat. The complainant showed the knife that Tekena had used. It was on a bench in the kitchen. It had a blade about 8 inches long.
66. Sen Const Deireregea said the complainant pointed out the lounge room where she said the events occurred. I note that the way the complainant had described the mattress on the floor and of Tekena sitting on a couch behind her head was consistent with the layout shown in the police photos.

Cross Examination of Senior Constable Deirereaga

67. She denied that she used the words was there a person "locked up". She said she asked "is there anyone else in the house?".
68. Both of them, meaning the complainant and Tekena, were affected by alcohol when they came to the door. Tekena was fully affected and Terry was quite sober. She denied that he was wearing a lava lava. The witness said the doors had deadlocks and the front door also had deadlocks.
69. When the knife was found there was a constable present, taking photos.

The importance of the evidence of Senior Constable Deirereaga

70. There are two areas of Sen Const Deirereaga's evidence that are of particular importance to the prosecution case. First, as evidence of consciousness of guilt of the two accused, and secondly, as evidence of the distressed state of the complainant.
71. First, was she distressed?

Was she distressed?

72. Terry Diehm said that after sending his wife to see the complainant in the room where, on the complainant's evidence, she had in effect barricaded herself, his wife told her to open the door, we don't hate you. They both returned to the lounge-room laughing. Then, immediately before the police arrived the complainant had again been laughing. When she saw police she became alarmed and rushed down the passage way, saying that her boyfriend must have sent the police to get her. Terry Diehm said that he did not know there had been an allegation that the complainant had assaulted her boyfriend, nor did he find it remarkable that police might have arrived after midnight because of such a complaint.
73. In my opinion the evidence points very clearly to the fact that she was indeed distressed. She had been distressed and fearful when speaking to her mother. There is no reason why I should not accept the mother's evidence. She was not challenged in cross-examination; indeed not cross-examined, at all.

74. I reject Terry Diehm's account that the complainant was laughing immediately before police arrived. I accept Sen Constable Deireregea's account of the significant degree of distress she exhibited, and of her appearance of being fearful.
75. That evidence provides strong support to the complainant's account. Terry Diehm's false denials of her being distressed damaged his credibility.
76. The second area of importance in the evidence of Sen Const Deirereaga is that said to demonstrate the consciousness of guilt of both accused.

Consciousness of guilt

77. There is a major disagreement in the accounts of Terry Diehm and Sen Const Deirereaga as to what was said when police arrived at the house. Terry Diehm claims that Deirereaga asked him whether there was a Nauruan girl locked in the house, and he answered, correctly, that there was no one locked in the house. He added that he did not think of [the complainant] as Nauruan. He thought she was Kiribati. He said he did not hear Deireregea ask if anyone else was in the house. Deigereigea claims that she asked repeatedly if there was anyone else in the house, and whether [the complainant] was in the house and they denied these propositions each time. Terry Diehm claims that as they first used the name [the complainant] that was the moment when [the complainant] appeared, before he could answer. I have set out that evidence in more detail earlier.
78. The prosecution wants to rely on the answers of both accused as evidence of consciousness of guilt.
79. The conversation took place in the presence of Constable Dillon Harris. He was due to give evidence, but did not, because he had been involved in a personal domestic dispute and was too drunk to come to court.
80. Subject to what I later say about the absent Constable Dillon Harris, I found the evidence of Sen Const Deireregea to be measured and credible.
81. Mr Diehm offered no explanation for the 10 minute delay in answering the door,

although he was not asked to provide one. But no innocent explanation comes readily to mind. Mr Aingimea submitted that police had heard the TV playing loudly, so he might not have heard the police. On his own evidence, he was awake as was his wife, when police arrived. His claim that the complainant panicked, and ran off to hide, thinking that the police might be there to arrest her for assaulting her boyfriend, reeks of invention, but even on his account, he knew that [the complainant] was somewhere in the house.

82. Terry Diehm claimed however, that they were responding to questions about whether anyone was locked up in the house. Sen Const Diereregea strongly denied that she had used the words “locked up”, but as I have earlier noted, that was the expression recorded in the police log following the mother’s phone call.

83. 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.

84. 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**”(my emphasis).

85. 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 Deireregea, having regard to what is contained in the statement of the untested witness.

86. The Director submitted that Diereregea 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.

87. The prosecution case would have been strengthened if Constable Dillon Harris had

corroborated his colleague's evidence. I make full allowance for his absence when weighing the evidence of Dierereaga. The defence could no doubt have made much of the discrepancies which I have identified, but the absence of Constable Harris does not cause me to have any doubt that Tekena Diehm expressly said "She left earlier in the afternoon", when asked specifically about [the complainant]. Even allowing for her state of intoxication, I see no reasonable alternative explanation than that that was a deliberate lie on the part of Tekena Diehm, and I consider it was told in consciousness of guilt.

88. Even if I accept that the words "locked up" were used at some point by Deirereaga, I would not regard that as a deliberate lie by Deirereaga, but more likely a mistake. I accept, however, that she asked if they knew [the complainant] and one or other said "No. There's no one else here", and, importantly, that they both said "no" when asked "Is she with you in the house".
89. 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.

The credibility of the complainant

90. The credibility of the complainant came under heavy challenge. I deal with some of those challenges.

Was she a prostitute?

91. The complainant denied the allegation that she was a prostitute. She said that she was not, but she said her sisters were prostitutes, an answer that seemed to me to be bluntly frank, and to carry conviction. Interestingly, the defence witness, Rose Igii, gave evidence that about a week after the alleged rape she had gone looking for the complainant, to confront her over rumours that Rose had heard that the complainant had been accusing Rose Igii of being a prostitute. When she confronted the complainant she said to her "If you saw it with your own eyes, then you could say that". The Complainant replied "Ok, I'm sorry". Thus, she was apparently accepting that it was a hurtful or damaging thing to accuse someone of being a prostitute. The

witness did not say to the complainant words such as “You are a prostitute yourself, so you know I am not” or “Who are you to call someone a prostitute?”. The witness was not cross-examined so as to explore these possibilities.

92. I am not persuaded by the evidence of Terry Diehm that the complainant is or was a prostitute. It seems to have no relevance to this case apart from being used to suggest she would be generally unreliable when giving an account of disputed sexual activities. Even if I assume she is or was a prostitute I would not conclude from that fact alone, that her account was unreliable.

Intoxication

93. In cross examination the complainant agreed that she and Tekena had drunk a full bottle of whisky and another half bottle. In addition she had drunk 5 cans of beer since the morning, and had drunk 2 cans at Location overnight. She denied that she was drunk.
94. The complainant says she was not falling down drunk – in a stupor. Terry Diehm swore she had been. However he did not suggest that she was in such a state when the police arrived. Const Deireregea said the complainant was under the influence, as was Tekena. It is likely that Terry Diehm was more sober than the complainant and that would generally mean that his account was less affected by intoxication.
95. I conclude that the complainant must have been significantly affected by alcohol, but she was capable of communicating, walking unaided, participating in a medical examination.
96. I conclude that Tekena Diehm was also significantly affected by alcohol, but again she was capable of communicating with police and walking.
97. I do not consider that the evidence discloses that either accused was so affected by alcohol as to be incapable of forming the intention to commit, or to aid and abet, rape.
98. I have regard to the extent of intoxication of the complainant as being a factor that would reduce her reliability as a witness, but not, in my view, to such an extent as to

render her evidence wholly or generally unreliable.

99. I turn to consider the evidence of use of a knife.

The Knife

100. According to Sen Const Deireragea the complainant said immediately that Tekena had held a knife to her throat. She said that the knife had been brought from the kitchen by Tekena. That is different to the account she gave in evidence, that Tekena had forced the door of the children's room open and entered, sideways, with the knife in her left hand. I do not regard the variation as significant, however, and the matter was not explored in cross-examination.

101. When Sen Const Deireregea returned with her to conduct an investigation, she asked her where the knife was, and she searched and found a knife on the kitchen bench. A photo was taken, but has not been produced.

102. Constable Dan Botelanga, who took photos which were tendered, but did not include one of the knife, said that there had been a first response group that had attended and taken photos before his group arrived. His group arrived with a search warrant.

103. It is not clear to me whether Sen Const Deireregea was part of the first response group that performed a search of the house. I have not been told who comprised that group. I have little information about what they were doing. According to the complainant, the knife was seized, in her presence, but it has not been tendered.

104. The photographic evidence that was tendered before me raises the possibility that the first response group may well have claimed to have located and perhaps photographed other items, including two pairs of womens' panties. Two pairs of panties on the floor of the lounge-room would have provided strong circumstantial evidence that two women had been engaged in sexual activities in that room. In addition, a plan of the house was apparently made. Such evidence is not before me, so if the search was unlawful, then it has potentially damaged the case for the State. I will have no regard to that evidence. I note in any event, that Terry Diehm alleges that

this evidence was planted by police. As it happens no evidence has been led that either woman had worn or had removed panties.

105. I have no explanation for the absence of all of this evidence. Most likely the search was unlawful, being conducted without a warrant under s.79 of the *Criminal Procedure Act 1972*.

106. These are very serious omissions. They mean that I must take particular care before I decide that a knife was used at all. The complainant had been affected by drink, and, she says, by fear. Has she invented the story about use of a knife to support a wholly false accusation? Is it possible that she sought to embellish her account of what was indeed a non-consensual sexual encounter, lest it not be accepted as such?

107. Was the evidence from Cecilia Boata of her laughing with police about the knife an indication that it was not a genuine story about a knife being used? But even assuming that she had been laughing with police, a suggestion she had denied, might it have been nervous laughter, or a product of embarrassment? Those possibilities were not explored with the witness in cross examination.

108. In any event, what she told Cecilia in their first phone call was that police were going back to the house "To get a knife that Tekena was using. For fingerprints". In the second phone call Cecilia asked why they were laughing, and the complainant said one of the police officers was holding the knife and imitating what happened before. She said "Imitating what Tekena was doing to [the complainant]". In other words the complainant consistently maintained that a knife had been used, and had said so from the first opportunity, at the scene.

109. In the absence of these other police officers from the witness box only Sen Const Deireragea can answer Terry Diehm's allegation that the first group of police who searched the house, fabricated evidence and moved items around. His complaint extended to the finding of the knife. Mr Aingimea submitted that the evidence of laughing police officers was consistent with the knife evidence having been fabricated.

110. If the search was unlawful, I must ask myself, might that not add weight to the

allegation of other police improprieties?

111. I am satisfied that a knife was indeed found in the kitchen. That does not prove who put it there, and when, or what use it had been put to, if any, that night. Nonetheless the fact that it was found, at all, provides some additional circumstantial evidence, but a knife in a kitchen is hardly unusual.
112. I am, however, denied corroborative evidence about the circumstances in which the complainant searched for and located the knife, and of the demonstrations as to its use which the first group of police asked her to give. I cannot compare that demonstration with her evidence in Court.
113. I have given close consideration to the deficiencies of the police investigation concerning the knife evidence. Notwithstanding that Terry Diehm's pleader did not have the opportunity to cross examine police officers from the first response group, I saw little credibility in Terry Diehm's suggestion that the knife had been planted. The complainant had already announced that there had been a knife used, so however and wherever it was found, it was inevitable that a knife would be found in the kitchen, and I can accept its existence without seeing a photograph. Planting it on a bench would have added nothing. Likewise I found highly improbable Terry Diehm's allegation that police had moved a mattress into the lounge room so as to add support for the complainant's version of events as to where the rape had occurred.
114. I am satisfied that a knife had been used, as the complainant claimed.
115. I turn then to the most troubling aspect of the prosecution case.

The evidence of Rose Igii

116. This witness swore that the complainant had said to her a week after the arrests and bailing of the accused that she should approach them and say that if they agreed to pay for her airline ticket, she would withdraw the case. She asked the witness to tell her what they said, and to keep this a secret.
117. The complainant said the witness was sort of a friend, but she denied the conversation.

She said she had not discussed the matter with Rose since 12 June.

118. If true, this allegation would seriously undermine the credibility of the complainant, and her denial on oath would further undermine her evidence.

119. The prosecutor, however, did not cross-examine her, at all. There was nothing about her evidence that would cause me to disbelieve her. She appeared to be an honest witness. Was she mistaken? Did she have a motive to lie? I have no information.

120. Although I found the complainant's evidence to be generally reliable and believable, I see no reason to disbelieve the account of Rose Igii. That being so, is that evidence sufficient to raise a reasonable doubt about the guilt of the accused?

121. It is, of course, possible that a victim of a rape might foolishly make such an offer to her attacker, for whatever misguided reason, and her exposure as a liar in denying the accusation on oath would seriously compromise the rest of her evidence. If she would lie about that, what else might she have lied about?

122. Mr Kurisaqila submitted that Rose Igii did not say that the complainant had said the rape did not occur. Indeed, she has never said that to anyone. He submitted that the complainant's denial of the bribe allegation ought to be accepted, as her evidence was credible generally, and corroborated.

123. This evidence troubled me, and I have given it careful thought. In the absence of cross examination, I accept that the complainant did make that approach. She did not, however, say that the complainant admitted that she had made up the story, only that she would withdraw the case. Terry Diehm did not take the bribe offer to police, but he was not obliged to do so.

124. If the complainant did make this offer, and I will presume she did, then it requires that the rest of her evidence be very carefully scrutinised. 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.

125. Is that confidence removed by the evidence of Mr Diehm? As I have said, he has no obligation to raise reasonable doubt, but is his account one which nonetheless does leave me with a reasonable doubt, as to what really happened on this night?

Evidence of Accused Terry Diehm

126. Terry Diehm's evidence was quite fanciful. It was riddled with implausible accounts of his sexual encounters with the complainant but with denials of his own sexual interest in pornography. His suggestion that she asked him for sex "Just for pleasure, not money" stands in stark contrast to her statement of disgust to police "I just had sexual intercourse with a 66 year old man".

127. He claimed that the first time he had sex with the complainant was 21 May and that the moment his wife had gone to the shower she had propositioned him for sex, without at that point asking anything from him, except, apparently, the pleasure of having sex with him. He claimed that this was done in secret without his wife knowing, but they later had sex again, and he thought, but did not know, that his wife might have suspected as much.

128. Then again, on 13 June, he claims that the complainant propositioned him for sex, seizing the ten minute opportunity while Tekena was in the shower. They had intercourse. He said nothing about taking Viagra. Then later, after 7.30 he said the complainant again wanted to seize an opportunity, while the wife was in the toilet. He said he could not get hard and she offered to suck his penis. He said "no, that's enough"

129. Asked why he did not tell his wife about the sex encounters with the complainant, he said he was shy. He had no interest in threesomes. He had never used the sex toys found in his wardrobe. He said only he watched pornography, not his wife. He had purchased a dildo about 5 months before but his wife had never used it. He forgot all about it being there.

130. The suggestion that Tekena Diehm was unaware of her husband's sexual interest in the complainant is fanciful. The sexual toys and pornographic DVDs were on open

- display in wardrobes. The Viagra tablets were also not hidden. He claims that those items had not been used, that he had intended to get rid of them but had just not got around to it.
131. Terry Diehm was at pains to deny any proposition that he thought might not be in his interest.
132. Terry Diehm denied that the decision to take the children out of the house and to have them spend the night away from the home was taken because he and his wife had planned to have sex with the complainant. He claimed that it had been arranged in advance that the children would be staying with friends at Location, and stay overnight. In answer to questions later, he said that the children were learning dancing at Location and Cecelia was teaching them. In my opinion, the events described both by him, and by the complainant, suggest it was a last minute decision.
133. The decision to remove the children was probably first considered soon after the complainant's arrival at their premises. The discussions by Tekena Diehm about her husband's sexual interest and her own, was an attempt to get the complainant to agree to the proposed sexual activity, but she did not get agreement.
134. Even if there had been a prior arrangement to take the children to Location, I am satisfied there had not been an arrangement to keep them overnight. The next day was a school day.
135. The decision to make a second trip to Location to convey clothes for the night in my opinion indicates that a sudden decision had been made to keep them out of the house overnight. That decision was probably taken during the drive they took together, specifically when the Diehm's remained in the car alone, arguing, with the complainant standing outside. She was not part of the discussion, but I have no doubt she was the topic of conversation.
136. Mr Diehm tried to lend an air of credibility to his account, by reciting much irrelevant detail, such as the colour of mugs from which people were drinking.

137. I do not believe his explanation for the departure of the children. It was one of many examples where he tried to lend weight to his denials of incriminating evidence by loading his response with a myriad of irrelevant details, intended to give an air of accuracy and verisimilitude to his account.
138. I must keep in mind that a foolish, but innocent, man might well try to bolster his defence by lies and exaggerations, out of fear that unless he does so his denials will not be accepted. It seems to me very likely that Terry Diehm had trawled through the prosecution case and worked out a contrived answer to every contention contained within it, even down to apparently pacing out the 21 steps between the front door and the children's room. That again, might be the approach taken by an innocent man. The suggestion of him having carefully constructed a false response to damaging parts of the prosecution case was not put to him in cross-examination. Indeed, apart from it being put to him that he was lying, the detail of his account was not subjected to rigorous cross-examination at all.
139. Having taken all of those matters into account, however, I remain impressed by the complainant's evidence. It appeared measured; if anything, understated. Her account has some significant corroboration. The prosecution case is a strong one.

Summary and conclusion

140. I am satisfied beyond reasonable doubt that both accused engaged in non consensual sexual intercourse with the complainant and that Terry Diehm penetrated the Complainant's vagina with his penis, and Tekena Diehm aided and encouraged him to do so, and held a knife to ensure that the complainant complied.
141. I am satisfied that they knew that the complainant was not consenting but continued anyway.
142. After careful thought, I am satisfied that the State has proved its case beyond reasonable doubt.

- A
- 143. I find you, Terry Diehm, and you, Tekena Diehm, Guilty of rape.

The Hon Geoffrey M Eames AM QC

Chief Justice

29 November 2011