IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

No. B15 of 2012

TERRENCE JOHN DIEHM

First Appellant

TEKENA DIEHM

Second Appellant

v

DIRECTOR OF PUBLIC PROSECUTIONS
(NAURU)

Respondent

JUDGE:	Eames, C.J.
DATE OF HEARING:	5 August 2013
DATE OF JUDGMENT:	5 August 2013 (revised 12 August 2013)
CASE MAY BE CITED AS:	Diehm v DPP
MEDIUM NEUTRAL CITATION:	[2013] NRSC 12

CATCHWORDS:
Appeals Act 1972, s.41 –*Appeals to the High Court (Legal Aid) Rules* 1977 - Application for a grant of legal aid – Relevant factors – Quantum.

APPEARANCES:

For the Appellants	Mr D. Aingimea
For the Respondent	Mr S. Bliim

CHIEF JUSTICE:

1. This is an application pursuant to s.41 of the *Appeals Act* 1972 for the grant of legal aid by Terence John Diehm and Tekena Diehm who are the appellants before the High Court of Australia with respect to their conviction in the Supreme Court of Nauru on 29 November 2011 for one count each of rape.

2. The Solicitor General has made submissions on behalf of the Director of Public Prosecutions in response to that application, and I have heard submissions and read affidavit material provided by Mr Aingimea on behalf of the appellants.

3. The appellants appealed against the convictions by a notice of appeal lodged on 12 March 2012. They were released on bail on 13 March 2012, pending the appeal. The application for legal aid was unfortunately delayed, not having been made until 29 July 2013. The hearing of the appeal is listed in Canberra on 8 August 2013, that is, three days after the application was made to me. The delay in lodging the application has had some consequences in assessing the application.

4. Section 41 of the Act reads:

> L**egal aid**
>
> (1) A Justice of the High Court or a judge of the Supreme Court may at any time grant legal aid to a party to an appeal, or to an application for leave to appeal, under this Part to enable such party to have a written case prepared for him by a barrister and solicitor of the Supreme Court or to be represented by counsel at the hearing of the appeal or the application by the High Court, if, in the opinion of the Justice or the judge, it appears desirable in the interests of justice that such party should receive such aid having regard to his financial means, the nature of the cause and the grounds of the appeal or the application.
>
> (2) The expenses of legal aid granted to an appellant under this section shall be paid out of the Treasury Fund up to an amount allowed by the High Court but subject to any provision as to rates and scales of payment made by rules of court.

5. Mr Bliim, submitted, correctly, s.41(1) requires that the issues which must be

addressed by me are:

a. first, did the appellants have the financial means to pay costs of their appeals;

b. secondly, do the interests of justice require that they receive legal representation;

c. thirdly, do the merits of the appeals, by reference to the nature of the cause and the grounds of appeal, justify the grant of legal aid?

6. As to the first question, Mr Aingimea disclosed that the appellants have in fact paid or incurred to date $36,400 in fees with an additional $5,000 falling due.

7. Mr Bliim criticised the affidavit of the first appellant as providing little detail for his claim that he had exhausted all his funds on legal fees and had no income or assets. The affidavit was hand drawn, and its omissions are no doubt attributable to the deponent's lack of legal skill. Nonetheless, the affidavit fails to address the issues identified in the *Appeals to the High Court (Legal Aid) Rules* 1977, which Rules are made by the Republic of Nauru under the *Appeals Act*.

8. Rule 2 provides as follows:

> **APPLICATIONS TO A JUDGE OF THE SUPREME COURT**
>
> **2.** (1) Application for legal aid by a party to an appeal, or to an application for leave to appeal, to the High Court under Part V of the Act, if made to a judge of the Supreme Court, shall be made in writing in English and shall be accompanied by a statement showing-
>
> (a) if the applicant is not in custody, his occupation and his salary or wages therefrom;
>
> (b) the occupation and the salary or wages therefrom, if any, of the applicant's spouse, if any;
>
> (c) the value of all property belonging to-
>
> (i) the applicant;
>
> (ii) his spouse, if any;
>
> (iii) his father, if alive;
>
> (iv) his mother, if alive;
>
> (d) all amounts, if any, of moneys received in the two years preceding

the application, or expected to be received within six months after the application, in respect of phosphate royalties by-

(i) the applicant;

(ii) his spouse, if any;

(iii) his father;

(iv) his mother.

(2) Where application for legal aid is made by a Nauruan, the statement referred to the preceding paragraph shall be certified as correct by the Secretary of the Council.

9. Although s.41(1) allows an application to be made "at any time", the terms of s.41(1) assume that an application for funding will be made before costs are incurred. That is shown by the words "to enable such party to have a written case prepared . . .or to be represented". That is also consistent with the approach adopted in Article 10(3) of the *Constitution* which grants a right to a defendant to be assigned a legal practitioner so as to defend himself on trial where in the opinion of the court the person does not "have sufficient means to pay the costs incurred".

10. The fact that costs have already been incurred and paid before an application was made for legal aid would suggest that the appellants then had the financial means to pay those fees. The affidavit of the first appellant suggests, however, that although he did in fact have the funds to pay his legal fees, that expenditure left him all but destitute, and I conclude that he did not have the financial means to meet the full legal costs charged to him by his Australian and Nauruan legal practitioners.

11. The mere fact that the fees had been incurred and substantially paid prior to the application being made should not bind a judge otherwise minded to grant an application to grant the sum actually incurred. In those circumstances, the Court had been denied the opportunity to decide in advance what level of funding was appropriate and an assessment would have to be made as to the financial status of the applicants prior to the fees being incurred. I accept the practical reality, however, that the sum of $30,000 paid out by Ronphos was not sufficient to both meet legal expenses and to provide adequately for the applicants' family.

12. I am satisfied, therefore, that the applicants meet the first requirement for their

application to succeed.

13. As to the second requirement, whether the interests of justice require that a grant of legal aid be made, Mr Bliim pointed to the very late notice and the fact that had the application been made earlier the sum granted for legal aid might have enabled competent counsel to have been engaged for fees substantially less than the costs actually charged. Whilst that is no doubt true, the nature of the appeal was such that a senior-junior counsel was reasonably engaged.

14. I accept that the interests of justice favour a grant of legal aid. This consideration is closely related to the third criterion.

15. As to the third question, Mr Bliim submitted that the appeals had very limited prospects of success.

16. I have read written submissions for the appellant, the respondent's response and the reply by the appellants counsel and I am satisfied that there is an arguable case to justify a grant of legal aid and I will therefore make an appropriate order under s41(1) of the *Appeals Act* 1972.

17. There is not much guidance from legislation as to the appropriate quantum for a grant of legal aid. Section 41(2) provides the quantum to be allowed by the "High Court" shall be that provided by the rates and scales of payment made by "the rules of court".

18. That provision is curious in that it refers to an amount allowed by the High Court but of course the application has been made here to the Supreme Court of Nauru and the Treasury Fund referred to is that of Nauru.

19. Rule 3 of the Rules headed **"Amounts of Legal Aid payments"** does not take the matter much further, but does refer to the Supreme Court**.** It reads**:**

> **3.** (1) Amounts of payments to counsel for work performed as the result of the granting of legal aid under section 41 of the Act shall be such as the High Court or a Justice thereof, having regard to the amount and complexity of the work, orders or, if no order is made by the High Court or a Justice thereof,

such as a judge of the Supreme Court, having regard to those matters, orders.

20. Neither counsel was able to discover any High Court scale applicable in such a case as this. Mr Bliim has referred me to scale of fees paid in the High Court by the Legal Aid Commission of New South Wales and I accept that that is a reasonable starting point for consideration of the scale of costs that should be allowed. I propose to follow that but also depart from it in respects which I will discuss. The scale of fees applies as at 17 September 2012.

21. Applying that scale I allow:

For the preparation, grounds of appeal and argument	$2300
For preparation of the appeal itself	$1150
For Appearance on appeal	$1150

In addition there is an item "each accused represented, per day of appeal".

I take that to represent the separate consideration that has to be given the situation of each appellant when arguing the appeal.

For two appellants that would total $410

22. In addition to those fees, I recognise that the scale that I have been applying is a legal aid scale applicable in Sydney, Australia. Given the volume of work in the High Court that it would fund the Legal Aid Commission could gain representation for appellants at a lesser fee than might be negotiated with respect to an appeal from Nauru. Counsel may well accept lower than usual fees because they were offered repeat work by the Legal Aid Commission.

23. Furthermore, more days of preparation and reading may be required for the appeal under the Nauru Appeals Act than would be the case for an appeal from a decision of the Supreme Court of New South Wales to the High Court. Although the appeal from a decision in the Supreme Court of Nauru is called an "Appeal" it is regarded as original jurisdiction of the High Court[1], which might be akin to a hearing de novo.

[1] See *Ruhani v Director of Police* [2005] HCA 42; (2005) 222 CLR 489, at [39]-[52], [64]-[66], per Mc Hugh J.

Thus, it is an appeal where the issues and detail of the evidence which appellant counsel would have to master may well be greater than that in other criminal appeals to that court.

24. I am accordingly going to allow some additional days' fees over and above the one day fee allowed on the New South Wales scale. I propose to allow an additional 4 days at $1,150 which is an additional $4,600.

25. I accept that counsel was engaged in Brisbane and had to travel to Canberra. I will allow an additional $1,500 for travel costs and accommodation.

26. Finally, for the solicitors and other legal practitioners who represented the appellants on the appeal, I will allow $5,000.

27. That is a total of $16,110.

28. I therefore order that legal aid be granted to the applicants in that sum, to be paid from the Treasury Fund.

Geoffrey M Eames AM QC

Chief Justice

12 August 2013