IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 101/2016
In the matter of a petition to appeal the sentence passed by the District Court in Criminal Case No. 20, 21, 22 and 24 of 2015 pursuant to s.3(3) of the Appeals Act 1972

BETWEEN

THE REPUBLIC OF NAURU — APPELLANT

AND

JOHN JEREMIAH, JOSH KEPAE AND JOB CECIL — RESPONDENTS

Before: Khan, ACJ
Date of hearing: 24 & 25 April 2017
Date of judgement: 2 May 2017

Case may be cited as: *Republic v Jeremiah and others*

CATCHWORDS:
S 3 (3) of the Appeals Act 1972- appeal by the Director of Public Prosecutions- no restriction imposed on the right to appeal-s.14 (4) Supreme Court on appeal has discretion to substitute the sentence of the District Court.
When police are trying to maintain public order and violence is used against to impede them - immediate custodial sentence is warranted irrespective of the motive.

APPEARANCES:

Counsel for the Appellants: D Tonganivalu (DPP)
Counsel for the first & third Respondents: N Funnel & S Lawrence
Counsel for second respondent: M Higgins

JUDGEMENT

INTRODUCTION

1. This is an appeal by the Director of Public Prosecutions against the sentence imposed on the respondents by the District Court by virtue of the provisions of the Appeals Act 1972.

2. The respondents John Jeremiah (first respondent), Josh Kepae (second respondent) and Job Cecil (third respondent) pleaded guilty to the following charges:

Count 1

Statement of Offence:

Unlawful assembly contrary to s.61 and 62 of the Criminal Code 1899.

Particulars of Offence:

Matthew Batsiua, Sprent Dabwido, Squire Jeremiah, Pisoni Bop, John Jeremiah, Remack Mau, Piroy Mau, Mareiya Halstead, Daniel Jeremiah, Josh Kepae, Bureka Kakioua, Job Cecil, Estakai Foilape, Dabub Jeremiah, Grace Detageouwa, Joram Joram, Rutherford Jeremiah, Jacki Kanth, Meshack Akubor and others on the 16th day of June 2015 at Yaren District in Nauru with intent to carry out some common purpose namely to unlawfully enter the Parliament of Nauru whilst it was in session assembled in such a manner as to cause persons in the neighbourhood to fear on reasonable grounds that the persons so assembled will tumultuously disturb the peace.

Count 2

Statement of Offence:

Right of access – security restricted area: Contrary to s.107(2) of the Civil Aviation Act 2012.

Particulars of Offence:

Sprent Dabwido, Squire Jeremiah, Pisoni Bop, John Jeremiah, Remack Mau, Piroy Mau, Mareiya Halstead, Daniel Jeremiah, Josh Kepae, Bureka Kakioua, Estakai Foilape, Dabub Jeremiah, Joram Joram, Rutherford Jeremiah, Jacki Kanth, Meshack Akubor and others on the 16th day of June 2015 at Yaren District in Nauru, was in a security restricted area of the aerodrome and was not authorised to be in the area and was reckless about whether the person was authorised to be in the area.

Count 3

Statement of Offence:

Riot contrary to s.61 and 63 of the Criminal Code 1899.

Particulars of Offence:

Matthew Batisua, Sprent Dabwido, Squire Jeremiah, Pisoni Bop, John Jeremiah, Remack Mau, Piroy Mau, Mareiya Halstead, Daniel Jeremiah, Josh Kepae, Bureka Kakioua, Job Cecil, Estakai Foilape, Dabub Jeremiah, Grace Detageouwa, Joram Joram, Rutherford Jeremiah, Jacki Kanth, Meshack Akubor and others on the 16th day of June 2015 at Yaren District in Nauru with intent to carry out some common purpose namely to unlawfully enter the Parliament of Nauru whilst it was in session, being assembled and by assembly needlessly and without any reasonable occasion provoked other persons tumultuously to disturb the peace.

Count 4

Statement of Offence:

Disturbing the legislature contrary to s.56 of the Criminal Code 1899.

Particulars of Offence:

Matthew Batsiua, Sprent Dabwido, Squire Jeremiah, Pisoni Bop, John Jeremiah, Remack Mau, Piroy Mau, Mareiya Halstead, Daniel Jeremiah, Josh Kepae, Bureka Kakioua, Job Cecil, Estakai Foilape, Dabub Jeremiah, Grace Detageouwa, Joram Joram, Rutherford Jeremiah, Jacki Kanth, Meshack Akubor and others on the 16th day of June 2015 at Yaren District in Nauru advisedly committed a disorderly conduct in the immediate view and presence of Parliament while in session intending to interrupt its proceedings.

Count 8

Statement of Offence

Serious assault, contrary to s.340(2) of the Criminal Code 1899.

Particulars of Offence:

Daniel Jeremiah, Remack Mau, Josh Kepae and Piroy Mau on the 16th day of June 2015 at the Yaren District in Nauru assaulted Snr Const Angelo Amwano while acting in the execution of his duty to prevent the rioters from entering the Parliamentary Building.

GUILTY PLEAS

3. (a) First respondent- pleaded guilty to counts 2, 3 and 4;

(b) Second respondent– pleaded guilty to count 2,3,4 and 8;

(c) Third respondent- pleaded guilty to count 1 and 4.

PLEA VACATED ON COUNT 2

4. On 9 November 2016, the respondents pleaded guilty to the above charges before learned magistrate Ms Garo (learned magistrate) and facts were outlined and accepted; plea in mitigation was made on their behalf by their counsel; followed by sentencing submissions by the prosecution and defence. The learned magistrate adjourned the matter to 25 November 2016 for sentencing. On or about 22 November 2016, the learned magistrate sought further submissions on count 2, since she had some reservations as to whether an offence was made out. After the submissions were made she ruled that no offence was made out in relation to count 2 and the plea was vacated and it was adjourned for trial. The magistrate proceeded to sentence first and second respondents on the remaining counts, instead of awaiting the outcome of determination on count 2. Unfortunately, counsels did not advise the learned magistrate to defer sentencing until the determination on count 2.

5. Further at the hearing of this appeal the counsels did not address this court on the issues as to whether the learned magistrate deviated from the established practice of sentencing the respondents before the determination of Count 2. The respondents in my considered view would be facing double jeopardy, so I took the matter up with the DPP at the hearing of this appeal and he did not give me a clear response. Considering the prejudice faced by the respondents the DPP, in my considered view should withdraw Count 2 against the respondents, regardless of the outcome of this appeal.

SENTENCES

6. The learned trial Magistrate imposed the following sentences:

1) John Jeremiah - (first respondent)

Count 3 – riot contrary to s.61 and s.63 of the Criminal Code 1899 – 3 months imprisonment.
Count 4 – disturbing the legislature contrary to s.56 of the Criminal Code 1899 3 months imprisonment.
Both sentences to be served concurrently with a total term of 3 months imprisonment.

2) Josh Kapae - (second respondent)

Count 3 – riot contrary to s.61 and s.63 of the Criminal Code 1899 – 3 months imprisonment
Count 4 – disturbing the legislature contrary to s.56(2) of the Criminal Code 1899 – 3 months' imprisonment.
Count 8 – serious assault contrary to s.340(2) of the Criminal Code 1899 – 6 months' imprisonment.

All sentences to be served concurrently. Total term 6 months imprisonment.

3) Job Cecil - (third respondent)

Count 1 – unlawful assembly contrary to s.61 and s.62 of the Criminal Code 1899 – 3 months imprisonment.
Count 4 – disturbing the legislature contrary to s.56(2) of the Criminal Code 1899 – 3 months' imprisonment.
Both sentences to be served concurrently. Total term 3 months imprisonment.

7. After the sentencing, the respondents made an application for bail pending appeal proceedings pursuant to the provisions of s.10 of the Appeals Act 1972 and the learned magistrate granted bail pending the finalisation of the appeal.

FACTS

8. In May 2014, Matthew Batisua (Batisua) [from "Boe" constituency] was suspended from Parliament for an indefinite period and his parliamentary salary and all benefits were withheld pending his suspension.

9. In June 2014, Sprent Dabwido (Dabwido) and Squire Jeremiah (Squire) [both from "Meneng" constituency] were also suspended from parliament for an indefinite period and their parliamentary salaries and all benefits were withheld pending their suspension.

10. After their suspension, Batisua, Dabwido and Squire and 2 other members of Parliament who were suspended filed an action for judicial review challenging the validity of their suspension against the Speaker of the Parliament (see Keke v Scotty) [2014] NRSC7 (11 December 2014). This matter was heard by the Full Bench of the Supreme Court of Nauru and on 11 December 2014 a decision was delivered. In its decision, the Full Court held at [59] as follows:

> "In both cases, we hold that this Court does not have jurisdiction to enquire into the Practices and Procedures of the Parliament or to review it. This is a matter solely within the province of Parliament. It is our respectful view Parliament should be allowed to conduct its proceedings as it deems fit and a member of Parliament is unhappy with its decision then he/she may use the parliamentary process to appeal against the decision and not to resort to this forum to seek relief."

11. Their suspension remained unresolved despite them having had meetings with the speaker, Honourable Ludwig Scotty, and they decided to stage a peaceful protest outside the Parliament on 16 June 2015 when the Parliament was to deal with the budget.

12. Following their decision, they met with their family members and their supporters from their respective constituencies. At the time they met their supporters, they decided to

stage a peaceful protest with the 'common purpose' to ensure that the 3 suspended Members of Parliament could enter the Parliament.

13. Having met their supporters, they came to the Parliament at around 10am. The supporters from Meneng were wearing white t-shirts while the supporters from Boe were wearing red t-shirts.

14. The police had information that there was going to be a protest march, so they put in a road block in front of the Catholic Church at Yaren, which is very close to Parliament House. The Meneng supporters including Dabwido and Squire arrived in vehicles. When they were unable to go past the road block, a white Land Cruiser drove into the fence of the airport compound which was followed by a white and a blue truck which had passengers. The first respondent was standing on the tray of the blue truck whilst the second respondent was standing on the tray of the white truck. The vehicles and the occupants including the 2 respondents remained on the grass patch of the airport.

15. Batisua and his supporters from Boe also arrived at 10.00 am. They walked on the road and moved over to the grass patch of the airport.

16. The only thing that divides the airport compound and the parliamentary complex is the main road. The car park of the Parliament is adjacent to the main road.

17. On 16 June 2015, the parliament was in session dealing with the budget.

18. The Commissioner of Police saw the protestors on the grass verge of the airport and asked Dabwido and Squire to move away, as a plane was about to arrive from Brisbane, but they refused to do so and the flight was diverted to Honiara.

19. The Commissioner of Police saw that the protestors were moving toward Parliament House so asked the police to form a police line.

20. Batisua, Dabwido and Squire were shouting 'let us in, we wanna go in' and were supported by the 2 respondents together with the people from their respective constituencies.

21. The police asked the 3 suspended members of Parliament to control the crowd and to move away but their instructions were ignored. The police then formed another line which was being pushed and some of the protestors were wrestling with the police.

22. The demonstration became very violent and the police line and cordon formed by police was pushed by the crowd including the 2 respondents.

23. The demonstrators set off fireworks and a fire extinguisher was sprayed at the police. They were assaulted and abused. Rocks and other objects were thrown at them. The police were exposed so they had to call for riot shields to protect themselves from the rocks that were thrown at them.

24. Rocks and objects were also thrown at the Parliament House and one front glass was shattered.

25. The police had difficulty controlling the crowd and were outnumbered and they did not have reserve officers to call in to assist them, so they sought the assistance of fire brigade officers and community liaison officers who obliged.

26. Despite the additional support the police were still unable to hold back the crowd which kept pushing them until they reached the entrance of the Parliament. The police with the assistance of the fire officers and community liaison officers formed a police line and it was pushed in by the supporters and the 2 respondents.

27. Respondent 3 arrived at 11.30am. He was not part of the original group which had decided to stage the protest march. He assembled with the protestors. He then saw a relative confronting the police and he assisted them in pushing the police line at the entrance of the Parliament.

28. When the police brought the riot shields in, the second respondent pushed the riot shield held by Senior Constable Amwano and he was exposed and the others around assaulted him.

29. The Speaker heard the noise and the explosions and commotion outside and Parliament was still in session. He was informed by the Clerk of the Parliament that the parliamentary lounge window had been broken and there was an angry crowd outside who were pushing against the police line and were intending to enter Parliament. The Speaker adjourned the parliamentary proceedings at midday. All the members of Parliament including the President were taken upstairs in the committee room for their safety. The Speaker was quite terrified and was concerned for the welfare of the members of parliament.

30. As the crowd was pushing Batisua came to the front of the protest line and was arrested by the police and taken into the parliamentary chambers.

31. The principal of the Yaren Primary School which is located near the parliamentary complex was very terrified at what she saw and was concerned for the safety of her children and her teachers.

32. The community liaison officers who had come to assist the police were frightened and one female officer became emotional while a male officer was worried for his life.

33. The Parliament did not resume in the afternoon and the crowd stayed around the precincts of parliament until 10.00pm when they dispersed. The parliamentarians including the President left after 10.00 pm.

34. Job Cecil left the parliamentary complex at around 2pm to go back to work.

APPEAL BY THE APPELLANT

35. The Republic has filed an appeal against the sentences of all three respondents and its grounds of appeal are as follows:

1) That being dissatisfied with the sentence, the Republic wishes to appeal against the sentences upon the following grounds:

i. That the sentences handed down by the learned magistrate were manifestly lenient in all the circumstances of the case.

ii. The learned magistrate erred in law and fact in not applying the appropriate sentences for the offence of riot and disturbing the legislature as it showed a sentencing disparity when viewed together with the penalty imposed for the offence of unlawful assembly.

APPEAL BY THE RESPONDENTS

36. The respondents have filed an appeal against their sentence. The grounds of appeal are as follows:

1) The sentences imposed are manifestly excessive.

2) The learned trial Magistrate erred in not taking into account the context and motives for offending as mitigating factors.

3) The learned trial Magistrate erred in assessing the individual moral culpability of the appellant.

4) The learned trial Magistrate erred in failing to apply the principle of parity.

5) The learned trial Magistrate erred in finding that deterrents must be an overriding factor in the sentencing exercise.

6) The learned trial Magistrate erred in her application of the purposes of the sentence.

APPEAL BEING OUT OF TIME

37. The appellant has taken issue to the respondent's appeal being out of time. The sentence was delivered on 25 November 2016 and the respondents filed their petition on 9 December 2016 and it is the appellant's contention that their appeal is out of time by one day.

38. S.5(1) of the Appeals Act 1972 provides that the appeal:

Every appeal shall be in the form of a petition in writing signed by the appellant or his barrister or solicitor or pleader and shall be presented to the Clerk within 14 days of the decision appeal against.

The appellant contends that 14 days should also include the date when the sentence was delivered.

39. Mr Higgins for the respondents submits that in s.63(2) of the Interpretation Act 2011 that the 'day of the event' is not included and when read together with s.5(1) of the Appeals Act 1972 the day of the judgment is not to be included.

40. I agree with Mr Higgins submission and hold that the appeal filed on 9 December was within time.

SUBMISSIONS

41. The parties filed written submissions and made various oral submissions which have been of great assistance to me.

CONSIDERATION

42. APPELLANT'S SUBMISSIONS

The DPP submits that the Republic's appeal is confined to the offence of riot and disturbing legislature (Counts 3 and 4) respectively.

43. The DPP submits that it accepts the sentence for unlawful assembly of 3 months on appellant three as being correct, which is one-quarter of the maximum 12 months imprisonment. He submits that there is no clarity as to how the Magistrate arrived at the sentence of 3 months for the offence of riot (Count 3) and disturbing Parliament (Count 4).

44. The DPP further submitted that if the Magistrate accepted one-quarter principle for the offence of unlawful assembly, then the sentence of 3 months for the offence of riot and disturbing Parliament is incorrect on the basis that it is being disproportionate. His submission is that if the one-quarter principle was going to be applied to the offence of riot and disturbing Parliament then the sentence should have been one-quarter of 3 years (9 months).

45. The DPP cited the case of ***Bukarau and others v State Crim Appeal***[1] which was a case of armed takeover of Parliament and charges relating to consorting with people carrying firearms and unlawful assembly, in which a sentence ranging from 15 months to 2½ years were imposed. He also cited the case of ***Igi v Regina*** [2] which was a case of riot causing damage to buildings where a sentence of 2 years was imposed and was upheld on appeal by Palmer CJ of the High Court of Solomon Islands.

[1] Crim. App. No HAA101 of 2005S
[2] (1997) SBHC 39

46. So, the whole basis of the DPP's appeal is that applying the principle of proportionality (one quarter) the sentence for the offences of riot and disturbing Parliament was incorrect.

RESPONDENTS SUBMISSIONS

47. Mr Funnel appears for the first and third respondents and Mr Higgins for the second respondent. Between them it was agreed that Mr Higgins will argue whether the DPP is entitled to file this appeal against the sentence.

WHETHER DPP IS ENTITLED TO FILE APPEAL AGAINST SENTENCE

48. Mr Higgins concedes that s.14(4) of the Appeals Act gives this court discretion to substitute the sentence of the Magistrate but he submits that it does not state as to how those powers shall be used and therefore submits that it must be guided by the principles of common law. S.14(4) states:

> "s.14(4) At the hearing of an appeal the Supreme Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the District Court and pass in substitute therefore such other sentence, whether more or less severe, which the District Court could lawfully have passed as it thinks ought to have been passed; any sentence passed by the Supreme Court shall, for the purposes of this Act, be deemed to have been passed by the District Court, save that no further appeal shall lie thereon to the Supreme Court."

49. Mr Higgins further submits that the position of the DPP is different when it seeks by way of appeal to have the sentence increased. He relies on ***Everett v R***[3] (Everett).

50. He cites paragraph [7] of Everett and submits that the failure of the Crown in that case to make submissions that the suspended sentence was not appropriate when the Court was contemplating a suspended sentence.

[7] states:

"In the present case, there was another particular consideration which strongly militated against the ground of leave to the Attorney General to appeal against the sentencing judge's order that the unexpired part of the sentence of imprisonment which he imposed should be suspended. It is that, in the context, where the learned sentencing judge had made it quite clear that he was contemplating making orders that the unexpired portion of any sentences of imprisonment be suspended, counsel who then appeared for the Crown made no suggestion whatsoever that such an order would be beyond the proper scope of his Honour's sentencing discretion in the circumstances of the case. Indeed, at one stage of the proceedings, his Honour, having expressed concern lest the complete suspension of any chance of imprisonment which he imposed upon the appellants might be seen by Everett as 'unfair' by reason of the fact that Everett had been detained in custody for eighty-five days prior to the sentencing whereas Phillips had been detained for eighteen days, asked the counsel whether he had 'the power in law to impose community service order in addition to goal and if I was minded to suspend?" Counsel who then appeared for the Crown and counsel for the appellants all made submissions in relation to that question. Far from suggesting that failure

[3] (1994) 181 CLR 295

to impose a term of actual imprisonment was inconsistent with the proper exercise of sentencing discretion, counsel for the Crown responded as follows:

> "COUNSEL: Your Honour, in my respectful submission the position in 1993 in relation to community service orders is that the Sentencing Tribunal does not have to make a decision first that a term of imprisonment is appropriate.
>
> HIS HONOUR: That's right.
>
> COUNSEL: And then take the second step to ameliorate it.
>
> HIS HONOUR: I agree with that.
>
> COUNSEL: The sentencing tribunal can straight to the question of community service orders.
>
> HIS HONOUR: Yes
>
> COUNSEL: I can't assist as to whether or not you can do both."

In the event, His Honour concluded that it was not open to him to order community service in addition to the imposition of a suspended term of imprisonment."

51. Mr Higgins further submits that the Crown in Everett was precluded from seeking an increased sentence when it failed to make those submissions in the court of first instance. He relied on paragraph [9] of Everett which states:

> "...it is necessary to consider whether the prosecution shall be allowed to raise on appeal the contention that the sentence ought to have been suspended when the contention was not put in the court below. The consequences of allowing the prosecution to do so are serious. The respondent has faced the prospect of deprivation of his liberty by way of imprisonment and has been spared, subject to observation of the conditions of bond. If the prosecution is allowed to raise the contention he must again face the prospect of imprisonment. This is what Federal Court meant in R v Tait and Bartley (8) (1979) 24 ALR 473) by 'double jeopardy'. In my opinion this court should allow the prosecution to put to it, on an appeal sentence, the contentions which were not put to the sentencing Judge, only in exceptional circumstances which appear to justify that cause. I endorse with respect what was said in Tait and Bartley as to the duty of prosecuting counsel before the sentencing Judge. In particular the submission is made by counsel for a convicted person that a sentence should be suspended or a possible suspension is mentioned by the judge, and this course is regarded by the prosecution as beyond the proper scope of the judge's discretion, a submission to that effect should be made. Generally speaking, if the submission is not made to the sentencing Judge the prosecution should not be able to advance that contention successfully by appeal to the Attorney General."

52. Mr Higgins further relies on [10] of Everett where it is stated that the Crown failed to advance submissions to the sentencing Judge as to the appropriateness of a suspended sentence the High Court stated as:

> "... counsel who then appeared for the Crown did not, at any stage of the proceedings, seek to advance any submissions to the learned sentencing judge that it would not be appropriate 'to impose' sentences of imprisonment which would be wholly suspended insofar as their future operation was concerned." Taking account of those matters, Zeeman J reached his dissenting conclusion that leave to appeal should be refused. We can see no error in either his Honour's reasoning or his conclusion."

53. Mr Higgins further submits that the DPP failed to make submissions to the Magistrate that the appropriate range of sentence for riot and disturbing Parliament was 6 to 12 months and is now precluded from making submissions that it should be increased on appeal as being manifestly lenient.

54. Mr Higgins also relies on the case of ***Dinsdale v The Queen***[4] (Dinsdale) and submits that the Crown appeal in Australia is regarded as being in a 'class different' to an appeal against sentence by an offender. For that proposition, he relied on paragraph [62] of Dinsdale where it is stated:

> "For reasons of legal history and policy, the position of the Crown appeals against sentence has long been regarded, in Australia and elsewhere, as being in a class somewhat different from that of an appeal against sentence by a convicted offender. When first introduced, Crown appeals were considered to cut across 'time honoured concepts' of the administration of criminal justice in common law legal systems. For this reason, it has sometimes been said that, as a 'matter of principle', such appeals should be a comparative rarity. The attitude of restraint reflected in such remarks has often been justified on the basis that a Crown appeal against sentence put the prisoner in jeopardy of punishment for a second time, a feature that is ordinarily missing from an appeal, or an application for leave to appeal, brought by those who have been sentenced. The consequence is that where the Crown appeals, it is normally obliged to demonstrate the error of which it complains. The further consequence is that, where such a demonstration succeeds, it is conventional for the appellate court to impose a substituted sentence towards the lower end of the range of available sentences. This convention tends to add an additional restraint into the interference, given the strong resistance that exists against appellate "tinkering" with sentences."

55. Mr Higgins further submits that Dinsdale at paragraph [62] states that an appeal by Crown should be a comparative 'rarity' as it exposes the accused to double jeopardy.

56. Mr Higgins further submits that the threshold for the DPP on an appeal is to demonstrate an error in principle. It is simply not enough to complain about an opinion about the outcome before the Magistrate Court and this Court. He relies on paragraph [65] of Dinsdale where it is stated:

> "I accept that reasons of busy courts of criminal appeal should not be scrutinised with a fine-tooth comb to detect errors. And that mere verbal infelicities in reasons should

[4] [2000] HCA 54

generally be ignored. But the point raised is important because it constitutes a significant protection to a prisoner against an over-ready appellate disturbance of the sentence imposed by the primary judge simply because of a difference of opinion about the correct sentence. Almost certainly, the primary judge will have had more time to consider the sentencing options and the punishment proper to the case than a busy appellate court. Disturbance of that judge's disposition requires a careful indication of the error that has been made warranting that course. Otherwise, especially where intervention is apparently being justified on the basis of a manifest error, it is all too easy for the mind to slip into impermissible reasoning. The complaint here was not of the failure of the appellate court to identify all of its reasons, but of its failure to show that it had approached those reasons in the law required by law."

57. Mr Higgins emphasised on the fact that the sentencing court as stated in paragraph [65] of Dinsdale:

> "Had more time to consider the sentencing options and the punishment proper to the case than will a busy appellate court."

58. In the context of the case before the Magistrate the position was:

1) The guilty plea was taken on 8 November 2016;

2) The probation officers report was received by the Magistrate on 21 November 2016;

3) On or about 22 November 2016 the Magistrate invited further submissions in relation to Count 2;

4) She received submissions from DPP on 23 November 2016;

5) She gave her ruling in relation to Count 2 on 24 November 2016;

6) She delivered the sentence on 25 November 2016.

59. I do not see as to how it can be suggested that the Magistrate would have had more time then this court to consider the sentencing options considering what I have stated above.

60. The Magistrate was placed in a very unfortunate position as she did not receive any assistance from the DPP in terms of the relevant authorities. I am surprised to say the least that the DPP did not know of the leading English authority of ***R v Caird*** [5] on the offence of riot or the Victorian case **of *R v McCormack*** [6] (McCormack). The Magistrate was facing a very daunting task and the DPP seemed to have taken a very casual attitude. I say that because he referred her to the case of ***Iggy v Regina*** (supra) in which the case of ***R v Caird*** was discussed and yet he made no effort to locate that case.

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6 [1981] Vic Rp.11

61. At this juncture, I would also like to add that whilst the defence counsels come from the New South Wales bar, they were not aware of the case of McCormack and were relying on other Pacific Island jurisdictions which unfortunately had no relevance to the matters before the Magistrate.

62. Unfortunately, the Magistrate was dealing with a very complex matter and she did not receive any assistance from the lawyers.

63. The Court has digressed somewhat but it was considered that these observations be made at this stage as it is important for the profession to provide adequate and reasoned assistance to the bench for a fair and equitable administration of justice.

64. Mr Higgins further submits that it is not the business of the appellate court to 'scrutinise with a fine comb to detect error' and I accept that in the context of this case the Magistrate was not provided with any assistance or important case authorities and nor did she have time to consider the sentencing options provided for at paragraph [65] of Dinsdale.

65. The cases of Everett and Dinsdale and the principles stated therein do not apply to this jurisdiction for 2 reasons:

    1) Firstly, the Magistrate did not make any indication as to the sentence that she was contemplating to impose; and

    2) Secondly, under s.3(3) of the Appeals Act 1972 gives an unfettered power to the DPP to appeal against sentence. S.3(3) provides:

    "where the District Court has convicted any person in any cause, the Director of Public Prosecutions may appeal to the Supreme Court against that sentence passed on such person's convictions."

66. When s.3(3) and s.14(4) of the Appeals Act 1972 is read together and seen against the provisions of s.669(A) of the Criminal Code Amendment Act 1939 it will be seen that the two provisions are almost identical. S.669(A) provides:

    "The Attorney General may appeal to the Court against any sentence pronounced by the Court of Trial and the Court may in its discretion vary the sentence and impose such sentence as to the said Court may deem proper."

67. S.669(A) of the Code was discussed **in *R v McKeown***[7] where at page 211 it was stated as:

    "Counsel for the prisoner resists the appeal on various grounds:

    1) No appeal lies because the crime of which the prisoner was convicted was committed on 30 November 1939, whereas the Amendment Act conferring the rights of appeal did not come into operation until 1 December 1939.

[7] 1940 St.R.QD 202

2) No appeal lies against a sentence, and the Trial Judge's action under s.19(9) did not constitute the imposition of a sentence,

3) It is still competent for the trial Judge to call the prisoner for sentence at any time within 12 months after the order was made;

4) That in any event, the Court should stay its hand and wait for the Trial Judge to act.

We do not think any of these grounds should prevail. The argument on the first ground rests on some alleged vested right in a prisoner to retain his sentence in respect of a crime committed before the Act came into force, though trial and sentenced thereafter. We know of no such right. Moreover, though the indictment charged the crime as having been committed on 30 November, an essential ingredient of the crime was death of the victim, which did not take place until 1 December. The prisoner then must be deemed to have killed the deceased on 1 December 1939, on which date the Amending Act came into operation. Cf s.299 of the Criminal Code. Death on which a charge of unlawful killing arises must take place within a year and a day after the causing of the death. The unlawful killing, however, we think, cannot be complete till the death happens, and that, in our opinion, fixes the date of the crime. Cf ss.564 and 571. However, we do not desire to rest the decision on that ground, but prefer to rest it on the broader principle of law and common sense. Whatever rights the prisoner might have in relation to his sentence, can came into existence at the earliest when he was first charged with the offence for which he was sentenced. It may not come into existence until he was charged on indictment, or until he was sentenced, but on any view the appeal is competent. There was no right of the prisoner in existence at the passing of the Amendment Act, assuming that the matter in question is a matter of procedure only. Cf. Colonial Sugar Refinery Company Ltd v Irving ([1905] AC 369). It would appear that the matter is more than one of procedure. Cf. Attorney General v Sillem ([1864] 10 HLC.704, per Lord Westbury at P.720):

"The creation of a new right of appeal is plainly an Act which requires legislative authority" ;and again at p.724:

"The Court from which the appeal is given and the Court to which the appeal is given must both be bound and must be the act of some higher authority... A new right of appeal is in effect a limitation of the jurisdiction of one Court and an extension of jurisdiction of the another. An appeal is the right of entering a superior count and invoking its aid and interposition to redress the error of the Court below."

It would appear therefore that the jurisdiction of the Court of Criminal Appeal must have been in existence when the process of law was first set in motion in respect of the charge on which he was ultimately convicted. He was first charged with wilful murder on 1 December 1939."

68. Further, in ***Neal v The Queen*** [1982] 149 C.L.R. 305 at p 308 it was stated:

"It may seem surprising that it is possible to frustrate the power of the Court in this way, but the continued existence of the power is itself surprising, now that the

Attorney General has the right of appeal against sentence: see s.669(A) of the Criminal Code. "

69. I find that the DPP's appeal against the sentence is competent pursuant to the provisions of s.3(3) of the Appeals Act 1972.

70. I would like to add that the Criminal Code Amendment Act 1899 (Qld) applies to Nauru as it was in force in the State of Queensland on 1 July 1921.

WHETHER UNDER S.14(4) – THIS COURT CAN SUBSTITUTE THE SENTENCE – WHETHER MORE OR LESS

71. Mr Higgins submits that although this Court is vested with the discretion to substitute a different sentence, it is still bound by the common-law principle and it does not have an unfettered right.

72. In ***R v Beevers***[8] MacrossanS.P.J. stated:

"I think we are bound by the decision of the High Court in ***Whittaker v The King*** ([1928] 41C.L.R.230) to hold that this Court has unlimited judicial discretion in exercising its jurisdiction on an appeal by the Attorney General under s.669(A) of the Criminal Code against a sentence pronounced by a Court of Trial. The language of s.5(D) of the Criminal Appeal Act, 1912, New South Wales, which was under consideration by the High Court in Whittaker's case (supra) is in all relevant respects the same as that of s.669(A) of the Criminal Code. This, however, does not mean that this Court should interfere with the sentence pronounced by a trial judge unless it is clearly satisfied that the sentence should be altered. In exercising its jurisdiction it is bound to give all the weight to the opinion of the trial judge and to recognise that the just sentence to be passed on an offender by a trial judge may depend on circumstances not apparent or available to the court of appeal. Where a trial has been held by a jury, those circumstances of trial which constitute what Issacs J. compendiously called its 'atmosphere' may be very important and it may be difficult if not impossible for a Court of Appeal to place itself in the position of the trial judge in weighing their importance. However, these advantages of the trial in assessing a sentence are not so great when there has been no trial but the prisoner has pleaded guilty to the offence with which he was charged."

FINDINGS BY THE MAGISTRATE

73. The Magistrate made the following finding at [19] of the Judgment:

a) *"[19] The attempt Ms Graham and Mr Hearn representing the defendants to classify the actions of the defendant and others on 16 June 2015 as civil disobedience and anti-social behaviour must fail because it is contrary to the pleas of guilty to the offence of riot and disturbing*

[8] [1942] ST.R.QD 230

legislature both of which are serious offences, and the pleas of guilty entered by all the defendants. It is also in contrast to the agreed facts submitted to the Court. When viewed collectively and assessed wholly it was a violent assembly that resulted in police officers being assaulted, civilians (working as community liaison officers) being called upon to assist the police, and the parliament session being suspended for that day. His Excellency The President, the Speaker of Parliament and other Members of Parliament were taken to the top floor of the Parliamentary building for their safety and remained there until 10pm and returned to their work after the protestors were disbursed. The President who is head of the executive arm of the Government and the Speaker who is the head of the legislature, the other 2 arms of the Government executive and Parliament were in fact held in captivity until 10pm. The circumstances as described in the agreed facts were not only volatile but unpredictable and were liable to change possibly for the worse. Thus the attempt to describe the behaviour of the defendants and others on the day as mere anti-social behaviour or acts of civil disobedience must fail."

b) When dealing with the second appellant, the Magistrate stated at [38] as follows:

> *"[38] At the time of offending, the defendant, Josh Kepae was a member of the Nauruan Police Force and a serving member at that time. Instead of assisting the police to control the situation, he went against his oath by committing an offence and even ended up assaulting one of his colleagues."*

c) In respect of all defendants, the learned Magistrate stated at [42] as follows:

> *"[42] In favour of the defendants, they are not the leaders of the protest that turned into an unlawful and riotous assembly. They are followers."*

74. I raised the applicability of Parliamentary Privileges and Immunities Act 1976 (PPIA) to the suspended members of Parliament and protestors whether they were allowed within the precincts of the Parliament. The PPIA provides:

1) That any stranger is not entitled to remain within the precincts of Parliament;

2) A member who has been suspended by the Speaker from service of Parliament cannot remain in or enter the precincts of Parliament and he can be forcefully removed if he enters.

75. Mr Funnel in response submitted that it was not conceded and will never be conceded that the expulsion of the three members of Parliament was lawful. I find this submission by the learned counsel rather incongruous to the situation his clients find themselves, especially with their pleas of guilty.

76. I think that PPIA has a great deal of relevance to the charges.

77. It is submitted by the respondents that they together with the three suspended members of Parliament and others were exercising their constitutional rights to a peaceful demonstration. That is their constitutional and inalienable right and nobody can dispute that. However, that right has to be seen in light of PPIA.The suspended members of Parliament and the respondents had to stay away from the precincts of Parliament. It should have to be borne in mind that the suspended members and their supporters had formed a common purpose before the protest to ensure that the suspended members were to enter Parliament and any attempt to enter the precincts of Parliament itself was going to be unlawful in light of the provisions of PPIA.

78. In the appeal the following charges that are to be considered are:

1) Riot;
2) Disturbing Parliament;
3) Unlawful assembly;
4) Serious assault.

79. I shall deal with them in that order.

1) Riot- (Count 3)

a) The circumstances leading up to the riot have been fully set out in the facts. Both first and second respondents were present in the riot from the start until it finished when the Parliament was disturbed. It lasted some 2 hours – from 10am to 12 noon.

b) In that period the police officers came under attack as they were trying to stop the suspended members of Parliament from entering Parliament and in the process the police officers were pushed in on several occasions, they were physically assaulted, objects were thrown at them, fire extinguishers were sprayed on them, they were badly exposed that they did not have protective gear, as they did not foresee that they will be attacked, they were abused, they were outnumbered and had to seek the assistance of the fire officers and the liaison officers. Whilst the intention of the suspended members of Parliament and their supporters was to ensure that the suspended members entered Parliament, the police became the focal point of the attack as they tried to stop them from doing so.

80. Since the police became the focal point of attack, the case of R v Caird (supra) is very relevant and this is the leading English authority on the offence of unlawful assembly, riot and sentencing when offenders join in an attempt to overpower police performing protective duties. Caird has a lot of factual similarities to this case. In Caird there was an attempt to interrupt or disrupt the occasion whereas in this matter there was this intention to enter Parliament by the suspended members of Parliament who would have been regarded as trespassers and in the process the Parliamentary proceedings was disturbed.

81. In Caird a sentence of 18 months was imposed for the offence of riot and 6 months consecutive for assaulting a police officer and 6 months concurrent to the offence of possessing an offensive weapon. But in that case the trial lasted 7 days.

82. The case of ***R v McCormack***[9] (McCormack) deals with the offence of riot and again has huge similarities to this case. In McCormack a crowd of 300 had gathered outside the police station and the police had formed a police line outside the police station facing the crowd. Members of the crowd threw objects including wood, food, paper, bottles, dust and stones at the police. Some of these missiles hit the police or some hit members of the crowd. Police reinforcement was called for from other districts. Attempts to disperse the crowd failed, and an order was made for the street to be cleared. The police moved forward, most of them with batons. Some of them retreated whilst others stayed back and fought with the police. A total of 16 were charged with unlawful riotous assembly and the trial lasted for 5 weeks. Four were convicted and 12 acquitted. The 4 convicted each received a sentence of 18 months imprisonment.

83. Mr Funnel on behalf of the third respondent submits that his part in the two offences was an aberration and that his life would be disturbed if he were to be sent to prison. He submits on behalf of the first respondent that a sentence of imprisonment should be the last resort and that the first respondent has completely reformed. It may have been an aberration on the part of the Respondents but it has to be remembered that their actions threatened the very heart of our democracy and the seat of democracy, which actions if not punished appropriately could encourage others as has been seen in other countries. A sentence has to be imposed which would send a strong message to the community that a behaviour of this nature would be condemned in the strongest terms.

84. Mr Funnel further submits that the suspension of 3 members of Parliament was an attack on democracy and the two respondents' participation must be viewed in that light.

85. Mr Funnel further submits that this is not a case where the principles of general deterrence should be applied.

86. Mr Higgins also submits on behalf of the second respondent that an immediate custodial sentence is not appropriate.

87. In ***R v McCormack***[10] it was stated as follows:

> "Mr Radcliffe referred the Court to the principle in **R v Williscroft, Weston, Woodley and Robinson** [1975] VIC Rp27; 1975 VR292, at pp.299-302, that where an offence is prevalent a court may give great weight to the consideration of deterrents. He submitted that the offence of riot was not one that was prevalent and argued therefore the consideration of a deterrent should not be given great weight in this case. However, in the present case, for other reasons, the Judge was entitled to give great weight to the consideration of deterrents. These were the first prosecutions and convictions in Victoria for some time for a riot of this type. The riot was serious and dangerous. It was an occasion when an appropriate, by imposition of substantial sentences, to make clear the gravity with which the law and

[9] [1980] Vic Rp11
[10] [1980] Vic Rp 11

the community view the crime of riot and the substantial sentences to be expected for it. Such sentences make it less likely that others would follow the applicant's example of joining in a riot."

88. In Carters Criminal Law of Queensland 7th Edition at p68 it is stated as:

"In ***R v Raddick*** [1954] NZLR 86 the Court of Appeal said:

> 'One of the main purposes of punishment is to protect the public from the commission of crime by making it clear to the offender and to other persons with similar impulses that if they yield to them they will meet with severe punishment. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does and will prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment or with only a light punishment. If a Court is weakly merciful and does not impose a sentence commensurate with the seriousness of the crime it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand justice and humanity both require that the previous character and conduct of the individual offender and the effect of sentences on these should also be given the most careful consideration although this factor is necessarily subsidiary to the main considerations that determines the appropriate amount of punishment.'

89. I am convinced that both the offence of riot and disturbing legislature calls for a deterrent sentence.

RIOT – COUNT 3

90. I shall now deal with the offence of riot on count 3. The maximum penalty is 3 years I will quash the sentence of 3 imprisonment months passed by the magistrate and substitute it with another sentence as discussed later. I will set a sentencing range of 18 months would be appropriate. Since all of you have pleaded guilty, I reduce it by 20 percent and am left with a figure of 14.4 months and I shall round it up to 14 months. In ***R v Thomson and Houlton***[11] Spigelman CJ set the following guideline at 419 [169]:

1) "A sentencing Judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.

2) Sentencing Judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant – contrition, witness vulnerability and utilitarian value – but particular encouragement is given to the quantification of the last-mentioned matter. When other matters are regarded as

[11] [2000] 49 NSWLR 383

appropriate to be quantified in a particular case, e.g. assistance to authorities, a single combined quantification will often be appropriate.

3) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 percentage discount on sentence. The primary consideration determining where it is in the range of a particular case should fall is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter of determination by the sentencing judge.

4) In some cases, the plea in combination with other factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.

91. Now I shall deal with each of you individually and the respective roles which each one of you played in the offence of riot.

FIRST RESPONDENT

92. 1) The first respondent is 31 years old. He is married with one child. He has one previous conviction for malicious injury which took place before this offence. On appeal against sentence, he was sentenced to 4 months imprisonment and I note that at [6] of the decision, Crulci J made the following comments:

"[6] The facts of the case before the Court raised serious concerns in relation to the vigilantism and the concern of the community at large when members of the public take law into their own hands."

2) You were involved right through the incident and because of your presence on the ground patch of the airport a flight had to be diverted to Honiara. I note that on that count the plea was vacated but the fact remains that a flight was diverted and that in my view is an aggravating feature.

3) I note that on the agreed facts you were only involved in pushing the police line and did not assault police officers or throw any objects at them and you stayed right through the incident and it is not clear as to when you left.

4) In your previous case, an element of vigilantism was involved and that is disturbing.

5) I will add on to the sentence of 14 months a term of 2 months for a flight diversion and 2 months for your previous conviction. So, a total sentence on Count 3 is 18 months imprisonment.

93. SECOND RESPONDENT

1) You are 25 years old. At the time of the offence you were a police officer and you failed to uphold the law. Instead of siding with the police you joined the protestors. I understand that you had some strong family connections with the suspended members of Parliament' but as a police officer you should have realised that your loyalty lay with the police. Whilst your colleagues came under attack you betrayed them, and not only that you also assaulted a police officer (Count 8) and in the process of pushing the shield he was left exposed, and others around him also assaulted him. You received a sentence of 6 months for that offence and I will not alter that. I will order that the sentence shall be served consecutively with the sentence of 14 months.

2) Because of your presence on the airport compound a flight had to be diverted and you will receive a sentence of 2 months – so the total sentence would be 22 months.

94. Disturbing Parliament- Count 4

The maximum sentence for this offence is 3 years imprisonment.

95. What occurred on the day was not only an attack on Parliament, it was an attack on Nauru and its people, the Constitution and the rule of law.

96. Your decision to ensure that 3 suspended members of Parliament entered Parliament would have been of no avail, because no sooner had they entered Parliament they would have been ejected. They had no right to be within the precincts of Parliament.

97. I understand that you may have been concerned at their suspension but you had no powers to restore them. I note that the 3 suspended members of Parliament maintain that the suspension was not unlawful and if that was so, then they could have entered the Parliament without your support.

98. In a democratic society one does not use force to achieve one's objective – it is done through lawful processes. Instead of using your strength to ensure that the suspended members entered Parliament you should have used your strength at the polling booth.

99. This kind of attack on Parliament is totally unprecedented in the whole world. I asked the counsels to provide me with any case authorities and they were unable to do so as none is available according to my research.

100. Of course, attack on Parliament by means of takeover is known in other countries but the consequences of that are so dire and very unfortunate.

101. The members of Parliament including the President were taken up into a room for their own safety from 12 noon to 10pm when the crowd outside Parliament had dispersed. The Parliament could not resume in the afternoon.

102. Judging by the way the police came under sustained attack for a period of 2 hours against whom the protestors had no gripe, I can foresee that the risk of harm that the Parliamentarians would have been subjected to would have been far greater if you were all allowed to enter Parliament.

103. I quash the sentence of 3 month imposed by the magistrate on count 4. For, the reasons given above, I will set a head sentence of 28 months imprisonment and will reduce it by 20 per cent which gives a figure of 22.4 months and I will round it off to 22 months.

104. Respondents 1 and 2 – you played almost identical parts in the riot outside which disturbed the Parliament so I will not make any adjustments to your sentence. I order that the sentence on count 3 is to be served concurrently with count 4.

105. Respondent 3 -he was around for half an hour before the Parliamentary proceedings was disturbed so I will sentence him to 14 months imprisonment. I will not disturb the sentence on unlawful assembly (count 1) and I order that the 3 months shall be served concurrently with the offence of disturbing Parliament (count 4). So, the total sentence for the third respondent is 14 months imprisonment.

106. Since I have substituted the sentence imposed by the learned magistrate under the provisions of s.14(4) of the Appeals Act 1972, it is unnecessary for me consider the respondents' appeal, but for the sake of completeness their appeal is dismissed.

107. The police put their own safety and welfare on the line, to protect the Parliament and the parliamentarians, and I think they are deserving of receiving the highest commendation and I do commend them.

DATED this 2 day of May 2017

Mohammed Shafiullah Khan
Acting Chief Justice

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU