IN THE SUPREME COURT OF NAURU

AT YAREN

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 101/2016

Being an appeal against sentence passed by the District Court of Nauru in relation to Criminal Case No. 20, 21, 22 and 24 of 2015.

BETWEEN:

THE REPUBLIC APPELLANT

AND:

JOB CECIL, JOHN JEREMIAH AND JOSH KEPAE RESPONDENTS

AND BETWEEN:

JOB CECIL, JOHN JEREMIAH AND JOSH KEPAE APPELLANTS

AND:

THE REPUBLIC RESPONDENT

Before: CHIEF JUSTICE FILIMONE JITOKO

Date of Hearing: 19 and 20 March 2018

Date of Judgment: 29 March 2018

Case may be cited as:

CATCHWORDS: Criminal appeal – Whether sentence manifestly lenient – Whether sentence manifestly excessive – Whether error in application of sentencing principles – Parity of sentence with co-offenders – Unlawful assembly – Riot – Disturbing the legislature – Serious assault – Whether aggravating factor – Error in interpretation of agreed facts – Range of sentencing – Assessment of individual moral culpability – Deterrence as an overriding factor – Appeal by the prosecution – Discretion not to intervene – Jurisdiction of appellate court.

APPEARANCES:

The Republic: J. Rabuku (Director of Public Prosecutions)

L. Tabuakuro

S. Tagivakatini

Josh Kepae:	F. Graham (instructed by C. Hearn)
John Jeremiah & Job Cecil:	N. Funnell (instructed by C. Hearn)

CASES CITED

Alkhazali v Republic of Nauru [2015] NRSC 11; Case 27/2015.

Barbaro v The Queen [2014] HCA 2

Bugmy v The Queen [2013] HCA 37

Bukarau v The State [2005] FJHC 425

Cecil v DPP (Nauru), Jeremiah v DPP (Nauru) and Jeremiah v DPP (Nauru) [2017] HCA 46

Dekamana v Regina [2005] SBHC 75; HCSI-CRC 170 of 2005 (23 June 2005).

Dinsdale v The Queen [2000] HCA 54

Dube v DPP Criminal Appeal No. 2/98 NRSC

Everett v The Queen 181 CLR

Green v The Queen [2011] HCA 49

Harris v DPP Criminal Appeal No. 1/98, NRSC

House v The King HCA 1936 55 CLR

Hussein v The Republic [2015] NRSC 22; Criminal Appeal 120 of 2015 (16 December 2015)

Igi v Regina [1997] SBHC 39

KR v R [2012] NSWCCA 32

Phillips v The Queen [1994] HCA 181 CLR

The Queen v Wilton (1981) 28 SASR

R v Annwen Jones and others [2006] ECWA Crim 2942

R v Caird (1970) 54 Cr. App. R 499

R v Jones [2006] UKHL 16

R v Rezayee Hussein and 9 Others – Criminal Case No. 13/15

R v Wall [2002] NSWCCA 42

Regina v George Lattouf SC NSWCCA [1996] No. 60433 of 1996

Regina v Janceski [2005] NSWCCA 288

Republic v T. Ubwaitoi, K. Teanu, A. Kangooa and T. Nabetari – High Court of Kiribati Criminal Case no. 7 of 2006

Republic v Ubwaitoi – Sentence [2006] KIHC 64

State v Kosi [1981] PNGNC 4; N306 (19 January 1981)

State v Wafia (No 2) [2004] PGNC 223 N2547 (5 March 2004)

JUDGMENT

INTRODUCTION

1. This is an appeal by the Republic against the sentences imposed by the District Court of Nauru and a cross appeal against the same by the offenders.

2. All three (3) offenders John Jeremiah, Josh Kepae and Job Cecil had pleaded guilty to the charge of disturbing the legislature under section 56 of the Criminal Code 1899.

3. Job Cecil pleaded guilty to the offence of unlawful assembly under section 62 of the Criminal Code 1899.

4. In addition, John Jeremiah and Josh Kepae had pleaded guilty to the charge of riot under section 63 of the Criminal Code 1899; the charges of unlawful assembly against them were withdrawn by the prosecution on 8 November 2016.

5. Josh Kepae had in addition pleaded guilty to the charge of serious assault under section 340(2) of the Criminal Code 1899.

6. The amended charges and particulars are as follows:

COUNT 1

Statement of Offence (a)

Unlawful Assembly: contrary to section 61 and 62 of the Criminal Code 1899.

Particulars of Offence (b)

Job Cecil 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 3

Statement of Offence (a)

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

Particulars of Offence (b)

John Jeremiah, Josh Kepae 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 such assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace.

COUNT 4

Statement of Offence (a)

Disturbing the Legislature: contrary to section 56(2) of the Criminal Code 1899.

Particulars of Offence (b)

John Jeremiah, Josh Kepae, Job Cecil 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 the Parliament while in session and tending to interrupt its proceedings.

COUNT 8

Statement of Offence (a)

Serious Assault: contrary to section 340(2) of the Criminal Code 1899.

Particulars of Offence (b)

Josh Kepae and others on the 16th day of June 2015 at Yaren District in Nauru, assaulted Senior Constable Angelo Amwano while acting in the execution of his duty to prevent the rioters from entering the Parliament building.

7. On 25 November 2016 Resident Magistrate Emma Garo sentenced the defendants as follows:

John Jeremiah

Riot	3 months imprisonment
Disturbing the legislature	3 months imprisonment

Both sentences to be served concurrently.

Josh Kepae

Riot	3 months imprisonment
Disturbing the legislature	3 months imprisonment
Serious assault	6 months imprisonment

All sentences to be served concurrently.

Job Cecil

Unlawful assembly	3 months imprisonment

Disturbing the legislature	3 months imprisonment

Both sentences to be served concurrently.

BACKGROUND

8. Note that for ease of reference, I will refer to Mr. Jeremiah, Mr. Kepae and Mr. Cecil as the 'offenders' and at some points the 'defendants' collectively in the general parts of the judgement. In the submissions put forward on behalf of them, they will be referred to as the 'appellants'. This is to avoid confusion between the cross-appellants and cross-respondents.

9. This matter was first heard by then Resident Magistrate Emma Garo in the District Court of Nauru.

10. On 8 and 9 November 2016 the offenders entered pleas of guilty to their charges.

11. On 25 November 2016 Resident Magistrate Emma Garo delivered her judgment and sentencing of the three offenders.

12. On 2 December 2016, a petition of appeal was lodged by the Republic appealing against the inadequacy of the sentences imposed upon the appellants.

13. On 9 December 2016, petitions of appeal were lodged on behalf of each of the three offenders appealing against the severity of the sentences imposed upon them.

14. On 24 and 25 April 2017 the matter was heard on appeal in the Supreme Court of Nauru before Acting Chief Justice Khan.

15. On 2 May 2017 Acting Chief Justice Khan upheld the Republic's appeal and resentenced the offenders.

16. On 4 May 2017 the offenders filed an application for leave to appeal to the High Court of Australia.

17. On 20 October 2017 the High Court heard the offenders' application for leave to appeal. The orders of the High Court were as follows:

    a. Leave to appeal be granted.
    b. The appeal to be heard instanter.
    c. The appeal be allowed and the judgement of the Supreme Court of Nauru reversed.
    d. The appeals to the Supreme Court of Nauru by the appellant and the respondent be remitted to the Supreme Court of Nauru, differently constituted, for hearing according to law.

18. Written submissions to the Supreme Court of Nauru were received from the offenders on 6 February 2018 and from the Republic on 7 February 2018.

19. The matter came before me and was heard on 19 and 20 March 2018.

GROUNDS OF APPEAL – THE REPUBLIC

20. The Republic put forward two grounds of appeal. The grounds of appeal are as follows:

Ground One

That the sentences are manifestly lenient in all the circumstances of the case

Ground Two

That the learned Magistrate erred in law and fact in not applying the appropriate sentences for the offences for riot and disturbance of the legislature as it showed disparity when compared to unlawful assembly.

21. The additional ground that the appeal was filed out of time was abandoned by the prosecution at the beginning of this hearing.

GROUNDS OF APPEAL – JOHN JEREMIAH, JOSH KEPAE AND JOB CECIL

22. The Counsel on behalf of the appellants cross-appealed based on the shared following grounds:

Ground One

The sentences imposed are manifestly excessive

Ground Two

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

Ground Three

The learned Magistrate erred in failing to assess the individual moral culpability of the appellants

Ground Four

The learned Magistrate erred in failing to apply the principle of parity

Ground Five

The learned Magistrate erred in finding that deterrence must be the overriding factor in the sentencing exercise

Ground Six

The learned Magistrate erred in her application of the purposes of sentencing

23. In respect of Josh Kepae, the additional ground of appeal is as follows:

Ground Seven

The learned Magistrate erred in finding that it was an aggravating factor that the defendant was a police officer.

24. In respect of Job Cecil, the additional ground of appeal is as follows:

Ground Eight

The learned Magistrate erred in finding that the defendant became involved in the offending in an attempt to break the police skirmish line when there was insufficient evidence to support that finding.

AGREED FACTS

25. I believe it is necessary to set out in detail the Agreed Facts as applying to each of the offenders and submitted to the learned Magistrate in the context of the grounds of appeal filed by both the parties.
26. The agreed facts will be set out for each defendant separately.

Agreed Facts – John Jeremiah [pp 263 – 266 of the Court Record]

The agreed facts as submitted to the court in respect of the case against the defendant Mr. John Jeremiah are:

a. John Jeremiah, along with family members and supporters of suspended Members of Parliament Sprent Dabwido and Squire Jeremiah, from Meneng District had assembled at the sporting field in Meneng District in the morning of 16th June 2015.
b. The group then travelled in several motor vehicles towards the Parliament Building to protest the Government.
c. John Jeremiah was the younger brother of the then suspended Member of Parliament, Squire Jeremiah.
d. Before reaching the Parliament Building, the vehicles were stopped by a police roadblock and were informed that they would not be allowed to go towards the

Parliament Building. The roadblock was erected in front of the Catholic Church at Yaren District to stop the protestors from coming into the Parliament Building.

e. Multiple vehicles were observed, including a white Toyota Land Cruiser, motorcycles, a white truck and a blue vehicle.
f. The white Land Cruiser was observed ramming the fence of the aerodrome and this was followed by a white truck and a blue cab truck with passengers.
g. John Jeremiah was standing on the tray of the blue vehicle.
h. The vehicles entering the aerodrome had passengers of protestors in them and were heading towards the Parliament Building area.
i. The Commissioner of Police Mr. Corey Caleb noticed Mr. Sprent Dabwido and Mr. Squire Jeremiah getting off the vehicles in the aerodrome near the Parliament Building and calling on their supporters to go into Parliament.
j. He recognised apart from others on the aerodrome to be John Jeremiah.
k. The Commissioner tried to persuade the protestors to move away from the aerodrome as a plane was due to land but John Jeremiah stood along with other protestors on the aerodrome whilst Mr. Squire Jeremiah and Mr. Sprent Dabwido confronted the Commissioner of their intention to enter Parliament.
l. Whilst the protestors made their way through the police line that had been formed by the Commissioner and his police officers, John Jeremiah assisted with other protestors in pushing against the police line.
m. The defendant had gathered with others for the common purpose of allowing three suspended Members of Parliament (namely Mr. Mathew Batsiua, Mr. Sprent Dabwido and Mr. Squire Jeremiah) to enter the Parliament building.
n. The Commissioner noticed that the protest was not peaceful and noticed Mr. Sprent Dabwido and Mr. Squire Jeremiah calling on their supporters to go into Parliament. He recognised apart from others, Mr. John Jeremiah.
o. The police line broke due to the riotous push by the protestors in front of the Parliament doors.
p. Senior Constable Fritz of the Nauru Police Force stated that the three Members of Parliament were trying to force their way into Parliament with John Jeremiah and others.

q. Nathan Hiram who was Nauru's Fire Chief was asked to assist police in creating a barricade in front of the Parliament. He recognised John Jeremiah and others pushing against the Police skirmish line.
r. As a result of the riot, the speaker of the House at the time, the Honourable Ludwig Scotty was terrified and had to stop the Parliament that was in session.
s. The President and Speaker together with other members of the Parliament were taken to the top floor of the Parliamentary Building for their safety. They remained upstairs until around 10p.m.

Agreed Facts – Josh Kepae [pp 268 – 271 of the Court Record]

The agreed facts as submitted to the court in respect of the case against the defendant Mr. Josh Kepae are:

a. Josh Kepae and supporters from the Meneng District all had all assembled at the sporting field in the Meneng District on the morning of 16th June 2015.
b. The group then travelled together in several motor vehicles with the two suspended Members of Parliament for Meneng (Mr. Sprent Dabwido and Mr. Squire Jeremiah) towards the Parliament Building to protest the Government.
c. Before reaching the Parliament Building, Josh Kepae and some others were stopped by a police roadblock and were informed that they would not be allowed to go towards the Parliament Building.
d. A roadblock had been erected in front of the Catholic Church to stop the protestors from coming to the Parliament Building.
e. Inspector Simpson Deidenang, who was assisting at the roadblock, stated that he saw a white Toyota Land Cruiser, followed by motorcycles, a white truck and a blue vehicle enter the aerodrome. The white Land Cruiser was seen ramming the fence of the aerodrome and was then followed by the white truck and a blue double cab truck with passengers.
f. The vehicles entering the aerodrome had passengers of protestors in them and were heading towards the Parliament Building area.

g. Josh Kepae was seen standing on the tray of the white truck as it entered the aerodrome.
h. The Commissioner of Police Mr. Corey Caleb noticed Mr. Sprent Dabwido and Mr. Squire Jeremiah getting off the vehicles in the aerodrome near the Parliament Building and calling on their supporters to go into Parliament.
i. He recognised apart from others on the aerodrome to be Josh Kepae.
j. The Commissioner tried to persuade the protestors to move away from the aerodrome as a plane was due to land but Josh Kepae stood along with other protestors on the aerodrome whilst Mr. Squire Jeremiah and Mr. Sprent Dabwido confronted the Commissioner of their intention to enter Parliament.
k. Whilst the protestors made their way through the police line that had been formed by the Commissioner and his police officers, Josh Kepae assisted with other protestors in pushing against the police line.
l. The defendant had gathered with others for the common purpose of allowing three suspended Members of Parliament (namely Mr. Mathew Batsiua, Mr. Sprent Dabwido and Mr. Squire Jeremiah) to enter the Parliament Building.
m. The Commissioner noticed that the protest was not peaceful and noticed Mr. Sprent Dabwido and Mr. Squire Jeremiah calling on their supporters to go into Parliament. He recognised apart from others, Mr. Josh Kepae.
n. The police line broke due to the riotous push by the protestors.
o. Senior Constable Fritz of the Nauru Police Force stated that the three Members of Parliament were trying to force their way into Parliament with Josh Kepae and others.
p. Nathan Hiram who was Nauru's Fire Chief was asked to assist police in creating a barricade in front of the Parliament. He recognised Josh Kepae and others pushing against the Police skirmish line.
q. Josh Kepae was part of the crowd that was pushing against police in front of the Parliament Building.
r. During the push by protestors in the front of the Parliament Building, Senior Constable Angelo Amwano of the Nauru Police Force was using a riot shield

that he had been instructed to get by Sergeant Dan Botelanga as protestors were throwing rocks.

s. Josh Kepae was pushing through the police line with others and pushed the riot shield held by Senior Constable Amwano onto his body whilst they held the police line.

t. At the same time Josh Kepae was pushing the riot shield onto Senior Constable Amwano, there were others assaulting Senior Constable Anwano.

u. The speaker of the House at the time, the Honourable Ludwig Scotty, was terrified and had to stop the Parliament that was in session.

v. The President and Speaker together with other members of the Parliament were taken to the top floor of the Parliamentary Building for their safety. They remained upstairs until around 10p.m.

Agreed Facts – Job Cecil [pp 271-273 of the Court Record]

The agreed facts as submitted to the court in respect of the case against the defendant Mr. Job Cecil are:

a. Job Cecil came on his own to the Parliament Building after the other protestors had all assembled at around 11:30 in the morning of 16th of June 2015. The groups of protestors were from the Meneng and Boe Districts and had converged at the front of the Parliament Building to show support for the three then suspended members of Parliament (Mr. Mathew Batsiua, Mr. Sprent Dabwido and Mr. Squire Jeremiah).

b. Job Cecil came to see what was happening at the Parliament Building.

c. Job Cecil had assembled with other protestors that were making their way through the police line that had already been formed by the Commissioner of Police and his police officers.

d. The protestors had gathered with the common purpose to allow Mr. Mathew Batsuia, Mr. Sprent Dabwido and Mr. Squire Jeremiah to enter the Parliament Building whilst Parliament was in session.

e. Mr. Squire Jeremiah and Mr. Sprent Dabwido were witnessed directing the other offenders to the Parliament door. Job Cecil then saw his relatives confronting police and so he came to be assembled with his relatives.

f. The angry crowd was pushing the police officers line in front of the parliament main entrance. Job Cecil was assisting his relatives by pushing through the police line in front of the entrance to the Parliament Building and later left the parliamentary area around 2 p.m. to go to work.

g. The speaker of the House at the time, the Honourable Ludwig Scotty, was terrified and had to stop the Parliament that was in session. The Parliament did not resume again for that day.

THIS APPEAL

SUBMISSIONS – THE REPUBLIC

27. The Republic made both written and oral submissions in support of their appeal grounds.

28. On 7 February 2018, written submissions were received from the Republic.

29. On 19 and 20 March 2018, oral submissions on behalf of the Republic were made by the Director of Public Prosecutions, Mr. John Rabuku.

Unlawful Assembly

30. In relation to Job Cecil, the Republic submitted that the 3 month imprisonment term is not harsh and excessive when considering the circumstances and nature of the offending. The Republic further submitted that in their view, a custodial sentence was "*inevitable in the circumstances*" and that therefore, the 3 month imprisonment term was appropriate.[1]

[1] Republic - Written submissions paragraph 33-35

31. The Republic submits that the term of imprisonment imposed on Job Cecil for unlawful assembly not be disturbed. The Republic submits that the sentence should be confirmed by this Court as it displays no error of law on the part of the sentencing Magistrate.[2]

Riot

32. The Republic submitted that the 3 month imprisonment for the offence of riot ordered by the Magistrate was the result of an error of law and an error in the application of sentencing principles.

33. The Republic further submitted that the abovementioned errors resulted in the sentences imposed for the offence of riot for both John Jeremiah and Josh Kepae being manifestly lenient when considering the seriousness of offending and the entire circumstances of the case.

34. The Republic submits that the offence of riot is more serious than that of unlawful assembly as displayed by their differing maximum penalties. Therefore, the Republic submits that riot should attract a higher sentence in the circumstances of the case than unlawful assembly.

35. The Republic submitted that the maximum penalty for riot is 3 years, however I note that as per the *Crimes Act 2016* which is currently in effect, the maximum penalty has been reduced to 2 years imprisonment. In response to the closing submissions of Ms. Graham and Mr. Funnell, the Republic submitted that the fact that the sentence was now lower, should have no impact on how the Court arrive at a sentence in these proceedings.

36. The Republic submitted comparative cases that concerned past riots in Nauru.

37. The first case, was that of *Harris v Director of Public Prosecutions*,[3] which concerned a riot at the police station of Nauru. In this case, the defendants had entered the police

[2] Republic - Written submissions paragraph 36.
[3] *Criminal Appeal 1 of 1998*, Court Record p. 292.

station armed and riotously with the aim of freeing one of their colleagues. The defendants all received a fine of $100.

38. The second case which the Republic submitted was that of the 2013 riot at the Refugee Processing Centre ('RPC') in Nauru. The Republic states that this riot was violent and that it caused considerable damage to the RPC. In this case, the defendants were charged with riot and received community service orders.

39. The Republic submits that the background, facts and circumstances of the offending concerned in this current appeal is easily distinguishable from those two cases. The Republic submits that this case is distinguishable as:

    a. This was a larger crowd of free Nauruans that had progressed and descended upon Parliament through the Aerodrome and the main road in a march. This is compared to the RPC riot which was conducted in the confines of a fenced area at 'Top Side' and out of view of the public;
    b. The intention of this riot was to enter Parliament by force whilst it was in session. Comparatively, the RPC riot was provoked by a change in Australia's resettlement policy of refugees;
    c. The RPC riot was limited and confined to the parameters of RPC1 camp. This riot caused disturbance not only to Parliament but to the immediate Government Offices and schools within the vicinity;
    d. This offending was committed during the day and in full view of the public. When night descended on Top Side, the refugee protestors ran havoc within the camp with little change of being recognised in the darkness;
    e. The respondents in this case were part of a crowd that was attacking the institution that is at the core of Nauru's democracy and stability as a nation. This was an attack on Nauru's governance structure. The refugees in the RPC riot of 2013 burnt down buildings and cars which belonged to the Australian Government and therefore in essence was not directly attacking the Nauruan Government or its citizens; and

f. Such an attack on Parliament could have easily escalated to a total breakdown of the rule of law which could have escalated into nationwide chaos and social and political instability.

40. The Republic submits that it is imperative for this Court on this appeal to arrive at a sentence that is reflective of those entire circumstances of offending as outlined above.

41. The Republic further submits that deterrence should always be at the core of sentencing on a charge of riot. It is submitted that a short and sharp sentence as considered by the Magistrate, must be one that is deterrent in nature and one that when viewed in the context of the offending, is in its totality deterrent in nature.

42. The Republic refers to the Solomon Islands case of *Igi v Regina*,[4] where 'Igi' was considered by the court as the instigator of the riot and received a two year term of imprisonment. The Republic submits that in the present case, John Jeremiah and Josh Kepae were not considered by the Magistrate as instigators of the riot. The Republic submits that "*they were hardly the followers anyway*" and that both offenders participated fully in the riot with others.

43. The Republic submits that in viewing the offence of riot, the Learned Magistrate made an error in law and an error in the application of proper sentencing practice in that she:

a. Failed to distinguish the offence of unlawful assembly from that of riot;
b. Failed to find that the offence of riot to which both John Jeremiah and Josh Kepae pleaded guilty to were more serious than the unlawful assembly charge to which Job Cecil had pleaded guilty, in that their maximum penalties are vastly different;
c. Failed to consider that her sentencing on unlawful assembly in this case should be distinguished from her sentencing for the offence of riot; and
d. Failed to consider that the riot offence that she is sentencing on is one that occurred in the precincts of Parliament with the intention of entering Parliament

[4] [1997] SBHC 39 see Court Record p. 156.

by force, and therefore a deterrent sentence on the charge of riot should be one that discourages and deters anyone from embarking on such an attack on Parliament in the future.

44. Therefore, the Republic submitted that the sentence for riot was manifestly lenient and not sufficiently deterrent given the entire circumstances of the case.

45. The Republic further submitted that given the entire circumstances of the case, the purpose behind the riot and the possible consequences the riot could have had; this was a riot at the higher end of the scale and should attract a sentence on the higher side.

46. It is submitted that the sentence should be higher than the 3 months ordered for the offence of unlawful assembly against Job Cecil.

47. The Republic submitted that there is very little that can be considered as mitigating the offending except that there was a guilty plea. The Republic submitted that a sentencing range of nothing less than two years is reflective not only of the seriousness of the offending, but also sends out a clear deterrent message.

Disturbing the Legislature

48. On the sentence of disturbing the legislature, the Republic submits that the Learned Magistrate erred in law and erred in applying proper sentencing principles in considering that the sentence for the offending of unlawful assembly of 3 months imprisonment could also be applied to that of disturbing the legislature.

49. The Republic submitted that the circumstances of the disturbance of Parliament were very serious and that a heavier sentence than 3 months would have been appropriate.

50. The Republic submitted that a sentencing range between one and half years to two years imprisonment is sufficient given the entire circumstances of the case.

Serious Assault

51. The Republic submitted that the 6 months imprisonment term for this particular offence was an appropriate sentence given by the Learned Magistrate.

52. The Republic noted that the Learned Magistrate considered an aggravating feature of the offence was that Mr. Kepae was a police officer. The Republic submitted that "*this was obviously an error of fact*".[5] The Republic submitted that "*whether he was a police officer at the time or whether he was a former police officer is immaterial*".

53. The Republic then submitted that it was "*proper for the Magistrate to see that as an aggravating factor*".[6]

54. During the closing submissions, I asked the DPP to clarify their submissions in regards to whether it was material or immaterial that the defendant was a police officer or a former police officer at the time of offending. The DPP responded that there should not be a distinction between the fact that the person was a police officer or not, that the offence was one of serious assault and that it warranted that type of sentence.

55. The Republic submitted that there was therefore no error in law in how the Learned Magistrate arrived at the 6 month imprisonment term and that this sentence should subsequently not be disturbed.

'Short and sharp sentence'

56. The Republic made submissions on the contention that the former Director of Public Prosecutions, Mr. David Toganivalu had told the District Court that a 'short and sharp

[5] Republic – Written Submissions at paragraph 79.
[6] Republic – Written Submissions at paragraph 80.

sentence would be sufficient' for the offences of riot.

57. The Republic submitted that this was not what was intended by the former DPP and that the Magistrate misinterpreted this submission by the former DPP.

58. The Republic submits that the former DPP made no concessions in the written or oral recordings, that John Jeremiah was entitled to, or should receive, a short and sharp sentence.

59. The Republic further submitted that the concession made by the former DPP with regards to a 'short and sharp sentence' was only in relation to the offence of disturbing the legislature. They submit that the concession was also to back the principle of denouncement, that because this was the first time this offence was committed in Nauru, that the court must come down with a short and sharp custodial sentence to denounce that type of behavior.

60. The Republic submitted that the former DPP knew that the custodial sentences that would be imposed would be concurrent. It's submitted that therefore the former DPP made the concession for disturbing the legislature in the view of it being a resulting offence and with knowledge that it would be sentenced concurrently with the other offences anyway.

61. Despite the concession by the former DPP, the Republic submits that they now cannot submit that this offending warrants a short and sharp sentence. The Republic submitted that the sentence of 3 months for disturbing the legislature was manifestly lenient and therefore wrong in principle.

Summary

62. In summary, the Republic submitted that the concurrent sentences of 3 months for both John Jeremiah and Job Cecil and 6 months for Josh Kepae does not reflect the seriousness of offending that all these three respondents participated in and the entire

circumstances of the case.

63. The Republic submitted orally that the sentences were unfair. They submitted that "*even on the face of it... it is a judgement that is unfair and therefore cannot be a judgement that is proper, proper in law, or that is arrived at, after a proper application of the sentencing principles, given the entire circumstances of the case.*[7]

64. In oral submissions the Republic stated that the reasoning, the considerations and the findings of the Learned Magistrate throughout her sentence judgement, did not resonate with the resulting sentences that she ordered. The Republic submitted that this was an imbalance and therefore did not reflect the whole circumstances of offending.

65. The Republic submitted that as the provisions of the *Crimes Act* were not available to the Learned Magistrate at the time, she had a discretion to apply common law principles and guidelines when passing sentence. Resultantly, the sentences she imposed were by way of a discretionary judgement.

66. It is submitted that the Learned Magistrate erred in law and erred in applying proper sentencing principles in both the sentences for riot and disturbing the legislature. The Republic submits that the sentences be quashed and substituted with a higher and more serious sentence, reflective of the seriousness of the offending, the entire circumstances of the case and the need for proper deterrence.

SUBMISSIONS on behalf of ALL OFFENDERS (Submissions in common)

67. As a majority of the grounds of appeal are shared by all offenders, I have found it applicable to set out their shared submissions from the outset.

[7] Transcript 20 March 2018, page 7.

68. Attempts to avoid overlap between the submissions written below and the individual submissions written hereafter have been made wherever possible.

69. Further, it is noted that both Mr. Funnell and Ms. Graham submitted that they rely and adopt on each other's submissions in relation to the common grounds of appeal and in their response to the Republic's appeal.

70. The 'offenders' will now be referred to as the 'appellants' in this section.

71. The common and overlapping submissions in relation to the grounds of appeal are as follows.

Ground One

72. It was submitted that sentencing is a discretionary exercise and that it is not sufficient that a court of a higher jurisdiction would have imposed a different sentence, but that it must be shown that the sentence was affected by relevant discretionary error or was manifestly wrong.

73. Counsel submitted statements from the Chief Justice of the Solomon Islands in the case of *Dekamana v Regina.*[8]

74. It was submitted on behalf of all appellants that the sentences were manifestly excessive having regard to:

    a. Full time incarceration was a sentence not called for upon the agreed facts;
    b. Too much weight was given to deterrence;
    c. Insufficient weight was given to the purpose of achieving reformation through sentencing;

[8] [2005] SBHC 75; HCSI-CRC 170 of 2005 (23 June 2005).

d. Insufficient weight was given to the evidence of demonstrated reformation since offending;
e. The Court failed to properly assess individual involvement and individual moral culpability;
f. Erroneous appreciation of the extent of culpability;
g. Insufficient weight given to the subjective case; and
h. Imposed sentences that are not consistent with the general pattern of sentencing for the like offences.

Ground Two

75. As of the day of offending on 16 June 2015, it is submitted that extraordinary political circumstances existed on Nauru. It is submitted that these included:
    a. The ongoing and indefinite suspension of the parliamentary opposition, effectively disenfranchising one third of the Republic's population, and this situation had been ongoing for some 15 months;
    b. The fact that the suspension had been imposed by the majority government members for the supposed wrongdoing of speaking to the foreign media and 'unruly' conduct in Parliament;
    c. The fact that the criticism in the media had taken place in respect of the unlawful expulsion from the country of the former Resident Magistrate and the banning from the country of the former Chief Justice causing his *de facto* removal from office; and
    d. The fact that this interference with the judiciary was indisputably unlawful. For example, the deportation of Mr. Law had taken place in violation of an injunction issued by the Chief Justice.

76. It was submitted that the government's misconduct had caused the offending of the appellants.

77. It was further submitted that it was incumbent on this court to accept that the executive government's criminality brought about the circumstances that led to the protest at Parliament and the subsequent offending in this matter.

78. It was submitted that the MPs notably remained absent from Parliament for the passing of the budget on 16 June 2015, which exacerbated the concerns of Nauruan citizens that their voices and those of their community would be excluded from decisions about the allocation of funds throughout Nauru.

79. Submitted further was that the unusual genesis of the offending in this matter justifies an adjustment to the ordinary approach to sentencing for offences of this type.

80. It was submitted that Magistrate Garo specifically rejected that the political context and motivation were mitigating factors in respect of the appellants. It is submitted that the conclusion reached by Magistrate Garo was flawed both in its logic and its assertion that it finds support in Kidu J's judgement in *State v Kosi* [1981] PNGNC 4; N306 (19 January 1981).

81. It was submitted that the portion of the judgement in *State v Kosi* as cited by Magistrate Garo at paragraph 14 of her judgement, relates to the limits of constitutional rights and freedoms, and in no way touch on the relevance of motive to the objective seriousness of an offence as assessed for the purpose of sentence proceedings. In citing this, it was submitted that the Learned Magistrate misconceived the proper application of the principles.

82. It was submitted that in relation to Magistrate Garo's citation as above, that none of the appellants have ever asserted that their behaviour was lawful by reference to a constitutional right or freedom; which is evident from their pleas of guilty.

83. It was submitted that the appellants do not attempt to avoid responsibility for their actions, but ask that their moral culpability be assessed by reference to the context in which the offences took place.

84. It was submitted that where an offence of civil disobedience (such as a riot or disturbing the legislature) is born from a sense of political disenfranchisement or exclusion, this is relevant to assessing the moral culpability of those involved.

85. It was submitted that the offences committed by the appellants reflected their political powerlessness and that of their fellow citizens of Nauru. It is further submitted that the original involvement of the protestors was designed to allow them to communicate this powerlessness and seek change peacefully.

86. It was submitted that the blockade set up by the police provoked and caused the unlawful response by the protestors when they were effectively barred from pursuing their peaceful expression of dissatisfaction with the government.

87. It was submitted that offending which occurs in the course of a political protest is "*highly relevant to the appropriate punishment*".[9]

88. It was submitted that Magistrate Garo failed to properly consider the relevance of the context and motivation of the offending as a mitigating factor when assessing the offenders' moral culpability and the weight to be given to the various purposes of sentencing.

89. The appellants submit that these highly unusual circumstances required a nuanced approach to assessing moral culpability and applying the various purposes of sentencing. It is submitted that Magistrate Garo failed to engage in such an approach; failing to consider questions of moral culpability with regard to the context and motives and accordingly misapplying the purposes of sentencing to the appellant's circumstances.

Ground Three

[9] *R v Annwen Jones and others* [2006] EWCA Crim 2942 at [16].

90. Submissions were made on behalf of all three appellants in relation to the assessment of their individual moral culpability.

91. Submissions made on behalf of the appellants in the first instance were, it was submitted, premised on the legal proposition that: although through their participation in the group offence, the defendants became legally liable for the same maximum penalty provided for the offence which reflect the conduct of the group, identifying each individual's contribution to the offences was also required in order to properly assess the individual's moral culpability and the sentence for his specific moral culpability.

92. It was submitted that Magistrate Garo found that that proposition was wrong and in doing so, erred. Magistrate Garo stated that the proposition was contrary to what Palmer CJ had taken in the case of *Igi v Regina,*[10] which cited a passage from the case of *R v Caird.*[11]

93. It was submitted that the passage that Magistrate Garo cited was misinterpreted by her. It was submitted that Magistrate Garo interpreted the passage from the case of *Caird*[12] as meaning that individual contributions to a group offence were not relevant at all in assessing individual culpability.

94. It was submitted that was meant in the case of *Caird*, was that the doctrine of common purpose should not apply. Further, that sentencing common purpose offences is a two-step approach – determining the maximum penalty applying to the offence reflecting the common purpose, and then determining the relevant offender's personal moral culpability.

95. It was submitted that Magistrate Garo appeared to have mistaken that the distinction between an assessment of the objective seriousness of the group offence being a matter clearly relevant to sentence and an individual offender's role in that group offence which is also a matter of clear relevance to sentence

[10] This is a reference to *Igi v Regina* [1997] SBHC 39; HC-CRAC047 of 1996 (23 July 1997) at para 5.
[11] *R v Caird* (1970) 54 Cr. App. R 499.
[12] *R v Caird* (1970) 54 Cr. App. R 499.

96. Counsel submitted a long line of authorities in support of the sentencing of members of joint criminal enterprises.

97. Counsel submitted that the principle that the individual roles of participants in joint criminal enterprises need to be carefully considered, not only favours accused persons. It was submitted that the principle is also necessary to ensure ring leaders and the like can be appropriately punished.

98. Counsel submitted that Magistrate Garo erred in not identifying the particular involvement of the appellants, and including this in the appropriate calculation for sentencing. It was further submitted that had the Court done this, it must have concluded that the defendants were not at the forefront of any of the offences to which they pleaded guilty to. Counsel additionally submitted that the moral culpability of each of the defendants can be distinguished from those who were involved to a greater extent and that accordingly the defendants were worthy of a lesser punishment.

Ground Four

99. Counsel on behalf of the appellants submitted that parity can apply as between co-offenders and as between offenders who have been sentenced for like offending at different points in tine. This submission was draw from the case of *Hussein v Republic.*[13]

100. It was submitted that whilst there were few Nauruan riot cases from which to draw comparisons, the Court was taken to several cases including *Harris v Director of Public Prosecutions*, in which three offenders convicted after trial of riot were sentenced to $100 fines.[14] The facts of this case included that the offenders had armed themselves with grass cutters and forcibly entered the Police station, using threat and violence to person and property to secure the release of a person.

[13] [2015] NRSC 22; Criminal Appeal 120 of 2015 (16 December 2015) at para 14.
[14] [1998] NRSC 2; Criminal Appeal No 01-05 of 1998 (7 September 1998).

101. The other cases submitted for consideration was *Alkhazali v Republic of Nauru*, which dealt with an appeal against sentence by the offender who had been charged and pleaded guilty to an unlawful assembly. The facts of the case involved serious offending and large scale property damage. It was submitted that all the factual circumstances of the case of *Alkhazali* amounted to more serious outcomes than the present offences. The offender in that case was sentenced to 165 hours of community service and no conviction recorded.

Ground Five and Six

102. Grounds five and six were submitted and considered together by counsel for the appellants.

103. It was submitted that it was apparent in Magistrate's Garo's findings that the significance of deterrence was central to her Worship's decision to impose sentences of imprisonment. It was further submitted that Magistrate Garo's use of the term "overriding factor" made it clear that the Magistrate weighed deterrence as the principal driver of the sentencing outcome

104. Counsel submitted that deterrence certainly has a role to play in sentencing, along with retribution, protection of the community and rehabilitation. It was submitted that there is no basis in principle for her Worship to have elevated deterrence to an 'overriding factor' and that in doing so she has failed to give sufficient weight to the range of sentencing objectives, most notably reformation. It was further submitted that Magistrate Garo accordingly failed to sentence in accordance with binding from the Supreme Court of Nauru.

105. Counsel submitted that in the political context of this case, the weight to be given to deterrence must be tempered by the need to send a message to the greater wrongdoers – the executive, those still wielding power in Parliament, that their egregious breaches of

the Constitution will not benefit them by the punishment and banishment of their opponents and opponents' supporters.

106. It was submitted that the circumstances of the case do not warrant an approach of the kind advocated for by the Republic. Further to this it was submitted that the circumstances of these cases involve citizens agitating against government interference with their fundamental rights and that it is therefore the exact type of case in which deterrence has a substantially diminished role to play in sentencing.

107. It was submitted that the circumstances of the offending will play a relevant role in determining the weight given to the various purposes of sentencing. However, it was submitted that Magistrate Garo did not have it open to her to place 'overriding' weight to general deterrence in circumstances where the Constitution had been breached by the executive, the riot had been suppressed, had not re-occurred, there was no suggestion that the offenders had re-offended and the defendants were not considered to be ring-leaders or instigators.

108. It was submitted that evidence on behalf of all the appellants at first instance strongly supported the conclusion that they had been reformed in the course of events following their offending behaviour. It was submitted that none of the defendants have re-offended since June 2015.

109. It was submitted that at common law, deterrence is one of numerous factors to take into consideration in sentencing and the fact that an offence is serious, or threatens to cause public unrest, is not a justification to subordinate other purposes of sentencing. It was submitted that this was particularly the case where the offender has demonstrated their rehabilitation since the offending occurred.

110. In oral submissions Mr. Funnell was asked by the Court what he found the ultimate purpose of general deterrence to be. Mr. Funnell submitted that it would be a rare case where general deterrence had absolutely no role to play. Mr. Funnell submitted

that the circumstances of this offending in this case was so unique due to the genesis of the peaceful protest, the background and the entire circumstances of offending – that it was not appropriate matter from which to elevate that principle of sentencing.

111. It was submitted that the terms of imprisonment imposed are only likely to disturb and undermine the process of reformation that has already taken place over the considerable period of time since the offending. Further to this it was submitted that Magistrate Garo's failure to have proper regard for the prime object of rehabilitation in sentencing under Nauruan law was a key factor that resulted in sentences outside the justifiable range.

Response to the Republic's appeal against inadequacy

112. The counsel for the appellants submitted that the Republic's appeal against the manifest inadequacy of sentences imposed on the offenders should be dismissed.

113. It was submitted that there is no basis on which to conclude that the sentences imposed on the offenders individually or in totality are manifestly inadequate in all the circumstances of the case. Further it was submitted that the matters raised above clearly reveal that this is a case where substantial leniency was warranted and where a full-time custodial sentence was not. It was thus submitted that the Republic's appeal must fail.

114. It was submitted that the extent that the Republic relied on the Fijian case of *Bukarau v the State* was misconceived and inapplicable.[15] It was submitted that the case of *Bukarau* is not analogous to the facts and circumstances of this case and does not support the Republic's position on any broader point of principle.

115. It was submitted by the counsel for the appellants that the case of *Bukarau* involved a 56 day armed siege of the Parliament in Fiji and therefore the suggestion that there is some parallel between these cases is patently wrong. It was further submitted that

[15] [2005] FJHC 425.

the Republic's reliance on this case to support the correctness of sentence imposed on the offenders, only serves to highlight the entirely disparate circumstances of the two cases.

116. It was submitted that for the offence of unlawful assembly, Mr. Cecil in particular received half the term of imprisonment as a person who participated in a 56-day armed siege of Parliament and therefore illustrates the justifiable sense of grievance that the defendants would be entitled to feel.

PARTICULAR SUBMISSIONS – MS. GRAHAM on behalf of JOSH KEPAE

117. Written submissions were received on behalf of Mr. Kepae and Ms. Graham further made oral submissions in support of those.

Ground One

118. Ms. Graham submitted that looking at all the circumstances of the case and in properly applying the various different principles in relation to mitigation and an assessment of the gravity of the offences, it emerges that the 3 month and 6 month terms imposed on Mr. Kepae were obviously too harsh.

119. Ms. Graham submits that that gives rise to an error that enlivens this Court's jurisdiction to resentence Mr. Kepae.

120. It was submitted that in the case of Mr. Kepae, the sentence imposed was manifestly excessive having regard to the following factors:

a. Full time incarceration was a sentence not called for upon the agreed facts;
b. Too much weight was given to deterrence;
c. Insufficient weight was given to the purpose of achieving reformation through sentencing;
d. Insufficient weight was given to the evidence of demonstrated reformation since offending;

e. The Court failed to properly assess individual involvement and individual moral culpability;
f. Erroneous appreciation of the extent of culpability;
g. Insufficient weight given to the subjective case; and
h. Imposed sentences that are not consistent with the general pattern of sentencing for the like offences.

Ground Two

121. Ms. Graham submits that Mr. Kepae's involvement in this offending was borne out of his loyalty to one of the MP's and that it was not of his own design that he became involved. It was submitted that this was a fact which is relevant to his moral culpability. It was additionally submitted that it was common ground that Mr. Kepae was a follower, not a leader.

122. Ms. Graham submitted that this case concerns a grave provocation and that that grave provocation was the context that gave rise to Mr. Kepae's involvement. Ms. Graham submits that the occasion for Mr. Kepae's involvement arose only because of an attack on the democracy of Nauru. She further submits that there was an attack on the democracy and rule of law in Nauru by the executive Government.

123. Ms. Graham submitted that the provocation in this case was of a much higher order than what occurred in the RPC case. She notes that the DPP found the provocation in the RPC case to be a mitigating factor, which therefore distinguished it from this current case.

124. Ms. Graham submitted that when Mr. Kepae answered MP Jeremiah's call to protest, Mr. Kepae did not plan or anticipate that events would turn violent. It was submitted that considering his lack of antecedents the Court would accept that he was not a person who would have agreed to participate if he knew that offences were going to be

committed.

125. It was submitted that following the case of *Kaitangare*, the Court ought to have factored into the assessment of Mr. Kepae's culpability and that Magistrate Garo erred in not doing so.

126. It was submitted that the political and familial context in which the offences occurred is of substantial importance in this case. The submissions in regard to the political context have been made in the shared submissions of the defendants.

127. It was submitted that Mr. Kepae has indicated his guilt by pleading guilty and that he does not attempt to avoid responsibility for his actions, but asks that his moral culpability be assessed to the context in which the offences took place.

128. It was submitted that the evidence does not support the contention that Mr. Kepae intended to engage in physical violence or disorder from the outset. It was further submitted that as per the agreed facts, Mr. Kepae's original involvement was as a follower, loyal to his leaders in agreeing to participate in a peaceful protest in support of them. It was submitted that his subsequent physical participation was limited and spurred on by his connections to those involved.

Ground Three

129. In relation to Magistrate Garo erring in failing to assess the individual moral culpability of the respondents, Ms. Graham submits that the principles in *KR*[16] apply and that there is a need to distinguish between liability for the conduct of the group and the individual role that was played.

[16] *KR v R* [2012] NSWCCA 32.

130. Ms. Graham submitted that the height of Mr. Kepae's involvement was the pushing against the police skirmish line and the assault on the officer. She submits that that is in the context of needing to be very careful about double punishment for that particular part of his role, as he was charged with riot and serious assault.

131. It was submitted that Mr. Kepae's particular contribution to the offence with which he was charged were identified. In relation to the riot charge the following was noted:

a. Mr. Kepae did not at any point punch or kick anyone, use any kind of weapon or throw any projectile;
b. While Mr. Kepae did assault Officer Amwano by pulling his riot shield, this has been separately charged and so care must be taken to ensure that he is not punished for this action twice; and
c. While fireworks were set off, Mr. Kepae had no foresight of this and no involvement in it.

132. It was submitted that when Mr. Kepae's individual conduct is considered against the rest of the group, that his involvement was very much at the lower end of the scale of the group in terms of conduct and that his punishment should reflect that.

133. It was submitted that Magistrate Garo erred in not identifying the particular involvement of the appellant in relation to the riot and disturb the legislature charges, and including this in the calculation of appropriate sentences. It was further submitted that if the District Court had done this, it must have concluded that Mr. Kepae was not at the forefront of either of the offences to which he pleaded guilty and that his moral culpability can be distinguished from those who were involved to a greater extent than he, and that accordingly he was worthy of a lesser punishment.

134. It was submitted that in relation to the offences of riot and disturbing the legislature the following matters ought to have been taken into account in assessing Mr. Kepae's individual moral culpability:

a. Mr. Kepae did not foresee or plan any acts of disorder;
b. While certain participants threw punches, Mr. Kepae did not;
c. While some participants used weapons, Mr. Kepae did not;
d. While certain participants threw items, Mr. Kepae did not;
e. While certain participants used fireworks and fire extinguishers, Mr. Kepae did not;
f. While certain participants caused damage to property, Mr. Kepae did not; and
g. While certain participants made verbal statements against police, Mr. Kepae did not.

135. In summary, it was submitted that Mr. Kepae's involvement was limited to pushing against the police line with others and that while he is criminally liable for actions of the group, his moral culpability must be assessed according to what he did. It's submitted that Magistrate Garo failed to do this, and so erred.

Ground Four

136. Ms. Graham made numerous submissions in regards to the issue of parity and it was submitted that Magistrate Garo's finding on parity was problematic.

137. It was submitted that Mr. Kepae pleaded guilty to the offence of riot, the offence of which encapsulated the public disorder nature of the offending.

138. It was submitted that Magistrate Garo double counted the public disorder context of the offending; that is by taking it into account for both the riot charge and the serious assault charge. It was further submitted that the assault of Officer Amwano could have been included as part of the riot allegation as a riot contemplates violence, including violence against authorities.

139. Ms. Graham referred to the decision in *Hussein*[17] and noted that the statement made in that case, is that the principle of parity applies not only to offenders within one set of criminal proceedings, but also across separate sets of proceedings in respect of the same offence. Ms. Graham submits that it is essentially a principle of consistency in sentencing.

140. Ms. Graham provided a comparative sentencing table for serious assault cases dealt with in the District Court of Nauru, focusing on assaults involving police officers. Ms. Graham submits that on the basis of the approach in *Hussein*, Mr. Kepae has a justifiable sense of grievance in relation to the 6 month sentence that was imposed on him. This is due in part to the way that similar offences were dealt with in Nauru and resulted in probation orders of various lengths and a fine in one instance.

Ground Five

141. Ms. Graham submitted that the extraordinary genesis of the offending means that the message of general deterrence is not the appropriate overriding message that the Court should be sending.

142. It was further submitted that involvement in these proceedings over the last few years has been extremely onerous for Mr. Kepae and the others. Ms. Graham submitted that in that sense, the message had already been sent loud and clear that no persons should involve themselves in these types of offences.

143. Ms. Graham submits that there needs to be no further message through a term of imprisonment in order to achieve deterrence.

Ground Six

[17] *R v Rezayee Hussein and 9 others* – Criminal Case No. 13 of 2015.

144. Ms. Graham noted that the new *Crimes Act 2016*, which sets out some principles of sentencing, has come into force since Magistrate Garo sentenced Mr. Kepae.

145. Ms. Graham noted that section 280 of the *Crimes Act* provides sentence considerations in relation to imprisonment. Ms. Graham submitted that none of the requirements contained therein engage the Court's power to impose a sentence of imprisonment on any of the offences committed by Mr. Kepae, given all of the circumstances of the evidence.

Ground Seven

146. This is the ground of appeal that only Mr. Kepae is pursuing relating to his status as a police officer being taken into account by the Learned Magistrate as an aggravating factor.

147. Ms. Graham submitted that the DPP acknowledged that it was immaterial whether Mr. Kepae was a police officer or not in his oral exchange with the Court. Ms. Graham submitted that she takes that as a concession that ground seven is made out.

148. Further to this, Ms. Graham submitted that it was clear from the references in support of Mr. Kepae that his status as a police officer was very much a mitigating factor on sentence, because of his positive contribution that he had made to Nauru in that role. Ms. Graham thus submitted that his status as a police officer could not be properly taken into account as aggravating his offending.

Summary

149. In summary Ms. Graham submitted that given the passage of time, the change in the maximum penalty to riot and given all the incidents of the passage of time that Mr. Kepae has faced in the nature of the double jeopardy on him and that he has further demonstrated his rehabilitation by not committing any further offences, that only short

probation orders are warranted given the punishment that has already been visited upon Mr. Kepae in the last almost 3 years through his participation in these proceedings.

PARTICULAR SUBMISSIONS – MR FUNNELL on behalf of JOHN JEREMIAH

150. Written submissions on behalf of Mr. Jeremiah were received on 6 February 2018 and Mr. Funnell made further oral submissions in respect of those at hearing.

151. Mr. Funnell submitted that he adopts and relies on the submissions of Ms. Graham in respect of the response of Mr. Jeremiah to the Republic's appeal.

Ground One

152. It was submitted that in the case of Mr. Jeremiah, the sentence imposed was manifestly excessive having regard to the following factors:

a. Full time incarceration was a sentence not called for upon the agreed facts;
b. Too much weight was given to deterrence;
c. Insufficient weight was given to the purpose of achieving reformation through sentencing;
d. Insufficient weight was given to the evidence of demonstrated reformation since offending;
e. The Court failed to properly assess individual involvement and individual moral culpability;
f. Erroneous appreciation of the extent of culpability;
g. Insufficient weight given to the subjective case; and
h. Imposed sentences that are not consistent with the general pattern of sentencing for the like offences.

Ground Two

153. Mr. Funnell submitted that Mr. Jeremiah is the younger brother of Squire Jeremiah, who was a member for Meneng and one of the suspended members of

Parliament.

154. Mr. Funnell noted that one of the other suspended members of Parliament, Mr. Sprent Dabwido was also a Member of Parliament for Meneng. Mr. Funnell submitted that this meant that Mr. Jeremiah was effectively left without any democratic representation within the Republic of Nauru.

155. Mr. Funnell submits that the background with respect to Mr. Jeremiah's offending is that not only was he the younger brother of one of the suspended MP's, he at that point had been deprived of any democratic representation within the Republic in excess of 12 months at the time of this protest.

156. Mr. Funnell submits that the next factor to take into account was that the protest explicitly and overtly began peacefully. He submitted that the fact that Mr. Jeremiah pleaded guilty to riot is no basis to infer that it was ever his intention to riot at the start of that peaceful protest. Mr. Funnell further submitted that that devolution was something that happened fluidly and spontaneously.

157. Mr. Funnell submitted that the high point or most serious part of Mr. Jeremiah's involvement consisted of pushing against the police skirmish line. It was further submitted that the high point of involvement involved only pushing; as distinct from some other more serious form of violence and that this is a very pertinent aspect of the facts.

158. It was submitted that the offences committed by Mr. Jeremiah reflect his political powerlessness and that of his fellow citizens and that Mr. Jeremiah's original involvement in the events were designed to allow him and others to communicate this powerlessness and seek change peacefully.

159. It was further submitted that the evidence does not support the contention that Mr. Jeremiah intended to engage in physical violence or disorder from the outset. It was

submitted that it is not in dispute that Mr. Jeremiah was a follower, not a leader nor an instigator. Furthermore it was submitted that his subsequent physical participation was limited and spurred on by his connections to those involved.

160. It was submitted that these circumstances give Mr. Jeremiah substantial mitigatory explanation as to why he became involved and so is relevant to his sentence. It is further submitted that motivation or purpose behind a criminal act is an important ingredient of objective criminality.

161. It was submitted that measured against other available motivations or purposes in disturbing the legislature, the motive or purpose here is at the bottom of the scale of criminality.

Ground Three

162. It was submitted that although Mr. Jeremiah is criminally liable through his participation in the group offence for the same maximum penalty provided for the offence which reflected the conduct of the group, identifying his individual contribution to the offences was also required in order to properly assess his personal moral culpability.

163. It is submitted that Magistrate Garo erred in not identifying the particular involvement of Mr. Jeremiah and including that in the final calculation of the appropriate sentence. It is submitted that if the court had done this, it must have concluded that Mr. Jeremiah was not at the forefront of any of the offences to which he pleaded guilty to, that his moral culpability can be distinguished from those who were involved go a greater extent than he, and that accordingly he was worthy of a lesser punishment.

164. In relation to the offences of riot and disturbing the legislature, it is submitted that the following matters ought to have been taken into account in assessing Mr. Jeremiah's individual moral culpability:

a. Mr. Jeremiah did not foresee or plan any acts of disorder;
b. While certain participants wrestled with police, Mr. Jeremiah did not;
c. While certain participants threw punches, Mr. Jeremiah did not;
d. While some participants used weapons, Mr. Jeremiah did not;
e. While certain participants threw items, Mr. Jeremiah did not;
f. While certain participants used fireworks and fire extinguishers, Mr. Jeremiah did not;
g. While certain participants caused damage to property, Mr. Jeremiah did not; and
h. While certain participants made verbal statements against police, Mr. Jeremiah did not.

165. It is submitted that Mr. Jeremiah's involvement was limited to pushing against the police skirmish line with others.

166. It was further submitted that it was common ground that Mr. Jeremiah was a follower and that the reasons why he was a follower are important. It is submitted that not only were Squire Jeremiah and Sprent Dabwido the Members of Parliament for the District in which he lived, but Squire Jeremiah was also his elder brother.

167. It is submitted that whilst Mr. Jeremiah was independently concerned about the issues, it was out of a sense of familial and political loyalty that he decided to follow.

168. It is submitted that Mr. Jeremiah did not plan or anticipate that events would turn violent; however when they did, he remained present and involved himself out of his sense of loyalty.

Ground Four

169. On the principle of parity, numerous comparative cases were submitted in support of Mr.
Jeremiah.

170. It was submitted that while there are few Nauruan cases against which to make comparison, the cases submitted indicate that the sentence imposed on Mr. Jeremiah stands alone in terms of severity.

Ground Five and Six

171. It was specifically submitted that evidence in the case of Mr. Jeremiah strongly supported the conclusion that he had been reformed in the course of events following his offending behaviour.

172. It was submitted that there was compelling material before Magistrate Garo in relation to the effect of a previous term of imprisonment on the appellant and his transformation to a positive community member contributing to a range of social activities which promote order and discipline in society.

173. It was submitted that the term of imprisonments imposed was only likely to disturb and undermine the process of reformation that had taken place over the considerable period of time since the appellant committed the offences. It is submitted that Magistrate's Garo failure to have proper regard for the prime object of reformation in sentencing under Nauruan law was a key factor that resulted in a sentence that was outside the justifiable range.

PARTICULAR SUBMISSIONS – MR FUNNELL on behalf of JOB CECIL

174. Written submissions on behalf of Mr. Cecil were received on 6 February 2018 and Mr. Funnell made further oral submissions in respect of those at hearing.

175. Mr. Funnell submitted that he adopts and relies on the submissions of Ms. Graham in respect of the response of Mr. Cecil to the Republic's appeal.

176. Mr. Funnell submitted that the clear distinction between the offences of unlawful assembly and riot must be drawn. He submits that the Republic made no submissions either orally or in writing, in terms of applying different elements of those offences to facts.

177. Mr. Funnell referred to Justice Crulci's judgement in the case of *Alkhazali*[18] in the Supreme Court of Nauru, where at paragraph 37, her Worship notes that a riot is a tumultuous disturbance of the peace as distinct from causing fear that the that the peace will be tumultuously disturbed.

178. In regards to the pertinent agreed facts relating to Mr. Cecil, Mr. Funnell submitted that the fact that Mr. Cecil pleaded guilty only to an unlawful assembly and not to a riot, has significant implications for what are the relevant facts that the Court would take into consideration on sentence. He submits that in this sense, Mr. Cecil's circumstances are directly equivalent to that in *Alkhazali*.

179. Mr. Funnell's oral submissions drew the Court to page 11 of Magistrate Garo's judgement where her Worship makes numerous references to the actual disturbance of the peace. Mr. Funnell further submitted that references made in Magistrate's Garo judgement to the actual disturbances of the peace cannot be considered as being in any way relevant to Mr. Cecil. He submits that the actual disturbance of the peace can only relate to the offence of riot and therefore are not relevant part of evidence to take into account when considering the facts of the offending of Mr. Cecil. Mr. Funnell submitted

[18] *Alkhozali v The Republic of Nauru*, Criminal Appeal Case Number 27 of 2015, in relation to Criminal Case No. 77/2014.

that facts that go to a more serious offence, such as riot, cannot be used when assessing the objective seriousness of the less serious offence, such as unlawful assembly.

Ground One

180. It was submitted that in all the circumstances of the appellant's case, the two terms of imprisonment imposed on Mr. Cecil were manifestly excessive.

181. It was submitted that the sentence is manifestly excessive in particular having regard to the following factors:

a. Full time incarceration was a sentence not called for upon the agreed facts;
b. Too much weight was given to deterrence;
c. Insufficient weight was given to the purpose of achieving reformation through sentencing;
d. Insufficient weight was given to the evidence of demonstrated reformation since offending;
e. Failure to properly assess individual involvement and individual moral culpability;
f. Erroneous appreciation of the extent of culpability;
g. Insufficient weight given to the subjective case; and
h. Imposed sentences that are not consistent with the general pattern of sentencing for the like offences in the region.

Ground Two

182. It was submitted that the political and familial context in which Mr. Cecil participated in the protest and subsequent offences was a mitigating factor.

183. It was submitted that this political and familial context included the ongoing suspension of MP Sprent Dabwido and MP Squire Jeremiah, who is Mr. Cecil's cousin. It was submitted that as a result of this context, Mr. Cecil and other citizens had been

deprived of their democratic right to have their elected political representatives lobby on behalf of their community in Parliament.

184. It was submitted that Mr. Cecil does not assert that his behavior was ever lawful or constitutional, but rather that his moral culpability for the criminal acts he has admitted is lessened on account of the particular context in which it took place.

185. Mr. Funnell further submitted that the evidence does not support the contention that Mr. Cecil intended to engage in physical violence or disorder from the outset. He submitted that it is the agreed position of the parties that Mr. Cecil's original involvement was as an observer.

186. Mr. Funnell submitted that Mr. Cecil's physical participation was limited and spurred on by his familial connections to those involved. When the other protestors and the Police clashed, he saw a confrontation between the Police and his relatives. This prompted him to become involved in the event, out of a need to help his relatives.

187. It was submitted that the issue of family loyalties and loyalty to political leaders calls for consideration the reduced moral culpability of Mr. Cecil as one of the 'followers'.

188. It was submitted that these circumstances give Mr. Cecil substantial mitigatory explanation as to why he became involved and so is relevant to his sentence. It is further submitted that motivation or purpose behind a criminal act is an important ingredient of objective criminality.

Ground Three

189. It was submitted that Magistrate Garo erred in failing to identify the particular involvement of Mr. Cecil, and relying upon those particulars as part of the matrix in the calculation of the appropriate sentence.

190. It was submitted that in relation to the offences of unlawful assembly and disturbing the legislature, the following matters, all of which are submitted to diminish Mr. Cecil's objective criminality by comparison with others, ought to have been taken into account in assessing Mr. Cecil's individual moral culpability:

a. Mr. Cecil did not foresee or plan any acts of disorder;
b. Mr. Cecil attended the event with the intention of being an observer and taking no part in the demonstration physically;
c. While many participants engaged in the protest and related actions for many hours into the evening, the Mr. Cecil stayed only for a short time before going to work;
d. Whilst certain participants wrestled with police, the Mr. Cecil did not;
e. While certain participants threw punches, Mr. Cecil did not;
f. While some participants used weapons, the Mr. Cecil did not;
g. While certain participants threw items, Mr. Cecil did not;
h. While certain participants used fireworks and fire extinguishers, Mr. Cecil did not;
i. While certain participants caused damage to property, Mr. Cecil did not; and
j. While certain participants made verbal statements against police, Mr. Cecil did not.

191. It was submitted that his involvement was limited to pushing against the police line with others. Further it was submitted that he is criminally liable for the actions of the group, but his moral culpability has to be assessed according to what he did. It is submitted that Magistrate failed to do this, and so erred.

192. It was submitted that Mr. Cecil involved himself out of loyalty and that in applying the case of *Kaitangare*; this ought to have been factored into the assessment of his culpability. It is submitted that as Magistrate Garo did not do this, she erred.

Grounds Five and Six

193. It is submitted that Magistrate Garo weighed deterrence as the principal driver of her sentencing outcome. It is submitted that placing such weight on deterrence by elevating it to the "overriding factor" was an error.

194. Written submissions on behalf of all defendants concur that deterrence has a role to play in sentencing, along with retribution, protection of the community and rehabilitation.

195. It was further submitted that there is no basis in principle for Magistrate Garo to have elevated deterrence to an 'overriding factor' and in doing so; she failed to give sufficient weight to the range of sentencing objectives, most notably reformation.

196. It was submitted that Magistrate Garo failed to sentence in accordance with binding from the Supreme Court of Nauru.

197. Further to that point, it was submitted that this is the type of case is one which deterrence has a substantially diminished role to play in sentencing.

198. The failure of Magistrate Garo to have proper regard for the prime object of reformation in sentencing under Nauruan law was a key factor that resulted in a sentence that was outside the justifiable range.

199. It is submitted that the evidence in the case of Mr. Cecil strongly supported the conclusion that he had been reformed in the course of events following his offending behaviour, especially having regard to the period of time that has passed 'offence-free' since June 2015.

200. It was submitted that whilst deterrence is one of numerous factors to take into account in sentencing, the fact that an offence is serious, or threatens to cause public unrest, is not justification to subordinate other purposes of sentencing. It is further submitted that this is particularly the case where the offender is a young first-time

offender such as Mr. Cecil.

201. It was submitted that the 3 month term of imprisonment that was imposed on Mr. Cecil was only likely to disturb and undermine the process of reformation that had taken place over the considerable period of time since the Mr. Cecil committed the offences.

Ground Seven

202. It was submitted that it was common ground between the parties at first instance that Mr. Cecil had initially arrived as an observer only and then had become involved criminally subsequently.

203. It was further submitted that Magistrate Garo was erroneous in finding that Mr. Cecil intended to assist in breaking the police skirmish line and in fact did attack the police skirmish line in an attempt to break it.

204. It was submitted that there was no factual basis to infer that and that moreover, it was never part of the agreed facts.

205. It was submitted that making such a finding amounts to a failure of procedural fairness to Mr. Cecil.

206. It was submitted that this was not a finding that was indicated during proceedings or one which prosecution or defence had the opportunity to make submissions on.

207. Further it was submitted that it was not a matter that could have been inferred beyond a reasonable doubt on the evidence.

208. Counsel for Mr. Cecil submits that he ought to have been sentenced on the basis that he was an observer, that he initially became involved to show solidarity with his relatives having seen the way the police clashed with his relatives and that his intention later shifted as the incident developed to forming the requisite criminal intent accompanied by the physical involvement of pushing in the crowd.

CONSIDERATION

209. I note the following for further consideration.

Jurisdiction

210. Defence counsel made submissions both written and orally in the jurisdiction and discretion of this court when dealing with an appeal by the Republic.

211. Ms. Graham made numerous submissions in regards to the jurisdiction of this Court in regards to a prosecution appeal. Ms. Graham submitted that this Court requires that the prosecution:

a. Shows an error;
b. That the quality of that error is such as to be an error of principle, an error in the nature of a *House and King* error;
c. An error that caused the sentence proceedings to miscarry; and
d. An error that is not immaterial in the outcome of the sentence.

212. Ms. Graham noted that Judge Khan failed in his exercise of jurisdiction on the prosecution appeal.

213. Ms. Graham submits the decision of the High Court in relation to this matter, which found that the discretion to substitute a sentence under the Appeals Act only arises where the appellate court finds error in the decision of the court below. Ms. Graham submitted that it is not enough that the appellate court considers it would have taken a

different course had it been in the position of the sentencing judge, but that it must appear that some error was made by the sentencing judge in exercising their discretion.

214. Ms. Graham submitted that the principles in relation to prosecution appeals recognise that there is a residual discretion not to intervene, even if error is shown. Ms. Graham submits that the Republic made no acknowledgement of this residual discretion in their submissions and that therefore the submissions of the Republic were apt to mislead.

215. Ms. Graham submitted the decision of *Bugmy and the Queen*, with particular reference to paragraph 24 in the High Court's decision which stated that:

> "*Sentencing is a discretionary judgment and there is no single correct sentence for an offender and an offence…within a range of sentences for this offence and this offender, the weight to be given to the evidence and the various, conflicting, purposes of sentencing was a matter for* [the sentencing Judge]".[19]

'Short and sharp sentence'

216. Ms. Graham submitted that for the charge of disturbing the legislature, it was an immediate 'short and sharp' custodial sentence that was urged upon Magistrate Garo by the former DPP.

217. In response to the Republic's submissions that Magistrate Garo misinterpreted what the former DPP had intended, Ms. Graham submits that there has been an outrageous change in position by the Republic.

218. In oral submissions, Ms. Graham stated:

> "*...the Director today claims to be able to go into the mind of his predecessor, not based on what was actually said by his predecessor, but based on something else*

[19] *Bugmy v The Queen* [2013] HCA 37 at para 24.

and suggest to your Honour that it is appropriate for your Honour to have regard to this knowledge that my friend apparently has".[20]

219. Ms. Graham submitted that the Republic's current position means that it has led the court into error at every stage.

220. Ms. Graham submits that the Republic has taken the extreme position that the court should impose the maximum penalty for the charge of riot. She submits that this is notwithstanding the pleas of guilty and the role of the offenders vis-à-vis the others.

221. Ms. Graham submitted that the suggested penalty by the Republic is vastly more severe than what was imposed at first instance as being appropriate and even more harsh than what Acting Chief Justice Khan imposed on the first appeal. Ms. Graham further submits that the Republic did not appeal the sentence imposed by ACJ Khan to the High Court, but asks for an even higher penalty in this instance.

222. Ms. Graham further submitted that the appeal by the Republic was brought against only the three offenders before this court. However, there were four offenders on the same day by Magistrate Garo. It was submitted that the fourth person, Mrs. Grace Detageawa, was sentenced to a 3 month suspended term of imprisonment for disturbing the legislature and sentenced to a probation order for two years in relation to the charge of damaging property.

223. Ms. Graham submits that the Republic did not appeal Mrs. Detageawa's sentence, which raises the problem that was considered in the case of *Green and Quinn*. Ms. Graham submits that if the result of the Republic's appeal were that it were to succeed in the terms urged upon the Court by the DPP, then the issues of disparity "*looms as an artifact of the Republic's selective indication of the court's jurisdiction*".[21]

[20] Transcript 20 March 2018, page 23.
[21] Transcript 20 March 2018, page 16.

Range of sentencing

224. One issue raised by counsel on behalf of the offenders was with paragraph 66 and 75 of the Republic's written submissions and statements made by the Republic in oral submissions in regards to the range of available sentences. Counsel for the offenders and the Republic cited the High Court case of *Barbaro and The Queen* in reference to this issue.[22]

225. The Republic expressed at paragraphs 66 and 75 of their written submissions, that a sentence in the range of two years would be appropriate for the offence of riot and a sentence of one and half to two years would be appropriate for the offence of disturbing the legislature.

226. The Republic submitted that the case of *Barbaro* states that "*whatever suggestions are made by the prosecution, in terms of an appropriate sentence or appropriate range of sentence is really just an opinion...at the end of the day the court still has to make its own independent findings on what sentence is appropriate to the entire circumstances of the case*".[23]

227. In his oral submissions, Mr. Funnell stated that correct interpretation of paragraph 7 of the majority decision was that not only is the prosecution not required to make submissions with respect to an appropriate range of sentence, they should not be permitted to do so.

228. Mr. Funnell submitted that the DPP should disavow their submissions made at paragraph 66 and 75 of their written submissions, on the basis that the submissions should not have been made, and were apt to mislead the Court.

229. As the majority decision in *Barbaro* is binding on this court, I am minded to agree with Mr. Funnell and note that submissions made as to the range of appropriate

[22] [2014] HCA 2.
[23] Transcript 20 March 2018, page 8.

sentencing by the Director of Public Prosecutions will be disregarded. I follow the majority judgement of this decision where at paragraph 7 it is stated:

> *"The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge".*[24]

ANALYSIS

230. I will begin by addressing Grounds 2 to 8 of the defendants' appeal before I address the prosecution's Ground 2 and finally together Ground 1 of both the prosecution's and the defendants'. However let me pre-empt my Analysis with the issue of jurisdiction of this court to hear and deliberate on an appeal against sentencing from the court below.

Issue of Jurisdiction

231. At the outset of this hearing of the defence submissions, Counsel Graham reiterated the importance of this court being aware of the nature of the jurisdiction it is exercising as set out under section 14(4) of the Appeals Act 1972. It states:

> *"(4) At the hearing of an appeal the Supreme Court may, if it thinks that a different sentence should have been passed, quashed the sentence passed by the District Court and pass in substitution therefor such other sentence, whether more or less severe, which the District Court could have lawfully passed as it thinks ought to have been passed; any such sentence passed by the Supreme Court shall*

[24] *Barbaro and the Queen* [2014] HCA 2.

for the purpose 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."

232. I thank counsel for reminding the court of the nature of the jurisdiction it is exercising and how and when it arises. It is clear from one's reading of section 14 as a whole that the powers vested in the court to intervene may only be brought about if it is satisfied that the District Court had made an error of law and that such an error if not rectified will result in an injustice in the sentencing. The exercise of the residual discretionary powers of the court thereafter will be discussed below.

Defendants Grounds

Ground 2 Context and Motive

233. Defendants' counsel submitted that the court should consider the context and motive behind the offences as a mitigating factor in deciding the appropriate sentencing. The suspension from Parliament of the Meneng District MPs, Squire Jeremiah and Sprent Dabwido, and the Boe District MP, Matthew Batsiua resulted in the disfranchisement of their constituents. Their legal challenge heard by the full court of the Supreme Court of Nauru correctly dismissed it on the law. The resultant gathering and assembly was in protest directly brought about by their frustrations, shared by their supporters at not been able to be in Parliament to represent their constituents, especially when the budget of the nation was being presented at the time of the event.

234. Defence referred to Lord Hoffman's statement in **R v Jones [2006] UKHL 16** recognising the place civil disobedience has in the United Kingdom and why the court should also consider the "conscientious motives" in imposing sentence.

235. This court accepts that civil disobedience is a recognized way of expressing opposition or objection to any actions of the authorities that may not be acceptable to any member of the Nauru public. Indeed the Nauru Constitution protects the exercise of such

right by every member of its citizenry. However, the exercise of such right, including public protest in public, must be done in accordance with the law of the land. Failure to do so will result in the same way as other criminal offendings are treated by the authorities.

236. In **R v Jones** (supra) the offenders committed criminal offences in the belief that the UK and the US governments were committing an international law crime of aggression by their invasion of Iraq and therefore in their view they were legally justified in damaging war materials and supplies as they did.

237. In this case, the defendants were part of an effort to through unlawful acts, to disrupt the legitimate deliberation of the Nauru Parliament.

Ground 3 Assessment of Individual Moral Culpability

238. I accept the defence's proposition that in a joint criminal enterprise, in considering sentencing principles to be applied, the court while it may properly view that each participant is equally responsible and liable for all the acts in carrying out the joint enterprise, each individual's level of culpability, may be considered by the court in the course of sentencing.

239. The court accepts principle in this regard as enunciated by the New South Wales Court of Criminal Appeal in **KR v R [2012] NSWCCA 32.**

240. The Solomon Islands High Court decision in **Igi v Regina [1977] SBHC 39** and specifically the reference by its Chief Justice Palmer to Sachs LJ's statement in **R v Caird (1970) 54 Cr App R 499** quoted, in part, by the learned Magistrate in her judgment, must be read and interpreted in the context of the whole of Lord Justice Sachs' judgment where he clearly recognized the responsibility and liability of the individual in a joint enterprise as separate from his blameworthiness within the joint enterprise.

241. In this case, it is clear from the Agreed Facts that all three defendants were at various times part of a crowd that was gathered in front of the Parliament, and although Job Cecil had joined at a later time he was still nevertheless part of the crowd that had turned unruly and began to push against the police line and hurl objects and abuses at them. As such all three defendants were parties to a joint enterprise and each a liable and accountable for the offences committed.

242. It is accepted and conceded by the prosecution that all three defendants were "followers" not "leaders" of the assembly. However from the Agreed Facts it is clear that their culpability or blameworthiness differed significantly. In the case of John Jeremiah and Josh Kepae, they were there at the beginning of the gathering and took part in guiding the crowd, while standing at the back of the trucks, to go around the police road block into the apron of the airport runway on the way to the front of the Parliament.

243. Contrast is drawn with the "follower" role of Job Cecil. Not only did he join the assembly at a much later stage, he did not play an active or visible role in the protest, except when he joined in to help his relatives and others in an attempt to break the police line.

Ground 4 Principle of Parity

244. Defence counsel Graham on behalf of Josh Kepae submitted that since an element of the offence of riot would include public disorder and also contemplate violence and violence against authorities, the serious assault charge against Josh Kepae should have been included in the riot charge. Parity principles apply equally within one set of criminal proceedings as it does to separate proceedings.

245. I am unable to accede to this proposition. The assault of a police officer is a serious matter indeed. A police officer is the embodiment of law and order in a society and any attack or assault of such a person represents a direct attack on the law and order of the country. That is the reason the offence is specifically set out and separate from the

offence of general assault under section 340 of the Criminal Code.

246. It was pointed out to the court that sentencing records in this jurisdiction of section 340 offences that the majority of sentences were non-custodial. They offenders were either fined, given probation orders or good behavior bonds. Be that as it may, it does not mean that this court should continue to give non- custodial sentences to every section 340 offences. In this case especially, the court notes the context the attack on the police officer was perpetrated.

Ground 5 Deterrence Not an Overriding Factor

247. The defendants' contention is that the learned Magistrate erred in finding that deterrence must be an overriding factor in the sentencing exercise. In her judgment she stated:

> *"The overriding factor in the sentencing of the defendants in this case now before me is deterrence and I accept the submission by the Director of Public Prosecutions, that a short and sharp sentence should be imposed on the defendants."*

248. On the other hand, defence counsel pointed to an earlier Nauru Supreme Court decision **Harris v Director of Public Prosecutions [1998] NRSC 2** where the then Chief Justice stated:

> *"The purpose of punishment is really to reform a wrong doer, if possible and to restore order and discipline in society...."*

and

> *"...our penal policy, as in all countries with a system of justice similar to that of Nauru, is aimed at keeping people out of prison. Reformation not retribution is the prime object of sentencing. Mitigating circumstances pertinent to an offender are always a major factor to be weighed in sentencing...."*

249. While this court agrees that deterrence is not the overriding factor in sentencing, neither may I suggest, is any other. Each component or purpose of sentencing principles is to be considered in turn by the court and depending on the relevancy and applicability are then given their due weight in assessing the appropriate sentence. If there be a primary objective in the purpose of sentencing, it is to ensure that the offender is adequately punished for the offence. All others, including deterrence, rehabilitation or reformation merely impact on the type and severity of the sentencing.

Ground 6 Purpose of Sentencing

250. The defence submission under this the learned magistrate had erred in her application of the purposes of sentencing. The defence submissions to an extend overlaps with their arguments under Ground 5. Reference is made to the provisions of the new Crimes Act 2016 which sets out, under section 278, the purposes of sentencing. In the defence counsel's view, if the court were to rely on section 280 of the Act dealing with the sentencing considerations for imprisonment, the court would find no grounds for the imprisonment of the defendants.

251. I am minded to remind the defence that section 280 (a) (iv) states that the court in considering whether the sentence of imprisonment is appropriate, must be satisfied that "any other sentence would be inappropriate having regard to the gravity or circumstances of the case." In any case, section 280(b) which stipulates that a sentence of imprisonment is necessary "to give proper effect" to section 278(purposes of sentencing) and section 279(consideration generally in sentencing).

Ground 7 Police Officer-Josh Kepae Only

252. The defendant submitted that it was an aggravating factor that the defendant Josh Kepae was a police officer. This, as was subsequently pointed out by the prosecution, was an error of fact. He was once in the police force but had since left it. It would certainly have been a much more serious case of a police officer assaulting another police

officer, if it were true.

253. Defence counsel nevertheless contended that the fact that Josh Kepae was a former police officer should be a mitigating factor on sentence because of the positive contribution he had made to the community in that role.

254. On the other hand, a former police officer attacking/assaulting a police officer in the course of the latter's duties should be viewed seriously, especially when considering that the attacker was once a serving police officer himself and familiar with the law.

Ground 8 – Error of Interpretation of Agreed Facts - Job Cecil Only

255. The learned Magistrate, it is submitted by defence counsel, had erred in interpreting the facts from Job Cecil's Agreed Facts to assert in her judgment as follows [p.31]:

> *"...getting involved when the police clashed with his relatives on the facts could only mean attacking the police skirmish line in an attempt to break it and allow the suspended members of Parliament to enter. Though his participation could be described as short and sharp, in my view it goes to the heart of the issue. A police skirmish line, when formed anywhere, should, even in silence, mean do not go beyond this line."*

256. The defence counsel had submitted before the learned Magistrate that Job Cecil was, at the beginning, merely an observer of the proceedings but added:

> *"His involvement only arose when he saw incidents between his relatives and the police and that prompted his involvement."*

257. The relevant parts of the Agreed Facts submitted on behalf of Job Cecil that goes to the merit or otherwise of this Ground are as follows:

1. *Job Cecil had assembled with other protesters that were making their way through the police line that had already been formed by the Commissioner and his police officers.*
2. *The protesters had gathered with a common purpose to allow Mr. Mathew Batsiua, Mr. Sprent Dabwido, and Mr. Squire Jeremiah to enter the Parliament building while the Parliament was in session.*
3. *Mr. Squire Jeremiah and Mr. Sprent Dabwido were witnessed directing the other defendants to the Parliament door. Job Cecil then saw his relatives confronting police and so he came to be assembled with his relatives.*
4. *The angry crowd was pushing the police officers line in front of Parliament main entrance. Job Cecil was assisting his relatives by pushing through the police line in front of the entrance to the Parliament Building and later left the parliament area around 2 pm to go to work."*

258. In my view the learned Magistrate could assume and interpret the phrases when **Job Cecil saw his relatives confronting the police and came to be assembled with his relatives** and that **Job Cecil was assisting his relatives by pushing through the police line** and that his family was part of the angry crowd that were also pushing the police officers, as meaning that, given the nature of the confrontation of the day described elsewhere, Job Cecil was "*involved when the police clashed with his relatives....*".

259. I do not agree that the learned Magistrate had erred in her interpretation of the facts as outlined in Job Cecil's Agreed Facts.

Prosecutions Grounds

Ground 2 Principle of Sentencing and of Parity

260. Prosecution highlighted in its submissions the necessity for the court to scrutinize carefully the sentencing guidelines for the offences the defendants are charged with. The range of sentencing imposed by law, giving the maximum sentence available for the court

to consider, clearly indicates the level of the seriousness of the offence. It is well for the court to bear in mind, that in considering the appropriate sentence to be imposed in respect of the 3 defendants in this case, it must always have regards to this important factor.

261. In this instance, the offence of unlawful assembly for which Job Cecil had pleaded guilty to carries a maximum penalty of 12 months imprisonment. On the other hand the offence of riot for which John Jeremiah and Josh Kepae are guilty of, carried a penalty of 3 years imprisonment and hard labour. The offence of disturbing the legislature for which all the 3 defendants are guilty of, carries a maximum penalty of 2 years imprisonment.

262. The maximum penalties for each of the three offences indicate how serious the offences are relative to one another. Riot obviously is more serious an offence to that of disturbing the legislature while unlawful assembly in the least serious offence between the three. They are guidelines for the court in assessing the appropriate sentencing, given the seriousness of the offence as deemed by the law.

263. Prosecution contends that the learned Magistrate had, by sentencing Job Cecil to 3 months imprisonment for the offence of unlawful assembly, while at the same time sentenced John Jeremiah and Josh Kepae also for a imprisonment term of 3 months for the more serious offence of riot, had erred in law by failing to take into account the principles of sentencing guidelines as submitted. Similarly, the learned Magistrate's sentencing of 3 months imprisonment for all the 3 defendants for the offence of disturbing the legislature also, given the sentencing guidelines, amounted to an error of law.

264. The court agrees with the argument that the maximum penalties set out for offences under the Criminal Code, and the new Crimes Act 2016, are a guide to the courts as to how our society views the seriousness of the offences and with it the expectation that the court will pay due regards to them in deciding the appropriate

sentencing to be given. Of course, within the range of these sentences, circumstances will play its part to redeem the offender from the harshness of the penalties that our law provides.

265. In my view, there is merit in the prosecution's arguments under Ground 2.

Prosecution and Defence

Ground 1 Sentences Manifestly Lenient/ Sentences Manifestly Excessive

266. The prosecution for its part argued that the sentencing by the learned Magistrate, especially in the more serious of the offences, namely, riot and disturbing the legislature did not correctly reflect the measure and correct or proper sanctions that the court would normally impose on such unlawful acts. All the offences endangered not only human lives, but also threatened the security of the country. The sitting of Parliament was adjourned and its members were relocated to safety areas for their personal safety and protection.

267. In the prosecution's view, these should have been the backdrop to the court's consideration in deciding what was the appropriate sentencing to be given. Taking all of these into consideration, prosecution argued that the sentences passed by the learned Magistrate were manifestly lenient.

268. On the other hand the defence's view that the sentences passed were manifestly excessive is premised on the argument that the offences to which the offenders/appellants are guilty of were brought about by the political circumstances existing at that time on Nauru. These are detailed in their individual as well as collective submissions. These taken together with mitigating factors presented to the court on behalf of each of the offenders/applicants, should have convinced the court that a more compassionate approach should have been taken resulting in much lighter or lenient sentences.

269. The court in my view has a balancing act to play in assessing the correct or appropriate sentencing. This is manifested in the exercise of its discretionary powers. The court agrees with the conclusion in *Bugmy v The Queen* that there is no such thing as a correct sentence for an offender or offence. In my view, so long as the court sentences an offender within a range of sentencing that are available, after giving due weight to aggravating as well as mitigating factors, then there is little room to challenge the court's decision.

CONCLUSION

There is no doubt that the offences to which all the three offenders/appellants have pleaded guilty to, are serious of their own, but made even more so by the circumstances under which the offences took place. The offences call for custodial sentences.

In the final, having listened to oral arguments and taken the submissions from both sides of this appeal and cross-appeal into careful consideration, the court finds that the learned Magistrate had erred in law in her application of the sentencing guidelines.

The sentences passed by the District Court on 25 November 2016 in respect of John Jeremiah, Josh Kepae and Job Cecil are hereby quashed.

After taking into account all the circumstances of the case, including mitigating and aggravating factors submitted, the following sentences are passed in substitution to that passed by the learned Magistrate:

1. John Jeremiah
   i. For the offence of riot, the court sentences you to 12 months imprisonment. Mitigating factors, reduces the term by 3 months making a total term of 9 months imprisonment
   ii. For the offence of disturbing the legislature, the court sentences you to a term of 9 months imprisonment with mitigating factors reducing the term by 3 months to 6 months imprisonment

   Both sentences to be served concurrently.

2. Josh Kepae

i. For the offence of riot, the court sentences you to 12 months imprisonment. Mitigating factors reduces your term by 3 months, making your total term of imprisonment of 9 months.

ii. For the offence of disturbing the legislature, the court sentences you to a term of 9 months imprisonment, reduced to 6 months on mitigation grounds

iii. For the offence of serious assault on a police officer, the court sentences you to 10 months reduced by 3 months through mitigation making a total of 7 months imprisonment

All three sentences to be served concurrently

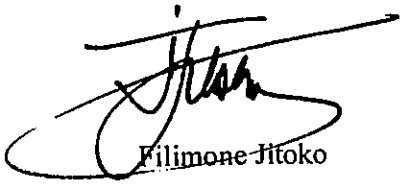
3. Job Cecil

i. For the offence of disturbing the legislature, the court sentences you to 7 months imprisonment with 3 months reduced because of mitigation making a total sentence of 4 months imprisonment

ii. For the offence of unlawful assembly, the court accepts the prosecution's concession not to disturb the 3 months imprisonment passed by the District Court. However given the mitigating factors of the case, the term is reduced to 30 days imprisonment.

Both sentences to be served concurrently.

Dated this 29th day of March, 2018.



Filimone Jitoko

Chief Justice