IN THE SUPREME COURT OF NAURU

AT YAREN

CRIMINAL JURISDICTION

Criminal Case No. 12 of 2017 and
Criminal Case No. 08 of 2018

BETWEEN: **THE REPUBLIC OF NAURU**

Complainant

AND:

1. MATHEW BATSIUA

2. PISONI BOP

3. RENACK MAU

4. MEREIYA HALSTEAD

5. BUREKA KAKIOUA

6. HESTAKAI FOILAPE

7. DABUB JEREMAIAH

8. JACKI KANTH

9. MESHACK AKUBOR

10. JORAM JORAM

11. PIROY MAU

12. LENA PORTE

Defendants

Before : Hon. Justice D. V. Fatiaki

For the Republic : Mr. R. Talasasa, Director of Public Prosecutions and associates

For the Defendants : In person

Date of Hearing: 12, 14, 15, 18, 19, 20, 25, 26, 27, 28, & 29 of November 2019 and 2 & 4 December 2019

Date of Judgment : 11 December 2019

JUDGMENT

BACKGROUND

1. Although this case is strictly concerned with the events that occurred outside the Government Complex and Parliament building at Yaren district on Tuesday 16 June 2015, for a better understanding of the factual context, a brief outline of the background would be useful albeit that it is not evidence in the case.

2. In this regard I gratefully adopt (with slight amendments and my insertions) the Introduction of Muecke J in **Republic of Nauru v Batsiua** [2018] NRSC 37 where he writes:

> "*[1]* *(*On 13 May) 2014*, five Members of the Parliament (**MPs**) of Nauru were suspended…., by the Parliament. These Members included Mathew Batsiua, Sprent Dabwido and Squire Jeremaiah."*
>
> *[2]* *The five Parliamentarians filed legal actions in the Supreme Court of Nauru (*unsuccessfully*) challenging their suspension from Parliament, arguing that their suspension was unlawful and in breach of the Constitution of Nauru ("the Constitution")."*

3. The legal action was heard before the Full Bench of the Supreme Court of Nauru on 30 October 2014 and was decided on 11 December 2014 (***see***: Keke v Scotty [2014] NRSC 7).

4. As for the suspensions, Parliament resolved:

> *"that this suspension remain in effect until such time as each member submits an unequivocal apology in writing to the House; and each member publicizes an unequivocal apology through the same foreign media which earlier remarks were made contrary to the national interest."*

On any reading, the **MPs** suspensions was not "*indefinite*" and infact were conditional on apologies being made by the suspended MPs.

5. In July 2014 the suspended **MPs** salaries and allowances were withheld pending their apologies which, unfortunately, were not forthcoming and continued through 16 June 2015 and up till the present.

6. Continuing with the background narrative I gratefully adopt the following 2 extracts from the Court of Appeal judgment in Jeremaiah v Republic [2018] NRCA 1 where the Court said :

> *"[8] After unsuccessfully lodging an application at the Supreme Court challenging the decision of Parliament, and little progress being achieved in discussions with the Speaker, the Hon. Ludwig Scotty,* (on 15 June 2015) *they decided to stage a peaceful protest outside Parliament on 16th June 2015 when Parliament was about to deal with the budget. They met with their supporters and family members and decided to march to Parliament with the intention to have their three suspended members to re-join or enter Parliament.*
>
> *[9] The police having had prior notification of what was happening decided to set up road blocks to prevent them from advancing further or achieving what they had planned to do…….*"

7. Returning now to the Meucke J narrative :

> *"[3] In the morning of Tuesday 16 June 2015, supporters of the suspended Members of Parliament which included Mathew Batsiua, Sprent Dabwido and Squire Jeremaiah, set out (*from Menen and Boe Districts*) to travel towards the Parliament building (*at Yaren District*) on Nauru to protest in support of the suspended **MPs**. Police formed a cordon line to stop the supporters moving towards or entering the grounds of the Parliament building……."*
>
> *"[4] From the next day, 17 June 2015, the Nauruan Director of Public Prosecutions ("the DPP") laid (*criminal*) charges against the three suspended **MPs** and 17 others, all of whom were alleged to have been involved in the events at Parliament House on 16 June 2015…."*

8. So much then for the background factual matrix. I turn next to the charges.

THE CHARGES & PLEAS

9. As a result of there being more than one Information filed in these proceedings since they were commenced, the Court requested the Director of Public Prosecutions (**DPP**) to file and serve a final consolidated and amended Information setting out the charges that he would be pursuing in the trial proper. This was dated and received on 29 October 2019. It charged 15 named defendants, some jointly and some individually in 11 Counts as follows:

   Count 1 - charged **Daniel Jeremaiah** alone with an offence of Unauthorised Access - Security Restricted Area contrary to section 107(2) of the Civil Aviation Act 2011;

Count 2 - charged **Jacki Kanth** alone with Right of (*sic*) Access - Security Restricted Area contrary to section 107(2) of the Civil Aviation Act 2011;

Count 3 - charged **Mereiya Halstead** alone with the same offence of Right of (sic) Access – Security Restricted Area contrary to section 107(2) of the Civil Aviation Act 2011;

Count 4 – jointly charged all defendants (excluding **Lena Porte**) with an offence of **Riot** contrary to section 63 of the Criminal Code, 1899;

Count 5 - also charged all defendants (excluding **Lena Porte**) jointly with an offence of Disturbing the Legislature contrary to section 56(1) of the Criminal Code 1899;

Count 6 - charged **Bureka Kakioua** alone with an offence of Act with Intent to Disable contrary to section 317(3) of the Criminal Code 1899 (*the "**fire cracker**" charge*);

Count 7 - charged **Bureka Kakioua** alone with an offence of Unlawfully Administering A Noxious Thing contrary to section 323(2) of the Criminal Code 1899 (*the "**fire extinguisher**" charge*);

Count 8 - charged **Daniel Jeremaiah** alone with an offence of Serious Assault of a named constable whilst acting in the execution of his duty contrary to section 340(2) of the Criminal Code 1899;

Count 9 - jointly charged **Renack Mau** and **Piroy Mau** with an offence of Serious Assault of constable **Angelo Amwano** whilst in due execution of his duty contrary to section 340(2) of the Criminal Code 1899;

Count 10 - jointly charged **Daniel Jeremaiah** and **Pisoni Bop** with an offence of Serious Assault of constable **Shaka Bill** whilst in due execution of his duty contrary to section 340(2) of the Criminal Code 1899;

Count 11 - charged **Lena Porte** alone with Serious Assault (*sic*) of police officer **Sgt Priscilla Dake** whilst acting in the execution of her duty contrary to section 340(2) of the Criminal Code 1899.

10. On 11 November 2019, the case was due to commence. In the absence of any defence counsel and, given the Court's concern that the defendants should be legally represented if they wished, the Court posed four questions to each of the defendants with a view to ascertaining his/her position with regards to legal representation and assistance for the trial. Unfortunately, the defendants proved uncooperative and the Court was constrained to proceed without legal representation for the defendants. The Court had also borne in mind that each

defendant had a constitutional right under Article 10(3)(e) : "…*to defend himself before the Court in person*".

11. In this regard in Regina v Sang [1980] AC 402, Lord Diplock said (excluding any reference to jury) :

"*A fair trial according to law involves, in the case of a trial upon indictment, that it should take place before a judge and a jury; that the case against the accused should be proved to the satisfaction of the jury(the judge) beyond all reasonable doubt upon evidence that is admissible in law; and, as a corollary to this, that there should be excluded from the jury (the trial) information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information. If these conditions are fulfilled and the jury receive correct instructions from the judge as to the law applicable to the case, the requirement that the accused should have a fair trial according to law is, in my view, satisfied for the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."*

To similar effect are the judgments of **Lord Salmon** (at p445**)** and **Lord Scarman** (at p455). Remarkable by its absence in all three judgment of the learned Law Lords is any suggestion, hint, or mention that a critical feature or component of a "*fair trial*" is the requirement that the accused person be legally represented.

12. On 14 November 2019, 12 of the 15 defendants appeared in Court, (Squire Jeremaiah, Daniel Jeremaiah and Rutherford Jeremaiah all failed to appear for their trial). Nevertheless, the 12 above-named defendants appeared in person, and each was individually arraigned. Each defendant was asked if he/she understood the charge(s) against him/her that was read out and translated in the Nauruan language, and each was also asked how he/she intended to plead. Owing to each defendant's equivocal and unhelpful response which included cryptic statements such as : "…*can't answer that*" and "…*not in a position to answer that*", the Court entered a "***not guilty***" plea for each defendant pursuant to section 190(6) of the Criminal Procedure Act, 1972 which provides:

" If the accused refuses to plead, the Court shall record that fact and he shall be deemed not to admit the truth of the information and to have pleaded 'not guilty'."

GENERAL DIRECTIONS

13. Pursuant to Section 188 of the Criminal Procedure Act, 1972, criminal trials in Nauru "*shall be by a judge alone*". This means that I am the sole and final arbiter of both law and fact and I am required to direct myself on several important legal principles.

14. Each of the defendants in this case, has pleaded "*not guilty*" to the charge(s) he/she faces and Article 10(3)(a) of the Constitution provides that each defendant is "….*presumed innocent until proved guilty according to law*". Furthermore, Articles 10(7) and 10(8) collectively provides that no defendant can be compelled to give evidence at his/her trial or to be a witness against himself/herself. As a consequence of these constitutional protections, the Prosecution which brings the charge(s) has the sole legal burden of proving the guilt of each defendant by establishing each and every element of the charge(s) against such defendant.

15. In other words, the burden of establishing the guilt of each defendant rest fairly and squarely on the Prosecution and never shifts throughout the trial. No defendant is required to prove or establish his/her innocence or call and produce any evidence in his/her defence. Each defendant is perfectly entitled to remain silent throughout the trial after having pleaded "*not guilty*" to the charge(s) as occurred in this case. However in fairness, each defendant was asked after every prosecution *witnesses'* evidence, if he /she wished to ask any questions of the witness and all defendants declined for each and every prosecution witness. ***See*** : Section 198 of the Criminal Procedure Act 1972.

16. Furthermore, the Prosecution must call and produce admissible evidence which establishes the elements of each offence charged to the required criminal standard of "***proof beyond a reasonable doubt***". This means that the Court, after hearing and carefully scrutinising all of the evidence, must feel sure of each defendant's guilt before it can convict him/her of the charge(s). If after hearing all of the evidence, the Court is not satisfied beyond a reasonable doubt or is unsure of a defendant's guilt, then the defendant will be given the benefit of the doubt and must be acquitted.

17. Although this case has political overtones no better exemplified than in the defendants concluding remarks in their closing address, and has generated strong opinions and emotions both locally and abroad, I caution myself and have

ignored such overtones and emotions in deciding this case. This Court is not concerned with such matters that have no relevance whatsoever to the charges brought against each of the defendants. In similar vein, several of the Prosecution's police witnesses testified to having had previous professional dealings with some of the defendants. I have also ignored such prejudicial testimony in considering and evaluating the evidence. In this case, this Court is concerned first, last and solely with the charges and the relevant and admissible evidence produced by the Prosecution from the witness box and nothing more.

18. Although, all male defendants are jointly charged with Riot and Disturbing the Legislature, I am required to warn and direct myself that the guilt or innocence of each defendant depends entirely on the nature and quality of the Prosecution's evidence led against each defendant. This necessarily means that just because one of several defendants might be guilty of the charge does not mean that all other defendants must also be guilty and vice-a-versa. Likewise, in a joint charge involving two defendants the guilt or innocence of each defendant depends solely on the evidence led against him/her alone and cannot be used against his/her co-defendant.

ELEMENTS of OFFENCES & EVIDENCE in SUPPORT

19. The Court will now proceed to deal with each Count in the Information (excluding those Counts charging an absentee defendant).

Counts 2 & 3

20. These two counts charged **Jacki Kanth** & **Mereiya Halstead** separately, with an identical offence of Right of Access - Security Restricted Area contrary to section 107(2) of the Civil Aviation Act 2011 by "….***cross (*sic*) the Airport Runway***".

21. The elements of this offence are:

(a) the defendant enters and is present in an airport area ;

(b) the said airport area is a "*security restricted area*" ;

(c) the defendant is "*not authorised to be in the security restricted area*" ; and

(d) the defendant is reckless as to whether or not he is authorised to be in the said area.

22. To establish **element (a)** the Prosecution relies on the evidence of Police Inspectors Simpson Deidenang and Raynor Tom who identified **Jacki Kanth** and **Mereiya Halstead** the defendants who are charged in Counts 2 & 3, respectively, as persons, who had entered and were present on the "a*irport* ***r****unway*". The Inspectors separately testified to seeing a white Land Cruiser driven by **Mereiya Halstead** (who was also identified in Court), crash through the perimeter fence at Yaren and enter into the aerodrome grass verge and then circling and doing a "*donut*" on the "a*irport runway*". Inspector Raynor Tom testified to seeing **Jacki Kanth** riding a motor cycle on the "a*irport* ***r****unway*" at about the same time that the Land Cruiser was on the runway. Inspector Raynor Tom positively identified Jacki Kanth in Court. Both witnesses confirmed their evidence upon viewing the Prosecution's video [**Exhibit No. P(1)**] which was shot at the scene on the day in question by members of the Nauru media.

23. To establish **element (b)** which concerns entering into and being present in the "*security restricted area*" charged, namely the "*airport runway*", the Prosecution called **Mrs Melaney Bill** the Director of Civil Aviation, who testified that on the day in question she saw, while looking out from her office window at the Airport terminal building, a number of unauthorised persons, motor vehicles and motorcyclists in the aerodrome area as well as on the "*airport runway*". She recalls that as a result of the unlawful incursion and unauthorised intruders in the aerodrome and runway areas, and for security and safety concerns, an incoming flight had to be diverted to Honiara in the Soloman Island.

24. The Prosecution also relies on a survey plan entitled : **PLAN SHOWING THE AERODROME RESTRICTED AREA,** drawn by the Director of Lands & Survey, Mr Peniasi D Nakautoga, which delineates the outer surveyed limits of the aerodrome restricted area which is comprised of a perimeter fence and a public road running beside it on two sides [**Exhibit P(6)**]. However the plan, does not show the "*airport runway*", which is the "*security restricted area*" mentioned in the particulars of the charges.

25. In this latter regard, the Prosecution relies on a self-explanatory Government Gazette Notice No. 101 published on 4 August 2014 which reads :

> ***"AIRPORT RUNWAY – SECURITY RESTRICTED AREA***
>
> *Pursuant to Section 106.1 and 2(a) of the Civil Aviation Act 2011 of the Republic of Nauru, I, MELANEY BILL hereby declare that the Airport Runway is a SECURITY RESTRICTED AREA at all times.*
>
> *Any unauthorized person attempting to access, cross or conduct any sporting and other activities on the Runway will be reported to the relevant authorities and subsequently fined. Any person fined under the Act may be liable to a maximum fine of $10,000/- and a 12 month imprisonment term.*
>
> *Dated this 1st day of August, 2014*
>
> *MELANEY BILL*
> *DIRECTOR OF CIVIL AVIATION*
> *REPUBLIC OF NAURU "*

26. Unfortunately, the Government Gazette was **not** produced in evidence by the Prosecution. This led to a submission from Mr. Mathew Batsiua where he says :

> "*In relation to the enter security restricted area charge, again, even if Government Gazettes can be evidence of the things stated in them, the Prosecution still needs to tender them in their case at the evidence stage. He did not do that, so that charge against the accused must fail.*"

27. Although no Government Gazette(s) were produced or tendered by any witness during the trial, an identically-worded **Notice** entitled **AIRPORT RUNWAY (SECURITY RESTRICTED AREA) NOTICE, 2014 (**S.L.No.9**)** was republished on 15 September 2014 as a Nauru Subsidiary Legislation under the Civil Aviation Act, 2011. In this regard, Section 26 of the Interpretation Act, relevantly provides:

> "*all Subsidiary Legislation shall be published in the Gazette and shall be judicially noticed".*

This means that no evidence is required to be produced by the Prosecution, to prove what is directed by the law to be "judicially noticed". Section 105 of the Interpretation Act further reinforces section 26 by presuming, unless the contrary is proved, that a Gazette is evidence of the matters contained in it.

28. I am also grateful to Mr. Mathew Batsiua for drawing to the Court's attention, the provisions of the **Law Revision and Consolidation Act, 2019** which

contains a helpful definition of what constitutes "*subsidiary legislation*" as including :

"*….regulations, proclamations, orders, rules and **notices** having legislative effect and any other form of subordinate legislation.*" (my emphasis)

29. In light of the foregoing I am satisfied that, in the words of the subsidiary legislation, the "***Airport Runway is a security restricted area at all times***" including on 16 June 2015.

30. To establish **element (c)**, the Prosecution again relies on the evidence of **Mrs Melaney Bill** to the effect that, except for a red Civil Aviation vehicle that she observed, all other vehicles and persons in the aerodrome area on 16 June 2015 were "*unauthorised*". Section 107 of the Civil Aviation Act, 2011 relevantly provides:

"107 Right of Access – Security Restricted Areas

(1) The following persons may enter or be present in a security restricted area:

(a) a police officer on duty

(b) an aviation security officer on duty;

(c) a person who is:

(i) authorised by the Director, aerodrome manager or other person in control of the area to be in the area; and

(ii) wearing an aerodrome identity card issued and worn in accordance with the rules;

*(d) ….(*inapplicable*) ;*

(e) *a person authorised to enter or be present in the area under the rules*."

31. There can be no doubting that neither **Jacki Kanth** or **Mereiya Halstead** are "*police officers*" or "*aviation security officers*" in terms of Section 107(1)(a)&(b) nor has it been suggested that either of them had been authorized by Mrs Melaney Bill to be on the "*airport runway*". Neither was each "*wearing an aerodrome identity card*" at the relevant time. Indeed, there is no evidence which contradicts Mrs Melaney Bill and I have no reason to doubt the veracity of her evidence which I accept.

32. Furthermore, Section 104 of the Criminal Procedure Act, 1972 relevantly provides:

> “***Negative averments***
>
> ***Any exception, exemption, proviso, excuse or qualification****, whether it does or does not accompany in the same section the description of the offence in the written law defining such offence, and whether or not specified or negatived in the charge or complaint,* ***may be proved by the accused, but no proof in relation thereto shall be required on the part of the complainant or prosecutor****.*” (my emphasis)

33. In <u>R v Edward</u> (1974) 59 Cr App R 213, it states interalia in the <u>headnote</u> :

> “*if the true construction of the enactment is that it prohibits the doing of acts subject to provisos, exception and the like, the Prosecution can rely on the exception and are not required to prove a prima facie case of lack of excuse, qualification, or the like. In such cases, the persuasive and not merely the evidential, burden of proof is placed on the defendant.*”

34. The effect of the above provision is clear, in that, the two defendants, have an option to prove that they had the necessary “*authority*” to enter and be on the “*airport runway*” if they chose to. The Prosecution for its part was not obliged to establish that “*negative averment*”. In this case, neither defendant adduced any evidence to prove he had authority to be on the “*airport runway*”. In light of the foregoing, this third element must be taken to have been established beyond a reasonable doubt.

35. To establish **<u>element (d)</u>**, namely reckless as to the defendant’s authority, the DPP submits that this too is established in that both defendants, without authority, intentionally entered the aerodrome area and “*airport runway*” which was enclosed within a perimeter fence which **Mereiya Halstead** violently breached by using a land cruiser he was driving and thereby exposing the aerodrome and runway area to **Jacki Kanth** and other vehicles to enter.

36. The DPP further submits that the existence of a perimeter fence, and the normal use to which an airport runway is put **<u>ie</u>**. for planes to land and takeoff, are so notoriously obvious that both defendants who are mature men would have known that the area beyond the fence was a “*security restricted area*” and that entering into such an area was fraught with danger and risk. I agree.

37. In light of the foregoing, I am satisfied beyond a reasonable doubt that neither **Jacki Kanth** nor **Mereiya Halstead** was authorised to enter onto and/or cross the *“airport runway”* on 16 June 2015. They are accordingly convicted as follows:

- **Jacki Kanth** is convicted on Count 2 of an offence of: **Right of Access – Security Restricted Area** contrary to section 107(2) of the Civil Aviation Act 2011; and

- **Mereiya Halstead** is convicted on Count 3 of an offence of **Right of Access – Security Restricted Area** contrary to section 107(2) of the Civil Aviation Act 2011.

Count 4

38. In this Count all defendants (excluding **Lena Porte**) are jointly charged with an offence of ***Riot*** contrary to section 63 of the Criminal Code 1899. That section however is the penalty section and not the offence - creating section which is section 61 which reads as follows:

"UNLAWFUL ASSEMBLIES : BREACHES OF THE PEACE

*61**.** When three or more persons, with intent to carry out some common purpose, assemble in such a manner, or, being assembled, conduct themselves 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, or will by such assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are an unlawful assembly*

It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.

….(inapplicable)*….*

When an unlawful assembly has begun to act in so tumultuous a manner as to disturb the peace, the assembly is called a riot, and the persons assembled are said to be riotously assembled."

39. It is obvious from the above definition of a **Riot***,* that it begins as an "*unlawful assembly*". The elements or ingredients of a **Riot** must interalia include an "*unlawful assembly*" which in turn, has the following elements:

- 3 or more persons "*assembled*" ;

- with "*intent to carry out a common purpose*" ;

- the assembled persons "*conducted themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that they would commit, or provoke other persons to commit*, *a breach of the peace*".

see also : Harris v Director of Public Prosecutions [1998] NRSC 1 which helpfully explains that : "*it is not necessary that the original assembling was lawful. It will become unlawful if the person starts conducting in above manner. Such an assembly becomes a riot when it begins to act in so tumultuous manner that the peace is disturbed.*"

40. Therefore, in order to establish a "***Riot***", the Prosecution must call and produce evidence which satisfies the Court beyond a reasonable doubt, of the following elements :

(a) an "*unlawful assembly*" has begun to execute its "*common purpose*" ;

(b) a "*breach of the peace*" occurred in that execution in a "*tumultuous manner*" ;

(c) such breach of the peace caused fear and terror to the public.

41. For completeness, certain meanings, often-encountered words and evidential requirements to establish a "***Riot***" may be noted as follows :

(i) the "*common purpose*" can be implied from the actions of the assembly ;

(ii) fear by persons in the neighbourhood can also be implied from the nature of the assembly, its conduct, numbers, and other relevant matters ;

(iii) terror to the public can be inferred from the nature of the breach of the peace and other relevant factors ;

(iv) As for the meaning of "*tumultuous*" or "*tumultuously*" , Lyell J. in J W Dwyer Ltd. v Metropolitan Police District Receiver [1967] 2 QB 970 said at (**p 979**) :

" …*I pause to consider what the concepts are which arise in one's mind when the noun, adjective or adverb, "tumult", "tumultuous" or "tumultuously" are applied to an assembly. …. it seems to me that all of them bring a certain impression to one's mind.* ***When those words are applied to an assembly of persons., the impression is that the assembly should be of considerable size ; that it should be an assembly in which the persons taking part are indulging in agitated movements ; and excited , emotionally aroused assembly ;***

excitement or emotion common to the members of the assembly; and generally , though not necessarily, accompanied by noise." (my emphasis) ;

(v) No person who is alleged to have taken part in a "*Riot*" should be convicted on the evidence of one witness alone where there is any possibility of mistake. In such cases there should be corroboration of identification.

42. To prove the offence of "**Riot**" the prosecution relies on most of the witness called, but mainly on the following :

- PW 1- Hon. Ludwig Scotty ;
- PW 4 - Insp Simpson Deidenang ;
- PW 7 - Insp Raynor Tom ;
- PW 8 – Sgt. Priscilla Dake ;
- PW 9 - PC Angelo Amwano ;
- PW 10 - Insp Czarist Daniel ;
- PW 11 – Sgt. Illona Dowedia ;
- PW 13 - Senior PC Shaka Bill ;
- PW 14 - Commissioner of Police Corey Caleb.

The Prosecution also heavily relies on :

- a 55 minute video shot by the employees of Nauru Media who were present at the scene, recording the events of the day [**Exhibit P(1)**] ;
- a booklet containing 70 screenshot colour photos identified and tendered by Insp Raynor Tom [**Exhibit P(2)**] ;
- 4 coloured photographs taken at the Parliament complex on 16 June 2015 by Insp Czarist Daniel [**Exhibit P(3)** and **P(4)]** ;
- a collection of 28 screen shot colour photos identified and produced by Sgt Illona Dowedia [**Exhibit P(5)**].

43. In the interest of brevity and to avoid excessive repetition and, mindful of the absence of any cross examination by the defendants, I do not propose to set out in any detail the evidence of <u>all</u> of the Prosecution witnesses. Instead, I propose

to adopt in large part the comprehensive eye-witness testimony of Sgt Illona Dowedia which was given in a clear and chronological order.

44. Sgt Illona said on Tuesday 16 June 2015 after reporting to duty at the police station, she was deployed with Insp Raynor Tom to meet and negotiate with the Menen group who were approaching the Parliament building from the Catholic Church side at Yaren. Outside the Catholic Church they observed a convoy of vehicles in the distance coming from the Menen side. As the convoy turned the corner of the aerodrome and approached she saw that it had blocked off both lanes of the road. The police decided to erect a temporary road block using two cones on each lane to prevent the convoy reaching the Parliament building.

45. As police waited for the Menen convoy to arrive, the first person to reach the temporary police road block erected outside the Catholic Church at Yaren was, **Mr. Doneke Kepae** who asked the police why they were preventing the Menen group from going to Parliament building. Sgt Illona told him they needed to submit documents about their protest, explaining why and who would be involved in it. Mr. Kepae said they were fighting for their human rights. She told him they should still follow the procedures and they were going back and forth in the same way, when, **Mr Sprent Dabwido** and his wife Anita arrived and started asking the same questions and arguing with her and Insp Raynor Tom.

46. Not long after, **Mr Squire Jeremaiah** joined the group and said :

"*why stop us, this is a peaceful protest*".

Sgt Illona told him :

"*what I am looking at right now is not peaceful and …police cannot handle the number of people I see in front of me*".

47. In similar vein, Insp Raynor Tom told Mr Squire Jeremaiah that "*the protest was not going to be peaceful and he wouldn't be able to control the group*". He later heard Mr **Daniel Jeremaiah** saying :

"***you want blood, you will see blood***."

48. Sgt Illona then asked the Menen MPs to ask their people to return home and wait for results or wait at the sports field at Menen. She told the MPs, that she might allow a small group of less than 20 people to approach the Parliament building

under police escort, but the rest would have to return to Menen. The Menen MPs refused and kept insisting their protest was peaceful.

49. Sgt Illona told them :

"*Nauru is very small, we know everyone and this should not be happening. We may have grievances but this was not the way to handle it.*"

The discussions went back and forth in vain. The Menen group and their MPs were claiming their rights, and Sgt Illona and the police at the checkpoint were telling them to "*stand down*". She heard some of the Menen supporters at the back, yelling out : "*run them over*". She pointed that out to both Menen MPs and they replied that that was because the police were stopping them approaching Parliament building. It was a stalemate. Insp Simpson Deidenang started talking to the MPs and Mr Squire Jeremaiah was seen turning back to his Menen supporters and saying loudly (in Nauruan) :

"***what do you think, are we going in****?*"

50. **Insp Simpson** picks up the narrative at this point. He heard Mr Squire Jeremaiah shouting to his group : "*are we going back ?*" and his supporters were shouting their disapproval. Then Insp Simpson says :

"…*I saw a white Land Cruiser rammed the airport perimeter fence. I recognised the driver of the vehicle was Mereiyah Halstead. The vehicle drove over the fence and onto the runway and then proceeded to head towards the Parliament building*."

51. He said he knew **Meraiyah Halstead** as a former police officer that he worked with, met, and spoke to. He said Meraiyah Halstead is from Menen district and he identified him in Court without any difficulty.

52. Insp Raynor Tom also describes seeing the breaching of the perimeter fence by the Menen convoy and he said in his evidence :

"….*it was as if they wanted to avoid our road blitz or running into our officers. Some vehicles actually went onto the runway as well as motor cyclist. The driver of the motor cycle was one of the accused. It was Jacki Kanth. I have met him several times in the Community. We know each other, this is a small island. He is from Menen and is the son in law of Doneke Kepae.*"

Jacki Kanth was also identified in Court by Insp Raynor Tom.

53. The next witness to take up the narrative is the **Commissioner of Police Corey Caleb**. He describes seeing a white Land Cruiser, a long big truck with an open tray with people on it, a twin cab, and some motor cycles in the airport restricted area. All vehicles were heading towards where the Parliament building was and stopped directly opposite to the Parliament building and Government offices.

54. He approached the airport fence and saw the Menen convoy, supportors, and their MPs were alighting from the vehicles and approaching the same airport fence from the aerodrome side, directly opposite the Parliament building. He confronted the Menen group who were trying to climb over and breach the fence.

55. On his way to the fence, he saw Mr Mathew Batsiua and his group of supportors dressed in red T-shirts attempting to head towards the Parliament Building from the Boe side at Yaren.

56. The Commissioner also explained that on the day before, Monday evening 15 June 2015, he lifted the "*Situational Code*" (level of threat) from "***green***" to "***orange***" which requires the Police to be on "*stand by*". This was because he had information that there was going to be a protest during the Parliament sitting on Tuesday 16 June 2015. He said that at the Parliament building when the police line was being pushed back, that was a Code "***red***" situation.

57. He too, informed the Menen MPs Mr Squire Jeremaiah and Mr Sprent Dabwido that they needed his permission to hold a protest or gathering, and that there had been no application by them, for his permission to hold such an event on that day.

58. The Commissioner recalls while confronting the Menen MPs, who were in the process of pushing down the aerodrome perimeter fence, "…*a fire cracker exploded, a very loud explosion*". It had come from behind the truck parked on the grass verge of the aerodrome area. After the explosion, the police line was unable to hold back the Menen group who broke down the fence and pushed through the police line that had formed to resist them.

59. While retreating towards the Parliament building car park area, he heard a second explosion which was accompanied by a great deal of smoke. The police line re-formed outside the Parliament building and at this time, the Commissioner says a fire extinguisher was sprayed onto the Police line. The extinguisher spray

was "…*a white powder and the taste was not good…it was nasty*." He said the Police line could not handle the spray because they had no face masks.

60. At about the same time, Insp Raynor and Sgt Illona describes that while they were retreating to the Parliament building entrance, rocks were thrown towards the retreating police line.

61. Sgt Illona said when the Menen group managed to break through the fence then both groups from Menen and Boe came towards the police line from 3 sides and they were unable to contain them. She continued :

*"We rallied and backed into the alley in front of the Parliament entrance. The crowd was too big. There were too many civilians. Not sure who was with what groups. I was standing under the Parliament entrance corridor when someone yelled "**epe** (*rock*)" and I saw a large rock coming towards me….the next rock hit one of the CLO female officers behind me in her chest area. Don't recall who she was but I saw that.*

Then there was a push and shove back and forth and a lot of confusion. The protestors broke through the police line and went up the Parliament entrance steps, but there was another line of our colleagues there at the top of the steps…

For the next 20 to 30 minutes there was lot of pushing and shoving and I was holding the front entrance door at the top of the steps".

62. During the pushing and shoving Sgt Illona describes how Mrs Dabwido had yelled at her to open the door and let her husband in as he needed to breathe. She apologised that she could not open the door and told her to take her husband home as he was a sick man and this was no place for him.

63. After an interval, the pushing and shoving seemed to pause, and she heard an Evangelist preaching in English to the crowd and Mr Mathew Batsiua arguing with him about the island being "*full of corruption*". She saw the two opposing sides sitting in the corridor area catching their wind. Mr Mathew Batsiua and Mr Squire Jeremaiah were rallying their followers to fight for their rights and Mr Squire Jeremaiah took his group around to a small corridor and they tried to come in through that way, but they were blocked.

64. She recalls rescuing Constable **Angelo Amwano** who was being assaulted and targeted by the Menen boys. After leaving him in the Parliament lounge area she returned to the corridor and noticed Mr Squire Jeremaiah had fallen onto his knees. While he too, was being rescued, there was a cessation in the pushing

and shoving. After he recovered, Mr Squire Jeremaiah took his group and there was another struggle towards the gallery area.

65. Asked how he felt about the overall situation outside the Parliament building and in the Parliament corridor, **Insp Raynor** said :

"*it was very tense. Never experienced anything like this especially from fellow Nauruans. The atmosphere was very frightening for me, because there were objects being thrown and we were overwhelmed by numbers. There was an explosion.*"

66. For his part, **Insp Simpson** said :

" …. *There was a lot of violence going on. Police were assaulted and some bled. I saw Daniel Jeremaiah assaulting police officers and throwing rocks. Other Government employees came and assisted us in resisting the protestors. Including the fire department officers.*"

67. In similar vein, **Sgt Priscilla Dake** describes the situation as follows :

"*It was chaos. At first there were so many people in the riot who were uncontrollable. I was frightened, scared of what I saw. It was my first time to attend the riot.*"

She also described being strangled by a protestor chocking her using his hands around her neck as she was manning the police line in the alley-way leading into Parliament House.

68. The **Commissioner of Police** assessed the situation in the following terms:

"*I could see someone could be put to injury – police, public, buildings. That is my fear someone could be injured.*"

69. Finally, reference may be made to the observation of a civilian, **Roy Denton Harris**, who describes the scene outside the Parliament House as follows :

"*the situation was very horrible. The rioters inflicted harm to police officer and fire and security personnel. There were a lot of things happening such as picking stones and throwing it at the defence line. Some protestor ripped off riot shields from the police. A fire extinguisher was sprayed at the police line and other protestors used their fist to punch the police and fire men. It was out of control.*"

70. Returning to Sgt Illona's narrative. She said that the police remained in the Parliament precincts to ensure that no one else returned. It was about 8 p.m. when they were finally told to return to their homes. The police de-brief was to return to work the following day in case something else happened.

71. At the end of her evidence, Sgt Illona identified all of the defendants on viewing the 28 coloured photographs in [**Exhibit P(5)**]. She also identified them in Court. Likewise Insp Raynor identified all the defendants upon viewing the video [**Exhibit P(1)**] and the booklet of 70 coloured photographs that he tendered as [**Exhibit P(2)**].

72. In his closing address, the DPP writes concerning the element of "*unlawful assembly*", as follows :

> *"….., the assembly was unlawful from the start. Whatever the reason for entering parliament that day, it is clearly unlawful under section 56(1) Criminal Code 1899 to disturb Parliament whilst it is in session.*
>
> *In view of the sum of evidence by prosecution and the common purpose of the assembly, it is submitted that the assembly was unlawful from the start. Whilst it may not be readily clear whether the original intention was for a peaceful or lawful procession, it is difficult to maintain such a view from the time when the crowd turned violent and became abusive and dangerous not only to the police officers but other Public Servants who were exposed to contain the crowd from entering or destroying parliament building.*
>
> *…, considers collectively the sum of prosecution evidence in this matter together with its evidential value; the following are clear:*
>
> ***The shouting; yelling, tearing down of aerodrome fence, use of dangerous substances such as fire crackers and fire extinguishers towards Nauru Police Force, the throwing of hard objects towards police officers and utter disrespect towards the highest law-making body of the Republic whilst it was in session conducting its normal business for the day****;*
>
> *A single one of the above factors made manifest the <u>intention to defy the law</u> of the land. A combination of them all, is even more potent.*
>
> *In view of the above, it is submitted respectfully on behalf of the prosecution that, the assembly was unlawful from start and ended in a riot.*
>
> *If Your Honor, however accepts that the assembly was lawful from the beginning, the fact that it turns tumultuous and immediately disturbed not only the peace of parliament to carry out its work that day; but also the neighbours who were affected as a result of accused persons' conduct ; cause or have caused persons in the neighbourhood to fear that persons so assembled will tumultuously disturb the peace; and where it had as a*

matter of fact disturbed the peace of neighbours, it still is, a breach of s63 of the Criminal Code 1899 as read with section 61 of the Code.

The fact as seen from the evidence is, there was an assembly of more than 3 people with a common purpose and that is to enter parliament house knowing that it was in session at that time. In the course of being assembled, they have acted in tumultuous a manner as to disturb the neighbourhood to have reasonable fear, having conducted themselves in such a manner as to cause persons in the neighbourhood to fear on reasonable grounds, so assembled would tumultuously disturb the peace. On that point there can be no reasonable doubt that this element is proved to the legal standard.

It is therefore submitted that the evidence during trial, satisfy this element and the prosecution has proved this element beyond reasonable doubt."

73. Furthermore, in his oral closing address, the DPP referred to the uncontested evidence that on the day and time in question, there was an "*assembly*" comprised of no less than 20 to 30 people including the 3 suspended MPs and their supporters from Menen District and Boe District. Whatsmore their singular declared "*common purpose*" was to obtain the admission of the suspended MPs into the Parliament Chamber. This purpose is reinforced, when one considers the acrimonious and inconclusive meeting that occurred between the suspended MPs and the Speaker of Parliament the day before 15 June 2015.

74. He also submits that there is sufficient evidence from the police officers, that the twelve defendants and others acted in a "*tumultuous*" manner such as to disturb the peace that should have prevailed in the Parliament Chamber during its "*sitting*" and resulted in its premature suspension for the rest of the day. The disturbance outside Parliament buildings also disrupted a meeting of the Emergency Services being held in Government offices 50 meters away from the Parliament building, which was called off because of the noise.

75. Furthermore, a crowd of protestors succeeded several times in breaking a police line set up to stop them until the police line reached the steps of Parliament entrance. Rocks were thrown. Police and fire authority personnel were assaulted. A Parliament window pane was broken. The airport aerodrome and runway restricted areas were breached and trespassed upon. "f*ire crackers*" were let off and a "*fire extinguisher*" was discharged at the police line.

76. Asked why he thought the assembly was "*unlawful*", the DPP said because it had an unlawful purpose insofar as it is an offence for a suspended member of Parliament to "…*enter or remain within the precincts of the Parliament while that suspension remains in force*". ***see*** also : Order 49 of the Standing Orders of

Parliament. Alternatively, the assembly was "*unlawful*" because it was held in breach of the provisions of section 24A of the Nauru Police Force (Amendment) Act 2015 which was valid and in force on 16 June 2015. The section required a permit to be sought from and granted by the Commissioner of Police, to hold such an assembly in a public place and it is common ground that no such permit was sought or obtained by the defendants.

The Defence Submssion

77. A written submission was made by Mr. Mathew Batsiua on behalf of all the defendants, to the charge on Count 4, as follows (which I have paragraphed for convenience) :

*"**RIOT***

The prosecutor has not proved that there was an earlier unlawful assembly, so all the riot charges must fail.

Firstly, the prosecutor said that there was an unlawful assembly because there was no permit from the Commissioner of Police under s24 A of the NPF Amendment Act. It is unclear to me whether the DPP is still relying on the provisions of s 24A NPF Amendment Act to prove the element of unlawful assembly. If he is, then I would like to say this first by way off general remarks.

This is an issue that we tried to raise in the proper way by bringing a constitutional redress application and we had lawyers on island to run these arguments. It was clearly relevant to this case even though your Honour, with respect, ruled incorrectly that it was irrelevant when dismissing our constitutional redress application in a preemptory fashion.

We were informed by our lawyers that there were cases of high authority that shows that the section requiring a permit from the Commissioner of Police to protest is unconstitutional. Our lawyers had a number of cases from other countries – including in submissions that were filed on the permanent stay/ constitutional redress applications – where there were similar laws that were struck down as invalid. The Court does not assume that the law is constitutional, as the DPP seems to suggest. If a law is unconstitutional, it was always unconstitutional and invalid even though it may not be until later that a Court rules it to be invalid. In other words, a law that was never a valid law, could never support an offence or element of unlawful assembly.

If the court does a proper analysis of the law and constitutional principles, we say that the court will find that section 24A is clearly unconstitutional, and so the protest itself is not a basis for finding an unlawful assembly. Here is a copy of the cases relevant to s24A to support my submission that section 24A is unconstitutional. I hand them up but

given my obvious limitations considering I am not a lawyer, I do not know how to make the arguments based on them.

Secondly, as for a purpose of getting the MPs into the Parliament, this now seems to arise as an issue because of the prosecutor's latest argument at the last minute relying upon getting the elected MPs into Parliament as forming an unlawful assembly. It is very unfair for the prosecutor to change his case at this late stage.

The prosecutor should not be allowed to change his case at this point. In my notes, these words were uttered "A simple submission that part of the reason why this Assembly is unlawful is besides Section 24A the assembly had an unlawful purpose and that is to force suspended MPs to enter Parliament….that's the alternative". These words were not uttered by the DPP. It was the Court who packaged those words and all the DPP had to do was agree. In his closing submission, this became his main argument, not the alternative, hence my comment that his reason has slided at a very late stage.

Thirdly, in any event, the prosecution has not proven beyond reasonable doubt that any police action in obstructing the elected MPs from entering Parliament was lawful. Indeed they have not even tried. Obviously in a parliamentary democracy, it is legally controversial to suspend a third of the Parliament, indefinitely and at the time of the protest the suspensions had already been in place for over a year. The indefinite suspension of elected MPs conflicts with numerous right in the Constitution and the whole structure of representative government. It was clearly unlawful for the elected MPs to be expelled from Parliament in the way that they were.

It was accordingly clearly unlawful for the police officers to try to prevent duly elected MPs from entering Parliament on the day of the protest. If the prosecutor wants to argue that the unlawful assembly was trying to get the MPs in Parliament, the prosecutor needed to prove that the expulsion of the MPs was lawful and he has not done that. The prosecutor also needed to prove that the police actions in stopping the MPs from entering Parliament was lawful and he has not done that. This obviously means that the prosecutor has not proven any unlawful purpose on the part of the protestors so the riot charge must result in acquittals."

78. It is clear that the defendants challenge the constitutional validity of section 24A of the Nauru Police Force (Amendment) Act 2015.

79. Although the defendant's elected not to cross examine any of the prosecution witnesses and adduced no evidence in their defence, there is undisputed evidence that the leaders of the protesters and the suspened MPs had verbally claimed or asserted that they had a constitutional right to conduct and hold a peaceful protest. Moreover, they also doubted the validity of the Police assertion

that they required a Commissioner of Police's permit to exercise their constitutional rights.

80. **<u>Part II</u>** of the Constitution deals with the protection of fundamental rights and freedoms of every person in Nauru. It begins with a "<u>Preamble</u>" in Article 3 which declares certain fundamental rights and freedoms of the individual which are in turn, subjected to the rights and freedoms of others <u>and</u> "*for the public interest*". The preamble is then followed by a list of more detailed freedoms, protections, and provisions, which contains limitations designed to ensure that the enjoyment of such rights does not prejudice the right and freedom of other persons or the "*public interest*".

81. Amongst the more detailed protections are Articles 12 and 13 of the Constitution which together protects the "*right to freedom of expression*" <u>and</u> "*freedom of assembly and association*" respectively.

"***Protection of freedom of expression***

12.-(1.) A person has the right to freedom of expression.

(2.) Except with his consent, no person shall be hindered in the enjoyment of his right to freedom of expression.

(3.) Nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the provisions of this Article to the extent that that law makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) ……..(inapplicable);

(c) ……(inapplicable); or

(d) ……(inapplicable)."

82. Article 12(1) clearly recognises a right to "*freedom of expression*" and sub-article (2) prohibits any hindrance of a person's enjoyment of the right "*except with his consent*". The **<u>Shorter Oxford Dictionary</u>** defines "*hinder*" as meaning "*to delay or frustrate action ; to be an obstacle or impediment*".

83. Although there is no definition of the term "*expression*" in the Constitution, in my view, it includes the process of making known one's thoughts and feelings; the right to hold opinions and to receive and impart ideas and information by written and oral words, signs, and facial movements as well as the right to speak one's mind freely without hindrance or censorship.

84. Be that as it may, "*the right to freedom of expression*" is **not** absolute and sub-article (3) clearly excludes or permits a law which makes inter-alia provision that is:

"…..*reasonably required*

(a) in the interest of ……..public safety, public order, public morality, or public health"

(b) for the purpose of protecting the reputation, rights and freedoms of other persons".

85. Freedom of expression does **not** mean absolute freedom to say what a person likes (however vulgar, threating, offensive or libellous); how and where the person wishes (by using an amplifier, talking loudly in a library, or during a movie in a picture theatre or shouting "***fire***" in a crowded hall).

86. In the context of the present case, the general public are entitled to free unobstructed use and access at all times to the "*public road*" at Yaren district that runs in front of the Government Centre and Parliament building, and any form of public assembly in large numbers on such a public road, is likely to result in its obstruction. At common law, there is no "*right of assembly*" on a public road. In McAra v Magistrate of Edinburgh [1913] SC 1059 at 1073, Lord Dunedin said :

"*The primary and overriding object for which streets exist is passage. The streets are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets….that does not necessarily mean that anyone is doing an illegal act if he is not at the moment passing along. It is quite clear that citizens may meet in the streets and may stop and speak to each other. The whole thing is a question of degree*."

87. Likewise, Members of Parliament (MPs) are entitled to a quiet, safe, and orderly Chamber in which to hold and conduct parliamentary debates and sittings under pain of criminal sanction. ***see*** section 56(1) of the Criminal Code 1899 which provides that a person shall be guilty of a misdemeanor for "*disturbing the Parliament while in session*".

88. In Oliver and Anor. v. Buttigieg (1966) 2 All ER 459, the Privy Council considered section 5 of the Malta Constitution which is in substantially identical terms to

Article 3 of the Nauru Constitution. Delivering the opinion of the Privy Council, Lord Morris of Borth-y-Gest, said, of the meaning of the section and in words that are relevant and applicable in the present case at (**pp 461/462**):

"*It is to be noted that the section begins with the words "Whereas". Though the section must be given such declaratory force as it independently possess, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement- coupled however with a declaration that thought "every person in Malta" is entitled to the "fundamental rights and freedoms of the individual" as specified, yet such entitlement is "subject to respect for the rights and freedoms of others and for the public interest". The section appears to proceed by way of explanation of the scheme of the succeeding sections. The provisions of Part 2 are to have effect for the purpose of protecting the fundamental rights and freedoms, but the section proceed to explain that, since even those rights and freedoms must be subject to the rights and freedoms of others and to the public interest, it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be "such limitations of that protection as are contained in those provisions". Further words, which again are explanatory, are added. It is explained what the nature of the limitation will be found to be. They will be limitations, "designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."*

The succeeding sections show that the promised scheme was followed. The respective succeeding sections proceed in the first place to give protection for one of the fundamental rights and freedoms (e.g., the right to life, the right to personal liberty) and then proceed in the second place to set out certain limitations – i.e., the limitations designed to ensure that neither the rights and freedoms of others nor the public interest are prejudiced………….."

89. By way of an aside, Article 4 of the Constitution which deals with the protection of the "*right to life*", recognises the validity of a law which permits the use of lethal force as is reasonably justifiable "…***(d) for the purpose of suppressing a riot, insurrection….***".

90. Having said that, it is not seriously argued that section 24A of the Nauru Police Force (Amendment) Act 2015 contravenes Article 12 of the Constitution nor does any of its provisions appear to impact on an individual's "*freedom of expression*". Of greater relevance is Article 13 of the Constitution which provides :

" ***Protection of freedom of assembly and association***

13 (1) Persons have the right to assemble and associate peaceably and to form or belong to trade unions or other associations.

(2) Except with his consent, no person shall be hindered in the enjoyment of a right referred to in clause (1) of this Article.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the provisions of this Article to the extent that that law makes provision that is reasonably required-

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for protecting the rights and freedoms of other persons."

91. It is immediately obvious from sub-article(1) that the right to assemble and associate is to be exercised, enjoyed, and undertaken "*peaceably*" , which according to **Collins English Dictionary** means " …*to do something quietly or peacefully, without violence or anger….*". Needless to say an "*assembly*" which is unruly, noisy, violent and hostile is not peaceable and cannot be justified as a lawful exercise of the constitutional right to "*freedom of assembly*".

92. Section 24A of the Nauru Police Force (Amendment) Act 2015 provides as follow:

"*24A Power to issue permits for processions or assemblies in a public place*

(1) Any person or organisation who wishes to organise a procession or assembly or to associate peaceably in a group of 3 or more persons in a public place must first apply to the Commissioner of Police and unless the Commissioner is satisfied for good reason that such a procession or assembly is unlikely to prejudice the maintenance of defence, public order, public safety, public morality or public health, he shall issue a permit specifying:

(a) in the case of a procession, the purpose, the routes, and the times at which such procession may pass and other conditions as he may think fit to impose;

(b) in the case of an assembly, the purpose, the place and times that the assembly may be held and other conditions as he may think fit to impose; and

(c) the name or names of person to whom such permit is issued.

(2) Every application for a permit must be made 7 working days prior to the proposed date on which the procession or assembly is due to take place.

(3) The provisions of this section shall not apply to:

(a) weddings;

(b) funerals;

(c) sporting events;

(d) assemblies for religious or charitable purposes; and

(e) private functions in private venues or private properties.

(4) It shall be lawful for any police officer to stop and detain any person or organisation whom he sees doing any act for which a permit is required under the provisions of this section.

(5) Any person or organisation who fails to produce such permit when called upon by a police officer, who is in uniform or who identifies himself as an officer of the Nauru Police Force, may be arrested without a warrant and taken into police custody.

(6) Any procession or assembly convened or taking place for which no permit has been issued under subsection (1), or which contravenes any of the conditions specified in such permit shall be deemed to be an unlawful assembly under this Act and any other applicable law.

(7) Any person or organisation found to be breaching the provisions of this section commits an offence and is liable upon conviction to imprisonment for 2 years or a fine of $3,000 or both.

(8) Should there be a conflict between this section of the Act and any other law of Nauru, this section shall take precedence."

It is sufficiently clear that sub-section(1) is concerned with a : "*procession or assembly*" that takes place in a "*public place*". Furthermore, the section is drafted in such a way as to imply that the application for a permit must ("*shall*") be granted, "…*unless the Commissioner is satisfied for good reason that such a procession or assembly is unlikely to prejudice the maintenance of defence, public order, public safety,….".*

93. Having said that, section 24A does not set out any factors or criteria which the Commissioner of Police must consider as constituting "*good reason*" for refusing to issue a permit ; there is **no** requirement for a written decision or reason to be given in the event of a refusal of a permit ; **nor** is there a right to review or appeal the Commissioner's decision. Despite the absence of these reasonable features, the DPP says that, even if section 24A is unconstitutional (which is denied), nevertheless, that does not affect the Prosecution's case because a lawful assembly can still turn into a riot and become "*unlawful*" after it has formed.

94. In support of their challenge to the constitutional validity of section 24A, the defendants provided the Court with 5 judgments as follows :

(1) Himat Lal K. Shah v Commissioner of Police [1973] AIR 87, Supreme Court of India decision ;

(2) Muwanga Kivumbi v Attorney General, Constitutional Petition 9 of 2005 delivered on 27 May 2008 by the Constitutional Court of Uganda at Kampala, Republic of Uganda;

(3) Rev Christopher Mtikila v Attorney General [1995] Tanzania Law Report 31 a decision of the High Court of Tanzania delivered on October 24, 1994 ;

(4) Re Munhuneso and others [1994] 1 LRC 282, a decision of the full court of the Supreme Court of the Zimbabwe, delivered on 13 January 1994 ;

(5) Christine Mulundik and Seven others v The People [1995] SCZ Appeal No. 95 of 1995 delivered on 10 December 1996 by the Supreme Court of Zambia.

I am grateful for the authorities which I have found very interesting and where similar provisions to section 24A were struck down by the various courts as unconstitutional for various reasons.

95. I prefer however, the persuasive authority of the judgment of the Privy Council in Francis v Chief of Police [1973] AC 761 where the Privy Council upheld a provision similar to section 24A wherein the Commissioner of Police was given unfettered power to control the use of loudspeakers at public meetings under section 5 of the Public Meetings and Processions Act 1969 (St. Christopher, Nevis and Anguilla). The Constitutional right to "*freedom of expression*" is to be found in Article 10 of the Constitution of St. Christopher, Nevis and Anguilla and is in similar terms to our Article 12.

96. Lord Pearson in delivering the unanimous judgment of the Privy Council relevantly said at (**p772**) :

"*There are two ways of construing section 10. One way is to read into subsection (1) the necessary limitations as inherent in the fundamental freedoms of expression and communication. The other way is to look first at subsection (1) to see whether according to the literal meaning of the words there is a prima facie hindering of or interference with the freedom of expression and communication, and if there is , look on to subsection (2) to see whether such hindering or interference is justifiable.*

*If the second way is adopted, the phrase "**public order**" must be given a meaning wide enough to cover action taken for the avoidance of excessive noise seriously interfering with the comfort or convenience of a substantial number of persons. The phrase would of course cover action for the avoidance of any behavior likely to lead to a breach of the peace, and perhaps excessive noise can be brought under that heading.*

Whatever may be the exact construction of section 10, it must be clear that (1) a wrongful refusal of permission to use a loudspeaker at a public meeting (for instance if the refusal is inspired by political partiality) would be an unjustified and therefore

unconstitutional interference with freedom of communication, because it would restrict the range of communication, and (2) some regulation of the use of loudspeakers is required in order that citizens who do not wish to hear what is said may be protected against " aural aggression" if that might reach unbearable intensity.

As some regulation of "noisy instruments" is required, and a system of licensing is the natural method, there must be some licensing authority to grant or refuse the permission. ***The Legislature of the State concerned has decided that the Chief of Police is the suitable officer to be given this power and duty. There is convenience in that choice, as he is concerned with the preservation of public order and knows the prevailing conditions affecting it and therefore is able to give a quick decision. There is no evidence, and no reason to infer, that he has abused the power or would be likely to abuse it in any way. It is reasonable to assume that the legislature, knowing the local conditions, made a suitable choice of licensing authority****.*

The final question is whether section 5 of the Act is so defective as to be unconstitutional because it does not expressly lay down guidelines for the exercise by the Chief of Police of his licensing power. Whether or not it might have been better to have some express provision as to the way in which his discretion should be exercised, he is not without guidance. It is plain from the preamble to the Act and from its provisions as a whole that its object to facilitate the preservation of public order. That being the object of the Act, he must exercise his powers bona fide for the achievement of that object*. …… Section 5 is not defective, or at any rate not seriously defective, in this respect. It does not contravene the Constitution."*

*(*my highlighting and paragraphing for clarity and emphasis*)*

97. It should be noted that the Nauru Constitution does not give or recognise a right or freedom to protest in a public place. Nor however, does it prohibit it. Neither does section 24A prohibit protests or assemblies. What it seeks to do, is to regulate the exercise of the "*freedom of assembly*" with a view to maintaining "*public order*" and "*public safety"*. There is a difference between prohibiting and regulating.

98. The Privy Council in Collymore and anr. v Attorney General [1970] AC 538 quoted at (**p 547**) from the judgment of Wooding CJ. who said :

"*In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest, object of the associating group. The object may be any of many. They may be religious or social, political or philosophical, …educational or cultural.. or charitable. But the freedom to associate confers neither right nor license for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good Government of the Country.*"

Earlier in his judgment, Wooding CJ. said :

"M*y first observation is that individual freedom in any community is never absolute. No person in an ordered society can be free to anti-social. For the protection of his own freedom everyone must pay due regard to the conflicting rights and freedoms of others. If not, freedom will become lawless and end in anarchy. Consequently, it is and has in every ordered society always been the function of the laws so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise the society."* [Collymore and Abraham v. Attorney General (1967) 12 WIR at **p.9**]

99. In light of the foregoing, I am satisfied and uphold the constitutional validity of section 24A of Nauru Police Force (Amendment) Act 2015. I reject the defence submissions in that regard and dismiss them. Having thus upheld the validity of section 24A, I find that on that basis also, assembly and protest of the suspended MPs and their supporters outside Parliament building on 16 June 2015, was "*unlawful*".

100. The DPP submits that the defendant's "*assembly*" was also unlawful because of its declared purpose which was itself, "*unlawful*". In this regard, reference may be made to the provisions of Section 9 of the Parliamentary Powers, Privileges and Immunities Act 1976 which clearly states :

" ***a member who has been suspended by the Speaker from the services of the Parliament shall not enter or remain within the precincts of the Parliament while that suspension remains in force****, and, if any such member is found within the precincts of the Parliament in contravention of this section, he may be forcibly removed therefrom by any officer*" (my emphasis)

which latter "*officer*" includes : "***any police officer on duty within the precincts of the Parliament***".

101. For completeness, the definition of the phrase "*the precincts of the Parliament*" includes :

"…*the entire building in which the chamber of the Parliament is situated, and any forecourt, yard, garden, enclosure or open space are adjoining or appertaining to that building and used or provided for the purposes of the Parliament*".

Such as the parking area and flower beds in front of the Parliament building. ***see also*** : Standing Order 49 which provides : "*when a member has been suspended, he shall not be permitted to enter the Chamber and galleries during the period of his suspension*".

102. Finally and for completeness, reference may be made to the general powers and duties of the Nauru Police Force which includes the following :

- <u>Section 23(1)</u> – "(**a**) *to take lawful measures for preserving the public peace* ; (**c**) *to take lawful measures for preventing injury to life and property* ; (**e**) *regulating processions and assemblies in public places and places of public resort* ; (**f**) *preserving orders in public places and places of public resort…..*" ;

- <u>Section 24(1)</u> – "*on public roads, to regulate and control traffic ; to divert all or any particular kind of traffic, when it is in the public interest to do so, to keep order on public road, streets, thoroughfares… and other places of public resort or places to which public have access*" ;

- <u>Section 25</u> – "(**1**)…*(if) necessary for the maintenance and preservation of law and …to erect or place barrier in or across any road or street or in any public place in such manner as …. fit* ; (**2**) …*take all such reasonable steps as considered necessary to prevent any person or vehicle from passing any barrier erected or placed under the provisions of* ..[25(1) above]…"

103. In <u>R v Caird and others</u> (1970) 54 Cr App. R. 499 Lord Justice Sachs said in words that are closely applicable to the present case at (**p504/505**) and which I respectfully adopt :

"…*Unlawful assemblies and riotous assemblies take many forms. Without, of course, attempting a full definition, the difference can be stated in broad terms applicable to occasions of the particular type under consideration. The moment when persons in a crowd, however peaceful their original intention, commence to act for some shared common purpose supporting each other and in such a way that reasonable citizens fear a breach of the peace, the assembly becomes unlawful. In particular that applies when those concerned attempt to trespass, or to interrupt or disrupt an occasion where others are peacefully and lawfully enjoying themselves, or show preparedness to use force to achieve the common purpose. The assembly becomes riotous at latest when alarming force or violence begins to be used.*

The borderline between the two is often not easily drawn with precision. In the nature of things some participation in an unlawful assembly when a mob is threatening violence may, according to its degree, constitute no less serious an offence than some participation in the riotous stage of actual violence. In each case the Court has, amongst other things, to take into account how grave the situation had become from the point of view of public peace. When the point has been reached when violence is about to erupt, a situation can already be grave indeed.

It is the law – and, indeed, in common sense it should be the case – that any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or by actions, or who participates in it, is guilty of an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose."

104. I am satisfied from the foregoing, including the Prosecution witness's undisputed testimonies and having viewed and considered the Prosecutions video [**Exhibit P(1)]** and still photos [**Exhibit P(3),(4),&(5)**], that the Prosecution has established beyond a reasonable doubt all the elements of the offence of **RIOT**.

105. Accordingly, I find each of the 11 defendants guilty of the offence of **RIOT** contrary to section 61 and 63 of Criminal Code 1899.

Count 5

106. In this Count all defendants (excluding **Lena Porte**) are jointly charged with an offence of Disturbing the Legislature contrary to section 56(1) of the Criminal Code 1899.

The elements of this offences are :

(a) the defendants named in the charge deliberately ;
(b) disturbed the Parliament ;
(c) while it was "***in session***".

107. In the absence of a definition of the word "*disturbs*" in the section, the **Shorter Oxford English Dictionary** (3rd Edn) provides the following helpful definition :

"…*to agitate and destroy (quiet, etc) ; to breakup the quiet, tranquility or rest of ; to stir up, trouble disquiet ; to agitate ; to unsettle …to interfere with the settle course or operation of ; to interrupt , hinder , frustrate.*"

108. The Prosecution's evidence on this Count comes almost exclusively, from the Speaker of Parliament at the relevant time Hon. Ludwig Scotty who testified being in Parliament for over 33 years of which he was Speaker for 6 years. In June 2015, he was the elected representative of AIA constituency.

109. He recalls meeting 4 suspended Members of Parliament (**MPs**) on Monday 15 June 2015. They included Mr Squire Jeremaiah, Mr Sprent Dabwido, Mr Roland Kun and Mr Mathew Batsiua who arrived late. He testified that the suspended MPs had approached him "*to uplift their suspension*". He told them :

"*It is not in my power to do that as the resolution was that of the House. They became quite aggressive and told me I was not fit to be Speaker and I should resign.*"

They were very adamant for him to resign but he told them :

"…*if I resign it would make matters worse*".

The frustrated MPs left his office after that. The matter remained unresolved.

110. The next day, Tuesday 16 June 2015, there was a "*sitting*" of Parliament which he had convened and issued Notices for, to the **MPs** (excluding the suspended members). Mr. Scotty said the parliamentary "*sitting*" started with the ringing of the bell at 10 am.

111. After the "*sitting*" commenced, he recalls trying to maintain order in the House between opposition and Government members when he noticed there was a commotion outside the Parliament Chamber. His clerk went out to investigate and returned and informed him that there was a "*big crowd outside in the yard"*. He sent her out again and this time, she returned quite urgently and was "*very alarmed*". She told him : "…*there was a big unruly crowd outside, looking dangerous and trying to push their way into the Parliament Chamber"*.

112. Mr Scotty then recalls hearing a lot of noise. In his own words :

"*I heard a big explosion like a bomb. Moments later there was another explosion. I was very alarmed. These things only happen in the Middle East."*

He tried to continue with the proceedings and recalls there was a shattering of the glass pane just behind the Government side. A rock had been thrown at the window. He then became concerned for the safety of the Members, so he stopped the meeting, and told all MPs to leave and go upstairs. After that he left the chamber and followed the MPs to an upstairs room which was the safest place to take refuge.

113. From the room, he looked down briefly and saw a large crowd outside trying to push their way into the Parliament Chamber and in front of them, there were policemen, CLOs and others trying to resist / hold the crowd back. The Parliament "*sitting*" never resumed that day or the next. Accordingly, it is established beyond a reasonable doubt that Parliament's sitting was "***disturbed***" on 16 June 2015.

114. Mr. Scotty was not cross examined on his evidence by any of the defendants when given the opportunity by the Court.

115. Significant by its absence however, is any mention of the word "***session***" by the Prosecution witness who was not asked about it, nor, did Mr Scotty volunteer that Parliament was "***in session***" at the relevant time. In this regard it needs hardly to be said that there is a difference both in meaning and duration, between a "*session*" and a "*sitting*". This is self-evident from a perusal of the interpretation Article 81 of the Constitution which defines a "*session*" as meaning inter alia: "…*the period beginning…after Parliament has at any time been dissolved and ending when the next Parliament is …dissolved*" **ie**. A *"session"* extends from the dissolution of one Parliament to the dissolution of the next.

116. The much shorter definition of a **"*sitting*"** is : "*…a period during which Parliament is sitting without adjournment "*. A more helpful definition however, is provided in the **Standing Orders** of the Parliament of Nauru which reads : *"…the daily meeting of the Parliament from the ringing of the bells at the appointed time until the adjournment of the Parliament".* It is this latter event that Mr Scotty was clearly testifying about in his evidence.

117. During the entire course of the Prosecution's evidence, at no time was the distinction clarified, nor, was any attempt made to produce evidence to establish that Parliament was **"*in session*"**, until the matter was raised with the DPP by the Court during discussions after he had closed his case. It was then, and during the course of the DPP's response to the Court's questions, that the DPP produced over the bar table, no less than 5 Gazette Notices which he asked the Court to take "*judicial notice*" of, and from which, he sought to establish the dissolution of the 20th Parliament and the commencement of the 21st Parliament during which latter Parliament, Tuesday 16 June 2015 apparently falls.

118. The DPP also relied on **Articles 40** and **41(7)** of the Constitution, to submit that the Court should infer that : "*a properly convened "sitting" of Parliament cannot be held or occur without Parliament being in session" ,* given that the "*life of Parliament"* is 3 years long. Mention was also made of the Court taking *"judicial notice"* of the **STANDING ORDERS** of Parliament which had not been produced through the Speaker as it could have been.

119. To further complicate matters, the Constitution itself in Article 32(1)(d) introduces a third word : "***meeting***" in **PART IV** dealing with Parliament. (***see*** also :

PRACTICE AND PROCEDURE OF THE PARLIAMENT OF NAURU by N.N.Mehra, Chapter 4 : "***Sessions of Parliament***" esp. at pp 34-37).

120. Despite the Court's uncertainty, no legal authorities were produced or referred to by the DPP to illuminate the nature and circumstances under which a Court could take "*judicial notice*" of the various matters, documents, and Gazette Notices produced by him after the closure of the Prosecution case.

121. This lacuna in the Prosecution's evidence, led to Mr Mathew Batsiua's submitting in relation to this charge on behalf of the defendants, as follows :

"***DISTURB PARLIAMENT***

In relation to the disturb Parliament charge, even if Government gazettes can be evidence of the things stated in them, the prosecution still needs to tender them in their case. In other words, they must be evidence and properly led so the trial is fair. The prosecution did not tender the gazettes into evidence. When it was put to him to cite the law which empowers him to tender evidence after he has formally closed his case, the DPP failed to do so.

The DPP relied on Section 105 of the Interpretations Act 2011 to introduce the Gazette after he had formally closed his case. S 105 is not a judicial notice provision, it is about the capacity to be adduced into evidence. The section makes clear that if that occurs it is evidence of the matters in it, which can then be contradicted. The DPP did not do this during his case. He did not tender the Gazette. Therefore there is no evidence of the gazettes and the matter ends there.

The charges against all accused in this regard must fail.

Secondly, because the peaceful demonstration by the protesters was lawful, or not proven to be unlawful, it is inconsistent with the constitutional rights to assemble and express ourselves to criminalise any disturbance of the legislature because of the protest."

122. The learned authors of **Phipson on Evidence** (11th Edition) describes the scope of the *"judicial notice rule"* in the following terms (**at para 47**):

"the doctrine of judicial notice extends to all departments of law, and is not confined to that of evidence. And it applies not only to judges, but also to juries with respect to matters coming within the sphere of their everyday knowledge and experience…generally, matters directed by statute to be judicially noticed, or which have been so noticed by the well-established practice or precedence of the courts, must be recognized by the judges ; but beyond this, they have a wide discretion and may notice much which they cannot be required to notice. The matters noticeable may include facts which are in issue or relevant to the issue, as well as the contents of documents and

*their methods of proof; and the notice is in some cases conclusive **,** and in others (e.g. the genuineness of signatures) merely prima facie and rebuttal."*

123. Accordingly, *"judicial notice*" has been taken, of the existence and contents of all public statutes ; of the procedure and privileges of both Houses of Parliament ; of all public matters affecting the Government ; and , more relevantly, (**at para 52)** : "…*of the days of the general election ; the date and place of sittings of Parliament ;…." ;* and *" the judges of the Supreme Court …*". Furthermore, in R v Wilde 83 E.R. 415, it was **Held** :

"the Court ex-officio ought to take notice of the beginning and end of prorogations and sessions of Parliament."

124. Notwithstanding the above, in the leading case of McQuaker v Goddard [1940] 1 K.B. 687, where the English Court of Appeal in dealing with the question of whether judicial notice could be taken of the nature of a camel and the proof required, relevantly said (***per*** **Clauson LJ**. at p **700)** who cited an extract from Stephen's Digest of the Law of Evidence (12th Edn) Article 62 as follows :

*" **no evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice** thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto,* or ***may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.***" (my emphasis)

125. A question that arises from the above citation and the defence submission is - whether or not the DPP can provide the Court across the bar table with copies of the Gazette Notices which he asks the Court to take "*judicial notice*" of, **after** the closure of his case.

126. In R v Frost 173 E.R. 784 Tindal CJ. relevantly said :

"…there can be no doubt about the general rule, that where the Crown begins a case (as it is with an ordinary plaintiff) , they bring forwarded their evidence , and cannot afterward support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises ex improviso, which the Crown could not foresee , supposing it to be entirely new matter , which they may be able to answer only by contradictory evidence , they may give evidence in reply".

127. This principle is also recognised in R v Levy and Tait (1966) 50 Cr. App. R 198

where the Court of Criminal Appeal (*per* James J.) said at (**p 202**) :

"… *it is quite clear and long established that the judge has a discretion with regard to the admission of evidence in rebuttal ; the field in which that discretion can be exercised is limited by the principle that* ***evidence which is clearly relevant - not marginally, minimally, or doubtfully relevant, but clearly relevant – to the issues and within the possession of the crown should be adduced by the prosecution as part of the prosecution's case, and such evidence cannot properly be admitted after evidence for the defence.****"* (my emphasis)

128. Finally, and closer to home, reference may be made to the judgment of the High Court of Australia in Killick v The Queen [1981] 147 CLR 565 where the Court, after referring to 2 extracts from Shaw v The Queen [1952] 85 CLR 365 at 379 & 383, said at (**p 569**) :

*"…**the general rule that all available evidence on which the prosecution intends to rely in proof of the guilt of the accused should be presented before the close of the case for the crown is not merely a technical rule, but an important rule of fairness***". (my highlighting)

129. In light of the foregoing, and in the absence of the Gazette Notices produced by the DPP over the bar table (which are rejected), this Court is constrained to conclude, that the Prosecution has failed to establish beyond a reasonable doubt, the third element of the charge, namely, that Parliament was "***in session***" (as opposed to "*sitting*") on the day and at the time of its disturbance on 16 June 2015.

130. Accordingly, the defendants are acquitted on **Count 5** of the offence of Disturbing the Legislature contrary to Section 56(1) of the Criminal Code 1899 as charged.

Counts 6 & 7

131. In these Counts **Bureka Kakioua** is charged alone with the following offences:

Count 6

Statement of Offence

Act with intent to Disable: Contrary to Section 317(3) of the Criminal Code 1899.

Particulars of Offence

In that **Bureka Kakioua** did, on the 16th day of June 2015, at YAREN DISTRICT in NAURU, with intent to disable Nauru Police Force personnel who had formed a cordon

to prevent him and others from entering Parliament, unlawfully cause an explosive substance to explode.

(hereafter referred to as "***the fire cracker charge***")

Count 7

Statement of Offence

Unlawfully Administering a Noxious Thing: Contrary to Section 323(2) of the Criminal Code 1899.

Particulars of Offence

In that **Bureka Kakioua** did, on the 16th day of June 2015, at YAREN DISTRICT in NAURU, unlawfully and with intent to annoy Nauru Police Force personnel who had formed a cordon to prevent him and others from entering Parliament caused a fire extinguisher to be administered to the said Nauru Police Force personnel.

(hereafter referred to as "***the fire extinguisher charge***")

The Fire Cracker Charge

To establish this charge, the Prosecution must call evidence which satisfies the Court beyond a reasonable doubt of the following elements as charged:

(a) Bureka Kakioua ;
(b) "*with intent to disable*" Nauru Police Force personnel ;
(c) unlawfully caused an "*explosive substance*" to explode.

In his closing address on behalf of Bureka Kakioua , Mr. Mathew Batsiua submits as follows :

"***BUREKA CHARGE – "FIRE CRACKER" CHARGE***

The prosecutor has not proved what type of item was involved. It has been called the fire cracker charge but there is no evidence about whether it actually was a fire cracker or what that means in terms of the ingredients of the charge.

Even if the evidence shows that a "fire cracker" was involved, the prosecutor has not proved that "an explosive substance" was involved.

The prosecutor has not called any scientific evidence about what was involved and whether or not it caused an explosive substance to be exploded.

The prosecutor also has not proved that Bureka had the necessary intention "to disable" police officers in relation to that offence.

All of this is required for the charge to succeed. It must fail."

132. The Prosecution's evidence in support of this charge comes mainly from Insp Simpson who testified to seeing Renack Mau and Bureka Kakioua lighting a "*fire cracker*" and before they could throw it, the fire cracker exploded in front of them. "*It was one of the biggest fire crackers I have seen*".

133. He was shown a video of the incident and he testified to seeing thick smoke coming from where the explosion had occurred. He distinctly recalls : "*there were two explosions one in the security restricted area and the other in front of the Parliament.*" He said, when he saw, them they were about 10 meters away from him behind the perimeter fence on the grass area of the aerodrome. Asked

    Q **:** "*Who lit the fire cracker* ?", he answered ***A*** : "*Bureka and Renack*"**.**

134. He identified both defendants in Court, and said that he had known Bureka for 10 years before the incident and he was from Menen. He knows Renack Mau for the same length of time. He is also from Menen and the Insp Simpson said : "…*he is my relative as well from my mother's side. Our mothers are first cousins. We are second cousins.*"

135. Insp Simpson's evidence receives some support from Insp Ranyor who testified hearing a "*hissing sound*" similar to a sound when something is about to explode after a fuse is lit. He also recalls hearing a loud explosion and seeing smoke everywhere. The smoke came from behind the Menen group in the aerodrome area beyond the fence.

136. The **Commissioner of Police, Corey Caleb** who was standing at the perimeter fence opposite to the Parliament building and facing the Menen group at that time, also testified hearing a fire cracker exploding :

    "a very loud explosion. I know it was a fire cracker because I saw small bits of debris falling down. Fire crackers are not allowed or available for public use or purchase. Those are dangerous goods and so you need permission to bring them onto island Nauru. A government department has to give you permission."

    He described how a container of fireworks which had been brought earlier in the year by the Government for use to celebrate Independence Day, was broken into and a quantity of fireworks was stolen and never recovered. He said they were unable to control the crowd at that time, and after the explosion " …*we were pushed back to the front of the Parliament".*

137. The final witness **Roy Denton Harris** who was attending a National Emergency Services meeting in Government buildings, described how the meeting was suddenly ended when there was a big commotion outside the building. He left the meeting on the top floor and descended to go to the front of the building to see what all the commotion was about. He said : "*I was on my way down when I heard a loud explosion that shook the building and another explosion went off and remnants flew and struck the building…*".

138. The two explosions and accompanying thick smoke are visually and audibly recorded on the Prosecution video [**Exhibit P(1)**].

139. The defence questions whether or not a "*fire cracker*" is an "*explosive substance*" in the absence of scientific evidence identifying its contents. In this regard reference may be made to Wikipedia which provides a helpful description of a "*fire cracker*" as being :

> "…*a small explosive device primarily designed to produce a large amount of noise, especially in the forum of a loud bang ; any visual effect is incidental to this goal. They have fuses, and are wrapped in a heavy paper casing to contain the explosive compound.*"

140. Section 1 of the Criminal Code 1899 defines an "*explosive substance"* as "*including a gaseous substance in such a state of compression as to be capable of explosion*". A classical common example of this definition might be an inflated balloon which when punctured, explodes with a loud bang or a "*pop"* depending on its size.

141. I accept that the Prosecution has not produced any scientific evidence to establish the presence of a known explosive chemical compound such as gun powder, dynamite, or nitroglycerine, nor has it produced any of the "*debris*" or "*remnants*" of the "*fire cracker*", which was referred to in the evidence of the Prosecution witnesses, but, there is not the slightest doubt in my mind that "*fire crackers*" and "*fireworks*" used for entertainment and for display purposes are "*explosive substances*" both in their visual and audible effects.

142. In **Words and Phrases** Legally Defined (Vol.2) by John B Saunders, the term "*explosives*" includes for the purposes of the Explosive Act 1875 (UK), any substances "….*used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect*". It also includes "..*fog-signals, fireworks*…"

(***see*** : Bliss v Lilley (1862) 122 ER 49). Similarly, for the purposes of Section 10(1)(c) of the Theft Act 1968(UK), an explosive means "…*any article manufactured for the purpose of producing a practical effect by explosion…*".

143. Accordingly, I am satisfied beyond a reasonable doubt that a "*fire cracker*" is an "*explosive substance*" for the purposes of Section 317(3) of Criminal Code 1899.

144. The defence also doubts the existence of any evidence to support **element (b)** namely an "*intention to disable*" Nauru Police Force personnel.

145. In the absence of a definition of the term, the **Shorter Oxford English Dictionary** (3rd Ed) defines "*disable*" as including :

"…*to render unable or incapable; to deprive of ability, physical or mental, to incapacitate… to render incapable of action or use by injury etc...*". [***see also*** R v James & James (1979) 70 Crim App R 215].

146. In the absence of any contradictory evidence or cross examination of the Prosecution witnesses, I am satisfied beyond a reasonable doubt that the setting off of the "*fire crackers*" and the ensuing explosions and heavy clouds of smoke that occurred outside the Parliament building entrance while the police cordon was attempting to hold back the Menen protestors, was intended and had the effect of disabling the members of the Police Force in the cordon, by breaking the corden up and causing the officers to retreat.

147. Accordingly, Bureka Kakioua is convicted on Count 6 of an offence of Act With Intent to Disable contrary to Section 317(3) of the Criminal Code 1899.

The Fire Extinguisher Charge

148. To establish this charge the Prosecution must call evidence which satisfies the Court beyond a reasonable doubt of the following elements as charged :

(a) Bureka Kakioua ;
(b) unlawfully and with "intent to annoy" ;
(c) administered a "*noxious thing"* ;
(d) to Nauru Police Force personnel.

149. In the absence of a definition of what a "*noxious thing*" is, the judgment in R v White 97 E.R.338 is helpful where Lord Mansfield says at **p340 :**

"*the word noxious not only means hurtful and offensive to the smell ; but it is also the translation of the very technical term nocivus ; and has been always used for it, ….but it is not necessary that the smell should be unwholesome : it is enough, if it renders the enjoyment of life and property uncomfortable*".

150. It is common ground that the "*noxious substance*" in this charge is the contents of a "*fire extinguisher*" which was sprayed at the police officers who had formed a cordon or skirmish line outside the Parliament building entrance.

151. In respect of this charge, Mr Mathew Batsiua on behalf of Bureka Kakioua, raises a single issue in the following extract where he writes :

"*Despite relying on evidence from several witnesses to describe the usage, the purpose, the chemical contents and the potential harm a fire extinguisher can cause, the Prosecutor has failed to prove that Bureka Kakioua was involved in the alleged use of a fire extinguisher. Not one witness who gave evidence in relation to the fire extinguisher identified Bureka as the person responsible. This charge must therefore fail.*"

152. From the Prosecution witnesses evidence especially Mr **Stution Temaki** and Mr **Roy Denton Harris,** there is not the slightest doubt in my mind that the contents of a fire extinguisher is a "*noxious substance*" capable of causing injury and even death, if directed at a person. Whatsmore, the evidence is clear and undisputed that the contents of the fire extinguisher was sprayed directly at the police line that was attempting to prevent Menen protesters from moving towards the entrance of Parliament building.

153. Furthermore, the effect of discharging the fire extinguisher, was to break up the line and cause the police officers to further retreat towards the Parliament building entrance alley. In my view, such an act constitutes "*administering a noxious substance with intent to injure or annoy*" the person(s) to whom the substance is directed, namely, the Nauru Police personnel who had formed the line in question. ***see***: R v Gillard (1998) 87 Cr. App R 189.

154. However, none of the above addresses the defence submission which concerns the identity of the person who discharged the "*fire extinguisher*". Indeed, during the DPP's oral closing address he was specifically asked by the Court:

(Q) : "*who identified Bureka Kakioua as the person using the fire extinguisher* ?"

DPP replied : (**A)** : "*Bureka Kakioua was identified by* …….. "

The DPP was unable to find the relevant testimony after searching through his own notes of the witnesses' evidence. My personal hand-written trial notes indicates that the DPP later said to the Court : "*I will come back to that"*. Unfortunately, he overlooked to return to the evidence that identified Bureka Kakioua as the person who discharged the fire extinguisher at the police line.

155. In the DPP's written closing address however, he writes at **para 16.9** :

"*from the evidence of the Police of Commissioner (sic), Mr. Tamaki and Mr. Harris on the extinguisher and how it was used : to whom it was directed to; it is apparent that its use on that day was clearly unlawful. It would appear clear that, where a particular conduct would result in a person committing or likely to commit a criminal offence such a conduct would certainly be impugned.*"

No-where in the above extract is the identity of the person using the fire extinguisher revealed or disclosed. Indeed, the DPP's submission in **paras 16.10, 16.11, 16.16** and **16.17** which mentions Bureka Kakioua by name, as the person in possession of and who used the fire extinguisher at the relevant time, appears to assume without reference to the testimony of any witness, that Bureka Kakioua was the person involved.

156. I have carefully canvased my own handwritten notes of the evidence of the above named 3 witnesses including Sgt Priscilla Dake, and Inspectors Simpson, and Raynor who were also present during the entire incident from beginning to end, and I confess, that I am unable to find anywhere in the testimony of the Prosecution's witnesses, a positive identification of Bureka Kakioua as the person who discharged the fire extinguisher at the police line or cordon that was formed outside the Parliament building. The user's identity is also <u>not</u> evident in any of the Prosecution's video footage or photographs.

157. I note also, that the empty fire extinguisher canister that was sprayed at the police line was apparently recovered by the police from the scene, but its contents was never analysed or tested nor was the canister finger-printed, or produced as a Prosecution exhibit as it should have been.

158. In light of the foregoing, whilst satisfied beyond a reasonable doubt as to the "***noxious***" nature of the contents of a fire extinguisher, and inferring that the intent of the user was at least, to annoy the police force personnel by discharging the fire extinguisher at them, I remain completely ignorant about the true identity of the person who used the fire extinguisher. Accordingly, I give the benefit of that doubt to Bureka Kakioua and acquit him on **Count 7** for the charge of Unlawfully Administering a Noxious Thing contrary to Section 323(2) of the Criminal Code, 1899 as charged.

Counts 9 & 10

159. These Counts may be conveniently dealt with together in so far as, they charge an identical offence of **Serious Assault** contrary to section 340(2) of the Criminal Code 1899. To prove the commission of such an offence, the Prosecution must call and produce evidence that establishes beyond a reasonable doubt the following elements:

(a) a named defendant assaulted ;
(b) a police officer ;
(c) who is "*acting in the execution of his duty*".

Section 245 of the Criminal Code 1899 defines "*assault*" as follows:

"*A person who strikes, touches….or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent, …or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent under such circumstances that the person making the attempt…has actually or apparently a present ability to effect his purposes is said to assault that other person and the act is called an assault.*"

160. The defence position in relation to these two Counts is set out in the written submission of Mr. Mathew Batsiua as follows :

"***ASSAULT / OBSTRUCT POLICE CHARGES***

These charges require the prosecutor to prove that each of the police officers were acting in the execution of their duty at the time of any alleged assault against them or obstruction of them. The prosecutor has not done this. It is clear from the arguments that our lawyers were going to make in relation to s 24A NFP Act and the unlawful expulsion of the MPs from Parliament that what the police were doing to stop the protest and interfering with the protestors was unlawful. So these charges all have to fail."

161. In **Count 9** the person who committed the assault are named as : **Renack Mau** and **Piroy Mau** (and another person not before the Court). Their victim was Police Constable Angelo Amwano.

162. In **Count 10**, **Pisoni Bop** was one of the assailants and his victim was Police Constable Shaka Bill.

163. Both police constables gave evidence and identified his particular assailant(s) in Court. Neither was cross-examined by the assailant(s).

164. Police Constable Angelo Amwano testified that on 16 June 2015, he was at the main Police Station where he was briefed about a protest march that would occur at Parliament building that day. He was initially deployed in the Traffic Unit but at about 10 - 10.30 a.m. he went as a "*backup*" in front of the Parliament building and saw many Menen protesters on the air strip.

165. He was directed to fetch the "*riot gear*" from the station and he went and returned with riot shields. There was pushing of the police line and he found himself at the front on the corridor side of the Parliament building. At that stage while he was using a riot shield, he was pulled out of line and assaulted by Josh Kepae (***see*** : Republic of Nauru v Jeremaiah [2017] NRSC 26).

166. Following that assault, Constable Angelo Amwano was assaulted by **Renack Mau** and **Piroy Mau**. In particular the Constable said : "*Renack eye-gouged me*" (right eye) and "*Piroy Mau tried to bite my ear*". The Constable fell on the ground and a colleague managed to pull him to safety. He went to hospital later that evening after his injuries were photographed by Insp Czarist Daniel. He was shown the two colour photographs of himself taken at the Parliament building **[Exhibits P(3)(A)&(B)]** which shows a small cut under his right eye. He is also clearly dressed in blue policemen uniform at that time.

167. In the case of Senior Constable Shaka Bill (Count 10) he recalls being deployed in front of Parliament House on the morning of 16 June 2015. Whilst there he saw a group of people from Boe coming towards Parliament House and led by Mr Mathew Batsiua. He went to assist Insp Imran Scotty who was negotiating with them. The next thing he sees is 3 or 4 vehicles stopping in the aerodrome in

front of Parliament House with about 30 to 40 people who were from Menen district.

168. Constable Shaka Bill says :

"*I went to aid my colleagues as the Menen people were trying to force the aerodrome fence in order to enter Parliament. I was in the front line.* ***I received a punch from Pisoni Bop and one from Daniel Jeremaiah****.* ***I was shocked and a little bit dizzy****. I was then hit by fire extinguisher gas. Our line broke and the Menen people forced their way towards the Parliament House.*" (my highlighting)

Later, Constable Shaka Bill sought medical help at the RON Hospital because he had received a cut on his right cheek/chin area. He received two stiches and some medicine. He identified Pisoni Bop in Court and he recognized him because he had had previous dealings with him.

169. In addition to the foregoing, reference may be made to Section 16 of the Nauru Police Act 1972 which expressly provides :

"***Every police officer shall for the purposes of this Act be deemed to be always on duty when required to act as such*** *and shall perform the duties and exercise the powers granted to him under this Act or any other law at any place in Nauru where he may be doing duty*." (my emphasis)

In this latter regard, the duties of a "*police officer*" includes the following under Section 23 :

"*(a) preserving the public peace ; (b) preventing and detecting offences ; (c) preventing injury to life and property ;* ***(e) regulating processions and assemblies in public places or places of public resort*** *; (f) preserving order in public places and places of public resort*…." (my emphasis)

Section 24 also imposes in respect of "*public roads*", a duty :

"…*(c) to keep order on public roads, streets, thoroughfares…, and at other places of public resort or places to which the public have access ; and* ***(d) to prevent obstructions on the occasions of assemblies and processions on the public roads and the streets and in any case when any road, street, thoroughfare ….may be thronged or may be liable to be obstructed****.*" (my emphasis)

And finally, Section 40 provides :

"Every police officer shall be provided with such articles of uniform and equipment as may be necessary for the effectual discharge of his duties…."

170. At this juncture, it is convenient to address the defence submission which refers inter alia to section 24A of Nauru Police Force (Amendment) Act 2015 and "*the unlawful expulsion of the MPs from the Parliament…*". For the following reasons this submission must be rejected:

- Section 17 of the Nauru Police Force Act 1972, requires every police officer to "…*obey every lawful order of a superior officer whether given verbally or in writing…*" this is reinforced by the "*oath of office*" taken by a Police Officer which requires him/her to pledge :

  "…*(to) obey, uphold and maintain the laws of Republic that I will execute the powers and duties of my office honestly, faithfully and diligently without fear or favour to any person and with malice or ill-will toward none, and that **I will obey without question all lawful orders of those set in authority over me***"; (my emphasis)

- section 24A of the Nauru Police Force (Amendment) Act 2015 which is raised by the defence deals with the obtaining of a permit from the Commissioner of Police to hold a procession or assembly. The section cannot and does not provide any possible justification or excuse for the Serious Assault charges in the above Counts;

- the suspension and expulsion of the MPs by Parliament has no direct or indirect relationship or effect on the Serious Assault charges and, in any event, was to the knowledge of Mr. Mathew Batsiua and others, unsuccessfully challenged in Keke v Scotty [2014] NRSC 7 ;

- the enforcement of a fundamental right or freedom is by way of a law "***suit***" pursuant to Article 14 of the Constitution of Nauru. Under no circumstances can the exercise of the right or "*freedom of assembly*" justify or excuse a Serious Assault on a police officer in execution of its duty.

171. In light of the above, there is no doubt in my mind that Constables Angelo Amwano and Shaka Bill who were dressed in police uniform at the relevant time, were specifically assigned and deployed to the front of Parliament House and, whilst acting in obedience to his superiors orders and commands in manning the

Police line, at the Parliament building precincts, was assaulted by the above-named defendants who neither cross examined the Constables nor adduced evidence in their defence.

172. Accordingly, I am satisfied beyond a reasonable doubt of the guilt of each defendant, who is convicted of the offence of Serious Assault contrary to section 340(2) of the Criminal Code 1899 as charged.

Count 11

173. In this Count, **Lena Porte** is charged alone with Serious Assault (sic) of police officer **Sgt Priscilla Dake** whilst she was acting in due execution of her duty contrary to section 340(2) of the Criminal Code 1899.

174. To prove the commission of the offence charged, the Prosecution must call and produce evidence that establishes beyond a reasonable doubt, the following elements:

(a) Lena Porte willfully obstructed ;
(b) Sgt Priscilla Dake ;
(c) who was acting in the execution of her duty.

175. In the absence of any definition of the term "*obstructs*" in the section, I respectfully adopt the judgment of Lord Goddard CJ in Hinchliffe v Sheldon [1955] 3 ALL ER 406 which held that "*obstructing*" means making it more difficult for the police to carry out their duties.

176. The defence relating to this Count also, is a submission from Mr. Mathew Batsiua, that the Prosecution failed to prove that the Police Officer was acting in the execution of her duty when she was obstructed by Lena Porte.

177. The Prosecution's evidence on this Count, comes from the victim (Sgt Priscilla Dake) herself who testified that on 16 June 2015 she was tasked to attend at Parliament House. When she got there, she saw Mr. Mathew Batsiua and she approached him and advised him that he was not allowed to enter Parliament chambers. She testified that some of his followers tried to prevent her from stopping Mr. Mathew Batsiua. She advised them not to intervene but in her words :

"…*some assaulted me. I know them. Mrs Lena Porte and Ms Elimita Kamtaura. I knew Mrs Lena Porte who works with the Government. I see her in Court*…."

(Lena Porte was identified in Court by the witness).

178. In particular, the witness said Mr. Mathew Batsiua told her : "*we will not cause trouble just enter the chamber*." She advised him that he was not allowed into the Parliament chamber, but, he kept insisting he wanted to enter. His followers assaulted her to prevent her from blocking his way.

179. She said : " *Mrs Lena Porte struck me with her elbow and it was an elbow strike*". (The witness demonstrated in Court a swift backward movement of her arm bent at the elbow). The strike was aimed at her arm which was holding on to Mr Mathew Batsiua. Lena Porte was also telling her to let go of him , but she did not. Then there was an explosion and she released her grip and covered herself and left the area looking for a place to breathe because she smelt an unknown chemical liquid which made it difficult for her to breathe.

180. Sgt Priscilla Dake was not cross-examined on her evidence which remains undisputed. After considering the evidence, I am satisfied that Lena Porte by intentionally elbowing Sgt Priscilla Dake's hand which was holding Mr Mathew Batsiua at the time, was "*making it more difficult for (*Sgt Priscilla Dake*) to carry out her duty*" in attempting to stop Mr. Mathew Batsiua a suspended member of Parliament from entering the Parliament chamber.

181. Similarly on this Count, the defence submission is rejected for the same reasons as outlined in **para 170** (above).

182. Accordingly, I am satisfied beyond a reasonable doubt of the guilt of Lena Porte and I convict her on **Count 11** of the offence of **Serious Assault** contrary to Section 340(2) of Criminal Code 1899 as charged.

CONCLUSION

183. In summary, the verdicts of the Court is as follows:

- Count 2 : **Jacki Kanth** is convicted of an offence of **Right of Access - Security Restricted Area** contrary to section 107(2) of the Civil Aviation Act 2011 ;
- Count 3 : **Mereiya Halstead** is convicted of an offence of **Right of Access- Security Restricted Area** contrary to section 107(2) of the Civil Aviation Act 2011;
- Count 4 : **All** 11 male defendants are convicted of an offence of **Riot** contrary to sections 61 & 63 of the Criminal Code, 1899 ;
- Count 5 : **All** 11 male defendants are acquitted of an offence of **Disturbing the Legislature** contrary to section 56(1) of the Criminal Code 1899;
- Count 6 : **Bureka Kakioua** is convicted of an offence of **Act with Intent to Disable** contrary to section 317(3) of the Criminal Code 1899 ;
- Count 7 : **Bureka Kakioua** is acquitted of an offence of **Unlawfully Administering A Noxious Thing** contrary to section 323(2) of the Criminal Code 1899 ;
- Count 9 : **Renack Mau** and **Piroy Mau** are convicted of an offence of **Serious Assault** of constable Angelo Amwano whilst in due execution of his duty contrary to section 340(2) of the Criminal Code 1899 ;
- Count 10 : **Pisoni Bop** is convicted of an offence of **Serious Assault** of constable Shaka Bill whilst in due execution of his duty contrary to section 340(2) of the Criminal Code 1899 ;
- Count 11 : **Lena Porte** is convicted of an offence of **Serious Assault** of police officer Sgt Priscilla Dake whilst acting in the execution of her duty contrary to section 340(2) of the Criminal Code 1899.

D.V.Fatiaki
Judge