



**IN THE DISTRICT COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION**

Criminal Case No. 69 of 2022

BETWEEN: **REPUBLIC OF NAURU**

PROSECUTION

AND: **MAHLONE ENGAR**

DEFENDANT

BEFORE: Resident Magistrate Mr. Vinay Sharma

DATE OF TRIAL: 14 - 18 October 2024 and 4 December 2024

DATE OF JUDGMENT: 29 January 2025

APPEARANCE:

PROSECUTION: W Deiy

DEFENDANT: R Tagivakatini

JUDGMENT

INTRODUCTION

1. The defendant is charged as follows:

COUNT 1

Statement of offence

INTIMIDATING A POLICE OFFICER: *Contrary to section 77A of the Crimes Act of 2016.*

Particulars of Offence

MAHLONE ENGAR on the 9th day of October, 2022 at Denig District in Nauru, intimidated a police officer namely Police Reserve Anthony Dabwadauw in the execution of the said police officer's duties.

COUNT 2

Statement of offence

DAMAGING PROPERTY: *Contrary to section 201(a)(b) of the Crimes Act of 2016.*

Particulars of Offence

MAHLONE ENGAR on the 9th day of October, 2022 at Denig District in Nauru, caused damaged to police vehicle No. NPF 130 amounting to AUD300 that belonged to the Nauru Police Force and **MAHLONE ENGAR** was reckless about causing damage to the said vehicle.

2. On 14 October 2024 the prosecution opened its case, and on 17 October 2024 it called its last witness and closed its case. The defendant was put to his defence. Directions were given to him in relation to his right to remain silent, give evidence under oath or make an unsworn statement in court. He chose to give evidence under oath, and his evidence was taken on 17 October 2024. On 18 October 2024 the defendant closed his case because the witnesses he intended to call were unavailable. The parties sought time to file their written closing submissions.
3. The defendant's counsel filed his closing submissions on 25 October 2024. The counsel

for the prosecution filed its closing submissions on 3 December 2024. I heard both parties on their closing submissions on 4 December 2024.

4. I am to determine the following issues:
 - i. What are the established facts in this matter?
 - ii. Whether the defendant intimidated Reserve Anthony Larrystynes Dabwadauw?
 - iii. Whether the defendant damaged the property of the Nauru Police Force and was reckless about it?
5. The following are the reasons for my judgment.

PRINCIPLES RELEVANT TO THE DECISION-MAKING

6. I will outline my role before I proceed to consider the evidence of the witnesses.
7. I am required to decide whether the prosecution has proven the essential elements of the alleged offence beyond reasonable doubt. The prosecution has the onus to prove the elements of the charge beyond reasonable doubt. The defendant is not required to prove or disprove anything. I cannot find the defendant guilty unless the evidence which is accepted by me satisfies me beyond reasonable doubt of his guilt. If there is an explanation consistent with the innocence of the defendant, or I am unsure of where the truth lies, then I must find that the charge has not been proven beyond reasonable doubt.
8. A reasonable doubt will result if in my mind I am left with an honest and reasonable uncertainty about the guilt of the defendant after I have given careful and impartial consideration of the evidence.
9. While the burden of proof is on the prosecution, it does not mean that every fact in dispute is to be proved beyond reasonable doubt, only the elements of the charge needs to be proven beyond reasonable doubt. However, evidentiary facts must be clearly proved before they are treated as established.
10. I have considered all the evidence placed before me. I must determine whether each of the witnesses are an honest, reliable and credible witness, and in doing so I can rely on the evidence that the witness has given and make a finding that the facts about which the witness has given evidence on has been proven. With this regard, I can accept part of the witness's evidence and reject part of that evidence or accept or reject it all. I am not required to give all evidence the same weight.
11. In assessing the credibility of a witness, I examined the veracity and/or sincerity of the witness to see whether he or she was trying to be truthful. Further, to assess the reliability of a witness, I examined the witness's ability to accurately recall a memory.

The following are the factors that I considered:

- i. ability and opportunity to observe events*
- ii. firmness of memory*
- iii. capacity to resist pressure to modify recollection*
- iv. factors which might have resulted in reconstruction or mistaken recollection*
- v. willingness to make concessions where recollection may be faulty, especially when favorable to the other party*
- vi. testimony that seems unreasonable, impossible or unlikely*
- vii. partiality/motive to lie*
- viii. general demeanor*
- ix. Internal consistency: does testimony change during direct or cross examination?*
- x. External consistency: does testimony harmonize with accepted, independent evidence?¹*

12. I remind myself that inaccuracy about secondary, marginal or unimportant facts often arises in cases because the witnesses are focused on central facts, and may differ on what evidence they give based on what they perceive to be essential. Further, witnesses also have different abilities of observation and recollection of their memories.
13. I must deliver my judgment in accordance with the evidence, which would require me to make findings of facts upon considering the evidence before me. With this regard, I am to carefully consider the evidence logically and rationally, bringing an open and unbiased mind to the evidence but I may use my common sense and experience in my assessment of the evidence before me. I must do this dispassionately, impartially, without prejudice, and without favour or ill-will.
14. From the established facts, I may draw a reasonable inference, which must be a justifiable inference and drawn beyond reasonable doubt. I must not draw an inference from the direct evidence unless it is a rational inference in all the circumstances.
15. The defendant did not have to give evidence during his trial, however, he gave evidence in his defence. His evidence is no better or worse than the evidence of the other witnesses just because he is the defendant. I must approach his evidence in the same way that I would approach the evidence of any other witness. I must also remind myself that the defendant did not assume any onus to prove anything at the hearing when he decided to give evidence in his defence. I can only find the defendant guilty of the

¹ *R v Killman* [2024] BCPC 104

alleged offence after I have considered all the evidence, and having done so I have rejected the defendant's evidence, and accepted beyond reasonable doubt the prosecution's evidence in relation to the essential elements of the alleged offence.

16. The prosecution is relying on circumstantial evidence to prove count two of the charge. There is no direct evidence to prove it. The prosecution does not need to prove beyond reasonable doubt every piece of circumstantial evidence which it is relying on. Every piece of circumstantial evidence only needs to be sufficiently proved. My role is to make a holistic assessment of all the pieces of circumstantial evidence and determine whether together they prove the guilt of the defendant beyond reasonable doubt. In doing so I must ensure that the guilt of the defendant is the only reasonable inference that I can draw from the evidence as a whole.
17. I must emphasize that in reaching my decision, I am not required nor is it necessary for me to articulate findings about every part of the evidence. All I have to do is determine whether the prosecution has proven all the elements of the alleged offence beyond reasonable doubt. With that regard, I may have to resolve some primary disputes over the facts.
18. I have considered all the evidence before me. I will summarize most of the evidence before me, and discuss the parts of the evidence which are essential to my analysis.

PROSECUTION'S CASE

19. The prosecution called 6 witnesses, namely, Constable Fonsi Amon ("PW1"), Constable Rhudy Senior Tokaibure ("PW2"), Anthony Larrystynes Dabwadauw ("PW3"), Sergeant Vicromic Starr ("PW4"), Senior Constable Truman Gioura ("PW5"), and Senior Constable My-Girl Cecil ("PW6").
20. I have considered all the evidence given by the prosecution witnesses. A summary of the prosecution witnesses' evidence are as follows.

Evidence of PW1

21. PW1 gave evidence that on 9 October 2022 he was travelling with police officers Truman, Anthony and Pancho in a police vehicle to attend a report at Econ's residence at Location, Denig District. The complaint is with regard to loud music and disturbances by drunkards. It was between 6am – 7am, and it was slightly dark. They entered into Location through the carpark opposite the RON Hospital. There was a "small light post" which is solar powered. They were around 5 houses away from reaching Econ's residence. When approaching Econ's residence, he could see drunkards on the road who were at Econ's residence. He could also hear loud music and noise coming from that direction. On their way to Econ's residence he heard a loud

thump on the left side of the police vehicle they were travelling in. Officer Anthony was sitting on the left side. After they heard the thump on the side, officer Anthony and Truman got of the police vehicle.

22. PW1 was sitting at the back-passenger seat. He got off and reversed the police vehicle to where Officers Anthony and Truman were. When he got off the police vehicle he saw officers Anthony and Truman trying to arrest the defendant. They were trying to arrest the defendant because when they turned, he was the only person they saw in front of Buddy's house cursing them and wanting to fight them. He further said that they also arrested the defendant because the rock that hit the vehicle came from where he was standing.
23. PW1 identified the defendant in the dock as the person they arrested. He gave evidence that at the time of arrest the defendant was very drunk. The police officers were struggling to put the defendant into the "can-cage" because he was holding the side of the police vehicle. The defendant was shirtless at the time. Two civilians were assisting the police officers to arrest the defendant, namely Buddy and Senior Tokaibure (currently he is a police officer). They were calming the defendant down, and managed to calm him down. The distance between the place of arrest and Econ's residence was only a few meters apart. Buddy came from Econ's residence.
24. During cross-examination, PW1 gave evidence that on the day of the incident officer Truman was driving the police vehicle, officer Pancho was sitting on the front passenger seat and officer Anthony was sitting behind officer Pancho. He confirmed that he saw a lot of people standing near Econ's residence. PW1 also gave evidence that he knows the defendant because they had arrested him a few times before. He confirmed that he did not see who threw the rock at the police vehicle. Counsel for the defendant put to PW1 that the defendant was not swearing at them, he was swearing at Rainier Dongobir. PW1 responded by saying no. Defendant's counsel also put it to PW1 that the defendant didn't challenge them to a fight. PW1 responded by saying that the defendant did challenge them because he saw him do so.
25. Counsel for the prosecution did not re-examine PW1.

Evidence of PW2

26. PW2 gave evidence that on 9 October 2022 he was drinking alcohol at Thaggard Duburiya's residence. There were many people drinking alcohol there, he could only remember the names of a few of them, namely, Buddy, Wagoi, Rainier, Poky, the defendant, and Kauwen. He identified the defendant in the dock as the person he was also drinking with at Duburiya's residence on the said date. He did not recall the name of the lady who owned Duburiya's residence. He gave evidence that when they were drinking alcohol the defendant was being aggressive and challenging people for a fight,

and then the defendant settled down. Not long after PW2 heard a loud bang outside. PW2 went outside and saw the police officers, Buddy, and Wagoi holding on Mahlone and putting him into the “can-cage” of the police vehicle. At the time he was employed with the Police Protective Services. He could not recall what was being said at the time.

27. PW2 gave evidence that the defendant did not want to get into the “can-cage” and was challenging everyone there to a fight when the police officers, Buddy, and Wagoi were trying to put him into the “can-cage”. He remembered that Buddy, Buddy’s brother, and Rainier were there.
28. During cross-examination, PW2 gave evidence that he recalled the defendant challenging Rainier Dongobir when they were drinking together.
29. Counsel for the prosecution did not re-examine PW2.

Evidence of PW3

30. PW3 gave evidence that at the time of the offence he was a police reserve. He was unemployed at the time he gave evidence. He gave evidence that on 9 October 2022 he was travelling with police officers Truman, Fonsi and Pancho in a police vehicle registration number NPF130 to attend a report at Econ’s residence at Location, Denig District. He was seated behind the front passenger seat. Officer Fonsi was sitting beside him, and officer Truman was driving. Officer Pancho was sitting in the front passenger seat. The complaint was with regard to loud music and disturbances by the drunkards. It was around 6am, and the sun was about to come up. They entered into Location through the carpark opposite the RON Hospital. Econ’s residence was not far away. The residences in Location are close to each other. While travelling PW3 saw the defendant standing in front of a house. He was shirtless. There was a concrete barrier between the defendant and the police vehicle when they were passing the defendant. The distance between Econ’s residence and the place where the defendant was standing is a few meters apart. He was leaning on the window and could see many people at Econ’s residence. He could also hear music.
31. PW3 gave evidence that as he was looking at the people drinking at Econ’s place he felt something hit the police vehicle. He did not know where it hit the vehicle. PW3 was shocked and was asking the officers what hit their vehicle. PW3 got off the vehicle and looked at the defendant and assumed that he threw something at the vehicle because he was swearing and challenging us to a fight. Straight after PW3 got off the police vehicle he pointed to the defendant to wait for him, and that he was going to him. The manner in which he said this suggested an aggressive response.
32. PW3 gave evidence that the defendant looked intoxicated, and that no one was with him at the time. There was a big rock lying on the ground at the place where he got off. The defendant was standing on the left side (passenger’s side) of the police vehicle

when the police vehicle passed him. He identified the piece of rock from photographic evidence tendered in court. He did not recall where the other police officers were. PW3 said that he was in his “own world” at the time, but officer Truman was already with the defendant when he reached him. The defendant was seated and there were some people with him there. More people also approached. PW3 said that he could hear someone approaching and asking the defendant why he threw something to police vehicle. This part of the evidence is hearsay and no reasons were provided by the investigating officer as to why they did not take this person’s statement. I will further discuss this in my analysis.

33. PW3 gave evidence that he told the defendant that he would be arrested for throwing something at the police vehicle and for disorderly conduct. The defendant told them that he didn’t want to be arrested. He was on the ground and officer Truman was holding him down. With the assistance of bystanders, they put the defendant into the “can-cage”. They dropped the defendant to the police station and returned to attend to the initial report. When they arrived back from attending to the first report he was instructed to take photos of the police vehicle and it was then that he noticed that the rock had been thrown at door where he was seated. PW3 identified the damage from the photographic evidence.
34. During cross-examination, PW3 gave evidence that he was not given any training on crowd control. He also confirmed that when he was looking at the drunkards he could not recognize anyone. He further stated that when he got off, he only concentrated on the defendant. He also confirmed that there were more than 3 drunkards when he reached officer Truman and the defendant. He did not know whether they were helping officer Truman or not. The police vehicle was parked a few meters away from where the defendant was at. PW3 also gave evidence that he is knows the defendant because he is a regular to the police station.
35. The defendant’s counsel put to PW3 that when he got off the vehicle the defendant was not looking at him and shouting and challenging him to a fight, the defendant was facing the drunkards and shouting and challenging them to a fight. PW3 responded by saying no.
36. During re-examination, PW3 gave evidence that he assumed that PW3 was the one who threw the rock at the police vehicle because when he got off the defendant was the only person in his line of sight.

Evidence of PW4

37. PW4 gave evidence that on 10 October 2024 he was assisting the investigating officer, Senior Constable My-Girl Cecil in this matter. He was tasked to take photographs of the damaged police vehicle and prepare a booklet of the same, and obtain quotes from automobile repair shops. He was the witnessing officer during the record of interview

as well. He identified the defendant in the dock as the person who was the subject of the record of interview. During the record of interview the defendant spoke with his lawyer and refused to give any comments during the record of interview. He tendered in evidence the quote he received for repair works on the police vehicle, which was in the sum of AUD300.

38. PW4 identified the object that was used to damage the police vehicle from photographs which he tendered as evidence. He gave evidence that the object used was a “concrete block”. He also tendered the “concrete block” in evidence. PW4 also gave evidence that he assisted the investigating officer in preparing a sketch of the crime scene. The investigating officer and PW4 were accompanied by the other officers who were in the police vehicle when the incident happened. The scene of the incident was in location. PW4 identified the scene of the incident from the sketch. The defendant was standing beside the concrete flowerbed (the side next to the residential blocks). The flowerbed had two palm trees. Straight after the flowerbed is a “water tank with foundation”.
39. During cross-examination, PW4 could not recall who were the officers who accompanied him to the crime scene.
40. Counsel for the prosecution did not re-examine PW4.

Evidence of PW5

41. PW5 gave evidence that on 9 October 2022 they received a report from Econ’s residence at Location compound. They were to removed people consuming alcohol. He attended to the report with police officers Anthony, Fonsi and Pancho in a police vehicle, registration number NPF130. He was the driver and the most senior officer in the police vehicle. Police officer Anthony was sitting behind the front passenger seat. They attended to the report around 6.30am and the sun was coming up. They entered Location through the car park opposite the RON Hospital. The dirt road at location was bumpy and there was a solar powered street light. They were travelling slowly. While travelling he could see two water tank reservoirs. Some people were consuming alcohol there. There was a shed next to reservoirs, and people were drinking there as well. PW4 estimated that there were more than 20 people drinking under the shed. He heard loud music and people shouting.
42. PW5 gave evidence that when they approached the people consuming alcohol under the shed, he heard a “loud bang as if somebody threw something at [their] car”. He stopped the police vehicle. He saw some people stopping the defendant. They were holding him because he was violent. He could recall who were holding him. It was Rainier Dongobir, Buddy and Wagoi. They were holding him and he was trying to break loose. He did not know why. When PW5 and officer Anthony approached them, he heard Wagoi say to the Defendant “why you threw the stone at the police car”. He gave evidence that he informed the investigating officer of what he heard. PW5 and officer Anthony lifted the defendant by the arms and took him towards the ‘can-cage’.

The defendant tried to break free and fell down. He was shirtless at the time. Rainier, Buddy and Wagoi assisted the two to put the defendant in the “can-cage”.

43. PW5 gave evidence that afterwards he walked towards where the police vehicle was parked before and picked up the broken off piece of block (“the Block”) that was there. He estimated the distance between where the defendant was arrested and where the Block was found as being 5 meters. He retrieved the Block because he was in charge of the vehicle and that the Block he retrieved matched the dent on the vehicle. PW5 identified the cement block that was tendered in evidence as the Block he was referring to.
44. During cross-examination, PW5 gave evidence that when he reached the police station after the arrest he informed the investigating officer that Wagoi saw the defendant throw the Block at the police vehicle. PW5 was shown his police statement. He confirmed it was his statement, that he wrote it. He confirmed that he did not mention anything in his police statement about Wagoi saying that he had seen the defendant throw the stone.
45. PW5 gave evidence that he did not hear the defendant swearing at Rainier Dongobir. However, he heard the defendant swear at the police officers.
46. During reexamination, PW5 said that so many things happened that day and he forgot to write that Wagoi said that the defendant threw the Block. When asked if that was the reason he forgot to write it, he said “I simply can’t remember what I did on that day. I had been working throughout the night shift. When I started doing the report...I can’t remember everything. The things that took place are the things I put in my statement”. He was then questioned again on it, and then he said that “after reading through the statement again things started coming back to me again relating to the incident”. He gave evidence that he read the statement the day before his examination in chief. He further clarified that the defendant was swearing at him and officer Anthony.

Evidence of PW6

47. PW6 gave evidence that she was the investigating officer in this matter and that she conducted the record of interview of the defendant. She identified the defendant in the dock as the person being the subject of her investigations in relation to this matter. She obtained the police statements and witness statement. She also compiled the photographic evidence, case summary and the sketch of the scene of the incident. She conducted the record of interview on 10 October 2022. PW4 was the witnessing officer. The defendant sought advice from his lawyer and did not make any admissions in his record of interview.
48. PW6 gave evidence that she attended the scene of the incident on 12 October 2024 to prepare a sketch of the same. Only PW4 and officer Anthony were present. Officer

Anthony showed them where the incident took place. She gave evidence that there are many blocks at Location compound which are closely situated to each other. The first block belonged to the Aliklik family and the other block belonged to the Econ family. She identified the two blocks on the sketch map that she tendered as evidence. She also identified the water tank in between the two residence, the area the people were drinking alcohol, the flowerbed on which there were two other water tanks, and where the defendant was standing.

49. PW6 gave evidence that the two water tanks on the flowerbed could “collapse” if not used. She said on the day she was there it was collapsed. The two tanks’ capacity was 3000-4000 liters. The flowerbed was surrounded by concrete. Once side of it was run down.
50. During cross-examination, PW6 gave evidence that the two water tanks on the flower bed were standard size. She also gave evidence that the water tank after the flowerbed was also the same size. She confirmed that according to the sketch map the defendant was standing behind the water tank, slightly to the right side. She also confirmed that the height of the flowerbed on which the tank was placed was the distance between her knee and the courtroom floor. She further gave evidence that if the defendant was standing on the ground then he would not be able to touch the top of the tank. She gave evidence that she couldn’t recall if she recorded Wagoi’s statement.
51. Counsel for the prosecution did not re-examine PW6.

DEFENDANT’S CASE

52. The defendant gave evidence under oath, and thereby, became a witness in his defence. I have considered his evidence in its entirety. A summary of his evidence is as follows.
53. The defendant gave evidence that he was drinking alcohol with Kauwen at Meneng the night before 9 October 2022. They arrived at Thaggard Duburiya’s residence at around 5 am on 9 October 2022, and continued drinking alcohol there. He could recall drinking alcohol with Buddy, Wagoi, Kauwen, Diriko, Freda, Senior, and Rainier. He could not recall the others. They were drinking beer and vodka. While drinking alcohol he started to argue with Rainier. The others stopped him. He went out to wait for Rainier. While waiting for Rainier a police vehicle pulled up. At the same time, Rainer and some others approached him, and they reached him first. He started “struggling” with them, they were holding him down. He was facing up. Officer Truman reached him a few moments later at the flowerbed. Officer Truman advised him that he would be arrested. He did not tell him why he was being arrested. Then he was taken to the “can-cage”. Buddy, Wagoi, and Rainier assisted the officers to take him to the “can-cage”. He assumed that he was arrested because he “struggled” with the other “boys”. He gave evidence that he did not throw the rock at the police vehicle. He also gave evidence that he did not intimidate Reserve Anthony Dabadauw or the other officers.

54. During cross-examination, the defendant agreed that he was drinking with a lot of people outside Thaggard Duburiya's residence, and that they were making a lot of noise at the time. He confirmed that he is familiar with Econ's residence. He also confirmed that Thaggard Duburiya's residence is part of Econ's residence. He agreed that he was behaving disorderly at the time he was drinking. He also gave evidence that he started wanting to fight Rainier because Rainier was teasing him. He agreed that he waited outside "Simon's studio block" waiting for Rainier to come. It was dark but the sun had started to rise. He came outside with Kauwen. He agreed that while he was outside he remained aggressive while waiting for Rainier to come. While waiting for Rainier he agreed that he saw a police vehicle pass the flowerbed. He confirmed that a flowerbed was in front of him. He gave evidence that when he saw the police vehicle, Rainier was about to reach him. The road path was beside the flowerbed. The defendant denied throwing a rock at the police vehicle. He also denied challenging the police officers.
55. The defendant gave evidence that when Rainier, Buddy and Wagoi reached him, Buddy and Wagoi held onto him stopping him from fighting Rainier. The defendant denied talking to officer Anthony. Further, he gave evidence that he never saw officer Anthony approaching him and that he never challenged officer Anthony. The defendant also denied that he turned to officer Anthony and challenged him while he was struggling with Buddy and Wagoi. He also denied that he was arrested for throwing a rock at the police vehicle. The defendant agreed that he swore at officers Truman and Anthony while they were trying to put him into the "can-cage". He did so because he didn't do anything and that he didn't want to be arrested. He also denied being told why he was arrested when he was taken into the "can-cage".
56. The defendant also gave evidence that Kauwen went to urinate behind a tree when the police vehicle passed, and Kauwen was with him outside.
57. During re-examination, the defendant gave evidence that he did not fight Rainier because the police got there in time and took him away.

ANALYSIS

58. For count one the defendant is being charged for intimidating a police officer contrary to section 77A of the Crimes Act ("the Act"), and for the other count he is charged for damaging property contrary to section 201(a)(b) of the Act.
59. Before I proceed with my analysis, I must determine the established facts in this case. I have heard all the witnesses and I have observed their demeanor. I have taken into consideration factors in relation to credibility and reliability of evidence. The witnesses for the prosecution were reliable for most part of their evidence. I found issues in

relation to credibility in some parts of their evidence and I will discuss them below. I understand different people perceive facts differently. I have also taken a common sense and logical approach to determining what are the established facts in this matter. I found the defendant to be truthful in his evidence as well. I will discuss the evidence below.

What are the established facts in this matter?

60. I note that the everything that unfolded on 9 October 2022 happened quickly and in the heat of the moment. I found the evidence of PW2 and PW5 for most part consistent with the evidence of the defendant. PW2 was drinking alcohol with the defendant and others on 9 October 2022. During that period in time he agreed that the defendant had an argument with the Rainier Dongobir. According to the evidence before me PW5 was the first to reach the defendant after the police vehicle came to a stop. According to PW5 when he reached the defendant he was already “struggling” with Rainer, Buddy and Wagoi. He did not know why they were struggling. I accept the defendant’s evidence with regard to what happened outside “Simon’s” residence. That is, he wanted to fight Rainier and was challenging him to a fight. He went outside with Kauwen to wait for Rainier to come and fight him. While waiting he saw the police van pass by. At the same time Rainer, Buddy and Wagoi were making their way to him. At this moment it would be illogical for the defendant to turn around and pick a rock, and then exert his aggression towards someone else apart for the person he wants to fight. Common sense would dictate that if he did so that he would put himself at risk of being attacked by Rainier. I doubt that the defendant would want to risk being attacked by Rainier especially judging from the state he was in. Further, it would also be illogical for him to turn around and challenge Reserve Anthony while he was held by Buddy and Wagoi, who were trying to stop him from fighting with Rainer. I find that he was indeed in a struggle with Buddy and Wagoi who were trying to stop him from fighting Rainier. He never challenged Reserve Anthony.
61. According to Reserve Anthony he was the second police officer to reach the scene. I accept his evidence with this regard. He gave evidence that when he got off he pointed at defendant and told him to wait there and that he is coming. From his demeanor and the manner in which he gave this evidence it seemed that he said it in an aggressive tone. The proper approach would be to deescalate. However, he did give evidence that he just joined the police force and did not received any training on crowd control.
62. When Reserve Anthony reached PW5 and the defendant, then they tried to arrest the defendant. The defendant did not want to be arrested because in his mind he did not do anything wrong and that he was not given reasons for his arrest. I accept that it was at this point in time that he started to swear at the police officers. During that time PW1, PW5, Reserve Anthony, Buddy, Wagoi and Raimier were taking the defendant to the “can-cage”. Reserve Anthony did not give evidence that he felt intimidated in any way. He only realized that the rock could have hit his head when he saw the dent on the

police vehicle at the police station.

63. Now I turn to the evidence given by PW1 and PW3 that the defendant was the only person they saw from the direction where the rock came. According to the evidence given by the prosecution witnesses, the place where the defendant was arrested was a few meters away from Econ's residence. When they were approaching Econ's residence they could see a lot of people drinking near Econ's residence. Even PW5 gave evidence that the incident took place when they reached the shed near Econ's residence where more than 20 people were drinking alcohol. PW3 also confirmed that there were a lot of people with PW5 and the defendant when he reached the them. I find the evidence given by PW1 and PW3 that the defendant was the only person there is unreliable because in their evidence they said that they knew the defendant to be a person who was frequently arrested by the police. They seem to have been biased and assumed that he was the only person there. Therefore, I find that he was not the only person there.
64. I also find that the evidence in relation to the scene of the evidence given by the prosecution witnesses are unreliable, specifically with regard to where the vehicle was situated when the incident took place and where the defendant was arrested. The sketch of the scene of the incident was prepared on 12 October 2022, which is three days after the incident took place. Further, PW6 gave evidence that there were water tanks on the flower bed and also there was another water tank after the flower bed. PW4 gave evidence that the third tank was also on a cement foundation. PW6 gave evidence that the defendant would not be able to reach the top of the water tanks if he were standing on the ground. PW6 also gave evidence that the distance between the place where defendant was arrested and Econ's residence is a few meters apart because residential blocks at Location compound are situated close to each other. There is evidence that there were palm trees there as well. PW1 had moved the car from the place it was during the point of impact. This was improper. The least that should have been done was to take photographs of the scene of the incident and the place where the defendant was arrested before moving the vehicle. This could have demonstrated whether there was anything that would have obstructed the defendant or not.
65. PW3 also gave evidence that he heard someone ask the defendant why he threw the Block at the police vehicle. PW5 gave evidence that Wagoi told him that the defendant threw the Block at the police vehicle. PW3 and PW5 said that they informed the investigating officer of the same. When the investigating officer was questioned if she recorded the statement of Wagoi, she said that she could not recall if she did. Even the counsel for the prosecution did not give reasons as to why Wagoi did not give evidence. These statements are hearsay. Further, this evidence was not in the police statement of the witnesses. It was an afterthought. With this regard I refer to Supreme Court of New Zealand's case *W (SC 38/2019) v R* [2020] NZSC 93 in which Winkelmann CJ made the following observations with regard to reliability of evidence at [223] and [225] of his judgment:

[223] The finding of the study is broadly consistent with those mentioned above,

identifying the same categories of evidence as most associated with miscarriages of justice, including false informant evidence. The authors also conclude that a weak prosecution case is a statistically significant factor in contributing to wrongful convictions. This is because, the authors conclude, it is in cases where the prosecution has only a weak circumstantial case that it is likely to lean most heavily on evidence with lower probative value, including the evidence of incentivised informants. The authors comment:223

Weak facts may ... encourage prosecutors to engage in certain behaviors designed to bolster the case, which our statistics show help predict an erroneous conviction. In several of our erroneous convictions, a prosecutor, convinced of the defendant's guilt despite a lack of conclusive proof, failed to recognize and turn over exculpatory evidence or enlisted a snitch or other non-eyewitness to provide dubious corroborating testimony.

[225] There is other relevant research which examines the reliability of evidence where a witness purports to have a verbatim or near verbatim recollection of conversations with another. Typically, the witness will give evidence without the aid of a recording of that conversation or a contemporaneous note. But research into human memory suggests detailed recollection of conversations is unlikely to be reliable. Jessica Roth, in her article "Informant Witnesses and the Risk of Wrongful Convictions", summarises this research as follows:226

Experimental research has demonstrated that all human memory is far more fragile than previously was thought, providing cause for skepticism about all witness testimony about past events. But studies have shown that memory of oral communications is particularly bad. In addition, conversational memory is "extremely malleable" and "strongly influenced by motivational biases." This suggests that we should be particularly concerned about informant testimony, developed during proffer sessions with government agents, about the specifics of what a defendant said – where meaning and guilt may turn on the precise words used. Jurors, however, tend to be unaware of these weaknesses of human memory of conversation.

66. I find that the evidence in relation to the purported statements made by Wagoi cannot be relied upon because of the fact that the circumstantial evidence against the defendant is very weak or non-existent, and there is a high tendency of human error in relation to recollection of oral communication as observed in *W (SC 38/2019) v R*, supra.

Whether the defendant intimidated Reserve Anthony Larrystynes Dabwadauw?

Count 1

67. Section 77A of the Act provides as follows:

Intimidating or threatening a police officer

A person commits an offence, if the person intimidates or threatens a police officer in the execution of the police officer's duties.

Penalty: a maximum term of 5 years imprisonment, of which imprisonment term at least one third to be served without any parole or probation.

68. The New South Wales Supreme Court in ***Director of Public Prosecutions (NSW) v Best [2016] NSWSC 261 (16 March 2016)*** identified the following elements of the offence of intimidating a police officer in the execution of his/her duties, which are applicable in the current matter:

(a) a particular form of conduct, whether words or actions or both;

(b) conduct that is capable of inspiring fear or is capable of coercing another to do or defer from some action;

(c) conduct directed at a law enforcement officer while in the execution of the officer's duty;

(d) actual intimidation of such an officer.

69. For count 1, the prosecution must prove beyond reasonable doubt that:

- i. The Defendant;
- ii. By particular form of conduct and/or words;
- iii. Inspired fear or the conduct and/or words used by him was capable to coerce Reserve Anthony Larrystynes Dabwadauw to do or deter from some action;
- iv. Reserve Anthony Larrystynes Dabwadauw was executing his duties as a police officer; and
- v. The conduct and/or words used by him his actually intimidated Reserve Anthony Larrystynes Dabwadauw.

70. I do not need to repeat my findings of fact above. Having considered my findings of facts, I find that the conduct of the defendant of swearing at Reserve Anthony Larrystynes Dabwadauw while he was being taken to the "can-cage" could not have inspired any fear in Reserve Anthony nor was it capable to coerce him to do or not do some action. The defendant was restrained by 5 people, including the police officers. The Supreme Court of Nauru in similar cases has provided that police officers need to have a high level of tolerance when compared to ordinary members of the public when coming across these types of circumstances.

71. I also find that the conduct of the defendant of swearing at Reserve Anthony Larrystynes Dabwadauw while he was being taken to the "can-cage" did not inspire any fear or intimidation in him. From his evidence alone, I found that Reserve Anthony was aggressive in his approach to the defendant.

72. For the foregoing reasons, I find that the prosecution has failed to prove the elements of the offence in count 1 beyond reasonable doubt.

Whether the defendant damaged the property of the Nauru Police Force and was reckless about it?

Count two

73. Section 201(a)(b) of the Act provides as following:

Damaging property

A person (the 'defendant') commits an offence, if the person:

(a) causes damage to property belonging to another person, or to the defendant and another person; and

(b) is reckless about causing damage to the property.

Penalty: 5 years imprisonment

74. Section 19 of the Act provides as follows:

Recklessness

(1) A person is 'reckless' about a matter if:

(a) the person is aware of a substantial risk that:

(i) in the case of a circumstance, the circumstance exists or will exist; and

(ii) in the case of a result, the result will occur; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) The question whether taking a risk is unjustifiable, is one of fact.

(3) Where recklessness is specified as the fault element required to prove an offence, proof of intention, knowledge or recklessness will satisfy that fault element for the offence.

75. For count two, the prosecution must prove beyond reasonable doubt that:

- i. The defendant;
- ii. Damaged property belonging to the Nauru Police Force; and
- iii. That he was reckless about causing damage to the property

76. For count 2, the prosecution is relying on circumstantial evidence against the defendant. With this regard I refer to the observations made by Warren CJ in the Court of Appeal of Victoria in ***Mannella v The Queen*** [2010] VSCA 357 at [41] of his judgment:

41 The manner in which a jury should be directed with regard to circumstantial evidence and the drawing of inferences is well set out in Part 3.5 of the Victorian Criminal Charge Book.¹ In deciding upon the guilt or

innocence of an accused person, a jury may rely on inferences drawn from circumstantial evidence. Proof of guilt by circumstantial evidence is not unacceptable or suspect of itself.² However, where the prosecution case relies in large part on inferences drawn from circumstantial evidence, it is usually necessary for the trial judge to direct the jury that, first, to find the accused guilty, his or her guilt must not only be a reasonable inference, it must be the only reasonable inference which can be drawn from the circumstances established by the evidence, and, secondly, that if the jury considers that there is any reasonable explanation of those circumstances which is consistent with the innocence of the accused, they must find him or her not guilty.³ These two requirements do not describe a separate standard of proof, they simply convey the meaning of "beyond reasonable doubt" in cases involved circumstantial evidence.⁴

77. In light of my findings of facts in this matter, I find that the prosecution has not been able to sufficiently prove any of the circumstantial evidence that they are relying on to establish the elements of the offence in count 2. As such, I find that the prosecution has not proven the elements of the offence in court 2 beyond reasonable doubt.

VERDICT

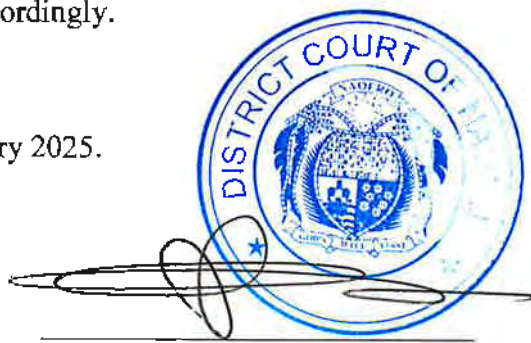
Count 1

78. For the foregoing reasons, I find the defendant not guilty of count 1 of the charge and acquit him of it accordingly.

Count 2

79. For the foregoing reasons, I find the defendant not guilty of count 2 of the charge and acquit him of it accordingly.

Dated this 29 day of January 2025.



Resident Magistrate

Vinay Sharma