IN THE SUPREME COURT OF NAURU
(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 1/98	**RENE HARRIS v DIRECTOR OF PUBLIC PROSECUTIONS**
CRIMINAL APPEAL NO. 2/98	**MILTON DUBE v DIRECTOR OF PUBLIC PROSECUTIONS**
CRIMINAL APPEAL NO. 3/98	**DIRECTOR OF PUBLIC PROSECUTIONS v RENE HARRIS**
CRIMINAL APPEAL NO. 4/98	**DIRECTOR OF PUBLIC PROSECUTIONS v MILTON DUBE**
CRIMINAL APPEAL NO. 5/98	**DIRECTOR OF PUBLIC PROSECUTIONS v MELVIN DUBE**

Date of Hearing : 14.8.98
Date of Decision : 7.09.98
D. Aingimea for Appellants Harris & Dube
Mrs. Deo for Director of Public Prosecutions

JUDGMENT OF DONNE C.J.

These appeals were lodged:

1. Appeals by Mr. Harris and Mr. Milton Dube on points of law.
2. Appeals by the Director of Public Prosecutions against the sentences in respect of the charges against Mr. Harris, Mr. Milton Dube and Mr. Melvin Dube.

The appeals were heard together. Lengthy written submissions were, before the hearing, filed by Counsel for the Director of Public Prosecutions. I did not read them before the hearing. The practice of this Court is that written submissions can, by leave of the Court, be filed at the hearing or subsequent thereto. There is no pre-emptive right of any party to make known to the Court before a cause is heard, the case to be presented by that party. Should all parties involved in the proceedings desire to adopt a procedure not in accord with this, the approval of the Court should first be obtained.

I have considered the notes of evidence and the submissions of counsel. I have read the decision of the learned Magistrate. It is comprehensive and thorough. There were, in fact, no challenge as to the findings of fact therein and having read the evidence I would comment that this is understandable.

APPEALS ON POINT OF LAW.

The Appellant offenders base their appeals on four points. They argue:

1. The charge of aiding prisoners to escape laid under section 142 of the Criminal Code Act cannot in law be sustained on the evidence.

2. The charge of serious assault laid under S.340(2) of the Code cannot be sustained in law on the evidence.

3. The learned Magistrate wrongly placed the burden of proving that all prisoners were not in lawful custody.

4. The charge of riot laid under S.63 of the Code could not be sustained in law on the evidence.

As to the first ground, Mr. Aingimea argues that the prisoners did not escape, but, were released by the Police.

The learned Magistrate in his judgment at pp. 28 and 29 found as follows:

> "It is pointed out by the learned Defence Counsel that in this case it was the decision of the police officer themselves (sic) that Tawaki Kam be released. He specifically refers to the statement of PW3 Curtis Olsson who admitted that he gave the instructions to release the detainees. It is submitted by the learned Counsel that there was no legal justification to keep the detainees in custody. I have carefully considered this argument. I do

> not find any merit in the same. We have to see the totality of circumstances in order to find if the police officer made a decision of his own or he was compelled by force to take this decision. We cannot lose sight of the fact that Melvin was smashing desk. The police officer was asking the accused to wait so that he may contact the Director of Police. There was struggle with the telephone. Melvin Dube also placed grass cutter against the head of Ivan Notte and spat at his face. Milton Dube was also armed with grass cutter close by. When all the circumstances are taken together, there remains no manner of doubt that the police officers were forced to release the detainees on fear of physical harm and the normal procedure of release of a detainee or prisoner was not allowed to prevail. It will be seen that Tawaki and his two brothers were taken away without undergoing formalities of entering a recognizance or surety bonds. I hold that the accused in fact paralyzed the normal police functioning in the Police Station and forcibly obtained the release of the detainees."

On the evidence the Magistrate's finding was justified and I can find no fault with his conclusions.

Ancillary to his argument under this ground, counsel referred to case of ***R v Scott*** [1967] V.R. 276 to support a contention that if the

prisoner who escapes did not intend to escape, the one who helped him escape cannot be charged with the offence of aiding his escape. The question of "mens rea" of the prisoners is irrelevant. It is the "mens rea" of those who aid that is relevant. I am satisfied on the evidence, as was the Magistrate, that the Appellants intended to aid the escape of at least Tawaki. Their purpose in going to the Police Station is abundantly clear.

A further point was pressed by the Appellants. They submit Tawaki was not in lawful custody.

The Magistrate has found Tawaki was arrested before he was taken to the Police Station. He was thus in lawful custody when escaping. Furthermore, the Magistrate did not accept that the Appellants believed Tawaki's arrest was unlawful. He also correctly held that for the purpose of the charge in question if one prisoner was

proven to be in lawful custody, the offence is complete in relation to him.

As to ground 2, the submission is that there is no evidence to sustain a charge under section 340(2) of the Code which reads:

Serious Assault

"340 Any person who

(2) Assaults, resists, or wilfully obstructs any person engaged in the lawful execution of his duty; or any person acting in aid of a police officer while so acting" (commits the offence)

The Magistrate in his judgment has covered comprehensively the conduct of the Appellants. The evidence shows the conduct of Mr. Harris to be threatening and intimidating. He organised his support team which he brought with him armed with grass cutters to back up his confrontation with the Police Officers there. This action, without doubt, allows the conclusion of the Magistrate that it collectively

constituted willful obstruction by all parties to the Police Officers in the course of their duty. The charge was clearly sustainable.

The plea of "rescue" was advanced by the Appellants. "Rescue" as used in criminal law is an offence. It consists in the forcible freeing of a person from lawful arrest or custody. It incurs criminal liability (sec.141). There was no unlawful arrest in this case. It is doubtful that even if the arrest were unlawful, the Appellants' conduct, as so called "rescuers" could be justified. Their conduct was aimed at Police Officers lawfully on duty at the Police Station.

As to ground 3, the Appellants point to the Magistrate's judgment at pp. 17 and 18 which they say, wrongly places the burden of proof on the Appellants suggesting they should have established by cross-examination of the prosecution's witnesses that all three prisoners were not in lawful custody. That seems to be a correct

interpretation of what was said. Of course, the burden is on the prosecution to prove custody and it is not the duty of the accused by his own examination to prove the contrary. However, in the end result the point loses relevance since Tawaki was clearly proven by the prosecution's evidence to be in lawful custody and, as has been pointed out, that finding is sufficient to inculpate the Appellants.

The final ground (4) of the appeal relates to the conviction of the Appellants on the charge of riot. Mr. Aingimea submits that all Mr. Harris was doing was arguing with the police – he was acting in a peaceful manner. The whole incident has to be considered in order to decide whether in fact, there can be established in law the offence of "riot". The learned Magistrate sums up the evidence he heard on this incident and the conclusions he arrived at on it. He says at pp. 31-33:

"It is now to be seen if the three accused did constitute unlawful assembly. Reference can be made to Section 61 of the Criminal Code where unlawful assembly has been defined. The requisite ingredients of an unlawful assembly are:

1) Assembly of three or more persons

2) Intention to carry out some purpose which is common.

3) Conducting in such a manner, as to cause persons in the neighborhood to fear that persons so assembled will tumultuously disturb the peace or such assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace.

It is not necessary that the original assembling was lawful. It will become unlawful if the persons start conducting in the above manner. Such an assembly becomes a riot when it begins to act in so tumultuous manner that the peace is disturbed.

When the circumstances of the present case are appreciated in the total context, there remains no manner of doubt that all the ingredients to constitute an unlawful assembly are proved. The common purpose is clearly established. The number of persons who entered the Police Station happens to be three. Two of the accused had armed themselves. The police officials were threatened to

get the release of Tawaki Kam. There was smashing and banging of the desk with weapons. The whole peace of the Police Station and its functioning was disturbed. The assembly did turn into a riot when the peace of the Police Station was disturbed. Mr. David Aingimea submits that Mr. Rene Harris was only arguing with the police officials and he was to have the release of Tawaki Kam in a peaceful manner. This argument cannot be accepted when we notice the determination of the accused, their preparation and conducting after coming to the Police Station where there was clear exhibition of force and violence by the two companions of Mr. Harris. It is true that three of their companions remained outside the Police Station throughout. This fact will not alter the situation in any manner. It was pointed out that PW12 Rayong Itsimaera while describing the situation maintained in cross-examination that from his house some sort of commotion is noticed in the Police Station from time to time in the ordinary course and this being so it cannot be said that the peace was disturbed tumultuously. It may be noticed here that the other witnesses PW13 Ms. Clarinda Olsson stated that the commotion which she observed that day was abnormal. Mr. David Aingimea tries to treat this case as a case where the disturbance of peace by such an assembly takes place away from the Police Station in some public place or street. Here is a case where the Police Station which is expected to maintain peace elsewhere was itself disturbed in such a manner that its functioning came to a stand still and paralyzed. The policemen themselves

> became frightened and helpless. It is a clear case of an unlawful assembly and riot in a Police Station itself, unlike other cases when generally such offences are committed away from the Police Station."

I have no hesitation that on the facts, as found, the Magistrate has applied the correct principles of law and has properly found the offence of "riot" sustained in respect of the defendants.

In the result I dismiss the Appeals of Mr. Harris and Mr. Milton Dube.

THE APPEAL AGAINST SENTENCE.

The Director of Public Prosecutions appeals against all sentences imposed on the grounds of their inadequacy.

In support of the appeal, Mrs. Deo who appears for the Director

stresses, in the main, the gravity of all the charges, the necessity in the public interest for deterrent sentences to indicate to all that the conduct manifested by the accused cannot be condoned and will not be tolerated in Nauru. She urges that for at least the offences of aiding the escape of prisoners, riot and serious assault imprisonment must be the only option available to the Court. The nub of her plea is that apart from the penalties of lengthy imprisonment fixed by the law, that imprisonment would rightly indicate the seriousness of the crimes committed, to the offenders, who by virtue of their positions of standing in the Community and their status as Community Leaders, need to be dealt with in a way to indicate what she calls "the equality of law". In particular, she underscores the position held by Mr. Harris, a Member of Parliament at the time he offended. She submits that the Magistrate wrongly gave favourable consideration to that fact and in general to the standing and public service of all offenders to mitigate the penalties. Counsel's view is that the Court should have

approached the task of sentencing on the basis that the greater the status and standing of the offenders, the harsher the sentence.

Undoubtedly the offences were serious and there is no question the offenders, by virtue of their background, should never have embarked upon what was clearly an attack on the law enforcement processes of Nauru. Even if they did believe Tawaki was unlawfully arrested (and I am satisfied they did not), as educated Nauruans, they know or ought to have known that the remedy for any unlawful arrest is to resort to the due process of law and certainly not to the "bully boy" and intimidating tactics they resorted to. The learned Magistrate has justly condemned them.

Before I consider any review of sentences, I would advert to the submission by Mrs. Deo that the learned Magistrate misdirected himself in not ascertaining whether any accused had previous

criminal history. That submission is misconceived. The obligation to make known to the Court any such history lies firmly on the prosecution. The clear duty of the prosecution is, after the Court finds an accused guilty of an offence, to bring to the attention of the Court any previous convictions of the offender who is then asked if he admits them. If he does not, the prosecution is required by evidence to prove them. If, in fact, that procedure was not followed in these cases, then it is the prosecutor who is wrong not the Magistrate. I should add that if a Probation Officer's Report is ordered, it is, quite proper for the Probation Officer to be advised by the prosecution of the previous history of an offender. That information will be included in the report which can be challenged by the accused when it is made available to him.

I now turn to the consideration of the sentences. The burden is on the Appellant to establish that the sentence appealed against is

manifestly wrong. In that respect, the task of the appellate Judge is not to weigh the sentence imposed against what he, in the circumstances may have imposed – it is not a balancing of opinions. Sentencing is a discretionary process. An appellate Judge before he interferes with the sentence of the trial Judge must be satisfied that it is either out of line with the general trend of sentences in similar cases or, if there is no comparable guide, that the sentencing Judge who had the benefit of conducting the trial and had experienced the impact of it, could not have, in any circumstances, imposed the sentence he did – in other words, he was manifestly wrong.

I have been referred to sentences for serious offences imposed in other jurisdictions. Some of the decisions set out the principles applicable in the sentencing process. They are, in general, of little assistance since sentencing policies and the quantum of any sentence in any country must relate to the culture of the country, its

degree of development, its penal policy and the prevalence of crime therein. Consequently, it is more appropriate for reference to be made to local decisions. In this instance, one decision of the Supreme Court was referred to, but, it did not assist.

The learned Magistrate on sentencing said:

> "..... It will appear that Tawaki Kam was not just a member of the Constituency for whose release Mr. Harris was anxious. In fact, he was husband of his niece and a close relative. ....."
>
> "I have given my serious thought to these submissions. In the ordinary course, the offences under Sections 142 and 340(2) have to be treated very seriously, especially when such an incident takes place in a Police Station and the police officers themselves become victims at the hands of the accused. At the same time, I am conscious of the entire background in which the incident took place. This is a case where a little more tact on the part of concerned police officers and a little more patience on the part of the accused could have averted the entire unpleasantness and pain which has been caused to the police officers. I feel that there has been a mishandling of the situation on the part of the concerned police officials and also Mr. Harris. Mr.

> Rene Harris has been a Member of Parliament for many years and even now he is a member of the present Parliament.
>
> The purpose of punishment is really to reform a wrong doer, if possible, and to restore order and discipline in society, and in the present case I am satisfied that all the three accused can be reformed to show proper conduct in the future.
>
> Keeping in view Mr. Rene Harris' status and long public service as a Member of Parliament, I feel that sentence of imprisonment is not indicated. I further find that Milton Dube, who is also having a status of his own, and Melvin Dube, in fact, acted on the advice of Mr. Rene Harris and who himself may have been under a wrong impression that he was acting rightly within the law. In view of this, it will not be proper to impose any sentence of imprisonment in respect of these two accused as well."

Mrs. Deo strongly submits that the factors taken by the Magistrate on matters to mitigate the penalties were not mitigatory but rather were matters of aggravation. She says that retribution should have been the main aim of the sentences not reformation.

Certainly, in the case of serious offences such as these here,

the starting point in the consideration of the quantum of the punishment must be that of imprisonment. The Magistrate had obviously imprisonment in mind. However our penal policy, as in all countries with a system of Justice similar to that of Nauru, is aimed at keeping people out of prison. Reformation not retribution is the prime object in sentencing. Mitigating circumstances pertinent to an offender are always a major factor to be weighed in sentencing.

Counsel, in pressing her plea for imprisonment, makes a strong submission thereon in the case of the offender Harris. She describes him as the "instigating party" of the riot giving the other offenders the impetus to carry on the tumult that occurred; he was, she submitted, the group leader and he should be imprisoned. She submits that the leniency shown to him would allow a percepton to be held by the public that a Member of Parliament is in a better position from the Court's perspective to receive a lighter punishment than the "less

privileged". A reading of the Magistrate's reason could not allow such a conclusion. His approach to the task of sentencing is clearly the correct one and there could be no justification for any wrong perception. However it can justifiably be contended there is reason for the public to perceive that Mr. Harris, in offending in the manner detailed in the judgment, possessed a totally erroneous idea of his powers as a Member of Parliament. While his profession gave him the privilege of participation in the making of laws, it did not allow him to break laws and subvert justice. A Member of Parliament is a leader of his Community; with the office goes the responsibility to demonstrate good leadership. Sadly, good leadership and example were very much lacking in Mr. Harris' conduct. Undoubtedly, it was their belief in his invincibility that brought Milton and Melvin into this criminal activity and thus into Court. That certainly does not excuse their conduct – there is no mitigating fact flowing from that belief. These two men should have known better than to try to emulate the

role of vigilantes which they were not. Rather they were what I have already branded them – "bully boys". However, Mr. Harris' leadership of them is a factor which must be considered in the fixing of his sentence.

I am influenced by the learned Magistrate's findings and observations on Mr. Harris and his part in these crimes. The evidence fully justifies what has been said on pp. 19-22:

> "The second point which needs determination in this case is as to whether Mr. Rene Harris and his companions wanted the release of Tawaki Kam and brothers by arguments or show of force. Mr. Rene Harris happens to be a responsible person who is a sitting Member of Parliament and who has remained Member of Parliament for twenty-two years. He also held the office of Speaker and Deputy Speaker of the House. He has been instrumental in passing many laws in Parliament. He also held important position in Church as mentioned by him in his statement in Court. He has asserted that he was simply arguing his case with the police officer that Tawaki be released and when he took with him the other accused he was to get the release of Tawaki

by talking. According to him, his co-accused did not carry with them any grass cutter or any other weapon. I wish I could find it possible to accept this account. The evidence which however has come on record tells a different story.

We can once again refer to some parts of the statement of Mr. Rene Harris himself. He claims to have learned about Tawaki Kam for the first time on 21st March 1998 in mid afternoon. In the examination-in-chief he describes Tawaki Kam just as a member of his Constituency who was taken away by the police for questioning. ....."

"Again it will be seen that it is in the statement of Mr. Rene Harris himself that he had left the Police Station after his discussion on the first visit suggesting to Ruskin that he should contact Director of Police and that "I would be back again and they had better get their guns ready". Not only this, he proceeded along with Nemo to the place of Nemo and dropped him there telling him that he should collect some boys of the Constituency ready to seek the release of Tawaki. When I consider this warning given by this accused to the Police Officer and his instructions given to Nemo to collect some boys of the Constituency ready to seek the release of Tawaki, I am inclined to infer that this accused Mr. Harris had set his mind quite clearly that Tawaki was to be released from the Police in any circumstances and if need be by use of force."

From all this, it is fair to say that if a sentence of imprisonment is to be imposed, the prime candidate for it must be Mr. Harris, the leader and instigator. The plea of the Director of Public Prosecutions is a compelling one and I have given hard and anxious consideration to it. I have also examined carefully the reasons which prompted the learned Magistrate to impose monetary penalties. It is evident, that to him, the decision of imprisonment or no imprisonment was a borderline one. He regarded the offences under sections 140 and 304(2) as very serious. He, in the ultimate, decided not to impose the punishment of imprisonment. Now, in deciding whether that decision was manifestly wrong, in addition to the factors weighed in the decision, there are, in fact, two further factors which I consider of importance and of relevance which must affect the end result. The first is that Mr. Harris has, by virtue of law been penalised twice for the same offences. The Constitution requires that on conviction for offences carrying a maximum penalty of a year's imprisonment or

more, a Member of Parliament is required to vacate his Parliamentary seat, a penalty effective immediately on conviction which cannot be stayed by appeal. In addition, he was instantly dismissed from his employment as a top executive as a result of his conduct. These points were not put to the Magistrate and consequently were not weighed by him. They are "extra judicial" punishments certainly obstructive and harsh. They must be taken into consideration. One further consideration, I feel, is that Mr. Harris, as the Magistrate found, is an intelligent man and is capable of accepting that the position in which he finds himself is because of his misplaced view of his own power and importance. I have no doubt he now realises the position and that having experience the trauma of his trial, the loss of his employment and Parliamentary seat he is unlikely again to offend against the law. Also, it was proper for the Magistrate to take into consideration by way of mitigation Mr. Harris' contribution to his community politically and spiritually. Having considered all these

matters I conclude the learned Magistrate was not manifestly wrong in imposing the sentence he did in the case of this offender.

Turning to the offenders Mr. Milton Dube and Mr. Melvin Dube. Imprisonment is urged by the Appellant to be the appropriate punishment for the serious offences for which they were convicted. They willingly assisted the Appellant Harris in the nefarious operation. They are not guileless dupes of their Member of Parliament. They are presented as educated and apparently intelligent Nauruans; they were fully aware of what they were doing – they were not just "following the leader". There are compelling reasons for imprisoning them. I certainly agree with the submission that the fact that as Community leaders and professed Churchgoers, the fact that they lied in giving evidence to exculpate themselves is a strong factor militating against leniency. I do not agree, as the Magistrate appears to do, that their willing acceptance of Mr. Harris' advise about Tawaki's arrest, can in a measure mitigate their criminal conduct.

They, armed as they were, acted as intimidating "thugs". On the other hand when the pertinent question of reformation and recidivism is posed, it is my view that these men are unlikely to offend again. They are certainly capable of appreciating that they now have recorded against them convictions for serious crimes and that to test their chances for further leniency by again offending, would be foolish in the extreme. Here, the learned Magistrate has shown them leniency in fining them after considering the option of imprisonment and in my view, he approached the task of punishment correctly. He weighed all relevant circumstances. He has ordered them to keep the peace. In the result, I cannot be convinced that the sentences he imposed were manifestly inadequate. He exercised his discretion responsibly.

The appeals against sentence are dismissed. In so dismissing them, I would say that the appeals were not frivolous. I consider the

Director of Public Prosecutions adapted a responsible stance in instituting them. There was in the public interest adequate justification for reviewing this consideration of the trial proceedings since the activities of these offenders were aimed against a most important instrument of state – that of law enforcement. Public interest demands that those who enforce the law do so with confidence that the State will uphold their lawful exercise of authority. In this case the incredible stupidity of these Nauruans who, by virtue of their positions in the Community felt they could challenge the State, have done no service either to themselves or the Republic.

CONCLUSION.

In summary, all appeals are dismissed. The following penalties are confirmed:

1. **MR. RENE HARRIS:**

Under Section 142 of the Criminal Code	- To pay a fine of $500
Under Section 340(2) of the Criminal Code	- To pay a fine of $500
Under Section 63 of the Criminal Code	- To pay a fine of $100
Under Section 62 of the Criminal Code	- No separate sentence as it is covered by Section 63 above.
Under Section 48 of the Nauru Police Force Act, 1972	- To pay a fine of $50

In all $1150. In default of immediate payment of fines, the accused will undergo imprisonment for a period of one month.

2. **MR. MILTON DUBE.**

Under Section 142 of the Criminal Code	- To pay a fine of $500

Under Section 340(2) of the Criminal Code	-	To pay a fine of $500
Under Section 63 of the Criminal Code	-	To pay a fine of $100
Under Section 62 of the Criminal Code	-	No separate sentence as it is covered by Section 63 above.
Under Section 69 of the Criminal Code	-	To pay a fine of $100
Under Section 48 of the Nauru Police Force Act, 1972	-	To pay a fine of $50

In all $1250. In default of immediate payment of fines, the accused will undergo imprisonment for a period of one month.

3. **MELVIN DUBE:**

Under Section 142 of the Criminal Code	-	To pay a fine of $500

Under Section 340(2) of the Criminal Code	-	To pay a fine of $500
Under Section 63 of the Criminal Code	-	To pay a fine of $100
Under Section 62 of the Criminal Code	-	No separate sentence as it is covered by Section 63 above.
Under Section 69 of the Criminal Code	-	To pay a fine of $100
Under Section 48 of the Nauru Police Force Act, 1972	-	To pay a fine of $50

In all $1350. In default of immediate payment of fines, the accused will undergo imprisonment for a period of one month.

Milton Dube and Melvin Dube will enter into a Personal Recognizance of their own and one Surety each in the amount of

$1000. Giving undertaking that they shall keep the peace and be of good behaviour for a period of one year.

Court costs $50 to be paid by each of these Appellants. I underline the requirement of payment of all fines and costs.

CHIEF JUSTICE

A Certified True Copy
of the Original.

G.L. CHOPRA
REGISTRAR, SUPREME COURT, NAURU.