IN THE SUPREME COURT OF NAURU

[CRIMINAL APPEAL JURISDICTION] Case No 27 of 2015

IN THE MATTER OF an appeal against Conviction in relation Criminal Case No. CF 77/2014 at the Meneng District Court

Between ALI ALKHAZALI (UNP 053) **APPELLANT**

And THE REPUBLIC OF NAURU **RESPONDENT**

Before: Crulci J

Appellant: J. Rabuku
Respondent: L. Savou

Date of Hearing: 3,6 August 2015
Date of Decision: 7 August 2015

CRIMINAL APPEAL – Parity of Sentence with Co-offenders – Subsequent Criminal Conduct - Unlawful Assembly and Riot – Appeal Allowed

CASES CITED
Bulitaiwaluwalu v The State [2014] FJCA 203
Lowe v The Queen [1984] 154 CLR 606
R v Abutahoun & Ors, Nauru District Court (Criminal Case 77 of 2014)
R v Ali Alkazali, Nauru District Court (Criminal Case 40 of 2014)
R v De Simoni [1981] CLR 383
R v Stroud (1977) 65 Cr.App.R. 150

JUDGMENT

BACKGROUND

1. The Refugee Processing Centre was established by agreement between the Governments of Nauru and Australia in August 2012, with the Asylum seekers (Transferees) housed at the Regional Processing Centre (RPC) in Nauru. Upon their arrival Transferees are issued with a Nauruan Visa, and whilst in Nauru all Transferees are subject to the law of Nauru.

2. Each transferee is referred to and identified by reference to the boat they were aboard when initially intercepted. The appellant's identification is UNP053.

3. On 19 July 2013 there were 543 Transferees housed at the RPC. At some point during the early afternoon loose groups of Transferees gathered and shouted comments in relation to their placement in the RPC. This initially peaceful protest escalated into a violent confrontation between Transferees, police and security services. At the entrance gate stones and rocks were thrown at the Nauru Police Force officers and Wilson Security guards who had formed lines in front of the gate. Buildings and vehicles were set alight and significant damage was caused to the RPC.

4. Around 10:00 pm, on 19 July 2013, 153 Transferees including the appellant were arrested by Nauru Police Force and taken into custody. They were subsequently charged with offences of unlawful assembly, riot, arson and assault.

MENENG DISTRICT COURT HEARING

5. The appellant and some 51 others appeared before a specially constituted District Court at Meneng. During the latter part of 2014 as a result of dialogue between counsel for the Transferees and the Office of the Director of Public Prosecutions, Magistrate Bracken gave 'Sentencing Indications' based on agreed facts and a guilty plea to one count of unlawful assembly, contrary to sec. 61 *Criminal Code* 1899.

6. As a result of these sentencing indications 18 Transferees pleaded guilty and in October 2014 they were sentenced to serve in a Community Group for a nominated number of hours; no convictions imposed.

7. Following further discussions between counsel for the Transferees and the Director of Public Prosecutions a further twelve of the remaining nineteen Transferees sought sentencing indication on one count of unlawful assembly contrary to section 61 of the *Criminal Code* 1899. Included in this Second Sentencing Group was the appellant.

8. In December 2014 eight of the group were sentenced to serve in a Community Group for a nominated number of hours; no convictions imposed. The appellant's mitigation was adjourned part-heard to January 2015, as were the cases against the remaining Transferees.

9. In January 2015 *nolle prosequis* were entered in respect of seven Transferees, five others had returned to their country of origin, and the remaining three Transferees sought sentencing indications. These three along with the appellant were sentenced on the 30 January 2015.

10. The charge against the appellant for Unlawful Assembly contrary to section 61 *Criminal Code* 1899 reads:

> "**Ali Alkhazali (UNP053)** and two or more others on the 19th day of July 2013 at the Nauru Regional Processing Centre with a common purpose to stage a demonstration assembled themselves in such a manner as to cause person or persons in the neighbourhood reasonably to fear that **Ali Alkhazali (UNP053)**, and others being so assembled would tumultuously disturb the peace."

11. The learned Magistrate's judgment in relation to the sentencing indication given to the appellant in November 2014 at paragraph 15 has the footnote (3) which reads as follows:

> "The sentencing indication I provided to Mr. Alkhazali, one of the 12, was to the effect that should he plead guilty I would not impose a sentence without conviction."[1]

[1] *R v Abutahoun & Ors* Criminal Case 77 of 2014, at 4

12. In other words the Court indicated to the appellant in November 2014 that it was likely that his guilty plea would result in a conviction being recorded against him. The reasoning for this indication regarding a conviction being recorded is not elucidated.

13. Paragraph 409 - 412 of the judgment of the learned Magistrate reads:

> "409 That Mr. Alkhazali:
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> 409.1 involved himself in the unlawful assembly for a time longer that some others;
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> 409.2 behaved aggressively;
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> 409.3 had direct knowledge of vehicles being deliberately damaged; and
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> 409.4 was a part of a group, members of which threw rocks at the police hitting their shields and protective equipment and a building;
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> makes his offending behaviour more objectively serious than the others in the Second Group of Accused Men. The next most serious are Messes Assad, Mahmoud, Mohamed Almsari, Sabzikar whose conduct is all of a similar seriousness. Thereafter Messes Alipoor, Assad and Subramaniam. The least serious Messes Kanzig and Reza Narimani."
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> 410 As I set out in relation to the First Group Sentenced, sentences must appropriately address specific deterrence, general deterrence, denunciation, punishment and protection of the community. Sentences must also be informed by individuals' personal circumstances including conduct prior and subsequent to the charged offences. None of the Second Group of Accused Men has any prior convictions and other than Mr. Alkhazali, none has any subsequent.
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> 411 A lack of prior and subsequent offences speaks of good character, at least the beginnings of rehabilitation and perhaps general and specific deterrence having been affected by the accused men being charged, dealing with associated criminal proceedings and having felt the sting of immediate incarceration in police cells and jail.[2]

[2] Ibid. at 94

412 Mr. Alkhazali's convictions for serious criminal offences, two counts of indecent assault committed after the charged offences are serious and influence his sentence." (*46 footnote*)[3]

14. Point 412 is referenced to footnote 46, which reads:

"On 23 October 2014, Mr. Alkhazali was convicted of indecent assault which occurred on 3 March and 15 March 2014. He was sentenced to a term of nine months imprisonment."[4]

15. In relation to the conviction for this offence, paragraph 428 of the judgment of the learned Magistrate reads:

"In Mr. Alkhazali's case the effect of a third conviction given the two extant was not addressed in any detail"[5]

16. In summation, paragraph 506 and 510 of the judgment of the learned Magistrate states:

"506 Additionally Mr. Alkhazali is alleged to have been acting aggressively, had direct knowledge that vehicles were being deliberately damaged whilst he was involved in the unlawful assembly. Further, Mr. Alkhazali cannot call on his good conduct in the same way that other of the accused men can; he is currently serving nine months imprisonment for two serious criminal offences - indecent assault. His circumstances require a sentence clearly more significant than imposed on others who pled guilty. His objective criminality is higher. A conviction is necessary in order that the sentence be 'of appropriate severity' in all the circumstances.[6]

510 Pursuant to s25(2) of the *Criminal Justice Act* (1999) with conviction I order:

510.1 Ali Alkhazali to serve in a Community Service Group and perform 140 hours of community service."[7]

[3] Ibid. at 95
[4] Ibid.
[5] Ibid. at 98
[6] Ibid. at 116
[7] Ibid. at 117

17. The sentence on the 30 January 2015 is commensurate with that imposed upon the other 29 Transferees save in the imposition of a conviction; only the appellant had a conviction recorded.

18. During the time the unlawful assembly matters were being dealt with at the specially constituted Meneng District Court, the appellant also appeared in the District Court at Yaren, before Resident Magistrate Garo. On the 23rd October 2014 he was sentenced before that court for indecent assault matters.[8] The appellant was 27 years of age at the time, the complainant 23 years of age. There were two instances of indecent assault two days apart, the assaults comprising of touching over the complainant's clothing. The learned Resident Magistrate stated:

> "*Whilst the court accepts that the defendant as an asylum seeker may have been subjected to harsh conditions before coming to Nauru, this court also has a duty to remind the defendant and others who may be tempted to do as he did, that the nation or community expects respect for its laws. It is the view of this court that a sentence to remind the defendant and others that no court will take lightly acts of indecent assaults as has occurred in the circumstances of this case must be imposed. It is further, the view of this court that a short, sharp, shocking sentence is warranted and will be imposed. The sentence is as follows, Count 1: 3 months imprisonment Count 2: 6 months imprisonment. Terms of imprisonment to be served consecutively. Total term of Imprisonment 9 months.*"[9]

RELEVANT STATUTORY PROVISIONS

19. *Criminal Code of Queensland* 1899 (1st Schedule) Adopted
Unlawful Assemblies: Breaches of the Peace

> 61. Where 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 neighborhood 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

[8] *R v Ali Alkazali*, Nauru District Court (Criminal Case 40 of 2014)
[9] Ibid.

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 aforesaid.

....

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.

Punishment of an Unlawful Assembly

62. Any person who takes part in an unlawful assembly is guilty of a misdemeanor, and is liable to imprisonment for one year.

Punishment of a Riot

63. Any person who takes part in a riot is guilty of a misdemeanor, and is liable to imprisonment with hard labour for three years.

20. *Appeals Act* 1972

s.14 Determination of Appeal by the Supreme Court in ordinary cases

(1) At the hearing of an appeal the Supreme Court shall hear the appellant or his barrister
and solicitor, pleader, if he appears, and the respondent or his barrister and solicitor or pleader, if he appears.

(2) The Supreme Court on any appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that:

(a) it is unreasonable or cannot be supported having regard to the evidence;

(b) any question of law has been wrongly decided; or

(c) there was a miscarriage of justice,

and in any other case shall dismiss the appeal.

Provided that the Supreme Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in

favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

Subject to the special provisions of this Act, the Supreme Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or, if the interests of justice so require, order a new trial.

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

21. *Criminal Justice Act* 1999

22 Community Work Orders

(1) Where a person who is not less than 13 years of age is found guilty of an offence punishable by imprisonment, the Court may make a community service order ordering him to serve in a Community Service Group for a period of not exceeding 12 months;

(2) A community service order may be made irrespective of whether or not the Court convicts the offender of the offence.

(3) Where the Court makes a community service order in respect of a person, it may also impose upon him a fine or other monetary penalty authorised by law, but shall not impose any other sentence.

GROUNDS OF APPEAL

22. The appellant filed his appeal against the sentence, the petition outlining two grounds:

(1) The learned Magistrate erred when he failed to consider the Appellant as a first offender;

(2) The learned Magistrate erred when he failed to apply the principle of parity to the appellant.

23. Written submissions have been filed for the appellant and respondent.

24. The appellant is 27 years of age. He was released from his term of imprisonment in relation to the indecent assault convictions on 23 July 2015. The appellant has successfully completed the 140 hours of community service ordered by the learned Magistrate in the matter subject of this appeal. Others sentenced at the time were given a range of 96 - 140 hours of community service.

25. Counsel for the appellant submits that on the 19th July 2013, the date of the commission of the offence of unlawful assembly, the appellant had no previous convictions. The offences of indecent assault for which the appellant was found guilty at trial were committed in March 2014. These offences were dealt with before the learned Resident Magistrate on the 23 October 2014 and a total sentence of nine months imprisonment was imposed.

26. When the appellant was before the learned Magistrate for these matters he had convictions recorded against him for offences that occurred *after* the commission of the unlawful assembly offence, the subject of this appeal.

27. Counsel for the appellant submits that had the Learned Magistrate treated the appellant as a first offender then no conviction would have been recorded against him for the unlawful assembly offence, in line with the sentences imposed on the other accused.

28. Counsel for the respondent draws the Court's attention to paragraph 410 in the learned Magistrate's judgment:

> *"None of the Second Group of Accused men has any prior convictions and other than Mr. Alkhazali, none has any subsequent."*[10]

This Court is not persuaded that the learned Magistrate failed to treat the appellant as a first offender, and the first ground of appeal fails.

29. The second ground of appeal raises the issue of parity. Here the argument on behalf of the appellant is that the learned Magistrate failed

[10] *R v Abutahoun & Ors* Criminal Case 77 of 2014, at 94

to apply the principle of parity; that the offending behaviour was not any more serious than other accused who had been ordered to serve the same number of Community Service hours without a conviction being imposed against them.

30. Counsel refers to the case of *Bulitaiwaluwalu v The State*[11]. There the court outlined the questions to be considered when looking at parity are *"whether...something had gone wrong with the administration of justice....where the disparity is unjustifiable and gross."*[12] In that case the appeal was dismissed and the disparity found to be justified based on appellant's culpability being higher than that of the co-accused.

31. Counsel submits that the sentence has caused the appellant reasonable grievance as notwithstanding the other accused pleading guilty to the same charge, no one else was convicted; further not to take into account the appellant being a first offender was unjustifiable and gross.

32. Appellant's counsel submits that disparities of sentence are a common ground of appeal, but not disparities of conviction. A total of 30 accused were sentenced and no convictions were entered against any, save the appellant.

33. Counsel for the respondent alleges that the appellant's offending is to be regarded at the higher end of the scale with him behaving aggressively, having knowledge of vehicles being deliberately damaged and being part of the group which threw rocks at the Nauru Police Force, these striking their shields and protective equipment.

34. Counsel for the respondent further argues that the appellant pleaded guilty to the offence of unlawful assembly in knowledge that the sentence would include a conviction[13]. With respect, the appellant pleaded guilty on the basis of the Second Sentencing Indication. The indication given by the learned Magistrate is just that, an indication, and the Court is not necessarily bound by an indication given previously.[14]

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[11] *Bulitaiwaluwalu v The State* [2014] FJCA 203
[12] Ibid. at para [6]
[13] *R v Abutahoun & Ors* Criminal Case 77 of 2014, at 70
[14] *R v Abutahoun & Ors* Criminal Case 77 of 2014, at 7 and 8

35. Counsel for the respondent contends that the learned Magistrate did apply the principle of parity to the appellant and that the recording of a conviction was appropriate in the circumstances of the appellant's prospects of rehabilitation and his objective criminality. Counsel refers the case of *Lowe v The Queen* [1984] to the Court:

> *"There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. Obviously where the circumstances of each offender or his involvement in the offence are different then different sentences may be called for but justice should be even-handed and it has come to be recognized both here and in England that any difference between the sentences imposed upon co-offenders for the same offence ought not to be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been done."*[15]

36. It is clear from the judgment of the learned Magistrate that the convictions for indecent assaults (sentenced on the 23rd October 2014), and the appellants aggressive behaviour and involvement in the unlawful assembly led to the conclusion that the appellant's objective criminality was higher than that of the other accused. In imposing a more severe sentence the learned Magistrate referred to additional factors germane to the appellant:

> *"Further, Mr. Alkhazali cannot call on his good conduct in the same way that other of the accused men can; he is currently serving nine months imprisonment for two serious criminal offences - indecent assault.*
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> ...
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> *Mr. Alkhazali is alleged to have been acting aggressively, had direct knowledge that vehicles were being deliberately damaged whilst he was involved in the unlawful assembly."*[16]

37. The offence of unlawful assembly evolves into that of an offence of riot by the actions of those assembled. Here the appellant (and others) pleaded guilty to an offence of unlawful assembly singular. The circumstances to be taken into account in sentencing for the lesser

[15] *Lowe v The Queen* [1984] 154 CLR 606, at 623
[16] *R v Abutahoun & Ors* Criminal Case 77 of 2014, at 116

offence only are well established. Gibbs CJ in *De Simoni*[17] outlines the general principle:

> *"..that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted."*[18]

38. A question for the Court is whether these actions of the appellant are ones which fall within an offence of unlawful assembly in which case they can be taken into account in sentencing, or are they more properly actions attributable to an offence of riot, in which case they cannot be considered as aggravating features for the unlawful assembly offence.

39. Acting aggressively and knowledge of deliberate damage being done at the time, arguably falls into the sphere of the offence of riot. Following *De Simoni*[19], the appellant can only be sentenced for what he has been found guilty of, in this case unlawful assembly and actions pertaining to the offence of riot cannot be used to aggravate the offence for sentencing purpose:

> *"..a judge, in imposing sentence, is entitled to consider all the conduct of the accused , including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence"*[20]
>
> *"...*
>
> *where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty."*[21]

40. How a sentence is to be determined has been extensively aired by the courts over the years. Mason J stated in *Lowe v The Queen*[22]

> *"Generally speaking a sentence within a limited range of years is appropriate to the circumstances in which the offence was*

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[17] *R v De Simoni* [1981] CLR 383
[18] Ibid. at 389
[19] Ibid.
[20] Ibid. at 389
[21] Ibid. at 392
[22] *Lowe v The Queen* [1984] 154 CLR 606, at 612

committed and to the character, antecedents and conditions of the offender."

41. The antecedents of the offender refer to the "*offender's previous history and past record*"[23]. The court that sentenced the appellant for the unlike matters of indecent assaults could rightly have found that the offences committed whilst on bail were aggravating features appropriate for consideration.

42. When looking at parity this Court is mindful of the matters stated by the Lord Chief Justice in *R v Stroud*[24] when referring to a previous matter of *Brown* (unreported):

> "*The practice of the Court to give effect to what is popularly called the 'disparity argument' is itself a relatively new feature in the practice of this Court. It arises only when the would be appellant has received a sentence which the Court thinks proper in itself but which is so disparate when compared with other sentences passed* ***at the same time*** *that a real sense of grievance may thereby be engendered in the person upon whom it is passed. It was never intended that a sentence should be reduced on the basis of disparity unless there was such a glaring difference between the treatment of one man as compared with another that a real sense of grievance would be engendered in the case of a man suffering the more serious penalty.*"[25]

43. Mason J expounded further on the need for the perception of the disparity to considered from the point of an independent observer:

> *"The sentence under appeal may be free from error. And the justification which the courts assign for intervention in the case of disparity is that disparity engenders a justifiable grievance in the applicant and an appearance of injustice to that impassive representative of the community, the objective bystander.*"[26]

44. The appellant was found in the Second Plea Summary to be implicated for a length of time only superseded by that of the accused Zein Ali[27].

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[23] Stroud's Judicial Dictionary, 144
[24] *R v Stroud* (1977) 65 Cr.App.R. 150
[25] Ibid. at 153.
[26] *Lowe v The Queen* [1984] 154 CLR 606, at 613
[27] *R v Abutahoun & Ors* Criminal Case 77 of 2014, at 73

When sentencing the accused Zein Ali, the learned Magistrate ordered 120 hours of Community Service without a conviction recorded[28] noting:

> *"Allegations made against Mr. Zein Ali in the Third Plea Summary are much less serious than those made in the Second Plea Summary. No explanation was provided."*[29]

45. The appellant was ordered to serve 140 hours, 20 hours more than that imposed upon Zein Ali, whose involvement was found to extend for a longer period than the appellant's involvement[30]. The hours ordered to be served by the appellant was in the higher tariff group of that ordered for the 30 defendants sentenced.

46. The learned Magistrate is entitled to take into account the subsequent conviction when looking overall at the appellants conduct in terms of rehabilitation, remorse and general good behaviour since the commission of the offence falling to be sentenced. Additionally it is open to him to find overall that the appellant's objective criminality was higher than that of the other accused (including that of Mr. Zein Ali).

47. What this Court is asked to consider in the second ground of appeal is whether the learned Magistrate failed to properly apply the principle of parity. Put simply, what was it that set this appellant apart from the other 29 men who also fell to be sentenced for the offence of unlawful assembly, such that the appellant should have a conviction recorded against him and not recorded against the others?

48. This Court is mindful that in considering the sentence of the appellant the matter pleaded to does not include acts the basis of the more serious offence of riot. If the appellant's overall offending and the circumstances placed him at the higher end or even most serious of the offenders in the group of 30 men, then this could have been reflected in an order for increased hours to be served by way of Community Service.

49. To the question as to whether the recording of a conviction in such circumstances of offending is '*unreasonable, unjustifiable or gross*' for this type of case, the answer of the Court is 'No'.

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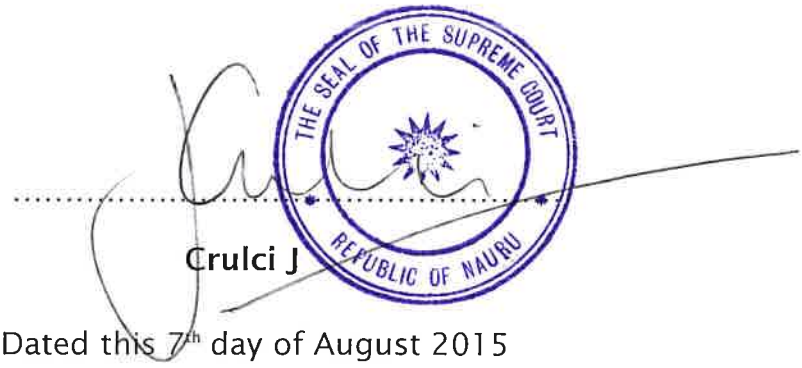
[28] Ibid. at 116, 117
[29] Ibid. at 112
[30] *R v Abutahoun & Ors* Criminal Case 77 of 2014, at 73

50. To the question as to whether the singling out the appellant in all the circumstances as the only one of the 30 accused sentenced to have a conviction recorded, and whether this would in all the circumstances create a justifiable grievance in the appellant and an appearance of injustice when viewed by an objective bystander, the answer is 'Yes'.

51. The second ground of appeal succeeds. The appeal is allowed and the sentence is quashed. The Court sentences the appellant to serve a period of 165 hours in a Community Service Group. No conviction recorded. The appellant has successfully served 140 hours to date; 25 hours remains to be served.



Crulci J

Dated this 7th day of August 2015