IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 20 of 2020

BETWEEN

REPUBLIC

AND

(1) JOHN-FIJ AGEGE
(2) BILLY KAKIOUEA
(3) LACHLAN BRECHTEFELD
(4) MASON TANNANG
(5) NAZON HUBERT
(6) ROBSON TEMAKI

Defendants

Before : Fatiaki CJ.

Date of Hearing : 10,11,12,13, 14 May and 19 May, 2021
Date of Verdict : 3 August, 2021

CITATION : Republic v Agege and others *(Meneng '6')*

CATCHWORDS: *"arrest without warrant"* ; *"in lawful custody"* ; *"under arrest"* ; *"harm"* ; *"physical harm"*; *"self-defence"*; *"intimidation & threat"* ; *"public nuisance"* *"public place"* ; *"joint commission"* ; *objectionable physical contact"*

LEGISLATION : ss.25, 32, 51, 77A, 77(a)(b)(c)(d)(i), s.242(a)&(b) ; s.231(a)(ii)&(b) ; ss.248 & 270 Crimes Act 2016 ; Article 5 Constitution ; ss.10(4) & 100 Criminal Procedure Act 1972.

CASES CITED : Republic v Jeremiah [2021] NRSC 21 ; Adeang v DPP [1982] NRSC 4 ; DPP v Orum [1988] 3 All ER 449 ; R v Cleghorn [1967] 2 QB 584 ; Republic v Agigio [2020] NRSC 17; Rex v Keane [1921] NZLR 581; Christie v Leachinksy [1947] AC 573 ; Murray v Ministry of Defence (Northern Ireland) [1988] 2 All ER 521 ; Dillon v The Queen [1982] AC 484 (PC); Attorney General v PYA Quarries Ltd [1957] 2 QB 169 ; Harper v Haden & Sons [1993] 1 Ch 298; Holgate-Mohammed v Duke [1984] 1 AC 437

APPEARANCES:

Counsel for the Prosecution : R.Talasasa (DPP)
Counsel for the 1st, 2nd, 4th and 6th Defendants : R. Tagivakatini (PLD)
Counsel for the 3rd and 5th Defendants : E Soriano

VERDICT

INTRODUCTION

1. All six (6) defendants are charged with a series of offences including Intimidating and Causing Harm to Police Officer, Obstructing Public Servant and Assisting Escape from Lawful Custody contrary to various provisions of the Crimes Act 2016. The offences allegedly occurred at Monty Dabwido's residence in Meneng District when a team of police officers had gone to arrest a suspect '**Smart Hubert**' in order to escort him to the Police Station.

BACKGROUND FACTS

2. On the early morning of 1 November 2020, at about 6.30 am a report was lodged by Police Reserve Jenko Karl who was on guard duty at the President's residence at Meneng, that a youth, Smart Hubert, was causing a disturbance outside the President's residence house while riding a motor bike. Following the report, two (2) police mobile patrol units were despatched to attend the report at Meneng. Their "*mission*" was to locate and arrest Smart Hubert and escort him back to the Police Station. All officers were dressed in police uniform.

3. The first patrol unit **NPF 116** carried Senior Constable Dunstal Ika, Senior Constable Kane Rykers, Police Reserves Romage Obeta and Francis Togagae who boarded a vehicle Toyota Landcruiser.

4. The second patrol unit **NPF 105** passengers were Senior Constable Christopher Amwano, Constable Zimran Caleb, Police Reserve Braveman Atto, and Constable Taekauwea Taumea who travelled in a Toyota Hilux Twin cab with "*can cage*".

5. On reaching Monty Dabwido's residence in Meneng District the suspect Smart Hubert was spotted in a group of men drinking alcohol. Constable Teakauwea Taumea alighted from NPF 105 approached the group, arrested Smart Hubert and escorted him to and seated him inside the "*can cage*" at the rear tray of NPF 105. At this time a group of men including the five (5) defendants namely John Fij Agege, Lachlan Brechtefeld, Mason Tannang, Nazon Hubert, and Robson Temaki advanced towards the '*can cage*' and started demanding the release of Smart Hubert. A '*melee*' ensued between the group and the police officers who had formed a protective line in front of the "*can cage*" , which culminated in the opening of the "*can cage*" door and the escape of Smart Hubert from police custody ("*the first escape*").

6. After returning to the Police Station empty-handed, the patrol units re-grouped and returned to arrest Smart Hubert. This time, Smart Hubert was spotted riding a motorbike in Meneng district. The mobile patrol chased him up to Meneng Terrace and when it closed in on him, Smart Hubert jumped off his motorbike and ran towards the main road near Meneng Church. Several police officers chased Smart Hubert on foot and as they were about to catch up to him, Billy Kakiouea arrived on a motor bike, picked Smart Hubert and drove away from the pursuing policemen ("*the second escape*").

THE CHARGES

7. All six (6) defendants were arrested on the next day and the DPP filed an Information jointly charging them with the following offences:

Count 1
Statement of Offence

Intimidating or Threatening a Police Officer : Contrary to s.77A of the Crimes (Amendment) Act 2020

Particulars of Offence

John-Fij Agege, Lachlan Brechtefeld, Mason Tannang, Nazon Hubert and Robson Temaki on 1st November 2020 at Meneng District, in Nauru intimidated **Christopher Amwano**, a police officer in the execution of his duty ;

Count 2
Statement of Offence

Causing Harm to Police Officer : Contrary to s. 77(a)(b)(c) (d) (i) of the Crimes Act 2016

Particulars of Offence

John-Fij Agege, Lachlan Brechtefeld, Mason Tannang, Nazon Hubert and Robson Temaki on 1st November 2020 at Meneng District, in Nauru, intentionally engaged in conduct and the conduct caused harm to **Dunstal Ika** a police officer without his consent ;

Count 3
Statement of Offence

Obstructing Public Official : Contrary to s.242(a) and (b) of the Crimes Act 2016

Particulars of Offence

John-Fij Agege, Lachlan Brechtefeld, Mason Tannang, Nazon Hubert, and Robson Temaki on 1st November 2020 at Meneng District, in Nauru obstructed, hindered, intimidated or resisted **Taekauwea Taumea** in the exercise of his function as a police officer ;

Count 4
Statement of Offence

Assist Escape from Custody : Contrary to s. 231(a)(ii) and (b) of the Crimes Act 2016

Particulars of Offence

Billy Kakiouea, on 1st November 2020 at Meneng District, in Nauru, assisted Smart Hubert to escape from lawful custody and intended to assist **Smart Hubert** to escape. (**Note**: This charge relates only to "*the second escape*")

8. Notable by its absence in the Information, is a count jointly charging the five (5) named defendants in Counts 1, 2, and 3 with an offence of Assisting Escape from Custody which is the most obvious and proper charge given "*the first escape*" by Smart Hubert.

9. Nor is there a joint charge against the five (5) defendants acting jointly against **all** of the police officers who were present at Monty Dabwido's residence , rather than, only against three (3) selected officers consistent with the prosecution's reliance on the "*joint commission*" principle.

THE LAW

CONSTITUTION

Protection of personal liberty

5(1) ***No person shall be deprived of his personal liberty, except as authorized by law.....;***

(2) ***A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention*** .....

CRIMINAL PROCEDURE ACT 1972

Arrest without warrant

10(4) ***Where a police officer, with reasonable cause, suspects that a cognisable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence.***"

10. In the exercise of this power, the relevant "*cognisable offence*" must be identified in ordinary language without any need to identify the particular provision contravened.

Mode of Making Arrest

11(1) ***In making an arrest the person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.***

(2) A person may use such force as is reasonable in the circumstances ..... or in effecting, or assisting in, the lawful arrest of offenders or suspected offenders .....

(3) The last preceding subsection shall replace the rules of the common law on the question when force used for a purpose mentioned in that subsection is justified by that purpose.

11. In this instance "*the circumstances*" that authorise the use of reasonable force to effect an arrest are :
"*....in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.*"

CRIMES ACT 2016

25 Burden of Proof on Prosecution

(1) The prosecution has a legal burden of proving each element of the offence.

(2) The prosecution also has a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) The legal burden of proof on the prosecution must be discharged beyond reasonable doubt, unless the written law in which the offence is set out specifies a different standard of proof."

12. The provisions of this section comprise immutable fundamental principles that are applicable to a criminal prosecution and which must be borne in mind by the Court in considering its verdict.

32 Joint Commission

(1) A person commits an offence if:

(a) a person enters into an arrangement with 1 or more other people; and

(b) the person and at least 1 other party to the arrangement intend to commit an offence and to assist one another to commit the offence; and

(c) either:

(i) an offence is committed in accordance with the arrangement; or
(ii) an offence is committed in the course of carrying out the arrangement."

(2) The offence is punishable as if the person had committed the offence mentioned in subsection (1)(b).

(3) ***For subsection (1)(b),*** *to prove that the parties to the arrangement intend to commit an offence,* ***it is not necessary to prove that the parties intend to commit a particular offence.***

(4) ***For subsection (1)(c)(i),*** *an offence is* ***committed in accordance with an arrangement*** *if:*

(a) the conduct of 1 or more parties in accordance with the arrangement makes up the conduct required for an offence (the 'joint offence ') of the same type as the offence agreed to; and

(b) to the extent that a physical element of the joint offence consists of a result of conduct— the result arises from the conduct engaged in; and

(6) ***An arrangement:***

(a) may consist of a non-verbal understanding; and
(b) may be entered into before, or at the same time as, the conduct making up any of the physical elements of the joint offence was engaged in.

13. Critical to the application of this section is the identification and articulation from the evidence of the "*arrangement*" entered into or existing at the relevant time between two (2) or more defendants. Furthermore, the "*arrangement*" must be "*to commit an offence*" or to participate in a criminal activity. Such an arrangement may include "*a scheme, agreement, understanding or undertaking whether express or implied*" (***see***: Section 8 of the Crimes Act)

270 Arrest without warrant—Police

(1) A police officer may arrest a person without warrant if the police officer:

(a) suspects, on reasonable grounds, that the person has committed, an offence against this Act; and

(b) considers that the arrest is reasonably necessary.

(2) For subsection (1)(b), an arrest may be considered reasonably necessary for 1 or more of the

following reasons:

"*(a) because the police officer reasonably suspects the offence is punishable by imprisonment for more than 5 years;*
(b) to stop the person committing, or repeating, the offence or another offence;
(d) to ensure the person appears before a court;
(e) to obtain evidence relating to the offence;
(g) to protect the safety or welfare of any person;
(i) to prevent the suspect from fleeing from the police or the location of an offence."

14. The arresting officer acting under section 270 of the Crimes Act must have in mind at the time of the arrest, "*the alleged offence committed against* (the Crimes Act)" and he should inform the person at the time of arrest, the factual basis and/or nature of the particular offence allegedly committed by him/her. Whatsmore the officer should be able to justify (if asked) why he considers that the arrest is "*reasonably necessary*".

51 Self-Defence

(1) A person is not criminally responsible for an offence if the person engages in the conduct constituting the offence in self-defence.

(2) A person engages in conduct in self-defence only if:

"***(a) the person believes the conduct is necessary:***

(i) to defend (Smart Hubert)***; or***
(ii) to prevent or end the unlawful imprisonment of (Smart Hubert),

(b) the conduct is a reasonable response in the circumstances as the (named defendants) ***perceives them.***"

15. Notable in the above provision is the entitlement of a person to engage in criminal conduct which is reasonably necessary "*self-defence*" of another person who is being assaulted or who is unlawfully arrested and/or being wrongfully detained as perceived by the defendants as rescuers.

248 Public Nuisance

(1) A person commits an offence if:

(a) ***the person engages in conduct in a public place*** *or within view of a public place; and*
(b) ***the conduct amounts to a public nuisance.***

Penalty: 6 months imprisonment.

(2) ...., conduct amounts to a ***'public nuisance'*** *if the conduct:*

(a) ***unreasonably interferes, ..., with the peaceful use of a public place and involves behaviour that:***

(i) ***is disorderly;*** *or*
(v) ***is drunken***

(3) In a prosecution for an offence against this section, evidence of more than 1 kind of behaviour mentioned in subsection (2)(a) may be relied on to prove the offence.

(4) ***A police officer may charge a person with an offence against this section despite the absence of a complaint by another person.***

(5) In this section:

*'**public place' means a place** (whether or not covered by water) **or premises that is open to the public, or is used by the public**, whether or not:*

*(b) **the place or premises is ordinarily open or used by the public;**"*

16. The importance of the above provision in this case is that section 270 (*op cit.*) permits an arrest without warrant where there are reasonable grounds to suspect an offence is being or has been committed against the Crimes Act by the person being arrested and includes an offence of "*public nuisance*" contrary to section 248.

17. Although not directly mentioned by any of the police officers or in DPP's written submissions, an offence of causing excessive noise on a public road does exist, but, was not charged in the Information. In any event, Police Reserve Jenko Karl, frankly admitted that he did not consider that Smart Hubert had committed any such offence in passing by the President's House.

PROSECUTION CASE on COUNT 1

18. The elements that the prosecution must prove beyond a reasonable doubt on Count 1 of Intimidating or Threatening a Police Officer contrary to s. 77A of the Crimes (Amendment) No.2 Act 2020 are :

(a) the named defendants ;
(b) "*intimidated*" or threatened a police officer ;
(c) "*Senior Constable Christopher Amwano*" was the police officer involved ; and
(d) he was "*acting in execution of his duty*" at the time.

19. The actions under "*element (b)*" includes, gathering in a group that out-numbered the police officers, abusing the officers and forcefully pushing against them until they succeeded in gaining access to the "*can cage*" in which Smart Hubert was detained. Then, unbolting the door of the "*can cage*" and resisting the officers attempts to restrain Smart Hubert including tossing a chair into the "*melee*". By these acts of the defendants, Smart Hubert got out of the "*can cage*" and escaped from police custody.

20. Prosecution called Senior Constable Christopher Amwano (PW1) to prove the charge under Count 1 which specifically identifies him as the affected police officer. The second element of the offence requires that there should be "*intimidation*" or a "*threat*" made or given to a police officer in execution of his duties. In this regard, Section 8 of the Crimes (Amendment) No.2 Act 2020 defines '*intimidation*' or '*intimidates*' as meaning :

"*.....**the use of violence or threats to compel a person to do or abstain from doing any act which he or she has a legal right to do or abstain from doing***"

Notable in the above definition is the requirement, that the person who was affected had a "*legal right*" to do or abstain from doing the act that he was coerced into or prevented from doing. This requirement must be proved and articulated by the prosecution as part of its case.

21. **Senior Constable Christopher Amwano** (PW1) stated that he felt "*..a bit frightened cos* (he did not) *want to get hurt"* and "*..was afraid for* (his) *safety and for the others around* (him)". Owing to the conduct of the defendants he was unable to execute his duty to arrest and escort Smart Hubert to the Police Station. He also testified that all four (4) named defendants approached and demanded the release of Smart Hubert from the "*can cage*" of their police vehicle. In doing so, the defendants had used abusive language such as '*bastard*' and '*ugly*' towards him and other police officers who had formed a barrier or cordon between the "*can cage*" and the defendants.

22. Senior Constable Christopher Amwano identified **Lachlan Brechtefeld** as the person who grabbed his shirt and pushed him away from the "*can cage*" door but he could not identify any other defendants who had allegedly threatened or intimidated him on that day. He also stated that during the "*melee*", a plastic chair hit his head but he did not see who threw it.

23. Additionally, **Constable Dunstal Ika** (PW4) confirmed that Lachlan Brechtefeld had pushed both Senior Constable Christopher Amwano and Constable Zimran Caleb. In cross examination however, when video footage was shown to Constable Dunstal Ika, he admitted that it was not clear whether Lachlan Brechtefeld was pushing Zimran Caleb or whether he himself got pushed by police officers when the defendants were trying to release Smart Hubert from the "*can cage*" .

24. DPP also relied on **Kirsty Karl** (PW7) who produced a USB containing a video recording of part of the incident. She identified the device and tendered it as **Exhibit P(1)**. The video recording which lasted for almost 3 minutes was played and it shows a group of people including the defendants acting in a somewhat intimidating and threatening manner toward the police officers at the back of "*can cage*" vehicle.

PROSECUTION CASE on COUNT 2

25. The elements that the prosecution must establish against each of the defendants in Count 2 : Causing Harm to Police Officer contrary to s.77(a)(b)(c)(d)(i) Crimes Act 2016 are as follows:

    (a) The defendants ;
    (b) intentionally "*engaged in conduct*" ;
    (c) which caused "*harm*" to Constable Dunstal Ika ;
    (d) who did not consent to such conduct ; and
    (e) the defendants believed Constable Dunstal Ika was a police officer ;

26. In this instance the prosecution relies on the testimony of **Constable Dunstal Ika** (PW4). He testified that Smart Hubert punched him in the face with a steel "*knuckle duster*", however, Smart Hubert is not charged in this case. He also stated that some (unidentified) assailant(s) punched him from behind during the '*melee*' between the police and the defendants outside the "*can cage*". In both instances there was undoubtedly, some "*physical contact*" with

Constable Dunstal Ika. On the other hand, all defendants denied punching or pushing Dunstal Ika.

27. Be that as it may, the prosecution did not produce any medical evidence to establish the "*harm*" allegedly caused to Constable Dunstal Ika which might be expected given his claim of being punched in the face with a steel "*knuckle duster*".

28. The DPP submitted however that the so-called "*harm*" in the charge refers to "*physical harm*" which, by definition, includes at its lowest level :

> "***(v) any physical contact with a person to which the person might reasonably object in the circumstances***..."

PROSECUTION CASE on COUNT 3

29. The elements that must be proved beyond a reasonable doubt in Count 3 of Obstructing Public Official contrary to s. 242(a) & (b) of the Crimes Act 2016 are :

(a) the named defendants ;
(b) "*obstructed*" or resisted "*Constable Taekauwea Taumea*"
(c) while he was exercising his function as a '*public official*' ; and
(d) the defendants believed him to be a '*public official*'.

30. A *"public official"* is defined in the Crimes Act as meaning:

"...an official ....acting in a public official capacity for the Republic, and includes the following:

(e) ***a police officer***;"

31. Plainly, Constable Taekauwea Taumea who was dressed in a police uniform at the relevant time is, by definition, a "*public official*" exercising his functions as "*a police officer*" when he arrested Smart Hubert and detained him in the "*can cage*". It is common ground that in performing that duty he was not obstructed or hindered by anyone nor had Smart Hubert resisted his arrest.

PROSECUTION CASE on COUNT 4

32. On this charge which relates to "*the second escape*", the elements that the prosecution must establish beyond a reasonable doubt on Count 4 : Assist Escape from Custody contrary to s.231(a)(ii)(b) of the Crimes Act 2016 are:

(a) Billy Kakiouea ;
(b) assisted Smart Hubert to escape ;
(c) from "*lawful custody*" ; and
(d) he intended to assist Smart Hubert to escape.

33. There are two (2) pre-requisites in the offence. First, the person being assisted must be "*in lawful custody*" and secondly, the person assisting intended that the person being assisted should escape from such custody.

34. The Particulars of this offence merely alleges that Billy Kakiouea assisted Smart Hubert to escape from "*lawful custody*", without distinguishing between the two (2) "*escapes*" involving Smart Hubert which was an integral part of the prosecution's case.

35. The evidence is clear that it is the "*second escape*" that is the subject matter of Count 4 where Billy Kakiouea intervened while Smart Hubert was being pursued by a police officer beside the Meneng Church. The prosecution must also prove that Billy Kakiouea knew that Smart Hubert was "*in lawful custody*" and he also intended to assist Smart Hubert to escape therefrom.

36. Besides the pursuer's testimony, the prosecution also relies on the extended definition of "*lawful custody*" in s.228 of the Crimes Act 2016 which relevantly provides :

"a person is in lawful custody if the person is
(a) under arrest"

DEFENCE CASE

37. Following the closure of the Prosecution's case, defence counsels made a "*no-case*" submission after which, the Court ruled there was a case to answer against five (5) of the six (6) named defendants and they were each put on his defence in respect of the charge(s) he faced in the Information. The DPP accepted however, that there was no evidence against the 6th defendant and **Robson Temaki** was acquitted on Counts 1, 2, & 3 and ordered to be released forthwith. Defence counsels then called the defendants to testify.

38. **John-Fij Agege** (DW1) told the Court that when police arrested Smart Hubert, he was in one of the drinking group that approached Constable Taekauwea Taumea to inquire about the arrest of Smart Hubert. Later on he got preoccupied in controlling his brother "*Diriko*" who was getting "*out of control*" and behaving in a very aggressive manner like a drunkard. He also stated that police came to their home at Meneng asking for "*Diriko*" and when he was not found, they arrested him instead. John-Fij Agege gave the following evidence before the Court:

Q: When your group approached Taekauwea Taumea what was your intention?
A: To ask him why

Q: Anyone shout at Taekauwea Taumea ?
A: No.

DW1 was shown the video recording at **2.03 sec** and cross examined as follows:

Q: See your image. It appears your left side is leaning forward with left hand outstretched towards the cage?
A: No.

Q: What were you doing there?
A: I was looking inside the cage.

Q: Put you moved in to help Smart Hubert come out of the cage?
A: Not correct.

Q: Put you were actively involved in the freeing of Smart Hubert from the "can cage" ?
A: No.

Q: In releasing Smart Hubert you caused harm to Dunstal Ika without his consent?
A: No

Q: You obstructed Taekauwea Taumea in the exercise of his duties?
A: No

Re-examined by his counsel DW1 said:

Q: Before cage opened what were you doing by standing there?
A: Nothing, just standing there looking inside "can cage".

39. **Billy Kakiouea** (DW2) who was charged alone in Count 4 was consistent in his testimony and stated that he was with Smart Hubert at Monty Dabwido's residence when the arresting officer Constable Takeauwea Taumea came to their drinking group and asked Smart Hubert for a person named "**DJ**". He said the "*Police did not even know the name of the person they were talking to*". When police approached Smart Hubert it was Meshak who intervened and said he is not "**DJ**" he is "**Smart**". Billy Kakiouea also said he then left the place and did not see Smart Hubert getting into the "*can cage*". The relevant excerpt from Billy Kakiouea's testimony is as follows:

Q: Where did you go?
A: I went home

Q: After went home then what happened?
A: As I was going downhill, I saw Smart who hitched a ride so I took him and we left.

Q: On what?
A: On my motorbike.

Q: How was Smart Hubert hitching a ride? What did he do?
A: He was running, police were chasing him and he asked me to take him and I took him.

Q: On foot or on wheels?
A: They were running.

Later he said :

Q: Why did you pick Smart Hubert from Meneng Church?
A: The reason I took him because when police came to Dabwido's residence they asked for "DJ", so I didn't know where or why they were after Smart Hubert.

Q: How many police officers approximately chasing?
A: ***There was just one Francis.***

Q: Talk to him when he was chasing Smart Hubert?
A: No.

40. **Lachlan Brechtefeld** (DW3) testified that he was with Smart Hubert throughout the night of 30 October and early morning of 1st November 2020 celebrating a birthday at Alamanda's oval and then they left for Monty Dabwido's residence where the drinking continued. He testified that later, when police arrived and arrested Smart Hubert, he approached Senior Constable

Christopher Amwano and inquired why they were arresting Smart Hubert but did not get any satisfactory response.

41. Only after Smart Hubert escaped from the "*can cage*" then Constable Zimran Caleb told him that Smart Hubert had allegedly caused a disturbance at the President's residence. He denied being involved in pushing and holding the collar of Senior Constable Christopher Amwano.

42. In his examination-in-chief Lachlan Brechtefeld explained his involvement as follows:

Q: Why did you keep asking about Smart Hubert?
A: Because we came from Alamanda's place together and suddenly they were arresting him. There was no loud music or anything.

Then after being shown the video recording of the incident, he said :

Q: How would you describe the boys reaction in the video?
A: It was the police who started the angry tone of the incident towards the people there.

Q: Why did you say that?
A: Because when I went to ask I also see Christopher's tone and he reacted angrily and also the other officers were angry and pushing the other boys.

Later in re-examination he said :

Q: You said Christopher Amwano was angry it showed in his tone and face. Did he look frightened to you when he was holding onto you?
A: No he did not appear frightened."

43. **Nason Hubert** (DW4) in his examination in-chief denied all charges of obstructing Constable Taekauwea Taumea, causing harm to Constable Dunstal Ika, and intimidating or using violence on Senior Constable Christopher Amwano. He said the reason he intervened was because Constable Taekauwea Taumea grabbed Smart Hubert by his shirt and the way he was pushed into the "*can cage*" without being told any reason for his arrest. When asked who opened the door of "*can cage*", Nason said it was "*Denton*" (who is not before the Court) and another unknown person who opened the door of the "*can cage*".

44. At the end of Nason Hubert's evidence defence counsel closed the case for the defendants and the Court adjourned for counsels to prepare closing addresses.

CALLING of SMART HUBERT :

45. On the resumption of the trial, the Court advised counsels that it would be calling Smart Hubert as a witness in the exercise of the Court's power under Section 100 of the Criminal Procedure Act 1972 which relevantly provides :

"*Any Court may at any stage of any proceeding under this Act, of its own motion ..., summon any person as a witness, ...and the Court shall,... examine any such person if his evidence, ... appears to it essential to the just decision of the case:*

Provided that the prosecutor, ... (and the accused)*.....shall have the right to cross-examine any such person,...* ".

46. Although there was no objection from the DPP or defence counsels, the court was mindful that no unfairness or prejudice should be caused to the parties in calling the witness and the Court was guided by the decision in R v Cleghorn (1967) 2 QB 584 which **held** :

"It is abundantly clear that it is the right of a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the State, that he should have a right to call a witness who has not been called by either party. It is clear of course, that the discretion to call such a witness should be carefully exercised ....."

However, when.....the witness is called only at the end of the defence's case, ...that should only be done in cases where no injustice or prejudice could be caused to a defendant, and for that purpose (the Court) *laid down a rule of practice that is in general, it should only be done where some matter arises ex improviso."*

47. The Court was very much aware of the fact that all of the witnesses in the case referred to the name of "*Smart Hubert*" including the defendants and it was his alleged behaviour outside the President's residence that triggered the initial police report that resulted in the despatch of the two (2) patrol units to arrest him. Further, it was his subsequent arrest and detention in the police "*can cage*" that prompted the defendants to act as they did towards the police officers in order to release Smart Hubert from the "*can cage*".

48. Surprisingly, Smart Hubert was not arrested and charged with the defendants as he should have been, and the failure of both the prosecutor and defence counsels to call him as a witness left the case and the evidence in an unsatisfactory and incomplete state. He was the figurative : "*elephant in the room*" that was being ignored and avoided for no apparent reason and yet, he was being blamed and accused of allegedly setting in motion the events that ultimately led to the charges being laid against the defendants. In fairness to all parties including Smart Hubert, the Court decided of its own motion, to summon him to testify in Court.

49. Needless to say a basis of the defendants defence to the charges is predicated on the perceived unlawfulness of Smart Hubert's arrest and of the defendants acting in defence of Smart Hubert pursuant to the provisions of "*self defence*" enacted in Section 51 of the Crimes Act 2016 (*op.cit*)

50. The Court's witness **Smart Hubert** gave the following evidence '*in-chief*' :

"Smart Hubert 17 years old. Date of Birth 24/10/2003. Live at Denig District. Attended Nauru Secondary School, year 12. Last year in Secondary. Taught in English and Nauruan. ***I don't own a motorcycle. Never had a motorcycle. I don't have a licence to ride or drive a motorcycle.*** *I am baptised. Don't know when. Attend Protestant Church in Denig District.. I understand my oath I took on bible to tell the truth.* ***I can sort of remember 01/11/2020. I know Alamanda whose home is near the oval. I remember being there at night drinking alcohol, AK47 Vodka. Not my first time drinking. There were others. It was someone's birthday, Lachlan, Uam and Myman.***

Drank whole night until next morning. Finished nearly morning. Don't recall how many bottle drink. I was feeling drunk when we finished. Could walk and stand. I was staggering around. *From Alamanda's Place went to Meneng to Dabwdio's place because the party*

shifted there. ***I was a passenger on a motorbike. Can't remember the driver of the bike. On the way to Dabwido's we passed the President's house.*** *"*

51. Under cross-examination by DPP, Smart Hubert maintained his evidence. He said :

Q: Put to you, that you were the driver not the passenger on the bike?
A: I was the passenger.

Q: Put to you, that you passed President's home more than one time ?
A: Incorrect.

Q: Put to you that at those times the sound from your bike was very loud?
A: Yes when we passed it made a loud sound.

Q: Put to you that it was daylight because a police officer Jenko Karl saw and identified you as the driver of the bike ?
A: No it was still dark *"*

(my highlighting)

CALLING of JENKO KARL

52. After Smart Hubert's evidence it created a "*lacuna*" in the prosecution's case and despite defence objections, the DPP was permitted to call Police Reserve Jenko Karl who testified about reporting to Police Headquarters on "*Smart Hubert*", instead of Senior Constable Pancia Depoudu who was the superior officer who had actually issued directions to the patrol units.

53. **Police Reserve Jenko Karl (PW9)** testified that he saw and heard Smart Hubert "*revving*" the motor bike in front of the President's residence. He also stated that there was one passenger on the motorbike but he couldn't recognize the passenger. He said the incident happened at daylight around 7-8 am. During cross examination he was adamant that he saw Smart Hubert driving the "*cabbage postie*" bike and not a "*Honda Cub Crypton*" bike.

54. He said he knew and recognised Smart Hubert as they had played football in the same team. He agreed that there was a football final on that day and many people drove past the President's residence throughout the night before Smart Hubert passed on his motorbike. He could not identify the colour of the bike used by Smart Hubert and he agreed that he was all alone guarding the President's residence since 11 pm the previous evening without any support and was due to be relieved in the morning at about the time when Smart Hubert passed by on his motorbike.

55. Reserve Jenko Karl stated he did not consider what Smart Hubert did on the road outside the President's residence was an offence and he only reported Smart Hubert because he was told to do so. This consideration receives some support from the observations of Lord Hanworth M.R. in Harper v Haden & Sons [1993] 1 Ch 298 where he said (at p. 304) :

"(1) A temporary obstruction ....to the enjoyment of adjoining premises (to a highway) *does not give rise to a legal remedy where such obstruction is reasonable in quantity and in duration."*

56. Applying the above to the observations of Police Reserve Jenko Karl, the passage may be paraphrased : the President's enjoyment of his quiet time outside his residence was temporarily

distrubed when Smart Hubert rode by on a motorcycle with a damaged muffler which emitted a loud noise.

57. In Jenko Karl's view, although the noise was loud, the fact that it would have lasted for no longer than the few seconds it took for the motorcycle to pass by the President's residence, rendered it both "*de minimis*" and not unreasonable in the circumstances and did not give rise to any offence or any "*legal remedy*" .

DISCUSSION and DECISION

58. In considering the evidence produced by the prosecution, defence and the additional witnesses in this case, I remind myself that the prosecution has the legal burden of proving the guilt of each defendant beyond all reasonable doubt. In this latter regard and despite not being obliged to, each of the defendants gave sworn evidence which must be carefully considered along with the prosecution evidence.

59. I also direct and warn myself that although jointly charged in Counts 1, 2, & 3, nevertheless , the Court is obliged to consider and determine the case against each defendant separately. This means, the guilt of each defendant depends solely and entirely on the quality of the evidence led against him, alone. It also means that just because one defendant may be guilty of a charge does not mean that his co-defendants must also be guilty and vice versa.

COUNT 1

60. In identifying and determining the relevant issues in Count 1 that have arisen from the evidence, the Court has attempted to maintain the chronology and sequence of relevant events.

Issue (1) : ***Did Smart Hubert commit an arrestable offence outside the President's residence ?***

61. DPP orally submitted that Smart Hubert committed an offence of "*public nuisance*" when he passed outside the President's residence on a motorbike that made a loud noise within the provisions of s.248(1)(a)(b) and 2(a) of the Crimes Act.

62. In Attorney General v PYA Quarries Ltd [1957] 2 QB 169 in rejecting the appeal in that case where an injunction was granted against the quarry company for excessive dust and vibration from its quarry works, the Court of Appeal :

> "***Held****: that any nuisance which materially affected the reasonable comfort and convenience of life of a class of subject was a public nuisance ; that the sphere of the nuisance might be described generally as " the neighbourhood ....."*

63. In the present case there is no evidence that the motorcycle noise inconvenienced, distracted or endangered other road users or pedestrians. Nor did it obstruct in any way the clear passage and free flow of traffic on the road. On the contrary, the so-called "*public nuisance*" in this case arose from the loud noise created by Smart Hubert's passing motorcycle which allegedly ruined the peace and tranquillity of an early Sunday morning devotion.

64. Even assuming without necessarily agreeing that the said noise was of such a nature and duration as to unreasonably cause inconvenience and even discomfort to the owner and users of adjoining land, the relevant provision in s.248 (2) of Crimes Act requires proof that the noise interfered with "*the peaceful use of a public place*". In other words, the affected area or locality must itself be : " *a public place*" .

65. The locality or affected land in the present case is the residence or home of the President beside the main road at Meneng. Undaunted by what might be considered is a private residence, the DPP submits that the President's residence is a "*public place*" because his constituents, the police, and even his fellow-church members allegedly had access to his residence. I say "*allegedly*" advisedly , because there is **not** a "*shred of evidence*" to support the submission.

66. In any event, I reject the submission which would make almost every unfenced home in Nauru, a "*public place*". In my view that cannot be the meaning of "*a premises that is open to the public, or is used by the public*" which is more apposite to a public park or play-ground or a public convenience or retail shop.

67. Defence counsel also submits that police did not act in "*the course of duty*" when they arrested Smart Hubert. That is to say, without making any proper inquiry, the police proceeded to arrest him on suspicion in the absence of any reasonable grounds to conclude that Smart Hubert had indeed committed an arrestable offence. Defence counsel cited in support the decision in Republic v Agigo (2020) NRSC 17 where Vaai J, said (at paras 9 to 11) as follows:

> "***Section 270(2)(e) does not authorise a police officer to arrest without a warrant any person against whom a complaint is laid ....immediately following the laying of a complaint. Reasonable steps should be taken to verify that the complaint is not spiteful,.....is reasonable and implicates the suspect.*** *The section certainly cannot justify the police to arrest without a warrant a suspect to assist the police to gather evidence to prosecute himself or herself. A suspect cannot be forced to break his silence.*
>
> *Article 5(1)(c) of the Constitution dictates that it is incumbent upon the police to establish suspicion based on reasonable grounds that the suspect has committed or about to commit the offence.* ***Reasonable grounds can only be brought about by making inquiries after the complaint is laid. It would be destructive and incongruous to the spirit of article 5(1)(c) if the police pursuant to s.270(2) were to arrest a suspect without a warrant immediately after a complaint is laid.***
>
> *The so called practice by the police to arrest an accused immediately upon the lodging of a complaint, if it is a practice, is unconstitutional and is unlawful. The unlawful arrest is not saved by Subsection 2 of Section 270 Crimes Act 2016."*
>
> (my highlighting)

68. In this regard I note Jenko Karl's evidence that he did not consider that Smart Hubert had committed any offence when passing the President's residence on the early morning hours of 1st November 2020. However, Smart Hubert is not charged before the Court and given the Court's decision on "*issue (2)*" (below), it is unnecessary to reach any decision on this first issue.

Issue (2) : ***Was Smart Hubert's arrest by Constable Taekauwea Taumea lawful?***

69. It is extremely unfortunate that the DPP did not see fit to address this question at all in his written submissions despite the Court's direction for counsels "*to address the lawfulness of* (Smart Hubert's) *arrest*" in their closing submission. Instead the DPP in his oral submissions referred to ss. 270 and 248 of the Crimes Act 2016 as well as the evidence of Police Reserve Jenko Karl to justify the arrest of Smart Hubert.

70. On the other hand, defence counsel submits that against Smart Hubert, there was only a report of allegedly causing a disturbance outside the President's residence. However, without making any inquiry into the allegation, and without any evidence, Constable Taekauwea Taumea went and arrested Smart Hubert. Taekauwea Taumea did not even know who Smart Hubert was and, in fact, he asked for "***DJ***" and, not finding "***DJ***", he arrested Smart Hubert from the group of drinking people, without informing him of the reason for his arrest.

71. In the leading case of Christie v Leachinsky [1947] AC 573 Viscount Simon observed of a policeman's right to arrest a suspect without a warrant (at p587) :

> "*The above citations and others.... seem to me to establish the following propositions:* ***(1) If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest.*** *He is not entitled to keep the reason to himself or to give a reason which is not the true reason.* ***In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.*** *(2) If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.* ***(4)The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.*** *(5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg, by immediate counter-attack or by running away."*

and later (at p 588) :

> "***No one, I think, would approve a situation in which, when the person arrested asked for the reason, the policeman replied: "That has nothing to do with you. Come along with me."*** *Such a situation may be tolerated under other systems of law,* ...(but)...*which the executive in this country happily does not in ordinary times possess."*

72. Constable Taekauwea Taumea's verbatim evidence of his arrest of Smart Hubert is as follows :

Q: Zimran Caleb told you to arrest the boy?
A: Correct

Q: Was Zimran your superior officer
A: No, we are of same rank.

Q: Did Zimran tell you why to arrest boy?
A: No he said that the boy is to be arrested.

Q: When you went to arrest Smart did you tell him why he's being arrested?
A: ***I told him that he was being arrested because he was driving a bike like a drunkard in front of the President's house. That's what we were told from our Senior.***"

In cross-examination the arresting officer said :

Q: Put you did not inform Smart Hubert why he was being arrested.
A: I think I told him."

Q: When reach the boy ask his name?
A; Yes

Q: Didn't you ask for "DJ" when you spoke to the boy?
A: Correct because I don't know the boy's name.

Q: Didn't the boy say to you "you know me"?
A: Correct that what the boy said.

Q: Then you asked the boy what is his name?
A: I didn't ask his name. Someone told his name so I arrested him.

73. The above may be contrasted with Smart Hubert's answers about his own arrest, as follows :

Q: What happened when arrived at Dabwido's house?
A: Resumed drinking there AK47 mixed with water.

Q: While there police arrived?
A: Yes

Q: How arrived?
A: Vehicle.....

Q: When first noticed police vehicle or police man?
A: The police man came to talk to me.

Q: Name?
A: Taekauwea

Q: Tell us what he did , what he said , and what did you say to him?
A: He came and asked me if I was "DJ". I know he knows who I am and my name. I asked him "don't you know who I am ? You know who I am." Someone said my name and he grabbed me and pulled me to the "can cage".

Q: Did Taekauwea Taumea say anything to you?
A: Nothing.

Q: Know why he pulled you and put you in "can cage" ?
A: I don't know why

Q: You couldn't release yourself?
A: No. I couldn't

Q: Call out to Taekauwea Taumea from "can cage" ?
A: Yes

Q: What say to him?
A: Swearing at him.

Q: Why?
A: Because when he grabbed me and put me in the "can cage".

74. Later when the DPP cross-examined Smart Hubert, he said:

Q: Taekauwea Taumea said you disturbed the President?
A: That's what he told the court but not me.

Q: Put Taekauwea Taumea told you the reason for arresting you?
A: No nothing said."

75. From the above verbatim extracts, it is clear that the evidence of Smart Hubert and Constable Taekauwea Taumea is in stark conflict as to whether or not Smart Hubert was told the reason for his arrest.

76. In Murray v Ministry of Defence (Northern Ireland) [1988] 2 All ER 521 Lord Griffiths in discussing an illegal arrest said (at p. 526) :

*"**It has been well-settled law,....., that a person must be informed of the reason for his arrest at or within a reasonable time of the arrest**. There can be no doubt that in ordinary circumstances, the police should tell a person the reason for his arrest at the time they make the arrest. **If a person's liberty is being restrained, he is entitled to know the reason. If the police fail to inform him, the arrest will be held to be unlawful, with the consequence that if the police are assaulted as the suspect resists arrest, he commits no offence**, and if he is taken into custody, he will have an action for wrongful imprisonment. ....."*

(my highlighting)

77. In resolving the "*stark conflict*" in evidence, I have no hesitation in saying that I prefer the testimony of Smart Hubert who gave his evidence in a forthright and unembellished manner unlike Constable Taekauwea Taumea who did not impress with his uncertainty about whether or not he did give any reason to Smart Hubert at the time he arrested him from his drinking group after asking for "*DJ*". I prefer Smart Hubert's detailed recollection of the incident and the conversation that passed between them. He did not seek to deny that the motorcycle he was riding past the President's residence emitted a loud noise because of its defective muffler. On the other hand, even the DPP doubted Constable Taekauwea Taumea's evidence when he unsuccessfully sought during his evidence in-chief to have him declared a "*hostile witness*".

78. If I may say so, I got the distinctly unfavourable impression after listening to the police officers involved in this case, that it was sufficient for their purposes that they had received directions from their superior(s) to locate and arrest the suspect and they, personally, did not need to know why the order to arrest the suspect had been given. In other words, blind obedience to a superiors order is enough.

79. A similar question was helpfully decided by the House of Lords in O'Hara v. Chief Constable of the R.U.C, [1997] 1 All ER 129 where it was held that obeying orders is not enough. Lord Steyn said (at p134) :

> *"Certain general propositions about the powers of constables ...*(to arrest on suspicion)*...can now be summarised.*
>
> ***(1) In order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case.*** *Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough: Hussien v. Chong Fook Kam [1970] A.C. 942, 949.*
>
> ***(2) Hearsay information may therefore afford a constable reasonable grounds to arrest.*** *Such information may come from other officers: Hussien's case, ibid.*
>
> ***(3) The information*** *which causes the constable to be suspicious of the individual* ***must be in existence to the knowledge of the police officer at the time he makes the arrest.***
>
> ***(4) The executive "discretion" to arrest*** *or not .....****vests in the constable, who is engaged in the decision to arrest or not, and not in his superior officers.***
>
> *Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984* ***it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1).*** *It is accepted, ...****that a mere request to arrest without any further information by an equal ranking officer, or a junior officer, is incapable of amounting to reasonable grounds for the necessary suspicion.*** *"*
>
> (my formatting and highlighting for clarity)

80. Accordingly, I am satisfied and find as a fact that Smart Hubert's arrest was "*unlawful*". In that Constable Taekauwea Taumea did not give Smart Hubert any reason for arresting him either before or at the time of his arrest or even , after he had shut Smart Hubert in the "*can cage*".

ISSUE (3) : ***Were the defendants justified in freeing Smart Hubert from the "can cage"?***

81. Defence counsel submitted that given Smart Hubert's unlawful arrest , everything that happened after, it did not constitute an offence and was committed in reasonably necessary defence of Smart Hubert. In the present case the circumstances were such that the defendants perceived that Smart Hubert had been unlawfully arrested and/or was being "*unlawfully imprisoned*" in the police "*can cage*". The offence(s) allegedly committed by the defendants while acting together in the course of freeing Smart Hubert from the "*can cage*" , includes harming, threatening, intimidating, and obstructing the three (3) named police officers in Counts 1, 2, & 3.

82. That the "*unlawful arrest*" of Smart Hubert was plainly visible to the defendants who were close friends and acquaintances is clear from their evidence. Furthermore, they were entitled to enquire why he was being man-handled, arrested, and detained in the "*can cage*" and on being angrily and rudely rebuffed, the defendants were justifiably compelled to intervene and to use reasonable force to penetrate the police line in front of the "*can cage*" in order to free Smart Hubert from his unlawful detainment.

83. **John-Fij Agege** (DW1) denied all charges against him in Counts 1, 2 & 3. He admitted being in the group that approached Constable Taekauwea Taumea to ask about Smart Hubert's arrest. He also admitted that his presence in the video recording around the "*can cage*" was because he was curious to see what was happening, but his main concern was to secure and remove his brother "*Diriko*" from the "*melee*" that had developed between the officers and the group of drunken men who had gattered behind the "*can cage*". He was not identified by any of the three (3) named police officers in the various charges, as having personally threatened, harmed, or obstructed the concerned officers.

84. **Lachlan Brechtefeld** (DW3) admitted that he had been drinking with Smart Hubert on the day before the incident at Alamanda's Oval and that they left on motorcycle and went to Monty Dabwido's residence where the drinking continued. The police later arrived and arrested Smart Hubert. He was concerned at the manner in which Smart Hubert was arrested, escorted and placed in the "*can cage*" , so he approached and spoke to Senior Constable Christopher Amwano about why Smart Hubert was being arrested since there had been no loud music or anything that might justify his arrest. Senior Constable Christopher Amwano reacted angrily to his question and did not give him a satisfactory response , instead Senior Constable Christopher Amwano and the other police man began pushing the boys angrily. He denied personally intimidating or threatening Senior Constable Christopher Amwano.

85. Indeed, in re-examination Lachlan Brechtefeld said :

> ***Q**: You said Christopher Amwano was angry it showed in his tone and face. Did he look frightened to you when he was holding onto you?*
>
> ***A**: **No he did not appear frightened.**"*

86. In the present case, after considering all the evidence I am firmly of the view that Smart Hubert's arrest was "*unlawful*". Additionally, he was wrongfully detained in the police "*can cage*" and in both instances, he and the other defendants, who were acting in Smart Hubert's defence, were entitled to and did use reasonable force to obtain his release from the police "*can cage*" and to prevent Smart Hubert's re-arrest.

87. The defence of "*self-defence*" which has been discussed above and found to be applicable to Count 1 also extends to Counts 2 & 3 below.

Issue (4) : ***Did the defendants in freeing Smart Hubert act under a joint "arrangement"?***

88. In the DPP's written submission, he refers to s.32 of the Crimes Act, 2016 concerning "*joint commission*" and submits after referring to Republic v Aliklik [2008] NRSC 2 that "*the principle is relevant and ought to be considered*" since the basis of the defendants liability is "*joint enterprise*" or "*common purpose*" and DPP further submits that "*all accused are equally liable*".

89. On the other hand, defence counsels submit that the principle of "*joint commission*" has no application in this case as there is no evidence of an agreement or any "*arrangement*" entered into by the defendants. I disagree.

90. Whilst there may not have been any direct evidence of an "*arrangement*" or agreement, I am satisfied from having viewed the video recording , that when the defendants approached the police cordon around the "*can cage*" at the rear of the police vehicle , there was an unspoken "*understanding*" between them, which was, to obtain the release of Smart Hubert from the "*can cage*" whether peacefully or by force.

91. Needless to say, the existence of such an implied "*arrangement*" does not necessarily make the combined actions of the defendants criminal or conversely, **not** in "*self defence*".

92. **Nason Hubert** (DW4) denied any active part in the offences charged against him in Counts 1, 2, & 3. He intervened because of the rough manner in which Smart Hubert was arrested and dragged to and placed in the "*can cage*" for no apparent reason for his arrest. He identified "*Denton*" (not before the Court) as the person who opened the door of the "*can cage*".

93. Nason Hubert was asked about his employment and he testified that at that time he was working as a Community Liaison Officer (CLO). The job of a CLO is to look after the community and work closely with the police by assisting them in maintaining peace. He also said he could not help police on the day of the incident because he was also taking part in the drinking group. He also said that during the entire "*melee*" he stood away from the crowd and only intervened to remove the (unidentified) young kids to protect them from getting involved in the incident.

94. **Mason Tannang** (D5) chose to remain silent in his defence. Against him, there is hardly any incriminatory evidence other than that of Police Reserve Marson Notte (PW5) who testified that he knew Mason Tannang and he told him not to "*push and intervene*" at the time when the group of men had surrounded the "*can cage*" vehicle. Marson Notte testified that he pulled Mason Tannang away from the crowd before he could become involved.

95. In this regard, defence counsel submitted that Mason Tannang was not actively participating in or encouraging the other defendants to "*intimidate*" Christopher Amwano or cause "*harm*" to Constable Dunstal Ika. The only mention in the DPP's closing submission about Mason Tannang is a single line referring to the video footage which reads : " ***Mason Tannang at 2.04 sec was seen with the crowd.***" Mere presence however, is not enough to ground culpability , something more is needed.

96. In light of the Court's decisions on "*Issues (2) & (3)*" namely, that Smart Hubert's arrest was "*unlawful*" for want of a stated reason and that the four (4) named defendant's were acting reasonably and justifiably in freeing Smart Hubert from the "*can cage*" , I am not satisfied beyond a reasonable doubt that Senior Constable Christopher Amwano was acting "*in due execution of his duty*". Accordingly, the defendants are found not guilty on Count 1 as charged.

COUNT 2

97. As already mentioned, the prosecution case in this Count is not dependent on pain , hurt or injury but instead, is based on the extended definition of "*physical harm*".

98. In other words, although there was no actual bodily injury caused to Constable Dunstal Ika, the legal basis of the charge is that there was "*physical contact*" with an unidentified individual(s) that, in the words of the definition, he "*might reasonably object to*". In this latter regard whilst Dunstal Ika "*might.....object*" to being punched or pushed from behind by an unknown assailant , is it "*reasonable*" to do so in a "*melee*" involving a group of drunken men?

99. With regard to what might constitute reasonably objectionable "*physical contact*" to a police officer , the Court repeats its recent observations in Republic v Jeremiah [2021] NRSC 21 where it said:

> "....., *police officers are trained in crowd control and in the use of physical force both offensively and defensively. They are also trained on how to deflate tensions and manage situations involving drunken people.* ***None of these activities should necessarily or inevitably involve or end in arrests or charges.*** *Police are also required to use some degree of force in arresting and restraining individuals and their duties often brings them into direct physical contact , both accidental and intentional , with members of the public.* ***But such contact should be expected , accepted and even tolerated as a normal incident of a police officers' duties.***.
>
> *At other times, police work is dangerous and even includes the risk of injury* , even then, *police officers are trained and expected to display a high level of patience and understanding of human behaviour and* ***to possess a higher tolerance threshold for contact and pain than ordinary members of the public.*** *To cite a readily obvious example , rugby or league players who don't like or who avoid physical contact , should choose another sport.*"

100. In similar vein, Glidewell LJ in DPP v Orum (1988) 3 All ER 449 observed (at p 451) that:

> "....*a police officer can be a person who is likely to be caused harassment and so on.* ***However, that is not to say that every police officer in this situation*** (of being abused and threatened by a drunk) ***is to be assumed to be a person who is caused harassment. Very frequently, words and behaviour which police officers will be wearily familiar, will have little emotional impact on them save that of boredom.***"

101. Even more trenchant are the observations of McCullough J. who said (at p 453) :

> "***It is improbable in the extreme that any police officer would ever be provoked*** (to retaliate) ***by the threatening, abusive or insulting words or behaviour .....***"
>
> (my highlighting)

102. In light of the foregoing and given the rather pedantic nature of the charge in Count 2 and the clear adverse view I formed of Constable Dunstal Ika's credibility in exaggerating and embellishing his evidence about being punched directly in the face with a steel "*knuckle duster*" and yet sustaining no injury at all not even a scratch or a bruise, I have no hesitation in saying that the prosecution have not established beyond a reasonable doubt that it was "*reasonable*" for Constable Dunstal Ika to object to the "*physical contact*" he claims occurred in the "*melee*" which included the 4 defendants named in Count 2, but none of whom , was identified as a person who had made any objectionable "*contact*" with Constable Dunstal Ika. Accordingly, all four (4) defendants are found not guilty and acquitted on Count 2.

COUNT 3

103. The DPP submits in respect of this Count, that by arresting Smart Hubert and detaining him in the "*can cage*", Constable Taekauwea Taumea was following orders given to him by his superiors, however, he was prevented from completing his "*mission*" by the intervention of the defendants who successfully opened the "*can cage*" door and released Smart Hubert. In other words, he was unable to complete his "*mission*" of escorting Smart Hubert to the Police Station, because he was obstructed by the defendants acting in concert.

104. In my view, although there was a general "*mission*" given to all members of both patrol units to arrest Smart Hubert and bring him back to the Police Station for what reason is unknown, nevertheless, I am satisfied and find that Constable Taekauwea Taumea was given a discrete personal order or "*mission*" when his unit arrived at Monty Dawbwido's residence at Meneng and that was, to arrest Smart Hubert and lock him in the "*can cage*". This personal duty was carried out and fully executed by Constable Taekauwea Taumea without any obstruction or resistance by any of the defendants or by Smart Hubert.

105. In this latter regard, **Police Reserve Francis Togage** who accompanied Constable Taekauwea Taumea to arrest Smart Hubert confirmed , that Smart Hubert did not resist or create any obstruction at the time of his arrest. The relevant excerpt of his evidence is as follows:

Q: At Dabwido's residence you and Taekauwea Taumea approached Smart?
A: Correct

Q: You told him you going to arrest him?
A: Correct.

Q: He complied, correct?
A: Correct

106. Needless to say , if it was the "*general mission*" that was intended to be charged in Count 3 then **all** police officers would have been named as having been obstructed but, instead, only Taekauwea Taumea was named and that could only have been because he was the officer specifically assigned to arrest Smart Hubert.

107. In light of the foregoing, I am not satisfied that the prosecution has established its case beyond a reasonable doubt on Count 3 as charged , in that Constable Taekauwea Taumea was not obstructed when he arrested and detained Smart Hubert in the "*can cage*". Accordingly on this Count also , the named defendants are found not guilty and acquitted.

COUNT 4

108. The Prosecution relies on the evidence of Police Reserve Officers **Francis Togage** (PW6) and **Braveman Atto** (PW8) to establish this Count. Francis Togage testified that while they were running after Smart Hubert near Meneng Church towards the main road, a motorcycle stopped and picked him up and sped away. The person who picked Smart Hubert was Billy Kakiouea.

109. In regard to Count 4 , DPP submits it is sufficient that the person "*under arrest*" is a wanted person of interest to the police and he is or would be aware of it. In Smart Hubert's case he was a "*fugitive*" on the run and as such he remained liable to be re-arrested at any time , and was being pursued by police officers on foot for that very purpose, when Billy Kakiouea gave him a lift on his motorcycle thereby preventing his re-arrest.

110. **Billy Kakiouea** (DW2) testified that he was with Smart Hubert at Monty Dabwido's residence when Constable Takeauwea Taumea came to their drinking group and arrested Smart Hubert. He then left the place and did not see Smart Hubert getting into the "*can cage*". The next time he saw Smart Hubert was later that morning when he saw him being pursued by two police officers beside the Meneng Church. Smart Hubert asked him for lift and he obliged by picking him up on his motorcycle before the police officers caught up with him.

111. There are two important elements in this offence. Firstly, the person being assisted to escape must be in "*lawful custody*" and secondly, the person assisting must have the intention to assist the other person to escape from the "*lawful custody*" that he was under.

112. **The question which arises from this incident is** : "*was Smart Hubert in "lawful custody" at the time when Billy Kakiouea gave him a lift on his motorcycle to his knowledge*?".

113. A similar question arose in Rex v Keane (1921) NZLR 581 where the accused had assisted the escapee by giving him a change of clothes after he met the escapee at a hotel sometime after he had escaped from a prison working party. The NZ Court of Appeal in acquitting the accused on appeal said :

> "***If a prisoner has regained his liberty by getting away*** *from the precincts of the prison, and also* ***from the sight and control of ...*** *(* the police*)....* **, he then has made his escape, and is no longer in lawful custody.**"

114. This dictum is clearly applicable to Smart Hubert's "*first escape*" from the "*can cage*", but, does it also apply to the circumstances in Count 4 ?

115. DPP submitted that Smart Hubert was "*in lawful custody*" in Count 4 since he had already been arrested and wrongly freed from the "*can cage*". He was therefore a "*fugitive*" from the law. I disagree given my earlier findings in Count 1 (above). I am also supported by the dictum of Lord Diplock in Holgate-Mohammed v Duke [1984] 1 AC 437 where he said (at p 442) :

> ***"....the mere act of taking a person into custody does not constitute an "arrest" unless the person known either at the time*** *when he was first taken into custody or as soon as thereafter as it is reasonably practicable to inform him,* ***upon what charge or on suspicion of what crime he is being arrested.***"

116. Although it is common ground that Smart Hubert had not been physically held or restrained (after his earlier escape from the "*can cage*"), when Billy Kakiouea gave him a lift on his motor cycle, the DPP submits nevertheless, that the extended definition of "*lawful custody*" includes a person who is "*under arrest*" irrespective of whether the person is actually detained or under physical restraint.

117. The evidence suggests that when Smart Hubert was being chased on foot, Reserve officer Francis Togage came "***within 20 meters***" of Smart Hubert when Billy Kakiouea gave him a lift on his motorcycle. At no stage was Smart Hubert actually re-arrested or restrained. In this regard s.11 of the Criminal Procedure Act 1972 provides that the person arresting another, must "*...actually touch or confine the body of the person (*being*) arrested.*"

118. In this latter regard, in Dillon v The Queen [1982] AC 484 (PC) where a police constable was charged with permitting a prisoner to escape from the station lock-up , the Privy Council in quashing his conviction cited with approval a passage from ***Hawkins's Pleas of the Crown*** 7th edn. (1795) Vol 3, p 252, where the learned author considers what shall be judged an "*escape*" and states, inter alia, the following rules :

> *"**Section 1: First, there must be an actual arrest ; .....***
> ***Section 2: Secondly , as there must be an actual arrest, such arrest must also be justifiable**, .."*
>
> and later their Lordships said :
>
> *"...it is essential for the Crown to establish that the arrest and detention were lawful and that the omission to do so was fatal to the conviction of the defendant... **The lawfulness of the detention was a necessary pre-condition for the offence of permitting escape, and it is well established that the Courts will not presume the existence of facts which are central to an offence....** "*
>
> This latter extract means, in this case, that this Court will not presume the existence of facts that would justify the arrest and detention of Smart Hubert without a warrant.

119. Plainly, by definition and the common law, Smart Hubert was not arrested during the foot chase. Additionally, it is undisputed that Billy Kakiouea had already left Monty Dabwido's residence before Smart Hubert was placed in the "*can cage*" and therefore would not have known if Smart Hubert had been detained or had escaped from the "*can cage*" and was a "*fugitive*" at the time that he picked Smart Hubert up near the Meneng Church.

120. In light of the foregoing I am not satisfied beyond a reasonable doubt that "*elements (c) and (d)"* of the offence charged have been established by the prosecution and indeed, I find as a fact, that Smart Hubert was not arrested or "*in lawful custody*" at the time he was given a lift near the Meneng Church. Accordingly, Billy Kakiouea is not guilty on Count 4 of assisting Smart Hubert to escape from "*lawful custody*" contrary to s. 231(a)(ii) and (b) of the Crimes Act 2016.

CONCLUSION :

121. In summary, all five (5) remaining defendants are acquitted on Counts 1, 2, 3, & 4 as charged in the Information. They are all released from their bail conditions forthwith.

Dated this 03 day of August, 2021.

D.V. FATIAKI
CHIEF JUSTICE