

**IN THE DISTRICT COURT OF NAURU  
(Criminal Jurisdiction)**

CRIMINAL CASE NO. 13 of 2015

BETWEEN:

**THE REPUBLIC OF NAURU**  
Complainant

AND:

**ADNAN CHOPANE**  
Defendant

Mr. Livai Sovau for the Republic  
Mr. Sevuloni Valenitabua Public Legal Defender for Defendant

*Dates of hearing: 6,7,9,13,20 June 2016 and 27 and 30<sup>th</sup> September 2016*

*Date of Submissions: 30 the September 32016*

*Date of Judgment: 17<sup>th</sup> October 2016*

Judgment

**INTRODUCTION**

1. The defendant is charged with one count of unlawful assembly contrary to section 62 of the Criminal Code 1899. Section 62 of the Criminal Code 1899 read:

*"Any person who takes part in an unlawful assembly is guilty of a misdemeanor, and is liable to imprisonment for one year"<sup>1</sup>*

2. Section 61 of the Criminal Code 1899 read:

*"when three or more persons, with intent to carry out some common purpose, assemble in such a manner, as to cause persons in the neighborhood to fear on*

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<sup>1</sup> Section 62 of the Criminal Coded 1899

*reasonable grounds that persons so assembled will tumultuously disturb the peace, or will by such assembly needlessly and without reasonable occasion provoke other persons tumultuously to disturb the peace, they are an unlawful assembly. It is immaterial that the original assembly was lawful if, being assembled; they conducted themselves with a common purpose in such a manner as afore said.*

*An assembly of three or more persons who assemble for the purpose of protecting the house of any one of them against persons threatening to break and enter the house in order to commit an indictable offence therein is not an unlawful assembly"<sup>2</sup>*

### **THE PROSECUTION CASE**

3. The case presented by the prosecution comprised the following:
  - i) Agreed facts tendered to the court
  - ii) Statements of 15 witnesses intended to be called by the prosecution tendered to the Court by consent.
  - iii) The evidence of 10 witness called by the prosecution.
  - iv) 3 CD's containing videos taken by various individuals marked as Zoe 1, Rachel 1, and Foulton 1.

### **THE AGREED FACTS**

4. The agreed facts are:
  - a) Adnan Chopane (the accused was in the assembly which assembled in front of the Beach House at Anibare District on 27<sup>th</sup> February 2015
  - b) The accused participated in the ensuing march on that day from the beach house to the Refugee lodge at Anibare District
  - c) The accused held a banner during the assembly and the ensuing march
  - d) The accused went to the police line in front of the Refugee Lodge at Anibare and spoke with a police officer
  - e) The accused was later arrested by the police and taken to court; and
  - f) He was also admitted to bail on the same day.

### **STATEMENTS TENDERED BY CONSENT AND WITNESSESSES CALLED BY PROSECUTION**

5. Fifteen statements from witnesses intended to be called by the prosecution were tendered by consent and the prosecution called another 10 witnesses to give evidence in Court.

### **THERE MUST BE THREE OR MORE PERSONS PRESENT**

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<sup>2</sup> Section 61 of the Criminal Code 1899

6. One of the elements of the offence of unlawful assembly is that there must be three or more persons involved. On the evidence it is not disputed that more than three persons were present and took part in the assembly organized by the refugees that took place on the 27 February 2015. I therefore find that the element that there be three or more persons assembled proven beyond reasonable doubt by the prosecution.

**WHETHER OR NOT THE DEFENDANT WAS AN ACTIVE PARTICIPANT IN THE ASSEMBLY**

7. On the evidence presented it is not disputed that the defendant actively participated in the assembly that took place on the 27 February 2015. I therefore find that the prosecution has proven beyond reasonable doubt that the defendant actively participated in the assembly of more than three persons that took place on the 27<sup>th</sup> February 2015. Consequential to this aspect of my finding, I further find that the defendant's active participation in the assembly, that took place on the 27 February 2015, meets the threshold of the standard of criminal intention to participate with those so assembled on the 27<sup>th</sup> February 2015. That is beyond reasonable doubt.

**WHETHER OR NOT THOSE WHO ASSEMBLED ON THE 27<sup>TH</sup> FEBRUARY 2015 AND PARTICIPATED IN THE ASSEMBLY ON THE 27<sup>TH</sup> FEBRUARY 2015 CONDUCTED THEMSELVES IN SUCH A MANNER TO CAUSE REASONABLE FEAR IN THE AREA THAT THEY WOULD COMMIT A BREACH OF PEACE AND THAT BY THEIR ASSEMBLY NEEDLESSLY PROVOKED OTHERS TO COMMIT A BREACH OF PEACE.**

8. On the evidence the defendant and others gathered at the Anibare beach house and carrying their banners and walked in the direction towards the Anibare lodge or Fly camp where other refugees live. On the evidence it is also not disputed that more than a hundred people participated in the assembly. Also on the evidence it is clear that the police were trying to get those assembled to remain on the walk way as they started moving from Anibare beach house towards the Anibare lodge (Fly Camp), but they were not able to. As a result the police had to organize a road blitz to control the flow of traffic onto one lane and to advise those driving the vehicles to turn back. It is a well-known fact in Nauru that we have two lane roads around the Nation, so much so that the court can take judicial notice of this fact. In addition to this, the evidence from the video footages submitted to the Court clearly reflects this. The evidence from the video footage also reflects clearly that one lane of the road, was taken over by those assembled and walking towards the direction of the Anibare lodge. The effect of the defendant and others taking over one lane of the road to walk in the direction towards the Anibare lodge from the Anibare beach house is that the flow of traffic was affected and that a road traffic blitz had to be conducted by the police to divert traffic and ensure flow of traffic on one lane of the two lane road. This in turn would have an impact on public peace and order to ensure flow of traffic. It also has the potential effect of provoking other road users to commit a breach of peace or other members of the community fearing on reasonable grounds that there will be a breach of peace.

9. It is also not disputed on the evidence that a Refugee woman and a Nauruan woman ended up in a scuffle. Again this in my view is evidence that goes to show that there is likelihood on reasonable grounds that there will be a breach of peace or others may be provoked to commit a breach of peace.
10. It is also not disputed on the evidence that a male refugee was injured and bleeding. It is clear from the evidence that women from within the camp were throwing stones in the direction of the police skirmish line and that the windscreens of one of the police vehicles was broken.
11. The evidence is that, the police skirmish line was formed at the Anibare lodge well before the protestors reached the Anibare Lodge. A police skirmish line when formed anywhere ought to be taken, even in silence, to mean stop and do not go beyond this line. It is also clear on the evidence that, the protestors clashed with the police by way of shoving and pushing at the police skirmish line. One police officer was also injured as a result of trying to control one of the participants of the assembly. The unchallenged evidence is that the defendant was also involved.
12. I find on the evidence that when taken collectively and assessed wholly, the evidence points to the inescapable conclusion that by the time those assembled were approaching or reached Anibare lodge, collectively their actions were conducted in such a way that would cause a reasonable person to fear that they would commit a breach of peace or provoke others to commit a breach of peace.
13. The defendant has given evidence that he should not be held responsible for the acts of the other participants which may be unlawful. He gave evidence that he is not the leader or organizer of the protest. And that he only received a phone call that morning informing him that there will be a protest and that he went and joined the protest without knowing where they were going. There is no evidence to show that the defendant ever withdrew or disassociated himself from the assembly.
14. Ward CJ in *John Maetia Kaliuae v Reginam* observed that in Russel on Crime 11<sup>th</sup> Ed, p285 two authorities (neither of which is available here) are cited in support of the following passage:

*"And "any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquility and peace of the neighborhood, is an unlawful assembly". In viewing this question, the jury should take into consideration the way in which the meetings were held, the hour at which they met, and the language used by persons assembled, and by those who addressed them: and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as alarm must not be merely as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage" (R v Vincent (1839)9C & p 91) "All person who join an assembly of this kind disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance*

*and support to it are criminally responsible as parties to the assembly.(Redford v Birley(1822)3 Stark(NP)76)”<sup>3</sup>*

15. In *Beatty v Gilbanks (1882) 9QBD 308*, Field J pointed out that “everyone must be taken to intend the natural consequences of his own acts and it is clear that, if this disturbance of the peace was the natural consequence of the acts of the Appellants, they would be liable”<sup>4</sup>
16. The assertion by the defendant in his evidence that he should not be held responsible for the actions of others ignores that the nature of the offence of unlawful assembly is that once he is a participant, he also deemed to be criminally responsible for the collective actions lawful or otherwise made in furtherance of the common purpose or committed by others in the group. Once he actively took part in the assembly and if he fails to disassociate himself from the assembly then he is as culpable as the others for their actions in terms of criminal responsibility.

#### **WHETHER OR NOT THERE WAS AN INTENTION TO CARRY OUT A COMMON PURPOSE**

17. Four witnesses whose statements were tendered by consent as part of the agreed facts gave evidence to the effect of:
- i) When the refugees arrived, our commanders (Inspector Raynor Tom and SP Gregor Garoa, about 5 meters in front of our skirmish line, were advising the refugees to stop but they gathered up and some of the male refugees did encourage them all to continue on (walk) their peaceful protest to the Nauru Government building<sup>5</sup>
  - ii) When the refugees arrived, our commanders (Inspector Raynor Tom and SP Gregor Garoa, about 5 meters in front of our skirmish line, were advising the refugees to stop but they gathered up and some of the male refugees did encourage them all to continue on (walk) their peaceful protest to the Nauru Government building<sup>6</sup>
  - iii) When the refugees arrived, our commanders (Inspector Raynor Tom and SP Gregor Garoa, about 5 meters in front of our skirmish line, were advising the refugees to stop but they gathered up and some of the male refugees did encourage them all to continue on (walk) their peaceful protest to the Nauru Government building<sup>7</sup>

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<sup>3</sup> [1999]SILR 24 at pages 27-28.

<sup>4</sup> Cited in *John Maetia Kaliuae v Reginam* [1999] SILR 24 at page 26

<sup>5</sup> Paragraph 8 page 1 of statement of Senior Constable Vicromic Star dated 27<sup>th</sup> February 2015

<sup>6</sup> Paragraph 8 paged 1 of statement of Constable Alice Fritz dated 16<sup>th</sup> March 2016

<sup>7</sup> Paragraph 8 statement of Constable Darrly Namaduk dated 17<sup>th</sup> March 2015

iv) Going in clockwise direction to the government building. As they were walking they were chanting yelling freedom and justice offshore shut down.<sup>8</sup>

18. Mr. Valenitabua has submitted that the evidence of Senior Constable Vicromic Star, Constable Alice Fritz and Constable Darryl Namaduk be rejected by the Court as unreliable. Mr. Valenitabua pointed out that what is peculiar about these three officers portion of their written evidence is they are verbatim the same and are duplicates of each other's statements. It therefore cannot be said who of these police officers actually heard what was said in this aspect of the three officer's statements. Mr. Valenitabua submits that it is not possible for three persons to report about something and for all of them to write their respective reports in the same way, and submitted that, the only possibility in this case is that the three police officers copied each other's statement.

19. When the court pointed out that the statements of the three officers were tendered by consent and that the defence did not cross-examine the said officers, Mr. Valenitabua submitted that this was a move on the part of the defence so as to point out the likelihood that the three officers copied each other's statements.

20. The evidence of the three police officers as pointed out in paragraph 17(i)(ii) and (iii) of this judgment are verbatim the same. The said statements were tendered by consent. The effect of this is that the contents of the said statements are evidence of the truth as therein in stated. The failure to cross-examine the three police officers to give an explanation as to why their said statements are verbatim the same is that the contents of the said statements are evidence for all purposes.

21. "Over 75 years ago the Lord Chancellor, Viscount Sankey said in *Mechanical & General Inventions Co and Lehwess v Austin Motor Company* [1935] AC346, 360:

*Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story*

*These words remain as true today as ever.*

*The two basic purposes of cross-examination are:*

- *to elicit favorable evidence, ie have the witness agree with the facts supporting your case; and*
- *to discredit unfavorable evidence and or the witness who gave it"<sup>9</sup>*

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<sup>8</sup> Evidence of Constable Jayjay Bop

<sup>9</sup> Robertson, Bruce (editor in chief) Introduction to Advocacy; New Zealand Law Society Revised edition; 2014 Cross-examination; Nigel Hamptom and John Wild, with revisions by Graham Lang at page 214, paragraphs 1, 2 and 3

22. The submission by the Mr. Valenitabua that the statements of the three police officers be rejected as unreliable is flawed because the said statements were tendered by consent and the defense failed to cross-examine the said officers. I therefore find on the evidence that the prosecution has proven beyond a reasonable doubt that the defendants and the others who assembled at the Anibare beach house shared a common intention to march to the Government complex to stage a protest.
23. Mr. Valenitabua has further submitted that the circumstances surrounding the arrest of the defendant were unlawful with regards to the evidence given by the defendant regarding the circumstances surrounding his arrest. If as is submitted that the arrest of the defendant is unlawful then the defendant is at liberty to seek redress from the relevant court. It is not open to the defendant to merely assert that his arrest was unlawful and submit that he be acquitted. I reject this submission.
24. I find on the whole of the evidence presented that the prosecution has proven the case against the defendant beyond a reasonable doubt. I find the defendant guilty of the offence of Unlawful assembly contrary to section 62 of the Criminal Code 1899.

Dated this 17<sup>th</sup> day of October 2016

  
Emma Garo  
Resident Magistrate

