



**IN THE DISTRICT COURT OF NAURU**

**CRIMINAL JURISDICTION**

Criminal Case No. 2 of 2021

**THE REPUBLIC OF NAURU**

**-v-**

**SAMBORA ADEANG**

**JUDGMENT**

*Coram:* Penijamini R. Lomaloma

*Prosecution:* Deborah Togoran with Ms. Serukai & the Director

*Defence:* Ms. Francilia Akubor

*Trial:* 30-31 March, 1 April 2021

*Judgment:* 5<sup>th</sup> May 2021

*Catchwords:* Damaging Property; Credibility of witness; Credibility of evidence; Corroboration of evidence.

**Introduction**

1. The defendant was charged with one count of threatening to cause serious harm to a public official contrary to section 93(a)(b)(c)(d)(ii) & (e) of the Crimes Act 2021 and two counts of damaging property contrary to section 201(b) of the same Act.
2. The prosecution called 8 witnesses and at the end of the prosecution case, I invited submissions on whether there was a case to answer the first charge. After receiving submissions, I concluded that there was no evidence of an element of the offence charged and I found the accused not guilty and acquitted him of count 1.
3. I found that there was evidence of the two charges of damaging property and put the accused to his defence. He testified on oath and called 3 witnesses to his defence.

**Background**

4. The charges arose out of an incident in Meneng District on 13<sup>th</sup> of January 2021. A group of youths were playing with "jelly bean guns" near Jeremiah Akua's residence and some of them had moved on to the main road. The matter was reported to police and a team of police officers went in NPF 107 to attend to it. Later, they asked for backup and a team of about 7 officers went in NPF 105 led and driven by Sgt Wilhelm Appi to assist them. When they reached the scene, the driver braked but he hit one of the youths playing there. He was thrown to the ground, got up and ran away. Two police officers chased him but in the meantime, an angry crowd had gathered around their vehicle. The prosecution case is that at this confrontation, the accused threw a rock at the windscreen and another at the rear passenger side door of the vehicle and causing damage to it.

## The Law

5. The accused is charged under section 201(a)(b) of the Crimes Act which provides:-  
**201 Damaging property**  
*A person (the 'defendant') commits an offence if the person:*
  - (a) causes damage to property belonging to another person, or to the defendant and another person; and
  - (b) is reckless about causing damage to the property.*Penalty: 5 years imprisonment*
6. The prosecution has to prove each of the following elements of the offence beyond reasonable doubt:-
  - a. The accused;
  - b. Caused damage to NPF 105; and
  - c. Was reckless about causing damage to NPF 105.
7. Recklessness is defined in section 19 of the Crimes Act as:  
**19 Recklessness**
  - (1) A person is 'reckless' about a matter if:
    - (a) the person is aware of a substantial risk that:
      - (i) in the case of a circumstance—the circumstance exists or will exist;
    - and
    - (ii) in the case of a result—the result will occur; and
  - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
  - (2) The question whether taking a risk is unjustifiable is one of fact.
  - (3) If recklessness is specified as the fault element required to prove an offence, **proof of intention, knowledge or recklessness will satisfy that fault element for the offence.**
8. The charge is causing damage which is a result for the purposes of section 19 above and therefore the prosecution will have to prove that the accused was, at the time of doing the act that caused the damage, aware that there was a substantial risk that damage will result.
9. The onus is on the prosecution to prove these elements of the offence beyond reasonable doubt.

## THE EVIDENCE

10. It is not disputed that on the evening of 13<sup>th</sup> January 2021, a complaint was made of boys playing with jelly bean guns on the coastal road in Meneng District near the residence of Jeremiah Kepae. NPF 107 was dispatched and they called for backup. The backup team consisted of Constable Merit Halstead (PW1), Sgt Wilhelm Appi (PW2), Senior Constable Eobob Denitage (PW3), ASgt Marvin Junior Tokaibure (PW4), Senior Constable Drusky Dabwadauw (PW5), Constable Jonas Menke (PW6) and a couple of others. The witnesses went in Nauru Police vehicle No. NPF 105, a white Hilux twin cab clearly marked on the side with the words "Police."
11. When they got to Meneng, the road was blocked by boys in the middle of the road. Two or three cars had stopped. Sgt Wilhelm Appi was driving and he applied the brakes. The vehicle swerved because only one of the brakes was working. He hit one of the players but the boy got up and ran away. Sgt Appi and Constable Jonas chased him. Sgt Appi turned around when he realised the police vehicle could be targeted. Constable Jonas chased the boy till he went into Jeremy Kepae's place then he returned to the vehicle.
12. When Sgt Appi returned to the police vehicle, a crowd had gathered around it and they were getting angry and agitated. Sgt Appi called for police backup as he was worried about their safety. Sgt. Appi and his men got into their vehicle but could not leave.

13. From here, the evidence of what happened is disputed and I have presented in detail the evidence of Constable Jonas Menke, the main prosecution witness and those of the other witnesses corroborating or contradicting him on the main issue of identification of the accused because the prosecution evidence on the damage to NPF 105 was not contested.
14. Before I move on, I must mention that there was no logical order in which witnesses gave evidence so the first witnesses dealt with his arrest and refusal to be interviewed and the key witness being called as the 7<sup>th</sup> witness.

**Prosecution Witness 6(PW6) – Constable Jonas Menke**

15. Constable Menke said he was on duty on the night of 13<sup>th</sup> January 2021. He was on patrol with Sgt Wilhelm and Senior Drusky and Police Reserve Dereck when they got a call to go and assist NPF 107 in Meneng. He continues:-
 

“When we completed our plan, we went to Meneng at Kepae’s residence on the main road to see the kids using jelly guns. When we reached there, it was really dark. The lights we used were from our vehicle. As we arrived, I got off and started chasing till I reached the back off and returned when I heard a female voice say that she will release the dogs on us. I returned to the vehicle and got on the passenger side and told Sgt Wilhelm to check on our colleagues because of the dogs. After we spoke, we went towards the back off to do a U-turn there. After the turn, Madi came out. He came and was yelling at Sgt Wilhelm. I did not know what he was saying as I was under pressure. When Madi was yelling at us, I was leaning towards the driver. That’s when the family came out and surrounded us. **Sgt Wilhelm drove forward and that’s when Sambora came up with his stone and hit the windscreen. He kept holding onto his stone and went to the rear and hit the passenger side door.** That’s when I poke my head out of the window and warned Sambora to be prepared. After I spoke to Sambora, we went to Able-Disable to check our other friends. We checked them, they were all okay and we returned to base.

I know it was Sambora because when we were little we play together, we sit together. He was just a bit longer than an arm’s length to the windscreen. No one was standing between me and Sambora. The car lights—our vehicles headlights.
16. After identifying the accused as Sambora, Constable Menke said, “I was under pressure because it seemed like they really wanted to do something not good to us.”
17. In cross-examination, he said the family came out and really surrounded them and he couldn’t do a headcount because it was chaotic.
 

“They were covering our vehicle, couldn’t even go forward. What I saw [was] my side, the front and other side. I couldn’t see the back. Madi was talking to me very aggressively, very angrily. He went to the window, my window, passenger side and really put his head in. Just his face inside our vehicle. It caused me to lean away from him because he was really aggressive. I was also looking at others, otherwise they throw rocks at us. I saw Trevor standing in front of our vehicle. It’s him I saw there.

Lights from the headlights of our vehicle only. No other source. When Madi came, no other lights except headlights. Inside lights were off. I don’t know how long Madi was there. I didn’t know Sambora’s clothing. I really know his face because we were together when we were young.

When he hit the front window, I kept my eyes on him and I saw him hit the rear passenger door. When Sambora hit the vehicle, people weren’t there as they’d moved away. Madi and them were there.”
18. Constable Menke clarified in re-exam that he could see Sambora because the lights from their vehicle were on and Sambora came from the front of the vehicle and he was close to him when he reached the vehicle. Constable Menke said he had seen Sambora lots of times in maybe 10 years from when they were really young until now. He said, “I saw him there that night.”

19. Constable Merit Halstead (PW1) also chased the boy who was bumped by their vehicle until he reached Jeremy Kepae's residence. He then returned to the police vehicle and sat on the left side of the back seat.
20. He said:  
 "I heard Constable Jonas shouting Sambora's name. Then I heard a loud sound on our glass window and from my side, I saw Sambora with a stone in his hand. He threw that stone at the back where I was. The people were surrounding the car because they were angry. We slowly left the crowd."
21. PW1 said in cross-examination that there were between 10-15 people in the crowd; that they were surrounding their vehicle on all sides; that this was about 10:30 pm; that it was dark; and that he was inside the vehicle at the rear on the passenger side (left side). He said that Madi was standing beside the car on the passenger side of the front seat; that he was talking to Sgt Appi who was driving. PW1 said:  
 "There were other people beside the vehicle. There was no light. The street light was off. It was not really pitch dark. The only light was from our vehicle. The light was coming from inside and outside the vehicle.  
 Sambora was about 4 meters from me. He threw a stone from that distance. From our side, there was only Madi standing on the passenger side and nobody on my side. [he was seated at the back passenger side]."
22. In re-examination, PW1 said his view was not obscured. He said:  
 I can see clear. As there were people standing at the front of the vehicle, the light was reflected onto the side. The lights inside the car—it was not pitch black. I could not tell how big the stone was but it fit his hand. I don't remember what he was wearing. Lots of shirts surrounding us. I saw his face. He had markings on his face. I don't remember what type of markings.
23. This witness did not identify the accused in court or in a parade and he did not say how he recognized the accused.
24. Prosecution Witness 2 (PW2)—Sgt Wilhelm Appi said:  
*As we were about to leave, Constable Jonas told me the left windscreen was damaged. He said he saw Sambora damage it. I heard the bang behind the passenger side door. I couldn't see the stone as it was so crowded. I called my colleagues to board the vehicle so we could leave the area and we did and left. Fifty meters away, we stopped and did a head count. We then proceeded back to the police station.*
25. Later in his evidence he said:-  
*"The windscreen was damaged on the left side. I couldn't identify who threw the rock as it was so crowded and so dark. .... The lighting was dark. The only light was from our car. We used two cars. Only the headlights. From the headlights, I can only see 5 meters in front of me. Beyond that, I could not recognize anyone."*
26. Police Constable Bronski Namaduk (PW7) was in the backseat of the police vehicle. He said:  
 Many of the people there were just standing next to our vehicle and yelling. I went to the back of our vehicle to check our colleagues and they were there. I was seated on the left side when I heard the sound of breaking glass and my colleague Jonas was seating on the passenger side said Sambora's name. I just looked up at the person running to the side because it was dark there. The person ran to the frangipani tree in front of Kepae's house near the road. I recognized him as Sambora. I know Sambora. He is my friend and he was also a colleague at work once and we are also related. He was our police reserve before. Twice he worked at police. His mother and my father are cousins. After I saw him, he threw a rock onto the side where I was.
27. In cross-examination, PC Namaduk said he was in the backseat when he heard the sound of broken glass. He saw the person run from there and kept his eyes on him. When he went under

the frangipani tree, he said he recognized him as Sambora. He was shown his statement which he made on 14 January 2021, at paragraph 24 which said:

“When our vehicle was shutdown, I saw a male figure hurling an object towards the windscreen.” When the blow happened, I didn’t see the person who did it, but I saw the person moving (running?) away after it.”

28. The witness said that if that is in his statement, then it’s correct. Unfortunately, this statement was not tendered as an exhibit.
29. In re-examination, he agreed that where he was seated in the backseat, people were blocking his view and he couldn’t make a correct description. He was asked how he could see a male person hurl an object at the vehicle and he said, “Because I saw. I didn’t see the object, but I could hear the banging on the vehicle.”
30. Prosecution Witness 3, Constable Eobob Denitage testified that the accused refused to be interviewed. Sgt Marvin Tokaibure (PW4) arrested the accused on the 18<sup>th</sup> of January 2020.
31. Senior Constable Drusky Dabwadauw was in the backseat of NPF 105 and he did not identify the accused as the person who damaged the vehicle. He took 4 photographs of the damage to NPF 105 and these were tendered without objections or challenge from the defence. They show the damage. I find that there was evidence that there was damage to the windscreen and side of NPF 105.
32. Sgt Thubalkain Dabuae (PW8) obtained a quotation for the repairs to NPF 105 from Automart garage in Aiwo. The cost of a new windscreen was \$650 with labour at \$200. This was not contested by defence.

### Defence Evidence

33. The accused denied the allegations against him. He testified that on the 13<sup>th</sup> of January, he and his cousins met at the Kepae residence to play a “jelly gun” game against a group from Ataro. They played on the seaside lane of the main road for some time. Someone went and complained to the Police station that one of her children had been shot with a jelly gun. The accused said this was not true. He said the police came and his family members told them to run and hide the guns. After they hid the guns, they came back and Rocco told them they could continue as long as they did not shoot anybody other than the players. The accused said that the police came again in the form of Sgt Wilhelm Appi and his team. He continues:

They came directly towards us and hit one of the kids by the name of Kidman and he went flying and that’s when we ran again. He had one foot on the road and the other on the footpath and the police vehicle hit him and he flew out of the main road. We all ran and scattered and I went to Jeremy and Alvita’s place. I also saw a police vehicle doing a U-turn at the back off. The police vehicle was stopped by Alvita’s place by the large group of people there. From the group I can see, I can see it’s a mix of my own family and those from Ataro. My family was in a bit of chaos or panic because of the child that was hit and that police were going to gather themselves and leave. Madi came out and yelled at them and the good thing was that he did not hit any of them and he put both hands in his pocket. There could have been over 90 people there and many were taking videos.

When Madi was yelling at police, I was at the front of the car and I was trying to get to the police but I couldn’t because the ladies there kept moving us away. I tried to come through the crowd but couldn’t as there were just so many people around the police vehicle. While trying to get there, the ladies moved us to the back and told us not to touch the police officers because we could get in trouble or arrested.

The police started to gather themselves to leave because of what happened when they hit the child. They were probably trying to wash their hands of the kid. When they left, my family spoke to me and told me to go home because they were looking for me. I didn’t know why police were looking for me.

34. He denied the evidence of Constable Jonas Menke:

Jonas Menke said I threw the rock at police vehicle but I didn't. I only tried to get to where they were but I couldn't because the ladies there kept pushing me back and I couldn't have thrown the stone because there were too many people there.

35. In cross-examination, he denied throwing the rock at the car because the police had hit Kidman; denied throwing the rock at the rear door of the police vehicle because he was angry with them; and he explained that if he threw the rocks, and even if he did, it would have hit the people standing around the vehicle and not hit the vehicle.
36. The accused denied that he was close to the police vehicle and said that he was about 10 meters away or maybe 15 meters.
37. The accused was asked this:
  - Q: If you were 15 meters away, and there were no lights except the police vehicle lights, how could you see Madi half in the car?
  - A: It was obvious and I could see and he was the only one on the passenger side of the vehicle. The others were mostly around him all the way to the front of the vehicle.
38. In reply to questions from the Court, the accused said Kidman was about 20 or 21 years old and he suffered injuries to the head. In re-examination, he said his family lodged a complaint about the injuries to Kidman but that so far, nothing has been done about it by the police.
39. DW2, Belana Hubert is 44 years old. She was watching the boys play from outside the Kepae home. She recounted what happened until the police vehicle was surrounded. She stated:

When the vehicle stopped, we all ran towards it. There were many of us and we all circled the vehicle from the passenger door, around the front to the other side. I do not know about the rear but we began from the back passenger side door all round.

I was standing right against the front passenger door. Madi was right next to me and his upper body was inside the vehicle. There were many people there up to the front. Madi was on my right. I was facing the driver. I was looking at the driver because Madi was yelling at him... because he hit the kid. Madi's face was really close to the passenger's face. We dispersed because there was a woman telling us to move away from the vehicle and we were talking to each other to calm ourselves down. When we left the vehicle, I heard someone calling out to Sambora. It was a police officer inside the vehicle. He told Sambora to get ready or be prepared. I don't know why he said that.
40. In cross examination, she said that there were maybe 30-40 people surrounding the police vehicle; she didn't even know the police vehicle was hit by a rock; that the boy who was injured was 17; that there was a coloured light competition going on so the street lights were therefore off; that she was standing right next to the windscreen; that there was so much yelling; that she did not hear any sound from the windscreen; and that she was not even sure if the windscreen was already broken.
41. DW3, Eigigu Bam is 38 years old and she was part of the crowd there that night. She said the crowd was around 40 strong. She was "standing at the front towards the passenger side. Where the bonnet was, that's where I was." She said she could see Madi sticking half his body inside the vehicle... she could only see the driver and not the others.
42. She continued:

After we finished shouting, their colleagues jumped on the vehicle and we left. I didn't hear anything like the sound of the window being broken. I should have been able to see it because I was right there. There were so many of us that we covered the vehicle... we were right there. The people on my side were about the same distance [from the vehicle] as me. I don't know about the other side. The car was surrounded from the rock in front of my home to around the vehicle. There were people behind as well as around me.
43. In cross-examination, she said she could not really see people as the light was obscured; that Madi was next to Belana (DW2) and then herself. She is related to the accused. The accused's father is her father's uncle.

44. DW4 is Alvita Kepae and she is 42 years old. She lives in Meneng and she is the Community Liaison Officer for Meneng. She was inside her home when the children were playing. She came out when she heard the adults supervising the children get mad and swearing. She came outside and saw her brother Madi standing next to the police vehicle with his body halfway in. She said there were many people there, maybe 50. She grabbed Madi's hand and pulled him away to her home under the tree. She said Sambora was standing under the tree also.
45. She said she is related to the accused. She said he is almost like a son to her. She said that on her way to get her brother from the police vehicle and back, she did not hear the sound of breaking glass.
46. When asked by the Court, Alvita said the lights in the lounge of her home was on but that they would not reach the road.

#### ANALYSIS

47. I have set out the evidence in some detail because I will have to determine who is telling the truth in this case. All sides agree that there was a large group of angry people surrounding the police vehicle. PW1 said there were 10-15 people there, Constable Menke said he could not do a headcount as the situation was chaotic and he was under pressure. The accused said there were maybe 90 people there. DW2 Belana Hubert said there were 30-40 people there. They were angry because the police vehicle had run over one Kidman who is from Meneng. He is described by the accused to be 20-21. DW2, Belana Hubert said he is 17.
48. Each witness picks different things to concentrate on in such a chaotic situation and each may honestly think their version of events is correct. As the stories get retold, the memories of events get altered as witnesses patch gaps in their recollections from what they hear from other witnesses. This is human nature.
49. I watched all the witnesses. I heard them give evidence and I prefer the evidence of Constable Jonas Menke. He honestly said he could not do a headcount as things were too chaotic. He said he could not remember what Madi was saying right next to him because he was under pressure and keeping his eyes open for others—"otherwise they throw rocks at us." He did not embellish his evidence to make himself look better.
50. Constable Menke testified clearly, had good eye contact and was not hesitant. He was not evasive. His demeanour was good. His body language did not elicit signs consistent with someone telling a lie. I found Constable Menke to be a credible witness.
51. PW1 said he saw Sambora smashing the window and the side of the vehicle but no evidence was elicited from him as to how he recognized Sambora.
52. PW7 Police Constable Bronski Namaduk was in the backseat and said he heard the sound of breaking glass and heard Sambora's name being called out. "I just looked up at a person running to the side because it was dark there. The person ran to the frangipani tree next to the house. I recognized him as Sambora. He is my friend and he was also a colleague at work once and we are also related. He was our police reserve before. Twice he worked at police. His mother and my father are cousins." In cross-examination, his statement to police was shown to him which differed in that he did not recognize the person as he was going. A close study of his testimony shows that he did not recognize the person when he first saw him, he did not recognize him as he was running to the tree and recognition was made after he reached the frangipani tree. PW7 corroborated the evidence of Constable Menke on identification of the accused.
53. The accused had a good reason to lie as he is facing a possible jail sentence. DW2 was standing next to and to the left of Madi who was leaning into the passenger side of the vehicle. DW2 was right in front of where the windscreen was broken yet she said no one broke it and she did not hear the sound of breaking glass. I do not believe her.
54. DW3 was to the left of DW2 and next to her. She was standing near the bonnet. She also did not hear the sound of breaking glass and did not see anyone smash it. She is related to the accused. She has a good reason to lie to prevent him from a possible prison sentence. I do not believe her evidence.

55. DW4 said Sambora was standing under the tree with her and Madi after she dragged Madi from the police vehicle. She was not asked if she saw the accused damage the police vehicle. PW7 said he saw the accused run to the frangipani tree near the house after he damaged the vehicle so her evidence does not exculpate the accused.

### Conclusion on Credibility

56. For the reasons given, I accept the version of events as related by PW6, Constable Jonas Menke and I reject the version put forward by the accused and his witnesses.

### Identification

57. The leading authority on identification is *R v Turnbull*<sup>1</sup>, where Widgery LCJ:
- "First, whenever the case against an accused depends wholly or substantially on one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.*
58. *Recognition may be more reliable than identification of a stranger but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*
59. The headlights of the car would have been reflected in many different directions from the people in front of the vehicle. Anyone receiving the reflected light would be more visible than others, especially when all other lights are off. If the accused is to be believed, he could recognize Madi leaning into the car from 10-15 meters away. DW3, Eigigu Bam was standing near the bonnet and she could recognize Madi who had his head inside the vehicle. Sambora would have to be next to her when he smashed the windscreen and I am confident he would have been visible to Constable Menke.
60. Constable Menke was seated in a dark vehicle. He saw the accused smash a rock against the windscreen which meant that the accused would have been about 2 meters away from him. He focused his attention on the accused after that and saw him smash the same rock on the rear passenger side door. He recognized Sambora as the person who did this and warned him.
61. I am satisfied that there was sufficient light for Constable Menke to have recognized Sambora, a person he grew up with and played with and is related to. The recognition was made at about 2 meters and there would have been sufficient time from the observation to the recognition for it to be reliable.
62. The recognition of Sambora was not something cooked up after the event. Constable Menke yelled out his name and warned Sambora immediately and alerted the others in the police vehicle so that they could look. DW2 Belana Hubert heard Constable Menke call out Sambora's name and tell him to "be ready or be prepared." Those words could only have been uttered if the

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<sup>1</sup> [1977] 63 Criminal Appeal R 132



speaker saw Sambora do something bad. Constable Menke had just seen Sambora smash the windscreen and hit the vehicle.

63. I have warned myself of the dangers set out in the passage from *R v Turnbull*<sup>2</sup> above and I conclude, for the reasons given above that the identification by Constable Jonas Menke of Sambora as the person who smashed the windscreen and the rear left door of NPF 105 with a rock is beyond reasonable doubt. It is also corroborated by PW7.

**Damage**

64. The damage was proved by photographic evidence and the amount proved by documentary evidence at \$850.

**Recklessness**

65. The prosecution needs to prove the accused was reckless. Section 19(3) of the Crimes Act states that if recklessness is an element, proof of intention is sufficient. Intention can be inferred from the actions of the accused.
66. I find that when the accused hit the windscreen and the side of the NPF 105, he intended to cause damage to the vehicle.

**Conclusions**

67. For the reasons given above, I find that the prosecution has proved each element of the offence beyond reasonable doubt and I find the accused guilty as charged on both counts of damaging property.

  
.....  
**Penijamini R Lomaloma**  
**Resident Magistrate**



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<sup>2</sup> [1977] 63 Criminal Appeal R 132