IN THE SUPREME COURT OF NAURU

[CRIMINAL APPEAL JURISDICTION] Case No 22 of 2014

IN THE MATTER OF an appeal against Conviction
and Sentence and in relation Criminal Case No. CF 135/13

BETWEEN	ASSAD ALSHALOK (UNP073)	**FIRST APPELLANT**
And	MAZEN KHALAF (RET033)	**SECOND APPELLANT**
And	THE REPUBLIC OF NAURU	**RESPONDENT**

Before: Madraiwiwi CJ, Hamilton-White J and Khan J

First Appellant: Glenn Casement
Second Appellant: Michael McGrath
Respondent: Imad Abdul-Karim

Date of Hearing: 2 and 3 December 2014

Date of Decision: 9 December 2014

CATCHWORDS:

Criminal Appeal – Unlawful Assembly S61 Criminal Code of Queensland 1899 and Riot S63 Criminal Code – Elements of Offences not made out – Errors in Findings of Facts in relations to Unlawful Assembly and Riot – Appeal Allowed

CASES CITED

The following are cases cited in the judgment:

Boxer and Others v The Queen (1995) 81 A Crim R 299

Langford v The State [2005] UKPC 20

R v Turnbull [1977] 1 QB 224

The following additional cases were cited in argument and submissions:

Anderson v Attorney-General (NSW) (1987) 10 NSWLR 198

Azzopardi v R [2001] HCA 25

Bessenger v The Queen [1979] WAR 65

Boxer v The Queen (1995) 81 A Crim R 299

Bulejcik v The Queen (1996) 185 CLR 375

DPP (Nauru) v Fowler (1984) 154 CLR 627

Dinsdale v The Queen (2000) 115 A Crim R 558

Dominican v The Queen (1992) 173 CLR 555

Field v Metropolitan Receiver of Police [1907] 2KB 853

Harris v DPP (Nauru) [1998] NRSC 2

Langford v The State [2005] UKPC 20

*Lagowesi (*Fiji 2009 LRC 254

Liberato v The Queen (1985) 159 CLR 507

MJW v The Queen (2005) 80 ALJR 329

Pearce v The Queen [1998] HCA 57

R v Carr [2000] 2 Cr App R 149

R v Demeter [1995] 2 Qd R 626

R v Howells [1999] 1 WLR 307

R v Turnbull [1977] 1 QB 224

Shand v The Queen [1996] 2 Cr App R 204

State v Patrick Nayacalagilagi [2007] HAC 165

State v Sucutuiqaqa [2001] FJHC 359

Weiss v The Queen (2005) 224 CLR 300

JUDGMENT

Hamilton-White J and Khan J

BACKGROUND

1. The Refugee Processing Centre was established by agreement between the Governments of Nauru and Australia in August 2012, with the transferees (Asylum seekers) housed at the Regional Processing Centre (RPC) in Nauru.

2. Upon their arrival transferees are issued with a Nauruan Visa, and whilst in Nauru all transferees are subject to the law of Nauru.

3. Each transferee is referred to and identified by reference to the boat they were aboard when initially intercepted. This number is placed with a photograph of the transferee in question and this data saved on computer. Each transferee is issued with an identity card which the transferees carry with them.

4. Appellant 1, Asaad Alshalok (A1) identification details are UNP073. Appellant 2, Mazen Khalef (A2) identification details are RET033.

5. On 19 July 2013 there were 543 transferees housed at the RPC. On this date a number of the Muslim transferees, including A1 and A2, were fasting between sunrise and sunset in observance of Ramadan.

6. At some point during the early afternoon of 19 July 2013 loose groups of transferees gathered and shouted comments in relation to their placement in the RPC. This escalated after 3:30 p.m. when at a meeting between a senior officer with Wilson's Security and transferee Community Leaders, it was announced that a planned meeting with the Department of Immigration that was due to proceed, had been cancelled.

7. During the afternoon of the 19 July 2013 the overall threat level assessment for the RPC was upgraded from Low to Medium which amongst other things meant that support staff were required to move about in pairs. Members of the Nauruan Police Force (NPF) were called to the RPC and remained outside the front gates.

8. During the latter part of the afternoon and into the evening the threat level was further upgraded from Medium to High. This resulted in non-essential staff leaving the RPC, and one consequence of this was that no food was able to be prepared and served to the transferees.

9. At around 7:30 pm, a fence alongside the walkway to the western side of "H" block was pushed over and numbers of transferees moved westwards towards the entrance to the RPC. The entrance gate is referred to as Charlie 2. At the front gate (Charlie 2) stones and rocks were thrown at the NPF and Wilson Security who had formed lines in front of the gate. Buildings and vehicles were set alight and significant damage was caused to the RPC.

10. Subsequently around 10:00 pm, on 19 July 2013, 153 transferees (including A1 and A2) were arrested by NPF and taken into custody.

DISTRICT COURT HEARING

11. A1 and A2 were charged with others and were presented to the Magistrate's Court on 24 July 2013 and were granted bail to the RPC.

12. In subsequent appearances the Director of Public Prosecution filed *nolle prosequi* against numerous accused and ultimately A1, A2 and another transferee by the name of Alshahay Shanta faced charges of Unlawful Assembly and Riot.

13. Alshahay Shanta was the First Accused in the trial before the learned Magistrate, A1 was the Second Accused and A2 was the Third Accused. The charges against the Appellants and the first accused before the District Court are as follows:

FIRST COUNT

Statement of Offence (a)

UNLAWFUL ASSEMBLY: Contrary to section 61 of the Criminal Code of Queensland 1899 (1st Schedule) Adopted.

Particulars of Offence (b)

Alshahay Shanta, Asaad Alshalok and others on the 19th day of July 2013 at the Nauru Regional Processing Centre with a common purpose to stage a demonstration assembled themselves in such a manner as to cause persons in the neighborhood reasonably to fear that the aforesaid **Alshahay Shahta, Asaad Alshalok and others** being so assembled would tumultuously disturb the peace.

SECOND COUNT

Statement of offence (a)

RIOT: Contrary to section 63 of the Criminal Code of Queensland 1899 (1st Schedule) Adopted

Particulars of Offence (b)

Kalif Mazen, Assad Alshalok and others on the 19th day of July 2013 at Nauru Regional Processing Centre being assembled together with a common purpose to leave the Regional Processing Centre in a manner as to cause people in the neighbourhood to fear that the said, **Khalif Mazen, Asaad Alshalok and others** so assembled would tumultuously disturb the peace, then and there tumultuously disturbed the peace.

14. The Appellants' petitions of Appeal against Conviction and Sentence were lodged on the 2 July 2014. This followed a seven day hearing in the District Court which commenced on the 15 April 2014; judgment was delivered on 16 May 2014, and sentence on 5 June 2014.

15. Alshahay Shanta was acquitted of the charge of Unlawful Assembly.

16. Asaad Alshalok, A1, received a term of imprisonment of 6 months for Unlawful Assembly, 2 years imprisonment for Riot, totaling 2 years 6 months imprisonment. This sentence was reduced by 1 month as time spent in custody and it was ordered A1 should serve a total term of 2 years and 5 months imprisonment. A1 had spent 17 days on remand before trial; was remanded in custody on 16 May 2014 and bailed on 5 September 2014. A1 has served 130 days.

17. Mazen Khalef, A2, received a term of imprisonment of 1 year imprisonment for Riot. His sentence was also reduced by one month for time spent in custody and it was ordered that he should serve a term of 11 months imprisonment. A2 spent 17 days on remand before trial; on 16 May 2014 he was remanded in custody and remains there to date. A2 has not made any application for bail; he has served 226 days to date.

18. At the time of sentence the learned Magistrate advised the Appellants that they had 28 days to file an appeal.

RELEVANT STATUTORY PROVISIONS

19. a) **Criminal Code of Queensland 1899 (1st Schedule) Adopted**

Unlawful Assemblies: Breaches of the Peace

61. *Where three or more persons, with intent to carry out some common purpose, assemble in such a manner, or, being assembled, conduct themselves in such a manner, as to cause persons in the neighborhood to fear on reasonable grounds that the persons so assembled will tumultuously disturb the peace, or will by such*

assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are an unlawful assembly.

It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner aforesaid.

....

When an unlawful assembly has begun to act in so tumultuous a manner as to disturb the peace, the assembly is called a riot, and the persons assembled are said to be riotously assembled.

b) Punishment of an Unlawful Assembly

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

c) Punishment of a Riot

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

20. **The Appeals Act 1972**

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

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

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

(a) it is unreasonable or cannot be supported having regard to the evidence;
(b) any question of law has been wrongly decided; or
(c) there was a miscarriage of justice,

and in any other case shall dismiss the appeal.

Provided that the Supreme Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

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

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

21. **The Criminal Procedure Act 1972**

s 116(1) *Every judgement in the trial of a criminal cause shall, accept as otherwise expressly provided by any written law, be written by the presiding judge or magistrate, or the magistrate having charge of the proceedings, as the case maybe, in the language of the Court and shall contain point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding judge or magistrate, or the magistrate having charge of the proceedings, in open Court at the time of pronouncing it"*

s 191(2) "*Where before a trial by the Supreme Court of at any stage thereof before judgment, it appears to the Court that the information is defective, either in substance or in form, or inappropriate to the facts disclosed by the depositions or the evidence received during the trial, the Court may make such order for the alteration of the information, either by amending the particulars of the offence or by submitting a new offence for the offence charged or by deleting any count or by adding a new count as the Court thinks necessary to meet the circumstances of the case".*

22. We note that the Judgment of the learned Magistrate was not in accordance with section 116(1) The Criminal Procedure Act 1972. The learned Magistrate outlined the evidence of the witnesses without considering the points for determination.

GROUNDS OF APPEAL

23. A1 and A2 filed their grounds of appeal against their conviction and sentence on 2 July 2014. Despite the learned Magistrate stating that the appellants had 28 days to appeal, s5(1) of *The Appeals Act* 1972 allows for 14 days for appeals to be filed. The leave

application was heard on 31 October 2014 and this Court granted the Appellants leave to file appeal out of time.

24. The petition and grounds of appeal filed by the Appellants are as follows:
    a. The learned Magistrate erred in his Worship's statement of the matters required to be proved by the Respondent in order to satisfy the applicable elements of the offences of Unlawful Assembly (A1) and Riot (A1 and A2).
    b. Error in findings of fact, such as they relate to the elements of the charges of Unlawful Assembly (A1) and Riot (A1 and A2).

25. Written submissions have been filed by counsel for the Appellants and Respondents and we are grateful to counsel for these well-researched and comprehensive submissions to assist the Court.

26. In the Appellants supplementary written submissions, their counsels have raised a number of issues. One of which is that the charges referred to here and above was date-stamped as filed on the 7 May 2014, a day after the evidence was closed. Counsel for the Appellants made reference to the fact that the learned trial magistrate alluded to[1] new charges were to be filed and served. This was at the commencement of the trial when he stated that amended charges should be stamped, filed and served. The record however, reveals the amended charges were dated 7 May 2014.

27. The Appellants raised another issue to the supplementary written submission in relation to the offence of Riot. The amended charge dated 7 May 2014 states the common purpose on the offence of riot was "*being assembled together with the common purpose to leave the Regional Processing Centre...*". Counsel for A1 submitted that the learned Trial magistrate stated in his judgment that the common purpose for the offence of riot was "*to stage a demonstration at the Regional Processing Centre*"

28. It is submitted on behalf of A1 and A2 that if the common purpose had been changed from that stated in the charge filed on 7 May 2014 then the learned Trial magistrate was obliged to apply the provisions of Section 191(2) of *The Criminal Procedure Act* 1972 (see above). Any failure to apply these provisions would, counsel submits, cause prejudice to the Appellants.

29. Counsel for the Respondent relied upon a Fijian High Court case of *Sucutuiqaqa*[2] which was an appeal against a submission of no case to answer.

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[1] Transcript 3/130
[2] State v Sucutuiqaqa [2001] FJHC 359

30. We are of the view that if the common purpose for the offence of Riot was changed then the learned Magistrate was obliged to follow the procedures as set out in s191(2) above and failure to do so has caused prejudice to the Appellants.

POLICE INVESTIGATION

31. It is of concern to this Court that the role played by the NPF was limited. Initially the NPF were called to assist Wilson Security at the RPC when the threat level was graded to medium. The NPF remained outside Charlie 2 and when the fence was pushed over around 7.30pm they played an active role outside the RPC in forming a line and were instrumental in preventing the transferees from leaving the RPC. The NPF later assisted (around 10:00pm) in the arrest and transportation of 153 transferees to the Police Station.

32. Thereafter the NPF did not take any significant role in the investigating the commission of the offences. Case investigation appears to have been carried out by employees of Wilson Security. The Court raised its concerns with counsel for the Respondent who having taken instructions informed the Court that the NPF have never conducted an identification parade as Nauru was a small island nation and everyone was known to each other. However our research shows that an identification parade was conducted in the case of R v Karl[3].

33. The Court wishes it to be noted that the information placed before it in relation to the investigative processes in this case display, in all the circumstances, a concerning paucity of observance of recognised due process and lack procedural fairness. The investigative authority in this country is the NPF which, if lacking in resources in certain circumstances, may be bolstered by outside assistance without having its statutory based role compromised.

IDENTIFICATION

34. The leading case in identification evidence is *R v Turnbull*[4]. The Learned Magistrate discussed the issue of identification in relation to A1 and also the principles laid out in the case of *Turnbull*:

> "*First, whenever the case against the accused depends wholly or substantially on the correctness of 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 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*

[3] (1985) NRSC 1986 LRC
[4] (1977) I Q B 224 at 228

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 ever 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 identification 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?"

35. The warnings necessary for identification evidence include that of recognition evidence as per *Langford v The State*[5]:

"*Judges could usefully refer to the reminder given by Lord Lane CJ in R v Bentley* [1991] Crim LR 620, *that many people have experienced thinking that they have seen someone in the street whom they knew, only to discover that they were wrong. The expression "I could have sworn it was you" is an apposite remark to describe such an honest mistake.*"

36. The Learned Magistrate did not consider *Turnbull* in so far as identification of A2 was concerned.

37. Counsel for the Respondent argues that the offence of unlawful assembly and riot took place at around 7.30pm and counsel for the Appellant say a little later. Whilst the learned Magistrate[6] noted the fence was knocked down at 10pm. There is disagreement as to time but there is consensus that the alleged offences took place during the hours of darkness.

A1 – COUNT ONE

38. The Respondent submitted that evidence against A1 for the offence of Unlawful Assembly rests with PW5 Paul Nathan Archer, a Customer Service Officer (CSO) with Wilson Security.

39. PW5 started work on the 19 July 2013 at the RPC at 6.00p.m., [7] the threat level was at High and they were to work in pairs or groups of threes. The witnesses evidence is that upon first arriving at the RPC there "*was a large number of transferees approximately*

[5] (2005) UKPC 20 at 27
[6] Judgment p40
[7] Transcript (revised) 15/20

hundred or hundred and fifty protesting there. There was banners placed out there. ..... protesting such causes as Close Nauru, Freedom, Nauru same as Guantanamo Bay." [8]

40. The witness was asked how he felt when he heard the chanting and replied: "*I felt threatened, threatened and fearful considering the large number of transferees as opposed to the small number of guards...we have at that time. As the chanting became more and more aggressive, I fear for my safety and the safety of my staff as well. We were conducting patrols through the hysteria and then identify key ring leaders and who were instigating the chants. It was at this time I was able to identify four main people starting the chants...They were RAM75, POLLAARD, UNPO 73 ASAAD, LICO 53 JAHMAL and AD163 MOHAMMAD SALAMAT.*" [9]

41. Under cross-examination the witness told the Court that on the day in question he had a camera with him clipped to his shirt that he did use but that there was nothing that could be identified of the footage[10] as "on the night it was dark". [11] The witness did not agree with the question in Cross-examination that the only time that day that A1 came out of his room was to get a meal.

42. David Adeang (PW4) came to work at RPC at 6pm on 19 July 2013. PW identified A1 as YON073 when his boat number was UNP073 and further in question to the DPP he said as follows:
DPP – You said you started in March 2013, is that correct?
W – Yes
DPP – So by July 2013, you had been working there for how many months?
W – 1 month[12]
Later in examination in chief, he was questioned as follows:
DPP – Yesterday, you made reference to a number, did you recall the number you have used yesterday?
W – UNP073
DPP – Yesterday you said UN073, you gave a different number yesterday, is there a reason why?
W – The number that I give to Court yesterday was the number of the transferee that we were whisking at the time.[13]
In cross examination, he was asked:
DEF – On this particular day of the 19 July, how many people can you identify?
W – I cannot identify them because there were plenty of them.

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[8] Transcript (revised) 4/20
[9] Transcript (revised) 5/20
[10] Transcript (revised) 15/20
[11] Transcript (revised) 14/20
[12] Trascript 51/130
[13] Transcript 53/130

DEF – Of all these plenty that you saw, is it your evidence that you could not identify any of them?
W – The ones I can identify are not in Court today
DEF – When you gave your statement to the investigating team, how many names or how many numbers did you use?
W – I cannot recall the numbers is been too long.[14]
DEF – Can you recall how many numbers you gave?
W – I cannot
DEF – But you agree that the numbers correspond to a particular name of a transferee, would that be correct?
W – The numbers that I gave in my statement is not in Court today, only the name that was highlighted to me
DEF – Who highlighted that name to you?
W – I don't know
DEF – Is he a Police Officer?
W – I don't know, when it was given to me it was like that
DEF – How many numbers were highlighted to you?
W – 4 numbers
DEF – What are the other 3 numbers?
W – I can't recall
DEF – But you can specifically remember this number yesterday when you give evidence YON073, is that correct?
W – The YON that wasn't his number, the number 73 belongs to him[15]
DEF – Do you recall giving at least 12 numbers and names to that particular person on August 2013?
W – Yes
DEF – But in this proceeding you can only recall one number and one person?
W – I can recall because he's the only one in Court
DEF – When you saw a face how did you get the numbers after the 19 July
W – Because they were arrested
DEF –Were you taken to a place where there are computers and you are asked to look at faces?
W – There are faces on the computer and also on paper
DEF – Were you given a paper to look at faces?
W – Yes
DEF – When were you shown this faces on paper and how many days after that were you have been shown?
W – 2 weeks later
DEF – Where were you shown these pictures?

[14] Transcript 53/130
[15] Transcript 54/130

W – At my place in a car a bit far from my house[16]
DEF – Who were in that car?
W – Just 2 of us
DEF – Who was the other person?
W – Shaun Hiram[17]

43. Having considered the transcript of the trial and counsel submissions, the circumstances that pertained at the time of the identification (darkness, large groups of people coming and going, chanting and an overall stressful and chaotic environment), these are circumstances within which mistakes and honest mistakes are made.[18]

44. This Court is of the view that the learned Magistrate was obliged to give himself a warning as to the special caution needed and direct himself to the circumstances in which identification was made. In our view the learned Magistrate failed to do so and this failure is fatal to the identification of A1. We hold that A1 is not positively identified in relation to Count One.

45. The Respondent submitted to this Court that 'chanting or leading the chanting does not constitute an offence in these circumstances'. Furthermore the Court takes note of the uncontested evidence of PW8 Inspector Raynor Tom to the effect that up until the time that the fence was broken no offence had been committed, and that lines could go on around the chanting. [19] The particulars of Count One place the events alleged prior to the breaking down of the fence.

A1 - COUNT TWO

46. The Respondent submitted that the evidence against A1 for offence of Riot rests with PW6 Michael Demadio, a CSO with Wilson Security.

47. PW6 shift commenced at 6:00pm, on the evening of 19 July 2013 at RPC[20] but he came in an hour earlier at 5:00pm as they had been briefed the transferees were protesting about being on Nauru.[21]

48. The witness stated that there were approximately 35 to 40 people there from Wilson's Security and 30 to 40 people from Sterling's Security. PW6 states that there were between 200 and 300 transferees chanting near the fence at that point he was some 100m away and could not identify their faces. When the fence line went down the transferees

[16] Transcript 55/130
[17] Transcript 56/130
[18] *R v Turnbull* [1977] 1 QB 224, *Langford v The State* [2005] UKPC 20
[19] Transcript 104/130
[20] Transcript (revised) 17/20
[21] Transcript (revised) 18/20

ran towards the gate and commenced throwing rocks at the light, the gate and the Transfield Office. There were also rocks thrown towards the local Nauruan Police who were outside the gate[22].

49. PW6 stated that once it was apparent that the transferees could not get through the line of police they turned and started throwing rocks in the direction where he (PW6) was. When asked to identify the names of those throwing rocks PW6 stated that the only one he recognised from previous dealings was UNP73. PW6 and other officers then left the area and went to the main gates[23].

50. Under cross-examination PW6 agreed that he had made two statements to the police; one on the 24 July 2013 and the other on 4 October 2013. The second statement given to the NPF is dated 22 October 2013. PW6 accepted that his statement did not include the information that he recognised A1. The witness stated that he told the Court he recognised A1 because of previous dealings with the witness. No reason was given to the Court as to why the statement given to the NPF omitted any reference to A1. [24]

51. Having considered the transcript of the trial and counsel's submissions, the circumstances that pertained at the time of the identification (darkness, many people coming and going, fence being broken, rocks being thrown in the direction of the witness in an overall stressful and chaotic environment), and that the witness initially omitted to name A1 in his statement to the NPF. The identification evidence of A1 for Count Two fails to satisfy the Court[25], and he was not positively identified.

A2 – COUNT TWO

52. The Respondent submitted that the identification of A2 rests on the evidence of PW7 Dion Donnelly. This witness was employed at the RPC as a Transfield CSO and on the 19 July 2013 was working the night shift commencing at 5.00p.m.[26] PW7 observed a large group chanting "Close Nauru" and "We are not criminals", this chanting continued to around 7:00pm.

53. PW7 describes a large group of transferees some 40 plus increasing to 70 in number near the Recreation Centre, the fence is shaken and then pushed down; this occurs around 7.30 p.m. Numerous Transferees are seen heading for the exit (referred to as Charlie 2). On rounding a corner, in the smoking area, the witness sees a man grabbing a service officer

[22] Transcript (revised) 18,19/20
[23] Transcript (revised) 19/20
[24] Transcript 78,79/130
[25] *R v Turnbull* [1977] 1 QB 224, *Langford v The State* [2005] UKPC 20
[26] Transcript 84/130

by the arm and attempt to assault the officer.[27]PW7 refers to this officer as CSO Moxley, the CSO was not called to give evidence at the District Court.

54. PW7 gave the name Morzen which perhaps corresponds to the name Mazen but he also gave a second name Al Manlhal and that does not correspond to the name Khalef. PW7, was asked to point out RAT003 by the DPP and he pointed to the 4th accused. We know that when the trial commenced, there were only 3 accused persons, but the DPP stated that "person on the left identifies the 4th accused" and the Court recorded "4th accused noted". So the question that we have to ask is who was identified in Court.[28]

55. PW7 evidence is that he had some previous dealings with A2 at meal lines and checking identification. The witness did not see A2 participating in the protest in front of H-Block[29], nor was A2 one of the transferees that the witness shone his torch into his face to see who was throwing stones. The situation as described by the witness was that of chaos, aggressive and out of control.[30]

56. A2 gives sworn evidence that he arrived at the RPC on the 22 June 2013. On the 19 July 2013 he was sleeping in his room and awoke around 5.00p.m. as he was fasting for Ramadan. On the way to the mess to eat he saw and heard some Sri Lankans protesting.[31] There was no food so he returned to his room to eat biscuits. Later there was screaming and stones being thrown, A2 went outside and, seeing people running away, he and others followed to avoid the stones that were being thrown. A2 denies taking part in any protest or assaulting anyone.[32]

57. The Learned Magistrate in his Judgment states "the Unlawful Assembly that the Third Accused (A2) has been charged with refers to the gathering of chanting transferee protesters along the fenced walkway in front of H block". The Learned Magistrate further stated in his Judgment that "The Third Accused was holding a soft ball sized stone at him. They shone the torch lights at the Third Accused's face. They yelled at the Third Accused to put the stone down. The Learned Magistrate found the Prosecution evidence to be "responsible" and that he was satisfied that the Third Accused (A2) was part of the unlawful gathering of transferee along the fenced walkway.[33]

58. Having considered the transcript of the trial, Sentence, Judgment and counsel submissions, with respect to the Learned Magistrate his interpretation of the evidence are

[27] Transcript 85/130
[28] Transcript 87/130
[29] Transcript 93/130
[30] Transcript 96/130
[31] Transcript 123/130
[32] Transcript 124/130
[33] Magistrate's Judgment 42,43/44

unsubstantiated. With respect the witness did not identify A2 as the one holding a stone, nor was A2 identified by having a torch shone in his face. Before the Learned Magistrate came to consider the evidence of identification he had already made a finding against A2 that he had acted in a tumultuous manner.[34]

59. Taken at its highest the evidence against A2 is that he was under observation by PW7 in chaotic circumstances where at 7:30 p.m. it was dark, there were numerous Transferees running towards the exit chanting, and rocks are being thrown. The witness rounds a corner and sees someone grabbing his partner's arm; at best this is a momentary sighting. There is no evidence before the Court that A2 was holding or throwing rocks or part of the gathering at the walkway.

60. The circumstances of this identification fall squarely within what is outlined in *Turnbull*; further A2 had been at the RPC for four weeks, one of 543 transferees, any assertion as to recognition must equally be treated with caution. These are circumstances in which honest mistakes can all too easily be made.[35] The identity of A2 was in issue and the Learned Magistrate should have given himself a warning as to the special need for caution which he failed to do. We find that A2 was not positively identified for Count Two.

PREJUDICAL REMARKS BY THE MAGISTRATE

61. At the close of the Prosecution case the Learned Magistrate said as follows to defence counsel:

> "*Right, I hope you have explained that the fact if they remained silence does not mean that they are not guilty of these offences that they have been charged with. At the end of the day, I still have assessed the evidence of the sentencing.*"[36]

62. The Learned Magistrate makes this reference to A1:

> "*Despite the first accuse silence; I will still have to assess the prosecution evidence to determine whether it is sufficient to convict him....*[37] *the accused has said nothing to detract from the strength of the prosecution evidence*"[38]

63. In making these comments it is our view that the Learned Magistrate was inferring that there was some onus on the appellants to disprove their guilt. These comments are very prejudicial and amount to an impermissible breach as per *Boxer*[39]*:*

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[34] Magistrate's Judgment 40/44
[35] *R v Turnbull* [1977] 1 QB 224, *Langford v The State* [2005] UKPC 20

[36] Transcript 115/130
[37] Magistrate's Judgment 29/44
[38] Magistrate's Judgment 30/44
[39] Boxer v The Queen (1995) 81 A Crim R 299, at 300 & 315

"In accordance with section 8(1)(c)of the Evidence Act 1902, there should be no comment by the prosecution which suggests that the exercise by an accused of the right to silence may provide a basis for inferring a consciousness of guilt.."

64. The Court sets aside the verdict of the District Court as it cannot be supported having regard to the evidence. The appeals against conviction are allowed, the convictions quashed and verdicts of acquittal are entered. Mazen Khalef is to be discharged from custody.

Madraiwiwi CJ

65. I have had the opportunity to read the Judgment of Hamilton-White and Khan JJ and respectfully concur with it. I only wish to express my concern that the investigation of this case appears to have been conducted by the authorities at the Refugee Processing Center with little regard for the Nauru Police Force. It may will that this was the first situation of its kind that caught those concerned unawares, but in future it would be appropriate for all concerned to remember that the maintenance of law and order in Nauru is vested in the Nauru Police Force.

DATED this 9th day of December 2014.

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CHIEF JUSTICE J. MADRAIWIWI

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JUSTICE J. HAMILTON-WHITE

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JUSTICE M. S. KHAN