IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Criminal Appeal No 1 of 2011

Director of Public Prosecutions — Appellant

v

Jesse Jeremiah, Jenke Jeremiah, Gabriel Ika, Janero Ika, Joram Joram, Renack Mau, Joggy Kam, Bureka Kakiouea. — Respondents

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JUDGE:	Eames, C.J.
WHERE HELD:	Nauru
DATE OF HEARING:	15 July 2011
DATE OF JUDGMENT:	19 July 2011
CASE MAY BE CITED AS:	DPP v Jeremiah and Others
MEDIUM NEUTRAL CITATION:	[2011] NRSC 14

Appeal - *Appeals Act* 1972, s5 - Application for leave to appeal out of time – Whether "good cause" - Leave granted.

Criminal law – Police - Statutory and common law rights to enter private property – *Nauru Police Force Act* 1972, s.23 – *Summary Offences Act 1967* (formerly the *Police Offences Ordinance* 1967), ss. 5(b) and s.6(1) -Whether implied licence - Report of disturbance at private property – Police enter property and demand persons leave – Refusal to leave – Melee follows refusal to leave - Withdrawal of any licence to police to be on property – Respondents charged with obstructing police in the execution of their duty – *Criminal Code* s.340(2) – Appeal dismissed.

APPEARANCES:	Counsel
For the Appellant	Mr Wilisoni Kurisaqila DPP
For the Defendant	Mr Knox Tolenoa

CHIEF JUSTICE:

1 The Director of Public Prosecutions seeks leave to appeal out of time against decisions of the learned Resident Magistrate who delivered judgment on 4 May 2011 dismissing charges laid against the eight respondents. Each respondent was charged with obstructing police contrary to section 340(2) of the Criminal Code Queensland, which makes it an offence, punishable by imprisonment up to 3 years, to unlawfully obstruct a police officer, "while acting in the execution of his duty, or any person acting in aid of a police officer while so acting".

2 In addition, Janero Ika had also been charged with unlawful wounding of Constable Raynor Tom, in breach of section 323 of the Code. The Magistrate dismissed that charge for lack of evidence, and no appeal is sought to be brought with respect to that acquittal.

Tumultuous events on private property.

3 The events giving rise to these prosecutions occurred on 18 July 2009, after a contingent of at least 6, and probably more, police attended a property on which stood a two story residence in the Meneng district. The property was owned by the Kakiouea family. The police attended the scene following a complaint which had been made by a member of the public about the conduct of "drunkards" on the premises.

4 Before they arrived at the property the police had taken part in a briefing which followed receipt of the complaint. Inspector Brown Capelle conducted the briefing. Before doing so he had first attended the home of Inspector[1] Deidenang and requested "back up "assistance "to remove drunkards" at the property in Meneng, which police had also attended two days earlier, following a disturbance. On that occasion the people had caused police "trouble" when they attended. After attending the briefing Deidenang then went to the scene with the other officers. Deidenang said that he was the senior officer who attended the scene, but it seems

[1] In the judgment Capelle and Deidenang are referred to both by the rank of Inspector and Sergeant. It may be that one or both was an Acting Inspector, and hence was referred to by witnesses by reference to both ranks.

that the exercise was largely directed by Capelle.

5 Capelle advised the other officers who had been called to attend the briefing that he had received a complaint between 1 pm and 1.30 pm. Constable Raynor Tom recalled being informed at the briefing "that there was a disturbance in the neighbourhood about people being too loud, drinking and plenty of young boys". It is not clear from the record of his evidence whether it was the caller who had demanded "that the police were to remove the drunkards because they were disturbing the peace", or whether that was Capelle's view of what was required. The Magistrate made the following findings:

> "The person who made a complaint to police seeking their assistance was not named and did not give evidence. Inspector Capelle referred to a report he received on that day, directing police to remove a drunkard from the Kakiouea residence. He later stated, "the report we received is to remove the drunkards because they were disturbing the peace of the neighbourhood".

6 In any event (and before attending the scene), that is what Capelle told the other officers was to be their task; they were attending to remove people from the premises.

7 It is important to note the observations police made when they first arrived at the scene. Inspector Capelle said he saw, "about 20 something people walking around, shouting, drinking and doing stupid things". Constable Baguga said he saw, "about 20 something drunkards". Constable Raynor Tom said he saw, "about 20 boys drinking or sleeping with music being played in the background". Some of those people were in the garage attached to the house, and some were underneath the house, on the ground floor.

8 Capelle, who appears to have been in charge, spoke to Bureka Kakiouka and told him "to remove his friends from the area" and Bureka and Renack Mau told Capelle that the residence belonged to them. Capelle acknowledged that that was so, but he said, "you are removed because you are causing a disturbance." According to Deidenang, Capelle said to the people who claimed it was their property, that "the people there wanted them to be removed". They refused to move, and so Capelle

called for reinforcements.

9 The learned Magistrate made the following findings:

> "The evidence indicated that police spoke to two people who were occupiers of the premises. The first was the male person Bureka Kakiouea, one of the people arrested and secondly, Fonda Kakiouea or Florina Kakiouea, the female (whom) police spoke to at the scene who identified herself as a resident. Both these people, on the evidence of Inspector Capelle had asserted (that) the male persons present were doing nothing wrong".

10 Constable Dabuae gave evidence that after Capelle had ordered Jesse Jeremiah and the others to leave the area they refused and then violence started, as police started arresting people. He said "it went out of control". In the course of the wild events that followed, a female approached him, while he was assisting one police officer holding an offender, and she told police to let that person go. Dubuae responded, saying that police were doing their job. He confirmed that Florina Kakiouea had asked police to leave the premises.

11 What is clear is that very soon after the police reinforcements entered the property, at Capelle's direction, a confrontation occurred, and then escalated. A struggle started between Janero Ika and one of the police officers. Capelle and other police officers then commenced trying to drag people from the premises. As that was happening, Jesse Jeremiah, who had been asleep, woke up and ran towards the police. Capelle pushed him away and ordered him to leave the premises. Capelle and Constable Fritz held Janero on the ground, then Capelle was punched in the face by Joram Joram. Capelle chased Joram, caught him and put him in the caged vehicle. Capelle returned to assist Constable Fritz with Janero, but Jesse Jeremiah grabbed Capelle and pulled him back against a post. Constable Simpson assisted Capelle, whereupon Renack Mau tried to hit Capelle with a rock, but his throw missed Capelle and hit Constable Baguga, instead.

12 Other police witnesses were engaged in their own confrontations. Constable Baguga was hit by a stone thrown by an unknown person, so then he used his truncheon on Janero Ika, in response, he said, to other people using sticks. Constable Tom was struggling on the ground and was helped by other officers. He was bleeding from a

cut that later required stiches. Constable Daduae saw Janero swing a bottle at police, and he saw Gabrial Ika struggle with Constable Tom, while holding a rock. He apprehended Joggy Kam, and saw Jenke Jeremiah chasing another officer.

13 Not surprisingly, the learned Magistrate found there to have been, "overwhelming evidence of obstruction" of police by the respondents but, as he correctly pointed out, for an offence to have been committed the police had to have been acting in the course of their duty. If not, then they were trespassers effecting unlawful arrests, which the alleged offenders were entitled to resist.

Should leave to appeal be granted?

14 The Director applies for leave to bring this appeal out of time. The 14 day time limit was not met, a further week expiring before the application was filed.

15 Section 5(1) of the *Appeals Act* 1972 permits the Court to enlarge the time for appeal beyond 14 days "for good cause". Without limiting the scope of that phrase, s.5(2)(b) provides that there will be "good cause" if the case is one "in which a question of law of unusual difficulty is involved".

16 In this case, the Director contended that good cause arises from the fact that the decision of the Magistrate is said to create uncertainty as to the powers of police to enter private property in response to unruly behaviour.

17 Mr Tolenoa, for the respondents, submits that I should refuse leave because the decision of the Magistrate is not arguably wrong, the case is now two years old, and the respondents have been living with it hanging over their heads, notwithstanding their acquittals, and because the appellant has provided no excuse whatsoever for the failure to lodge the appeal within time.

18 I agree that each of the matters raised by Mr Tolenoa is significant, and militates against granting leave. On the other hand, I accept that the Resident Magistrate's careful and comprehensive judgment identifies what are some uncertain areas in the law concerning the powers of police. Whilst the law might not be "unusually

difficult", it is by no means simple. There have been discernable differences in the approach of English and Australian courts as to the weight to be given, respectively, to the rights of enjoyment of private property and the powers of police as to the control of crime. Furthermore, by examining these principles in the context of a case which shows the potential for confrontation in circumstances where police do not know the limitations of their power, the Court may be able to provide guidance for citizens and Police officers alike.

19 The notion of "good cause" should not be narrowly interpreted, or confined by strict rules. What matters overall are the interests of justice: see *DPP v Ciccolini*[2]; *R v McBride*[3].

20 In my view, this is an appropriate case on which to grant leave, and I do so.

Trespass and the exercise of police power.

21 Police officers do not have power to enter private property as they wish. They may do so only if they are exercising very clear statutory power or common law power.[4] As the High Court held, in the joint judgment in *Coco v The Queen*[5]:

> "8. Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right ((1) Entick v. Carrington (1765) 2 Wils KB 275 at 291 [1765] EWHC J98; (95 ER
> 807 at 817); Halliday v. Nevill [1984] HCA 80; (1984) 155 CLR 1 at 10 per Brennan J;
> Plenty v. Dillon [1991] HCA 5; (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ See also Colet v. The Queen (1981) 119 DLR (3d) 521 at 526.). In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law ((2) Halliday v. Nevill (1984) 155 CLR at 10 per Brennan J; Plenty v. Dillon (1991) 171 CLR at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ). Statutory authority to engage in what otherwise would be

[2] [2007] QCA 336
[3] [2011] QCA 25
[4] *Kuru v State of New South Wales* [2008] HCA 26 at [43]; *Halliday v Nevill* [1984] 155 CLR 1 at 10.
[5] (1994) 179 CLR 427 at 435-6

> tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct ((3) Plenty v. Dillon (1991) 171 CLR at 648 per Gaudron and McHugh JJ; Morris v. Beardmore (1981) AC 446 at 455, 463; Colet (1981) 119 DLR (3d) at 527-528.). But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in Plenty v. Dillon ((4) (1991) 171 CLR at 654.):
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> > "(I)nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights".

22 Their Honours added:

> "The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights(see Chu Kheng Lim v Minister for Immigration [1992] HCA 64; (1992) 2176 CLR 1a t 12 per Mason C.J)."

23 These principles apply in Nauru. *The Constitution of Nauru* provides, by s.3, that every person is entitled to the fundamental rights and freedoms, including the freedom for the enjoyment of property and the protection of the law, and respect for his private and family life. By s.5(1), no person shall be deprived of his personal liberty, except as authorised by law in any of the listed cases, one such case being, (c) "upon reasonable suspicion of his having committed , or being about to commit, an offence". Section 5(2) provides that a person who is arrested or detained "shall be informed promptly of the reasons for the arrest or detention . . .".

24 What, then, was the power that the police were exercising in entering private property and thereupon effecting arrests?

25 Mr Kurisaqila pointed to two sources of power. First, that provided by s.23(1)(a) of the *Nauru Police Force Act* 1972, which provides that "The duties of the Force shall be

to take lawful measures for . .. preserving the public peace".

26 Secondly, and/or alternatively, he identifies the source of power as s.5(b) and s.6(1) of the *Summary Offences Act* 1967. Section 5(b) provides that every person who is guilty of "disturbing the public peace" commits an offence punishable by a fine of ten dollars or one month's imprisonment. Section 6(1) provides:

> "Any constable may arrest without warrant any person he finds committing an offence under this Ordinance"

27 Mr Kurisaqila expressly disavowed reliance on other paragraphs of s.5 as being the source of power. Thus, it was not contended that the offences which in this case gave power of entry and arrest were those set out in s.5(a)"riotous, offensive, disorderly or indecent behaviour, or of fighting, or of using obscene language in or within the hearing or view of any person in any road, street thoroughfare, or public place", or s.5(d) "any offensive behaviour in or about a dwelling house . . .". Nor was the power said to relate to the offence of being drunk in a public place under s.3, or being drunk and disorderly in or on any public place under s.4.

28 In the hearing before the Resident Magistrate the prosecution also sought to rely on the power to arrest without warrant under s.546 of the *Criminal Code*, but that provision does not apply to police officers: see s.545A. Tentative reliance was also placed on s.10 of the *Criminal Procedure Act* 1972, which grants such power of arrest without warrant where a police officer has reasonable grounds for believing that an offence punishable by imprisonment for a term of five years or more has been committed, which plainly did not apply here. Nor did the prosecution either below of before me seek to rely on s.260, which gives power to any person "who witnesses a breach of the peace" to use such force as is reasonably necessary, and to detain the offender, in order to prevent its continuation or renewal.

29 Did the power to deal with "disturbing the public peace" under s.5 (b) of the *Summary Offences Act* give the right of entry to private premises, and arrest, in this case? In the first place, it is to be noted, that not one of the eight offenders was charged with that offence.

30 As to what constitutes a breach of the peace, I am content to adopt the analysis of authority made by the learned Resident Magistrate, which, with respect, provided a correct statement of the law. Halsbury's Laws of England summarises the position, thus:

> "For the purposes of the common law powers of arrest without warrant, a breach of the peace arises where there is an actual assault, or where public alarm and excitement are caused by the person's wrongful act. Mere annoyance and disturbance or insult to a person or abusive language, or great heat and fury without personal violence, are not generally sufficient".[6]

31 The UK Court of Appeal in *R v Howell*, held, as to that passage in Halsbury:

> "The statement in Halsbury is in parts, we think, inaccurate because of its failure to relate all the kinds of behaviour there mentioned to violence. Furthermore, we think, the word 'disturbance' when used in isolation cannot constitute a breach of the peace. We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or, in his presence, to his property, or a person is in fear of being harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant."[7]

32 Mr Kurisaqila submitted that the police entered the premises for the purpose of investigating the complaint that there had been breach of the public peace; specifically, a complaint about noise.[8] The Director conceded that he could not point to any evidence that the police had themselves observed conduct constituting a breach of the peace upon their arrival.

33 The Director submitted that police had a duty and express statutory power by s.23 to preserve the public peace and an implied licence to enter private premises for that purpose. Section 23 does not itself say anything about entering private property. To apply the words of the High Court in *Coco*, it does not "in unmistakable and unambiguous language" purport to interfere with any fundamental right to enjoy

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[6] *Halsbury's Laws of England*, 4th Ed, Vol 11, "Criminal Law", par 108.

[7] [1982] 1 QB 416 at 427, cited in Carter's Criminal Law of Queensland [260.10].

[8] Nauru does not have any environmental protection legislation to deal with excessive noise, c.f., the situation addressed by Marks, J in *Nicholson v Avon* [1991] 1 VR 212, a decision that pre-dated the High Court decisions that I have discussed.

private property. It imposes a duty to take "lawful measures" for preserving the public peace, which begs the question, was it a lawful measure to enter private property in this situation? The Director submits that it was, in order to investigate the validity of the complaint that had been received. A similar argument, based primarily on what was said to be an identical common law power of police officers, was rejected by the High Court in *Kuru v New South Wales*[9].

34 In the joint judgment in *Kuru* the Court identified a difference in the approach taken by English and Australian courts on this question. Counsel for the State of New South Wales had argued that where a police officer apprehended on reasonable grounds that a breach of the peace had occurred or might re-occur, or was imminent, then they could enter dwelling houses for preventative and investigative purposes, remaining only so long as necessary to effect those purposes. The Court noted statements in *Thomas v Sawkins*[10], a decision of the Divisional Court of the King's Bench, concerning police powers of entry to private property in order to prevent the commission of an offence. The Court said that the English authorities were expressed in very wide terms. Indeed, as the Court noted, the decision had been criticised by academic writers as having employed unnecessarily wide terms[11].

35 Their Honours observed (with the emphases in the original):

> "Further, the State's submission that police may enter for "preventative *and* investigative purposes" would, by its reference to "investigative purposes", extend the power much further than any description of common law power given in the English cases. There is no basis for making that extension. Whatever may be the ambit of the power of police (or of a member of the public) to enter premises to *prevent* a breach of the peace, that power of entry does not extend to entry for the purposes of investigating whether there has been a breach of the peace or determining whether one is threatened."[12]

36 The High Court considered whether there was a statutory source of power for police officers to keep the peace. Their Honours identified provisions in the Police Act and regulations, in particular the form of the prescribed oath, "to cause her Majesty's

[9] [2008] HCA 26
[10] [1935] 2 KB 249.
[11] *Kuru*, at [46]-[48]
[12] *Kuru*, at [51]

peace to be kept and preserved": language close to that in s.23(a) of the *Nauru Police Force Act*. The joint judgment continued:

> "[53]It is not necessary to decide whether it is these provisions that obliged police officers in New South Wales to keep the peace. It is sufficient for present purposes to accept, without deciding, that at the time of the events giving rise to this litigation New South Wales police officers were bound to "keep the peace". But in the present matter, by the time police went to the appellant's flat, there was no continuing breach of the peace and nothing in the evidence of what happened thereafter suggested that, but for the police officers not leaving the flat when asked to do so, any further breach of the peace was threatened or expected, let alone imminent. However broadly understood may be the notion of a duty or right to take reasonable steps to make a person who is breaching or threatening to breach the peace refrain from doing so, that duty or right was not engaged in this case. It was not engaged because, by the time police arrived at the appellant's flat there was no continuing or threatened breach of the peace. And no breach of the peace was later committed or threatened before the eruption of the violent struggle that culminated in the appellant's arrest.
>
> [54]It follows that the continued presence of police officers in the appellant's flat, after he had asked them to go and a reasonable time for them to leave had elapsed, could not be justified as directed to preventing a breach of the peace. No other form of common law justification for remaining in the appellant's flat was suggested.[13]

37 As I shall later discuss, that analysis is entirely apt for the evidence in the present appeal, and the evidence in this case may be contrasted with that in other cases in which the right of entry to private premises was upheld.

38 In *Crisp Adeang v DPP*[14], Thompson, C.J. held that a police officer was entitled to arrest an offender without warrant for obstructing him when he was trying to prevent the commission of the offence of disturbing the public peace under s.5(b) of the *Summary Offences Act* 1967 (under its then title of the *Police Offences Ordinance 1967*). In that case, the police officer attended a home in response to a noise complaint and found the offender had set up loudspeakers outside his home, blasting noise towards a set of speakers placed in front of the home opposite. After the officer had called for the noise to stop, the offender, from his premises

[13] *Kuru*, at [53]-[54].
[14] [1969-1982] NLR Part D page 115, Criminal Appeals Nos 20 and 27, 26 January 1982

encouraged the 'music' maker to start it up again. The police officer arrested the person who was hindering his effort to stop the noise, presumably by arresting the interloper on his premises, although the question of trespass was not argued in that case. Thompson, C.J. held that the *Summary Offences Act* enabled police to intervene to prevent or terminate conduct which is causing or is likely to cause annoyance or nuisance to the public. With respect to the offence of disturbing the public peace, he held:

> "In order to prove such a disturbance, all the prosecution has to do is to establish that the public peace was in fact disturbed, i.e. that noise, not kept within the confines of a private building, not reasonable in all the circumstances and which caused or was likely to cause annoyance or nuisance to other persons, was in fact made. There is no need for any member of the public to give evidence that he was annoyed by the disturbance of the public peace".[15] (My emphases).

39 I respectfully agree with the analysis of Thompson, C.J., but I note that the general observations about the purpose and intended scope of the Act/Ordinance, must give way to the specific terms in which s.6(1) is couched. Had there been an offender or offenders "found committing" the offence of disturbance of the public peace, then the police would have had power of arrest, and, as I shall discuss, could have done so on private property. But that is not the evidence in this case and, as I have noted, no one was charged with an offence under s.5(b).

40 In *Wheare v Police*[16], Gray J considered whether by virtue of s.75 of the South Australian Summary Offences Act, or else at common law, police could enter premises to effect an arrest, without warrant. Section s.75 provided that a police officer could, without warrant, "apprehend any person whom the officer finds committing or has reasonable cause to suspect of having committed or being about to commit an offence". That language is broader than "finds committing" as appears in s.6(1) of the Nauru legislation.

41 Gray, J. held, following his review of many previous decisions, that if the elements of s.75 were established then it permitted police to enter private property to effect an

[15] At 122.
[16] [2008] SASC 13

arrest, and to stay on the premises until that is achieved, notwithstanding being told to go by the occupier[17]. Thus, in the present case, if the police had found offenders committing a breach of the peace they could have entered the premises to effect arrests.

42 In *Lippl v Haines*[18], Gleeson C.J. identified the statutory power in similar terms to Gray, J. but added the useful observation that save for "exigent circumstances" (a phrase the Chief Justice adopted from a Canadian case) police should give a proper announcement to the occupants prior to entry, so that the occupants were made aware that police were claiming a right of entry, and giving the occupants an opportunity to permit that to occur without force.

43 As to common law rights of entry to private property, in the joint judgment in *Halliday v Nevill*[19] the High Court held that there was an implied licence to any member of the public to enter the driveway of premises, to approach and knock on the door. That licence could be rebutted by signs or by a locked gate, or by the occupant telling the visitor to depart. Police officers would share that implied licence with other members of the public.[20] In this case, however, if police were indeed acting pursuant to an implied licence, it was revoked before the confrontation commenced, when the occupiers asserted their rights as occupiers to remain on their property, refused to depart their premises, denied any breach of the peace had occurred, and then both expressly in words, and by unmistakable behaviour, told the police to go.

44 In *Halliday* Brennan J held (dissenting, but not as to this statement) that there was common law power to arrest without warrant which, without licence, could be exercised both on private and public land but that the common law power was limited to cases where there was a reasonable suspicion of the offender committing a felony, but not so with respect to a misdemeanour, except where there was an actual

[17] *Wheare*, at [40]; see too *Dinah v Brereton* [1960] SASR 101 at 105; *McDowell v Newchurch* (1981) 9 NTR 15, at 20; *Kennedy v Pagura* (1977) 2 NSWLR 810, at 812.
[18] (1989) 18 NSWLR 620 at 622.
[19] (1984) 155 CLR 1. at 6-8.
[20] See, too, *Robson v Hallett* [1967] 2 QB 939, at 950; *Dehn v Attorney General* [1988] 2 NZLR 564, per Tipping J.

breach of the peace by virtue of an affray or by personal violence, and where the offender is arrested while committing the misdemeanour or immediately afterwards[21].

45 Applying those cases, Gray, J. held that there was a common law right of entry for purposes of effecting arrest, but he observed that that since the dichotomy of felonies and misdemeanours had been abolished it was difficult to be certain what offences might now be the equivalent of a felony. He found that the offence in that case, wilful damage, was akin to a felony. That would not be the case with the offences to which this appeal relates; they were summary matters carrying low penalties.

Conclusion

46 On the evidence in this case, as found by the Magistrate, police were not and could not have been relying on their powers under s.6(1) of the *Summary Offences Act*, as the people arrested were not found committing a breach of the peace. Nor could they rely on s.23 of the *Nauru Police Force Act*, since their conduct did not amount to a lawful measure for preserving the public peace, and that provision in itself did not authorise entry on to private property.

47 The Director contended that the police entered the private property for the purpose of investigating whether an offence of disturbing the public peace had occurred. As I have discussed, the High Court made clear in *Kuru* that that would not justify what would otherwise be trespass. In any event, the evidence in this case strongly suggested that in reality the police entered with the pre-determined intention to order all persons to depart, arresting those who declined, and then forcibly removing them, irrespective of whether or not they were then found committing an offence of disturbing the public peace. Even if their entry was initially by implied licence, which I do not think was the case, given their pre-determined intention, then that licence was withdrawn before any obstructing conduct commenced.

48 A police officer acts in the execution of his duty from the moment he embarks on a

[21] *Halliday*, at 12.

lawful task connected to his functions as a police officer, and continues to act in the execution of his duty for as long as he is engaged in pursuing that task until it is completed, providing that he does not go outside the ambit of the duty, thereby ceasing to act within his duty.[22]

49 In this case the police were not acting lawfully in entering or remaining on the property. Not only did no witness assert that they entered because conduct amounting to the offence of disturbing the public peace was then taking place, but the evidence could not have amounted to that. The police were trespassers, and were not, therefore, acting in the execution of their duty when they arrested the respondents for obstructing them in the execution of their duty.[23]

50 The respondents were not guilty of the offence of obstructing police in the execution of their duty. The learned Resident Magistrate's decision, as articulated in his well-reasoned judgment, was correct.

51 Leave to appeal out of time is granted, but the appeal is dismissed.

Dated the 19th day of July 2011

Geoffrey M. Eames AM QC

Chief Justice

[22] *Re K* (1993) FCR 336 at 340-341.
[23] See *Garwood v Schultz* 1982 Tas R 120; *Letts v King* [1988] WAR 76.