



HIGH COURT OF KIRIBATI

Criminal Case N° 3/2016

THE REPUBLIC

v

IOTEBWA TEBATAI

Teanneki Nemta for the Republic
Teetua Tewera for the prisoner

Date of sentencing: 4 September 2019

SENTENCE

- [1] Iotebwa Tebatai has pleaded guilty to 1 count of unlawful wounding, contrary to section 223 of the *Penal Code*, and 1 count of indecent assault, contrary to section 133(1) of the *Penal Code*.¹
- [2] The circumstances giving rise to these offences occurred on 9 August 2013 on Tabiteuea South. At around midday, the complainant left her home in Tewai village with her 4-year-old daughter, intending to take provisions to her husband, who was working on the islet of Abarei. After walking for some distance, they stopped to rest. She was approached by the prisoner, who is her husband's brother. He told her that he was also going to see her husband on Abarei, and offered to carry the child. She declined the offer and told the prisoner to go on ahead. He left, but halfway to the next islet he turned back and returned to where the complainant and her child were resting.
- [3] The complainant and prisoner discussed an incident that had occurred between them the previous evening, about which the complainant was unhappy. The prisoner then pushed the complainant to the ground. A struggle ensued, during which the child awoke and started crying. The prisoner was on top of the complainant, pinning her down. She bit him, so he released her. The complainant then attempted to flee with her child towards Abarei. The

¹ Despite the repeal and replacement of section 133 by section 4 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case has proceeded under the *Penal Code* as it was in force on the date of the offence (as provided for under section 10(2) of the amending Act).

prisoner pursued her and, on catching her, grabbed her by the hair and began dragging her back in the direction of Arakeaka.

- [4] At one point, the prisoner hit the complainant in the torso with the blade of his bush knife. He then struck her in the head with the tip of the knife, wounding her. The prisoner threatened to kill the complainant if she did not do as he desired. He pushed the complainant to the ground, and lifted up her dress and underskirt, exposing her genitals. He lay on top of the complainant and attempted to insert his penis into her vagina. He failed, as his penis was not erect. The complainant felt the prisoner's penis at her vaginal opening. She told the prisoner that she thought her husband may be returning soon, so he stood up. They then walked back towards Tewai village. Later that day the complainant was treated by the island's Medical Assistant. The wound to her head was described as being 3.5cm long and over 1cm deep. It required 3 stitches.
- [5] An information was originally filed on 21 January 2016, charging the prisoner with causing grievous harm and attempted rape. For reasons unclear, the matter lay dormant until it was first mentioned on 31 August 2018. Efforts were made to serve the prisoner on Tabiteuea South with notice to appear. In the meantime, as the original information did not comply with section 70 of the *Criminal Procedure Code*, on 25 September the Attorney-General filed a fresh information. The prisoner was now charged with attempted rape and assault occasioning actual bodily harm. In order to secure the prisoner's attendance in Court, it was necessary to issue a warrant for his arrest. The warrant was executed and the prisoner was brought to South Tarawa, where he finally appeared in Court for the first time on 26 November.
- [6] On 21 December, a further information was filed, and a *nolle prosequi* was entered with respect to the 25 September information. The prisoner was now charged with causing grievous harm and attempted rape, with a charge of indecent assault as an alternative to the attempted rape charge. On that day counsel for the prisoner informed the Court that his client would plead guilty to both count 1 and the alternative count of indecent assault. Counsel for the prosecution refused to accept the plea to the lesser charge, and the matter was fixed for trial in July.
- [7] On 19 July – what was to have been the first day of the trial – counsel for the prosecution advised that she was now prepared to accept the prisoner's plea to the alternative charge on count 2. It took some time to finalise the agreed summary of facts, and the matter eventually came on for submissions on sentence on 23 August. When the agreed summary of facts was presented to the Court, it was clear that the facts as agreed did not support a charge of causing grievous harm. The case was again adjourned. When it resumed on

28 August, counsel for the prosecution applied to replace the charge of causing grievous harm with a charge of unlawful wounding. The amendment was allowed, the accused was arraigned on both counts and pleaded guilty.

[8] The prisoner is now 43 years of age, and was 37 at the time of the offences. He is single, and leads a subsistence lifestyle on Tabiteuea South. He has no previous convictions. Counsel for the prisoner offers little explanation for the offending, other than to say that his client was angry at the time because he believed – without foundation – that the complainant was being unfaithful to his brother. When questioned by police he denied the offences.

[9] The maximum penalty for both offences is a sentence of imprisonment for 5 years. In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.²

[10] As the offences were committed as part of a single course of conduct, and in order to avoid what might otherwise be a crushing sentence were I to treat each offence separately, I will apply the totality principle, and impose a single sentence in respect of both counts that I consider meets the gravity of the prisoner's offending.

[11] Both offences are extremely serious, and should be considered as falling somewhere above the middle of the range on the scale of seriousness. The indecent assault involved genital-to-genital contact, and the wound was inflicted with a blow to the head using a bladed weapon. I consider an appropriate starting point in this case to be a sentence of imprisonment for 2½ years.

[12] While this starting point does take into account some of the aggravating features of the prisoner's offending, I consider the following matters to be additional aggravating factors:

- a. as the complainant's brother-in-law, the prisoner was in a position of trust with respect to the complainant, and his offending constitutes a grave breach of that trust;
- b. the prisoner threatened to kill the complainant if she did not do what he wanted.

For these matters I increase the prisoner's sentence by 6 months.

[13] As far as mitigating factors are concerned, the prisoner has no previous convictions. He is to be regarded as having pleaded guilty at the earliest possible opportunity. For these matters I will deduct 1 year.

² *Kaere Tekaei v Republic* [2016] KICA 11, at [10].

- [14] Finally, it has taken more than 6 years to conclude the prosecution of this case. This is an appalling violation of the prisoner's constitutional right to be afforded a fair hearing within a reasonable time. For the reasons discussed by the Court of Appeal in *Li Jian Pei*, the prisoner is entitled to a reduction in his sentence to compensate him for this breach.³ I will reduce his sentence by another 4 months.
- [15] Taking all of the above matters into account, I am of the view that an appropriate sentence in this case is one of imprisonment for a period of 1 year and 8 months.
- [16] As such a sentence falls within the scope of section 44 of the *Penal Code*, I turn to consider whether the circumstances of the offence and the personal circumstances of the appellant warrant suspension of his sentence.
- [17] Despite the strong submissions from counsel for the prisoner on this issue, this case is not a suitable one for the exercise of my discretion. I am not prepared to suspend the sentence. The prisoner's offending involved the use of a weapon in the commission of an offence of violence. Even without the recent amendment of the *Penal Code* to insert section 44A, which prevents the suspension of a sentence for any offence involving the use of a weapon, I could not have been persuaded to suspend the prisoner's sentence. I find strong support for this view from the recent decision of the Court of Appeal in the case of *Tamuine Mataio*.⁴
- [18] The prisoner is convicted on his pleas of guilty. Taking the above matters into account, he is to be imprisoned for a period of 1 year and 8 months. The sentence is to run from today.


Lambourne J
Judge of the High Court



³ *Attorney-General v Li Jian Pei & Taaiteiti Areke* [2015] KICA 5.

⁴ *Tamuine Mataio v Republic*, Court of Appeal Criminal Appeal 3/2018, 21 August 2019, at [11].