

# IN THE HIGH COURT OF KIRIBATI 2021

CRIMINAL APPEAL NO. 5 OF 2021

	[KABWEA ATAUUEA	APPELLANT
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BETWEEN	[AND	
	[	
	[THE REPUBLIC	RESPONDENT

Before: The Hon Chief Justice William Hastings

24 August 2021

*Mr Taburuea Rubetaake* for the Appellant  
*Ms Tewiia Tawita* for the Respondent

## JUDGMENT

1. Kabwea Atauea seeks an order allowing him to bring an appeal against conviction out of time under s 272 of the *Criminal Procedure Code*. He also appeals his 2017 conviction for challenging another to fight a duel under s 82 of the *Penal Code*.

### Background

2. Mr Atauea was charged under s 82 of the *Penal Code* which states:

82. Any person who challenges another to fight a duel, or attempts to provoke another to fight a duel, or attempts to provoke any person to challenge another to fight a duel, shall be guilty of a misdemeanour.

3. In his affidavit supporting the notice of appeal, Mr Atauea stated there was a fight between his older brother and his neighbour as a result of their

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mother calling the older brother. . Mr Atauea said he was asleep at the time. Nevertheless, he was charged under s 82 and appeared before a Single Magistrate. She asked the Police to read the charge to him, and then asked “whether I was guilty or not”. He said “I’m guilty”. He said the Police prosecutor read the summary of facts to him, but the Single Magistrate “did not clearly ask me whether the summary of facts was correct or wrong nor asked me whether I admit them or not.” Mr Atauea said he pleaded guilty because it was his first involvement with the law and he did not know the Magistrate could adjourn the hearing to give him time to seek legal advice. The Magistrate entered a conviction and suspended his sentence. Mr Atauea said because he was set free, he thought that was the end of the matter.

4. Mr Atauea stated in his affidavit he did not realise at the time that a conviction could adversely affect his employment prospects. He stated it was only two years later when he started to look for work to support his family that he realized his criminal record could prevent him from getting a job. He was told his application to be a leading hand at Central Pacific Producers Limited in 2019 was rejected because of his conviction. He then applied to be recruited as a seasonal worker in Australia but the Ministry of Labour told him that Australia would not accept an applicant with a criminal record.

5. Mr Atauea explained the reason for the delay in appealing his conviction. In addition to his lack of knowledge of how the legal system works, he said he sought the assistance of the Pastor of Kiribati Uniting Church to write a letter to the Ministry of Labour. He said he also sought the assistance of a social welfare officer at the Ministry of Women, Youth and Sports to explain that he “had been a good person since my conviction in 2017 and now a law-abiding member of society.”

### **Discussion**

6. I will deal first with the application to bring this appeal four years after a conviction was entered.

7. Mr Rubetaake for the defendant submitted that time should be enlarged because there is "good cause" as required by s 272 of the *Criminal Procedure Code*. He submitted that the defendant was not legally represented in the Magistrate's Court, and given the questionable status of s 82 as good law (a point conceded by Ms Tawita) justice requires that time be enlarged so that the conviction can be overturned.

8. The application was opposed by Ms Tawita for the Republic on three grounds. First, she submitted Mr Atauea has waited too long. Even if he was not properly advised in 2017, he knew in 2019 that a conviction would affect his job prospects, yet he waited until 17 May 2021 to file a notice of appeal. Second, she submitted any enlargement of time would prejudice the Republic. If the case were to be sent back to a Single Magistrate for retrial, memories will have faded and evidence become stale. Third, she submitted the floodgates would be opened if time were enlarged simply because a defendant was not represented in the Magistrate's Court by a lawyer and did not understand the law.

9. I am concerned by the passage of time. The defendant realised that the conviction could affect his job prospects two years ago. But he did not sit on his hands. He attempted recourse through non-legal means. He sought the intervention of his pastor and a social welfare officer. He eventually obtained a lawyer. The list of things in s 272 deemed to provide "good cause" to enlarge time is not exhaustive. Given the procedural and substantive difficulties surrounding the conviction itself, and the efforts made by the defendant to remedy the consequences of a conviction by the only means he knew, I am satisfied that good cause exists to enlarge time.

10. For these reasons, the application to enlarge the time to appeal is granted.

11. I turn now to consider the merits of the appeal.

12. I start with the procedural grounds. The essence of Mr Rubetaake's submission is that the defendant's guilty plea is equivocal because the Single Magistrate did not ask him if he admitted or denied the facts read out by the Police prosecutor. Mr Rubetaake relied on *Tarataake Karakaua v Republic* [2015] KIHC 3 in which Zehurikize J stated that the defendant must be asked whether he or she admits the facts after they are read out by the prosecutor. Only if they are admitted can the Magistrate find the defendant guilty.

13. Ms Tawita referred to the legislation. Section 193 of the *Criminal Procedure Code* states:

193. (1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him ...

14. Section 271 of the *Criminal Procedure Code* states:

271. (1) No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted of such plea by a magistrate's court, except as to the extent and legality of the sentence.

15. Section 67(1) of the *Magistrates' Courts Act* reflects s 271 of the *Criminal Procedure Code*. Ms Tawita submitted that these statutory provisions apply to the defendant: he pleaded guilty to the charge and was convicted. This was sufficient reason for the Commissioner to dismiss the appeal in *Tokoia v Republic* [2013] KIHC 4. Ms Tawita submitted the only remedy permitted by statute is to appeal the sentence which the defendant himself described as lenient, or to seek a review under s 81 of the *Magistrates' Courts Ordinance* (which I note must be brought within 12 months of the date of

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sentence or judgment). The defendant's issue is not with the sentence however, but with the entry of the conviction.

16. In this case, I do not think the defendant's plea was unequivocal. He could not be said to have been given an opportunity to admit or deny "the truth of the charge" in terms of s 193 without knowing the facts of the allegation against him. A conviction can only be entered if the defendant admits "the truth of the charge."

17. The following exchange occurred between the Single Magistrate and the defendant. It has been transcribed and interpreted:

Court: Read out charge. Are these charges true?

Kabwea: All true.

Plea: Guilty

Facts: Your worship, the accused before you is Kabwea Atauea and on the 20/5/17 between 5 to 6 in the afternoon, the accused challenge his brother Teaeki Atauea for a fight with Betero Taremon when his brother did not want to and he himself challenge him for a fight.

Court: Since you are pleading guilty to the charge against you, this court found you guilty.

18. There is nothing in the transcript that shows the Single Magistrate asked the defendant whether he admitted the facts after they were read out by the prosecutor. Indeed, the defendant in his affidavit stated that if he had been asked, he would have denied the allegations. This places the matter squarely within Zehurikize J's reasoning in *Tarataake Karakaua v Republic*. In the circumstances, I find the defendant was not given the opportunity to make an informed admission or denial of the facts supporting the charge. He could not therefore be said to have admitted "the truth of the charge". Not having properly admitted the truth of the charge, the Single Magistrate could not have convicted him.

19. Even if the Single Magistrate had done everything correctly, this appeal would still be allowed because the facts as read by the prosecutor do not support the charge. Section 82 does not prohibit challenging another to a fight. It prohibits challenging another “to fight a duel.” In *Kiamaro Riteri v Republic* (Criminal Appeal No 14/2018), Lambourne J relied on the Oxford Dictionary definition of duel as “a contest with deadly weapons arranged between two people in order to settle a point of honour.” Lambourne J said section 82 “really has no place in the modern law of Kiribati”. Although I agree with Lambourne J, the provision remains in the Penal Code. In this case however, there is nothing in the allegations against the defendant that satisfies this element of the offence. The prosecution did not allege that Mr Atauea challenged, provoked or attempted to provoke anyone “to fight a duel.” This is another reason the conviction must be overturned.

20. The defendant has essentially made an uninformed plea to a charge the prosecution could not prove. For these reasons, the conviction cannot stand.

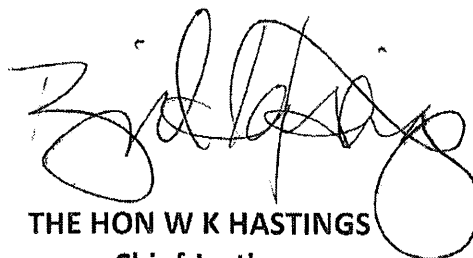
### **Result**

21. The application to enlarge time for the appeal is granted.

22. The appeal is allowed.

23. The conviction and sentence are quashed.

Dated the 25<sup>th</sup> day of August 2021

  
**THE HON W K HASTINGS**  
Chief Justice