



HIGH COURT OF KIRIBATI

Criminal Case No 25/2018

THE REPUBLIC

v

ATANAERA BWAIBWA

*Tewia Tawita, Senior State Attorney, for the Republic
Raweita Beniata for the accused*

Date of sentencing: 4 September 2018

SENTENCE

- [1] The prisoner has been convicted following a trial of 1 offence of engaging in sexual intercourse with a person under the age of 15 years, contrary to section 135(1) of the *Penal Code* (Cap.67). The facts of this case are set out in my judgment, which was delivered on 31 August 2018.
- [2] As I said there, this the first prosecution for an offence in the High Court under Part XVI of the *Penal Code* since significant amendments were introduced by the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*. The offence committed by the prisoner was formerly known as defilement of a girl aged between 13 and 15 years, and it carried a maximum sentence of 5 years' imprisonment. The maximum penalty for an offence under the new section 135(1) is imprisonment for life. As such, sentences imposed by this Court for similar offences in the past provide little assistance.
- [3] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal in *Kaere Tekaei v The Republic*.¹
- [4] The amendments to the *Penal Code* present a challenge in determining an appropriate starting point for this kind of offending. The offences of unlawful sexual intercourse (section 129(1)), engaging in sexual intercourse with a person under the age of 13 years (section 134(1)) and engaging in sexual intercourse with a person under the age of 15 years (section 135(1)) all now carry a maximum penalty of imprisonment for life. Furthermore, the much broader definition of 'sexual intercourse' provided for in section 127A means that a wider range of

¹ Criminal Appeal 1/2016, at [10]

conduct now falls within the ambit of the expression, which no longer refers only to penetration of the vagina of a female person by the penis of a male person. Penile penetration, anal penetration, digital penetration, penetration of the genitals or anus by an object, and oral sex are all now categorised as sexual intercourse. Some of these actions are clearly more serious than others. In my view, penile penetration falls at the higher end of the spectrum.

- [5] In this case, I find assistance in the Court of Appeal decisions in *Attorney-General v Tanre Tengke*² and *Republic v Uriano Arawaia*³. While both cases were determined under the now-repealed provisions of the *Penal Code*, in both matters the Court of Appeal gave sentencing guidance for sexual offending carrying maximum penalties of imprisonment for life. *Tanre Tengke* concerned rape, and *Uriano Arawaia* concerned defilement of a girl under the age of 13 years. In each case the Court of Appeal held that an appropriate starting point would be a sentence of 5 years' imprisonment. I consider that the same starting point is also appropriate in a case such as this. Both counsel were in general agreement with this approach.
- [6] It is a relevant consideration that the offending involved a single act of intercourse, as is the fact that the prisoner was not in a position of trust with respect to the complainant.
- [7] In my view, the prisoner's offending is aggravated by the fact that he did not use a condom when he had sexual intercourse with the complainant. As a result, she was exposed to the risk of both pregnancy and sexually-transmitted infections. Either of these would have been a devastating outcome for her.
- [8] The age discrepancy between the prisoner and the complainant, while almost 8 years, is not so great as to constitute an aggravating factor.
- [9] As far as mitigating factors are concerned, the prisoner is a young man, with no previous convictions. The offending involved no use of force and, although the complainant could not legally consent, I did find that she was a willing participant. The complainant sustained no injuries, other than the hymenal tear.
- [10] By pleading not guilty, the prisoner does not get the benefit of an early plea of guilty. Nor can he legitimately claim to be remorseful for his actions.
- [11] The prisoner has spent 1 week in custody awaiting sentence.
- [12] Taking all of these matters into consideration, I sentence the prisoner to imprisonment for a period of 3 years and 9 months.


Lambourne J
 Judge of the High Court



² Criminal Appeal 3/2004, at [13].

³ Criminal Appeal 1/2013, at [18].