



HIGH COURT OF KIRIBATI

Criminal Case No 70/2017

THE REPUBLIC

v

FG and JK

Tumai Timeon, Senior State Attorney, for the Republic

Kiata Kabure for the accused FG

Teetua Tewera for the accused JK

Date of sentencing: 23 October 2018

SENTENCE

- [1] The prisoner FG has been convicted following a trial of 3 offences of defilement of a girl under the age of 13 years, contrary to section 134(1) of the *Penal Code* (Cap.67). The prisoner JK has been convicted following a trial of 1 offence of defilement of a girl under the age of 13 years. Defilement is very serious offence, with a maximum penalty of imprisonment for life.
- [2] The facts of this case are set out in my judgment, which was delivered earlier today. FG and JK are husband and wife. JK is the paternal grandmother of the complainant so, as in my judgment, and in an effort to protect the complainant's identity, I have used unique initials in these remarks to refer to the complainant and to both prisoners.
- [3] In determining the appropriate sentence for the prisoners, I am mindful of the approach to sentencing recommended by the Court of Appeal in *Kaere Tekaei v Republic*.¹ At the same time, I note that determining an appropriate sentence in any case is not a process that lends itself to precise mathematical calculation.
- [4] The Court of Appeal has held that an appropriate starting point in a case such as this is a sentence of at least 5 years' imprisonment.²

¹ Court of Appeal Criminal Appeal 1/2016, at [10]

² *Republic v Uriano Arawaia*, Court of Appeal Criminal Appeal 1/2013, at [18]

- [5] There are significant aggravating circumstances in this case. The relationship between the prisoners and the complainant meant that their conduct constituted a grave breach of trust. There were threats of violence from both prisoners, and actual violence inflicted upon SK by FG. The offending by FG occurred over the course of 3 months.
- [6] Most significantly, in 2012 FG pleaded guilty to 2 counts of indecent assault and 2 counts of defilement of a girl under the age of 13 years. The complainant in that case is SK's older sister and the offences were committed when she was 12 years old. Now that I am apprised of the details of that offending, I see that FG's conduct towards SK bears striking similarities to that inflicted on her older sister. He was ultimately sentenced to 5 years' imprisonment, and could not have been long out of prison before he began committing the offences against SK. I consider that FG poses a serious risk of reoffending in future, and a sentence carrying a strong personal deterrent is necessary in his case.
- [7] FG has inflicted unthinkable harm on 2 young women from the same family, and JK has assisted him in imposing his will against her own granddaughter. I cannot imagine what it must have been like for SK to have her pleas to her grandmother for help fall on deaf ears. I struggle to comprehend why SK's family would place her in FG's care given his history, but the outrage I feel on SK's behalf is not relevant to the exercise of my sentencing discretion.
- [8] I take the view that FG's offending is further aggravated by the fact that he did not use a condom when he had sexual intercourse with SK, thereby exposing her to the risk of both pregnancy and sexually-transmitted infection.
- [9] Neither prisoner is young. FG is now 54 years old, and JK is 75 years old. JK in particular is feeling the effects of age, and has mobility issues.
- [10] The prisoners went to trial, as is their right, but, by doing so, they have foregone the reduction in sentence that they would have received had they pleaded guilty.
- [11] There are parallels between this case and *Tekariba Kimaere v Republic*.³ In that case, the Court of Appeal applied the totality principle to reduce a total sentence of 10 years' imprisonment to one of 7 years' imprisonment. The appellant had been convicted at trial of 2 offences of defilement of a girl under 13 years and 1 offence of assault occasioning actual bodily harm. The complainant was the appellant's step-granddaughter. The appellant had no previous convictions.
- [12] The prisoners have been in custody ever since their arrest on 14 May 2017, or almost 18 months. Given that any person sentenced to imprisonment for 2 years or more may request parole after having served half their sentence,⁴ I consider

³ *ibid.*, at [3]-[7] and [15]-[16]

⁴ *Parole Board Act 1986*, section 11(1)(b)

the prisoners to have already served the equivalent of a 3-year sentence. I take that into account in determining the sentences that I will impose today.

- [13] In determining an appropriate sentence for FG, applying the totality principle, I will impose a single sentence in respect of all 3 counts that I consider meets the gravity of his offending. My starting point is 8 years. The aggravating factors, in particular his prior similar offending, warrant a steep increase. Were it not for the time spent in pre-sentence custody, I would have imposed a sentence of 15 years' imprisonment. Taking into account the time spent on remand, I reduce FG's sentence to imprisonment for 12 years.
- [14] JK comes before me with no previous convictions. She was clearly not the principal offender. I have not been provided with any reasons by her counsel for her willingness to be complicit in the defilement of her granddaughter. I will not speculate, but I do admit that it baffles me. Were it not for the time spent in custody on remand, I would have imposed a sentence of 4½ years' imprisonment. Taking that time into account, I reduce JK's sentence to imprisonment for 1 year and 6 months.
- [15] As JK's sentence is within the scope of section 44 of the Penal Code, and at the urging of her counsel, I turn to consider whether her sentence should be suspended. Ordinarily, the gravity of her offending is such that I would not have contemplated suspending the sentence, but JK's personal circumstances have given me reason to pause. She is an elderly woman and, away from FG, I consider that she poses no risk of reoffending. A further relevant consideration is the circumstances in which she would be obliged to serve any immediate sentence of imprisonment.
- [16] For the duration of her time on remand, JK has been the sole occupant of the women's section of the prison here on Kiritimati. She has effectively been held in solitary confinement for the entire period. Furthermore, due to staffing restrictions at the prison, she is only under the supervision of a warder for 4 hours a day on weekdays and 12 hours a day on weekends. For the rest of the day she must remain locked up alone. Were she to serve any further time in custody, that situation, in all likelihood, would continue. I am a visiting justice under section 67 of the *Prisons Ordinance* (Cap.76), and last week I inspected the Kiritimati prison. I observed the conditions under which JK has been held. It is clear that, if she were to serve any further period of imprisonment, the conditions in which she would be held are considerably more onerous than what could be considered normal prison conditions for Kiribati. Where a prison sentence will be more burdensome than it is for ordinary prisoners, a court may take action to alleviate those conditions.
- [17] In the circumstances, I will suspend JK's sentence. I therefore order, under section 44(1) of the Penal Code, that JK's sentence of imprisonment for 1 year

and 6 months referred to above is not to take effect unless, within the period of 2 years from today's date, she commits another offence punishable by imprisonment.


Lambourne J
Judge of the High Court

