



HIGH COURT OF KIRIBATI

Criminal Case No 87/2016

THE REPUBLIC

v

TIKAUA TARATAI

*Tewia Tawita, Senior State Attorney, for the Republic
Reiati Temaua for the accused*

Date of sentencing: 7 December 2018

SENTENCE

- [1] Tikaua Taratai has pleaded guilty to 8 counts of failing to pay, to the Kiribati Provident Fund (KPF), contributions collected from his employees, contrary to section 34(2)(c) of the *Provident Fund Ordinance (Cap.78A)*.
- [2] Section 34(2)(c) provides as follows:
- (2) If any person—
- ...
- (c) having made any deductions fails to pay to the Fund in the months in which they are due the contributions in respect of which such deductions have been made,
- he shall be liable to a fine of \$1000 and to imprisonment for 2 years.
- [3] An information was filed with this court by the prosecution on 16 September 2016, charging the prisoner with a single contravention of section 34(2)(c). For reasons unclear, the case was not mentioned by the court until 3 August 2017, then not again until more than 11 months after that. When the matter came before me on 18 July this year, the question was raised as to whether the information complied with section 70 of the *Criminal Procedure Code (Cap.17)*. On 27 September the Attorney-General rectified the defect by filing the present information, signed by her. On 26 October, counsel for the prisoner indicated that his client would be pleading guilty to all charges. Minor amendments were made to the charges (without objection) on 16 November.

- [4] The charges all relate to a period between February and August in 2014, during which the prisoner was operating a security firm, with several employees. In 2015, the KPF became aware that the prisoner had not paid to the Fund contributions collected from 8 employees, totalling \$743.89. The KPF wrote to the prisoner in November 2015, reminding him of his obligations and asking for payment.
- [5] No payment was received, and the amount remains outstanding to this day. The KPF lodged a complaint with police in April 2016, leading to the investigation that gave rise to these charges.
- [6] The prisoner concedes that his security business was not very successful. That is no excuse for failing to remit his employees' contributions to the KPF. Employers have a clear legal obligation to ensure that such payments are made. However I am not sure that criminal prosecution is necessarily the best way to enforce this obligation. It appears that no consideration was given to imposing penalties for late payment under section 14 of the Provident Fund Ordinance. The KPF can also bring civil proceedings to recover unpaid contributions under section 40. Resorting to prosecution seems a little heavy-handed, but that is not a matter for me.
- [7] Counsel for the prosecution submits that both penalties of imprisonment and a fine are mandatory. I do not accept this. Such an interpretation is inconsistent with sections 79 and 80 of the *Interpretation and General Clauses Ordinance* (Cap.46).
- [8] The prisoner has no previous convictions. Counsel for the prosecution submits that, in addition to punishing the prisoner for the offence, I should also exercise my powers under section 35 of the Provident Fund Ordinance to order him to pay the amount of the outstanding contributions to the KPF, and impose a period of imprisonment in default of payment.
- [9] The prisoner is married with 2 young children, aged 1 and 3 years. His wife is pregnant with their third child. He is not presently employed and his only source of income is a small business selling food from home. The prisoner has no significant assets. His security firm stopped operating in 2015. His counsel informed me that the prisoner is in the process of obtaining a loan from the Development Bank, although the purpose of that loan is unclear.
- [10] 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
- [11] I have not been provided with the details of any comparable cases involving offences under the Provident Fund Ordinance. It may be that this is the first time that such a matter has come before this Court.

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

- [12] A custodial sentence is not warranted in this case. The prisoner's offending falls very much towards the lower end of the spectrum. He has pleaded guilty at the earliest opportunity. The only realistic sentencing option is a fine. In determining the amount of any fine, I must have regard for the prisoner's ability to pay such a fine.² If I impose a fine, I also have the power to direct that, in default of payment of the fine, the prisoner is to be imprisoned for a specified period (section 29(d)(i) of the *Penal Code* (Cap.67)). Under section 32(1) of the *Penal Code* I can give the prisoner time to pay a fine, but the period must be no longer than 30 days.
- [13] It is relevant that there has been an unacceptable delay in the prosecution of this case, although perhaps not as bad as we have seen in other cases. It is over 4 years since the offences were committed, and it is 2 years and 7 months since the complaint was filed with the police. The prisoner is not responsible for any of the delay. For the reasons discussed by the Court of Appeal in *Attorney-General v Li Jian Pei*³, the prisoner is entitled to a modest reduction in sentence, to compensate him for the breach of his constitutional right to be afforded a fair hearing within a reasonable time.
- [14] Taking all of these matters into account, I am of the view that an appropriate sentence in this case is a modest fine. Applying the totality principle, I will impose a single sentence in respect of all 8 counts that I consider meets the gravity of his offending. I fine the prisoner the sum of \$50, to be paid no later than 4 January 2019. In default of payment of the fine, the prisoner is to be imprisoned for a period of 2 weeks.
- [15] Under section 35 of the Provident Fund Ordinance, the prisoner is ordered to pay to the KPF, no later than 4 January 2019, the sum of \$743.89. In default of payment of this sum, the prisoner is to be imprisoned for a period of 8 weeks.
- [16] To ensure that warrants of commitment are not issued unnecessarily, the prisoner is to deliver to the Court copies of his receipts, showing payment of the amounts ordered, as soon as possible after payment.


Lambourne J
 Judge of the High Court



² *Yang Xueqiang v Republic; Tsai Ching Shan v Republic*, Court of Appeal Criminal Appeals 10 & 11/1996; *Tebuangui Biketi v Republic*, Court of Appeal Criminal Appeal 6/2002

³ Court of Appeal Criminal Appeal 5/2015.