HIGH COURT OF KIRIBATI

Criminal Case № 10/2017

THE REPUBLIC

v

KENETE TAKAA
and
EREATEITI KENETE

Tewia Tawita, Senior State Attorney, for the Republic
Mantaia Kaongotao for Kenete Takaa
Angitonu David for Ereateiti Kenete

Date of sentencing: 21 December 2018

SENTENCE

[1] Kenete Takaa has been convicted following a trial of 3 counts of incest, contrary to section 156(1) of the *Penal Code* (Cap.67). His daughter, Ereateiti Kenete, pleaded guilty to a single count of incest, contrary to section 156(5) of the Penal Code. The facts of this case are set out in my judgment in Kenete's trial, delivered on 3 December. The maximum penalty for incest is 7 years' imprisonment.

[2] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.[1]

[3] The offence of incest is one that our community regards with disgust. I must take care however to ensure that my approach to sentencing addresses the objective wrong-doing of the offenders, rather than enforcing some moral or religious code of conduct.[2]

[4] The offence of incest can cover a wide range. At the lower end of the spectrum, incest between consenting adults may result in a non-custodial sentence, or a nominal punishment.[3] On the other hand, where the victim is young or does not

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

2 *R* v *Watson* (1999) 106 A Crim R 300, per Fryberg J at 302.

3 *Attorney-General's Reference (№ 1 of 1989)* (1989) 1 WLR 1117, at 1121H and 1122H.

consent, or if violence is threatened or used, then a lengthy custodial sentence is warranted. Other possible aggravating features can include: the victim suffering psychological or physical harm extending beyond the period of the offending; if pregnancy results; if there is more than 1 victim; and if sexual intercourse is accompanied by additional humiliation, such as anal or oral intercourse.[4]

[5] I will first deal with Kenete. I have not been told his age, but he appears to be in his mid-40s. He has no previous convictions. He was a special constable and, for a brief period in 2015 or 2016, a sworn police officer. I am informed by his counsel that he now admits to having had sexual intercourse with his daughter, although that needs to be considered in light of the robust cross-examination of Ereateiti during the trial. It was put to her that she was lying, and that there had never been any acts of sexual intercourse with her father. There is no evidence that Kenete is remorseful for his appalling behaviour towards his daughter. He blames excessive consumption of alcohol for his offending, although this can in no way be regarded as an excuse.

[6] Kenete is perhaps fortunate that he was not charged with rape. Ereateiti did not consent to the acts of sexual intercourse that are the subject of counts 1 and 3. Had he been convicted of rape he would have been looking at a much longer sentence. As it is, counts 1 and 3 carry significantly greater culpability for Kenete when compared to count 2, where it is conceded that the sexual intercourse with Ereateiti was consensual.

[7] I accept Ereateiti's evidence that her father subjected her to multiple acts of sexual intercourse from 2009 to 2016. Despite this, I can only sentence Kenete for the 3 counts of which he has been convicted. This approach may appear to run counter to common sense but, as Kenete has not admitted the other matters, they remain uncharged offences, and cannot be taken into account in sentencing him.[5] However it is important to have regard to the 3 offences in the context of what was a continuing and abusive relationship between father and daughter. This context shows that the offences charged were not isolated events, nor were they committed on impulse.[6]

[8] Counsel referred me to 2 cases. In *Bureua Baraniko*[7] the offender was convicted after a trial of 2 counts of indecent assault and 1 count of incest, where the victim

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4 *ibid.*, at 1123E-F.

5 *R* v *Huchison* [1972] 1 All ER 936, and *R* v *Wackerow* [1998] 1 Qd R 197, per Pincus JA at 205-206 and Byrne J at 210. This issue could be addressed by adopting a provision similar to that found in section 229B of Queensland's *Criminal Code*, under which it is an offence to maintain a sexual relationship with a child. It is unfortunate that the recent amendments to the Penal Code did not make provision for an offence of that kind. The Maneaba-ni-Maungatabu may wish to consider taking action to remedy this apparent oversight.

6 *R* v *Percival* (1998) 2 Qd R 191, per Lee J at 197.

7 *Republic* v *Bureua Baraniko* [2005] KIHC 79.

was his 14-year-old daughter. He was sentenced to 3½ years' imprisonment. In *Teakai Nakuau*[8] the offender pleaded guilty to a single count of incest involving his 13-year-old daughter. He was imprisoned for 4 years. I am also aware of the case of *Obera Ieera*,[9] in which the offender pleaded guilty to 2 counts of incest with his 14-year-old daughter and was sentenced to 3 years' imprisonment.

[9] Incest by a man against his daughter, in circumstances where she does not (or cannot) consent, will always involve a substantial breach of trust and an abuse of the inequality inherent in the relationship. In a contested case involving a victim aged 13 or older, I consider the appropriate starting point to be a sentence of imprisonment for 4 years. The situation would be different where the victim is under 13 years of age, as the proviso to section 156(1) increases the maximum sentence in such a case to imprisonment for life.

[10] I will consider each count individually, and determine first what would be an appropriate sentence. I will then consider whether the sentences should run concurrently or cumulatively, before applying any relevant reductions for mitigating factors.

[11] The circumstances giving rise to count 1 occurred when Ereateiti was only 14. She was not a willing participant, and complied only because her father threatened to kill her. Kenete did not use a condom and ejaculated inside her vagina, exposing Ereateiti to the risk of both pregnancy and sexually-transmitted infection. For these matters I would increase the sentence from the starting point by 1 year. I consider an appropriate sentence for count 1 to be imprisonment for 5 years.

[12] Count 3 occurred in 2015, when Ereateiti was 20. She did not consent to sexual intercourse, which took place on the ground, in a bushy area. Again, Kenete did not use a condom, and ejaculated inside Ereateiti's vagina. For these matters I would increase the sentence from the starting point by 9 months. An appropriate sentence for count 3 is imprisonment for 4 years and 9 months.

[13] Count 2 concerns an act of consensual sexual intercourse in late 2015. Considered in isolation, a non-custodial sentence would ordinarily have been appropriate. In light of the sentences that will be imposed in respect of counts 1 and 3, I consider it appropriate to impose no penalty in respect of count 2.

[14] The events giving rise to counts 1 and 3 occurred 6 years apart. I intend to order that the sentences are to be served cumulatively. In taking this approach, I must have regard to the totality principle, and ensure that such an approach does not result in a overall sentence greater than one that properly reflects the gravity of

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8 *Republic* v *Teakai Nakuau* [2008] KIHC 36.

9 *Republic* v *Obera Ieera* [1997] KIHC 80.

Kenete's offending. I consider that a total sentence of 9 years and 9 months would be too long in the circumstances. I will address that by adjusting the sentences in respect of each count downwards by 9 months, to arrive at an overall sentence of 8 years and 3 months (before considering any mitigating factors).

[15] I move then to the factors in mitigation of sentence. Kenete has no previous convictions. For this I will reduce his overall sentence by 6 months.

[16] There has been an unacceptable delay in the prosecution of this case. It is more than 2½ years since the commission of the offences. For the reasons discussed by the Court of Appeal in *Li Jian Pei*,[10] Kenete 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. I reduce his sentence by 1 month.

[17] Kenete has spent 18 days in custody awaiting sentence. As a consequence, I reduce his sentence by a further month, to take account of the effect that the rules concerning parole will have on his ultimate sentence.

[18] Kenete went to trial, as is his right, but, by doing so, he has foregone the reduction in sentence that he would have received had he pleaded guilty.

[19] Taking all of these matters into account, Kenete is sentenced as follows:

a. in respect of count 1, to imprisonment for 3 years and 11 months;

b. in respect of count 2, he is convicted but no penalty is imposed;

c. in respect of count 3, to imprisonment for 3 years and 8 months.

The sentences for counts 1 and 3 are to be served cumulatively, so that Kenete is to be imprisoned for a total period of 7 years and 7 months. The sentence is to run from today.

[20] I turn now to Ereateiti. She is clearly the victim here. She was deprived of a normal childhood by her father. Over time she came to regard sexual intercourse with her father as routine. Since matters came to light, she has taken measures to rebuild her life. She is now married, and is about to give birth. I understand that she has not been able to bring herself to tell her husband of the abuse she suffered at the hands of her father. I can only imagine the psychological scars she is carrying. I hope that, in time, she will be able to fully heal. Her decision to testify against her father is to her credit.

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

[21] In the circumstances, it is not appropriate to punish Ereateiti for her crime. Under section 38(1) of the Penal Code, I order that the charge be dismissed absolutely.

Lambourne J
Judge of the High Court