HIGH COURT OF KIRIBATI

Criminal Appeal Nº 13/2014

KINONO MWANGKIA *Appellant*

v

THE REPUBLIC *Respondent*

Banuera Berina for the appellant
Tewia Tawiita for the respondent

Date of hearing: *18 October 2019*
Date of judgment: *21 October 2019*

JUDGMENT

[1] On 11 November 2014 the appellant was convicted after a trial in the Kiritimati Magistrates' Court on 1 count of indecent assault (contrary to section 133(1) of the *Penal Code* (Cap.67)). He was sentenced to imprisonment for 3 years.

[2] Shortly after the trial, the appellant filed a notice of appeal against sentence with the Magistrates' Court. On 1 December 2014 a further notice of appeal – this time against both conviction and sentence – was filed on the appellant's behalf, together with an application for bail pending hearing of the appeal. On 18 March 2015 the Chief Justice granted bail to the appellant, although I understand that he was not released until 24 March. He has been at liberty ever since.

[3] The appeal first came on for hearing on Kiritimati on 7 October 2015. Counsel were not ready and the hearing was transferred to South Tarawa. Thereafter numerous dates for hearing of the appeal were fixed but, for a variety of reasons, the case was not heard. On 24 August 2018 the Chief Justice dismissed the appeal for want of prosecution, only to vacate that order and reinstate the appeal some 2 weeks later. On 14 November 2018 counsel for the appellant informed the Court that the appeal against conviction would not be pursued. After several more adjournments, on 13 February 2019 the matter was transferred back to Kiritimati at the request of counsel for the appellant, for hearing during the April 2019 sitting. It did not come on then, and the appeal was finally heard on 18 October 2019.

[4] At the start of the hearing of the appeal, I informed counsel of my concern that the original charge was bad for duplicity. Despite being a single charge of indecent assault, the particulars alleged 2 separate acts, namely that, on one occasion the appellant had licked the complainant's vagina, while on another occasion he had exposed his penis to her. Under section 118(2) of the *Criminal Procedure Code* (Cap.17), these should have been the subject of separate counts. In the circumstances, given that the appeal against conviction had been abandoned, and also that the allegation of indecent exposure could not provide a factual basis for a charge of indecent assault, I advised counsel that I proposed to consider the appeal against sentence on the basis that the appellant had been convicted only with respect to the first instance alleged, namely the licking of the vagina. Any other allegations would be regarded as matters not charged. Counsel agreed to this approach.

[5] The offence was committed on an unknown date in September 2014. The complainant was aged 11 years at the time, while the appellant would have been 72 years old. One afternoon the complainant visited the appellant at his store in Ronton village. The appellant laid the complainant down, lifted up her skirt and removed her underpants. He then licked her vagina. He also pinched the complainant on the leg, so that she was unable to stand up. It would appear that her leg was bruised as a result. There were other allegations of indecent conduct from the appellant on different days but, as I said above, I will disregard those matters as not being the subject of any valid charge.

[6] The Single Magistrate accepted the evidence of the complainant, convicted the appellant and sentenced him to imprisonment for 3 years. Unfortunately, she failed to give the appellant an opportunity to set out any matters relevant to mitigation of sentence (*ie*. any matters that might lead the Court to reduce the appellant's sentence). As I said in the case of *Tiobe Ueue*:

> It is essential that offenders be given full opportunity to explain to the Court why they committed the offences and to put forward any matters relevant to the sentence to be imposed. If an offender is unrepresented, it is very important that the Court prompt him or her to make these submissions. Without them, the Court will not have enough information to pass a sentence that addresses both the circumstances of the offending and the personal circumstances of the offender.[1]

[7] Counsel for the appellant submits that this failure, on its own, is sufficient evidence of an error of law by the Single Magistrate. Counsel further submits that, given that the maximum penalty for indecent assault at the time was a sentence of 5 years' imprisonment, the appellant's sentence is manifestly excessive. Counsel for the respondent submits that the Single Magistrate did not fall into error, and the sentence was not excessive.

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1 *Tiobe Ueue* v *Republic* [2019] KIHC 37, at [5].

[8] My role in considering an appeal against sentence is fairly straightforward. The Court of Appeal in the Solomon Islands has said:

> The principles governing the exercise of appellate jurisdiction in reviewing a sentence are well settled. The question is not whether this Court would have imposed a different sentence to the one given but whether there was an error in the exercise of the sentencing discretion in the court below.[2]

[9] A custodial sentence will often be an appropriate penalty for the offence of indecent assault, particularly where the complainant is young. The fact that the appellant was sent to prison is not in itself remarkable. Unfortunately, in addition to the fact that the appellant was not provided with an opportunity to be heard in mitigation, the Single Magistrate did not explain why she considered that a sentence of 3 years' imprisonment was warranted. As I also said in *Tiobe Ueue*'s case:

> A court should always try to provide its reasons for the sentence that is to be imposed in a particular case. It should set out the matters that it considered made the offending worse, leading to an increase in sentence, and what matters were in the offender's favour, leading to a reduction in sentence. This is even more important if the Court has decided to imprison an offender. If a Court does not give reasons, it is almost impossible for the High Court to be satisfied that the magistrates took all relevant considerations into account, and did not rely on anything that it was not supposed to.[3]

[10] While I am not prepared to go so far as to say that a failure to provide an offender with an opportunity to make submissions on sentence will, of itself, constitute an error of law, the opacity of the Single Magistrate's decision-making in this case is such that I cannot say with any certainty that she has properly exercised her sentencing discretion. In the circumstances I consider it prudent to allow the appeal and embark on the sentencing process afresh.

[11] The appellant is now 77 years old. When he was younger he was a pastor in the Seventh-day Adventist Church, and was held in high regard. He is now in poor health, suffering from both high blood pressure and diabetes, for which he is required to take regular medication. He has no previous convictions.

[12] There is no denying the seriousness of the appellant's conduct. After the recent amendments to the *Penal Code*, such conduct would render him liable to a maximum sentence of life imprisonment. Having reviewed a number of comparable cases,[4] in a contested case such as this I consider an appropriate starting point to be a sentence of imprisonment for 2 years.

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2 *Berekame* v *DPP* [1986] SBCA 5, citing the Australian case of *Skinner* v *R* (1963) 16 CLR 336. *Berekame* was cited favourably in *Taatu Bakeua* v *Republic* [2012] KIHC 22.

3 *Tiobe Ueue* v *Republic* [2019] KIHC 37, at [9].

4 See *Republic* v *Korere Boiti* [2018] KIHC 67, and the cases referred to therein at [13] and [14].

[13] I consider the following matters to be the aggravating features of this case:

a. as a respected elder in the community, the appellant was in a position of trust, and his offending constitutes a grave breach of that trust;

b. the complainant is young, and the difference in ages between the appellant and the complainant is significant;

c. the appellant pinched the complainant's leg, causing her pain and leaving her bruised.

For all of these matters I increase the appellant's sentence by 4 months.

[14] There is little if anything to be said in mitigation, save that the appellant has no previous convictions. He offers no explanation for his conduct. There is no evidence of any remorse on his part. The appellant 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. I take into account that the appellant is elderly and unwell. A sentence of imprisonment of any duration will be difficult for him. For his previous good character and the other mitigating factors I will reduce the prisoner's sentence by 2 months.

[15] The appellant spent almost 1 month in pre-sentence custody. To take account of the effect that the rules concerning parole will have on his overall penalty, I reduce his sentence by a further 2 months.

[16] Taking all of the above matters into account, I am of the view that the appellant should be imprisoned for a period of 2 years.

[17] While it would be open to me to suspend such a sentence under section 44 of the *Penal Code*, I see no reason to do so in this case.

[18] The appeal is allowed. The sentence imposed by the Kiritimati Magistrates' Court is set aside and, in lieu thereof, the appellant is sentenced to imprisonment for 2 years. The period of 133 days that the appellant served between 11 November 2014 and his release on bail on 24 March 2015 is to be taken into account when calculating his release date.

[19] I wish to make a final comment, for the benefit of the Parole Board. Although the appellant will become eligible for release on parole after having served half of his sentence, it is my strong recommendation to the Parole Board that the appellant not be released from prison on parole unless the Board is satisfied that appropriate measures are in place to protect any young women and girls who will be living at the place at which the appellant intends to reside on his release.

Lambourne J
Judge of the High Court

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