



HIGH COURT OF KIRIBATI

Criminal Case N° 41/2017

THE REPUBLIC

v

ERIATA KABIRIERA

*Pauline Beiatau, Director of Public Prosecutions, for the Republic
Raweita Beniata for the accused*

Date of sentencing: 8 November 2019

SENTENCE

- [1] Eriata Kabirirera comes to be sentenced for 3 offences under the *Penal Code*: indecent assault, contrary to section 133(1); abduction, contrary to section 131; and assault occasioning actual bodily harm, contrary to section 238.¹
- [2] The offences involved a 4-year-old child and were committed on 25 June 2014 at Tuarabu village on Abaiang. The prisoner was aged 16 years at the time. Sometime around 2:00 or 3:00am the child was sleeping with her parents on the family *buia*. The prisoner, who was intoxicated, took the child from the *buia*, undetected by her parents. He carried her to the nearby airfield; she was crying. He punched the child in the jaw, neck and abdomen, and threatened to cut her neck if she was not quiet. He forced her to the ground and inserted his fingers into her vagina. He then engaged in non-penetrative sex, rubbing his penis between the child's thighs (*te bwanna* in the Kiribati language). After several minutes the prisoner saw a light approaching, so he ran away, leaving the child behind. A short time later the child was found by her father, who had woken to find his daughter missing and had come looking for her. The child

¹ Despite the repeal and replacement of section 133 by section 4 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case has proceeded under the *Penal Code* as it was in force on the date of the alleged offences (as provided for under section 10(2) of the amending Act).

suffered bruising to her jaw and scratches to her face and head. She had a tear, approximately 1cm in length, from her vagina to her rectum. When the prisoner was questioned by police, he made full admissions. He admitted that, as a result of his actions, the child had been distressed and her vagina was bleeding.

- [3] An information was originally filed on 4 May 2017, charging the prisoner with rape, abduction and causing grievous harm. For reasons unclear, it was not until 31 August 2018 that the prisoner first appeared before the Court. As the information did not comply with section 70 of the *Criminal Procedure Code*, on 28 September the Attorney-General filed a fresh information, replacing the rape charge with one of defilement of a girl under the age of 13 years. There was some delay in securing a lawyer for the prisoner. On 16 November the Court was informed that the prisoner intended to plead guilty to the charge of abduction, but not guilty to the other charges. The matter was fixed for trial in May 2019. On 22 May (what was to have been the first day of the trial) the prisoner failed to appear and a warrant was issued for his arrest. He surrendered himself to the Court 2 days later, and his matter was fixed for trial in September.
- [4] The trial commenced on 23 September. Counsel for the prosecution applied to amend count 3 on the information to instead charge assault occasioning actual bodily harm. There being no objection from counsel for the prisoner, the amendment was made. On arraignment the accused pleaded not guilty to count 1 and guilty to counts 2 and 3. The Court heard the testimony of the child's father, after which counsel for the prosecution applied to again amend the information, to substitute a charge of indecent assault for the charge of defilement in count 1. There being no objection, leave was granted. The accused was re-arraigned on count 1 (as amended) and pleaded guilty.
- [5] The prisoner is now 21 years of age. He married last year and he and his wife have a young child. He has no previous convictions and leads a subsistence lifestyle. Counsel for the prisoner says that his client is unable to explain why he committed these offences. He was very drunk at the time, having consumed fermented yeast with friends over a period of several hours earlier in the night. While intoxication cannot excuse the prisoner's actions, it does help to give some context to conduct that was both impulsive and callous. Despite the prisoner's young age, I am told that he was then binge drinking

regularly, 2 or 3 times a week. His mother was worried, but his father seemed not to care. The prisoner was regularly watching pornographic videos, and had experimented with sniffing petrol. Clearly things were not right at home; he was not being given the discipline and structure that teenagers, particularly male teenagers, require. A psychiatric assessment conducted recently found the prisoner to be mildly depressed, perhaps unsurprising given his present predicament. There is no evidence to suggest that he has any sociopathic or other aberrant tendencies. He appears to be genuinely remorseful for what he did to the child.

- [6] There is no doubt that the child suffered at the hands of the prisoner. However, nothing has been placed before the Court as to what, if any, longer-term impact this offending has had on her. It may be that, given her very young age at the time, she recalls little, if anything, of that night. It is clear however that there has been an impact on her family. The child's father became quite distressed when asked to recall the events of that night, despite the passage of time.
- [7] The maximum penalty for the offence of abduction is 7 years' imprisonment, while for indecent assault and assault occasioning actual bodily harm it is imprisonment for 5 years. In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.² I intend to apply the totality principle and impose a single sentence in respect of all 3 counts that I consider meets the gravity of the prisoner's offending.
- [8] There is no avoiding the seriousness of the offences committed by the prisoner. As I said in the recent case of *Korere Boiti*:
- The communal way of life in Kiribati, involving as it does an inherent lack of privacy and insecure sleeping arrangements, can result in children being left particularly vulnerable. Any person preying on a child must be dealt with severely, as a clear deterrent to others.³
- [9] The facts in *Korere Boiti* are somewhat comparable. There the offender took an 8-year-old girl away from the *buia* where she had been sleeping with her parents, removed her pants and engaged in non-penetrative sex. In that case I reviewed a number of cases of child stealing and indecent assaults involving

² *Kaere Tekaei v Republic* [2016] KICA 11, at [10].

³ *Republic v Korere Boiti* [2018] KIHIC 67, at [15].

young children, and came to the view that an appropriate starting point was a sentence of 3 years' imprisonment. However Korere's victim was not injured, which is a substantial point of difference. In the present case the violence inflicted on the child and the resulting serious injury warrant a significant uplift. I intend to start with a sentence of 4 years' imprisonment. There are no particular aggravating features to the prisoner's offending that have not already been taken into consideration in arriving at that starting point.

- [10] As far as mitigating factors are concerned, there is much that has been said on the prisoner's behalf. He is a young man with no previous convictions. His pleas of guilty should be regarded as having been entered at the earliest possible opportunity. He was a juvenile at the time of the offences, although the *Juvenile Justice Act 2015* had not yet become law.⁴ Regardless, he is no longer a juvenile and comes to be sentenced as an adult. That is not to say that his youth is an irrelevant consideration. As the Court of Appeal has said:

Deficiencies in decision-making ability, greater vulnerability to external coercion and the relatively un-formed nature of the adolescent character are all factors relevant to an assessment of youth culpability. Poor decision-making will often manifest itself in real-time coercive situations including a propensity for impulsive behaviour. This type of behaviour can be attributed to the fact that adolescents are less efficient than adults in processing information, and lack life experience. Youth offending will often be accompanied by other disadvantageous circumstances that may reduce culpability further; examples are intellectual disability, mental impairment and substance abuse.⁵

- [11] Adopting the approach of the Court of Appeal in that case, I take account of the mitigating factors as follows:

- a. for the prisoner's youth, I allow a credit of 25%;
- b. for his previous good character and early pleas of guilty, I allow a credit of 30%.

Working from a starting point of 4 years' imprisonment, this gives an overall reduction (rounded up) of 27 months.


- [12] There has been an unacceptable delay in the prosecution of this case. More than 5 years have elapsed since the commission of the offences. This is of

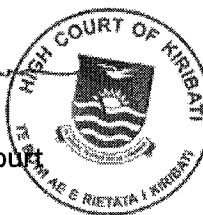
⁴ For the reasons explained by the Court of Appeal, the *Juvenile Justice Act* is probably of no application in a matter where the offending occurred before commencement of the Act – *Attorney-General v Teibi Benna & Benetito Kauaua* [2019] KICA 11, at [29].

⁵ *Attorney-General v Teibi Benna & Benetito Kauaua* [2019] KICA 11, at [38], citing *Churchward v R* [2011] NZCA 531.

particular concern given the youth of the prisoner. For the reasons discussed by the Court of Appeal in *Li Jian Pei*, 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.⁶ I reduce his sentence by a further 3 months.

- [13] Taking all of these matters into account, the prisoner is to be imprisoned for a period of 1 year and 6 months. I have wrestled with the question of whether this sentence should be suspended. The prisoner is still young, and I have no doubt that suspension of his sentence would provide a significant incentive for him not to reoffend. Despite this, I have reached the conclusion that the need to deter others from committing such odious crimes outweighs the considerations in favour of suspension. I am not prepared to suspend the sentence. Under section 28(2) of the *Penal Code*, I order that the prisoner's sentence is to run from 23 September 2019, being the day on which he was first remanded into custody on these charges.
- [14] Finally, I note that the psychiatrist recommends that the prisoner's mental health be reviewed on a monthly basis, and that he attend regular counselling sessions. In the interests of the prisoner's well-being, I strongly encourage the prison authorities to implement these recommendations.


Lambourne J
Judge of the High Court



The seal of the High Court of Kiribati is circular. It features a central shield with a sun, a wave, and a palm tree. The text "HIGH COURT OF KIRIBATI" is written around the top inner edge of the seal, and "I AM E RIKETATA I KIRIBATI" is written around the bottom inner edge.

⁶ *Attorney-General v Li Jian Pei & Taaitaiti Areke* [2015] KICA 5.