



## HIGH COURT OF KIRIBATI

*Criminal Case No 16/2017*

**THE REPUBLIC**

**v**

**TAUTEBWA TOOM**

*Teanneki Nemta for the Republic*

*Teetua Tewera for the accused*

*Dates of hearing: 5-6 March 2019*

*Date of judgment: 11 March 2019*

### JUDGMENT

- [1] Tautebwa Toom has pleaded not guilty to 1 count of causing grievous harm with intent to maim, disfigure or disable, contrary to section 218(a) of the *Penal Code* (Cap.67).
- [2] The offence is alleged to have occurred on 8 October 2016. An information was originally filed in this case on 20 February 2017. That information was defective in that it failed to comply with section 70 of the *Criminal Procedure Code* (Cap.17). The Attorney-General rectified the defect by filing a fresh information, signed by her, on 1 August 2018. At a mention of this matter on 16 November, counsel for the prosecution applied to amend the particulars of the charge. Counsel for the accused did not oppose the application and the trial proceeded last week on the information as amended.
- [3] Two witnesses were called for the prosecution. The first of these was Sai Rebaio, the complainant. He is 29 years old. Originally from Fiji, Sai was adopted by an I-Kiribati couple and has been here for 8 years. He lives at Temwaiku, but in October 2016 he was living at the home of his adoptive parents in Ambo. Sai's wife is the sister of the wife of the accused. On the afternoon of 8 October 2016, Sai was drinking fermented yeast with the accused and 2 others at the accused's house in Ambo. They were enjoying themselves. At some point Sai's mother-in-law, Nei Teerimwa (also the mother-in-law of the accused), came to him and told him that he should come back and drink at the house of his adoptive parents. He ignored her request and told her to leave. He went back inside to drink.

- [4] While he had been talking with Nei Teerimwa, the accused had left the house. Sai did not know where he had gone. A short time later, he heard an argument nearby. When he went to see what was happening, he saw the accused and Nei Teerimwa fighting. Teerimwa was not wearing a shirt, only a bra. The accused hit her. Sai went and grabbed the accused by the shoulder from behind. The accused turned around and punched Sai. They fought. Some of the accused's relatives also joined in. The fight did not last long – a bystander pulled Sai away, and he went with Nei Teerimwa back to the house of his adoptive parents, some 50 metres down the road.
- [5] Sai asked Teerimwa for some money, so that he could go and buy more drink. She gave him some money and he went to Teaoraereke and bought sour toddy. Sai took his drink back to the house in Ambo. By this time it was about 7:00 or 8:00pm. He was sitting on his bed under the verandah of the house, drinking and chatting with Nei Teerimwa. The bed is surrounded by curtains for privacy. Suddenly, he was struck on the right side of the head. He fell onto his bed. The accused had hit him with a long metal torch, like a diving torch. Sai had not seen the accused prior to being struck. He had approached Sai from behind, and was hidden by the curtains.
- [6] Despite being stunned by the blow, Sai got up and hit the accused, who fell to the ground outside the verandah. They fought, using their fists. Even though the fight only lasted a few minutes, a number of people had already come to watch. The 2 men struggled and fell to the ground, with Sai on top of the accused. Sai got up and the accused left. Someone told Sai that his right ear was bleeding. Sai heard the accused shout from the road, "How is it now? Your ear is cut." The police came and took Sai to the hospital in Betio. His right ear required stitches. The top quarter of the outer ear was missing. Sai could not say how that had happened. His ear had been uninjured prior to the second fight.
- [7] In cross-examination, Sai admitted that he had been drinking since about midday on the day in question. The accused had started drinking earlier than that. With regard to the earlier altercation, Sai denied hitting the accused first, and denied hitting him in the face. He rejected the suggestion that anyone else had been involved in the fight, or that anyone had intervened to separate them.
- [8] The other prosecution witness was Nei Teerimwa Maua, the mother-in-law of both Sai and the accused. She is a 54-year-old retired teacher. At around 6:00 or 7:00pm on the day in question, she was returning from bingo. She was living in Ambo with her daughter and Sai at the house of Sai's adoptive parents. Sai's wife had gone to work, but she had asked Teerimwa to make sure that Sai drank at home. Teerimwa went looking for Sai. She heard loud music coming from the house of the accused. She went to the accused's house and spoke with Tekinene. He said that Sai had been there earlier but had gone. Teerimwa went back to the road and saw Sai some distance away. She gestured towards him and he came. They spoke. As they were speaking, the accused came and said to Sai, "Who are

you going to listen to? Your brother or this lady?" Teerimwa left, and Sai went with the accused.

- [9] Teerimwa then heard someone behind her, shouting. She turned and saw the accused running towards her. He moved to hit her, but she dodged him. The accused then tried to hit her again, striking her on the back, where she had her bag. He pulled her bag while she was twisting away from him, and her T-shirt came off with the bag. She was standing there in her bra. Many people came running, including Sai. He pulled the accused away and said, "Why did you hit Mum?" Teerimwa took her bag and shirt and went back to the house.
- [10] At the house, Sai's adoptive father was cooking some food. Sai arrived and asked Teerimwa for some money, so that he could go and buy some more drink. She gave him some money and he left. After about 5 or 10 minutes he returned with the drink. By now it was after 8:00pm. Sai sat on his bed, drinking. The 2 of them talked. Music was playing. Suddenly the accused arrived, shone his torch on Sai's face and hit him on the head with the torch from behind. The accused went away, and Sai seemed stunned. The accused returned, now holding a stick. He hit Sai with the stick in the head, twice. Sai pushed the accused away and went after him. They fought, using their fists. They fell to the ground, with the accused on the bottom. Sai was kneeling on him. Teerimwa conceded that her eyesight was poor, but she identified the accused as being the man on the bottom by feeling his legs. Sai pinned the accused down while the 2 men struggled.
- [11] Someone from among the bystanders said that the police were coming. Tekinene came and called the accused. The accused got up and left with Tekinene. Someone shone a torch on Sai, and Teerimwa could see that his ear was bleeding. It looked as if someone had torn part of it off. She used the torch to search for the missing piece. By the time she found it, Sai had already left with the police. Teerimwa went on the motorcycle to the police station in Bairiki. She left the piece of Sai's ear with a police officer there.
- [12] In cross-examination, Teerimwa maintained that Sai did not hit the accused during the first altercation on the side of the road. She did not see the accused with a bleeding nose at that time. Sai's ear had not been bleeding before the second fight. Teerimwa did not hear the accused say anything after he left with Tekinene.
- [13] Counsel for the prosecution then tendered, by consent, a medical report and the record of the accused's interview with police. The medical report, prepared by Dr Moaraoi Kabiriera, records that the helix (the rim) and scapha (upper part) of Sai's right ear had been detached. It did not suggest a cause.
- [14] The police interview with the accused was conducted on 28 November 2016 by Detective Constable Naburea Maraki. The English translation provided was very poor, so I have relied on the vernacular. At the beginning of the interview, it was

explained to the accused that it had been alleged that he had bitten off Sai's ear in the course of a fight.

- [15] After covering a number of preliminary matters, several specific questions about the incident were put to the accused. The accused said that he had bitten Sai's ear in an attempt to defend himself. A group was attacking him, and he had no choice but to bite Sai's ear. When asked why he had fought with Sai, the accused said that Sai had hit him first, and Sai's ear had 'fallen off' during the fight.
- [16] That brought the prosecution case to a close.
- [17] I formally found that the accused had a case to answer, and informed him of his rights, as required by section 256(2) of the *Criminal Procedure Code*. Counsel for the accused advised that his client would be giving evidence, and would not be calling any other witnesses.
- [18] The accused is 35 years old and lives at Ambo. On the day in question, he was drinking at his house with Otia and Tekinene. They were drinking fermented yeast. He had started at about 8:00am. Sai joined them around midday, at the accused's invitation. Later in the day they moved to another place nearby. They were listening to music. By evening, the accused was very drunk. They had finished almost an entire bucket of fermented yeast. He slept, but was woken by Tekinene, who told him that Nei Teerimwa had come. The accused went to Sai and told him that he would go and hear what Teerimwa had to say. Sai told the accused that Teerimwa was angry with them. The accused went to the side of the road and called to Teerimwa. She did not want to listen to him, so he pulled her by the clothes. She walked off and the accused tried again to grab her clothing. He was surprised when Sai punched him in the face. He fell down. They fought.
- [19] While they were fighting, others separated them. The accused went back to his house and got his torch. He then went to Sai's house. Very little time had passed. The accused was not sure of the time, but it was dark. He went to Sai and hit him with the torch. They fought again. The accused ended up on the ground, with Sai on top of him. His hands were pinned down by Sai, who was punching him. He managed to free his left hand, which he used to pull Sai towards him. He said that it was possible that his face came into contact with Sai's ear, but he has no clear recollection of biting the ear. The accused was surprised when Sai stood up, releasing him. He then walked away, with a man named Teangitaai.
- [20] In cross-examination, the accused agreed that he had been angry with Sai after the first fight, which is why he went home and got his torch. He denied shining the torch in Sai's face before hitting him with it, and also denied using a stick to hit Sai. He maintained that it had not been his intention to bite Sai on the ear; he had been trying to free himself, or defend himself. The accused said that he could not recall admitting to the police that he had bitten Sai on the ear, although he did remember some of the other things that he had said during the interview.

- [21] In answer to a question from the Court, the accused said that his torch was made of metal, but was quite small. That brought the defence case to a close.
- [22] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.
- [23] It is perhaps convenient at this point for me to set out the facts as I find them to be. The 3 witnesses have each given quite different accounts of the events of that evening. None of them gave what might be considered a full account of what happened, however there are common threads. There was an earlier altercation, involving the accused, Teerimwa and Sai. After that, Sai and Teerimwa went back to the house, while the accused went to his house and armed himself with a torch. The accused presented himself at Sai's house and hit him in the head with the torch. The 2 men fought, during which the top of Sai's right ear became detached from the rest of the ear.
- [24] The details of the initial altercation are of little (if any) significance to the matters that I am being asked to decide, so the variations in the accounts of that fight are not important. I do not accept Nei Teerimwa's testimony regarding the accused's use of a stick during the second fight. I accept that the accused, despite starting the second fight, soon found himself in a losing position, pinned underneath Sai. Despite Sai being unable to say how his ear was injured, I am satisfied that the only reasonable inference that can be drawn is that the injury occurred when the accused bit the ear. This is supported by the accused's admission in his interview with police. I reject the suggestion, made by the accused during his interview, that anyone else was involved in the second fight.
- [25] In order to convict the accused of the offence of causing grievous harm with intent to maim, disfigure or disable, I must be satisfied to the required standard of each of the following elements:
- a. the accused caused grievous harm to Sai;
  - b. that he did so with the subjective intention to maim, disfigure or disable.
- [26] 'Grievous harm' is defined in section 4 of the *Penal Code* as:
- any harm which amounts to a maiming or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.
- [27] As the severing of part of the ear amounts to permanent disfigurement, I have no difficulty in concluding that Sai's injury amounts to grievous harm. For the reasons set out above, I find that the injury occurred when the accused bit Sai on the ear. I am therefore satisfied beyond reasonable doubt that the accused caused Sai's injury.

- [28] However, I must also determine the intention of the accused at the time he bit Sai's ear. For the prosecution to succeed, it must be established that he intended to maim, disfigure or disable. "Maiming" is defined in section 4 as the destruction or permanent disabling of any external or internal organ, membrane or sense. To disfigure is to do some external injury which detracts from another's personal appearance. To disable is to do something which creates a disability, whether temporary or permanent.
- [29] There is no direct evidence of the accused's intention; the evidence on this point is entirely circumstantial. Direct evidence is not required. It is possible to infer intention from an accused person's actions. However I must be satisfied that the only rational inference that can be drawn from the evidence is that the accused intended to maim, disfigure or disable Sai at the time of the biting. After consideration of the evidence, I am not so satisfied. While the bite strength needed to detach part of a human ear must be significant, it is equally possible that the accused intended only to cause Sai enough pain to turn the tables in the fight, or to get free.
- [30] The prosecution has therefore failed to prove a necessary element of the offence charged. I cannot convict the accused of that offence. However under section 157 of the *Criminal Procedure Code*, I can convict him instead of a lesser offence. I have already found that the elements of the offence of causing grievous harm *simpliciter*, contrary to section 220 of the *Penal Code*, have been proven to the necessary standard. Before I can convict on the lesser charge, I must first consider whether the defence of self-defence is available to the accused.
- [31] Self-defence has been raised by the accused, both in his interview with police and in his testimony. Section 17 of the *Penal Code* provides that the relevant principles are to be found in the common law.
- [32] Despite a lack of enthusiasm for the defence from counsel for the accused in his closing submissions, I am required by law to consider it. If the prosecution has failed to negative, beyond reasonable doubt, that the accused was acting in self-defence, then he is entitled to be acquitted.
- [33] The biggest problem for the accused on this issue is that he started the fight. He was the original aggressor. The decision of the High Court of Australia in *Zecevic v Director of Public Prosecutions (Victoria)*<sup>1</sup> is highly persuasive authority on this point. In circumstances where:
- an accused person has created the situation in which force might lawfully be applied to apprehend him or cause him to desist – where, for example, he is engaged in criminal behaviour of a violent kind – then the only reasonable view of his resistance to that force will be that he is acting, not in self-defence, but as an aggressor in pursuit of his original design. A person may not create a continuing situation of emergency and

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<sup>1</sup> (1987) 162 CLR 645.

provoke a lawful attack upon himself and yet claim upon reasonable grounds the right to defend himself against that attack.<sup>2</sup>

- [34] I am satisfied that the prosecution has negated self-defence in this case. The accused started the fight with Sai by assaulting him with a torch. The fight continued without pause. Only when the accused realised that he was losing the fight did he bite Sai's ear. The defence of self-defence is not available to him in these circumstances.
- [35] I find the accused not guilty of the offence of causing grievous harm with intent to maim, disfigure or disable, but guilty instead of causing grievous harm *simpliciter*, contrary to section 220 of the *Penal Code*. He is convicted accordingly.
- [36] I will hear counsel as to sentence.

  
**Lambourne J**  
Judge of the High Court

The seal of the High Court of Kiribati is circular with a red border. The text "HIGH COURT OF KIRIBATI" is written in red capital letters around the top inner edge. The bottom inner edge contains the Kiribati motto "TE PŪMI AE E RIETATA I KIRIBATI" in red. The center of the seal features a red shield with a white sun rising over three white waves, and a red torch is positioned behind the shield.

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<sup>2</sup> *ibid.*, per Wilson, Dawson and Toohey JJ, at 664.