HIGH COURT OF KIRIBATI

Criminal Case № 11/2018

THE REPUBLIC

v

TEBWAIRETI TEBABUTI
and
RITITE KAMOTI

Kanrooti Aukitino for the Republic
Reiati Temaua for Tebwaireti Tebabuti
Raweita Beniata for Ritite Kamoti

Date of sentencing: 9 April 2019

SENTENCE

[1] Tebwaireti Tebabuti and Ritite Kamoti have both pleaded guilty to assaulting Aimerei Taariki, causing him actual bodily harm, contrary to section 238 of the *Penal Code* (Cap.67).

[2] The offence was committed on 19 September 2017. At the time, the prisoners and the complainant were friends and Form 6 students at Kauma Adventist High School, a boarding school in Tekatirirake village on Abemama. That evening, with 3 other students, they absconded from school grounds. They went to the village, where arrangements had been made to purchase 2 buckets of fermented yeast.

[3] All went well as the boys drank the first bucket of yeast. However, Aimerei became increasingly argumentative the more he drank. He fought with Tebwaireti, and had to be restrained. Aimerei continued to shout and cause trouble, so the group decided to go to another place to finish the drink, leaving Aimerei behind. That plan failed, as Aimerei followed them, continuing to be a nuisance. Tebwaireti, still angry after the initial altercation, turned and punched him. Ritite joined in the attack, which continued after Aimerei fell to the ground. Both prisoners used fists and feet against the complainant. One of their companions tried to get the prisoners to stop, without success. He was verbally abused for interfering. Only after a second companion intervened did the attack stop. The prisoners walked away, leaving the complainant on the ground.

[4] Early the next morning the complainant was found by another student – he was in a bad way. He was naked save for his underwear, and had a significant injury to his face. He was flown to South Tarawa that day, and it was discovered that his left eye ball was missing, with a laceration to the conjunctiva of the right eye. There were several wounds around both eyes, which the treating doctor felt were consistent with having been caused by a sharp object. In surgery the left eyelid was sewn shut, and the injury to the conjunctiva of the right eye was sutured. The medical report made no mention of any other injuries to the complainant.

[5] The prisoners were initially charged with causing grievous harm with intent, contrary to section 218(a) of the *Penal Code*. A plea of not guilty to that charge was indicated by defence counsel on 26 October 2018, and the matter was set down for trial. On what was to have been the first day of the trial, counsel for the prosecution advised that she proposed to call Aimerei as a witness. Counsel for the prisoners objected, on the basis that the prosecution had not previously listed him as a witness, and no witness statement had been provided to the defence. Section 251 of the *Criminal Procedure Code* provides:

> **251 Additional witnesses for prosecution**
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> (1) No witness who has not given evidence at the preliminary inquiry shall be called by the prosecution at any trial unless the accused person has received reasonable notice in writing of the intention to call such witness.
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> (2) The notice shall state the witness's name and address and the substance of the evidence which he intends to give.
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> (3) The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness.

[6] The information in this case was filed directly with the High Court by the Attorney-General under section 70(1) of the *Criminal Procedure Code*, so there had been no preliminary inquiry. In order to address the requirement for notice to the defence, it is the practice in such cases to provide them with copies of all documents from the prosecution case file. That occurred in this matter. However, for reasons that are not clear, the complainant had never given a statement to the investigating police. Even though counsel for the prosecution was asking for leave to include Aimerei as a witness, on the first day of the trial there was still no statement from him. The prosecution was therefore unable to comply with its obligations under section 251. An adjournment would be needed to allow for the statement to be taken. Counsel for both prisoners resisted the adjournment application, adding that, if the request was granted, additional time would then be needed for their clients to consider the implications of the statement. As in a recent case where the same issue had arisen, this dilemma was of the prosecution's own making. Had there been adequate preparation for trial, the omission would have been identified and rectified. In the circumstances, I refused counsel's request and ruled that the complainant would not be allowed to testify.

[7] Counsel for the prosecution then advised that, without Aimerei's testimony, they could not proceed on the original charge. She applied to amend the charge to one of assault occasioning actual bodily harm. Neither defence counsel objected to the amendment and, after a brief adjournment, the prisoners were arraigned on the new charge and both pleaded guilty.

[8] It is accepted that this case now proceeds on the basis that the prisoners did not cause the injuries to Aimerei's face, and they are not responsible for the loss of his eye. Aimerei did not have those injuries when they left him after the beating. He must have been the victim of a second attack. The prisoners concede that their beating would have caused the complainant actual bodily harm, in the form of bruises and abrasions. They are to be sentenced on that basis.

[9] Both prisoners are now 20 years of age, and were 18 at the time of the offence. They were expelled from school after the attack.

[10] Tebwaireti was able to enrol at a school here on South Tarawa, but did not finish Form 6. He has since taken some short courses run by the Seventh Day Adventist church at Korobu. He is not employed. His counsel submits that he was provoked by Aimerei during the initial altercation, in which Aimerei had been the aggressor. Clearly the consumption of alcohol was also a contributing factor. All 3 boys had been good friends prior to the night in question. Tebwaireti has since apologised to Aimerei over the phone, and I am advised that the apology was accepted.

[11] Ritite did not go back to school after his expulsion, but he has recently started a certificate course in plumbing at the Kiribati Institute of Technology. He was also intoxicated at the time of the assault on Aimerei. This in no way excuses his conduct, but may go some way to explaining why he was willing to join in on a dispute that had not involved him to begin with.

[12] Neither prisoner has previous convictions.

[13] In determining the appropriate sentence for the prisoners, I am mindful of the approach to sentencing recommended by the Court of Appeal.[1] The maximum penalty for assault occasioning actual bodily harm is 5 years' imprisonment.

[14] On a review of several similar cases,[2] I am of the view that a suitable starting point for a case such as this is a sentence of imprisonment for 9 months. The injuries, while not specified, were likely to have been relatively minor. No weapon was involved but this was a sustained beating, involving repeated punching and kicking, which continued even after the complainant fell to the ground. The prisoners resisted the efforts of others to get them to stop.

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

2 *Reken Mateero* [2003] KIHC 79; *Toromon Eritai* [2004] KIHC 127; *Ioane Ianana* [2005] KIHC 166; *Tabotabo Otati* [2006] KIHC 23; *Kurin Taungea & others* [2006] KIHC 46; *Nakibae Bakati* [2006] KIHC 75; *Bibiana Kookia* [2008] KIHC 61; and *Tawita Kabuta* [2009] KIHC 23.

[15] I consider the fact that the prisoners attacked the complainant together to be an aggravating feature of this case. An offence committed in company will almost always result in a longer sentence. For this I increase each prisoner's sentence by 3 months.

[16] As for mitigating features, the prisoners have pleaded guilty to this charge at the earliest possible opportunity. They are young, and have no previous convictions. There is an element of provocation from the way Aimerei had been behaving. I accept that they are both genuinely remorseful for their actions. For these matters I deduct 4 months from each prisoner's sentence.

[17] Taking all of these matters into account, I am of the view that an appropriate sentence in this case is one of imprisonment for a period of 8 months.

[18] As such a sentence falls within the scope of section 44 of the *Penal Code*, I turn to consider whether the circumstances of the offence and each prisoner's personal circumstances warrant suspension of their sentences.

[19] The Court of Appeal in *Attorney-General* v *Katimango Kauriri*[3] recommended the New Zealand Court of Appeal's decision in *R* v *Petersen*[4] as a useful guide when considering whether to suspend a sentence of imprisonment. In *Petersen* the Court said the principal purpose of the New Zealand equivalent of section 44 is:

> to encourage rehabilitation and provide the Courts with an effective means of achieving that end, by holding a prison sentence over the offender's head. Put another way it enables the Court to give the offender one last chance in a manner which clearly spells out the consequences if he offends again. It is available to be used in cases of moderately serious offending but where it is thought there is a sufficient opportunity for reform, and the need to deter others is not paramount. Although not so limited, it may be particularly useful in cases of youthful offenders.[5]

[20] The suspension of a sentence of imprisonment should have some direct benefit for the offender by providing an incentive to avoid reoffending. The purpose of suspension is not just to free a person who should otherwise be imprisoned. In this case I consider the youth of the prisoners provides a compelling basis for suspending their sentences. The argument for Ritite is strengthened by the fact that, if his sentence is not suspended, he will lose his place at the Kiribati Institute of Technology. I consider that they should both be given a chance to demonstrate that the attack on Aimerei was out of character, so I will suspend their sentences. I hope they will not disappoint me.

[21] The prisoners are convicted on their pleas of guilty. They are each sentenced to 8 months' imprisonment. However I order that, for each prisoner, the sentence is not to take effect unless, within 18 months from today, he commits another

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3 [2015] KICA 6, at [3].

4 [1994] 2 NZLR 533.

5 *ibid.*, per Eichelbaum CJ (for the Court) at 537.

offence punishable with imprisonment. If such an offence is committed, it will be a matter for the court to decide whether this sentence should then take effect.

Lambourne J
Judge of the High Court