HIGH COURT OF KIRIBATI

Criminal Case Nº 19/2018

THE REPUBLIC

v

TIBWERE MAIAWA

Teanneki Nemta for the Republic
Raweita Beniata for the prisoner

Date of sentencing: 20 May 2019

SENTENCE

[1] Tibwere Maiawa has pleaded guilty to 1 count of causing grievous harm, contrary to section 220 of the *Penal Code* (Cap.67). He had initially pleaded not guilty, but changed his plea on the morning of the second day of the trial.

[2] The offence was committed on 19 December 2016 at Bonriki village on South Tarawa. The prisoner and the complainant both worked as security guards at the airport. They were good friends, and had spent close to 24 hours prior to the incident drinking with several other workmates. They had each consumed copious quantities of fermented yeast and sour toddy. They were both heavily intoxicated. Some members of the group suggested to the complainant that he had had too much to drink and should go home. That irritated him. He stood up and challenged the prisoner to a fight. He testified that he was not serious, and was really just fooling around. The prisoner stood up and was holding a large rock, about 15 centimetres in diameter. He threw the rock and it struck the complainant in the left temporal region of the head. It is accepted that the prisoner did not intend for the rock to hit the complainant, who unexpectedly moved into the rock's trajectory after it was thrown.

[3] The complainant remembers nothing after having been struck with the rock until he regained consciousness some time later. He was at his house. He could hardly stand and felt strange. He was taken to the hospital, where it was discovered that he had a depressed skull fracture. He was bleeding from both ears. He had lost his hearing and could not speak. The complainant spent the next 3 weeks in the hospital, after which he regained the ability to

speak. The hearing in his left ear returned after about 2 months, but he is still deaf in the right ear. The doctors cannot say whether he will ever regain full hearing.

[4] An information was originally filed on 6 March last year, and the case was first mentioned by the court in October. As the initial information did not comply with section 70 of the *Criminal Procedure Code*, on 16 November the Attorney-General filed a fresh information. Counsel for the prisoner advised that his client would be pleading not guilty and the matter was fixed for trial. The trial commenced on 13 March but, as I mentioned above, the prisoner changed his plea to guilty on the morning of the second day, after 3 of the prosecution's 5 witnesses had given evidence.

[5] The prisoner is now 25 years of age, and was 22 at the time of the offence. He is married with a 2-year-old son. He is still employed as a security guard, and is his family's sole breadwinner. He has no previous convictions.

[6] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.[1] The maximum penalty for causing grievous harm is 7 years' imprisonment.

[7] Counsel for the prosecution accepts that the prisoner and the complainant were just engaged in drunken tomfoolery, however she submits that a custodial sentence is warranted. In the case of *Teekua Kamauti*, I reviewed a number of previous sentences imposed for causing grievous harm.[2] In that case I took the starting point to be between 18 months and 2 years. Teekua's case involved the use of a knife, and the use of such a weapon will almost inevitably lead to a higher starting point. In this case, I consider that an appropriate starting point is a sentence of imprisonment for 12 months. This is despite the fact that the prisoner and complainant were simply fooling around. They were behaving like idiots, but the consequences were serious.

[8] I am satisfied that there are no particular aggravating features to the prisoner's offending that have not already been taken into consideration in arriving at the starting point.

[9] As far as mitigating factors are concerned, the prisoner has no previous convictions. I accept that he is genuinely remorseful for his actions. The prisoner did plead guilty, but the plea came very late in the day, so he is not entitled to the significant reduction in sentence that ordinarily follows a timely plea. For these matters I reduce his sentence by 2 months.

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

2 *Republic* v *Teekua Kamauti* [2018] KIHC 48, at [15]-[17].

[10] It has taken 2½ years to conclude the prosecution of this case. That is an unacceptable delay. For the reasons discussed by the Court of Appeal in *Li Jian Pei*, the prisoner is entitled to a modest reduction in his sentence to compensate him for the breach of his constitutional right to be afforded a fair hearing within a reasonable time.[3] I will reduce his sentence by another month.

[11] Taking all of these matters into account, I am of the view that the sentence in this case should be one of imprisonment for a period of 9 months.

[12] 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 the prisoner's personal circumstances warrant suspension of his sentence. However such a consideration is complicated by a recent amendment to the *Penal Code*,[4] which inserted a new section 44A with effect from 15 April, as follows:

> **44A Dicsreation** [*sic*] **to suspend sentence may not be exercises** [*sic*]
>
> Notwithstanding section 44(1), the Court shall not exercise its discretion to suspend sentences where a weapon is used or involved in the commission of an offence.

[13] If the rock thrown by the prisoner in this case is properly considered a weapon for the purpose of section 44A, the option to suspend his sentence is not available to me. It is necessary therefore to consider the term 'weapon' in the context of section 44A. The term is not defined in the *Penal Code*, and the explanatory memorandum accompanying the amending Act provides no assistance in divining the intention of the Maneaba ni Maungatabu.

[14] In the case of *Deing* v *Tarola*[5] the Victorian Supreme Court was asked to decide whether a studded leather belt could be considered a weapon. Beach J said as follows:

> The *Oxford English Dictionary* defines 'weapon' as "an instrument of any kind used in warfare or in combat to attack and overcome an enemy"…
>
> That would seem to me to be a particularly wide definition; not one which gives great assistance when construing the provisions of the Act and the regulations made under it. Given a literal interpretation it could encompass such things as pieces of timber, lengths of piping, brickbats and the like. Indeed, on one view of the matter, it could include almost any physical object.
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> It would seem to me that a more appropriate interpretation of the word 'weapon' is that appearing in *Halsbury's Laws of England*, 3rd ed., vol. 10 at p.653. There, when dealing with the term 'offensive weapon', the learned authors say:
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> > Large clubs or sticks are 'offensive weapons'; the expression includes anything that is not in common use for any other purpose but that of a

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

4 *Penal Code (Amendment) Act* 2019, section 2.

5 [1993] 2 VR 163.

> weapon; but a common whip is not such a weapon, nor, probably, is a hatchet which is caught up accidentally during the heat of an affray.
>
> If the term 'weapon' includes anything that is not in common use for other purposes, for example, a hammer, a screwdriver, an axe or a chainsaw, one could ultimately arrive at the ridiculous situation whereby most instruments used by the human race fall into the category of weapons. Is it to be said that a pair of silk stockings or a length of twine used to strangle a victim are weapons? Clearly when so used they become weapons. But a reasonable person would not generally perceive them to be such.
>
> In my opinion the Act can only be given a sensible interpretation if the word 'weapon' is defined as including anything that is not in common use for any other purpose but that of a weapon.[6]

[15] Beach J then went on to quote the following passage from the judgment of McGarvie J in the Victorian Supreme Court case of *Wilson* v *Kuhl*; *Ryan* v *Kuhl*:

> I turn to consider whether the carving knife was an offensive weapon. I consider that within the meaning of the section a physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury. A knuckle duster is an article of this kind. In my opinion an article such as a sawn-off shotgun is of itself an offensive weapon even though it may be shown that articles of that kind are normally used to threaten rather than inflict injury. A person armed with an article of a kind normally used only to inflict or threaten injury is armed with an offensive weapon whatever his intention. An article of a kind which is not normally used only to inflict or threaten injury is an offensive weapon only if the person found armed with it had then any intention to use it for an offensive, that is an aggressive, purpose. A carving knife is an article of this kind.[7]

[16] I find considerable assistance from these passages. It is clear that there are 2 categories of articles that might be considered a weapon. The first relates to items that are normally used only to threaten or inflict injury. Such items are weapons *per se*. I cannot think of an item commonly used in Kiribati today that would satisfy this definition, although the shark-toothed weapons from pre-colonial times certainly would. On the other hand, an item ordinarily used for a purpose other than to threaten or inflict injury will only be a weapon if the person carrying it has, at the time, the intention to use it to inflict or threaten injury.

[17] Applying that rationale, a rock is not a weapon *per se*, but, with the requisite intention, it could certainly be a weapon for the purpose of section 44A.[8] In this case, it is accepted that the prisoner's intention at the time he threw the rock was neither to threaten nor inflict injury. He was fooling around, and did not intend for the rock to hit the complainant. As such, I am satisfied that this rock was not a weapon, as that term is used in section 44A of the *Penal Code*. A weapon was not used or involved in the commission of this offence.

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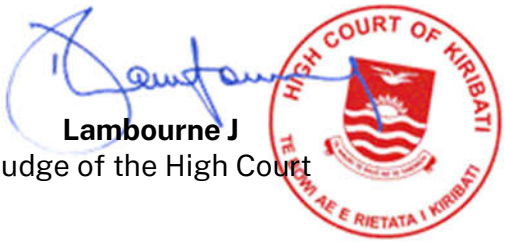
6 *ibid.*, at 165.

7 [1979] VR 315, at 320.

8 Such a view is consistent with the English decision of *Harrison* v *Thornton* (1979) 68 CrAppR 28.

[18] So, should I suspend the prisoner's sentence? He is a young man, with family responsibilities and a good job. I am told that he has given up drinking alcohol, which is certainly a good thing. As I have said elsewhere, the suspension of a sentence of imprisonment should have some direct benefit for the offender by providing an incentive to avoid reoffending.[9] I consider that the prisoner will benefit by having such an incentive. I will suspend his sentence.

[19] The prisoner is convicted on his plea of guilty. He is sentenced to 9 months' imprisonment. However I order that the sentence is not to take effect unless, within 1 year from today, the prisoner commits another 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

[9] For example, in *Republic* v *Tebwaireti Tebabuti and Ritite Kamoti* [2019] KIHC 29, at [20].