HIGH COURT OF KIRIBATI

Criminal Appeal Nº 3/2019

MIITA TIONIKAI *Appellant*

v

THE REPUBLIC *Respondent*

Teetua Tewera for the appellant
Teanneki Nemta for the respondent

Date of hearing: *14 June 2019*
Date of judgment: *24 June 2019*

JUDGMENT

[1] On 14 June I granted leave to the appellant to appeal against the sentence imposed by the Nonouti Magistrates' Court on 24 May 2018 and allowed his appeal. At the time I said that the reasons for my decision would be published later. These are those reasons.

[2] Following a trial, the appellant was convicted of unlawful wounding, contrary to section 223 of the *Penal Code* (Cap.67). He was sentenced to imprisonment for 2 years.

[3] On 4 January 2019 the lawyer acting for the appellant at the time filed an application with the High Court for leave to appeal out of time, with the proposed notice of appeal annexed. This is not the correct procedure. Both section 272(1) of the *Criminal Procedure Code* (Cap.17) and rule 33(1) of the *Magistrates' Courts Rules* require appeal documents to be filed with the relevant Magistrates' Court. If an appellant ignores this requirement and files the documents in the High Court, it is likely that there will be delays in the hearing of the appeal. Despite that, it is not clear why another 5 months elapsed before a file was opened and the matter was brought to my attention.

[4] There are conflicting provisions in the law as to the time within which an appeal must be filed. The most generous of these is the 3-month limit set by section 67(1) of the *Magistrates' Courts Ordinance* (Cap.52) (increased from

21 days by a 1990 amendment). By that measure, the appellant's appeal was lodged more than 4 months late.

[5] It is clear from the minutes of the proceedings in the court below that the magistrates failed to inform the appellant (who was not legally represented) of his right of appeal at the time of sentence (as required by section 270(2) of the *Criminal Procedure Code*). This is disappointing, particularly in a case where a custodial sentence is imposed. Magistrates are reminded of the importance of informing all convicted persons of their right to appeal to the High Court against conviction and/or sentence. The Court should also ensure that the time limit of 3 months is explained.

[6] Under rule 33(4) of the *Magistrates' Courts Rules* the High Court may, "if it thinks fit", extend the time for the filing of an appeal, while the proviso to section 272(1) of the *Criminal Procedure Code* allows the High Court to enlarge the time, "at any time, for good cause".

[7] On 1 April 2018 the complainant, aged 68 years, went to the appellant's house, armed with a bush knife. Both men were drunk. They had argued earlier, during which the complainant had insulted the appellant's daughter. The appellant also had a bush knife, with which he struck the complainant, wounding him in the leg and hand. The appellant did not deny wounding the complainant. It would appear that he pleaded not guilty in the mistaken belief that the complainant's provocation entitled him to an acquittal. Had he been legally represented, it is highly likely that he would have pleaded guilty.

[8] There are a number of issues with the way in which the appellant's trial was conducted. Although the appellant does not challenge his conviction, it is very important that magistrates understand the correct procedures. They must take great care to ensure that these procedures are followed to ensure that the accused person's constitutional right to a fair trial is protected. A failure to do so may lead to a conviction being set aside, with the matter sent back to the Magistrates' Court to be heard again.

[9] The following steps appear not to have been taken by the magistrates:

a. at the start of the trial, the charge was not read to the appellant and he was not asked to plead (section 193(1) of the *Criminal Procedure Code* and rule 15(1) of the *Magistrates' Court Rules*);

b. the appellant was not given an opportunity to cross-examine the complainant, or if he was and he declined, that fact was not recorded (section 194(2) and (3) of the *Criminal Procedure Code* and rule 15(2) of the *Magistrates' Court Rules*);

c. at the close of the prosecution case, the appellant was not informed of his right to give evidence on oath, or to make an unsworn statement from the dock, nor was he informed of his right to call witnesses in his defence (section 196(1) of the *Criminal Procedure Code* and rule 15(4) of the *Magistrates' Court Rules*);

d. the decision of the Court to convict the appellant was not recorded (section 201 of the *Criminal Procedure Code* and rule 15(7) of the *Magistrates' Court Rules*).

I note that the Court Clerk was not present for the appellant's trial, and it is possible that the minutes of the proceedings are incomplete. If the procedures were followed, then it is the responsibility of the presiding magistrate to ensure that the minutes accurately record what was said.

[10] It is also of concern that, prior to sentencing, the appellant was not provided with an opportunity to set out any matters in 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]

[11] Appellant's counsel submits that the sentence of 2 years' imprisonment is manifestly excessive. Counsel for the respondent submits that the Court did not fall into error, and the sentence was not excessive.

[12] 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]

[13] The appellant is now 62 years old. Prior to his imprisonment he led a subsistence lifestyle on Nonouti. He has no previous convictions.

[14] A custodial sentence will often be an appropriate penalty for the offence of unlawful wounding, particularly where a knife is used. The fact that the appellant was sent to prison is not in itself remarkable. Unfortunately the

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

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.

Magistrates' Court did not explain why it considered that the appellant's conduct warranted imprisonment for 2 years. As I said in *Tiobe Ueue*:

> 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]

[15] A sentence of imprisonment should only ever be imposed as a measure of last resort. While the offence of unlawful wounding is serious, carrying a maximum sentence of 5 years' imprisonment, I am satisfied that the sentence imposed in this case is manifestly excessive. Given the provocation from the complainant, the age of the appellant and his previous good character, a sentence of 6 months' imprisonment would have been more appropriate.

[16] This case is complicated by the fact that the appellant has essentially served the sentence imposed by the Magistrates' Court. On a sentence of 2 years' imprisonment, he was eligible for release on parole on 24 May this year.[4] It is not clear why he has not been released already. As such, there is nothing to be gained by imposing any further punishment.

[17] I therefore order as follows:

a. leave to appeal out of time is granted;

b. the appeal against sentence is allowed, and the sentence of 2 years' imprisonment imposed by the Nonouti Magistrates' Court on 24 May 2018 is set aside;

c. instead the appellant is sentenced to the rising of the Court.

[18] The appellant is to be released from custody immediately, and he is to be repatriated to Nonouti as soon as possible.

Lambourne J
Judge of the High Court

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

4 *Parole Board Act* 1986, section 11(1)(b).