



HIGH COURT OF KIRIBATI

Criminal Case No 24/2017

THE REPUBLIC

v

ROUBEN BAITAU

*Ateti Tekawa for the Republic
Batiwate Itibita for the accused*

Date of sentencing: 11 February 2019

SENTENCE

- [1] Rouben Baitau has pleaded guilty to 1 charge of indecent assault, contrary to section 133(1) of the *Penal Code* (Cap.67).
- [2] 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 proceeds under the *Penal Code* as it was in force on the date of the offence (section 10(2) of the amending Act).
- [3] The offence was committed on 6 June 2016, in a remote area of Temwaiku on South Tarawa. The complainant and the prisoner had known each other for some time. The prisoner's wife and the complainant's aunt worked together. The complainant was aged 17 years at the time, and the prisoner was 29. They were friends, and had occasionally gone out drinking kava together. The prisoner described the complainant as having flirted with him on those occasions.
- [4] On the day in question, the complainant's aunt sent her to buy fish. Before she could buy the fish, the prisoner arrived on his motorcycle and told the complainant that her mother had sent him to bring her home. She got on the prisoner's motorcycle but, instead of heading back home, the prisoner drove towards Bonriki. He told the complainant that he was taking her to another place where she could buy fish. The prisoner drove the motorcycle at quite high speed, with no opportunity for the complainant to get off. On the way, the prisoner told the complainant that he had been thinking about her.

- [5] When they reached an isolated and bushy area of Temwaiku, the prisoner stopped the motorcycle and dismounted. He told the complainant to get off, but she pleaded with him to take her home. Eventually the complainant got off the motorcycle, and the prisoner grabbed her from behind. He put his hand inside her T-shirt and reached for her breast. The complainant pushed the prisoner's hand away. The prisoner kissed the complainant on the neck. While she was trying to get away, the complainant fell. She got up and headed towards the main road. The prisoner followed the complainant and asked her to get back on the motorcycle with him. She was reluctant but, as she was unfamiliar with the area, she finally agreed. They headed in the direction of her house. On the way, the prisoner apologised for what he had done. The complainant got off the motorcycle at the end of Ananau causeway and walked the rest of the way home.
- [6] An information was originally filed on 11 January 2017, charging the prisoner with attempted rape. The prisoner made his first court appearance on 8 August 2017. On 28 September 2017 the prisoner pleaded guilty to the attempted rape charge before Commissioner Eberi and submissions on sentence were received from both sides. For reasons unclear, the Commissioner failed to deliver a sentence, and the case remained dormant until mentioned before me on 24 July 2018. At the request of the parties, the matter commenced afresh before me, with the case adjourned for submissions to 17 August.
- [7] On that date I expressed concern that the facts as outlined in the submission from counsel for the prosecution did not appear to be sufficient to form the basis of a charge of attempted rape. I adjourned the case for a week, to see if the issues could be resolved. A fresh information was subsequently filed, charging the prisoner with the present offence. When the matter resumed on 24 August the prisoner's plea to the attempted rape charge was vacated. I noted that the original information had not, in any event, complied with section 70 of the *Criminal Procedure Code* (Cap.17). Counsel for the prisoner asked for more time to consider the new charge, and the case was adjourned for a further week. On 31 August counsel for the prisoner informed the court that her client would be pleading not guilty, and the matter was fixed for trial in the week commencing 4 February 2019. When the case was called for trial on 4 February, counsel for the prisoner advised the court that her client would plead guilty as charged.
- [8] The prisoner is now 32 years of age. He is married with 4 children, aged from 1 to 11 years. Although he trained as a seafarer, his wife works and he stays at home to look after the children. By way of an explanation for his conduct, the prisoner says that he interpreted the complainant's friendliness and flirtatious behaviour as a sign that she may be interested in a relationship with him. He concedes however that he never asked the complainant if his understanding was correct.

- [9] 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 sentence for indecent assault under the old law is imprisonment for 5 years. While that is the maximum to be applied in this case, I note that indecent assault under the amended *Penal Code* now carries a maximum sentence of 7 years' imprisonment.
- [10] Counsel for the prisoner concedes that a custodial sentence is appropriate, although she argues that the circumstances of this case and the personal circumstances of her client warrant suspension of any such sentence.
- [11] While the prisoner's conduct falls towards the lower end of the spectrum, I am of the view that, in a case such as this one, an appropriate starting point is a sentence of imprisonment for 6 months.
- [12] I consider the following matters to be the aggravating features of this case:
- a. as a family friend, the prisoner was in a position of trust, and his offending constitutes a breach of that trust;
 - b. the complainant is young, and the difference in ages between the prisoner and the complainant is significant;
 - c. taking the complainant to a remote area, from where she was unlikely to escape, added to what was already a traumatic experience for her;
 - d. the prisoner's conduct cannot be seen as opportunistic; there was an element of planning involved.
- For all of these matters I increase the prisoner's sentence by 2 months.
- [13] As far as mitigating factors are concerned, the prisoner has no previous convictions. Furthermore, I accept that he eventually desisted of his own accord when the complainant objected to what he was doing.
- [14] His counsel submits that his early apology to the complainant, as well as a further apology made on his behalf by his family to the family of the complainant, are evidence of the prisoner's remorse. However, he was far from candid when interviewed by police, and his plea of guilty came very late in the day. While he will receive a modest reduction in sentence for his plea, I am not satisfied that the prisoner is genuinely remorseful. As I said to counsel for the prisoner in the course of submissions, his actions seem to be those of a man experiencing regret, rather than remorse.
- [15] For his previous good behaviour and his plea of guilty I will deduct 6 weeks.

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

- [16] It is relevant that there has been an unacceptable delay in the prosecution of this case. It has been more than 2½ years since the commission of the offence. Very little of that delay can be attributed to 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.² I therefore reduce his sentence by a further 2 weeks.
- [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 6 months.
- [18] As such a sentence falls within the scope of section 44 of the *Penal Code*, and at his counsel's request, I turn to consider whether the prisoner's personal circumstances warrant suspension of his sentence. Counsel for the prisoner submits that her client's family will suffer hardship if the prisoner is sentenced to an immediate term of imprisonment, particularly given his role as the provider of primary care to his children while his wife is at work. As in almost all cases where someone is sent to prison, a custodial sentence will be difficult for the prisoner's family. Had he thought more about his family on the day of this offence, then perhaps they would not have to experience such hardship. I see no reason to suspend the prisoner's sentence.
- [19] The prisoner is convicted on his plea of guilty. He is to be imprisoned for a period of 6 months from today.


Lambourne J
Judge of the High Court



² *Attorney-General v Li Jian Pei & Taaiteti Areke* [2015] KICA 5