HIGH COURT OF KIRIBATI

Criminal Appeal Nº 6/2017

ATTORNEY-GENERAL *Appellant*

v

DONNA JANICKI *Respondent*

Pauline Beiatau, Director of Public Prosecutions, for the appellant
Angitonu David for the respondent

Date of hearing: *23 August 2018*
Date of judgment: *29 July 2019*

JUDGMENT

[1] In case BaiCrim 15/17, the respondent faced charges in the South Tarawa Magistrates' Court of assault occasioning actual bodily harm (contrary to section 238 of the *Penal Code*) and obstructing free passage of a public way (contrary to section 169(s) of the *Penal Code*). She pleaded guilty to both counts and, on 2 June 2017, was sentenced by a Single Magistrate on the first count to imprisonment for 6 months, suspended for 18 months. For the second count the Single Magistrate fined the respondent $10, to be paid within 2 weeks. In default of payment of the fine the respondent would be imprisoned for 2 weeks.

[2] On 30 August 2017 the Attorney-General filed an appeal against the sentence imposed in respect of count 1 (there being no appeal as of right where a fine of $10 or less is imposed[1]). On 23 August 2018 I dismissed the appeal. At the time I said that the reasons for my decision would be published later. I now publish those reasons, and I regret that it has taken me so long to do so.

[3] The offences were committed on 17 January 2017. Prior to that day the respondent and complainant had argued, and clearly matters had been left unresolved between them. The respondent was driving on the main road at Ambo and saw the complainant's car. The respondent used her car to block

[1] *Criminal Procedure Code*, section 271(2).

the complainant's progress (giving rise to count 2). Both respondent and complainant left their vehicles. The respondent struck the complainant. It was conceded for the respondent that the complainant was left with scratches to her face following the assault. It would appear that no medical report was tendered.

[4] The respondent is in her mid-30s. She has no previous convictions.

[5] Counsel for the appellant submits that the sentence imposed by the Single Magistrate was manifestly inadequate. She does not argue that the sentence of imprisonment determined by the Single Magistrate was itself inadequate, however she says that the Single Magistrate fell into error by suspending the sentence. Counsel for the respondent submits that the Magistrate did not err, nor was the sentence was inadequate.

[6] 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]

[7] The learned Single Magistrate clearly viewed the respondent's behaviour as serious. She correctly identified the maximum penalty under section 238 to be imprisonment for 5 years. She approached the task of sentencing by taking the maximum penalty as her starting point, and then identifying the matters that she considered warranted a reduction from that maximum. This was a departure from the approach recommended by the Court of Appeal in *Kaere Tekaei* v *Republic*.[3] In that case the Court suggested identifying an appropriate starting point for a contested matter of the kind under consideration (having regard to the objective seriousness of the crime), then increasing the sentence to take account of aggravating factors and reducing it for mitigating factors.

[8] The Single Magistrate considered the following matters as mitigating the respondent's sentence:

a. the respondent had no previous convictions (for which she reduced the sentence by 2½ years);

b. the injuries sustained by the complainant were relatively minor (less another 6 months);

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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.

3 [2016] KICA 11, at [10].

c. the respondent was the mother of a young child (less 6 months);

d. the respondent pleaded guilty at the earliest possible opportunity (less 1 year).

The Single Magistrate did not identify any aggravating factors. By this process she arrived at a sentence of 6 months' imprisonment.

[9] The Single Magistrate then decided to suspend the sentence, with an operational period of 18 months, but did not give any reasons for exercising her discretion to suspend.

[10] The approach adopted by the Single Magistrate in calculating the term of imprisonment was clearly flawed. It is never going to be appropriate to take the maximum penalty as the starting point. The generally accepted means by which a starting point is identified is to consider the sentences imposed in comparable cases. Had the Single Magistrate done that, and there are several comparable cases upon which she could have relied,[4] it is likely that she would have arrived at a starting point of no more than 6 months' imprisonment.

[11] Given the strong mitigating factors and the absence of any significant aggravating factors, I am of the view that, had the correct approach been taken by the Single Magistrate, the final sentence would have been substantially less than the one that was imposed.[5]

[12] However, the respondent has not sought to challenge her sentence – this is an appeal by the Attorney-General on the ground of manifest inadequacy. From the foregoing, it will be clear that I do not consider the sentence of 6 months' imprisonment to be inadequate. If anything, it is too high.

[13] As I have said above, the primary challenge of the Attorney-General to the respondent's sentence is to the Single Magistrate's decision to suspend the sentence under section 44 of the *Penal Code*.

[14] The Court of Appeal in *Attorney-General* v *Katimango Kauriri*[6] recommended the New Zealand Court of Appeal's decision in *R* v *Petersen*[7] as a useful guide when considering whether to suspend a sentence of imprisonment. In

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

5 While the comparable cases referred to above clearly indicate that a custodial sentence is usually warranted in a case such as this, it should be noted that a sentence of imprisonment will not always be justified for an offence of this kind.

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

7 [1994] 2 NZLR 533.

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.[8]

[15] While the Single Magistrate did not set out her reasons for suspending the respondent's sentence, it is impossible to say that she was wrong to do so in this case. In my view, the personal circumstances of the respondent are such that the decision to suspend her sentence is unremarkable.

[16] It will be a rare case where an appellate court will be able to say that a decision to suspend a sentence of itself rendered the sentence manifestly inadequate. This will most likely occur only in situations where insufficient regard has been had to the need for general deterrence.[9]

[17] In the circumstances, I am not satisfied that the exercise of the Single Magistrate's discretion to suspend the respondent's sentence resulted in a sentence that was manifestly inadequate. The appeal is dismissed, and the sentence is confirmed.

Lambourne J
Judge of the High Court

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

9 For example, *Republic* v *Bwebwetaake Dan & Taniera Dan* [2014] KICA 4, at [12].