



## HIGH COURT OF KIRIBATI

*Criminal Case N° 23/2018*

### THE REPUBLIC

v

### TANGAROA TOWAREKA

*Teanneki Nemta for the Republic  
Raweita Beniata for the prisoner*

*Date of sentencing: 29 July 2019*

### SENTENCE

- [1] Tangaroa Towareka has pleaded guilty to 1 count of indecent assault, contrary to section 133(1) of the *Penal Code*.<sup>1</sup>
- [2] The circumstances giving rise to this charge occurred in the bush near Aubeangai village on Nonouti island late in the afternoon of 22 October 2017. The complainant, who was aged 14 years and 9 months, had been drinking fermented yeast with others since that morning, and was returning home when she met the prisoner. He invited her to drink with him. She joined the prisoner and they continued drinking fermented yeast, along with one of her companions from the morning session, a man named Brian. The prisoner reassured the complainant that she was safe with him as he was her cousin.
- [3] After some time, the prisoner asked Brian to go and find a lighter or match for his cigarette. While Brian was away, the prisoner and complainant began kissing and cuddling. The complainant engaged in these acts willingly. They stopped kissing when Brian returned, unsuccessful in his search for a light. The prisoner again sent Brian away, suggesting that he look for a lighter at the complainant's house.

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<sup>1</sup> 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 has proceeded under the *Penal Code* as it was in force on the date of the offence (as provided for under section 10(2) of the amending Act).

- [4] With Brian again out of the way, the prisoner carried the complainant to a place out of the sun. He laid her down on some fallen coconut fronds. The prisoner pushed up the complainant's shirt and began sucking her breasts. He removed her shorts and underpants, and then took off his own shorts and underwear. The prisoner was about to get on top of the complainant, intending to have sexual intercourse with her, when Brian again returned. Brian hid himself from the couple and threw a stone at a nearby coconut tree to distract the prisoner. He threw a second stone. The prisoner did not know who was throwing the stones, but it was enough for him to leave the complainant – who by now was asleep – and return to his bucket of fermented yeast to resume drinking.
- [5] Brian went back to the village and sought help from the complainant's family. He returned to the location with the complainant's sister and others and the complainant was taken home. In the course of this intervention, the prisoner assaulted the sister of the complainant.
- [6] An information was originally filed on 17 April 2018, charging the prisoner with rape of the complainant and common assault of her sister. The case was not mentioned until 31 August, and the prisoner first appeared before the Court a few days later. For reasons unclear the prosecution material was not disclosed to the defence until late October. On 9 November, the Court was advised that the prisoner would be pleading not guilty, and the trial was fixed for the week commencing 23 April 2019. On 24 April the matter was called on for trial. That morning a fresh information had been filed, charging the prisoner with 1 count of rape, with an alternative count of defilement of a girl under the age of 15 years. It was almost immediately amended to remove the superfluous alternative count. Unfortunately the prisoner did not attend Court, having gone to Maiana island in breach of his bail conditions. A warrant was issued for his arrest. The warrant was executed on 27 May, at which time a new trial date was fixed.
- [7] The matter next came on for trial on 17 June, at which time counsel for the prosecution advised the Court that she wished to further amend the information to replace the rape charge with one of indecent assault. Counsel for the prisoner advised that his client would plead guilty to the new charge. There was some initial difficulty in agreeing the facts of this case, and it was thought that a hearing to resolve those facts might be necessary. In the end, such a hearing was not required, and counsel were able to submit an agreed summary of facts.
- [8] The prisoner is now 26 years of age; he would have been 25 at the time of the offence. He is married with 3 young children, aged between 2 and 7 years. After this incident, he moved with his family from Nonouti to Maiana, where

he leads a subsistence lifestyle. He attributes his offending to his intoxicated state at the time, and claims that the complainant initiated the intimacy. It was the complainant's idea to send Brian away.

- [9] The prisoner has since made a customary apology to the complainant and her family. He pleaded guilty in the Magistrates' Court to assaulting the complainant's sister and was placed on a good behaviour bond.<sup>2</sup>
- [10] When the prisoner was later questioned by police, he chose to remain silent.
- [11] The offence of indecent assault carries a maximum penalty of 5 years' imprisonment,<sup>3</sup> and will ordinarily attract a custodial sentence. Counsel for the prosecution asks that the prisoner be given a sentence of imprisonment. However the prisoner's actions place his conduct at the lower end of the spectrum for offending of this kind. Given that the complainant was a willing participant, had she been older by just 3 months the prisoner's actions would not have constituted an offence. That is not to say that the prisoner's conduct is not serious. As the complainant's cousin, he was in a position of trust with respect to her, and his actions were a grave breach of that trust. The 11-year difference in their ages is significant. He took advantage of a young girl who was clearly intoxicated. Even if I accept that the complainant was the instigator, this was clearly a situation where the prisoner should simply have rejected her advances.
- [12] His plea of guilty was made at the earliest possible opportunity, and I am satisfied that he is remorseful for his actions.
- [13] The prisoner is to be given little (if any) credit for the apology made to the complainant and her family. While I understand that such apologies assist, to a degree, in restoring community harmony, they are too often an attempt by an offender to escape responsibility for his or her actions, rather than a genuine effort to accept responsibility.
- [14] It is not suggested that there has been an unacceptable delay in the prosecution of this case.
- [15] The prisoner has spent 24 days in pre-sentence custody. On a short sentence, taking into account the remission ordinarily allowed under section 56(1) of the *Prisons Ordinance* for "industry and good conduct", that is the equivalent of a 5-week sentence. As far as I am concerned, the prisoner has spent enough time in custody.

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<sup>2</sup> Information regarding that conviction was volunteered by counsel for the prisoner; according to counsel for the prosecution, the prisoner does not have any convictions.

<sup>3</sup> Parliament recently increased the maximum penalty for indecent assault to imprisonment for 7 years, so an offence committed on or after 23 February 2018 should attract a higher sentence.

