HIGH COURT OF KIRIBATI

Criminal Case Nº 12/2019

THE REPUBLIC

v

TK

Pauline Beiatau, Director of Public Prosecutions, for the Republic
Teetua Tewera for the prisoner

Date of sentencing: 16 August 2019

SENTENCE

[1] TK has pleaded guilty to 4 counts of incest by a man, contrary to section 156(1) of the *Penal Code* (Cap.67).[1]

[2] The complainant in this case is the daughter of the prisoner. She was born on *[redacted]* 2005. In September 2017 she was 12 years of age and a Class 6 student at the local primary school. One night the complainant was sleeping on the family *buia* next to her brother. It was a week or so after she had experienced her first menstrual period. The prisoner woke her and inserted his finger into her vagina (no charge arises from this conduct). He removed her underpants and got on top of her. The complainant protested, but the prisoner told her to be quiet. She tried to escape, but the prisoner hit her feet and covered her mouth with his hand. He inserted his penis into the complainant's vagina and had sexual intercourse with her. The prisoner told the complainant that, if she told anyone what had happened, he would kill her.

[3] A few nights later, the complainant was again asleep on the *buia* when she was woken by the prisoner. He had sexual intercourse with her. He said that he would kill her if she made a noise.

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[1] Despite the repeal and replacement of section 156 by section 5 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] A few nights after the second incident, maybe a week after the first incident, the prisoner again had sexual intercourse with the complainant on the *buia*.

[5] Some months later, in January 2018, the prisoner woke the complainant from her sleep and had sexual intercourse with her. He told her that he would kill her if she told anyone what he had done.

[6] At no time did the prisoner use a condom. On each occasion he ejaculated inside the complainant's vagina. The sexual intercourse was painful for her. In March 2018 the complainant told her grandmother what the prisoner had been doing, and the matter was reported to the police.

[7] When interviewed by police, the prisoner admitted to the acts of sexual intercourse with his daughter. He told the police that he suspected that the complainant was not a virgin, and he had sexual intercourse with her on the first occasion to see if his suspicions were justified. His counsel concedes that the prisoner no longer seeks to rely on that explanation.

[8] An information was originally filed on 2 April 2019, charging the prisoner with 6 counts of incest and 2 counts of sexual intercourse by a person in a position of trust. A second information was filed on 14 April, correcting some minor errors in the particulars for a number of the charges. A *nolle prosequi* was entered with respect to the first information. On 26 April, counsel for the prisoner advised the Court that his client would plead guilty to count 1 on the new information but not guilty to the remainder of the charges. The matter was set down for trial.

[9] On 7 August (what was to have been the first day of the trial) counsel for the prosecution filed the present information and entered a *nolle prosequi* with respect to the second information. Count 1 on the new information was in essentially the same terms as count 1 from the information filed on 14 April. Counts 2 and 3 did not have counterparts in the earlier document. Count 4 was in the same terms as count 5 from the 14 April information. The accused was arraigned and pleaded guilty to all 4 counts on the new information.

[10] The prisoner is now 47 years of age. He has fathered 12 children. With the complainant's mother – his present wife – he has 3 children, the complainant being the eldest. He left school after Class 9 and leads a largely subsistence lifestyle, supporting his family through the sale of fish. He has no previous convictions.

[11] The prisoner's offending was extremely serious. The only matter put forward by counsel for the prisoner by way of an explanation for his client's conduct is that the prisoner was simply satisfying his sexual desires. Counsel concedes that intoxication was not a factor in the prisoner's offending.

[12] The prisoner sought to place some reliance on the fact that the complainant was a naughty child – hanging around with boys and staying out late. I fail to see the logic in that submission. The complainant's behaviour can in no way provide a justification or excuse for the prisoner's actions.

[13] Counsel for the prosecution submits that, according to the complainant's grandmother, the complainant was affected quite badly by the prisoner's actions. She did not go back to school after Class 6 and is now, even though only 14 years old, pregnant and in a *de facto* relationship with a boy of roughly the same age. While I would prefer to see these sorts of issues canvassed in a victim impact statement, or the report of a child protection officer, it is not hard to see that a young child forced to submit to multiple acts of sexual intercourse at the hands of her own father would face enormous challenges in settling down to something resembling a normal life.

[14] As the complainant was under the age of 13 years at the time the offences were committed, the maximum penalty is a sentence of imprisonment for life. In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.[2]

[15] The offence of incest is one that our community regards with disgust. I must take care however to ensure that, in sentencing the prisoner, I address his objective wrongdoing, rather than looking to enforce some moral or religious code of conduct.[3]

[16] In order to avoid what might otherwise be a crushing sentence were I to treat each offence separately, I intend to apply the totality principle, and impose a single sentence in respect of all counts that I consider meets the gravity of the prisoner's offending.

[17] Determining a suitable starting point in a case such as this is a challenging task. The only comparable Kiribati case I have been able to find is that of *Karaiti Tiwirim*.[4] Karaiti pleaded guilty to 1 count of incest and was found guilty following a trial on a further 4 counts. He had sexual intercourse with his daughter on 5 separate occasions over a period of 2 years, when she was aged between 10 and 12 years. Karaiti was sentenced to life imprisonment, with a non-parole period of 6 years.

[18] For the reasons set out by the Court of Appeal in 2 cases where it had been asked to review sentences of life imprisonment imposed in the High Court,[5]

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

3 *R* v *Watson* (1999) 106 A Crim R 300, per Fryberg J at 302.

4 *Republic* v *Karaiti Tiwirim* [2010] KIHC 73.

5 *Tebweua Teratabu* v *Republic* [2008] KICA 2 (an appeal against a life sentence for manslaughter) and *Aneti Tenubobo* v *Republic* [2011] KICA 15 (an appeal against a life sentence for dangerous driving causing death).

the imposition of a life sentence for an offence where such a sentence is the maximum provided by law is rarely justified. A finite sentence is almost always the preferred approach. I intend to adopt that approach in this case.

[19] The Court of Appeal has given guidance in sentencing for other sexual offences where the maximum penalty is imprisonment for life. In cases of rape[6] and defilement of a girl under the age of 13 years[7] the Court has held that an appropriate starting point is a sentence of 5 years' imprisonment. However, an offender convicted of incest involving a girl under the age of 13 years, particularly in circumstances amounting to rape, is objectively far more culpable than a person convicted of rape or defilement. Counsel for the prosecution submits that I should fix a starting point of 7 years, while counsel for the prisoner proposed 6 years.

[20] In my view neither of the suggested starting points adequately reflects the gravity of this kind of offending. In *FG*, a case of defilement of a girl under the age of 13 years, the complainant was the offender's step-granddaughter, I fixed a starting point of 8 years' imprisonment.[8] In this case, I consider a sentence of imprisonment for 10 years to be an appropriate starting point. This takes into consideration matters such as the egregious breach of trust involved in such offending and the young age of the complainant (although offending involving a particularly young victim would warrant a somewhat higher starting point).

[21] I consider the following matters to be the aggravating features of this case:

a. the prisoner struck the complainant in the course of the offending giving rise to count 1;

b. the prisoner repeatedly threatened to kill the complainant, which added terror to what must already have been a very traumatic experience for her;

c. there were several offences, spanning 4 months;

d. the prisoner did not use a condom, and he ejaculated inside the complainant's vagina on each occasion, thereby exposing her to the risk of both pregnancy and sexually-transmitted infection.

For all of these matters I increase the prisoner's sentence by 3 years.

[22] As far as mitigating factors are concerned, the prisoner has no previous convictions. I regard his pleas of guilty to counts 1, 2 and 3 as having been made at the earliest possible opportunity. However, his plea to count 4 must be regarded as one that was made 'on the steps of the court'. He admitted his

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6 *Attorney-General* v *Tanre Tengke*; *Teitiniman Kaurake* v *Republic* [2004] KICA 10, at [13].

7 *Republic* v *Uriano Arawaia* [2013] KICA 11, at [18].

8 *Republic* v *FG and JK* [2018] KIHC 11, at [13], relying on *Tekariba Mikaere* v *Republic* [2005] KICA 5.

offending when interviewed by the police. I am satisfied that he is remorseful for his actions. For these matters I deduct 3½ years.

[23] There is no suggestion that there has been an unacceptable delay in the prosecution of this case.

[24] The prisoner is convicted on his plea of guilty. Taking all of the above matters into account, he is to be imprisoned for a period of 9 years and 6 months. Under section 28(2) of the *Penal Code*, I order that the sentence is to run from 26 April 2019, being the day on which he was first remanded into custody on these charges.

[25] Before I conclude, there are some matters that warrant further comment.

[26] Firstly, I was disturbed to learn that, even though the complaint regarding the prisoner's conduct was lodged with police in March 2018, and despite making admissions to the offences shortly thereafter, the prisoner was not removed from the family home – the home of the complainant – until he was remanded in custody by me in April this year. No steps were taken to prevent the prisoner from occupying the family home and remaining in close proximity to the complainant for over a year. This is unacceptable. Under section 22(1) of the *Children, Young People and Family Welfare Act* 2013, a police officer who becomes aware that a child or young person is in need of care and protection has a duty to ensure that child or young person's safety and wellbeing, and must notify the relevant government ministry as soon as possible. On receiving notification under section 22(1), the Secretary and officers of the ministry (for now, the Ministry of Women, Youth, Sports and Social Affairs) are obliged to undertake an assessment of the situation and to take all steps necessary to ensure the safety and wellbeing of the child or young person. For the *status quo* to continue for over a year after the prisoner's crimes were reported to police suggests that neither the police officers involved nor the government officials fulfilled their statutory obligations towards the complainant.

[27] That the complainant is in dire need of care and protection is emphasised by the fact that, despite now being only 14 years old, she is pregnant and in a *de facto* relationship, matters apparently condoned by her mother and extended family. The age of consent in Kiribati is 15 years, a milestone the complainant does not reach for another 10½ months. Until she turns 15, the complainant cannot lawfully consent to sexual intercourse. It is highly likely that whoever fathered her child committed an offence. Her 'husband' commits an offence each time he has sexual intercourse with her. The complainant has done nothing wrong. Those who have the duty to protect her – her family and the government – are the ones at fault. Action is urgently required.

[28] I direct that copies of these sentencing remarks be delivered to the Commissioner of Police and the Secretary for Women, Youth, Sports and Social Affairs. The Commissioner must ensure that his officers understand their obligations under the *Children, Young People and Family Welfare Act*, and be prepared to exercise their powers when required. The Secretary must take steps to immediately assess the present circumstances of the complainant, and take all action necessary to protect her.

[29] I did give some thought as to whether I should exercise the powers available to me under section 156(4) of the *Penal Code*, to divest the prisoner of all legal authority over the complainant. In the circumstances of this case, given that the complainant will have turned 18 by the time the prisoner becomes eligible for release on parole, such an order is unnecessary.

[30] Although the prisoner will become eligible for release on parole after having served half his sentence, it is my strong recommendation to the Parole Board that the prisoner not be released from prison on parole unless the Board is satisfied that suitable measures have been adopted to protect any young women and girls who will be living at the place at which the prisoner intends to reside on his release.

[31] Finally, given the age of the complainant and the nature of this case, any publication of these sentencing remarks must not reveal the identity of the prisoner or of the complainant. The version of this document that will be released to the public will be anonymised. Any publication that reveals (or tends to reveal) the identities of the prisoner or of the complainant may result in the publisher being liable for contempt of this Court.

Lambourne J
Judge of the High Court