HIGH COURT OF KIRIBATI

Criminal Case Nº 4/2019

THE REPUBLIC

v

IBWEBWEKI TAKAM

Tewia Tawiita for the Republic
Kiata Kabure-Andrewartha for the accused

Date of sentencing: 2 September 2019

SENTENCE

[1] Ibwebweki Takam has been convicted after a trial of 1 count of engaging in unlawful sexual intercourse, contrary to section 129(1) of the *Penal Code*, and 1 count of assault with intent to engage in unlawful sexual intercourse, contrary to section 129(3) of the *Penal Code*. The facts of the case are set out in my judgment, which was delivered on 12 August 2019.

[2] At the time of the offences the prisoner was employed as a teacher at Sacred Heart High School in Bikenibeu. The complainant was a student at the same school, although she was not in any of the prisoner's classes. The prisoner is now 28 years of age, and would have been 27 at the time of the offences. He is no longer employed as a teacher, but works providing IT services for Taotin Trading. He is married with 4 young children, and is presently the family's sole breadwinner. He has no previous convictions.

[3] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.[1] The offence of engaging in unlawful sexual intercourse carries a maximum penalty of imprisonment for life, while for assault with intent to engage in unlawful sexual intercourse the maximum penalty is 7 years' imprisonment. As the offences arise from the same incident, I intend to apply the totality principle and impose a single sentence in respect of both counts that I consider meets the gravity of the prisoner's offending.

---

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

[4] Determining a suitable starting point in this case is a challenging task. On 23 February 2018 the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act* 2017 entered into force, substantially amending the sexual offence provisions of the *Penal Code*. Prior to the amendments, non-consensual digital penetration of a woman's vagina was punished as an indecent assault, with a maximum sentence of 5 years' imprisonment. The offence of assault with intent to engage in unlawful sexual intercourse did not exist. The much broader definition of 'sexual intercourse' provided for in the new section 127A means that a wider range of conduct now falls within the ambit of the expression. It no longer refers only to penetration of the vagina of a female person by the penis of a male person. Penile penetration, anal penetration, digital penetration, penetration of the genitals or anus by an object, and oral sex are all now categorised as sexual intercourse.

[5] In the course of submissions, I posed the question as to whether the Court should approach the task of sentencing in a case such as this by having regard to some kind of hierarchy of offending. Should, for example, penile penetration be regarded as being more serious than digital penetration? Indeed, in *Atanaera Bwaibwa*, the first prosecution for engaging in unlawful sexual intercourse after the *Penal Code* was amended, I expressed the view that "penile penetration falls at the higher end of the spectrum".[2]

[6] I am grateful to counsel for the prosecution, who has provided me with a copy of the decision of the New South Wales Court of Criminal Appeal in *Hibberd*.[3] In New South Wales, as here, the concept of sexual intercourse under the law includes conduct that goes beyond what is ordinarily understood by the term. In a number of decisions now, the Court of Criminal Appeal has rejected the suggestion that 1 form of non-consensual sexual intercourse is inherently more or less serious than another. Price J, who gave the lead judgment in *Hibberd*, said:

> Relevant considerations in determining where on the scale of seriousness an offence contrary to section 61I of the *Crimes Act* lies include 'the degree of violence, the physical hurt inflicted, the form of forced intercourse and the circumstances of humiliation…' To those matters I would add the duration of the offence. Non-consensual sexual intercourse by digital penetration has *generally* been considered to be less serious than an offence of penile penetration, but each case will depend on its own facts. There is no canon of law which mandates a finding that digital penetration must be considered less serious than other non-consensual acts of sexual intercourse. Whilst the form of the forced intercourse is an important factor it is not to be regarded as the sole consideration.[4]

---

2 *Republic* v *Atanaera Bwaibwa* [2018] KIHC 33, at [4].

3 *R* v *Stephen Eric Hibberd* [2009] NSWCCA 20, reported in (2010) 194 A Crim R 1.

4 *ibid.* at [56], omitting citations.

[7] In sentencing for the offence of engaging in unlawful sexual intercourse, it is essential to consider the objective seriousness of the offending. The form that the sexual intercourse took is just one of the matters to be taken into account in undertaking this task. It is relevant for the purposes of this case to have regard to the fact that the prisoner inserted a single finger into the vagina of the complainant, with penetration lasting a relatively brief period. In all of the circumstances of this case, I consider an appropriate starting point to be a sentence of imprisonment for 3 years.

[8] I consider the following matters to be aggravating factors:

a. as a teacher at the complainant's school, the prisoner was in a position of trust with respect to the complainant, and his offending constitutes a grave breach of that trust;

b. the prisoner threatened to kill the complainant if she did not do what she was told;

c. the prisoner punched the complainant in the face, and on the thighs;

d. the complainant was injured as a result of the prisoner's actions, with bruising to her throat and several painful scratches to her genitals.

For these matters I increase the prisoner's sentence by 1 year and 6 months.

[9] There is little to be said in mitigation, save that the prisoner has no previous convictions. I accept that the prisoner's offending was opportunistic, with no pre-planning. I also accept that the prisoner's intoxication was a significant factor in his offending, although that cannot excuse his conduct. The prisoner has demonstrated no remorse for his actions. He went to trial, as is his right, but, by doing so, he has foregone the reduction in sentence that he would have received had he pleaded guilty. For his previous good character I will reduce his sentence by 3 months.

[10] Counsel for the prisoner argued strongly that, while a custodial sentence was perhaps inevitable, any sentence should be of less than 2 years' duration, thereby leaving open the possibility of suspension. She submits that her client's wife and children will suffer hardship if the prisoner is sentenced to an immediate term of imprisonment. As in almost all cases where someone is sent to prison, a custodial sentence will be difficult for the prisoner's family. This saddens me, but it is not a relevant consideration when deciding an appropriate sentence for the prisoner. Had he thought more about his family on the day he committed these offences, then perhaps they would not have to undergo such hardship. For the reasons set out above, I consider that the prisoner's offending calls for a sentence of imprisonment significantly longer than that proposed by his counsel. A suspended sentence is out of the question.

[11] Taking all of the above matters into account, the prisoner is sentenced to be imprisoned for a period of 4 years and 3 months. The sentence is to run from today.

Lambourne J
Judge of the High Court