IN THE KIRIBATI COURT OF APPEAL CRIMINAL JURISDICTION HELD AT BETIO REPUBLIC OF KIRIBATI	]]]]	Criminal Appeal No. 4 of 2010

BETWEEN	**TOAWEA BIRIBO**	**APPELLANT**
AND	**THE REPUBLIC**	**RESPONDENT**

Before: Paterson JA
Williams JA
Barker JA

Counsel: *Raweita Beniata* for appellant
Pauline Beiatau for respondent

Date of Hearing: 25 August 2011
Date of Judgment: 31 August 2011

JUDGMENT OF THE COURT

1. After a defended hearing lasting five days, the appellant, along with four others, was convicted by the Chief Justice in the High Court on 30 October 2009. They, plus another person who was acquitted, faced charges of unlawful assembly, riot and arson.

2. On 3 November 2010, all five convicted persons, including the appellant, were sentenced by the Chief Justice. For unlawful assembly, they were each fined $200; for riot, they were each fined

$400 and for arson, each was given a twelve months' suspended term of imprisonment.

3. On 20 July 2011, the appellant filed in this Court an application for leave to appeal against his convictions out of time.

4. Only one affidavit in support of his application for leave to appeal was filed. It was made by present counsel for the appellant who deposed that, after sentence had been imposed, the appellant had no wish to appeal: he was content with the fines imposed which had been paid by his village. However, he wished to appeal his conviction, once he found out that his position as a lay magistrate had been terminated as a result of the conviction. The affidavit does not state when that termination occurred. The consequence of losing his magistrate's position, does not appear to have been mentioned to the judge at sentencing.

5. The appellant's solicitor then deposed that the appeal had not lodged 'right away' 'as time and effort were still needed for this big complex case, not to mention the workload and the pressure already succumbed by the office at that time'. Presumably, that was a reference to the office of the People's Lawyer. The deponent stated that he had been occupied as counsel during the High Court's circuit tour of the outer islands which occurred before the last sitting of this Court in August 2010. This was apparently offered as another reason for delay.

6. We consider that an affidavit in support of the application for leave to appeal, so long after trial, should have been made by the appellant himself. An affidavit from the lawyer may have also been

necessary but that doe not excuse the appellant from explaining the reasons for the delay himself. This is not the usual case of a lawyer mixing up dates or being a bit dilatory, as is often the case when appeals are sought to be brought out of time. It seems that the appellant had decided not to appeal but then changed his mind after he had been dismissed as a magistrate.

7. We also point out the rule that lawyers who make substantive affidavits should not appear as counsel in the case. We excused counsel in this occasion but point out to the profession that such a practice is undesirable. One reason is that a deponent to an affidavit may be required for cross-examination which is not compatible with the role of counsel. Counsel should not give evidence which is what an affidavit is providing.

LEAVE TO APPEAL

8. Authority in this Court and in many Commonwealth jurisdictions makes it clear that leave to appeal out of time will not be granted unless there is some reasonable excuse for the delay. The greater the delay, the higher the threshold. Moreover, the Court will look at the merits of the appeal. See the decision of this Court in *Batee v Trustees for Jehovah's Witness Church* [2006] KICA 17.

9. The Court has determined that it should not grant leave to appeal out of time in this case. The delay of some 20 months or so was great. There is no proper excuse for it. The appellant had originally decided not to appeal but changed his mind when his status as magistrate was withdrawn. That happening would well have been

anticipated as a consequence of his convictions. Moreover, we are not satisfied that the explanations from the lawyer mentioned above are sufficient to excuse this inordinate delay. An application to the Court could have been filed much earlier. It would have stopped time from running. Necessary preparation would then have occurred later.

10. Whilst a full enquiry into the merits of the appeal is not justified, the Court has looked at the grounds of appeal. These essentially attack the Chief Justice's findings of fact, particularly as to identifications of the various actors in the unlawful assembly and riot. All accused offered different alibis.

11. The appellant would have faced the normal difficulties in trying to upset a decision of the judge who saw and heard the witnesses over a long trial. The Chief Justice seems to have assessed the case for and against each accused with care and to have made findings of credibility when required. He specifically noted that he should consider the evidence of identification in respect of each accused separately and to be absolutely certain about it. He referred to the *locus classicus* on identification – *R v Turnbull* [1976] 3 All ER 549. Identification evidence he noted, may be and often is, unreliable: he must scrutinise the evidence with great care before accepting it and that evidence must be beyond reasonable doubt. He rejected the different alibis that each convicted accused put up, acknowledging that an accused is not required to prove anything and that the onus lay with the prosecution.

12. At the end of a fairly comprehensive judgment, reviewing all the evidence, acknowledging the risk of relying on identification evidence, the Chief Justice was confident that it was not unsafe to convict. Accordingly he convicted five out of the six accused on all counts.

13. We are satisfied that the appeal, even if allowed to proceed, lacked merit.

14. Leave to appeal out of time is refused.

Paterson JA

Williams JA

Barker JA