HIGH COURT OF KIRIBATI

Criminal Appeal № 12/2018

TEBEUA TOKINTEKAI *Appellant*

v

THE REPUBLIC *Respondent*

Tabibiri Tentau for the appellant
Manrongo Kararaonnang for the respondent

Date of decision: 17 December 2018

JUDGMENT

[1] On 20 July 2018, in South Tarawa Magistrates' Court case BetCrim 595/18, the appellant was sentenced to imprisonment for 3 months following her plea of guilty to 1 offence of obstructing a police officer, contrary to section 140(1)(a) of the *Police Powers and Duties Act* 2008.

[2] The appellant lodged an appeal against her sentence on 27 July, and she was released on bail pending the hearing of her appeal on 10 August, having spent 3 weeks in custody.

[3] Shortly after midnight on 26 May this year, the appellant was drinking with her husband at Temakin, Betio. The appellant was drunk, so drunk that she has no recollection of what happened that night. The court was told that a police patrol directed the appellant and her husband to move on from where they were drinking. The appellant objected, and challenged one of the officers to a fight. She was then restrained, in the course of which she kicked the officer in the leg.

[4] The appellant accepted this version of events and pleaded guilty. She had no previous convictions. In the plea in mitigation put forward on her behalf, it was said that the appellant had apologised to the officer as soon as she realised the seriousness of her actions. It was submitted that, if the court was considering imposing a sentence of imprisonment, then the appellant's circumstances warranted suspension of that sentence under section 44(1) of the *Penal Code*. It is worth noting that the prosecutor did not ask for a custodial sentence.

[5] The Single Magistrate clearly viewed the appellant's behaviour as serious. She set out the text of section 140 of the *Police Powers and Duties Act*, and correctly identified the maximum penalty under that section to be a fine of $5000 and 2 years' imprisonment.

[6] The Single Magistrate said that, in her view, neither a fine nor a suspended sentence of imprisonment would be an adequate deterrent, and an immediate custodial sentence was warranted. Her starting point was the maximum term provided, 2 years' imprisonment, from which she deducted 1 year because the appellant was a first offender. The Single Magistrate then deducted a further 6 months for the appellant's early plea of guilty. Finally, she deducted another 3 months because there was nothing to suggest that the police officer had been injured. That left the appellant with a sentence of 3 months' imprisonment.

[7] In this Court, counsel for the appellant argued that the sentence was manifestly excessive. The appellant is aged only 25 years, unemployed and a first offender. Counsel for the respondent submitted that the Single Magistrate had not fallen into error, and the sentence was not excessive.

[8] 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.[1]

[9] In determining an appropriate starting point for any offence, a court must have regard to the objective seriousness of the crime. The starting point is the sentence that would be appropriate in the case if there were no aggravating features and no mitigating features. It is almost never going to be appropriate for a starting point to be the maximum sentence provided for under the Act. By taking 2 years' imprisonment as her starting point in this case, it is clear that the Single Magistrate has erred in the exercise of her sentencing discretion.

[10] The Single Magistrate was also mistaken in her overall approach to sentencing in this case. She placed undue emphasis on denouncing the appellant's conduct and on the need for deterrence, and ignored the importance of rehabilitation. Imprisonment, particularly in the case of a young person without previous convictions, should have been an option of absolute last resort.

[11] While I agree that police officers should be able to go about their duties free from obstruction and assault, it would need to be a pretty serious case for a custodial sentence to be an appropriate punishment for a section 140 offence. The Single

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[1] *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.

Magistrate should have considered one of the non-custodial sentencing options available.

[12] The appellant is not employed, so it would not have been appropriate to impose a fine. Before a court can fine an offender, it must first have regard for the person's ability to pay such a fine.[2] A person who is without an income should not be sentenced to pay a fine, for that will only result in them being imprisoned (in default of payment) because of their inability to pay. Imprisonment in default should only be the outcome where a person has the means to pay a fine, but refuses to do so.

[13] In all of the circumstances of this case, it would have been fitting for the court to release the appellant on her entering into a bond to keep the peace and be of good behaviour, under section 36(1) of the *Penal Code*. However the appellant has already served 3 weeks in custody. That is more than enough of a penalty. It is therefore not appropriate to impose any further punishment.

[14] The appeal is allowed. The sentence imposed by the South Tarawa Magistrates' Court is set aside and, in lieu thereof, the prisoner is sentenced to the rising of the court.

Lambourne J
Judge of the High Court

HIGH COURT OF KIRIBATI
TAKOMI AE E RIETATA I KIRIBATI

[2] *Yang Xueqiang* v *Republic*; *Tsai Ching Shan* v *Republic* [1997] KICA 16, and *Tebuangui Biketi* v *Republic* [2003] KICA 3.