HIGH COURT OF KIRIBATI

*Criminal Case Nº 9/2016*

**THE REPUBLIC**

***v***

**AB**
**and**
**CD**

*Teanneki Nemta for the Republic*
*Tabibiri Tentau for AB*
*Raweita Beniata for CD*

*Date of sentencing: 15 April 2019*

# SENTENCE

[1] AB and CD are jointly charged with rape, contrary to section 128 of the *Penal Code*,[1] and throwing objects, contrary to section 83A of the *Penal Code*. CD pleaded guilty to the rape charge, while AB was convicted after a trial. Both pleaded guilty to the throwing objects charge. The facts are set out in my judgment in AB's trial, delivered on 5 April. Counsel for CD advises that his client accepts those facts.

[2] The offences were committed on 2 September 2015. At the time, the prisoners were Form 2 students at the Junior Secondary School on Kuria. AB was only 15 years old, having been born on 6 June 2000. CD was 16, having been born on 5 July 1999. They are now aged 18 and 19 respectively. AB is a Form 5 student at St Louis' High School in Teaoraereke. CD did not return to school after the commission of the offences, and he is not presently employed.

[3] It is difficult to understand what drove the prisoners to commit these offences. Alcohol was not a factor. The prisoners had been attending a

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[1] Despite the repeal and replacement of section 128 by section 3 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).

funeral, and were returning to their respective homes. AB was living with his grandmother, while CD lived with his parents and 6 younger siblings. Counsel for CD submits that, despite being the older of the 2, his client was quite naïve, and easily led by AB. He says that the attack on the complainant was AB's idea. It was AB who had thrown the stone at the complainant. In the days after the incident, the 2 boys met to discuss what they would tell the police, and agreed to admit to throwing the stone, but everything else would be denied.

[4] I am faced with significant challenges in determining appropriate sentences for the prisoners. The maximum penalty for rape is imprisonment for life; for throwing objects it is 2 years' imprisonment. The Court of Appeal has held that an appropriate starting point for a contested case of rape is a sentence of 5 years' imprisonment.[2] For a rape committed by 2 or more offenders acting together, I am of the view that the starting point should be 8 years. Had the prisoners been adults at the time these offences were committed, there is little doubt that they would be facing quite lengthy prison terms.

[5] The initial information in this case was filed on 28 January 2016. The *Juvenile Justice Act* 2015 had commenced shortly before that, on 24 December 2015. The Act establishes a dedicated regime for dealing with children and young people in conflict with the law. For the purposes of the Act, a child is aged under 14 years, while a young person is aged between 14 and 17 years.

[6] Despite the fact that the *Juvenile Justice Act* was not in force at the time the offences were committed, I have no difficulty in finding that it is relevant to this case. It is a well-understood principle that, where the provisions of a new law are procedural in nature (such as is the case with this Act), the law will apply to matters pending at the time of its entry into force.[3]

[7] As might be expected, the *Juvenile Justice Act* emphasises the importance of rehabilitation in the sentencing of children and young persons. Section 15 of the Act provides for a range of sentencing options when dealing with offending by a child or young person. These include:

a. committal of the offender to the care of a relative or other fit person;

b. an order that the offender (or a parent or guardian of the offender) pay a fine, damages or costs; and

c. committal of the offender to custody in a place of detention (which would appear to be a place other than a prison).

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

3 *Blyth* v *Blyth* [1966] AC 643, per Lord Denning at 666.

With reference to the last-mentioned option, I understand that the responsible Minister has not yet "provided or appointed" any places of detention, as required by section 16(1), so an order for committal to a place of detention is of little utility, at least for now.

[8] Under section 11(1) of the Act, a child cannot be sentenced to imprisonment. Section 11(2) provides that a young person can be sentenced to imprisonment, but only if none of the other sentencing options provided for under section 15 are suitable. Clearly the Act envisages that a sentence of imprisonment for a young person should be a measure of last resort. This is in keeping with Kiribati's obligations under Article 37(b) of the *United Nations Convention on the Rights of the Child*, which also obliges States Parties to ensure that any sentence of imprisonment be "for the shortest appropriate period of time". Under section 11(3) of the Act a young person serving a prison sentence must not, "so far as is practicable, be allowed to associate with" adult prisoners. I note that this does not go as far as Article 37(c) of the Convention, which obliges States Parties to only permit a young person serving a sentence of imprisonment to associate with adult prisoners if it is in the young person's best interest to do so. In any event, there are at present no facilities available in Kiribati that would allow for young persons to be imprisoned separately from adults. Any young person sentenced to imprisonment today would therefore have to be accommodated alongside adult prisoners.

[9] How then should I approach the task of sentencing the prisoners, who were young persons when the offences were committed, but who are now adults? The *Juvenile Justice Act* appears not to contemplate the possibility that a young person might turn 18 in the course of proceedings. The sentencing options under section 15 of the Act are available to a court when it is satisfied of the guilt of a child or young person. That would suggest that they only come into play where the offender is still a child or young person at the time of sentencing.

[10] Counsel for CD referred me to the Fijian case of *State* v *Ramere*.[4] Ramere, who was 22, was sentenced for an offence committed at age 15. Although the maximum penalty for the offence was 10 years' imprisonment, the sentencing judge considered that he was bound to apply section 30(3) of Fiji's *Juveniles Act*, which provides: "A young person shall not be ordered to be imprisoned for more than 2 years for any offence." That view is supported by the decision of Fiji's Court of Appeal in *Komaisavai and Tukai* v *State*.[5] With respect to both courts, it is difficult to understand the logic of that approach. Having reviewed the Fijian law (which appears to have been the inspiration

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4 [2018] FJHC 1017.

5 [2017] FJCA 91.

for our *Juvenile Justice Act*) there is nothing to suggest that an adult being sentenced for an offence committed as a juvenile must be sentenced as a juvenile. For example, in the Kiribati context, it would hardly be appropriate to commit an adult to the care of a relative or other fit person (section 15(c)), or to order that an adult be committed to a place of detention (section 15(h)).

[11] Having said that, I have come to what might be considered a similar outcome by a different route. It is generally accepted that children and young persons should be treated differently by the criminal justice system because they lack the maturity and sense of responsibility that we expect from adults. They are not to be held to the same standard as adults. It would be wrong then to punish an offender for what they had done as a young person as if it had been done by them when they were an adult.[6] An adult who comes before the Court to be sentenced for an offence committed as a young person should be sentenced no more harshly than if they had come to be sentenced while still a young person. This case has taken more than 3½ years to reach this stage, through no fault of the prisoners. It would be grossly unfair for them to be prejudiced by the delays and inefficiencies that are seemingly unavoidable in our criminal justice system.

[12] That is not to say that the options available under the *Juvenile Justice Act* when sentencing a child or young person are available to the Court when sentencing an adult – that would be contrary to the clear language of the Act. In my view, the end result should match, as closely as possible, the likely outcome had they been sentenced while still a child or young person, while applying the relevant statutory provisions for the sentencing of adults.

[13] Had I been dealing with AB and CD shortly after the commission of these offences, I am of the view that, despite their youth, custodial sentences would have been unavoidable. There is no denying that the attack and rape of a vulnerable woman late at night is an extremely serious matter, calling for a heavy penalty. However the prisoners' youth means that the appropriate starting point will be significantly lower than the one indicated in [4]. I take some guidance from the sentences handed down in *Republic* v *Uatara Henry and others*.[7] In that case, 4 young men pleaded guilty to the assault and rape of a 16-year-old girl. Three of the 4 were juveniles (2 offenders were aged 17 years while the third was 15). Although *Uatara Henry* was decided before passage of the *Juvenile Justice* Act, the Chief Justice stressed the importance of rehabilitation in the sentencing of young people. All 4 offenders were

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6 *State* v *N and another* [2015] ZAWCHC 5, per Binns-Ward J, giving the judgment of the Western Cape High Court (South Africa), at [10].

7 [2014] KIHC 5.

sentenced to 18 months' imprisonment for the rape, with a concurrent sentence of imprisonment for 6 months for the assault.

[14] In dealing with AB and CD, applying the totality principle, I intend to impose a single sentence for each prisoner in respect of both counts, which I consider meets the gravity of the offending. In all the circumstances, I consider an appropriate starting point to be imprisonment for 2 years. Despite CD's claim that AB was the leader in this undertaking, I consider them both to be equally culpable. I see no reason to distinguish between them when fixing a starting point.

[15] In addition to the fact that the offences were committed in company, I consider the following to be the aggravating factors of this case:

a. while the complainant did not to sustain any injuries, violence was used, beyond that inherent in the nature of the offence of rape – AB punched the complainant in the thigh, in order to weaken her resolve, and a rock was thrown at the complainant, hitting her on the buttock;

b. neither prisoner used a condom, and both prisoners ejaculated inside the complainant's vagina, thereby exposing her to the risk of pregnancy and sexually-transmitted infection.

For these matters I increase the prisoners' sentence by 6 months.

[16] As for mitigating factors, neither AB nor CD have any previous convictions. For this I will reduce each prisoner's sentence by 2 months.

[17] While AB went to trial, as is his right, CD pleaded guilty (although his plea came very late in the day). CD is therefore entitled to an additional reduction in his sentence. For his plea I will reduce CD's sentence by a further 4 months.

[18] As mentioned above, it has taken over 3½ years to prosecute this case. Such a delay is unacceptable, more so because of the prisoners' youth. For the reasons discussed by the Court of Appeal in *Li Jian Pei*, the prisoners are entitled to a modest reduction in sentence to compensate them for the breach of their constitutional right to be afforded a fair hearing within a reasonable time.[8] I will reduce each prisoner's sentence by another 4 months.

[19] Taking all of these matters into account, I am of the view that the following are the appropriate sentences in this case:

a. for AB, imprisonment for a period of 2 years;

b. for CD, imprisonment for a period of 20 months.

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8 *Attorney-General* v *Li Jian Pei & Taaiteiti Areke* [2015] KICA 5.

[20] As both sentences fall within the scope of section 44 of the *Penal Code*, I turn to consider whether the circumstances of the offences and each prisoner's personal circumstances warrant suspension of their sentences.

[21] The Court of Appeal in *Attorney-General* v *Katimango Kauriri*[9] recommended the New Zealand Court of Appeal's decision in *R* v *Petersen*[10] as a useful guide when considering whether to suspend a sentence of imprisonment. In *Petersen* the Court said the principal purpose of the New Zealand equivalent of section 44 is:

> to encourage rehabilitation and provide the Courts with an effective means of achieving that end, by holding a prison sentence over the offender's head. Put another way it enables the Court to give the offender one last chance in a manner which clearly spells out the consequences if he offends again. It is available to be used in cases of moderately serious offending but where it is thought there is a sufficient opportunity for reform, and the need to deter others is not paramount. Although not so limited, it may be particularly useful in cases of youthful offenders.[11]

[22] The suspension of a sentence of imprisonment should have some direct benefit for the offender by providing an incentive to avoid reoffending. The purpose of suspension is not just to free a person who should otherwise be imprisoned. In this case I consider the youth of the prisoners provides a compelling basis for suspending their sentences. The argument is strengthened by the fact that, had they been sentenced as young persons under the *Juvenile Justice Act*, it is extremely unlikely that an immediate custodial sentence would have been imposed. Without separate facilities for the detention or imprisonment of young persons, such a sentence would have been inappropriate, as well as constituting a likely breach of Kiribati's international obligations under the *Convention on the Rights of the Child*. I will suspend their sentences.

[23] AB has already been convicted with respect to the rape charge. He and CD are formally convicted on their pleas of guilty to the other charges. They are sentenced as follows:

a. AB is sentenced to imprisonment for 2 years. However I order that his sentence is not to take effect unless, within 2 years from today, he commits another offence punishable with imprisonment.

b. CD is sentenced to imprisonment for 20 months. However I order that his sentence is not to take effect unless, within 2 years from today, he commits another offence punishable with imprisonment.

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9 [2015] KICA 6, at [3].

10 [1994] 2 NZLR 533.

11 *ibid.*, per Eichelbaum CJ (for the Court) at 537.

[24] If either prisoner commits an offence punishable with imprisonment during the operational period, it will be a matter for the court to decide whether the sentence imposed today should then take effect.

[25] Before I finish, I want to make it clear that, given the ages of the prisoners at the time of commission of these offences and the nature of this case, any publication of these remarks, or of the judgment delivered earlier, must not reveal the identities of the prisoners or of the complainant. The versions of these documents that will be released to the public will use initials to identify these individuals. Any publication that reveals (or tends to reveal) the identities of the prisoners or of the complainant may result in the publisher being liable for contempt of this Court.


**Lambourne J**
Judge of the High Court