HIGH COURT OF KIRIBATI

Criminal Appeal Nº 4/2019

ROBWATI TIIBOU *Appellant*

v

THE REPUBLIC *Respondent*

Teetua Tewera for the appellant
Teanneki Nemta for the respondent

Date of hearing: *14 June 2019*
Date of judgment: *24 June 2019*

JUDGMENT

[1] On 25 April 2018 the appellant was convicted by the Nonouti Magistrates' Court after a trial on a charge of indecent assault, contrary to section 133(1) of the *Penal Code* (Cap.67). He was sentenced to imprisonment for 2 years. On 14 June 2019 I granted leave to the appellant to appeal against the sentence imposed and allowed his appeal. At the time I said that the reasons for my decision would be published later. These are those reasons.

[2] The offence was committed on 19 March 2017. On that day the 15-year-old complainant was at home asleep. The complainant and appellant are cousins, and members of the same household. The appellant put his hand under the complainant's shirt and touched her breasts. He then put his hand inside her shorts. The appellant says that he had been out fishing and then drank kava, and has no recollection of the assault. The Court accepted the evidence of the prosecution witnesses and found the appellant guilty. The appellant does not challenge his conviction, only the sentence imposed.

[3] On 4 January 2019 the lawyer acting for the appellant at the time filed an application with the High Court for leave to appeal out of time, with the proposed notice of appeal annexed. This is not the correct procedure. Both section 272(1) of the *Criminal Procedure Code* (Cap.17) and rule 33(1) of the *Magistrates' Courts Rules* require appeal documents to be filed with the relevant Magistrates' Court. If an appellant ignores this requirement and files the documents in the High Court, it is likely that there will be delays in the hearing of the appeal. Despite that, it is not clear why another 5 months elapsed before a file was opened and the matter was brought to my attention.

[4] There are conflicting provisions in the law as to the time within which an appeal must be filed. The most generous of these is the 3-month limit set by section 67(1) of the *Magistrates' Courts Ordinance* (Cap.52) (increased from 21 days by a 1990 amendment). By that measure, the appellant's appeal was lodged more than 5 months late.

[5] It is clear from the minutes of the proceedings in the court below that the magistrates failed to inform the appellant (who was not legally represented) of his right of appeal at the time of sentence (as required by section 270(2) of the *Criminal Procedure Code*). This is disappointing, particularly in a case where a custodial sentence is imposed. Magistrates are reminded of the importance of informing all convicted persons of their right to appeal to the High Court against conviction and/or sentence. The Court should also ensure that the time limit of 3 months is explained.

[6] Under rule 33(4) of the *Magistrates' Courts Rules* the High Court may, "if it thinks fit", extend the time for the filing of an appeal, while the proviso to section 272(1) of the *Criminal Procedure Code* allows the High Court to enlarge the time, "at any time, for good cause".

[7] It is of concern that, prior to sentencing, the appellant was not provided with an opportunity to set out any matters in mitigation of sentence (ie. any matters that might lead the Court to reduce the appellant's sentence). As I said in the case of *Tiobe Ueue*:

> It is essential that offenders be given full opportunity to explain to the Court why they committed the offences and to put forward any matters relevant to the sentence to be imposed. If an offender is unrepresented, it is very important that the Court prompt him or her to make these submissions. Without them, the Court will not have enough information to pass a sentence that addresses both the circumstances of the offending and the personal circumstances of the offender.[1]

[8] Appellant's counsel submits that the sentence of 2 years' imprisonment is manifestly excessive. Counsel for the respondent submits that the Court did not fall into error, and the sentence was not excessive.

[9] 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.[2]

[10] The appellant is now 59 years old. Prior to his imprisonment he led a subsistence lifestyle on Nonouti. He has no previous convictions.

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1 *Tiobe Ueue* v *Republic* [2019] KIHC 37, at [5].

2 *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.

[11] A custodial sentence will often be an appropriate penalty for the offence of indecent assault, particularly where the complainant is young. The fact that the appellant was sent to prison is not in itself remarkable. Unfortunately the Magistrates' Court did not explain why it considered that the appellant's conduct warranted imprisonment for 2 years. As I said in *Tiobe Ueue*:

> A court should always try to provide its reasons for the sentence that is to be imposed in a particular case. It should set out the matters that it considered made the offending worse, leading to an increase in sentence, and what matters were in the offender's favour, leading to a reduction in sentence. This is even more important if the Court has decided to imprison an offender. If a Court does not give reasons, it is almost impossible for the High Court to be satisfied that the magistrates took all relevant considerations into account, and did not rely on anything that it was not supposed to.[3]

[12] A sentence of imprisonment should only ever be imposed as a measure of last resort. While the offence of indecent assault is serious, carrying (at the time) a maximum sentence of 5 years' imprisonment, I am satisfied that the sentence imposed in this case is manifestly excessive. The offending falls towards the lower end of the spectrum. Given the age of the appellant and his previous good character, a sentence of 6 months' imprisonment would have been more appropriate.

[13] This case is complicated by the fact that the appellant has essentially served the sentence imposed by the Magistrates' Court. On a sentence of 2 years' imprisonment, he was eligible for release on parole on 25 April this year.[4] It is not clear why he has not been released already. As such, there is nothing to be gained by imposing any further punishment.

[14] I therefore order as follows:

a. leave to appeal out of time is granted;

b. the appeal against sentence is allowed, and the sentence of 2 years' imprisonment imposed by the Nonouti Magistrates' Court on 25 April 2018 is set aside;

c. instead the appellant is sentenced to the rising of the Court.

[15] The appellant is to be released from custody immediately, and he is to be repatriated to Nonouti as soon as possible.

Lambourne J
Judge of the High Court

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3 *Tiobe Ueue* v *Republic* [2019] KIHC 37, at [9].

4 *Parole Board Act* 1986, section 11(1)(b).