HIGH COURT OF KIRIBATI

Criminal Case Nº 35/2017

THE REPUBLIC

v

TIAOTI BUAKA

Tumai Timeon for the Republic
Reiati Temaua for the prisoner

Date of sentencing: 25 June 2019

SENTENCE

[1] Tiaoti Buaka has pleaded guilty to sexual intercourse with a collateral, contrary to section 158(1) of the *Penal Code* (Cap.67).[1]

[2] The offence was committed sometime during 2015, at Betio on South Tarawa. The complainant is the prisoner's first cousin; their fathers are brothers. She was 22 at the time. Late one night the complainant was sleeping, and she awoke to find the prisoner removing her shorts. He put his hand over her mouth to prevent her from alerting the others who were sleeping nearby. The prisoner then got on top of the complainant and inserted his penis into her vagina. He thrusted into her several times but, before he could ejaculate, he was interrupted by his wife, who shone a torch in their direction. The prisoner did not use a condom, and the complainant was not a willing participant. Despite the fact that the prisoner's actions had been observed by his wife, the matter was not reported to police until May 2016.

[3] An information was originally filed on 15 May 2017, charging the prisoner with 1 count of rape and 2 counts of sexual intercourse with a collateral. As the information did not comply with section 70 of the *Criminal Procedure Code*, the Attorney-General filed a fresh information on 25 September 2018,

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[1] Despite the repeal of section 158 by section 5 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). It should be noted that, as a result of this amendment, consensual sexual intercourse between adult cousins is no longer a criminal offence.

omitting the rape charge. There was some difficulty in locating the prisoner, and he did not make his first appearance in Court until 2 November 2018. On 14 December, counsel for the prisoner advised the Court that his client would be pleading guilty to count 1 but not guilty to count 2. The matter was fixed for trial. Yesterday (on what was to have been the first day of the trial) counsel for the prosecution amended the information to withdraw count 2 and the prisoner was discharged on that count.

[4] The prisoner is now 30 years of age, and was 26 at the time of the offence. He is married, with a 6-year-old daughter. He works occasionally as a labourer, loading and unloading cargo. He has no previous convictions.

[5] The prisoner's offending was very serious. Given the agreed facts, he is very fortunate that the prosecution did not persist with the rape charge. A conviction for rape would have resulted in a much more severe penalty. No explanation has been offered for his conduct. His counsel accepts that he was not intoxicated at the time the offence was committed.

[6] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.[2] The maximum penalty for this offence is 5 years' imprisonment. A non-custodial sentence may be appropriate for a case involving consensual sexual intercourse between adult cousins. However, an offender should expect to go to prison if the other party was a minor at the time, or did not consent.

[7] Both counsel have submitted the case of *Biiti Tionatan* as being comparable to the matter before me today.[3] In that case the offender and the complainant were first cousins; he was 28 years old and she was 15. He pleaded guilty to a single count of sexual intercourse with a collateral, covering 2 acts of sexual intercourse with the complainant. The complainant did not consent on either occasion. Force was used. The offender had an extensive criminal history, having served several terms of imprisonment. He was jailed for 2½ years for the sexual intercourse, with a further 6-month sentence (to be served consecutively) for a separate offence of unlawfully wounding the same complainant.

[8] In the circumstances of this case, I am of the view that an appropriate starting point is a sentence of imprisonment for 18 months.

[9] I consider the following matters to be the aggravating features of this case:

a. the complainant was attacked while she was sleeping and particularly vulnerable;

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

3 *Republic* v *Biiti Tionatan* [1998] KIHC 62.

b. the prisoner abused the trust that is placed in all members of an extended family, as communal sleeping arrangements provide little protection for women and girls;

c. the prisoner did not use a condom, thereby exposing the complainant to the risk of both pregnancy and sexually-transmitted infection.

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

[10] Counsel for the prosecution submits that I should have regard to the fact that the complainant was a virgin at the time of the commission of the offence. I acknowledge that, according to custom, virginity is a prized attribute for an unmarried woman in Kiribati. However, in the absence of evidence to the contrary, I cannot simply assume that the complainant's loss of virginity has had negative consequences for her. No material has been placed before me (such as a victim impact statement) to enable such a conclusion to be drawn. If it could be established that the prisoner knew that the complainant was a virgin and deliberately set out to defile her, that might warrant an increase in his sentence, but there is no evidence of that. While I accept that the loss of her virginity would have been distressing for the complainant, and painful, I am not prepared to treat the matter as an aggravating factor in this case.

[11] As far as mitigating factors are concerned, the prisoner has no previous convictions. He cooperated with police, making full admissions when questioned, and he pleaded guilty at an early opportunity. I am satisfied that he is genuinely remorseful. I also take into account that the prisoner spent 1 night in custody after his arrest. For these matters I deduct 7 months.

[12] Finally, it has taken more than 3 years from the time the offence was reported to police to conclude the prosecution of this case. While some of the delay can be attributed to the difficulty in locating the prisoner, it is still unacceptable. For the reasons discussed by the Court of Appeal in *Li Jian Pei*, the prisoner is entitled to a modest reduction in his sentence to compensate him for the breach of his constitutional right to be afforded a fair hearing within a reasonable time.[4] I will reduce his sentence by 2 months.

[13] The prisoner is convicted on his plea of guilty. Taking all of the above matters into account, he is to be imprisoned for a period of 1 year and 3 months. While it is open to me to suspend such a sentence under section 44 of the *Penal Code*, I see no reason to do so in this case. The sentence is to run from today.

Lambourne J
Judge of the High Court

HIGH COURT OF KIRIBATI
TEOMI AE E RIETATA I KIRIBATI

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