HIGH COURT OF KIRIBATI

Criminal Appeal Nº 15/2018

BAIKITEA IOANE *Appellant*

v

THE REPUBLIC *Respondent*

Banuera Berina for the appellant
Teanneki Nemta for the respondent

Date of hearing: *8 August 2019*
Date of judgment: *27 August 2019*

JUDGMENT

[1] On 20 August 2018 the appellant was convicted after a trial in the Nonouti Magistrates' Court on charges of unlawful wounding (contrary to section 223 of the *Penal Code*), resisting arrest (contrary to section 117 of the *Penal Code*), possession of a weapon while under the influence of drink (contrary to section 74(b) of the *Liquor Ordinance*), and criminal trespass (contrary to section 182(a) of the *Penal Code*). He was sentenced to imprisonment for 3 years and 3 months. In addition, he was ordered to pay a fine of $500, to be paid within 6 months, with 6 months' imprisonment in default of payment of the fine.

[2] On 12 September 2018 counsel for the appellant filed a notice of appeal with the High Court registry. This is not the correct procedure. Both section 272(1) of the *Criminal Procedure Code* 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.

[3] On 19 September 2018 the Chief Justice granted bail to the appellant pending the hearing of this appeal. He has been at liberty ever since.

[4] The offences were committed on Saturday, 18 August 2018, only 2 days before the trial. On that day the appellant and others were celebrating the end of a construction project for the Island Council. The appellant had been

one of the supervisors for the project. Alcohol and kava were consumed at the gathering. Some of those in attendance were drunk and began fighting. The appellant (who was also intoxicated) attempted to calm the situation, but ended up getting involved in the fight as well. After some time the fighting stopped and the appellant left.

[5] Two police officers then arrived at the scene. Shortly after their arrival, the appellant returned, armed with a knife and a hatchet (referred to in the minutes as an axe). The police officers attempted to restrain the appellant and he struggled. One of the officers attempted to knock the hatchet out of the appellant's right hand with a stick. The appellant responded by striking the officer in the head with his hatchet. The appellant was then forcibly restrained and placed in custody.

[6] The police officer was left with a 2-inch wound to the back of his head. There was a lot of blood. The wound required 4 stitches. While any head injury is serious, the police officer was well enough to testify at the appellant's trial 2 days later.

[7] The appeal was initially framed as a challenge to the appellant's conviction on all 4 charges. While it is clear that there were several irregularities in the manner in which the trial was conducted, the appellant later conceded that, had he received legal advice prior to the start of the trial, in all likelihood he would have pleaded guilty. The appeal then proceeded as an appeal against sentence only.

[8] Before I move to the substance of the appeal, I want to say a few things about the way in which the appellant's trial proceeded. Although the appellant does not now challenge his conviction, it is very important that magistrates be aware of the correct procedures. They must take great care to follow these procedures so as to ensure that an accused person's constitutional right to a fair trial is protected. A failure to do so may lead to a conviction being set aside, with the matter sent back to the Magistrates' Court to be heard again.

[9] The following matters are of concern:

a. at the start of the trial, the appellant asked for time to prepare and to seek legal advice. His application was refused. This was wrong. The Court should have given him time to consult with a lawyer. As we have now seen, it is likely that the trial could have been avoided altogether had he been given that opportunity;

b. the police prosecutor was 1 of the officers who had attended the scene. He was therefore also a witness. It was unwise for him to conduct the prosecution, particularly in a case as serious as this. The trial should have been adjourned to allow for another prosecutor to be engaged;

c. the charges were not read to the appellant at the start of the trial and he was not asked to plead (section 193(1) of the *Criminal Procedure Code* and rule 15(1) of the *Magistrates' Court Rules*);

d. at the close of the prosecution case, the appellant was not informed of his right to give evidence on oath, or to make an unsworn statement from the dock, nor was he informed of his right to call witnesses in his defence (section 196(1) of the *Criminal Procedure Code* and rule 15(4) of the *Magistrates' Court Rules*);

e. the decision of the Court to convict the appellant was not recorded (section 201 of the *Criminal Procedure Code* and rule 15(7) of the *Magistrates' Court Rules*);

f. the Court did not inform the appellant of his right of appeal at the time of sentence (section 270(2) of the *Criminal Procedure Code*).

It is possible that the minutes of the proceedings are incomplete. If the procedures were followed, then it is the responsibility of the presiding magistrate to ensure that the minutes accurately record what was said.

[10] Moving then to the appellant's appeal against his sentence, it is contended on his behalf that a sentence of imprisonment for 3 years and 3 months, coupled with a $500 fine, is manifestly excessive.

[11] The offence of unlawful wounding carries a maximum penalty of 5 years' imprisonment. The maximum sentence for resisting arrest is imprisonment for 2 years, and for criminal trespass it is imprisonment for 1 year.

[12] For the offence of possession of a weapon while under the influence of drink, the *Liquor Ordinance* provides for a mandatory minimum fine of $500, with the maximum penalty being a fine of $5000. As section 24(1)(b) of the *Magistrates' Courts Ordinance* prevents a Magistrates' Court from imposing a fine of more than $500, a $500 fine was really the only sentence the Court could have imposed for that offence. In the circumstances, I am unable to interfere with that part of the sentence, so the appeal in that respect must be dismissed. I note that the appellant has already paid the fine. My focus will therefore be on the prison sentence imposed for the other offences.

[13] 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]

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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.

[14] The Magistrates' Court imposed a single sentence of imprisonment intended to address the 3 offences for which the appellant was liable to be imprisoned. There is nothing wrong with this approach, but the sentence must be determined with due regard to the gravity of the person's offending.

[15] The most serious of the appellant's offences is the charge of unlawful wounding. A custodial sentence will often be an appropriate penalty for such an offence, particularly where a weapon is used. 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 a sentence of imprisonment for 3 years and 3 months was warranted. As I said in the case of *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.[2]

[16] In the circumstances, given that the appellant's sentence is significantly higher than sentences imposed in comparable cases, I am satisfied that the Magistrates' Court erred in the exercise of its sentencing discretion in this case. The appellant's sentence is manifestly excessive.

[17] I must therefore embark on the sentencing exercise afresh. In a contested case such as this I am of the view that an appropriate starting point is a sentence of imprisonment for 1 year.

[18] The appellant's offending is aggravated not only by his choice of weapon, but also by the fact that the complainant was an on-duty police officer who was hit in the head. The appellant is fortunate that the officer's injuries were not more serious. For these matters I would increase the sentence by 9 months.

[19] As far as mitigating factors are concerned, the appellant is now 47 years of age. He is married with 1 child, and has no previous convictions. Prior to his imprisonment he supported his family by undertaking various handyman jobs on Nonouti. I understand that the appellant is well-regarded on Nonouti, and a number of letters in support have been provided to the Court, including from the officer injured in the altercation. The appellant acknowledges the role that alcohol played in his offending. He says that he has not consumed alcohol since his arrest, and vows not to do so again. He appears to be genuinely remorseful for his actions.

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

[20] Despite the fact that he went to trial, it is clear from what he said in the course of that trial that he does not deny the allegations against him. I accept the submission from his counsel that, had the appellant been given the opportunity to seek legal advice after his arrest, he would have pleaded guilty. I am prepared to treat the appellant as if he had pleaded guilty at an early opportunity. For these matters I deduct 5 months.

[21] Taking all of the above matters into account, I am of the view that an appropriate sentence in this case is one of imprisonment for a period of 1 year and 4 months.

[22] As such a sentence falls within the scope of section 44 of the *Penal Code*, I turn to consider whether the circumstances of the offence and the personal circumstances of the appellant warrant suspension of his sentence.

[23] Despite the strong submissions from counsel for the appellant on this issue, this case is not a suitable one for the exercise of my discretion. I am not prepared to suspend the sentence. This was an offence of violence involving the use of a weapon. Even without the recent amendment of the *Penal Code* to insert section 44A, which prevents the suspension of a sentence for any offence involving the use of a weapon, I could not have been persuaded to suspend the appellant's sentence. I find strong support for this view from the recent decision of the Court of Appeal in the case of *Tamuine Mataio*.[3]

[24] I therefore order as follows:

a. the appeal against sentence with respect to the fine of $500, imposed for the offence of possession of a weapon while under the influence of drink, contrary to section 74(b) of the *Liquor Ordinance*, is dismissed and that sentence is confirmed;

b. the appeal against the remainder of the sentence is allowed, and the sentence of imprisonment for 3 years and 3 months imposed by the Nonouti Magistrates' Court on 20 August 2018 is set aside;

c. instead the appellant is sentenced to imprisonment for 1 year and 4 months.

[25] The sentence is to run from 20 August 2018. However, under rule 46(2) of the *Magistrates' Courts Rules*, the period from 19 September 2018 (when the appellant was released on bail) until today is to be excluded in calculating the appellant's release date.

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[3] *Tamuine Mataio* v *Republic*, Court of Appeal Criminal Appeal 3/2018, 21 August 2019, at [11].

[26] The appellant's bail is revoked, and he must now surrender himself to the authorities to resume serving his sentence.

Lambourne J
Judge of the High Court