HIGH COURT OF KIRIBATI

Criminal Appeal № 5/2018

RIITI TIMON *Appellant*

v

THE REPUBLIC *Respondent*

Tabibiri Tentau for the appellant
Teanneki Nemta for the respondent

Date of decision: 2 April 2019

JUDGMENT

[1] On 29 December 2017, in South Tarawa Magistrates' Court case BetCrim 731/17, the appellant was sentenced to imprisonment for 12 months following her plea of guilty to 1 charge of assault occasioning actual bodily harm, contrary to section 238 of the *Penal Code* (Cap.67).

[2] The appellant lodged an appeal against her sentence on 23 January 2018, and on 2 March 2018 she was released on bail pending the hearing of her appeal, having spent just over 2 months in custody.

[3] The offence was committed on 15 July 2017, when the appellant assaulted the complainant using fists and feet, causing injuries to her neck and ribs. The appellant also pulled the complainant's hair. In the course of the assault the complainant lost 2 teeth, only 1 of which was able to be successfully reattached. The appellant was aged 33 at the time, and the complainant was her 16-year-old cousin. The complainant had been placed in the appellant's care while she attended Junior Secondary School in Betio. That arrangement ceased a couple of months after the assault.

[4] The appellant claims to have been provoked by the complainant's misbehaviour and lack of respect. The complainant had been drinking and had also been spreading untruths about the appellant. Counsel for the appellant submits that this incident was no more than an attempt by his client to discipline the complainant that got out of hand.

[5] The appellant's plea of guilty only came after the trial had commenced. In sentencing the appellant, the learned Single Magistrate considered the following to be aggravating factors: the age difference between the appellant and the complainant, and the appellant's superior physical build; the injuries sustained by the complainant, in particular the permanent loss of 1 tooth; and the lateness of the appellant's plea, as evidence of a lack of remorse. The prosecution had asked for a sentence of imprisonment for 18 months, while the defence asked that any custodial sentence be suspended under section 44(1) of the *Penal Code*.

[6] The appellant has no previous convictions, and was said at the time to be employed by the Betio Town Council. She is no longer employed, although it is not clear whether that is as a consequence of this matter. The appellant has 4 children, aged between 2 and 12 years. Her husband works on board an inter-island ship, and is frequently absent. The appellant is the primary carer for the children. When she was imprisoned, the children stayed with the appellant's parents.

[7] In this Court, counsel for the appellant argued that the sentence was manifestly excessive. The appellant is relatively young, unemployed and a first offender, with significant family responsibilities. Counsel for the respondent submitted that the learned 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] The learned Single Magistrate clearly viewed the appellant's behaviour as serious. He correctly identified the maximum penalty under section 238 to be imprisonment for 5 years. However he did not take the approach to sentencing recommended by the Court of Appeal in the case of *Kaere Tekaei* v *Republic*.[2] The Court of Appeal suggests identifying an appropriate sentencing point for a contested matter of the kind under consideration (having regard to the objective seriousness of the crime), then increasing the sentence to take account of aggravating factors and reducing it for mitigating factors. While this approach is not mandatory, magistrates are encouraged to study and apply the Court of Appeal's decision in *Kaere Tekaei*. It serves as a useful tool to assist judicial officers in avoiding error when sentencing offenders.

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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.

2 [2016] KICA 11, at [10].

[10] On a thorough consideration of this case, and a review of comparable cases,[3] I am satisfied that the appellant's sentence was manifestly excessive. Too much emphasis was placed on the aggravating features of the case, and insufficient weight given to the mitigating factors. The learned Single Magistrate could only have arrived at a sentence of 12 months' imprisonment by setting his starting point too high. I am of the view that a suitable starting point for a case such as this is a sentence of imprisonment for 6 months, although it should be noted that a custodial sentence will not always be justified for an offence of this kind.

[11] The age difference between the appellant and the complainant, as well as the serious injuries suffered by the complainant, are appropriate aggravating factors. The fact that the appellant was in a position of authority over the complainant is also relevant. For these matters, the sentence should be increased by 3 months.

[12] It can never be an aggravating factor that an accused pleaded guilty at a late stage of proceedings. The penalty to be imposed should not be increased for a late plea of guilty, or because the accused has exercised their right to go to trial. In such a case the accused foregoes the reduction in sentence they would have received for a timely plea of guilty. The sentence does not go down, but nor does it go up.

[13] I consider the mitigating factors in this case to be as follows: the appellant has no previous convictions; and she was (to an extent) provoked by the complainant. For these matters the sentence should be reduced by 2 months.

[14] I reject the argument put forward by counsel for the appellant that the fact that his client assaulted the complainant in a misguided attempt to discipline her should be considered a mitigating factor of this case. While I acknowledge that corporal punishment is widely practised in the homes of Kiribati, the line that separates acceptable parental discipline from criminal assault is often hard to distinguish. Each time a child is physically punished, the parent or guardian takes the chance that they will cross that line and commit a criminal offence. There are other, far more effective, ways of punishing a child than by striking them.

[15] 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 7 months.

[16] 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 appellant's personal circumstances warrant suspension of her sentence. Counsel for the appellant submits that his client's family will suffer significant hardship if she is sentenced to an immediate term of imprisonment.

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[3] For example: *Reken Mateero* [2003] KIHC 79; *Toromon Eritai* [2004] KIHC 127; *Tabotabo Otati* [2006] KIHC 23; *Nakibae Bakati* [2006] KIHC 75; and *Bibiana Kookia* [2008] KIHC 61. *cf. Ioane Ianana* [2005] KIHC 166, *Kurin Taungea & others* [2006] KIHC 46, and *Tawita Kabuta* [2009] KIHC 23.

[17] The Court of Appeal in *Attorney-General* v *Katimango Kauriri*[4] recommended the New Zealand Court of Appeal's decision in *R* v *Petersen*[5] 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.[6]

[18] 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. I see no reason to suspend the sentence in this case. On the contrary, the need to send a clear message that this kind of violence is unacceptable, particularly where it occurs within the family, outweighs any argument in favour of suspension.

[19] As in almost all cases where someone is sent to prison, a custodial sentence will be difficult for the appellant's family. However that is not enough to justify suspending her sentence. As seen when the appellant first went into custody, the resources of the extended family are sufficient to ensure that her children will be properly looked after.

[20] 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 imprisonment for 7 months. The period of 63 days that the appellant served prior to her release on bail is to be taken into account when calculating her release date.

Lambourne J
Judge of the High Court

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4 [2015] KICA 6, at [3].

5 [1994] 2 NZLR 533.

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