



HIGH COURT OF KIRIBATI

Criminal Case N° 40/2017

THE REPUBLIC

v

ERIAKIM TABOKAI

*Tewia Tawita for the Republic
Raweita Beniata for the prisoner*

Date of sentencing: 10 May 2019

SENTENCE

- [1] Eriakim Tabokai has pleaded guilty to 2 counts of indecent assault, contrary to section 133(1) of the *Penal Code*.¹
- [2] The circumstances giving rise to these charges occurred at Tekarakan village on Marakei. The first offence was committed sometime between 1 January and 24 January 2016, while the second was committed on 25 January 2016. The complainant, who lives with a mild intellectual impairment, was 15 years of age at the time, and the prisoner was 47. The prisoner is married to the complainant's half-sister.
- [3] One evening during the period covered by count 1, the prisoner led the complainant to a bushy area behind the KUC camp in Tekarakan. He removed her clothing and placed her on the ground. The prisoner sucked the complainant's breast, got on top of her and rubbed his penis between her thighs. It is not clear whether he ejaculated. The prisoner told the complainant that he would beat her if she told anyone what had happened.
- [4] On the evening of 25 January 2016, the complainant was walking towards the clinic in Tekarakan with her younger brother. They met the prisoner, who was on a bicycle. He sent the complainant's brother back home and told the

¹ Despite the repeal and replacement of section 133 by section 4 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).

complainant to get onto his bicycle. She resisted, but he gave her no choice. The prisoner then took the complainant to an isolated area where he had a *buia*. He made her lie down on the *buia* and he removed her clothing. Despite the complainant's struggles, the prisoner sucked her breast, got on top of her and rubbed his penis between her thighs until he ejaculated. Again he threatened to beat her if she told anyone. When the complainant returned home she told her mother what had happened and the matter was reported to the police.

- [5] When the prisoner was questioned by police, he admitted to sucking the complainant's breast and cuddling her, but denied that anything else had happened. Following his arrest he was detained for 2½ weeks at the police station in Rawannawi, before being released on bail.
- [6] An information was originally filed on 4 May 2017, charging the prisoner with rape and, in the alternative, defilement of an idiot or imbecile. For reasons unclear, the case was not mentioned by the court until August 2018, and the prisoner did not make his first appearance until the following month. As the initial information did not comply with section 70 of the *Criminal Procedure Code*, the Attorney-General filed a fresh information on 28 September 2018, charging the prisoner with a single count of rape. In November, counsel for the prisoner advised that his client would be pleading not guilty to that charge, and the matter was fixed for trial.
- [7] On Monday this week, which was to have been the first day of the trial, counsel for the prosecution entered a *nolle prosequi* on the rape charge. The matter then proceeded on the present information, which had been filed that morning. The prisoner was arraigned and pleaded guilty to both counts.
- [8] The prisoner is now 50 years of age. He remains married to the complainant's half-sister, which I imagine must give rise to some tension within the family. He and his wife have 3 young children, the eldest of whom is 7 years old; the youngest has not yet turned 1. He leads a subsistence lifestyle, although he has undertaken some casual labouring jobs since coming to Tarawa for this case. Counsel for the prisoner offers no explanation for his client's conduct, other than to say that he was intoxicated at the time of the commission of the second offence. The prisoner admits that, when he assaulted the complainant on the second occasion, it had been his plan to have sexual intercourse with her. It was only her struggling that led him to desist. He has no previous convictions, and had offered (through his counsel) to plead guilty to the present charges back in November last year.

- [9] 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 indecent assault is imprisonment for 5 years.³ Applying the totality principle, I intend to impose a single sentence in respect of both counts that I consider addresses the gravity of the prisoner's offending.
- [10] In determining an appropriate starting point, I find some assistance from the case of *Buakaua Bauro*.⁴ *Buakaua* indecently assaulted the 16-year-old sister of his former wife by pushing her down on the beach and sucking her breast. He pleaded guilty and was sentenced to 9 months' imprisonment.
- [11] Another comparable case is that of *Buraitoa Tainimaki*, who led his 11-year-old victim away from where she was sleeping and digitally penetrated her anus.⁵ *Buraitoa* was 58 years old and had previous convictions from some time before. He pleaded guilty and was imprisoned for 12 months.
- [12] The prisoner's actions, in sucking the complainant's breast and engaging in non-penetrative sex, place his conduct towards the middle of the range for the offence of indecent assault. I am of the view that, in a case such as this, an appropriate starting point is a sentence of imprisonment for 18 months.
- [13] I consider the following matters to be the aggravating features of this case:
- a. as the complainant's brother-in-law, the prisoner was in a position of trust, and his offending constitutes a grave breach of that trust;
 - b. the complainant is young, and the difference in ages between the prisoner and the complainant is significant;
 - c. the complainant's intellectual impairment rendered her particularly vulnerable;
 - d. the offending occurred on more than 1 occasion;
 - e. the prisoner threatened the complainant with violence should she tell anyone what he had done to her.

For all of these matters I increase the prisoner's sentence by 8 months.

- [14] As far as mitigating factors are concerned, the prisoner has no previous convictions. His guilty pleas are to be regarded as having been made at the earliest possible opportunity. For these matters I deduct 8 months.

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

³ Parliament recently increased the maximum penalty for indecent assault to imprisonment for 7 years, so an offence committed on or after 23 February 2018 should attract a higher sentence.

⁴ *Republic v Buakaua Bauro* [2004] KIHC 35.

⁵ *Republic v Buraitoa Tainimaki* [1998] KIHC 73.

- [15] Counsel for the prisoner submits that I should consider a customary apology, made on the prisoner's behalf by his uncle and aunt shortly after his arrest and while he was still in custody, as evidence of remorse. I am ordinarily fairly sceptical of apologies; they tend to be more an expression of regret rather than of remorse. There is no reason to think otherwise in this case. Had the prisoner been completely honest when interviewed by the police, I might have been more willing to accept that he was remorseful from the beginning. Instead, he attempted to minimise his culpability. The reduction in sentence for his previous good character and his pleas of guilty will suffice.
- [16] It has taken more than 3 years to conclude the prosecution of this case. None of that delay is the fault of the prisoner. 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.⁶ I will reduce his sentence by another 2 months.
- [17] The prisoner spent 2½ weeks in pre-sentence custody. On a short sentence, taking into account the remission ordinarily allowed under section 56(1) of the *Prisons Ordinance* (Cap.76) for "industry and good conduct", that is the equivalent of a 27-day sentence. I therefore reduce the prisoner's sentence by a further 1 month.
- [18] Taking all of the above matters into account, the prisoner is convicted and sentenced 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



⁶ *Attorney-General v Li Jian Pei & Taaitaiti Areke* [2015] KICA 5.