HIGH COURT OF KIRIBATI

Criminal Appeal Nº 1/2019

TIOBE UEUE *Appellant*

v

THE REPUBLIC *Respondent*

Kiata Kabure-Andrewartha for the appellant
Tewia Tawita for the respondent

Date of decision: 20 May 2019

JUDGMENT

[1] On 21 November 2018 the appellant pleaded guilty before the Teraina Magistrates' Court to 1 count of damaging property, contrary to section 319(1) of the *Penal Code*, and 1 count of escaping from lawful custody, contrary to section 117 of the *Penal Code*.[1] On 28 November he was sentenced on count 1 to imprisonment for 1 year, and on count 2 to imprisonment for 6 months. The Court ordered the sentences to be served cumulatively.

[2] The appellant lodged an appeal against his sentence on 7 January 2019, and on 1 February 2019 he was released on bail pending the hearing of his appeal, having spent just over 2 months in custody.

[3] The offences were committed on 18 November 2018, after the appellant had been arrested in relation to allegations that he had been driving while under the influence of alcohol and speeding. He was then detained in the cell at the Teraina police station. From the photos shown to the Court, the police cell is a fairly rudimentary affair, with concrete block walls and no ceiling, just a mesh of security wire nailed to the rafters. There is a heavy cell door linking the cell to the main office of the police station.

[4] A few hours after his arrest it would appear that the appellant was left unattended. He was able to escape the cell by forcing his way through the security wire into the roof space of the building. He then kicked his way

[1] Teraina Magistrates' Court case Nº 143/18.

through the masonite ceiling of the main office and dropped to the floor. He forced the external door to the police station and made his escape. The damaging property charge relates to the damage to the ceiling and door of the police station. From the photographs the damage appears fairly minor, although counsel for the respondent is unable to say what it cost to repair.

[5] The appellant has no previous convictions. It is not clear what has happened to the charges that were the reason for his initial arrest. His age is not given in the record, but it is accepted that he is a young man in his 20s. It is of concern that the record of the proceedings in the Magistrates' Court does not indicate whether the appellant was provided with an opportunity to make submissions in mitigation of sentence. 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.

[6] In this Court, counsel for the appellant argued that the sentence was manifestly excessive. She also argued that the appellant's arrest was unlawful and, as such, his conviction for escaping from lawful custody could not be sustained. I pointed out that the appellant had not appealed against his conviction and, in any case, no appeal can lie against a conviction where the appellant has pleaded guilty.[2] I will consider only the argument that the sentence was manifestly excessive. Counsel for the respondent conceded that the Magistrates' Court was wrong to order that the sentences be served cumulatively, but she submitted that otherwise the Court had not fallen into error, and the sentences on each count were not excessive.

[7] 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.[3]

[8] There is at least 1 clear error in the approach taken by the Magistrates' Court. Where an offender is charged with multiple offences, it is generally only appropriate to order that sentences for such offences be served cumulatively (*ie*. one after the other) where the offences are unrelated to each other, or do not form part of the same course of conduct. In this case the appellant's

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2 *Magistrates' Courts Ordinance*, section 67(1); *Criminal Procedure Code*, section 271(1).

3 *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.

charges stem from a single course of conduct – the property was damaged in the course of the escape from lawful custody. In such a case the order should have been for the sentences to be served concurrently (*ie.* at the same time). It was wrong therefore for the Court to order that the sentences be served cumulatively. It resulted in a total sentence that was disproportionate to the gravity of the appellant's offending. It was appropriate for counsel for the respondent to make this concession.

[9] Given that, was the Magistrates' Court correct to impose the sentences it did? Unfortunately the Court did not explain why it chose to imprison the appellant. 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.

[10] A sentence of imprisonment should only ever be imposed as a measure of last resort. Even when a court considers that imprisonment is appropriate, if the sentence to be imposed is 2 years or less, the court should consider whether to suspend the sentence under section 44 of the *Penal Code*. While the charges to which the appellant pleaded guilty are serious, carrying maximum sentences of 5 years' imprisonment and 2 years' imprisonment respectively, I am satisfied that the appellant's sentences are manifestly excessive. He is a young man, with no previous convictions. He pleaded guilty at the earliest possible opportunity. Consideration should have been given to one of the non-custodial sentencing options available.

[11] As it is, the appellant has already spent 2 months in prison, which is the equivalent of having served a 3-month sentence.[4] That is more than enough of a penalty. It is therefore not appropriate to impose any further punishment.

[12] The appeal is allowed. The sentences imposed by the Teraina Magistrates' Court are set aside and, in lieu thereof, the prisoner is sentenced to the rising of the Court.

Lambourne J
Judge of the High Court

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[4] Under section 56(1) of the *Prisons Ordinance*, a prisoner is ordinarily allowed a one-third remission of their sentence for "industry and good conduct".