HIGH COURT OF KIRIBATI

Criminal Case Nº 1/2019

THE REPUBLIC

v

KABOKIA BWARANE

Tewia Tawita for the Republic
Reiati Temaua for the prisoner

Date of sentencing: 3 June 2019

SENTENCE

[1] Kabokia Bwarane has been convicted after a trial on a charge of rape, contrary to section 128 of the *Penal Code* (Cap.67). The circumstances of that offence are set out in my judgment, which was delivered on 27 May 2019. He also comes to be dealt with on 2 counts of sexual intercourse with a family member, contrary to section 156(1) of the *Penal Code*, to which he has pleaded guilty. The rape charge was count 3 on the information, while counts 5 and 6 concerned the section 156 offences. The prosecution did not proceed with counts 1, 2 and 4 on the information.

[2] I understand that this is the first prosecution for the offence of sexual intercourse with a family member, introduced only last year, replacing the offence of incest.[1] The scope of prohibited relationships has been broadened to now include uncles and aunts, and nieces and nephews.

[3] The complainant for all 3 offences is the prisoner's niece. She was 16 years old at the time of the rape and 18 at the time of the section 156 offences.

[4] The circumstances giving rise to count 5 occurred in June 2018, at the family compound in Temwaiku. The complainant went to the prisoner's *buia* to tell him that she wanted him to stop his sexual acts towards her. They talked,

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1 By section 5 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act* 2017, which commenced on 23 February 2018.

after which, at the prisoner's request, they had consensual sexual intercourse, involving penile penetration of the complainant's vagina.

[5] The following month, the prisoner and the complainant met in Bairiki. They then went to Betio to buy fermented yeast, which they drank until they were both very drunk. They stayed together on a *buia* at the place where they had bought the fermented yeast. Again they engaged in consensual sexual intercourse involving penile penetration of the complainant's vagina. This is the subject of count 6 on the information.

[6] It is suggested that, between the rape in 2015 and the acts of sexual intercourse in 2018 that give rise to counts 5 and 6, there had been several occasions when the prisoner and the complainant had engaged in consensual sexual touching, short of penetrative sexual intercourse. This is disputed by the prisoner, and these acts are not the subject of any charges. I cannot and do not take these allegations into account when sentencing the prisoner, but it might help the Court to understand how the complainant went from being the victim of a rape at the hands of the prisoner to being a willing participant in further acts of sexual intercourse with him. It serves to place the offences charged in context.

[7] The prisoner is now 33 years of age; he would have been 29 at the time of the rape and 32 at the time of the other 2 offences. He has previously worked on board foreign fishing vessels. He has a 10-year-old son, who lives with the prisoner's ex-wife on Teraina. There are 2 entries on his criminal record: a conviction for common nuisance in 2009, for which he received a small fine; and a reference from 2015 to a charge of threatening violence. The latter entry relates to the occasion described by the complainant in her evidence, when she was assaulted by the prisoner at her home in Temwaiku. Despite the charge having been withdrawn, the prisoner was bound over to keep the peace. I assume that this was an exercise of the magistrate's power under section 35(2) of the *Penal Code*.

[8] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.[2] Under section 129 of the *Penal Code* the maximum penalty for rape is imprisonment for life, while for sexual intercourse with a family member the maximum penalty is 7 years' imprisonment.

[9] The rape occurred almost 3 years before the events giving rise to counts 5 and 6 (which happened within about a month of each other). Counsel for the prosecution submits that, while the sentences for counts 5 and 6 could run

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

concurrently, they should be served consecutively with the sentence for count 3. That this should be so is conceded by counsel for the prisoner.

[10] With respect to count 3, the Court of Appeal has held that an appropriate starting point for a contested case of rape is imprisonment for 5 years.[3] I consider the following matters to be aggravating factors:

a. as the complainant's uncle, the prisoner was in a position of trust, and his offending constitutes a grave breach of that trust;

b. the difference in ages between the prisoner and the complainant is significant;

c. the complainant was raped while she was asleep and under the influence of alcohol; she was particularly vulnerable;

d. 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 1 year.

[11] There is little if anything to be said in mitigation. His only previous conviction was for a very minor offence several years earlier, but he cannot truly be said to have previously been of good character. The unchallenged description of his assault on the complainant the year before the rape (confirmed by the second entry on the prisoner's criminal record) shows that he was not a good person.

[12] The prisoner has demonstrated no remorse for his actions. He went to trial, as is his right, but, by doing so, he has foregone the reduction in sentence that he would have received had he pleaded guilty.

[13] Taking these matters into account, an appropriate sentence for count 3 is imprisonment for 6 years.

[14] With respect to counts 5 and 6, it is helpful to consider this Court's approach to sentencing for the offence of incest, despite that offence having been replaced by the new offence of sexual intercourse with a family member. The maximum penalty under the old section 156(1) was the same as the maximum under the new section 156(1) – imprisonment for 7 years. In a recent case I said the following:[4]

> The offence of incest is one that our community regards with disgust. I must take care however to ensure that my approach to sentencing addresses the objective wrong-doing of the offenders, rather than enforcing some moral or religious code of conduct.[5]

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3 *Attorney-General v Tanre Tengke; Teitiniman Kaurake v Republic* [2004] KICA 10, at [13].

4 *Republic* v *Kenete Takaa & Ereateiti Kenete* [2018] KIHC 68, at [3]-[4].

5 *R* v *Watson* (1999) 106 A Crim R 300, per Fryberg J at 302.

> The offence of incest can cover a wide range. At the lower end of the spectrum, incest between consenting adults may result in a non-custodial sentence, or a nominal punishment.[6] On the other hand, where the victim is young or does not consent, or if violence is threatened or used, then a lengthy custodial sentence is warranted. Other possible aggravating features can include: the victim suffering psychological or physical harm extending beyond the period of the offending; if pregnancy results; if there is more than 1 victim; and if sexual intercourse is accompanied by additional humiliation, such as anal or oral intercourse.[7]

[15] As the complainant's uncle, the prisoner's offending is objectively less serious than if he had been her father, although the fact that he is her uncle by blood makes this more serious than if he had been her uncle by marriage.

[16] I am of the view that the prisoner's conduct warrants a custodial sentence, despite the complainant being a willing participant on both occasions. The relationship was an unequal one in which the prisoner exploited his position of trust to gratify his sexual feelings with the complainant. Such offending risks long-term psychological harm to the complainant and threatens the very fabric of the extended family unit. An appropriate starting point for a single contested count of sexual intercourse with a family member in the circumstances of this case is imprisonment for 1 year.

[17] There are no particular aggravating features with respect to counts 5 and 6 that have not been taken into consideration in arriving at the starting point.

[18] The prisoner indicated that he would be pleading guilty to these charges at a very early opportunity. He co-operated with police, and admitted to having had sexual intercourse with the complainant. For these matters I reduce his sentence for each count by 3 months.

[19] Taking these matters into account, an appropriate sentence for each of counts 5 and 6 is imprisonment for 9 months.

[20] Counsel for the prisoner argued that, given the events giving rise to count 3 occurred in 2015, there had been an unacceptable delay in the prosecution of this case. This misconstrues the principle laid down by the Court of Appeal in *Li Jian Pei*, which deals primarily with delay occurring in the period between charge and disposition.[8] There has been no unacceptable delay in this case. The matter was reported to police in August 2018, some 10 months ago. The investigation and prosecution proceeded with admirable swiftness. A reduction in sentence on this ground is not justified.

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6 *Attorney-General's Reference (Nº 1 of 1989)* (1989) 1 WLR 1117, at 1121H and 1122H.

7 *ibid.*, at 1123E-F.

8 *Attorney-General* v *Li Jian Pei & Taaiteiti Areke* [2015] KICA 5, at [17].

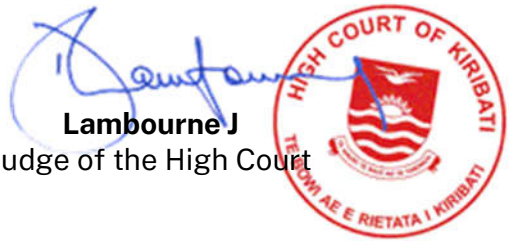
[21] The prisoner has already been convicted with respect to the rape charge. He is now formally convicted on his pleas of guilty to 2 counts of sexual intercourse with a family member. He is sentenced as follows:

a. in respect of count 3 (rape), to imprisonment for 6 years;

b. in respect of count 5 (sexual intercourse with a family member), to imprisonment for 9 months;

c. in respect of count 6 (sexual intercourse with a family member), to imprisonment for 9 months.

The sentences for counts 5 and 6 are to be served concurrently with each other, but consecutively with the sentence for count 3, so that the total period for which prisoner is to be imprisoned is 6 years and 9 months. Under section 28(2) of the *Penal Code*, I order that the prisoner's sentence is to run from 13 May 2019, being the day on which the prisoner was first remanded into custody on these charges.



Lambourne J
Judge of the High Court