



## HIGH COURT OF KIRIBATI

*Criminal Case N° 5/2016*

**THE REPUBLIC**

**v**

**WANGKA TION**

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

*Date of sentencing: 2 September 2019*

### **SENTENCE**

- [1] Wangka Tion has pleaded guilty to rape, contrary to section 128 of the *Penal Code* (Cap.67).<sup>1</sup>
- [2] The offence was committed on 10 August 2012 at Matang village on Nonouti island. The complainant was aged 42 years at the time and was mentally ill. She has been diagnosed with schizophrenia. The prisoner, who was drunk, went to the complainant's *buia* sometime between 10:00 and 11:00pm and entered her mosquito net. He had sexual intercourse with her, by inserting his penis into her vagina. The complainant did not consent. The prisoner was not wearing a condom, and it is unclear if he ejaculated inside the complainant's vagina. After the prisoner had finished, the complainant tried repeatedly to send him away, but he refused. A short time later the complainant's aunt arrived to find the prisoner sitting on the complainant's *buia*, wearing only his underpants. He said that he had come to the complainant's house by mistake, and left. The island's Medical Assistant examined the complainant the next day and saw some bruising on her right thigh, as well as evidence of recent sexual activity. When interviewed by the police, the prisoner admitted to having sexual intercourse with the complainant. He was not asked whether the sexual intercourse had been consensual.

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<sup>1</sup> Despite the repeal and replacement of section 128 by section 3 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).

- [3] This case has had a somewhat chequered history. The first information was filed on 28 January 2016, charging the prisoner with rape and entering a dwelling-house in the night with intent to commit a felony. For reasons unclear, the matter lay dormant until the Chief Justice visited Nonouti in March 2018. The Court was then informed that the prisoner was believed to be on South Tarawa, and the matter was adjourned. The prisoner did not make his first appearance in Court until 13 August 2018, more than 6 years after the date of the offence. By then, having been made aware that the original information did not comply with section 70 of the *Criminal Procedure Code*, the Attorney-General filed a fresh information on 1 August 2018. The prisoner was now charged with defilement of an idiot and criminal trespass. After some initial difficulty in securing the services of a lawyer, the prisoner informed the Court on 9 November that he would be pleading not guilty to the charges and a date was fixed for trial.
- [4] When the matter came on for trial in May this year, the prisoner failed to appear and a warrant was issued for his arrest. The warrant was executed the following week and a fresh trial date in June was allocated. On 3 June (which was to have been the first day of the trial) the prisoner pleaded guilty to both charges contained in the 1 August information. An agreed summary of facts was then provided to the Court. It was clear from the summary that the evidence did not support a charge of defilement of an idiot, and I vacated the pleas and ordered that pleas of not guilty be entered instead.<sup>2</sup>
- [5] Counsel for the prosecution then applied to amend the information, by substituting a charge of rape for the defilement charge. She indicated that she would not be proceeding on the criminal trespass charge. Against the objection of counsel for the prisoner, I allowed the amendment. The following day the Attorney-General filed a fresh information, charging a single count of rape, and a *nolle prosequi* was entered with respect to the 1 August information. A new trial date was fixed for 29 July.
- [6] On 29 July the prisoner again failed to appear and another warrant was issued for his arrest. That warrant was executed on 9 August, and the matter was fixed for trial on 27 August. The week before the trial was to start, counsel for the prisoner informed the Court that his client would now be pleading guilty to the charge. When the prisoner was arraigned on 27 August he pleaded guilty.
- [7] The prisoner's offending was serious. While intoxication was clearly a contributing factor, it in no way excuses what he did. The complainant

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<sup>2</sup> My reasons for taking this action are set out in detail in my file note dated 3 June 2019 (see *Republic v Wangka Tion* [2019] KIHc 53). In summary, a person with a mental illness cannot be said to be either an idiot or an imbecile, as those terms were used in section 135(1)(b) (now repealed) of the *Penal Code*.

sustained only superficial injuries, but the gravity of the prisoner's conduct cannot be ignored. This was an attack on a vulnerable woman in her own home. I said the following in the case of *Tamaroa Mikaere*, and it is equally applicable in this case:

[T]he communal way of life in Kiribati, involving as it does an inherent lack of privacy and insecure sleeping arrangements for most people, requires us all to abide by an unwritten compact not to take advantage of the vulnerable in our communities. The prisoner has shown complete disregard for that compact.<sup>3</sup>

[8] The prisoner is now 27 years of age, and was 20 at the time of the offence. He is married with 1 young child. He supports his family through a subsistence lifestyle. He has no previous convictions.

[9] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.<sup>4</sup> Section 129 of the *Penal Code* provides a maximum penalty for rape of imprisonment for life. The Court of Appeal has held that an appropriate starting point for a contested case of rape is a sentence of 5 years' imprisonment.<sup>5</sup> I adopt that term as the starting point in this case.

[10] I consider the following matters to be the aggravating features of this case:

- a. the complainant's mental illness rendered her particularly vulnerable, a matter of which the prisoner was aware;
- b. 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] I turn then to the mitigating features of this case. The prisoner was only a young man at the time of the offence, and was of previous good character. His plea came late in the day, but it is to his credit that he pleaded guilty to a charge that would likely have been very difficult for the prosecution to prove. For these matters I deduct 1 year and 6 months.

[12] The prisoner has spent a total of 50 days in custody awaiting sentence, 26 days after he was arrested on 8 May for failing to attend court on 3 May, and a further 24 days from 9 August after his failure to appear on 29 July. As a consequence, I reduce his sentence by a further 3 months, to take account of the effect that the rules concerning parole will have on his overall sentence.

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<sup>3</sup> *Republic v Tamaroa Mikaere* [2018] KIHc 46, at [5].

<sup>4</sup> *Kaere Tekaei v Republic* [2016] KICA 11, at [10].

<sup>5</sup> *Attorney-General v Tanre Tengke; Teitiniman Kaurake v Republic* [2004] KICA 10, at [13].

- [13] Finally, it has taken more than 7 years to conclude the prosecution of this case. This is, by far, the worst delay that I have seen in my time on the bench. The initial information was not filed until almost 3½ years after the date of the offence. Another 3½ years, or more, has passed since then. Some of the delay can be attributed to the prisoner's repeated failures to attend court, but that is a tiny fraction of the overall period. This is an appalling violation of the prisoner's constitutional right to be afforded a fair hearing within a reasonable time. For the reasons discussed by the Court of Appeal in *Li Jian Pei*, the prisoner is entitled to a reduction in his sentence to compensate him for this breach.<sup>6</sup> I will reduce his sentence by another 9 months.
- [14] The prisoner is convicted on his plea of guilty. Taking all of the above matters into account, he is to be imprisoned for a period of 3 years and 6 months. The sentence is to run from today.

  
**Lambourne J**  
Judge of the High Court



The seal of the High Court of Kiribati is circular, featuring a central shield with a sun, a bird, and waves. The text 'HIGH COURT OF KIRIBATI' is written around the top inner edge, and 'TE HIA AE E RIETATA I KIRIBATI' is written around the bottom inner edge.

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<sup>6</sup> *Attorney-General v Li Jian Pei & Taaiteiti Areke* [2015] KICA 5.