

12th February, 1987

Between:

Republic

-vs-

Tebinou Teunaja

The accused is charged with indecent assault C. to S.133(1) of the Penal Code and entering a dwelling by night C. to S.133(1) of the Penal Code. It is said that that on 10 August 1986 he entered the dwelling house of Kiebu Mikaere and indecently assaulted Nei Meetau Etam.

I remind myself that it is for the prosecution to prove the guilt of the accused on both Counts beyond a reasonable doubt. Since the case is a sexual one I warn myself that it would be dangerous to convict on the indecent assault charge without corroboration. Nei Meetau was asleep in her house. She awoke in the early hours of the morning while it was still dark to find a person with his head between her legs. As a result of what he was doing she grabbed his hair and pulled him up. She realized it was not her husband and tried to push him away. At the same time she shouted for her husband Kiebu. She shouted (Oho Tebinou) when she recognised Tebinou and when her husband who was asleep outside woke up they met as he was coming in, and the intruder was going out. Kiebu chased the intruder and in the light of the street lamp recognised him to be Tebinou a neighbour now the accused person before the Court. Kiebu also told the Court that while chasing the accused he fell over a cycle so the accused escaped.

PW2 was drinking with the accused on the night in question together with others. He asked the accused about an incident at Kiebus house. The witness asked the accused this question 'Is it true that you went into the dwelling house? And the accused answered: 'Try not to be funny. Why don't you apologize on my behalf': The witness took him at his word and went and apologized on his behalf. Accused himself told the Court that throughout the evening he was drinking. He ended up at Tokamans house. He denied going to the complainants house. The effect of Tooms evidence DW1 was that for most of the evening he had been with the accused drinking, singing, and playing the guitar.

If the complainant and PW3 are to be believed then there can be no doubt that the accused was the person who entered the house.

If the accused and his witness are to be believed he was engaged in drinking nearly all night.

The complainant told the Court that there was a bottle lamp in her house but agreed in cross examination that this might have blown out during the night. This would leave only the light from the street lamp by which she could have seen the intruder.

The Court inspected Nei Meetau's house at night when the street lamp was on. It also noted that there was a certain amount of additional light from the nearby house which may not have been on at 0400 on the day in question.

The inside of the house as seen from the outside was fairly dark. It would have been difficult but not perhaps impossible for effective identification to be made. The street light does throw a surprising amount of light and in the position where Kiebu says he fell over the cycle he would be able to see and make an effective identification, at least of such features as the outline of the body, height, weight and so on, but not the face. I have applied my mind to the directions as to evidence of identifications given in Republic -vs- Turnbull (1976) 63 Criminal Appeal Rep 132 and in the recent decision of R v Martin Anthony Breslin (1985) Criminal Appeal Rep Vol.II p.226. I have considered the possibility of a mistake by Kiebu as to the identity of the accused and I am aware of the special care that should be taken to avoid such a mistake. I have noted that no identification parade has been held. As can be seen from the evidence Kiebu and his wife knew the appellant well. They were on visiting terms prior to this incident and it is perhaps of some small significance that the accused has not visited since the incident although there may be some explanation for this.

It is the quality of the evidence that matters. I therefore reject the evidence of the complainant because there must be a real doubt as to whether she could see who was in the house. In rejecting the evidence I must stress that I do not think she lied. I think she believed she saw Tabinou but because of the darkness I think it must be open to doubt. As to Kiebu's evidence it is credible. He met the accused in the door way as the accused was coming out. They were close to each other. He then chased him towards the light and could have clearly seen his figure as he claims. His evidence of identification is credible. I shall consider whether to accept it in due course. The accused's own evidence is that he was drinking all evening. The evidence of persons consuming alcohol over long periods must be unreliable. He consumed a considerable quantity on his own admission. His witness seems to have been drinking longer and is probably unreliable too. As to PW2 no doubt he was drunk as well. But it is strange that he went to apologise although he claims he thought the accused was drunk and joking when he asked the witness to apologise on his behalf.

For these reasons I cannot place any great weight on the evidence of the accused and his witnesses as to where the accused was on the evening of the 9 August and early morning of the 10th. Accepting as I do the evidence of PW3 Kiebu I have looked to see if there is any other evidence to re-enforce it.

PW1 in cross examination said she didn't notice accused's hair but she said that the person who came to her house had a beard. Accused when he was in Court had no beard. In re-examination she said he had long hair at the time of the incident. I do not think she really can be said to be reliable on the question of identification. I reject her evidence.

PW3 Kiebu claimed the accused had a moustache and never combed his hair. He claims that since that incident the accused has cut his hair and shaved. He claimed to know the accused well as a former friend and that prior to that incident they used to visit. Accused admitted in cross examination that he had shaved off his beard and moustache but said he did so quite a long time after the incident.

He agreed that prior to the time of the incident he had long hair but said it was cut before the incident. He agreed that he used to visit Kiebu prior to the incident and knew him well and that since the incident he had not visited. If all these circumstances are added to Kiebu's original identification evidence it is in my view sufficiently convincing to establish beyond reasonable doubt that it was the accused who was in the house of Nei Metau on that night and that he is guilty of the offence of criminal trespass as charged. He is convicted on Count 2.

As to count 1 there is regrettably no evidence to corroborate the alleged indecent assault on the complainant. While it seems possible that this occurred yet PW's evidence, particularly that identifying the accused cannot be relied upon. It would therefore be unsafe to convict the accused of indecent assault in the absence of corroboration and he is therefore acquitted on Count 1.

(R.G. TOPPING)  
JUDGE

RGT/MK