

IN THE HIGH COURT OF KIRIBATI) HIGH COURT CRIMINAL CASE No. 67 OF 2004
CRIMINAL JURISDICTION)
HELD AT BETIO)
REPUBLIC OF KIRIBATI)

THE REPUBLIC
VS
RUATOA TOKOIA

FOR THE REPUBLIC: MS PAULINE BEIATAU
FOR THE ACCUSED: MS TAOING TAOABA

DATE OF HEARING: 30 NOVEMBER 2004

J U D G M E N T

The accused is charged with abduction of a girl under the age of 18 with intent to have sexual intercourse: a misdemeanour pursuant to section 132 of the Penal Code.

Particulars:

On 22 January 2003 at Nanikaai village in the Republic of Kiribati, Ruatoa Tokoia unlawfully took or caused to be taken Nei Tebuae Atiota, an unmarried girl under the age of eighteen, out of the possession and against the will of her grandmother with an intent unlawfully to have sexual intercourse with her.

The Republic has proved beyond reasonable doubt that Nei Tebuae was under 18 on the 22nd January 2003 (she was not yet 15), that she was unmarried and that she was in the care and control at that time of her grandmother. The two points which have given concern are whether Ruatoa “unlawfully took” her and whether if he did it was “with an intent unlawfully to have sexual intercourse with her”.

It was a Wednesday evening. Tebuae went to play Bingo. After some time she left the Bingo and went to buy cigarettes at a store. She ran into Ruatoa whom she already knew very well. They talked for some time. They walked together from Nanikaai waiting for a bus to take them to Betio. They got as far as Bairiki before they found one. In Betio they went to Kabokia's house behind the Beru Café to spend the night there. The next morning they returned to Nanikaai. Tebuae was given into the custody of her father.

That is a bare outline of the facts. Tebuae and Ruatoa were the only witnesses: apart from their evidence Ruatoa over four months after the 22nd January made a caution statement. Ms Beiatau tendered it by consent. The three accounts of what happened within that outline vary.

Tebuae from the beginning of her time in the witness box was a most reluctant witness: long pauses between the Prosecutor's questions and her replies: questions had to be repeated to get replies at all:

He suggested we go and watch movie in his house. I went. Told me we weren't going to watch movie: do something else. Wanted to elope. Told him afraid: he said nothing We walked from Nanikaai to Bairiki and caught bus to Betio. Look for place to hide. I asked him - he said we were going to look for a place to hide from my relatives Went to Kabokia's house: some people there, asleep: woke them up. Kabokia and his wife: Went to house with accused. Discussion with Kabokia and his wife: asked if we could stay and they said "Not a problem". We slept in their house. I slept with someone, Ruatoa. A long time. Did something. They were on a buia: we on ground: very close - we could hear them from ground. We did something. I remember Left next day to Nanikaaireason for going to Betio not to attend dance.

From the caution statement which Ruatoa made on 3rd June 2003 and the questions and answers which immediately followed:-

The caution statement:

I am not agreeing to the allegation against me [the nature of the allegation not set out] but the thing that happened was that I was with Nei Tebuae both attending dance at Betio on that night of Wednesday. Because she was afraid of being fired (?) if she return so late in the night she then decided to get married to myself and so she came with me to my house at Nanikaai... I had not liked the idea of getting married but it was Tebuae herself who longed to get married to me as I assume she may have afraid.

From the questions and answers:

Q.6 When the dance ended how did both of you return?

Ans: We took a bus.

Q.7 At what time you arrived Nanikaai?

Ans: On the next day.

Q12: And what did you then both of you?

Ans: We have been accepting marriage so we slept as husband and wife....

[In questions and answers the accused admitted penetration.}....

She was the first who liked the idea of marrying since she was afraid.

Ruatoa told the Court he is now 19 or 20:

In early evening at Nanikaai - on road, on way home: met the girl We were well acquainted Told her going to dance in Betio. She accompanied me to catch bus. No success: stayed on and talked about where we were going. If I had gone home I'd have been beaten by my father. We got a bus. I got on and she said she (wanted to come too). Got off at Gateway. I was drinking at bar: she standing next to me, not drinking. Left when Gateway closed. Walked, trying to stop buses. Late: buses stopped. Truck for hire - Kaibokia Beru truck - went to house behind café where Kabokia stayed - key locked in office. Know Kabokia a relative. Did nothing apart from talking to Kabokia: Tebuae and I slept on ground, she next to me. Kabokia and his wife slept on top. Woke early in morning. Got up intending to leave. Kabokia called me about my companion. When she woke she refused to g back. Said she was afraid. We telephoned my house. Later she told me "too scared to go back: better we settle down". Stayed until daylight: went to my house She was afraid. We did not elope: went to dance. When we woke up early in morning agreed to get married: first time.

Tebuae denied they went to a dance in Betio: she did not say that they had intercourse. She put the responsibility on Ruatoa for her going with him to Betio. In the caution statement Ruatoa admitted intercourse but he did not admit it in his evidence.

One most unfortunate omission by Counsel was failure to examine or cross examine on the accused's caution statement. At the end of the prosecution case the caution statement was admitted by consent. That was that. Counsel should realise that a caution statement is merely one piece of evidence: like any other piece of evidence it may be weak or strong: it is not exempted or privileged from scrutiny. By examination and cross examination a caution statement should be tested to find out if it may be reconciled with the oral evidence, the reasons why it varies (if it does) from the oral evidence. It is a valuable way to establish or destroy the credibility of a witness. It certainly should not be left to stand as though without more it proves the case.

One would have expected Ms Taoaba to have led an explanation from her client as to his admission of his intercourse in the caution statement and its denial (implied at least by silence) in evidence. Likewise Ms Beiatou should have put the caution statement to the accused in cross examination, asking him, for example, whether having admitted sexual intercourse in the caution statement he admitted it in court. Instead nothing.

I am left with two differing versions in the evidence of the facts and a third version in the caution statement.

Am I able to find proof beyond reasonable doubt all the elements of the offence charged?

Sexual intercourse is not an element of the offence - it is the intent to have sexual intercourse which must be proved - but if sexual intercourse is proven beyond reasonable doubt to have occurred then finding the preceding intent to have it is the more likely.

The weight to be attached to the caution statement is a matter for me to assess as it would be for the jury in a jury trial. I must decide what weight to give to the caution statement. Generally, confessions (at least "hasty confessions") have not been well regarded by the common law. - "—English criminal lawyers have long recognized that 'hasty confessions are the weakest and most suspicious of all evidence'" (*Kenny's Outline of Criminal Law* (1952 edition) at paragraph 614 (page 428)). I do not know any of the circumstances in which this statement was taken whether the statement were taken "hastily" or at leisure or what or where.

Ruatoa's caution statement is, in contrast to his oral evidence, not made on oath. The contradictions with the sworn evidence were not canvassed in examination in chief: the accused's oral evidence in conflict with the caution statement was not challenged in cross examination. I could not in any case give to the statement as much weight as the accused's sworn evidence and the less so because of the absence of cross examination.

Ruatoa appeared to be telling the truth. He was quite a good witness. The absence of cross examination leaves me with a doubt about intercourse. Ms Beiatau admitted in her closing submissions that there is no evidence of intercourse except in the caution statement.

What evidence is there of intent to have sexual intercourse? The evidence of Tebuae, the so unwilling witness, raises an inference that intercourse was Ruatoa's intent but that's all.

Ruatoa in his evidence said he meant to go to a dance in Betio: Tebuae wanted to come with him. Instead they were both at the Gateway, he drinking, she standing next to him. When the Gateway closed he looked for a bus, finding none went to Kabokia to try to hire the truck. Only when that was not possible did he and Tebuae stay at Kabokia's house. None of that indicates an intent by Ruatoa to have sex with the girl.

Considering all the evidence I am left with a reasonable doubt about the intent of the accused "unlawfully to have sexual intercourse" with Tebuae. The Republic has failed to prove beyond reasonable doubt that element of the offence.

That finding is enough for the failure of the prosecution and makes it less necessary for me to make a finding as to whether Ruatoa "unlawfully took" Tebuae. He says she wanted to go with him and went: she says it was his idea. The next morning they went back to his house in Nanikaai. I am left in doubt. The onus was on the prosecution to prove unlawfully taking beyond reasonable doubt and it has failed to do so.

I find the accused not guilty.

Dated the 3rd day of December 2004

A handwritten signature in cursive script that reads "Robin Millhouse". The signature is written in black ink and is positioned above a horizontal line.

THE HON ROBIN MILLHOUSE QC
Chief Justice