HIGH COURT OF KIRIBATI

Criminal Case № 70/2017

THE REPUBLIC

v

FG and JK

Tumai Timeon for the Republic
Kiata Kabure for the accused FG
Teetua Tewera for the accused JK

Dates of hearing: 18-20 October 2018
Date of judgment: 22 October 2018

JUDGMENT

[1] The 2 accused in this case, referred to as FG and JK, are jointly charged with 8 counts of defilement of a girl under 13 years of age, contrary to section 134(1) of the *Penal Code* (Cap.67), to which they have pleaded not guilty. FG and JK are husband and wife. JK is the paternal grandmother of the complainant so, in an effort to protect the complainant's identity, I have used unique initials to refer to the complainant, to both accused, and to all prosecution witnesses (except a police officer).

[2] Despite the repeal and replacement of section 134 by section 4 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act* 2017, which commenced on 23 February 2018, this case proceeds under the Penal Code as it was on the date of the alleged offences (section 10(2) of the amending Act).

[3] The information in this case has been through several iterations. The original information was filed on 22 May 2017. A further information, in lieu of the original, was filed on 18 October 2017. That information did not comply with section 70 of the *Criminal Procedure Code* (Cap.17), so a fresh information was filed on 25 September 2018 by the Attorney-General, signed by her. That information alleged 4 offences of defilement, 1 offence of rape and 2 offences of failing (in 2016 and 2017) to secure the complainant's regular education under the *Education Ordinance* (Cap.29). When this case was called on at the start of the sittings here on Kiritimati, I pointed out to counsel for the prosecution that

the Education Ordinance had been repealed as of 1 January 2014, so could not possibly be relevant. I also observed that all other counts on the information were bad for duplicity, in that each count alleged the commission of that offence "on more than one occasion" during the period covered by the count. It is not permissible to charge more than 1 offence in a single count (section 118(2) of the Criminal Procedure Code). As a consequence, a further fresh information was filed by the Attorney-General (without objection) on 16 October 2018 and, with some minor amendments made on the first day of the trial (without objection), the trial proceeded on that information.

[4] Five witnesses were called for the prosecution. The first was the complainant, SK, aged 13 years. After some initial questioning as regards her understanding of the nature of an oath, I was satisfied for the purposes of section 3(1) of the *Evidence Act* 2003 that she could give her evidence under oath, and she was sworn.

[5] SK presently lives with her older brother in Tabwakea village. She does not go to school, and has not been to school since last year, when she was in Class 5 at Tennessee Primary School. SK is pregnant, and due to give birth very soon. Her pregnancy is unrelated to the matters before this court.

[6] SK testified that, in early October 2016, she had been living with her older sister at Tabwakea #3, but was taken one Saturday to live with the 2 accused at their house in Tabwakea #2. SK recalled that, on the first evening at that house, she was surprised to be woken from her sleep late at night by FG sucking on her breast. This incident is not the subject of any charge.

[7] The next day, SK went with FG and JK to a place known as Kakai #2 (a place from which coconuts could be collected). She said that this was on a Saturday, and that, in fact, it had been a Friday when she was taken by her sister to the house of FG and JK in Tabwakea. At Kakai #2, SK was collecting coconuts with FG when he suddenly pushed her to the ground. JK was some distance away, out of sight. FG told SK to be silent, removed her clothes and his shorts and had sexual intercourse with her by inserting his penis into her vagina (count 2). SK then got dressed and they continued collecting coconuts. After some time SK went back to where her grandmother was and told her what FG had done. JK responded, "It doesn't matter. He did the same thing to your older sister, [RK]."

[8] In the evening of the following Monday, SK was with FG and JK under the awning at Kakai #2. FG asked SK, "Who did you lose your virginity to?" SK responded, "You." FG asked the question 2 more times, and SK gave the same response. FG got angry and said, "I am going to carry out what you have accused me of." He told SK that he would take her out to the bush, at which she started crying. JK said that FG would not leave her for the complainant, then to FG she said, "That's enough. Come and do it here." FG went to SK and removed her shorts. He then had sexual intercourse with her while JK was at her feet, holding her legs apart.

SK asked them to have pity on her, as she was their granddaughter. She said they responded, "How can you say that you are our granddaughter?" SK could feel FG's penis inside her vagina (count 3). FG later beat her with the midrib of a coconut frond.

[9] Sometime later they returned to the house in Tabwakea. SK described a further instance of sexual intercourse with FG in October 2016 at the bushy part of the plot in Tabwakea, known as *te nii-itikai*. SK was with FG in a bushy area; JK was with their belongings some distance away. FG removed SK's clothing, took off his shorts and had sexual intercourse with her (possibly count 1). She had tried to run away, but FG held on to her. After FG was finished, SK put her clothes back on and ran back to where JK was waiting. They had the following conversation:

JK: Why have you returned?

SK: I am going back to my brother.

JK: Why?

SK: Because your husband keeps on defiling me.

JK: Don't you know that he did that to your older sister?

SK: I don't care. I have to return to my brother.

JK: I am going to tell someone, and you will be beaten.

FG then returned, and JK told him of SK's plan to return to her brother. They then went back to the house and FG beat SK. She was told that there was no other place that she could stay, as the police had instructed that she was to stay with them.

[10] SK then said that, 2 days later, a police officer came to the house. He wanted SK to go with him the next day to take photographs related to allegations she had made against the husband of her aunt, BD. Before the officer returned, FG and JK took SK to hide her in the bush. They told a neighbour to tell the police if they came that he did not know where they had gone. SK said that they were on a path. She was riding a bicycle and FG and JK were pushing a handcart. They were spotted by a police officer, who said that SK had to go with him. He wanted JK to come too, but SK said that there was no need, as she knew where to go. SK then testified that the encounter with the police officer had happened later in 2016. Later in her evidence she said that it had actually occurred in April 2017.

[11] In February 2017, SK was still staying with FG and JK at their house in Tabwakea. She described an evening in that month when she was lying between FG and JK. The light was on. FG removed SK's shorts and top and then his own shorts. He then had sexual intercourse with her (count 4). She reached out and tapped JK, trying to alert her, but JK had her back to them and did not roll over.

[12] On 10 March 2017, there was a large family gathering at the house of FG and JK in Tabwakea to celebrate the birthday of the child of SK's sister RK. In the evening, after the party, SK had watched a movie and then gone to sleep, between FG and JK. She awoke as FG unbuttoned her shorts and removed them. He told her to be silent. The light was on. FG had sexual intercourse with SK (count 6). When he was done, SK put her shorts back on. JK was still lying next to her. SK later told JK what FG had done, and her grandmother responded with the same thing she had said before about SK's sister. SK testified that this was the only instance of FG having sexual intercourse with her that month.

[13] SK then described an evening in April 2017, which she said was the night before the police officer came to get her to take the photographs. She was again sleeping at the house at Tabwakea, between FG and JK. FG unbuttoned her shorts and removed them, along with her top. He removed his shorts and had sexual intercourse with SK (possibly count 7). JK was sleeping next to her, on her back. SK tapped JK on the shoulder, trying to alert her as to what FG was doing, but JK merely turned away. Sometime later, SK told JK what FG had done, to which JK said, "I told you before that he did that to your sister." SK responded, "I don't care. You have to take me back to my brother." The next day, when SK was out with the police officer, she had a conversation with him, after which she was taken to the house of her brother in Tabwakea #1.

[14] SK testified that, one night in the period between 1 May and 16 May 2017, she was again staying at the house of JK and FG in Tabwakea. FG had sexual intercourse with her, while JK was lying next to them (count 8).

[15] In cross-examination, counsel for FG sought to take SK through the statement she had given to police. SK remembered having given the statement, and agreed that she had signed it. She was shown her statement and accepted that it was the document she had signed. SK claimed that she could read, but was not able to read the handwritten statement for the court. The statement was tendered as an exhibit by counsel for FG. There were clearly significant differences between SK's statement and her testimony in evidence-in-chief. When each inconsistency was put to SK, her response was that she could not remember telling the police that. SK agreed that her statement had been read back to her before she had signed it, but she could not remember what was in it because it had been a long time ago. SK said that there were things that had happened to her about which she had not told the police, because she was afraid.

[16] Counsel for FG then asked SK to recall the night of the birthday party. SK agreed that there were many people at the house. She said that, after the party, some of the family members went home, while others stayed the night. When FG had had sexual intercourse with her that night, the light was on, and 4 other people (in addition to herself, FG and JK) were sleeping in the same room, perhaps 6 metres away. Her aunt, BD, was there, as was her aunt's husband. SK did not

cry out because FG had told her to be quiet, otherwise he would do something to her.

[17] SK maintained the version of events that she had given in evidence-in-chief, and denied that she was making up stories.

[18] Under cross-examination from counsel for JK, SK maintained that what she had said in evidence-in-chief was true. She rejected the suggestion that her evidence was untrue. SK accepted that there had been opportunities to tell other members of her family what was happening to her, or to run away, but she was afraid to do so, because FG and JK had told her that she would be taken to jail if she left them. SK agreed that she had been taken to her brother's place after giving her statement to police in April, and did not return to her grandmother's house after that.

[19] In re-examination, in an attempt to clarify when SK had gone to live with her brother, SK said that she could not remember whether the police had come to her at any time between 1 May and 16 May 2017. According to her recollection, she was staying with her brother throughout that period.

[20] SK was then excused, having spent the better part of 2 days in the witness box.

[21] The next prosecution witness was SK's aunt, BD. She is 43 years old and is the sister of SK's mother. BD lives at an area known as Te Non Kakai, within the area known as the big pond. BD testified that, in October 2016, SK was living with her and her husband at Te Non Kakai. BD and her husband attended the birthday party at the house of JK and FG in Tabwakea. BD said that, as they were preparing to leave on a truck that evening after the party had finished, SK came and boarded the truck. She was crying. SK's father KA was also on the truck. JK came and told SK to get down from the truck, but she refused. SK accompanied them on the truck back to Te Non Kakai. BD described an incident between SK and her father at Te Non Kakai more than a month later, where KA had said that he was going to beat SK. The significance of this incident is unclear.

[22] The third prosecution witness was SK's father, KA. He is 43 years old and lives at Tabwakea. SK is the youngest of his 4 children. Her birth was registered in a different name, but they had started calling her by her present name before her first birthday. SK's birth certificate was tendered without objection, confirming that she had been born on 22 October 2004. KA testified that JK is his mother and FG is his mother's second husband. In October 2016, SK was living with FG and JK in Tabwakea.

[23] The next prosecution witness was RK, SK's older sister. It was immediately apparent that she was extremely nervous. Soon after beginning her evidence, RK became quite distressed. After a brief adjournment, she was excused.

[24] The final prosecution witness was Detective Constable Mikaere Tebano. He received the initial complaint from SK in May 2017, but he was not the person who took down her statement.

[25] That brought the prosecution case to a close.

[26] Counsel for FG submitted that her client had no case to answer in respect of counts 1, 5, 7 and 8 on the information. Counsel for JK submitted that his client had no case to answer in respect of all counts except count 3. Counsel for the prosecution conceded that she could point to no evidence in support of count 5.

[27] I reminded counsel that the test to be applied is as set out in section 256(1) of the Criminal Procedure Code. As I said in *Republic* v *Bitiauoki Temeria*[1]:

> a submission of 'no case' can only succeed if there is no evidence at all that the accused committed the offence. This determination should be made by taking the evidence from the prosecution witnesses 'at its highest', and putting to one side any concerns I may have regarding the veracity of any or all of the witnesses.

[28] Counsel for FG argued that counts 1 and 7 could not stand, as the particulars provided by the prosecution alleged that each offence had taken place at Kakai #2, whereas the only evidence from SK that could possibly be attributed to those counts was to the effect that the offences had occurred at Tabwakea. Counsel submitted that the only evidence in support of count 8 was contradicted by so much other evidence that it could not be accepted.

[29] Counsel for JK submitted that, with respect to counts 1 and 2, there was no evidence placing his client at the scene, and no other evidence that could support a contention that she had aided or counselled FG in the commission of those offences. With respect to counts 4, 6, 7 and 8, counsel conceded that SK had testified that JK had been present during the sexual intercourse, but he argued that there was nothing to suggest that his client was any more than a passive bystander. There was no evidence that she had done anything that could attract criminal liability under section 21 of the Penal Code.

[30] With respect to the submissions from counsel for FG on counts 1 and 7, the location at which an offence is alleged to have been committed is not ordinarily material. Any reference to location in the particulars of a count is usually treated as surplusage. However, the accused is entitled to be provided with sufficient particulars as will enable him to adequately make his defence. In a case such as this, with repeated offences alleged to have been committed in broadly similar circumstances, where the Attorney-General has chosen to particularise the locale in order to distinguish one count from another, I consider that the prosecution should be required to prove not only the elements of the offence, but also the

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[1] High Court Criminal Case 9/2018, at [20]

location as set out in the particulars. A failure to do so puts the accused at an unfair disadvantage in the preparation of his defence. After the complainant's evidence, when it was clear that her testimony as to the location of some of the offences had differed from what had been anticipated, I invited counsel for the prosecution to apply to amend the particulars of these counts, but she declined. I therefore held that the accused FG had no case to answer with respect to counts 1, 5 and 7 on the information. With respect to count 8, as there was some evidence, albeit contradictory, I rejected the submission from counsel for FG on that count.

[31] With respect to JK, the prosecution must prove that she was in some way an accessory to the commission of the crime by FG under section 21(1)(b), (c) or (d) of the Penal Code. As regards counts 1 and 2, there was no evidence that pointed to her having any role in aiding or abetting FG, or in counselling or procuring him to commit the offences. Subsequent knowledge, and her failure to support SK, is insufficient to found criminal liability. On counts 4, 6, 7 and 8, her mere presence at the commission of the offence is not enough; there must at least be positive encouragement.[2] As a consequence, I held that the accused JK had no case to answer with respect to all counts except for count 3.

[32] The trial then proceeded; as against FG on counts 2, 3, 4, 6 and 8, and as against JK on count 3 alone. I informed both accused of their rights, as required by section 256(2) of the Criminal Procedure Code. FG elected to give evidence on oath in his own defence, but would not be calling any witnesses. JK chose to neither give nor call evidence.

[33] FG is a 54-year-old man, living at Tabwakea village. He testified that SK was not living with him and JK in October 2016. SK had been living with them up until September 2016, but left them in that month to go to her aunt, BD. FG said that he recalled this because SK had had her first menstruation that month, an event that had been celebrated by the family. SK had gone with BD after that, and did not return to FG and JK until school started again in February 2017. He denied having sexual intercourse with SK at any time during February 2017.

[34] With respect to the birthday party on 10 March 2017, FG testified that the party had actually been held at the house of RK and her husband. The party started at 9:00pm and concluded at midnight. After the party several family members came back to FG's house. Some were drinking coffee, while others watched movies all

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[2] Shanahan, M. *et al*, *Carter's Criminal Law of Queensland* (12th ed., 2001) at p.189, citing *R* v *Corey* (1882) 8 QBD 534. The authors also cite *R* v *Clarkson, Carrol & Dodd* [1971] WLR 1402; 3 All ER 344; (1971) 55 Cr App R 445, in which "it was held on a charge of aiding and abetting rape on the basis of continuing and non-accidental presence, that the prosecution must establish actual encouragement of the commission of the offence, as well as an intention to encourage".

night. FG denied having sexual intercourse with SK that night. The family members stayed with him and JK for almost 2 weeks after that.

[35] FG testified that SK was living with them during the early part of May 2017, but that nothing unusual happened. He and JK were arrested on these charges on 14 May 2017. He denied ever having had sexual intercourse with SK.

[36] Under cross-examination, FG agreed that he had been convicted of having sexual intercourse with RK. Section 6 of the Evidence Act permits the questioning of a witness as to their previous convictions. The offence was committed in 2010, when RK was 12 years old. He pleaded guilty and was sentenced to imprisonment in 2012. He denied that his conduct with RK meant that he had also defiled SK. He reiterated that he had never done anything like that to SK.

[37] That was the case for the accused FG, and the end of the evidence in this case.

[38] In considering the evidence in this case, I remind myself that neither accused is required to prove their innocence. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of each offence.

[39] In order to convict FG of the offence of defilement of a girl under the age of 13 years, I must be satisfied to the required standard of the following elements:

a. that he had sexual intercourse (that is, as defined by section 161 of the Penal Code, penile penetration of the vagina) with the complainant, SK;

b. that, at the time of the sexual intercourse, SK was aged under 13 years.

[40] In order to convict JK, I must be satisfied to the required standard that she aided, abetted, counselled or procured FG to commit the offence of defilement.

[41] I have no difficulty with the second limb of the offence of defilement. At the time of counts 2 and 3, SK was either 11 or 12 years of age. For counts 4, 6 and 8, she was 12 years old. I find that element proven beyond reasonable doubt.

[42] Perhaps the most challenging aspect of this case is the question of how to deal with the evidence of SK. The case rises or falls on the strength of her evidence. There was little, if any, assistance provided by the other prosecution witnesses. If I am satisfied that SK is telling the truth then, in all likelihood, the offences (or at least some of them) will be made out. I accept that it is possible for me to believe some parts of her testimony and yet not be satisfied as to other parts.

[43] Much of SK's evidence was given with great difficulty. She was frequently confused about dates and places. However, I must remember that she is only 13 years old; and she struck me as being extremely immature, even for a 13-year-old. She is perhaps not very bright, and has been deprived of at least some of the education to which she is entitled. She referred in her testimony to having been

sexually abused by her uncle, the husband of BD. This was not disputed. Whoever is responsible for her pregnancy has also (almost certainly) subjected her to a further offence. Her pregnancy is close to term, and she needed frequent adjournments to get medical treatment for complications she is experiencing. She has clearly not had a normal childhood, and has undoubtedly confronted many challenges along the way.

[44] SK's evidence differed in several respects from the details provided in the statement she had given to police in May 2017. When confronted by the apparent inconsistencies, she simply responded that she could not remember what she had told the police. Counsel for FG tendered SK's statement to police in support of her contention that, as a prior inconsistent statement, it undermined SK's credibility. I have used the statement only as evidence of its contents, and not as proof that any of the matters described therein actually occurred. However, it is important that I reflect on why a person who is the complainant in a trial such as this might give differing versions of events. I bear in mind that experience shows the following:

a. a person may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time;

b. trauma affects different people differently, including by affecting how they recall events;

c. it is common for there to be differences in accounts of a sexual offence. For example, a person may describe a sexual offence differently at different times, to different people or in different contexts;

d. just because accounts of a sexual offence contain differences, it does not mean that the person is being untruthful; both truthful and untruthful accounts of a sexual offence may contain differences.[3]

[45] When I came to consider SK's evidence overall, I found that her statement to the police had the effect (somewhat counter-intuitively) of strengthening the credibility of her testimony, rather than undermining it.

[46] This is not a case where the complainant has clearly contradicted herself with a previous statement. SK has never said that FG and JK did not do the acts of which she has accused them. There are certainly differences as to detail, but now, having seen SK testify, I am not surprised to see such inconsistencies. They are a reflection of her youth and immaturity, not of a lack of credibility. It has been almost 18 months since SK gave her statement to police, and 2 years since the alleged offending began.

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[3] Adapted from the Victorian Judicial College's *Criminal Charge Book*, section 4.19, "Differences in a Complainant's Account – Sexual Offence Matters", updated 1 October 2017

[47] I ultimately formed the view that SK was doing her best to honestly recall what had happened to her. Under cross-examination, SK could not be shaken on the core details of her allegations against FG and JK. I regard her evidence as broadly credible. That is not to say that I accept her evidence in its entirety without question, but I will get to that shortly.

[48] In contrast, the denials by FG rang hollow. I did not find his testimony credible. Very little detail was provided. His contention that SK was not living with them in October 2016 and the evidence regarding her first menstruation were matters not put to SK in cross-examination. Neither KA nor BD were asked to confirm when SK's first menstruation had occurred, something that should have been relatively straightforward.

[49] Much was made by counsel for the prosecution of FG's previous conviction for defilement of RK but, in the end, hardly any details were provided of that offending, other than the fact that RK was 12 years old at the time. There was not enough for me to determine whether FG's offending against RK was particularly similar to his alleged conduct involving SK, which might have allowed me to find that FG has a propensity for such conduct. Just because FG has committed an offence (even a similar offence) before, it does not mean that he must therefore be guilty of the present offences. I place no reliance on FG's previous conviction in reaching my verdict in this case.

[50] Weighing the totality of the evidence in this case, I am satisfied, beyond a reasonable doubt, of the following:

a. FG had sexual intercourse with SK at Kakai #2 on a day in October 2016 when they were collecting coconuts (count 2);

b. FG had sexual intercourse with SK under the awning at Kakai #2 on an evening in October 2016, while JK held SK's legs (count 3);

c. FG had sexual intercourse with SK at his house in Tabwakea on an evening in February 2017 (count 4).

[51] With respect to count 2, the offence was particularised as having happened on a Monday, whereas SK testified that the offence was committed on a Saturday. I am satisfied that this minor inconsistency is of no significance.

[52] With respect to count 3, counsel for JK contended that SK's version of events could not be accepted because, if JK was holding SK's legs as described, then it would be physically impossible for FG to have sexual intercourse with SK. I reject this contention, and am satisfied that the events occurred as described by SK.

[53] With respect to count 6, I find I am left with some doubt that the events occurred as described by SK on the night of the birthday party. There are just too many conflicting versions. I am also struck by the inherent implausibility of a scenario

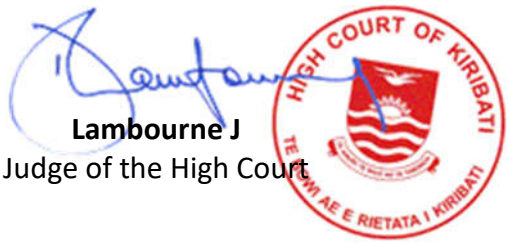
where FG had sexual intercourse with SK while the light was on and there were at least 4 other people in the room (even if they were asleep).

[54] I am also left with some doubt with respect to count 8. While SK testified that the offence did happen as charged, this was only after she had been led in her evidence as to the dates. She was later quite insistent that she had not been staying with FG and JK during May, and that she had been with her brother at that time.

[55] I therefore find FG guilty on counts 2, 3 and 4 of the information, and he is convicted accordingly. FG is acquitted in respect of counts 1, 5, 6, 7 and 8.

[56] I find JK guilty on count 3 of the information, and she is convicted accordingly. She is acquitted in respect of counts 1, 2, 4, 5, 6, 7 and 8.

[57] I will hear counsel as to sentence.



Lambourne J
Judge of the High Court