



HIGH COURT OF KIRIBATI

Criminal Case No 10/2017

THE REPUBLIC

v

KENETE TAKAA

*Tewia Tawita, Senior State Attorney, for the Republic
Mantaia Kaongotao for the accused*

Dates of hearing: 28-30 November 2018

Date of judgment: 3 December 2018

JUDGMENT

- [1] The accused has pleaded not guilty to 3 counts of incest by a man, contrary to section 156(1) of the *Penal Code* (Cap.67). His daughter, Ereateiti Kenete, is charged with a single count of incest by a woman, contrary to section 156(5) of the *Penal Code*. She pleaded guilty when the pair were arraigned on the first day of the trial, and her matter has been adjourned to the end of this trial.
- [2] An information was originally filed in this case on 17 January 2017, containing a single count of incest. That information was defective, in that it failed to comply with section 70 of the *Criminal Procedure Code* (Cap.17). On 20 July 2018 the Attorney-General rectified the defect by filing a fresh information signed by her (in the same terms). The 2 accused had originally been indicted separately, but a further information was filed on 14 August 2018, joining the charges against the them into a single information. On what was supposed to be the first day of the trial, 26 November 2018, a *nolle prosequi* was entered in respect of the earlier informations under section 68(1) of the *Criminal Procedure Code*, and a new information was filed, increasing the number of charges faced by the accused to 3. Counsel for the accused had only been advised of the new charges the night before, so the trial was adjourned to allow him to take further instructions. After the adjournment, the trial proceeded on the most recent information.
- [3] Despite the repeal and replacement of section 156 by section 5 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).

- [4] Three witnesses were called for the prosecution.
- [5] Takiri Kakoroa is a 43-year-old resident of Betio. She was in a relationship with the accused from late 1992. They lived together in Betio, before moving to Abaiang, and then Butaritari. In about September 1993, when Takiri was close to term with their first child, the accused left for South Tarawa, supposedly to buy things for the new baby. He never returned. Takiri heard later that he had settled down with a new wife. Ereateiti was born on 19 October 1993. The accused was registered as her father.
- [6] From the time that Ereateiti was 11 months old she was looked after by her maternal grandparents. Takiri recalls meeting the accused once on a bus in South Tarawa. He asked how his daughter was. At the end of 2008, when Ereateiti was transitioning from Butaritari Junior Secondary School to senior secondary, she went to live with the accused. Takiri was living on Kiritimati at the time.
- [7] Kannangaki Kakoroa was the second prosecution witness. He is Takiri's younger brother. He testified that, in 2015, he was living with his wife at Takoronga. At some point, the accused and Ereateiti came to stay in the enclosed verandah of Kannangaki's *buia*. They stayed for about 7 months. Kannangaki testified that, in the late afternoon, sheets would be hung around the verandah, for privacy. It was only the accused and Ereateiti sleeping in the verandah.
- [8] Kannangaki recalled an evening when he was invited to join the accused to drink fermented yeast. That night he slept on a bed adjacent to the verandah. He woke up at about 4:00 or 5:00 the next morning and heard Ereateiti calling out. Kannangaki heard her say, "Wait for me to correct my position." Curious, he lifted up one of the sheets and looked in. He saw the accused on top of Ereateiti – they were having sexual intercourse (count 2). Kannangaki heard Ereateiti say, "Kenete, take it slow." He then went to his wife. Later that day Kannangaki challenged the accused, saying, "You are a disgusting man. You had sex with your daughter. Come out." The accused said nothing, but chased Kannangaki and beat him. He and Ereateiti left Kannangaki's house a few days later.
- [9] Kannangaki admitted in cross-examination that his relationship with the accused had not been smooth. They had argued some time earlier about the fact that Kannangaki was not happy about the accused staying there. He denied having stolen roofing iron from the accused, and he denied that he was lying about what he had seen. Kannangaki had some difficulty recalling exactly when it was that the accused had come to stay. He initially testified that they arrived in November 2015, but later said that they must have come earlier that year, as he had seen them having sexual intercourse before Christmas in 2015.
- [10] The final witness was Ereateiti Kenete, aged 25. Ereateiti is pregnant, and due to give birth very soon. Her pregnancy is unrelated to the matters before this court. After finishing Junior Secondary School on Butaritari in 2008, Ereateiti came to

live with the accused in Temwaiku, ahead of starting Form 4 in 2009. She initially went to boarding school on Abaiang but, before the end of the first semester, she transferred to Sacred Heart High School in Bikenibeu. Ereateiti was living with the accused and his then wife, Atinta.

- [11] Ereateiti testified that, one night during the final school term of 2009, the accused came to her and sucked her breasts while she slept. This incident is not the subject of any charge. A few nights later, very early in the morning after Atinta had gone to attend a religious devotion, the accused had sexual intercourse with Ereateiti. He told her not to say anything or he would kill her. The accused pulled Ereateiti's underpants aside and inserted his penis into her vagina (count 1). The accused was wearing a lavalava, but Ereateiti was unsure as to whether he was wearing underwear. The accused did not use a condom, and he ejaculated inside her vagina. Ereateiti did not consent to the sexual intercourse.
- [12] From then on, the accused would regularly have sexual intercourse with Ereateiti. He would do so whenever no one else was around. Ereateiti lost count of the number of times that it happened. She was only allowed to leave the house to attend school. There were times when the accused beat her with his fist. Ereateiti finished school after Form 5 in 2010, but she continued living with the accused.
- [13] In early 2015, the accused took Ereateiti to the nearby Ananau causeway. It was night, sometime before midnight. The accused was drunk, and she was afraid of him. They went to a bushy area, next to a fishpond near the road to Bonriki. The accused removed Ereateiti's clothes and underpants. He was wearing a lavalava and no underwear. The accused had sexual intercourse with Ereateiti (without her consent) on the ground (count 3). He did not use a condom, and ejaculated inside her vagina. A man came close to them and the accused chased him away. They then went back to the house together. There were several other occasions on which the accused had sexual intercourse with Ereateiti at this place, but she remembered this occasion in particular because the accused had chased the man.
- [14] Later in 2015, before the Independence holiday, the accused and Ereateiti moved to Betio. The accused had separated from Atinta in 2011 or 2012. They went to stay with Ereateiti's maternal grandparents and her uncle, Kannangaki. The accused, who had been a special constable, was training to become a sworn police officer. He would stay in the recruits' barracks during the week, and come to her on weekends. Initially, they stayed in the house of Ereateiti's great-uncle but, after a few months, they moved to the verandah attached to Kannangaki's *buia*. Ereateiti hung sheets around the verandah for privacy. Her uncle Tanentoa was supposed to be staying with them, but he was not around much. If ever they were alone together, the accused would have sexual intercourse with Ereateiti.
- [15] The accused and Kannangaki had a turbulent relationship. Ereateiti can recall an argument about the house. Kannangaki did not want the accused to stay. There were claims that Kannangaki had stolen things from the accused and pawned

them with a local sour toddy seller. On another occasion, she heard Kannangaki shouting at the accused that he had seen them having sex. Kannangaki was drunk at the time, and he and the accused fought. Ereateiti could not recall whether the accused had had sexual intercourse with her the night before that fight, but she said that it was likely, as they had been alone together.

- [16] The sexual relationship between the accused and his daughter continued until sometime in 2016, when the accused was arrested and placed in custody. Ereateiti went to live with her mother. There was no evidence as to how the relationship came to the attention of the police. The accused had become a police officer after completing his training, but his appointment had been terminated shortly afterwards, some time before his arrest on these charges.
- [17] In cross-examination Ereateiti conceded that, when initially questioned by police in 2016, she had denied that the accused had ever had sexual intercourse with her. She did so because the accused had told her not to say anything. Ereateiti said however that, a few months later, she had given a statement to a female police officer about a subsequent incident in which the accused had assaulted her. She told that officer about the sexual relationship with her father. By this time Ereateiti was no longer living with the accused. She could not remember the name of the police officer, but knew that her husband's name was Brian. Counsel for the prosecution was able to identify the officer as Teinabure, and she was brought to court. I was informed that Teinabure remembered interacting with Ereateiti in 2016 but had no recollection of what she had said. For reasons unclear, no statement could be found.
- [18] When asked why she had not run away, or complain to someone about what the accused had been doing, Ereateiti said that she did not know what to do. She was of the view that it was her grandparents' wish that she stay with the accused. Ereateiti said that the accused had threatened to kill her if she ever left him. He had beaten her often, using his fists, or an open hand. In answer to a question from the court, Ereateiti said that the sexual relationship had gone on for so long that she had "just got used to it". She accepted that, at least by the time they were living in Betio, she was a willing participant in the sexual activity.
- [19] Ereateiti agreed that she had discussed the case with Kannangaki, but denied that she had colluded with him as to her evidence.
- [20] Ereateiti rejected the suggestion that she had lied about the sexual relationship with the accused because he had been unable to give her money once he stopped being a police officer. Ereateiti also denied that she had made up stories because she wanted the accused to be punished for assaulting her, or for abandoning her in her early childhood.
- [21] Ereateiti agreed that she had not become pregnant between 2009 and 2016, despite her claim that it was the practice of the accused to not use a condom and

to ejaculate inside her vagina. She had never been on birth control. Ereateiti said in re-examination on this point that the accused had had 4 wives and, as far as she was aware, she was his only child.

- [22] At the close of the prosecution case, counsel for the accused made no application so I formally found that the accused had a case to answer, and informed him of his rights, as required by section 256(2) of the Criminal Procedure Code. The accused elected to neither give nor call evidence.
- [23] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.
- [24] In order to convict the accused of the offence of incest, I must be satisfied to the required standard of each of the following elements in respect of each of the 3 counts:
- a. that he had sexual intercourse (that is, as defined by section 161 of the Penal Code, penile penetration of the vagina) with Ereateiti;
 - b. that Ereateiti is his daughter, and he knew her to be his daughter.
- [25] The accused does not challenge the fact that Ereateiti is his daughter. He knew this to be so at all material times. The only question then is whether it can be proved beyond reasonable doubt that he had sexual intercourse with her on the 3 specified occasions.
- [26] I note that the fact that Ereateiti has pleaded guilty is of no consequence in this trial. Her guilty plea cannot be used as evidence of this accused's guilt.¹
- [27] The only evidence against the accused on counts 1 and 3 comes from Ereateiti. While there is no longer a requirement that I warn myself of the dangers of convicting on the evidence of an uncorroborated witness,² it is still the case that I must consider the evidence of Ereateiti very carefully. If, however, I find her to be a credible witness, then there is no difficulty in convicting the accused on these counts.
- [28] There is also the fact that, with respect to count 2, Ereateiti is an accomplice. It is not asserted that Ereateiti is an accomplice on counts 1 and 3. If there was a jury in this trial, section 12 of the Evidence Act would require me to warn that jury of the possible unreliability of the evidence of an accomplice. I should take great care in deciding whether or not to accept Ereateiti's evidence on count 2, and what weight it should be given. Perhaps she has sought to implicate the accused because she believes that, by giving evidence, she expects to be dealt

¹ *Burnett v R* (1994) 76 A Crim R 148

² Section 11, *Evidence Act* 2003

with more leniently. On the other hand, Ereateiti's account of the events giving rise to count 2 is potentially supported by the evidence of her uncle, Kannangaki.

- [29] This case rises or falls on my view of Ereateiti's evidence. Keeping in mind the matters discussed above, if I am satisfied that Ereateiti 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.
- [30] Ereateiti gave evidence with considerable difficulty. Her pregnancy is close to term, and she found it hard to get comfortable. She seemed very uneasy in the presence of the accused, and was determined not to look at him. Counsel for the accused points to these matters and submits that I should regard them as proof of Ereateiti's lack of credibility. I do not accept that submission.
- [31] I ultimately formed the view that Ereateiti was a credible witness. Under cross-examination, she could not be shaken on the core details of her allegations against the accused. She has clearly not had a normal childhood, and her relationship with her father has been grievously corrupted. She is immature for her age, and her unease in giving evidence is a reflection both of her immaturity, and of the incredibly embarrassing nature of the story she was telling.
- [32] Kannangaki was not the easiest of witnesses either, but I also consider him to be a credible witness. His evidence of seeing the accused having sexual intercourse with Ereateiti aligns with that of Ereateiti herself, without being so similar as to raise suspicions of collusion.
- [33] Weighing the totality of the evidence in this case, I am satisfied, beyond a reasonable doubt, of the following:
- a. the accused had sexual intercourse with Ereateiti at Temwaiku during the final school term of 2009 (count 1);
 - b. the accused had sexual intercourse with Ereateiti near the Ananau causeway in early 2015 (count 3);
 - c. the accused had sexual intercourse with Ereateiti at Betio in late 2015 (count 2).
- [34] I therefore find the accused guilty of each of the 3 counts of incest. He is convicted accordingly.
- [35] I will hear counsel as to sentence.


Lambourne J
 Judge of the High Court

