



HIGH COURT OF KIRIBATI

Criminal Case N° 1/2019

THE REPUBLIC

v

KABOKIA BWARANE

*Tewia Tawiita for the Republic
Reiati Temaua for the accused*

*Dates of hearing: 20-21 May 2019
Date of judgment: 27 May 2019*

JUDGMENT

- [1] Kabokia Bwarane is charged on information with 1 count of rape, contrary to section 128 of the *Penal Code* (Cap.67).¹ He has pleaded not guilty. He is charged on the same information with 2 counts of sexual intercourse with a family member, contrary to section 156(1) of the *Penal Code*, to which he has pleaded guilty. As those charges are not directly related to the allegation of rape, any further consideration of those matters has been put aside until the conclusion of the trial. I place no reliance on the accused's pleas of guilty in considering my verdict on the rape charge.
- [2] The complainant was the only prosecution witness. Special arrangements were put in place while she testified, without objection. The court was closed during her evidence, although a supporter from the Women's Crisis Centre was allowed to remain. Counsel for the prosecution also asked that a screen be erected between the accused and the complainant. As a screen was not immediately available, the request was denied. Counsel was reminded that such matters should properly be the subject of a pre-trial application, to ensure that the necessary arrangements can be made without the risk of delaying the trial.

¹ 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] The complainant is now 19 years old and is the niece of the accused; the accused and her father are brothers. For most of her life the complainant has lived with her family at Temwaiku. The accused lives on the same plot. In late 2015, sometime after she had finished her Form 3 exams, the complainant came to Betio with her grandmother. She was then aged 16. The purpose of the trip was to visit her father's cousin, Tamuera. The accused also happened to be staying with Tamuera at the time.
- [4] That evening, the accused asked the complainant to come with him to buy a movie. They would be joined by Tamuera's daughter, Rutieta, who was in her 20s. The complainant agreed. However, instead of getting a movie, the accused stopped at a house and bought a bucket of fermented yeast. He told the complainant that they were going to find somewhere to drink. It was about 10:00pm. The 3 of them walked to a place near the office of the Meteorological Service in Temakin. They sat on the ground and the accused offered the complainant a cup of fermented yeast. She was reluctant, as she had never drunk alcohol before. Rutieta assured her that the accused was 'modern', which the complainant took to mean that the accused would not care if she drank alcohol in front of him. She took the cup and drank from it. After that, she asked the accused to take her back to Tamuera's house. He said that they would leave when the bucket of fermented yeast was finished. The accused and Rutieta drank, and then the accused offered the cup to the complainant for a second time. She drank again. She then told the accused that she wanted to go back and sleep. He told her that she could sleep where she was. The complainant had 1 more cup of fermented yeast, then lay down and went to sleep.
- [5] The complainant was woken by the accused inserting his penis into her vagina. He had lifted up her skirt and pulled her underpants to the side. He had removed most of his clothes, and was wearing only boxer shorts. He was lying on top of her, thrusting into her. The complainant screamed, and the accused put his hand over her mouth. She was in pain, and kicked out at the accused in an attempt to get him off her. She told the accused that he was hurting her and begged him to stop. The complainant could not see Rutieta; it appeared that she had gone. The complainant told the accused that they should go back to Tamuera's house and finish having sex there. This was a ruse, but it succeeded in getting the accused to stop. He stood up and put his clothes back on.
- [6] The complainant walked back to Tamuera's house with the accused. As soon as they arrived, the complainant ran to where her grandmother was sleeping in the house and lay down next to her. The accused called to the complainant from outside the house, asking that she come and help him 'finish'. She did not respond and stayed where she was. She could not sleep, because she was

afraid of the accused. She was in pain, and there was a burning sensation in her vagina.

- [7] The next morning the complainant saw blood on her underpants and skirt. She confronted the accused and asked him why he had done that to her. He said that it had been his plan. He told her that he had seen blood on his penis and boxer shorts when he woke up that morning.
- [8] The complainant did not want to tell her grandmother what had happened because she thought that her grandmother would just confront the accused. She did not want that, as she did not know how the accused would respond. She knew the accused to be a trouble-maker, as she had seen him threaten her father with a bush knife. The accused had also assaulted her the year before, when he punched her in the face and pulled her hair after she had refused to allow him into the house when he was drunk. She complained to the police about that assault, but had later withdrawn the complaint at the urging of her parents.
- [9] The complainant testified that her fear of the accused kept her from telling anyone what he had done. It was only in 2018 that she eventually told her aunt what had happened, after which she was taken to the police to file a complaint.
- [10] Under cross-examination, the complainant denied that it had been her idea to buy fermented yeast that night, and rejected the suggestion that she knew that had been the plan when they left the house. When asked why, if she did not want to be with the accused and Rutieta, she had not returned to Tamuera's house, the complainant testified that she was afraid to go alone; it was dark and she did not know the way back. She had not wanted to drink the fermented yeast, but the accused had insisted. She denied that she had rejected 2 offers from the accused to take her back.
- [11] The complainant denied that she had initiated the intimacy. It was put to her that she had pulled the accused to her and kissed him. She denied it. She also rejected the suggestion that she had exposed her breast to the accused and asked him to suck it. She maintained that she did not consent to sex with the accused that night. The complainant said that, when she had tried to kick the accused, he was holding her too tightly for the kicks to have any impact. She rejected the suggestion that the reason she had not told anyone what had happened was because the intercourse had been consensual. The accused had told her not to tell anyone, and she feared the consequences if she did. She described the accused as "a tough guy". The complainant denied that anyone had forced her to complain to the police about the actions of the accused.

- [12] Counsel for the prosecution tendered (without objection from the defence) a record of the accused's interview with police on 9 September last year. It was explained to the accused that it had been alleged that he had had sexual intercourse with the complainant on a number of occasions. The accused admitted to having had sexual intercourse with her 3 times.² The specific allegations giving rise to the present charge were not put to the accused, nor was he asked whether the complainant consented to the sexual intercourse.
- [13] That brought the prosecution case to a close. 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*. Defence counsel advised that his client would be giving evidence, and no other witnesses would be called.
- [14] The accused is a 33-year-old resident of Temwaiku. He has worked on foreign fishing vessels since 2016. From late 2015 until April 2016 he was staying with Tamuera in Betio. He recalled a Friday during that period when the complainant came back from school and made a plan with Rutietta to go drinking. They asked him to go with them, as a sort of chaperone. It was agreed that the rest of the family would be told that they were going to a social night. The accused bought 20 cups of fermented yeast in a bucket and they went to the Meteorological Service compound. The accused served the drinks and all of them drank. After a while, the complainant said she wanted to sleep. She slept, and the accused and Rutietta kept drinking. The accused was quite drunk, and was listening to Rutietta. Suddenly she stopped talking and walked off. The accused went after her and asked where she was going. Rutietta said that she had somewhere else to go.
- [15] The accused returned to where the complainant was sleeping. He woke her up and told her that Rutietta had left and it was time for them to go. He was tapping the complainant on the leg. She grabbed his hand and told him to lie next to her. She needed time to regain her strength. The complainant then put her hand on his head and kissed him. He kissed her back. She lifted up her shirt and told him to suck her breast. He did so. She pulled up the lavalava she was wearing and asked the accused to perform oral sex. He did that too. She appeared to enjoy it.
- [16] The accused then asked the complainant if he could have sexual intercourse with her. She said, "That's no problem. Come on, get on top of me." When he

² The English translation of the record of interview is very poor. It often uses the word 'rape', and suggests that the accused admitted to having raped the complainant. It is clear from an analysis of the vernacular that the accused was never asked if he had raped the complainant, and he did not admit to having done so. The English translation was apparently prepared by the investigating police officer. Prosecuting counsel are reminded of the importance of ensuring the accuracy of any translation provided of a document in the vernacular. In my consideration of the case against the accused I place no reliance on the English translation of his record of interview.

inserted his penis into her vagina the complainant winced and screamed out in pain. She said, "It hurts." After a short time he withdrew his penis and lay next to the complainant. She cuddled up to him with her head on his shoulder. She touched his penis. They tried again to have sexual intercourse, with the complainant on top. This was also too painful for the complainant, so they resumed with him on top of her. The sexual intercourse did not continue for long. The accused was tired, so he lay on the ground next to the complainant. She told him that she loved him, and said that she would not tell anyone what had happened. After chatting for a while, the complainant said that they should return.

- [17] They put their clothes on and walked back to Tamuera's house. It was late and everyone was asleep. The accused told the complainant to sneak into the house and go to sleep. He slept on the *buia*. Early the next morning the complainant woke him and asked him to fetch her water so she could bathe. He did that and went back to sleep.
- [18] The accused asserted that all sexual acts with the complainant had been with her consent.
- [19] In cross-examination, the accused admitted that he had been married 3 times before, although he was not married when he was staying with Tamuera. He had 1 child with his first wife.
- [20] The accused said that the sexual intercourse at the Meteorological Service compound did not happen in 2015, rather, it had occurred in April 2016, when the complainant was in Form 4 at William Goward Memorial College. He was sure of that because he had been due to leave to work overseas at the end of that month. He denied having sexual intercourse with the complainant in 2015. He maintained that the version of events set out by the complainant in her evidence was not true. He denied that she had struggled or tried to kick him. The sexual intercourse had happened at the complainant's insistence; she had seduced him and he had responded.
- [21] That brought the defence case to a close.
- [22] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. His evidence is to be assessed like the evidence of any other witness. Even if I reject his evidence, I still need to be satisfied beyond reasonable doubt of the prosecution case before the accused can be convicted. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.

- [23] In order to convict the accused of the offence of rape, I must be satisfied to the required standard of each of the following elements (from section 128 of the *Penal Code*):
- a. the accused had sexual intercourse (that is, as defined by section 161 of the *Penal Code*, penile penetration of the vagina) with the complainant;
 - b. she did not consent to the sexual intercourse;
 - c. alternatively, if she did consent, that consent was obtained by force, by means of threats or intimidation, by fear of bodily harm, by means of false representations as to the nature of the act, or by the accused impersonating her husband.
- [24] There is no dispute that the accused had sexual intercourse with the complainant. On the prosecution case the complainant did not consent to the sexual intercourse, while the accused maintains that it occurred with the complainant's consent. Counsel for the accused submits that the evidence of the complainant should not be accepted; that it was inherently unbelievable.
- [25] Assessment of the evidence is not a competition between the complainant and the accused, nor is it a balancing act, but it is necessary for me to make a finding as to the complainant's credibility. The prosecution case rises or falls on my view of her evidence. While it is no longer a requirement that I warn myself of the dangers of convicting on a complainant's uncorroborated testimony,³ it is still the case that I must consider her evidence very carefully. However, if I find her to be a credible witness, then it is open to me to convict the accused, even on the evidence of a single witness.
- [26] I referred earlier to the special arrangements that were in place while the complainant gave evidence. I have not drawn any adverse inference against the accused, nor have I placed any extra or undue weight on the evidence of the complainant because of these arrangements.
- [27] I carefully observed the complainant as she testified, and I found her to be an impressive and credible witness. She remained consistent in her account of the night in question and was not shaken under cross-examination. While the accused need not satisfy me of anything, I do not accept the evidence he gave to the Court. I find the suggestion that an inexperienced 16-year-old girl would seduce someone who was not only twice her age, but also her father's brother, to be implausible at best. When considered in light of the accused's assault of the complainant the year before (the evidence of which went unchallenged), it becomes simply unbelievable. Where the accounts of the

³ Section 11, Evidence Act 2003.

complainant and the accused differ, I accept the complainant's evidence and reject that of the accused.

[28] Having considered the evidence before me, I am satisfied beyond reasonable doubt that the complainant did not consent to sexual intercourse with the accused. There is no suggestion that the accused somehow mistakenly believed that the complainant consented but, even if he had been so mistaken, given the facts as I have found them to be, there is no way that it was reasonable for him to hold such a belief. I find the accused guilty of the offence of rape and he is convicted accordingly.

[29] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court

