



HIGH COURT OF KIRIBATI

Criminal Case N° 20/2017

THE REPUBLIC

v

TEIORA MWAIO

*Teanneki Nemta for the Republic
Reiati Temaua for the accused*

*Dates of hearing: 29-30 July 2019
Date of judgment: 16 August 2019*

JUDGMENT

- [1] Teiora Mwaio is charged on information with 1 count of rape, contrary to section 128 of the *Penal Code* (Cap.67).¹ The offence is alleged to have been committed on 9 August 2015, at Taborio village on South Tarawa.
- [2] An information was filed in this matter on 11 January 2017. On 31 August 2018 the Chief Justice dismissed the information on the ground that it did not comply with section 70 of the *Criminal Procedure Code* (Cap.17). Perhaps in anticipation of that finding, the Attorney-General filed a fresh information on 13 August 2018. Save for some minor amendments that were made without objection on the first morning, the trial proceeded on that information.
- [3] The complainant was the only prosecution witness. She testified that she believed herself to be now aged 18 years. On the day in question, when she would have been 14 years old, the complainant was at the house of one Tebao in Taborio village. She had been there since the previous evening, drinking fermented yeast with Tebao, her boyfriend Rubi and the accused. She had not known the accused prior to that evening.
- [4] The complainant estimated that the drinking session ended close to 4:00am, by which time she had consumed perhaps 20 cups of fermented yeast. She

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).

considered that she was drunk, but still quite capable. She and Rubi retired to a room built under a nearby *buia*, where they had sexual intercourse. The complainant was a willing participant. She then went to sleep. She was naked. The complainant woke sometime later to find the accused on top of her. He had inserted his penis into her vagina and was thrusting his hips.

- [5] At first the complainant thought that it was Rubi on top of her; when she realised that it was the accused and not her boyfriend, she pushed him away. The accused stood up, and then went out to the well. The complainant put on her clothes and left. As she walked away she said to the accused that he and Rubi were ganging up on her.
- [6] The complainant went to the house of her sister and told her what had happened. Her sister encouraged her to report the matter to the police, which she did.
- [7] Quite some time later, perhaps in 2017, the accused and his wife came to the complainant's house. The complainant was aware that the accused's case was to be mentioned in court the next day, and she assumed that he wanted to offer a customary apology. She told her sister not to accept any apology and left the house without speaking to the accused.
- [8] Under cross-examination, the complainant agreed that the accused and Rubi were of different builds. At first, she had not noticed that the person on top of her was heavier than Rubi, as he was using his arms to support his weight. When the complainant moved to cuddle him she realised that it was not her boyfriend. She looked at the man on top of her and recognised the accused. She pushed him away.
- [9] The complainant conceded that she neither screamed nor called out for help. She said that she had been afraid that the accused might hurt her if she did. After the accused stood up, and as he was walking away, the complainant saw Rubi sitting close by. He had his back to her, but was looking at her over his shoulder. She thought that, if Rubi had been watching the accused have sexual intercourse with her, the 2 of them must have colluded, which is why she had made the remark to the accused as she left. The complainant rejected the suggestion that she had pushed the accused away only when she realised that Rubi could see them. She denied that she was ashamed to have been caught by her boyfriend having sex with another man.
- [10] The complainant was adamant that she had fallen asleep after having sex with Rubi, and was still asleep when the accused first inserted his penis into her vagina. She was not sure how long she had been asleep – it may have been only a matter of minutes – but dawn was breaking by the time she woke to find the accused on top of her.

- [11] It was put to the complainant that, only minutes after having had sexual intercourse with Rubi, and without falling asleep, she had willingly engaged in sexual intercourse with the accused. The complainant maintained that the accused had started having sexual intercourse with her when she was asleep and she had not consented to anything the accused did to her.
- [12] The complainant rejected the suggestion that she had been forced to lodge her complaint with the police. She agreed that she had not been medically examined after making her statement.
- [13] That brought the prosecution case to a close. I 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*. Counsel for the accused advised that his client would not be giving evidence, nor would he be calling any witnesses.
- [14] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. The accused has exercised his right not to give or call evidence. He is not bound to give or to call evidence. He is entitled to insist that the prosecution prove the case against him, if it can. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged. The fact that the accused did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the prosecution case. It proves nothing at all, and cannot be considered when deciding whether the prosecution has proved its case to the required standard. It does not change the fact that the prosecution retains the responsibility to prove the guilt of the accused beyond reasonable doubt.
- [15] 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:
- 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. the complainant 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.
- [16] It is not disputed that the accused had sexual intercourse with the complainant. On the prosecution case the complainant did not consent to the sexual intercourse, as she was asleep. It is rape for a man to have sexual intercourse with a woman who he knows to be asleep.² The defence case, as

² *R v Mayers* (1872) 12 Cox CC 311, *R v Young* (1878) 14 Cox CC 114.

put to the complainant, was that she was awake when the sexual intercourse occurred, and the act was consensual. Counsel for the accused submits that the complainant should not be believed when she says that she was asleep when penetration occurred. He further submits that the absence of any injury to the complainant suggests that she consented to sexual intercourse.

[17] Assessment of the evidence is not a competition between the complainant and the accused, 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.

[18] I observed the complainant closely as she testified, and I found her to be an impressive and credible witness. She remained consistent in her account of the incident and was not shaken in cross-examination. I reject the suggestion that the absence of injuries should give me cause to doubt the complainant – not all victims of rape sustain injuries, and it is certainly not an element of the offence. Given that the complainant had only a short time before engaged in consensual sexual intercourse, it is perhaps unsurprising that the actions of the accused, even though uninvited, did not cause her any injury. I accept the evidence of the complainant.

[19] Having carefully considered the evidence before me, I am satisfied beyond reasonable doubt that the complainant was asleep when the accused got on top of her and inserted his penis into her vagina. The complainant could not have consented to sexual intercourse with the accused. I am satisfied that the accused knew that she was asleep, and that she could not consent. Given the fact that the initial penetration was without the complainant's consent, it is irrelevant that she was initially mistaken in thinking that the man who was on top of her when she woke up was her boyfriend.

[20] I am satisfied of the guilt of the accused on the charge of rape beyond reasonable doubt. I find the accused guilty and he is convicted accordingly.

[21] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court



The seal of the High Court of Kiribati is circular with a red border. The outer ring contains the text 'HIGH COURT OF KIRIBATI' at the top and 'TE KŌMI AE E RIETATA I KIRIBATI' at the bottom. The center features a red shield with a white sun, a white wave, and a white bird.

³ Section 11, *Evidence Act* 2003.