HIGH COURT OF KIRIBATI

Criminal Case № 45/2017

THE REPUBLIC

v

AMBEROTI TAWANGA

Pauline Beiatau, Director of Public Prosecutions, for the Republic
Raweita Beniata for the accused

Date of ruling: 15 February 2019

RULING ON FACTUAL MATTERS

[1] Amberoti Tawanga has pleaded guilty to 1 charge of defilement of a girl under the age of 13 years, contrary to section 134(1) of the *Penal Code*.

[2] Counsel have informed the Court that they are unable to agree on the factual basis for the sentencing of the prisoner. What is agreed is that, in 2016, the prisoner, who is the complainant's step-father, had sexual intercourse with the complainant, who was aged 11 or 12 at the time. It is agreed that the sexual intercourse occurred at the family home in Nooto, North Tarawa.

[3] The prosecution asserts the following matters as having occurred in the course of the commission of the offence, none of which are accepted by the prisoner:

a. the prisoner slapped the complainant;

b. the complainant resisted the prisoner;

c. the prisoner bound the complainant's arms and legs and gagged her with a piece of cloth;

d. the prisoner threatened to kill the complainant if she told anyone what had happened.

[4] The prisoner maintains that no violence was used, that the complainant was not bound and gagged and that no threats were made. On the prisoner's version of events, the complainant was a willing participant in the sexual intercourse.

[5] The prosecution further asserts that the sexual intercourse occurred on a date unknown between 1 July 2016 and 12 December 2016, whereas the prisoner maintains that sexual intercourse occurred on 12 December. The difference is significant because the prosecution alleges that the prisoner is the father of the complainant's child, born in March 2017, and therefore conceived in mid-2016.

[6] As these matters are of significance in the determination of an appropriate sentence for the prisoner, the disputed facts must be resolved. Section 269 of the *Criminal Procedure Code* (Cap.17) provides as follows:

> The court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed.

[7] Where, in the course of submissions on sentence, an asserted fact is disputed, or the sentencing judge is not prepared to act on the assertion, the judge:

> may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.[1]

[8] In the case before me, as each of the matters in dispute (if proved) is likely to result in an increased sentence for the prisoner, the onus rests with the prosecution to prove these matters beyond reasonable doubt.

[9] Two witnesses were called by counsel for the prosecution – the complainant and her grandmother. The complainant testified that, in 2016, she was living with her mother and the prisoner in Nooto. Also living there were 2 younger siblings. Her grandmother lived in another house on the same plot of land.

[10] The complainant testified that, in 2016, she was in Class 5 at primary school. She said that there were many occasions in that year when the prisoner had sexual intercourse with her. She was asked to describe the first of those occasions, which had been particularised as the subject of the charge before the Court. The complainant said that she was in the family's brick house, which was comprised of a single large room, half of which had a cement floor, with the rest unfinished. It was night-time, sometime in July or August. She was putting her siblings to bed. It was just the 3 of them. The complainant's mother was at the *mwaneaba* to play bingo, and the prisoner had gone to drink kava.

[11] The complainant was inside the mosquito net with her siblings, who were asleep. There was some light from 3 kerosene bottle lamps. She heard the prisoner calling to her from outside. She did not respond. The prisoner entered the house.

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1 *R* v *Storey* [1998] 1 VR 359 at 369, adopted by the High Court of Australia in *R* v *Olbrich* (1999) 73 ALJR 1550, at [27]. See also *Republic* v *Tauati Tiaon* [2005] KIHC 164 and *R* v *Morrison* [1999] 1 Qd R 397, at 422.

He looked intoxicated from the kava. The prisoner went to the complainant and slapped her on the right side of her head. He took her out of the mosquito net and told her to remove her clothing. They went to the other end of the house, where there was no floor. The complainant did not remove her clothes, and was looking for a way to escape. The prisoner locked the door.

[12] The complainant called for help. The prisoner put his hand over her mouth and then gagged her by tying a piece of cloth around her head. The prisoner then tied a piece of cloth around one of the complainant's wrists. He removed her t-shirt and singlet. The prisoner then bound her wrists together, crossed over each other. He removed the complainant's shorts and underpants, then tied 1 end of a lavalava around her ankle, and the other end of the lavalava around the other ankle. The prisoner lay the complainant down on the ground. She was completely naked. The prisoner was also naked by this time. He then had sexual intercourse with the complainant. To the complainant it seemed that the sexual intercourse lasted a long time, maybe an hour. She does not know whether the prisoner ejaculated or not. When he was finished he got up and untied the complainant's wrists and ankles. The prisoner said to her that he would kill her if she told anyone what had happened.

[13] The complainant noticed blood in her underpants the next morning. She had never had sexual intercourse before. Her vagina was sore for about a day afterwards. She experienced some pain in her wrists, but there was no bruising. The complainant testified that she had no opportunity to tell her mother what the prisoner had done because it seemed that he was always around. She was too afraid of the prisoner to tell anyone at the clinic in Nooto.

[14] Some 3 or 4 days later, the complainant attempted to tell her grandmother about what had happened. Her grandmother appeared to be unwilling to listen, and told the complainant that she was "talking rubbish". The complainant thought that perhaps it was because her grandmother is hard of hearing. In any event, the prisoner approached, so she did not persist.

[15] A day or 2 after that conversation, the prisoner again had sexual intercourse with the complainant. From then until December 2016 the prisoner had intercourse with her on many occasions; almost every night, or every other night. In early January 2017, the complainant's mother noticed that her abdomen was swollen and brought her to South Tarawa for a medical check-up. She was 6 months' pregnant. The complainant had no idea. She gave birth to a son in March 2017. She had never had sexual intercourse with anyone else. The prisoner must be the father of her child.

[16] The complainant maintained her version of events in the face of quite robust cross-examination from counsel for the prisoner. She rejected the suggestions that she neither struggled nor called for help. The complainant explained that her

grandmother's house, while on the same plot, was some distance away, which is why her calls for help went unanswered.

[17] The following version of events, which broadly accords with the version given by the prisoner to police when interviewed under caution on 11 January 2017, was put to the complainant:

a. the prisoner only had sexual intercourse with her on one occasion, on 12 December 2016;

b. it occurred inside the house, during the daytime, with no one else present;

c. the prisoner had just returned from fishing, and the others were eating outside;

d. she and the prisoner were playing a wrestling game, that led to sexual intercourse, in which she was a willing participant.

The complainant rejected each proposition.

[18] It was put to the complainant that, in her statement to police dated 10 January 2017, she had only mentioned a single act of sexual intercourse, described as having occurred on 12 December 2016. She accepted that that was what she had told the police. With regard to the date of the offending, the complainant said that she had been confused about the dates. She said, "That was just a date I gave them." She insisted that, despite what she had told the police, the first instance of sexual intercourse with the prisoner had occurred in July or August of 2016. The police had not asked her about any other occasions on which the prisoner had had sexual intercourse with her. The complainant's statement to police was tendered and, other than the date of the offence, the version of events given to police closely matched her evidence in court.

[19] The other prosecution witness was the complainant's grandmother. She said that she recalled a time in 2016 when the complainant had come to her to talk about something. The grandmother testified that she did not really hear what the complainant was saying. She scolded the complainant and told her to do her chores. The grandmother said that this was perhaps 5 months before the complainant was brought to South Tarawa and it was discovered that she was pregnant. Under cross-examination she conceded that she had told the police that the complainant had come to her in December 2016, but she had forgotten the month.

[20] The prisoner elected not to give evidence, and he called no witnesses. Given that the burden of establishing the facts in dispute rests on the prosecution, nothing should be inferred from his decision not to testify.

[21] Counsel for the prisoner submits that I should have difficulty in accepting the complainant as a credible witness, particularly in light of the inconsistencies surrounding the date of the offence.

[22] Counsel referred me to the case of *Republic* v *Atantaake Iaokiri*.[2] That case is of no application here. It concerned a trial for an offence of indecent assault committed before commencement of the *Evidence Act* 2003, which removed the requirement that a warning be given before convicting on the uncorroborated evidence of a single witness. In any event, this is not a trial, it is a contested plea. While I must scrutinise the complainant's evidence very closely, there is no requirement that I warn myself before acting on her uncorroborated testimony.

[23] Put at its highest, the evidence of the complainant's grandmother was of little consequence, and I do not rely on it. The prosecution's assertions as to the circumstances of the prisoner's offending therefore depend on my findings as to the complainant's credibility. If I am satisfied that she is telling the truth, then I can proceed to sentence the prisoner on the basis of her version of events.

[24] I do not accept the submissions of counsel for the prisoner that the complainant's mis-statements to police should cause me to doubt the rest of her evidence. In court, the complainant came across as a young and immature girl. She would have been more so 2 years ago when she gave her statement. At the time she had just learned that she was pregnant, and it is easy to see how she would have been overwhelmed by all that was happening. Coupled with the inadequacies of the police investigation, which seemingly failed to appreciate the significance of the then 12-year-old complainant's pregnancy, I am not surprised that there are inconsistencies. I am satisfied that the complainant was telling the truth, and that the prosecution has met its obligation to establish its asserted facts beyond reasonable doubt.

[25] To be clear, I will sentence the prisoner on the basis that the following occurred in the course of the commission of the offence:

a. the prisoner slapped the complainant;

b. the complainant resisted the prisoner;

c. the prisoner bound the complainant's arms and legs and gagged her with a piece of cloth;

d. the prisoner threatened to kill the complainant if she told anyone what had happened.

[26] However, given the complainant's evidence that sexual intercourse occurred on many occasions after the events giving rise to the charge before me, I cannot be satisfied that her pregnancy resulted from that particular act of sexual

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[2] [2004] KIHC 142.

intercourse. The prisoner has not been charged with respect to any other acts of sexual intercourse, and I cannot, in sentencing him for this offence, have regard to those other allegations. While I have no doubt that the prisoner is the father of the complainant's child, I cannot take that into account when sentencing him.

[27] I will hear further submissions from counsel as to the appropriate sentence for the prisoner in light of my findings.

Lambourne J
Judge of the High Court