High Court Criminal Case 1/86

Betio
30th May 1986

THE REPUBLIC
versus
TIIN MATIA

JUDGMENT

The accused stands charged with Rape contrary to section 128 of the Penal Code or in the alternative Defilement contrary to section 134 of the Penal Code. The offence is alleged to have been committed at Tanaeang village Tabnorth on 27 July, 1985 when it is alleged that he had sexual intercourse with Nei Akata Kabiri a young girl said to be under the age of 13 years.

It is for the prosecution to prove the charge against the accused beyond a reasonable doubt and as a matter of practice and law some corroborative evidence of the unsworn evidence of Nei Akata is required.

Nei Akata is a very young girl and she is blind.

The accused is a young man and he is deaf and has a number of other physical defects.

Nei Akata who was examined on a voire dire gave her evidence unsworn. She said that the accused called her from where she was playing with her friends, lifted her up onto the platform of a house and had sexual intercourse with her. She gave her evidence very well.

The other witness was as to the age of the small girl. Dr Kautu PW6 assessed her age at between 6 or 7. I have no doubt that is a correct assessment and having seen her, I have no real doubt that she is under 13 years.

While I might in an older girl be prepared to accept that she had intercourse with the accused on her own evidence clearly I cannot do that here. I very much doubt if she knows what sexual intercourse is. Corroboration is vital as a matter of law and in any event of practice since she gave her evidence unsworn.

Accused was asked a number of questions by the police. Communication with him must have been most difficult. He is very slow and possibly simple minded. The first 8 of these were introductory but placed the accused in Aukitino's house at Tanaeang which is where Nei Akata said the offence took place. Question 14 agrees that Nei Akata knows the accuseds voice and Question 16 that he saw Nei Akata playing. In Question 19 he admitted calling Nei Akata and leading her to Aukitino's house, and onto the raised platform where there was a mattress.

In Q.31 he was asked if he had sexual intercourse with Nei Akata and he denied it. He denied doing anything to her vagina but when it was suggested that he might have done something between her legs, he agreed that he had. He agreed to getting on top of her but denied putting his penis into her and between her legs. (Q.38).

In Q.42 he admitted he had an ejaculation while he was on top of Nei Akata which stained his clothes.

However in Q.44 he changed his story completely and said that he penetrated Nei Akata completely but denied that there was any blood from her vagina.

The accused admitted to the police that he had never had sexual intercourse with a woman before.

The detailed and specific questions which the police asked the accused were designed to find out exactly what the accused did to Nei Akata and in that respect they failed. The accused may well have though that he was having intercourse with Nei Akata but that is not proof that he did so, although the girl's hymen was missing. Accused's statement is contradictory and unsatisfactory. It is in my view only safe to accept that he climbed on top of the girl and some sort of sexual activity took place between them but I do not think penetration is proved.

In Q.51 he says his sperm poured into her vagina. But PW1 who examined her did not mention any sperm. No evidence as to how long after the incident the examination took place has been given. When examined this very young girl did not seem to have any injuries.

One of the little girls PW3 gave evidence that clearly established that accused and Nei Akata were together in the afternoon about 1500 at Aukitino's house. The accused elected to say nothing and to call no witnesses. The onus is upon the prosecution to prove the charge beyond a reasonable doubt. In view of the accused's difficulties in hearing and his slowness of mental approach it must have been very difficult for the police officer to take any statement from him. I am satisfied beyond reasonable doubt that when interogating the accused the police officer was trying to find out what happened. It is for that reason he put so many varied possibilities to the accused.

The answers which the accused gave must be treated with caution both because of this and because of the accuseds mental state. This does not render them totally ineffective but require them to be viewed with great caution.

The prosecution must prove on a charge of rape that there was penetration without the girls consent. While there is proof by way of inference that she did not consent there is no direct evidence on the point.

As to penetration Nei Akata claims that the accused had sexual intercourse with her. She is a very young girl and we must ask how she knows this. She may think that the accused had full sexual intercourse with her but could any court be sure of that? The medical evidence is that she is no longer a virgin but when she lost her virginity is not directly in evidence.

Nei Akata gave her evidence unsworn. It has been argued that as a matter of law she does not need to be corroborated. I respectfully beg to differ. I can see no merit in the submission of the State Advocate and find difficulty in understanding some of them.

The Children and Young Persons Act of 1933 Law required corroboration of a childs unsworn evidence as a matter of law.

This was the view adopted by Quinn Chief Justice in Regina v Ientaake T. 1978 GILR 22. I respectfully agree with it. It is suggested that because the Criminal Procedure Code does not provide for this in section 134 and it is a matter of procedure, therefore the requirement of law as to corroboration does not apply.

I do not agree that corroboration is a matter of procedure in the case of children. It is a matter of law and evidence. I cannot see that failure to deal with it in the Criminal Procedure Code or elsewhere in the local law affects the issue. This is nothing inconsistent with the requirement of corroboration as a matter of law under section 38 of the Children and Young Persons Act 1933 and as indicated above Quinn Chief Justice has followed it. I elect to do likewise.

It is also argued that the Children and Young Persons Act 1933 is not a statute of General Application. It is trite law that the United Kingdom Parliament is able to legislate so as to apply its legislation to all its colonies. There is nothing in the Children and Young Persons Act 1933 to indicate that it is to apply to England only. I therefore hold it to be a statute of General Application which still applies in Kiribati. Corroboration of Nei Akatas evidence is required both as a matter of law and practice.

On the rape and defilement charges no such corroboration is available unless the accuseds police statement is relied on.

For reasons which are set out above I decline to accept it as corroboration for penetration and I am not satisfied beyond a reasonable doubt that the prosecution have proved either rape and defilement to the required standard.

It is I think safe to accept the evidence of the accuseds statement in general. Clearly he had some sexual connection with Nei Akata which involved his lying on top of her and achieving sexual satisfaction. This would amount to an indecent assault as she is too young to consent to it.

On a charge of rape by virtue of Section 164 of the ~~General~~ Criminal Procedure Code it is open to the court to convict of indecent assault. The accused is found not guilty of rape or defilement but guilty of indecent assault and convicted contrary to section ~~133(1)~~ of the Penal Code.

HIGH COURT OF KIRIBATI

R. G. TOPPING
Judge