IN THE HIGH COURT OF KIRIBATI)
CRIMINAL JURISDICTION)
HELD AT BETIO)
REPUBLIC OF KIRIBATI)

HIGH COURT CRIMINAL CASE NO. 35 OF 2004

THE REPUBLIC
VS
KIAN TOKIA

FOR THE REPUBLIC: MS EVEATA MAATA
FOR THE ACCUSED: MR BANUERA BERINA

DATE OF HEARING: 31 MAY 2004

REASONS FOR SENTENCE

Last Thursday I found the accused guilty of driving without due care. The Republic asked that submissions on sentence be delayed until Friday. Ms Maata wanted to draw my attention to a recent English authority to the effect that in fixing penalty the consequences of the careless driving should now be taken into account. It is the Court of Appeal decision in *Derek Simmonds* ((1999) 2 Cr App R 18). The Court of Appeal decided that the principle enunciated in Krawec ((1984) 6 Cr App R (S) 367 @ 369) is no longer the law. That principle:

> ....the unforeseen and unexpected results of the carelessness are not in themselves relevant to penalty. The primary considerations are the quality of the driving, the extent to which the appellant on the particular occasion fell below the standard of the reasonably competent driver; in other words the degree of carelessness and culpability (quoted in Simmonds @ 20).

The Court of Appeal said that "the statutory context" in which Krawec was decided has been changed: "the current statutory framework is wholly different": the UK Parliament has now made it clear that the consequences of the driving should be taken into account in fixing penalty.

Krawec was decided within a statutory framework of offences of causing death by reckless driving, reckless driving and careless driving. The framework in the Kiribati Traffic Act 2002 is quite similar to the previous UK framework in which Krawec was decided: our offences are described as dangerous driving, negligent driving and careless driving. Given the differences between the present Kiribati Act and UK Act and the similarity between the present Kiribati Act and the previous UK Act, Simmonds may not be relevant in Kiribati. The old principle enunciated in Krawec of not taking the consequences of the driving into account is still good law in Kiribati.

However Parliament has provided in the *Traffic Act2002*, by a combination of section 56(1)(a) and the definition in section 4 of "serious traffic offence" that for an offence involving a motor vehicle leading to the death or injury of a person the Court must disqualify the offender from holding a driver's licence for not less than five years.

An example of mandatory sentencing.

I venture two comments. First, that the minimum disqualification of five years would be regarded in many jurisdictions as severe. Secondly, that even the slightest injury to a person caused in an accident following which a person is found guilty of a traffic offence, be it a dangerous driving, negligent driving or careless driving, means a loss of licence for at least five years. I suggest that in some cases this is a very severe penalty indeed. I point out that it is <u>any</u> injury: the slightest injury is enough to lead to a five year suspension. Parliament has given the courts no discretion at all.

Whether this was realised I do not know but I now bring it to the attention of Parliament in case Parliament may care to reconsider the mandatory disqualification of five years at least in the case of an injury, however slight. By inserting the word "serious" before the word "injury" in section 56(1)(a) the courts would be given a discretion as to disqualification of licence where the injury could not be regarded as serious.

naked on top of Kotiku and told her to tell it to her husband. She did. They left.

There are two points in the trial. The first is whether, if the accused did get naked on top of Kotiku, it was an attempted rape. No evidence of erection: no removal or a demand for a removal of the woman's clothes: no other action but pinning her down by her arms. The Director of Public Prosecutions said there need not be an erection to prove an attempt. She knows of authority to that effect. Perhaps in some circumstances. There was no evidence of an erection or of no erection. An erection could have been an indication of intention. As the evidence has come out, there is no indication of an intention to rape. Ms Tebao relies on the accused having taken off his shorts, being naked. Perhaps that together with his being on top of the woman shews an intention to commit some indecency but not necessarily an intention to rape. His actions may have been an indecent assault, no more.

The second even more difficult point for the prosecution is whether there has been proof beyond reasonable doubt that the incident happened at all.

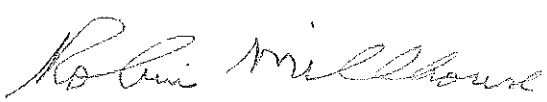
Mr Berina reminded me that it is said to have happened in broad daylight, no screens down round the buia. I remember Nei Kotiku saying there were children on the buia. Is it likely that in these circumstances a man would act as the accused is said to have acted?

"Far fetched" was Ms Tebao's description of the accused's story. In Kiribati custom, sexual intercourse with a relative is a very bad thing and this is what the accused would be admitting. Certainly it would be a bizarre way of getting rid of unwanted house guests.

The accused does not have to prove anything. I have to be satisfied of guilt beyond reasonable doubt on the whole of the evidence. I cannot be satisfied that the prosecution has proved the case beyond reasonable doubt. I have a reasonable doubt that the incident happened at all.

The accused is not guilty of attempted rape.

Dated the 7th day of July 2004



THE HON ROBIN MILLHOUSE QC
Chief Justice

In the present case I fined the accused $200 and suspended his licence for five years.

Dated the 7th day of June 2004

THE HON ROBIN MILLHOUSE QC
Chief Justice