HIGH COURT OF KIRIBATI

Criminal Case № 61/2016

THE REPUBLIC

v

TABANGA KAIETARO

Pauline Beiatau, Director of Public Prosecutions, for the Republic
Ryan West for the accused

Dates of hearing: 11-12 February 2019
Date of judgment: 15 February 2019

JUDGMENT

[1] The accused has pleaded not guilty to the following offences under the *Penal Code* (Cap.67): 1 count of attempted rape (section 130); 1 count of criminal trespass (section 182(2)); and 1 count of unlawful wounding (section 223).

[2] An information was originally filed in this case on 13 May 2016. That information was defective in that it failed to comply with section 70 of the *Criminal Procedure Code* (Cap.17). On 27 September 2018 the Attorney-General rectified the defect by filing a fresh information, signed by her.

[3] Counsel for the prosecution called only 2 witnesses. The first of these was the complainant, Nei Tirite Irooti, aged 38. Tirite is a nurse. In May 2013 she was posted to Tabiteuea North, to work at the clinic in Tanaeang village. She arrived on the island on 22 May and was staying with her husband, who was a teacher in Terikiai village. At that time they had 1 child, a daughter aged 7 years. The house in Terikiai had walls made from the midrib of coconut fronds. It had a door. The interior of the house was a single room, half of which had a raised floor.

[4] Before midnight on the evening of 24 May, Tirite was lying on the raised floor with her daughter. Her husband had gone to drink kava. She was about to go to sleep when she became aware that someone had climbed onto the raised floor and was lying next to her. Tirite assumed that it was her husband, returned from the kava session. She turned towards the person beside her, and her hand touched the person's head. She was surprised to find that it was a head with hair, whereas her husband was bald.

[5] Tirite jumped up and shouted, "Who is it?" The intruder held a knife to her throat and said, "It's Tabanga. Don't make a noise." She was afraid because of the knife, which she described as small, like a toddy knife. Tirite knew the accused, who lived nearby. She had had numerous dealings with him between 2010 and early 2012, while she had been posted to the clinic at Buota village. She thought that she recognised the intruder's voice as being the voice of the accused. It was dark inside the house, with only moonlight filtering through the cracks in the walls, so she was not sure.

[6] Tirite tried to think of how she might escape. She told the intruder that she needed to urinate, in the hope that, once outside, she could run to get help, but he refused to let her go. She wanted to keep the intruder talking, so Tirite asked if her husband had done something wrong. The intruder told her that he wanted to have sexual intercourse with her. He asked her to take off her clothes. Tirite asked him why he was doing this to her and he said that he loved her. She told him that, if that was the case, they would have to go to his house and settle together as husband and wife. The conversation seemed to last a long time, more than 5 minutes.

[7] Tirite got down from the raised floor. The intruder told her to wait for him. She was close to the door by now, so she opened it, hoping to run away. The intruder grabbed her by the shirt and pulled her back. Tirite turned to face the intruder and she could now see him clearly in the light from the nearby *buia* that was shining through the doorway. It was the accused, and he was holding the knife in his right hand, raised over her. He was not wearing a shirt, and Tirite thought that he was naked, although he was holding a lavalava. She grabbed the blade of the knife with her right hand and called out, "Help me! I'm dying!" They struggled, and Tirite fell down. She got to her feet and managed to get out of the house. She ran next door, to the house of Marea and Nei Beia. Marea went over to Tirite's house to get the child, while Tirite told Beia what had happened. She had a cut to the palm of her right hand, from when she had grabbed the blade of the accused's knife. She noticed a cut to the top of her left foot, like a puncture wound, but she had no idea what had caused that. She had had no injuries before the struggle with the accused. Tirite went to the clinic and was taken from there by ambulance to the hospital.

[8] Under cross-examination, Tirite agreed that she had told the police, in her statement made soon after the incident, that she had been asleep when the intruder entered the house. She accepted that she was now not sure whether she had been asleep at the time or not. Tirite insisted that she had recognised the voice of the accused, and that her identification of him had been confirmed when the door opened and she could see him by the light from the *buia*. She rejected the suggestion that the intruder was not the accused, although she agreed that it had been more than a year before the incident that she had last seen the accused. Tirite accepted that her interactions with the accused at the clinic in Buota had all been relatively brief.

[9] At the conclusion of Tirite's evidence, counsel for the prosecution applied under section 241 of the *Criminal Procedure Code* to amend the information, to add a charge of indecent assault as an alternative to count 1 (attempted rape). Counsel for the prosecution conceded that, given the evidence of the complainant, it may be difficult to prove the attempted rape charge. In the absence of a statutory alternative to attempted rape, there was a possibility that the accused's conduct could go unpunished.

[10] The application was vigorously resisted by counsel for the accused. Counsel raised 2 objections, the first being that section 241 only permitted amendment of the information to cure a formal defect, and the issue raised by counsel for the prosecution did not amount to such a defect. He also objected on the ground that the accused would be significantly prejudiced if the court allowed the application. Counsel argued that he had committed to a particular strategy, and structured his cross-examination accordingly, to meet the charge of attempted rape. Any prejudice could not be cured by recalling the complainant. Counsel pointed out that he had written to counsel for the prosecution some weeks previously, identifying what he considered to be a weakness in her case with respect to count 1 on the information. Counsel for the prosecution acknowledged that Tirite had testified in accordance with her statement to police. Counsel had not been taken by surprise by anything that the complainant had said in evidence.

[11] I rejected the application to amend. It was unnecessary for me to rule on the first ground of the objection raised by counsel for the accused. I was satisfied that allowing the amendment would be unacceptably prejudicial to the accused. It was significant that counsel for the prosecution had elected to lay a charge of attempted rape without an alternative, knowing what the complainant would say, and having been told by counsel for the accused before the start of the trial that such a course was problematic. Having herself committed to that strategy, I was not prepared to allow an amendment to the information after the bulk of the evidence in the trial had been given. The trial continued.

[12] The second and final prosecution witness was Nei Beia Teiwaki, Tirite's next-door neighbour on the night of the incident. She is a 43-year-old teacher. On the night of 24 May 2013, Beia was at home in Terikiai village with her husband, Marea. It was late, but not yet midnight. She heard Tirite calling out, "Marea, help me!" Not long after that, Tirite arrived at Beia's house. She seemed afraid. Marea went to get Tirite's daughter while Beia asked Tirite what had happened. Tirite said that someone from the village had come to the house. Beia asked who the intruder was, and Tirite said that it was the accused. Beia knew the accused, who lived nearby. Beia said that you could see the accused's house from hers. Tirite was taken to the hospital, and Beia stayed behind with Tirite's daughter.

[13] In cross-examination, Beia agreed that she had been woken by Tirite's call for help. At no time did she see anyone near Tirite's house, and she did not see the accused that night.

[14] By consent, the medical report of Dr Baua Tebau was admitted into evidence. It recorded a "clean edged wound", 3 to 4 inches in length, on Tirite's right hand, and a similar wound to her foot. That brought the prosecution case to a close.

[15] Counsel for the accused submitted that his client had no case to answer in respect of all 3 counts on the information. On a submission that an accused has no case to answer, the test to be applied is as set out in section 256(1) of the *Criminal Procedure Code*. As I said in *Republic* v *Bitiauoki Temeria*[1]:

> a submission of 'no case' can only succeed if there is no evidence at all that the accused committed the offence. This determination should be made by taking the evidence from the prosecution witnesses 'at its highest', and putting to one side any concerns I may have regarding the veracity of any or all of the witnesses.

[16] Counsel for the accused argued that, with respect to the attempted rape charge, there needed to be evidence that the acts of the accused were proximate to the commission of the substantive offence of rape, and not just acts that might be merely preparatory. There was no such evidence here. The complainant remained fully clothed throughout. I could not be satisfied that the accused was in fact naked. While the complainant had testified that the accused told her that he wanted to have sexual intercourse with her, he had done nothing that could be characterised as an act directed towards carrying out an intention to rape her.

[17] With respect to the unlawful wounding charge (count 3), counsel for the accused submitted that there was no evidence that the accused had caused the injury to the complainant's foot. He further submitted that I could not be satisfied that there was any evidence that the accused foresaw that his actions would result in the injury to the complainant's hand.

[18] Counsel for the accused did not pursue his application with respect to the criminal trespass charge (count 2).

[19] Although counsel for the prosecution resisted the application, I found that there was no case for the accused to answer on count 1. While there was evidence that might have supported a charge of either indecent assault or common assault, there was no evidence that the accused had committed the offence of attempted rape. Accordingly I found the accused not guilty with respect to count 1.

[20] I rejected the submission of counsel for the accused with respect to counts 2 and 3, and the trial continued. I informed the accused of his rights, as required by section 256(2) of the *Criminal Procedure Code*. Counsel for the accused advised that his client would make an unsworn statement from the dock, and would not be calling any witnesses.

[21] According to the accused, on the night in question he had gone to drink kava. During the evening he returned to his house on a few occasions, before going

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1 [2018] KIHC 31, at [20].

back to the kava bar. He was at home when he heard a commotion at the complainant's house, but he elected not to go and investigate. At no time did he go to the house of the complainant, and he was not the person who had attacked her.

[22] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offences charged.

[23] In order to convict the accused of the offence of criminal trespass under section 182(2) of the *Penal Code*, I must be satisfied to the required standard of each of the following elements:

a. that the accused entered Tirite's dwelling-house without lawful excuse;

b. that he did so at night-time (defined under section 4 of the *Penal Code* as being between 6:30pm and 6:30am the following day).

[24] In order to convict the accused of the offence of unlawful wounding, I must be satisfied to the required standard that the accused wounded Tirite without lawful excuse.

[25] Counsel for the accused concedes that, if I am satisfied that the complainant was not mistaken in identifying the accused as the intruder on that night, then I would have little difficulty in convicting him on the criminal trespass charge. He argues however that, almost 6 years after the incident, and given the circumstances in which the identification of the offender was made, I could not be satisfied beyond reasonable doubt that the complainant correctly identified the accused as the intruder.

[26] Section 12 of the *Evidence Act* 2003 categorises identification evidence as evidence of a kind that may be unreliable. Had there been a jury in this trial, I could be asked to warn that jury of the possible unreliability of the complainant's identification of the accused. Even without a jury, I accept that I should take great care in deciding whether or not to accept Tirite's evidence as to the identification, and what weight it should be given.

[27] Having carefully considered the complainant's evidence, I am satisfied beyond reasonable doubt that she is not mistaken in her identification of the accused. She had ample opportunity to observe the intruder, even in the context of what must have been an extremely traumatic situation. He was not a stranger – Tirite had had regular interactions with the accused throughout 2011 and into 2012. The lighting was poor initially, but he was clearly illuminated by the light that came through the open door later in the attack. There can be no lawful excuse for his presence in the house in those circumstances. It follows then that I am satisfied beyond reasonable doubt as to the accused's guilt with respect to count 2.

[28] On count 3, counsel for the accused submits that, even if I am satisfied that the accused was the intruder that night, I should still hesitate before convicting him on the unlawful wounding charge. Counsel submits that the wounding did not result from any positive act on the part of the accused. The complainant was wounded though her own act of grabbing the blade of the knife. Furthermore, there was no evidence as to how the wound to the complainant's foot occurred. As to this last point, I agree that there is nothing to suggest that the foot wound was caused by the accused, and I will focus solely on the wound to the hand of the complainant.

[29] On a charge of unlawful wounding, it is not necessary for the prosecution to prove that the accused intended to cause the wound. However counsel for the accused submits that I must at least be satisfied beyond reasonable doubt that the accused foresaw that his actions might result in the complainant being injured. No liability attaches to an event that occurs by accident, or for an act that occurs independently of the exercise of the will of the accused (section 9(1) of the *Penal Code*). It is for the prosecution to establish, beyond reasonable doubt, that the injury sustained by the complainant was not an accident. The High Court of Australia has held:

> It must now be regarded as settled that an event occurs by accident … if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.[2]

[30] I am satisfied that the accused was unlawfully in the complainant's house, wielding a knife. He had put the complainant in considerable fear. The accused held the knife over the complainant, in circumstances such that the complainant felt it necessary to grasp the knife by the blade. Even if the accused himself did not foresee such a thing happening, I have no doubt that it was reasonably foreseeable to an ordinary person. I am satisfied beyond reasonable doubt as to the accused's guilt with respect to count 3.

[31] For the reasons set out at [19] above, the accused is found not guilty on the charge of attempted rape. However, on a full consideration of the evidence in this case, I find the accused guilty of the offences of criminal trespass and unlawful wounding. He is convicted accordingly.

[32] I will hear counsel as to sentence.

Lambourne J
Judge of the High Court

HIGH COURT OF KIRIBATI
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[2] *Kaporonovski* v *R* (1973) 133 CLR 209, per Gibbs J at 231.