



HIGH COURT OF KIRIBATI

Criminal Case No 9/2016

THE REPUBLIC

v

AB

Teanneki Nemta for the Republic
Tabibiri Tentau for the accused

Dates of hearing: 2-3 April 2019

Date of judgment: 5 April 2019

JUDGMENT

- [1] AB and CD are jointly charged with rape, contrary to section 128 of the *Penal Code*, and throwing objects, contrary to section 83A of the *Penal Code*. AB pleaded not guilty to count 1 and guilty to count 2. CD pleaded guilty to both charges, and his matter has been adjourned until the end of AB's trial on the rape charge.
- [2] The offences are alleged to have occurred on 2 September 2015. An information, charging a single count of rape, was first filed in this case on 28 January 2016. For reasons unclear, a further identical information was filed on 4 March 2016. Neither information met the requirements of section 70 of the *Criminal Procedure Code* (Cap.17). The Attorney-General filed a fresh information, in the same terms, on 25 October 2018. At a mention on 9 November defence counsel advised that their clients would be pleading not guilty, and the matter was fixed for trial for this week.
- [3] When the case was called on Monday, counsel for the prosecution applied to amend the information to add the throwing objects charge. There being no objection from counsel for the accused, I allowed the amendment.
- [4] Two witnesses were called for the prosecution, the first of whom was the complainant, Nei MN, aged 45 years. On the evening of the day in question, she was drinking fermented yeast with 5 others at the house of a friend in Buariki village on Kuria. Over the period from 4:00pm until 9:00pm, the complainant

consumed 5 cups of fermented yeast. She was drunk, but still aware of her surroundings. The gathering broke up when the drink was finished. She then went to the house of Tiaromea in Tabontebike to buy some local cigarettes, intending to give them as gifts to her drinking companions.

- [5] After buying the cigarettes she went to the house of Tuuti, close to where the gathering had been held. Three of her friends were there, and she gave them the cigarettes. Close to Tuuti's house the complainant saw AB with CD. It was around 10:00pm.
- [6] The complainant then headed south towards Norauea village. She was going to the house of her friend Riin, as she had also bought a cigarette for her. As she was walking along the road in the bushy area between Buariki and Norauea, an area the complainant believed might be haunted, she hesitated. As she walked, she heard a noise behind her. She stopped and then continued on. She then heard what sounded like footsteps. The complainant stopped, turned around and saw 2 shadows. She called out, "Are you humans or ghosts?" There was no response, so she continued on towards Riin's house, but walking a little faster.
- [7] Suddenly, the complainant was grabbed around the waist from behind. As she was grabbed, she twisted around and saw that it was AB. CD was there as well. She said, "[AB], what are you going to do?" AB dragged her into the bushes, close to a *babai* pit on the ocean-side of Robuti's house. CD came too. They tripped the complainant and she fell to the ground. She was wearing a T-shirt and skirt, with denim shorts and underpants. Both men then tried to remove her shorts – AB unzipped the fly while CD undid the button. The complainant resisted, dropping the cigarettes to try and hold on to the waistband of her shorts. She was unsuccessful, and her underpants came off along with the shorts. She had her period at the time, and the cloth she was using as a pad must have fallen away as well. Her skirt was hitched up, and she was naked from the waist down.
- [8] AB had unzipped his shorts and taken his penis out. The complainant brought her knees up to her chest, with her legs pressed together. AB lay on top of her, and CD crouched beside them. AB then punched the complainant in the thigh, weakening her resistance and forcing her legs apart. He inserted his penis into her vagina and began thrusting. He continued until he ejaculated inside her vagina. He was not wearing a condom. The complainant did not consent to sexual intercourse with AB.
- [9] AB stood up and told CD, who had removed his shorts, to have his turn. CD then had sexual intercourse with the complainant until he ejaculated inside her vagina. He was not wearing a condom either. AB was standing nearby. When CD finished, he stood up and put his shorts on. The 2 young men then ran away.

- [10] The complainant got up and looked around for her shorts and underpants. She could not find them. She decided to continue on to Riin's house. It was between 10:00 and 11:00pm. When she arrived at Riin's house she called out and Riin welcomed her in. She talked to Riin for a period and had something to drink. The complainant then borrowed Riin's torch and went back to look for her missing clothing. She still could not find them. As she was about to leave she felt something hit her in the right buttock. It was a stone, about the size of her fist. The complainant shone the torch around and saw AB and CD in the bushes, about 5 metres away. She shouted at them.
- [11] The complainant then returned to her home. She was very angry and in pain where she had been hit with the stone. As she walked back she was shouting and cursing. When she got home she slept.
- [12] In cross-examination the complainant rejected the suggestion that it was not AB who had grabbed her on the road. She said she clearly recognised him. She accepted that, in addition to the house of Robuti, there were other houses near to the place where the incident occurred. She called out for help but no one came. She assumed that the occupants had all gone to the funeral that was taking place at the time. It was put to the complainant that she neither struggled nor called out for help. She maintained that she had done both. She denied that she consented to sexual intercourse with AB. The complainant accepted that she did not go to the Police that evening, instead choosing to go to Riin's house.
- [13] The other prosecution witness was Nei Riin Bureka, a 35-year-old resident of Kuria. Late in the evening of 2 September 2015, between 11:00pm and midnight, she heard a woman shouting. It sounded like the woman was angry or afraid. Riin mentioned it to her husband. Not long after that, Nei MN arrived. She was distressed and angry. Her hair was in a mess and she was covered with sand. She was wearing a skirt and a T-shirt, but had nothing on under the skirt. MN gave Riin 3 cigarettes and asked to borrow her torch. Riin gave her the torch and she left.
- [14] In cross-examination, Riin conceded that she had not been expecting MN to come to the house that night. However, in re-examination, Riin said that MN was a friend and a regular visitor.
- [15] That brought the prosecution case to a close. Counsel for the accused submitted that his client had no case to answer. He suggested that I could not find the complainant to be a credible witness, and that I could not be satisfied that she had not consented to sexual intercourse with the accused. He argued that, in the absence of any corroboration or evidence concerning injuries to the complainant, there was no evidence that his client had committed the offence of rape.

- [16] I reminded counsel that the test to be applied in the High Court is as set out in section 256(1) of the *Criminal Procedure Code*. As I said in *Republic v Bitiauoki Temeria*:
- 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.¹
- [17] The complainant’s credibility is not a relevant consideration in determining whether the accused has a case to answer, unless her evidence was so flawed that no tribunal of fact could possibly believe her. That was not the case here. Putting the prosecution case at its highest, there was ample evidence of an absence of consent. On a charge of rape the prosecution does not have to prove that the complainant sustained injuries, and corroboration has not been required since the passage of the *Evidence Act 2003* (section 11). I ruled that the accused did have a case to answer.
- [18] I then informed the accused of his rights, as required by section 256(2) of the *Criminal Procedure Code*. The accused elected to neither give nor call evidence.
- [19] 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 offence charged.
- [20] 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 (from section 128 of the *Penal Code*):
- 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. that 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 the complainant’s husband.
- [21] I note that the fact that CD has pleaded guilty is of no consequence in this trial. His guilty plea cannot be used as evidence of AB’s guilt.²
- [22] It is not disputed that AB had sexual intercourse with the complainant on the night in question. It is contended for the accused however that the intercourse occurred with the complainant’s consent. I reminded counsel that only 3 aspects of MN’s evidence had been subject to challenge in cross-examination, namely

¹ High Court Criminal Case 9/2018, at [20]

² *Burnett v R* (1994) 76 A Crim R 148

that it was AB who grabbed her on the road, that she called out for help, and that she did not consent to sexual intercourse. The other aspects of her account – that she was dragged into the bushes and tripped so as to fall to the ground, had her shorts and underwear removed despite her resistance, and that she was punched in the thigh – were not challenged at all. These facts are at odds with the suggestion that the sexual intercourse was consensual. Furthermore, the throwing of a stone at MN when she returned to look for her shorts, an offence admitted by AB, is not what one would expect from someone with whom she had recently had consensual sexual intercourse.

- [23] I was impressed by the complainant's testimony; she came across as forthright and genuine. The unchallenged evidence of her demeanour and appearance on arriving at Riin's house is consistent with that of a person who had recently been raped. I accept MN's account of what happened in the bushes that night. I am satisfied that she did not consent to sexual intercourse with AB.
- [24] Counsel for AB submits that, were I to be satisfied that MN did not consent to sexual intercourse, his client is still entitled to acquittal by virtue of his honest and reasonable, but mistaken, belief that the complainant consented. It is for the prosecution to exclude beyond reasonable doubt the operation of mistake, but there must first be some evidence that the accused in fact believed that the complainant consented to sexual intercourse.³ There is no evidence that AB believed this but, even if he had been so mistaken, given the unchallenged evidence of the complainant's resistance to his advances there is no way that it was reasonable for him to hold such a belief.
- [25] On a full consideration of the evidence in this case, I am satisfied beyond reasonable doubt of the accused's guilt. I find him guilty of the offence of rape and he is convicted accordingly.
- [26] I will hear counsel as to sentence, for this and the offence of throwing objects, to which he has pleaded guilty.


Lambourne J
 Judge of the High Court



³ *Brimblecombe v Duncan; ex parte Duncan* [1958] Qd R 8, per Philp J at 14-15.