



HIGH COURT OF KIRIBATI

Criminal Case N° 5/2016

THE REPUBLIC

v

WANGKA TION

*Tewia Tawiita for the Republic
Raweita Beniata for the accused*

FILE NOTE

- [1] The accused was charged with 1 count of defilement of an idiot, contrary to section 135(1)(b) of the *Penal Code*,¹ and 1 count of criminal trespass, contrary to section 182(1)(a) of the *Penal Code*. The offences were alleged to have been committed on 10 August 2012.
- [2] When the accused was arraigned this afternoon he pleaded guilty to both charges. An agreed summary of facts was then provided to the Court, in which it was stated that, at the time of the offences, the complainant had an intellectual impairment, namely schizophrenia. It was on this basis that the complainant was said to be an idiot, as that term is used in section 135(1)(b).
- [3] The use of the terms ‘idiot’ and ‘imbecile’ in section 135(1)(b) is an unfortunate anachronism. These are terms that have fallen out of favour among mental health practitioners and today are considered derogatory and inappropriate. The Maneaba ni Maungatabu is to be commended for its recent reforms to the sexual offence provisions of the *Penal Code*, which removed these terms from the law, preferring instead the concept of a cognitive incapacity to consent.

¹ Despite the repeal of section 135 by section 4 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case proceeds under the *Penal Code* as it was in force on the date of the offence (as provided for under section 10(2) of the amending Act).

[4] Neither 'idiot' nor 'imbecile' are defined in the *Penal Code*. In *R v Abbott*,² the Queensland Court of Criminal Appeal considered an appeal against conviction for an offence under the equivalent provision in the Queensland *Criminal Code*. Giving the decision of the Court, the then Chief Justice said that the words should be given their "ordinary everyday meaning". He continued:

It seems to me that an imbecile may be described as a person "of weak character, intellect or will resulting from a mental deficiency". The difference between 'idiot' and 'imbecile' is a matter of degree.³

[5] In the Samoan case of *Police v Samuelu Fono*,⁴ the then Chief Justice adopted the approach of the New South Wales Court of Criminal Appeal in *R v Colgan*, which relied on the following definitions of 'idiot' and 'imbecile' under that State's *Mental Deficiency Act 1927*:

Idiots, that is to say persons in whose case there exists mental defectiveness of such a degree that they are unable to guard them-selves against common physical dangers. Imbeciles, that is to say persons in whose case there exists mental defectiveness which though not amounting to idiocy is yet so pronounced that they are incapable of managing themselves or their affairs, or in the case of children of being taught to do so.⁵

[6] What is clear from these authorities is that, for a person to be classified as an idiot or an imbecile, that person must have some kind of intellectual disability. Schizophrenia is not an intellectual disability, it is a mental illness. A person with a mental illness cannot be said to be an idiot or an imbecile by reason only of that illness. That the complainant was not an idiot at the time of these offences is borne out by the fact that she had previously been employed as a teacher, before her illness prevented her from continuing.

[7] As I could not be satisfied that the facts as agreed were sufficient to constitute the offences to which the accused had pleaded guilty, I directed that the pleas be vacated and pleas of not guilty be entered instead.⁶

[8] Counsel for the prosecution then applied to amend the information, by substituting a charge of rape for the defilement charge. She indicated that she intended to withdraw the criminal trespass charge. The application to amend

² [1984] 1 Qd R 342.

³ *ibid.*, at 346.

⁴ [1999] WSSC 51.

⁵ (1959) SR(NSW) 96.

⁶ *R v Durham Quarter Sessions; Ex parte Virgo* [1952] 2 QB 1.

was opposed by counsel for the accused. He argued that it would be unfair to his client to allow an amendment at such a late stage, particularly given the long delays in prosecuting the offences. After consideration I ruled that the proposed amendment should be allowed. Any prejudice to the accused occasioned by the amendment can be adequately remedied by adjourning the trial to a later date. The delay in prosecuting the case will come to be addressed at time of sentence, should the accused be convicted.

- [9] Counsel for the prosecution is to file a fresh information, charging the accused with 1 count of rape, contrary to section 128 of the *Penal Code*. At that time a *nolle prosequi* will be entered with respect to the information filed on 1 August 2018. This matter is fixed as the first trial for the week commencing 29 July. The accused will be admitted to bail, the conditions of which will be set out in a separate order.

Dated 3 June 2019.


Lambourne J
Judge of the High Court

