



HIGH COURT OF KIRIBATI

Criminal Case N° 13/2019

THE REPUBLIC

v

ENRIKI ATANIMAN

*Pauline Beiatau, Director of Public Prosecutions, for the Republic
Reiati Temaua for the accused*

Dates of hearing: 16-18 September 2019

Date of judgment: 27 September 2019

JUDGMENT

- [1] Enriki Ataniman has pleaded not guilty to 1 count of defilement of a girl under the age of 13 years, contrary to section 134(1) of the *Penal Code* (Cap.67), and 3 counts of indecent assault, contrary to section 133(1) of the *Penal Code*.¹ He has however pleaded guilty to 2 counts of indecent assault involving the same complainant (counts 4 and 5 on the information).
- [2] An information was originally filed on 16 April 2019, under which the accused was charged with 1 count of defilement and 3 counts of indecent assault. Counts 3 and 4 on that information were bad for duplicity, so the Attorney-General entered a *nolle prosequi* on 31 May. A fresh information, that fixed the duplicity issue with counts 3 and 4, had been filed 2 days earlier.
- [3] The present information originally alleged 1 count of defilement (count 1) and 3 counts of indecent assault. At the start of the trial the accused was arraigned and pleaded not guilty to counts 1, 2 and 3, but guilty to count 4. Counsel for the prosecution then opened her case. It became clear in the course of her opening address that counsel was working from the 16 April information, rather than the 29 May information. After a brief adjournment, counsel for the prosecution then applied to amend the information, to add

¹ Despite the repeal and replacement of sections 133 and 134 by section 4 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case has proceeded under the *Penal Code* as it was in force on the date of the alleged offences (as provided for under section 10(2) of the amending Act).

2 further charges of indecent assault. There being no objection from counsel for the accused, I allowed the amendment. Counsel for the accused asked for, and was provided with, further particulars with respect to counts 2 to 6 on the information. The further particulars given were as follows:

- a. count 2 – touching the complainant’s breasts;
- b. count 3 – digital penetration of the complainant’s vagina;
- c. count 4 – touching the complainant’s genital area on the outside of her underwear;
- d. count 5 – licking the complainant’s vagina;
- e. count 6 – touching the complainant’s breasts and vagina.

[4] The Court then adjourned, to allow counsel for the accused to obtain instructions with respect to the new charges. When the trial resumed, the accused was arraigned on the new counts. He pleaded guilty to count 5 and not guilty to count 6. The trial then proceeded on counts 1, 2, 3 and 6.

[5] The first prosecution witness was Doctor Ioanna Ioran. She is a specialist obstetrician/gynaecologist, having obtained her medical degree from the Fiji School of Medicine in 2004. She completed her specialist training in 2013. Ioanna is employed at the Tungaru Central Hospital in Nowerewere. She examined the complainant in this case on 10 October 2015 and prepared a report of her findings. She observed a rupture of the complainant’s hymen in 2 places, and considered that this could have been caused by penetration of the complainant’s vagina. She also observed a rash around the complainant’s anus. Ioanna conceded that it was not possible to state with any certainty what had penetrated the complainant’s vagina. It could have been a penis, a finger or some other object. Ioanna had little independent recollection of her examination of the complainant, and was unable to say whether the hymenal tear had been a recent injury.

[6] The only other prosecution witness was the complainant. She is now 15 years old, having been born on 20 May 2004. She is the niece of the accused, but regarded him as her adoptive father; he is married to Timrete, the sister of the complainant’s father. Her biological father had died before she was born, and she was raised by the accused and his wife from shortly after her birth until she was 5. She then went to live with her paternal grandmother in Bikenibeu while she attended primary school.

[7] In early 2014 the complainant was 9 years old and in Class 5 at primary school. She recalled a time shortly after the accused and his wife had come from their house in Betio to stay in Bikenibeu. Late one night the accused woke the complainant as she slept and asked her to accompany him to the

ocean side, where he wanted to defecate. She went with him. They stopped in the middle of a football field. The accused removed his *lavalava* and spread it out on the ground. He was naked. The complainant was wearing shorts and a top. The accused told her to take off her shorts. She told him that she was afraid. He said, "There's nothing to be afraid of here. There's no one around." The complainant removed her clothing and lay down on the *lavalava*, naked. The accused got on top of her, inserted his penis into her vagina and began thrusting his hips (count 1). He was not wearing a condom. The thrusting continued for quite some time. The complainant was in considerable pain. The accused ejaculated between the complainant's thighs and stood up. He told her to go back to the house and not say anything to anyone about what had happened. When she got back to the house, everyone was asleep. She returned to her place beside her grandmother and went to sleep.

- [8] On another night, about 2 weeks after the incident on the football field, the complainant felt someone come and cuddle her from behind as she slept next to her grandmother. She recognised the accused from his hairy arms. The accused put his hands under the complainant's shirt and began touching her breasts (count 2). Everyone else in the house was asleep. She moved to try and wake her grandmother, but the accused pushed her hand away. After a short time, the accused stood up and walked back to his sleeping place.
- [9] The complainant could not be sure, but she thought that both of these incidents occurred around the middle of the year. Not long after the second incident, she moved to Betio to live with the accused and his wife. She started attending the Temwanoku primary school.
- [10] The complainant then described a third incident that occurred late one night in 2014, in the outside toilet at the house of the accused in Betio. She had been asleep in the house, but woke to find herself seated on the toilet. She was naked. The accused was also in the toilet, standing next to her, wearing a *lavalava*. The accused told the complainant that he wanted her to suck his penis. She told him that she did not want to. The accused removed his *lavalava* and put his penis into the complainant's mouth. As she was sucking his penis, the accused inserted a finger into her vagina (count 3). He kept his finger inside the complainant's vagina until he ejaculated in her mouth. She wanted to vomit. The accused told her to swallow the ejaculate, but she spat it out. He then told her to return to the house. When she went back inside everyone else was asleep.
- [11] The complainant stayed with the accused for the remainder of 2014, and into 2015. One night in September 2015, the complainant was sleeping in the house. Timrete had gone to work, but returned to find the accused licking the complainant's vagina (count 5).

- [12] One night in October 2015, the complainant was woken by the accused. The other members of the household were asleep. He put his hand inside her shorts and inserted a finger into her vagina (count 6). The next day, the complainant told a friend at school what the accused had done. After school she did not return home, instead going to the house of the friend. She told her friend's mother, who took her to the police to file a complaint against the accused.
- [13] In cross-examination, the complainant was asked about Itinikua, her grandmother's husband. She said that Itinikua and her grandmother had separated by 2014, and he was not living with them in Bikenibeu at the time of the first 2 incidents. She agreed that there was an outside toilet at the house in Bikenibeu, but maintained that the accused had told her that he wanted to go to the ocean side to defecate, and he wanted the complainant to accompany him.
- [14] The complainant denied that she had been a disobedient girl, and further denied that she had told lies about the accused because she disliked him. It was put to the complainant that she disliked the accused because he had stopped her using *kouben*.² She said that it had been Timrete who punished her for using *kouben*. She agreed that there had been occasions when she had been beaten by the accused, but maintained that she was telling the truth about the accused's improper actions towards her.
- [15] The complainant denied that it had been Itinikua who had sexual intercourse with her on the football field. She agreed that she had told the police that Itinikua had sexual intercourse with her, but said that this had been at the urging of Timrete, who had told her to lodge a complaint about what Itinikua had done. The complainant rejected the proposition from counsel for the accused that his client had not had sexual intercourse with her.
- [16] With respect to the second incident, the complainant agreed that it was dark at the time, but said that there had been some light coming from a neighbour's house. She maintained that she knew that it was the accused who had touched her breasts because she recognised his hairy arms, and he had later returned to the accused's customary sleeping place. The complainant agreed that she had not seen his face.
- [17] When asked about the timing of the second incident, the complainant said that she could not be sure that it had happened around the middle of 2014. It was put to her that her grandmother had died in March 2014, a matter that

² *Kouben* is a locally-produced mixture of tobacco, lime powder, distilled alcohol, powdered cordial and (sometimes) toothpaste, packaged into small foil envelopes and consumed in a manner similar to chewing tobacco. Teenagers are the target market.

she did not accept. Counsel for the accused then produced a death certificate showing that the complainant's grandmother had died on 2 March 2014.

- [18] With respect to the incident in the toilet at Betio, the complainant maintained that the accused had been standing while she sucked his penis, and his finger had been inserted in her vagina at the same time. She rejected the suggestion that it would be physically impossible for the accused to have his penis in her mouth and his finger in her vagina at the same time. It was put to the complainant that, while the accused had asked her to suck his penis, he had not inserted his finger into her vagina. She insisted that both of these things had happened. She said that, while she was seated, the accused's hips had been level with her head. He was standing to one side while she sucked his penis.
- [19] With respect to the final incident, in October 2015, the complainant conceded that she had not told the police about it. She was shown her statement to police, taken on 8 October 2015, in which she had said that the occasion on which the accused had licked her vagina in September was the last time he had done anything to her. While agreeing that this is what she had told the police, the complainant insisted that the accused had inserted his finger into her vagina in October 2015.
- [20] The complainant agreed that she had never told her grandmother or Timrete what the accused had been doing to her.
- [21] In answer to questions from the Court, the complainant said that the conversation with Timrete about Itinikua had taken place sometime after she had filed her complaint with the police about the accused. She said that both of the incidents that she had described as having occurred in Bikenibeu happened while her grandmother was still alive. At the time of the second incident in Bikenibeu, the accused had been the only adult male staying at the house.
- [22] That brought the prosecution case to a close. I formally found that the accused had a case to answer and informed him of his rights, as required by section 256(2) of the *Criminal Procedure Code* (Cap.17). Counsel for the accused advised that his client would not give evidence, but that 1 defence witness would be called.
- [23] That witness was the wife of the accused, Timrete Fakalupe. She is 37 years old. She testified that, in early 2014 when her mother was sick, she had gone to stay in Bikenibeu, accompanied by the accused and their children. Itinikua was also living in the house in Bikenibeu at that time. Timrete did not recall anything unusual happening during the period they stayed in Bikenibeu. Sometime in February 2014, her mother was admitted to hospital in Betio, so

the family moved back home. The complainant came with them. At that time the complainant was misbehaving – lying and chewing *kouben*.

- [24] In 2015, the complainant told Timrete that Itinikua had touched her when they had been in Bikenibeu. Timrete went with the complainant to the police, where the complainant gave a statement about what Itinikua had done. The complainant told police that the incident occurred at the house in Bikenibeu, after her grandmother had left them alone together.
- [25] In cross-examination, Timrete said that the complainant's statement to police about Itinikua had been given sometime after she had already filed her complaint against the accused.
- [26] That brought the defence case to a close.
- [27] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. The accused has exercised his right not to give evidence. He is not bound to give evidence. He is entitled to insist that the prosecution prove the case against him, if it can. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offences charged. The fact that the accused did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it cannot be used to fill any gaps in the prosecution case. It proves nothing at all, and cannot be considered when deciding whether the prosecution has proved its case to the required standard. It does not change the fact that the prosecution retains the responsibility to prove the guilt of the accused beyond reasonable doubt.
- [28] The accused is facing multiple counts. I am required to consider each charge separately, evaluating the evidence relating to that particular charge to decide whether I am satisfied beyond reasonable doubt that the prosecution has proved its essential elements.
- [29] In order to convict the accused of defilement of a girl under the age of 13 years, I must be satisfied to the required standard of each of the following elements:
- a. the accused had sexual intercourse with the complainant;
 - b. at the time of the sexual intercourse, the complainant was aged under 13 years.
- [30] 'Sexual intercourse' is defined in section 161 of the *Penal Code* as penile penetration of the vagina. The accused need not have ejaculated.

- [31] In order to convict the accused of the offence of indecent assault, I must be satisfied to the required standard of each of the following elements:
- a. the accused assaulted the complainant;
 - b. the assault was unlawful;
 - c. the assault was indecent.
- [32] An assault is an application of force to the person of another, either directly or indirectly, without the consent of that person. Under section 133(2) of the *Penal Code*, a girl under the age of 15 years cannot consent to an indecent assault. An assault is unlawful unless it is authorised, justified or excused by law. The word 'indecent' bears its ordinary everyday meaning. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.
- [33] Counsel for the accused submits that I should not accept the evidence of the complainant with respect to the incidents that have not been admitted by his client. It is therefore necessary for me to make a finding as to her credibility. The prosecution case rises or falls on my view of her evidence. It is no longer necessary that I warn myself of the dangers of convicting on a complainant's uncorroborated testimony.³ Despite this, I must still weigh her evidence very carefully. If I find the complainant to be a credible witness, then it is open to me to convict the accused, even on her evidence alone.
- [34] I observed the complainant closely as she testified, and I found her to be an impressive and credible witness, particularly given her age. I saw nothing of the lying and disobedient child described by Timrete. She did not attempt to embellish her testimony. She remained consistent in her account of the various incidents and was not shaken under cross-examination. While the testimony of the doctor did little, if anything, to assist the prosecution case, I do find support from the fact that the accused pleaded guilty to 2 of the counts of indecent assault. He has therefore admitted to having touched the complainant's genital area on the outside of her underwear (count 4), and to having licked the complainant's vagina (count 5). These matters, together with the complainant's unchallenged evidence that, at the insistence of the accused, she sucked his penis until he ejaculated in her mouth, are relevant to my consideration of the evidence in this case. It is clear that the accused had a sexual interest in the complainant and was willing to give effect to that interest. These matters do not provide proof of the elements of the disputed counts, but they do show that the accused is more likely to have done what is alleged against him.

³ Section 11, *Evidence Act 2003*.

- [35] Timrete's evidence provides no assistance to the accused. The possibility that the complainant lodged a complaint with police about Itinikua's conduct does not weaken her testimony regarding the conduct of the accused. While it was suggested to the complainant in cross-examination that it had in fact been Itinikua who engaged in sexual intercourse with her on the football field, it was clear from Timrete's evidence that the complainant's allegations about Itinikua concerned a completely different scenario. The only possibly relevant matter where Timrete's evidence directly contradicted that of the complainant concerned whether Itinikua was still resident at the Bikenibeu house in early 2014. I find that to be of no significance at all.
- [36] With respect to count 1, it is not disputed that the complainant was under the age of 13 years at the time. She was 9. I accept her evidence and am satisfied beyond reasonable doubt that the accused had sexual intercourse with her on the football field in Bikenibeu in the manner she described.
- [37] With respect to count 2, it is suggested that the complainant could not have been certain as to the identity of the person who cuddled her from behind and touched her breasts. Despite this, in my view she was sufficiently familiar with the physical characteristics of the accused, a person she regarded as a father, to not be mistaken as to the identity of her assailant. I am satisfied beyond reasonable doubt that the accused assaulted the complainant and that the assault was indecent.
- [38] With respect to count 3, I am satisfied beyond reasonable doubt that the accused inserted his finger into the complainant's vagina as she sat on the toilet. I reject the contention that the scenario described by the complainant was physically impossible. This too was an assault that was clearly indecent.
- [39] With respect to count 6, I am satisfied beyond reasonable doubt that the accused again inserted his finger into the complainant's vagina in October 2015. Again, there is no doubt that this act constituted an indecent assault.
- [40] There is nothing to suggest that any of the assaults the subject of counts 2, 3 and 6 were authorised, justified or excused by law.
- [41] Having carefully considered the evidence before me, I am satisfied of the guilt of the accused on each of counts 1, 2, 3 and 6. I find the accused guilty on each count and he is convicted accordingly.
- [42] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court



The seal of the High Court of Kiribati is circular with a red border. The text 'HIGH COURT OF KIRIBATI' is written in red capital letters around the top inner edge. The text 'THE KIRIBATI' is written in red capital letters around the bottom inner edge. The center of the seal features a red shield with a white sunburst at the top, a white wave pattern in the middle, and a white anchor at the bottom.