

12/2/87

Republic

-vs-

Kaieie Uouo

The accused person is charged with attempted rape c.to S.130 of the Penal Code, with an alternative charge of indecent assault c.to S.133(1) of the Penal Code.

Both offences are alleged to have been committed on 4 June 1986 at Betio in respect of N. Maria Taberu.

The onus of proof is upon the prosecution to prove the guilt of the accused person in respect of the substantive and alternative charges beyond a reasonable doubt. Moreover since the charges are sexual ones I have to look for some corroboration of the complainants evidence. It is dangerous to convict without it.

There is no dispute that on the day in question N. Maria went to the accuseds house to collect sour toddy. The accused agrees that he asked her to massage his legs. These facts are common to both the prosecution and defence and they are proved.

According to Nei Maria the accused removed her pants and tries to insert his penis into her vagina. She would not agree to this or it hurt and she asked him to desist. She struggled. Her mother came and they reported to the police. N. Maria gave her age to the Court as 12.

In cross examination she agreed she had come to the accused asking for money and agreed she had said she was 14 years old and mature.

She said she knew her mother was drunk at the time. PW2 her mother says she sent Nei Maria to collect sour toddy from accused who she described as her relative. She followed her and heard her say 'look stop it hurts me' and when she looked into the house she saw N. Maria naked with the accused naked on top of her. She shouted and accused got off Nei Maria and pulled his pants up. N. Maria was only wearing her skirt she had no pants on and had just started to put them on. PW2 denied being drunk but said she had taken one cup of sour toddy. N. Maria she said was born in 1972.

PW3 the step father of the complainant was drinking that day. He discussed drink with accused but had no useful evidence to give.

Accused himself gave evidence on oath. He admitted that Nei Maria came to the house and massaged his legs but said she left without the sour toddy. He denied that anything improper happened during Nei Marias visit. Nei Maria left when her mother came.

The complainant was a reasonable witness. She does not in my view know her age but she is clearly not mature in the accepted sense of that word. She was very frank in cross examination and I believed her. She may well have offered some encouragement to the accused in respect of his acts.

Her mother PW2 apart from her recollection as to her own age was a clear and competent witness. I believed her when she said her daughter was born in 1972. This would make her 14 or thereabouts at the time of the incident and this agrees with what she told the accused, and the Courts own estimate of her probable age.

The accused did not impress me as a witness of truth. The girl came to buy sour toddy and left without it when she heard her mother. This seems inexplicable if nothing happened between the accused and herself.

There are manifest discrepancies between the evidence of PW1 and 2. PW1 says her mother came and pulled accused off but PW2 does not say this. But it would be a cause for suspicion if the evidence of PW1 and PW2 agreed too closely.

I have no doubt that both PW1 and 2 are telling the truth when they say that accused was naked on top of PW1. It is clear that he was trying to put his penis into her vagina. PW2 corroborates PW1 on this point. It is also clear that she did not consent as it was hurting her. In any event as she was only 14 years old in connection with the charged indecent assault she could not consent to it S.133(2) of the Penal Code. In my view the evidence of PW2 corroborates fully the evidence of PW1.

On consideration of the proved facts it is clear that the accused put saliva on his penis to ease his entry into Nei Maria. When she complained he did not insist and in the circumstances I am in doubt as to whether his conduct amounted to attempted rape. However there can be no reasonable doubt that what he did amounted to an indecent assault and he is found guilty an offence C.to S.133 of the Penal Code and convicted and not guilty of attempted rape and acquitted on that more serious charge.

(R.G. TOPPING
JUDGE

RGT/KT

