



HIGH COURT OF KIRIBATI

Criminal Case No 28/2018

THE REPUBLIC

v

TINAA TINGA

Taburuea Rubetaake for the Republic
Kiatoa laoniman for the accused

Dates of hearing: 19-21 November 2018

Date of judgment: 26 November 2018

JUDGMENT

- [1] The accused has pleaded not guilty to the following charges under the *Penal Code*: 1 count of attempted rape, contrary to section 130; an alternative count of indecent assault, contrary to section 133(1); and 1 count of assault occasioning actual bodily harm, contrary to section 238. He stands jointly charged on the attempted rape and indecent assault counts with Manibwebwe Baon, who pleaded guilty to attempted rape when the pair were arraigned on the first day of the trial. Manibwebwe's matter has been adjourned to the end of this trial.
- [2] An information was originally filed in this case on 21 May 2018. That information was defective, in that it failed to comply with section 70 of the *Criminal Procedure Code*. On 20 July 2018 the Attorney-General filed a fresh information, signed by her, thereby rectifying the defect. While the original information had charged both accused with attempted rape and assault occasioning actual bodily harm, the 20 July information charged the more serious offences of rape and causing grievous harm. On the first day of the trial, counsel for the prosecution (on behalf of the Attorney-General) entered a *nolle prosequi* under section 68(1) of the *Criminal Procedure Code*; the accused were accordingly discharged in respect of that information. A fresh information was then filed reinstating the original charges. This time however, while both accused were charged with attempted rape, only the accused Tinaa was charged with assault. The new information also introduced a count of indecent assault as an alternative to the attempted rape charge. The trial proceeded on that information.

- [3] Counsel for the prosecution called 4 witnesses.
- [4] The first witness was the complainant, Eren Ariki, aged 26 years. On the night of 12 October 2017, she was drinking kava at Bauro's kava bar in Bikenibeu with the accused and Manibwebwe, both of whom are related to her step-father. By around 3:00 or 4:00 the next morning, the bar had closed. The accused was transporting customers home, Manibwebwe was playing pool and Eren was playing a guitar and singing karaoke. At about 5:00am, Manibwebwe left the bar, returning some 2 hours later. On his return, the accused suggested that they get some sour toddy. The 3 of them went to Timera's place and bought a basin of sour toddy.
- [5] They took the sour toddy to a pit where bananas grow, close to Tabontemaneaba primary school. They sat in a circle in the pit, hidden by long grass. Manibwebwe was serving the drink from the basin, which was in the middle. They were sharing a single cup. When the drink was finished the accused went and bought another basin. As they drank from the second basin, Eren saw Manibwebwe and the accused whispering to each other. She asked what they were whispering about, to which Manibwebwe responded, "Nothing." When the second basin was finished, the accused went and bought a third. As they drank, Eren felt that she was being given a larger share of the drink, that the 2 men were trying to get her drunk. She was afraid and wanted to leave. Eren stood up to go, but the accused pulled her by the shirt and forced her to sit down again.
- [6] Manibwebwe then grabbed Eren by the wrists and removed her top. The accused pulled off her shorts and underpants. Eren tried to run away but the accused and Manibwebwe grabbed her by the legs and she fell to the ground. She shouted, "*I rawa!* (I refuse!)" She was wearing only a bra. The accused and Manibwebwe were naked from the waist down. Eren was on her back on the ground, and the accused was standing over her. The accused punched her in the face and she blacked out.
- [7] The next thing that Eren remembers is the police coming to take her from the pit. The accused and Manibwebwe had gone. She was taken home, where she slept. Some time later, Eren awoke and went to urinate. She felt pain under her left eye, and experienced a burning sensation when she urinated. Later in the evening the police returned and took Eren to the hospital, where she was examined. During the internal examination, a doctor removed a blade of grass from Eren's vagina and showed it to her.
- [8] Under cross-examination, Eren rejected the version of events put to her by counsel for the accused and maintained her account. She rejected a suggestion that the injury to her cheek had been caused by her husband. She agreed that her husband had earlier injured her cheek, but that had healed by the night in question.

- [9] Aroiti Keangimawa is a 45-year-old early childhood teacher. Eren is her daughter. On 13 October 2017, Aroiti was at the pre-school where she worked. Between 10:00am and 11:00am, another of her children came to her. As a result of what she heard, Aroiti went to a nearby *babwai* pit. On the edge of the pit there were some children and adults, looking down into the pit. Aroiti saw Eren lying in the pit. She was naked, save for her bra. Her clothing was scattered around the pit. Aroiti went to Eren, and saw that she had scratches on her arms, back and legs. Eren was bleeding from a cut to her cheek. Aroiti found a lavalava and covered Eren. Aroiti described Eren as “helpless”. She appeared unconscious, and did not speak. Aroiti called the Bikenibeu police station, and 3 officers came and helped take Eren home. It was about 1:00pm or 2:00pm by the time they got home. Eren then slept until about 8:00pm, after which they went to the hospital.
- [10] In cross-examination Aroiti agreed that, in the pit, Eren was lying on *tiitania* (a kind of long, sharp grass). Eren did not open her eyes, but she did move her leg.
- [11] At the hospital, Eren was examined by Dr Moaraoi Kabiriera and Dr Tanebu Tong. Moaraoi testified that she conducted an external examination, while Tanebu performed the internal examination. Moaraoi observed swelling and redness on Eren’s left cheek, with a 0.5cm laceration. The blood from the wound had clotted. Eren’s right upper back was swollen and tender and covered with scratches. There were more scratches across the upper buttocks, with some tenderness on the left-hand side.
- [12] Moaraoi rejected the suggestion from counsel for the accused that the injury to Eren’s cheek was an old one. In her view, the injury had been caused within the 24 hours prior to the examination. The scratches on Eren’s back were superficial, and probably caused by her being dragged. Moaraoi conceded that Tanebu’s examination of Eren was likely to have been more thorough, as she had examined Eren in Emergency, while Tanebu had examined Eren in a private room.
- [13] In addition to the injuries seen by Moaraoi, Tanebu reported seeing scratches to Eren’s wrists and upper arms, and down the backs of her legs. She observed blades of grass inside Eren’s vagina. Tanebu considered that the injury to Eren’s cheek had been caused by a blow from something, inflicted within the 24 hours prior to the examination. It was definitely not an old injury. Tanebu was of the view that the injuries to Eren’s wrists were consistent with her being forcibly grabbed, and the scratches down her back were the result of Eren being dragged across the ground.
- [14] At the close of the prosecution case, counsel for the accused made no application so 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. The accused elected to give evidence on oath in his own defence.

- [15] The accused is 37 years old and lives at the Bonnano area of Bikenibeu. He spent the night of 12 October 2017 drinking kava with Manibwebwe, Bwebwentekai and Eren. When morning came, he went with Manibwebwe and Eren to get some sour toddy to drink as a 'wash-down'. He bought a basin of sour toddy and they went to the pit to drink. When the first basin was finished, Manibwebwe went to get another, for which the accused paid. When the second basin was finished, Eren gave Manibwebwe the money for another.
- [16] After the third basin of sour toddy was finished, the others sent the accused to go and find some money to pay for a fourth. He left, and Manibwebwe and Eren remained in the pit. The accused went to his house, and he estimated that he was away for less than 30 minutes. When he returned, Manibwebwe was naked, and Eren was wearing only her bra. They were lying close to each other in the pit. Eren was lying on her back on the *tiitania*. She was drunk, and wriggling around.
- [17] The accused called to Manibwebwe from the edge of the pit. He said, "What did you do to this lady? Why isn't she wearing any clothes? Did you hit her?" He responded, "No, but she bit my lip and the blood dripped onto her." The accused then left the pit and went back to his house. He had something to eat and slept. The police came looking for him at about 8:00 in the evening.
- [18] The accused denied being in any way involved in any attack on the complainant. He had seen an injury or bruise on Eren's cheek earlier in the evening, which he believed to have been inflicted by her husband.
- [19] That brought the defence case to a close.
- [20] 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.
- [21] In order to convict the accused of the offence of attempted rape, I must be satisfied to the required standard of each of the following elements (from section 371(1) of the Penal Code):
- a. the accused intended to rape Eren (*ie.* he intended to have sexual intercourse with her without her consent);
 - b. he began to carry out his intention to commit the offence in a way suitable to bring about that which he intended to achieve;
 - c. he did some overt act that made clear his intention to commit the offence.
- [22] I need only consider the charge of indecent assault if I am not satisfied as to the guilt of the accused on the attempted rape charge.
- [23] As it is alleged that 2 men were involved in the attempted rape of Eren, the accused can be found guilty in 1 of 3 ways: (i) if he was a principal offender; (ii) if

he was in some way an accessory to the commission of the offence by Manibwebwe under section 21(1)(b), (c) or (d) of the Penal Code; or (iii) if he and Manibwebwe were engaged in an unlawful common purpose under section 22 of the Penal Code.

- [24] I note that the fact that Manibwebwe has pleaded guilty to the charge of attempted rape is of no consequence in this trial. His guilty plea cannot be used as evidence of this accused's guilt.¹
- [25] The accused stands charged alone with the offence of assault occasioning actual bodily harm, in respect of which I must be satisfied of the following:
- a. that the accused assaulted Eren;
 - b. that the assault was unlawful, in that was not authorised, justified or excused by law;
 - c. that the accused thereby caused Eren actual bodily harm, noting that "harm" is defined in section 4 of the Penal Code as meaning "any bodily hurt, disease or disorder whether permanent or temporary".
- [26] It is convenient at this point for me to set out the facts as I find them to be. There are significant differences between Eren's account and that put forward by the accused. The assessment of the evidence is not a competition, nor is it a balancing act, but it is necessary for me to make a finding as to the complainant's credibility. The prosecution case rises or falls on my view of her evidence.
- [27] I was impressed by Eren; she came across as forthright and genuine. I accept her account of what happened in the pit that morning. I did not find the accused to be a credible witness, and I do not believe his version of events. Where his testimony varies from that given by Eren, I reject it.
- [28] This finding enables me to deal quite easily with the charge of assault occasioning actual bodily harm. I am satisfied beyond reasonable doubt as to each element of the offence, and as to the accused's guilt.
- [29] I turn then to the charge of attempted rape. In considering the evidence, I am satisfied that the accused planned to have sexual intercourse with Eren, whether she consented or not. The accused punched Eren, with the intention of disabling her or weakening her resolve. He removed Eren's shorts and underpants and removed his own clothing. These are clear and overt acts that signal the accused's intention to rape Eren and are the means by which he began to put his plan into action.

¹ *Burnett v R* (1994) 76 A Crim R 148

- [30] I am satisfied beyond reasonable doubt that the accused was a principal offender in the attempted rape of Eren. It is therefore unnecessary for me to consider whether he aided and abetted Manibwebwe, or whether they were engaged in an unlawful common purpose. It is also unnecessary for me to reach a verdict on the alternative charge of indecent assault.
- [31] On a full consideration of the evidence in this case, I find the accused guilty of the offences of attempted rape and assault occasioning actual bodily harm. He is convicted accordingly.
- [32] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court

