



## HIGH COURT OF KIRIBATI

*Criminal Case N° 26/2019*

**THE REPUBLIC**

**v**

**BOBOIA KIOFUNG**

*Ateti Tekawa for the Republic  
Banuera Berina for the accused*

*Dates of hearing: 11-12 and 18-19 December 2019*

*Date of judgment: 10 February 2020*

### **JUDGMENT**

[1] Boboia Kiofung is charged on information with engaging in unlawful sexual intercourse.<sup>1</sup> The offence is alleged to have been committed on or about 8 July 2018, at Teoraereke village on South Tarawa. The accused admits to having inserted his penis into the complainant's vagina – the only issue to be decided is whether he did so unlawfully.

[2] The first of the 2 witnesses called for the prosecution was the complainant. She is 30 years of age. She testified that, on the evening of 7 July 2018, she attended a birthday party for her cousin in Betio. After the party she went with others to a bar in Betio, remaining there until it closed. Over the course of the evening the complainant consumed beer, spirits and *kaokioki*.<sup>2</sup> She does not recall how much she had to drink, but she was quite intoxicated. She remembers getting onto a truck and going to Nanikaai village with friends. The next thing she recalls is that she was drinking *kaokioki* with strangers in Teoraereke, sometime around dawn. She does not remember how she got from Nanikaai to Teoraereke.

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<sup>1</sup> Section 129(1), *Penal Code* (Cap.67).

<sup>2</sup> *Kaokioki* (also called sour toddy) is the fermented sap of the coconut tree.

- [3] The complainant continued drinking *kaokioki* until about 7:00 or 8:00am. She was not sure, but she thinks that she went to sleep under a pandanus tree. When she woke up, some hours later, it was afternoon. There was a group drinking *kaokioki* nearby who called her to join them. Among the group was a woman she recognised as a classmate of hers from school. After a while, her former classmate left and the group dispersed. The complainant continued drinking with some other people at a place closer to the ocean-side.
- [4] While there, the accused approached and spoke with the complainant. He asked her to go with him. She did not know the accused and did not want to go with him. He left and she continued drinking. Soon after the accused returned and again invited the complainant to go with him, saying something like, "Come with me to that place." She was annoyed with the accused and hid behind another young man. She scolded the accused and sent him away; he left. The group then moved to another place, where the drinking continued through the night. The complainant returned home around 7:00am on 9 July.
- [5] About a week later, the complainant was contacted by an aunt who lives in New Zealand. The aunt sent her a video file that she had received via social media. The complainant watched the video and saw that it depicted the accused having sexual intercourse with her. She was surprised, as she had no recollection at all of any such incident having occurred. She believed that the video had been recorded sometime on 8 July, as she can be seen wearing a blue top and black tights, which were the clothes she wore to the birthday party on 7 July. She had worn the blue shirt until the afternoon of 8 July. Having seen the video she filed a complaint with the police.
- [6] One day in early 2019 the complainant and her husband were walking in Teoraereke when they were approached by the accused. The following conversation ensued:
- Accused: Do you remember me?
- Complainant: Yes.
- Accused: About what happened, I have to apologise. Perhaps I was too drunk, which may be why I did that. I apologise for what I did. I did not expect to do that because I was so drunk. I did not expect those people to film it. I beg you to withdraw your complaint, because I have small kids.
- Complainant: It's okay. I accept your apology. I will try to withdraw my complaint.

Accused: If it is hard for you to withdraw your complaint, then you should say in court that you were my girlfriend and you consented to what I did.

The complainant did not agree to this final suggestion.

- [7] Under cross-examination, the complainant said that she did not recall going to sleep in Teaoaraereke after she had been annoyed by the accused. She assumed that the incident shown in the video had occurred earlier that day, while she had been sleeping under the pandanus tree. The complainant said that it had been around 6:00 or 7:00pm when the accused had approached her. At the time, some of her companions told him to stop bothering her. She denied going with the accused voluntarily after he had invited her to do so. She denied engaging in consensual sexual intercourse with the accused.
- [8] The only other prosecution witness was Senior Constable Naburea Maraki. He interviewed the accused on 30 July 2018, the record of which was tendered without objection (exhibit 1). The interview was conducted in the Kiribati language. A translation of the record of interview was provided, but it is very poor, so I have relied on the original. At the beginning of the interview it was explained to the accused that he was alleged to have been filmed having sexual intercourse with the complainant. It was daylight at the time, and the incident had occurred under a pandanus tree in Teaoaraereke. It was further alleged that the complainant was asleep at the time and unaware of what was happening because she was very drunk.
- [9] The accused gave his age as 36 years. He said that he was married with children, and worked as a carpenter. In the course of the interview the accused was shown the video provided to the police by the complainant. In response to questions from Senior Constable Naburea, the accused said the following:
- a. he agreed that he could be seen in the video on top of a woman;
  - b. during the events depicted in the video, his penis had penetrated the woman's vagina;
  - c. during the sexual intercourse, the woman had squeezed him with her legs;
  - d. at the beginning the woman had been sitting up, but then she leaned back;
  - e. when he finished, he pulled up the woman's lower garments;

- f. he had been accompanied at the time by 2 men, Tanentoa and Boata;
- g. he did not know who had filmed the incident;
- h. the woman had been awake to begin with, but had fallen asleep while they were having sexual intercourse.

[10] A flash drive containing the video file was then tendered without objection (exhibit 2). The video is 2 minutes and 25 seconds in duration. It starts with the couple already engaged in sexual intercourse. It is daylight. They are outdoors, on the ground under a pandanus tree. The accused can be seen lying on the complainant, thrusting his hips and grunting. The complainant is on her back; her eyes are closed and she appears unresponsive. Her t-shirt and bra are pulled up. The accused has on a sleeveless shirt and a pair of shorts. His shorts are pulled down slightly. As the camera pans down, the complainant's leggings and underpants can be seen bunched together around the top of her right leg. Her left leg is free.

[11] About 13 seconds in the complainant appears to try to weakly push the accused away with both hands. The accused stands up and the complainant, eyes still closed, rolls into the foetal position on her right side. The accused then twice roughly brushes the complainant's left buttock. He stands up straight, facing the camera. His erect penis is exposed briefly, before he pulls up his shorts. The complainant does not move. The accused bends down and lifts up her left leg, rolling her onto her back. It looks as if he is about to put her left foot through the leg openings of her underpants and leggings, but he is interrupted by the voice of another man; perhaps the person filming. The man instructs the accused, "Kaurea moa. (Open it first.)" His hand waves towards the complainant's genitals. The accused spreads the complainant's legs, exposing her genitals. He uses his fingers to spread her labia majora apart as the camera gets closer. The complainant does not respond.

[12] The accused then attempts, with considerable difficulty, to put the complainant's left foot through the leg openings of her underpants and leggings. As he does this, the camera pans back to the complainant's upper body; she still appears to be unconscious. The accused finally pulls the complainant's underpants and leggings up around her knees. The other man then tells the accused to again spread the complainant's legs and expose her genitals, which he does. The complainant appears to weakly resist, trying to keep her legs together. With both hands, the accused spreads her labia majora. He is being quite rough, but she does not respond. Her eyes remain

closed. The men continue their conversation, laughing, as the accused struggles to pull the complainant's leggings up all the way. He is moving her lower body around quite forcibly but she still does not respond. The accused pulls down the complainant's t-shirt and bra as the video ends.

- [13] That brought the prosecution case to a close. I found that the accused had a case to answer and informed him of his rights.<sup>3</sup> Counsel for the accused advised that his client would be giving evidence, and 2 other witnesses would be called.
- [14] The accused testified that, on 8 July 2018, he was drinking at Teariki's bar in Teaoaraereke. He saw a group of at least 10 people, including the complainant, drinking towards the ocean-side. He joined the group, which comprised mostly young men. They were all drunk and in good spirits. The accused was flirting with the complainant. As the group broke up, the accused went to the complainant and told her that he wanted to have sex with her. She went with him to a place that the accused thought was secluded, at the foot of a pandanus tree. The complainant was intoxicated and required his assistance to walk. The accused removed the complainant's lower garments and they had sexual intercourse. The complainant was awake. He was not aware that they were being watched, nor did he realise that someone was filming them. The complainant consented to sexual intercourse with the accused.
- [15] Some time later he again met the complainant. She did not recognise him, so he introduced himself. He apologised to her for the fact that the video of their encounter had been shared on social media. They discussed the withdrawal of her complaint. She told him that she had no problem with that, but her family was angry.
- [16] In cross-examination, the accused admitted that he had never met the complainant before the day in question. He knew a few of the others in the group, but not all. The complainant had responded to the accused's flirting by teasing him good-naturedly, although he was unable to recall exactly what she said. In his view, the complainant was not that drunk at the time. He rejected the suggestion that he had found her sleeping under the pandanus tree, and maintained that they had walked there together.

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<sup>3</sup> In accordance with section 256(2) of the *Criminal Procedure Code* (Cap.17).

- [17] In answer to questions from the Court, the accused said that the complainant had initially rejected his suggestion that they go off together, telling him that she wanted to drink some more. About 30 minutes later, when the drink was finished, he asked her again. She did not respond to his request, other than asking for his help to stand up. Once they were at the pandanus tree, the complainant sat down. The accused helped her to lie down and he removed her clothes. She did not say anything. The accused said that he was aware that the complainant's eyes were closed during the sexual intercourse, but he thought that she was just pretending to be asleep.
- [18] The first of the defence witnesses was Boata Bauro, a 30-year-old man from Nanikaai. He was among those drinking at the ocean-side in Teoraereke on 8 July 2018. He and his friend Tanentoa had bought *kaokioki* and were later joined by others, including the complainant. He knew the complainant as they had attended the same junior secondary school. The accused showed up and joined the group. He was sitting next to the complainant. She was teasing him, although Boata could not hear what she was saying. The complainant asked one of the others to take a photo of her with the accused. After a while the complainant left with the accused and Boata went with Tanentoa to buy some more drink. When they returned, a large group of people had gathered. They were watching the accused and the complainant having sex.
- [19] Under cross-examination, Boata said that the events he had described had occurred in the afternoon. He had concluded that the complainant was teasing the accused because he saw her poke his side and tug on his shorts. He and Tanentoa left Teoraereke at about 5:00 or 6:00pm. They went to a dance in Bikenibeu. Boata agreed that he had told the police that it was Tanentoa who had filmed the accused and the complainant having sex. At the time, he had assumed that this was the case because Tanentoa had his phone with him, but he is no longer sure that Tanentoa was the one who had filmed the couple. He thought that the complainant was not that drunk, although he conceded that he did not know how much she had had to drink.
- [20] In answer to a question from the Court, Boata said that the complainant had not had any difficulty walking. He and Tanentoa had only been away for about 5 minutes before returning to where the crowd had gathered. There were at least 20 people in the crowd, but he did not recognise any of them.
- [21] The final defence witness was Tanentoa Kaetau, a 30 year-old resident of Teoraereke. He was drinking with Boata on 8 July 2018. Others joined them,

including the complainant and the accused. He recalled that the complainant was teasing the accused. She asked someone to take a photo of the 2 of them. Later the complainant and the accused left together. Tanentoa and Boata went to buy some more drink, and when they returned the accused and the complainant were having sex.

[22] Under cross-examination, Tanentoa conceded that he had been quite drunk that afternoon. The accused had sat down next to him and Boata when he first arrived. The complainant had then come and sat next to the accused. Tanentoa had not heard any of their conversation before they left the group. The complainant had not needed any help to walk. When he and Boata had returned from buying the drink, others told him that the accused and the complainant were having sex; he did not actually see them. He recalled that, at some point earlier in the afternoon, he had heard the complainant tell the accused that she wanted to have sex with him.

[23] That brought the defence case to a close.

[24] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. His evidence is to be assessed like the evidence of any other witness. Even if I reject his evidence, I still need to be satisfied beyond reasonable doubt of the prosecution case before the accused can be convicted. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.

[25] In order to convict the accused of the offence of engaging in unlawful sexual intercourse, I must be satisfied to the required standard of each of the following elements:

- a. the accused engaged in sexual intercourse with the complainant;
- b. the sexual intercourse was unlawful.

[26] Sexual intercourse is defined as being one of a number of acts involving penetration of, or contact with, the genitals or anus of another.<sup>4</sup> For the purposes of this case, sexual intercourse includes the penetration, to any extent, of any part of a person's genitals by any part of the body of another person.

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<sup>4</sup> Section 127A, *Penal Code*.

- [27] Sexual intercourse is unlawful if done without the consent, or an honest and reasonable belief in the consent, of the other person involved in the activity, other than for a genuine medical or law enforcement purpose.<sup>5</sup> A person consents to an activity only if the person freely and voluntarily agrees to the activity.<sup>6</sup>
- [28] The accused admits that he penetrated the vagina of the complainant with his penis. He denies that this act was done without the complainant's consent.
- [29] On the prosecution case the complainant did not consent to the sexual intercourse, as she was either asleep or unconscious at the time.<sup>7</sup> The defence case is that the complainant was awake when the sexual intercourse occurred, and the act was consensual. If, as the intercourse continued, the complainant had fallen asleep or unconscious, the accused was unaware of that, and it was reasonable for him to believe that she was still consenting.
- [30] The complainant has no recollection at all of what occurred that day under the pandanus tree. She denies going with the accused willingly. She says that the incident must have occurred earlier in the day, when she was sleeping. The accused and the defence witnesses tell a very different story. In the circumstances, while I do not accept all of what was said by the accused and his witnesses, I find that I am left with some doubt as to how the accused and the complainant ended up together under the tree. It is quite possible that the complainant's intoxicated state has left her with a faulty memory of what happened that day.
- [31] However, the prosecution case does not rely solely on the oral testimony of the witnesses. We have the video; an unchallenged record of at least some of what transpired. The video does not lie. As the recording commences, the complainant is clearly unconscious and unresponsive. She remains so throughout, despite being subjected to various indignities. The few weak and ineffective movements she makes are, in my view, merely instinctive or a reflex response on her part. I do not accept the accused's contention that the complainant was merely pretending to be asleep, just as I do not accept his claim that he had no idea that he was being filmed. Even if the complainant had been awake at the time the accused first penetrated her vagina with his

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<sup>5</sup> See the definition of 'unlawful' in section 127A, *Penal Code*.


<sup>6</sup> Section 128(1), *Penal Code*.

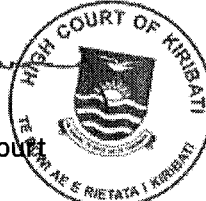
<sup>7</sup> Section 128(2)(b)(vi), *Penal Code*.



penis, by the start of the video she was no longer conscious. The accused continued to engage in sexual intercourse with the complainant after this point. Any consent that may have been given initially, ceased the moment she lost consciousness.<sup>8</sup>

- [32] However, an absence of actual consent is not enough by itself to support a conviction in the circumstances of this case. The prosecution must also satisfy me, beyond reasonable doubt, that the accused did not, at all material times, have an honest and reasonable belief that the complainant was conscious and consenting to sexual intercourse. Having watched the video, I am of the view that the accused did not believe that the complainant was conscious. In all likelihood he did not even turn his mind to the matter. Even if he did hold such a belief, it was not reasonable in all the circumstances for him to have done so. There is no way that a person in the position of the accused, even somewhat intoxicated, could reasonably have formed the view that the complainant was consenting. I am satisfied that the prosecution has negated the defence to the required standard.
- [33] Having carefully considered the evidence before me, I am satisfied beyond reasonable doubt that the complainant was unconscious for at least some of the time that the accused was engaging in sexual intercourse with her. Once she was unconscious she was incapable of consenting. I am satisfied that the accused did not have an honest and reasonable belief that the complainant consented to the act of sexual intercourse.
- [34] I am therefore satisfied beyond reasonable doubt of the guilt of the accused on the charge of engaging in unlawful sexual intercourse. I find him guilty and he is convicted accordingly.
- [35] I will hear counsel as to sentence.

  
**Lambourne J**  
Judge of the High Court



The seal of the High Court of Kiribati is circular, featuring a central shield with a sun, waves, and a palm tree. The text 'HIGH COURT OF KIRIBATI' is written around the top inner edge, and the motto 'TE KIRI AE E RUETATA I KIRIBATI' is written around the bottom inner edge.

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<sup>8</sup> See the decision of the Supreme Court of Canada in *R v JA* [2011] SCC 28, reported at [2011] 2 SCR 440.