

IN THE KIRIBATI COURT OF APPEAL ]  
CRIMINAL JURISDICTION ]  
HELD AT BETIO ]  
REPUBLIC OF KIRIBATI ]

Criminal Appeal No. 2 of 2011

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BETWEEN                      KARABU KAIAIA                      APPELLANT

AND                              THE REPUBLIC                              RESPONDENT

Before:                      Paterson JA  
                                    Williams JA  
                                    Barker JA

Counsel:                      *Daniel Webb* for appellant  
                                    *Tewiia Tawita* for respondent

Date of Hearing:                      26 August 2011  
Date of Judgment:                      August 2011

## JUDGMENT OF THE COURT

### INTRODUCTION

1. On 25 November 2010 Mr Kaiaia was found guilty of the defilement of a child under 13 years of age, in accordance with section 134(1) of the *Penal Code*. He appeals his conviction, but not his sentence of 7 years 9 months' imprisonment.
2. At the hearing the complainant and her mother gave evidence for the prosecution, while Mr Kaiaia gave evidence in his defence.

3. The Chief Justice noted in his judgment that before the complainant gave evidence he questioned her and was satisfied that she knew she must tell the truth and that she should be sworn.

4. The complainant's evidence was that the appellant forced her to undress, he undressed and lay on top of her. She said he inserted his penis into her vagina. The appellant's evidence was that he only put his penis between her legs. The actual words used by the complainant, as recorded in the judgment were:

*He took my underpants off. He took off his pants. He got on top of me. He then thrust his bottom against my bottom. He then inserted his penis into my vagina. I started crying. I was afraid "Don't cry or I'll punch your eyes". I felt pain when his penis was inside. Inside me not a very long time.*

5. The Chief Justice stated in his judgment that the complainant was:

*A good reliable witness who told a coherent story. This despite her being only 11 and appearing shy and embarrassed having to tell so intimate a story in a crowded court room and with people looking in from outside. An ordeal for anyone, let alone a little girl of 11. Even though S.11 of the Evidence Act has abolished the requirement for corroboration I still bear in mind that one should think carefully before convicting on the uncorroborated evidence of the victim especially one so young. Nevertheless in this case I do accept Termwane's evidence beyond reasonable doubt.*

6. Trial counsel for the appellant relied heavily on the complainant's statement made three days after the incident where she did not say the appellant had penetrated her. The translation of the statement produced in Court includes, "I felt my vagina hurt...." The Chief Justice saw that comment as "an inference of penetration".

7. In a further statement given three months later the complainant said:

*"forced to be penetrated his penis into my vagina".*

~~8. The appellant in his statement and in evidence did not deny~~  
indecently assaulting the girl by putting his penis between her legs  
but denied having penetrated her.

9. At trial the appellant's counsel made much of the omission in the first statement, complained of the lack of evidence of any recent complaint and of a medical examination. The Chief Justice concluded his judgment by saying:

*On the whole of the evidence I have no reasonable doubt of the guilt of the accused. He is guilty of defilement.*

10. The ground of appeal in the notice of appeal reads:

*The conviction is unreasonable because, having regard to all the evidence, the learned Chief Justice could not reasonably have been satisfied to the required standard that the accused had sexual intercourse with the complainant.*

11. At the appeal hearing, Mr Webb, counsel for the appellant, in well-reasoned submissions supported the ground of appeal on two grounds:

(a) The Chief Justice could not reasonably have been satisfied to the required standard that intercourse occurred;

(b) The finding that there was sexual intercourse was unsafe and unsatisfactory on the evidence before the Court.

12. Mr Webb's primary submission was that the verdict should be set aside as unsafe because the Chief Justice had determined the

matter on credibility issues alone. Also he submitted that the Chief Justice should have given reasons for disbelieving the appellant.

13. The key issue in dispute at the trial was whether or not penetration had taken place. Indecent assault was admitted by the appellant but he denied he penetrated the complainant's vagina. He had admitted, in his drunken state, to have had the thought of having sexual intercourse with the complainant, but prior to actually penetrating the complainant, her cries prompted him to desist and his "mind was recovered". He also said that he had a daughter around the same age as the complainant, and that when the latter started crying his "human thinking sustained" and he desisted prior to commencing sexual intercourse.
14. Counsel accepted that the Chief Justice was entitled to prefer the evidence of one witness over another, but submitted that in this case the credibility finding was based largely on observations of demeanour, and the Chief Justice's preference could not reasonably have been of such strength as to in itself justify a finding of proof beyond reasonable doubt on the issue of penetration.
15. Mr. Webb acknowledged that this Court could only set aside a finding of fact based on the credibility of witnesses where it can be shown that the judge failed to use or palpably misused the judge's advantage or acted on evidence which was inconsistent with facts uncontrovertibly established by the evidence or which was glaringly improbable. He accepted that the bar for appellate intervention is set high.
16. Counsel, while accepting that proper allowance must be made for the advantage the trial judge has in assessing credibility referred to authority which establishes that notwithstanding this advantage an

appellate court should be guided by and not bound by findings on credit or on the basis of demeanour – see *Fox v Percy* [2003] HCA 22 and *Devries v Australian National Railways Commission* [1992] HCA 41.

17. A pragmatic reason for the preference given to a trial judge's credibility finding is that he has seen the witness at first hand and can form an impression on reliability and credibility. The appellant's submission in this case is that the preference should diminish in circumstances where the pragmatic reason is less significant.
18. Reasons given for the preference being less significant in this case are, in the appellant's submissions, that the Chief Justice only had the benefit of observing the complainant for a short time, her words were translated and his Honour observed her demeanour over a cultural barrier. It was submitted that these factors, notwithstanding the preference given to a trial judge made it unreasonable and unsafe for the Chief Justice to have concluded, beyond reasonable doubt, that penetration occurred.
19. In summary the principal submission on behalf of the appellant was that, in the absence of further evidence, demeanour alone was not sufficient to allow the penetration issue to be determined beyond reasonable doubt. The appellant's evidence must have, in the circumstances of this case, created a reasonable doubt.
20. Circumstances which should have left doubt in the Chief Justice's mind include the uncorroborated evidence of an eleven year old girl who was nine years old at the time of the incident; while corroboration is not required a judge must still be cautious in such circumstances; the appellant's evidence contradicted the

complainant's evidence; and the combination of the age of the complainant and the nature of the complainant.

21. The appellant also submits that in the circumstances the Chief Justice was required to give reasons for determining that the appellant's evidence did not raise a reasonable doubt.
22. It was submitted that the Chief Justice misused his advantage by:
  - (a) Relying excessively on his impressions of the complainant's demeanour in assessing credibility;
  - (b) Reaching a finding as to the credibility of the complainant and the appellant of a strength that was not reasonably open to make; and
  - (c) Relying exclusively, and therefore excessively, on such a demeanour-based credibility finding to find the only disputed element of the defilement charge proved beyond reasonable doubt.

#### THE REPUBLIC'S SUBMISIONS

23. Ms Tawita, counsel for the Republic, submitted that this was a case in which the complainant's evidence alone was sufficient to convict. Once the Chief Justice accepted her evidence beyond reasonable doubt, that was the end of the matter.
24. Counsel relied upon authority which indicated the preference given to trial judges in assessing credibility. The evidence was such that the Chief Justice was entitled to accept the complainant's evidence and reject that of the appellant.

## DISCUSSION

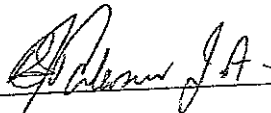
25. This was a case which fell for determination on whether or not the Chief Justice was satisfied beyond reasonable doubt that penetration occurred. He was required to determine this on the basis of the contrary evidence of the complainant and the appellant.
26. An omission in this case was the failure of the appellant's trial counsel to cross-examine the complainant specifically on the appellant's denial of penetration. It is unfortunate that this did not occur.
27. Although it would have been preferable for the Chief Justice to have been more explicit in his findings, it is clear that he believed the complainant and disbelieved the appellant on the penetration issue. This Court accepts that this is the finding he made, and the issue is whether it is unsafe to allow the verdict to stand, when it was obviously arrived at by assessing credibility largely, if not completely, on demeanour.
28. If the appellant's submissions are taken to their logical conclusion, the Republic would be wasting time and money by charging sexual defilement against a child where the only evidence is the statement of the child, and the offence is denied by the accused. This cannot be what the Legislature contemplated.
29. This Court accepts that caution is required when relying on the uncorroborated evidence of a child. However, section 11 of the *Evidence Act 2003* provides that corroboration is not required. In this case the Chief Justice satisfied himself that the complainant

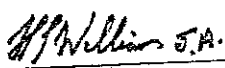
knew she must tell the truth, and warned himself that he must think carefully before convicting on the complainant's uncorroborated evidence. He was an experienced judge who had judged in the Republic for about ten years. He would have been aware of cultural differences and also possible interpretation problems. Nevertheless, he was satisfied beyond reasonable doubt.

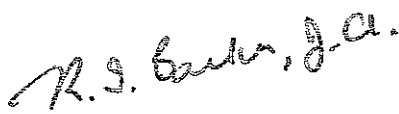
30. The House of Lords in *Watt v Thomas* [1947] AC 484 determined that where question of fact has been tried by a judge without a jury and it is not suggested that the judge has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his decision, because he saw and heard the witnesses, and should not disturb the judgment unless it is plainly unsound.
31. This principle applies in this case. This Court finds no reason to find the judgment is unsound.

#### DECISION

32. The appeal is dismissed.

  
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Paterson JA

  
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Williams JA

  
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Barker JA