

IN THE HIGH COURT OF KIRIBATI)
CRIMINAL JURISDICTION)
HELD AT BETIO)
REPUBLIC OF KIRIBATI)

CRIMINAL CASE NO. 2 OF 2000

THE REPUBLIC
V.
AAMON RIAUA

FOR THE REPUBLIC:
FOR THE ACCUSED:

MR TION NABAU
MR BANUERA BERINA

DATE OF HEARING:

28 AUGUST 2000

J U D G M E N T

The accused is charged with three counts:-

Count 1

Statement of Offence

Rape contrary to section 128 of the Penal Code Cap. 67

Particulars of Offence

Aamon Riaua on the 20th March 1999, at the Dai Nippon causeway close to Bairiki side, on the island of Tarawa, had unlawfully sexual intercourse with Nei Tekarimwa loane without her consent.

Count 2

Statement of Offence

Sexual intercourse with collateral contrary to section 158(1) of the Penal Code Cap. 67.

Particulars of Offence

Aamon Riaua on the 20th March 1999, at the Dai Nippon causeway close to Bairiki side, on the island of Tarawa, had sexual intercourse with Nei Tekarimwa loane who is his first cousin.

Count 3

Statement of Offence

Assault occasioning actual bodily harm contrary to section 238 of the Penal Code Cap. 67

Particulars of Offence

Aamon Riaua on the 20th March 1999, at the Dai Nippon causeway close to Bairiki side, on the island of Tarawa, committed an assault occasioning actual bodily harm upon Nei Tekarimwa loane.

He pleaded not guilty to each count.

The prosecution called five witnesses of whom the first was the victim.

Tekarimwa is the first cousin of Aamon: his mother is her father's sister. She had been living for some time at his house but on this evening between 7 pm and 8 pm had been at the teachers' bathroom, next to the playing field at Teaoraereke. Tekarimwa and two friends were leaving when Aamon came along on his motor bike. He called to her: she hung her clothes on the line except her panties which she held in her hand. She thought he was going to take her home on the motor bike. However instead they continued on towards Betio. They passed through Bairiki and kept on going. After they were on the Dai Nippon causeway the accused stopped the bike, got off and over the wall on the lagoon side and called to the victim to follow him. She did, putting on her panties as she went. Her version is that he then attacked her, pulled her to the ground, disarranged her clothing, eventually got it off, was on top of her, hit her in the face, squeezed her thighs and throat, spread her legs and, although he did not take his shorts off, took out his penis and inserted the penis into her vagina. Until that moment she had been a virgin. She felt pain and later she bled.

His version is that the bike ran out of petrol as they entered the causeway. He decided to take advantage of this to go down on to the beach to relieve himself. He had had 12 cans of beer that day and was drunk. She followed him down, pestering him to take her to the dance in Betio. He became

angry and gave her a backhand. He denied altogether any sexual impropriety.

I have given the two competing versions. I remind myself that it is not a matter of deciding between the two. It is for the Republic to prove its case against the accused, on each separate count, beyond reasonable doubt. The accused does not have to prove anything.

It is common ground that having been over the wall, the victim ran back to the roadway shouting for help. A bus ignored her but a vehicle driven by James Schutz and having two young male passengers did stop. The victim got in. My note of Mr Schutz's evidence:-

Heard her shouting out "Help me". Reversed car. She ran and opened door and entered. Got in seat behind me. Never seen her before. She was crying, very frightened. I asked "What happened?" She said she was about to be raped Told us person trying to rape her a member of household. "He was trying to rape me and inserted his finger in my vagina". Crying, her voice shook.

The accused on the motor bike followed the car, shouted the witness' name and yelled, "The girl is now with you. She is your responsibility."

Mr Schutz asked "Charlie" one of the passengers in his car, to look after the victim. Charlie took her to the house of Bwebwereiti Copeland. This lady gave evidence:-

One of the boys (Charlie) came with a young girl: asked if young girl could stay night: in some trouble: didn't know her. Her eye was bruised, swollen lip: hair untidy. When I asked her what happened, she cried again..... Bruises on left eye - eye red, surrounding area swollen. She was shamed because she didn't know me. Slept with me girl did say something about someone trying to rape her but she never finished the story: too upset.

There was no doubt at all that the accused assaulted the girl: he admitted it and there is sufficient evidence of her injuries for me to find the accused beyond reasonable doubt guilty of assault occasioning actual bodily harm.

The difficult question is whether there was rape, an attempted rape or no sexual impropriety at all. Having heard and seen the witnesses and having thought over their evidence I am satisfied beyond reasonable doubt that the accused was guilty of sexual impropriety. I accept the victim's evidence about what happened: that the accused called her over the wall, she went, he attacked her sexually, she resisted, he eventually desisted and she ran away crying for help. All that is beyond reasonable doubt.

Did the accused have sexual intercourse or did he merely attempt to have sexual intercourse? My note of her evidence:-

I struggled, tried to get hand off throat. He let go himself, attempted to penetrate me. Pain in my neck, couldn't breathe. Pain in my vagina: I struggled: he let go. I felt his penis penetrate my vagina: I tried to push him off but by then he was no longer attempting to penetrate me. Only his genital area was touching me.

That is evidence plainly of sexual intercourse. Yet when she made complaints to James Schutz and to Bwebwereiti Copeland it was merely of an attempt. I had allowed evidence of the complaint to Mr Schutz, as being a complaint made at the first reasonable opportunity. I would not allow Mr Tion Nabau, prosecuting, to ask Bwebwereiti Copeland in examination in chief what the victim had said to her. I considered that was a complaint not made at the first reasonable opportunity and therefore inadmissible. However Mr Banuera Berina, defending, brought it out in cross examination.

Unfortunately the Republic had no medical evidence. The list of witnesses contained the name of a doctor. The victim said she was examined at the hospital the next day. Mr Nabau had to tell me that the examining doctor at present is out of the country. Had I had his evidence he may have put penetration beyond doubt one way or the other. I suggest most strongly that those in charge of prosecutions should check that witnesses are available well in advance, certainly before a case

is listed for trial. Otherwise they risk the failure of the prosecution.

Mr Nabau when addressing argued that, because it is such a shameful thing for a young woman to lose her virginity before marriage, the victim was too embarrassed to complain of actual rape to three men and later to a lady whom she did not know. Mr Berina countered by asking why should she be embarrassed by having to say that she had lost her virginity through no fault of her own? Mr Berina went on to remind me that it is dangerous to convict of rape on the uncorroborated evidence of the complainant: I, representing the jury, may do so if convinced beyond reasonable doubt but it is dangerous to convict. The complaint of the victim that she was actually raped is uncorroborated. The evidence of James Schutz and of Bwebwereiti Copeland goes to support an attempted rape. I find, on reflection, that I do have a doubt, I believe a reasonable one, about whether there was actual penetration. That being so I cannot find the accused guilty of rape. However I have no doubt that Aamon tried to rape Tekarimwa.

Accordingly I find, relying on section 371 of the *Penal Code*, the accused guilty of attempted rape (itself a felony pursuant to section 130 of the *Code*), of attempted sexual intercourse with a collateral (a misdemeanour pursuant to section 372) and of assault occasioning actual bodily harm.



THE HON ROBIN MILLHOUSE QC
CHIEF JUSTICE