

Scan

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

HIGH COURT CRIMINAL CASE NO. 14 OF 2004

THE REPUBLIC
VS
KAITAAKE BUREUA

FOR THE REPUBLIC: MS RURIA ITERAERA
FOR THE ACCUSED: MS TAOING TAOABA

DATE OF HEARING: 3 & 4 MAY 2004

JUDGMENT

The accused has pleaded not guilty to the charge of indecent assault contrary to section 131(1) of the Penal Code, Cap. 67 in that on or about 25 April 2003 at Temakin, Betio at about between the hours of 4 am and 5 am or 5 am and 6 am, he did unlawfully and indecently assaulted a woman named Nei Beenika Baoro.

The accused's defence for denying the charge is that he was not the one who did indecently assaulted the complainant as at the relevant time in question when the alleged offence took place he was elsewhere, far away from the scene of crime. The principal issue therefore to be decided in this case is identification: was the accused the person who indecently assaulted the complainant at the relevant time in question?

The incident which gave rise to the charge of Kaitaake (accused) with indecent assault occurred at Temakin, Betio on 25 April 2003 between 4 am and 5 am or 5 am and 6 am inside the complainant's house in a large sitting room. The complainant was sleeping in the sitting room when she felt her vagina being tickled with. So she got up and tried to identify the person who did it. However she knew that it was not her husband who did that to her as he has

not told her or made previous arrangement with her about it on his wanting to play with her that early morning as he normally does when he wished so. So she pushed the person off her thigh and turned away from him without knowing where he went to. However she remembered that she has not yet identified the intruder and so she turned back to her left hand side and there she saw a person lying on his side and close to her but much closer to the corner of the room and facing away from her. That person was wearing short only. She then reminded herself that she has not yet been able to identify the intruder so she decided to stay awake and keep an eye on him. She however managed to stay awake for some time but gradually felt tired and sleepy and so she fell asleep again. And as she was sleeping she felt someone's head on her thigh which she pushed it off her quickly but then the person moved his head to her arm and then asked her whether he could suck her breast. On hearing this the complainant quickly pushed off her arm that person's head but then that person moved his head quickly to her vagina and licked it again. As this particular point in time the complainant recognise the intruder as the accused.

In order to prove its case the prosecution called two witnesses and the first witness is the complainant herself - Nei Beenika Baoro (PW1). She testified that she is 34 years old, married and has five children. She recalled that on the early morning of 25 April 2003 between 4 am and 5 am or 5 am and 6 am at Temakin Betio she was sleeping in her house in a large sitting room with her aunt Nei Marion and the brother in law of her husband. The husband on the other hand was sleeping in a separate room by himself. When they slept the complainant and her aunt lied close to each other with the door behind their feet. The brother in law of the husband on the other hand was sleeping by himself in the same sitting room but farther away from where the complainant and her aunt were sleeping.

At that time the complainant was wearing lavalava only without any underwear. And while sleeping the complainant woke up because she felt her vagina being tickled. So she turned to identify the person who had tickled her vagina. However she knew that that person was not her husband as he has not woken her up or told her that he wished to do something with her that early morning. She therefore pushed that person's head off her thigh and turned away from that person to her right hand side and did not see where that person might have gone to. And as she was lying on her side she realised that she has not identified that person so she rolled back to her left hand side and then she saw a person lying on his side close to her but closer to the corner of the room and facing away from her. That person was wearing short only.

She then reminded herself that she has not yet identified that person so she managed to stay awake for a while but she then got tired and sleepy and eventually fell asleep. And as she was sleeping she felt a person's head on her thigh with the face turning to her vagina. When she saw this she immediately pushed that person's head off her thigh and then turned her body around away

from that person to her right hand side of her body. After she pushed that person's head off her thigh that person quickly moved and laid his head on her right arm. Then that person asked the complainant whether he could suck her breast. On hearing this the complainant quickly pushed that person's head off her right arm but that person then moved his head downward towards her vagina and started licking it. The complainant was naked at that time.

Then she recognised that person as the accused and told him to leave her. She also spoke to him and said: 'Look at you! What a pitiful sight". The accused then stood up and he simultaneously held on the right leg of the complainant. In the meantime the complainant then lifted her left leg and kicked the accused with it and from the force of which kick the accused was hurled to the side of the wall of the room. Shortly afterwards the accused stood up and left the room by the door.

When the accused left the room the complainant was complaining and talking to herself as why any member of her household has not seen or stopped the accused at all from intruding into her house. Then her nephew Avita Aviu (PW2) heard her talking and asked her as what has happened with her. She then asked him why he has not raised the alarm and Avita explained to her that he has been sleeping just like everyone else did in the house.

The complainant then confirmed that the person she saw was Kaitaake (accused) whom she knows well as she and the accused had grown up together in the same area on Betio since childhood. And Kaitaake is sitting at the dock in court today. She also stated that when the accused indecently assaulted her as described above she was very unhappy about it as the accused is not her husband at all and he should not have done that to her.

In cross-examination the complainant said that her aunt Nei Marion and the brother in law of her husband were all sleeping in the same large sitting room. This brother in law however was sleeping farther away from the complainant and her aunt who were sleeping closely next to each other near the door of such sitting room.

The complainant further stated that the incident in question took place between 4 am and 5 am and or 5 am and 6 am during which time there was sufficient daylight to enable her to identify the accused when he left the sitting room early that morning. She also stated that the person who first tickled her vagina could not possibly be her husband at all as her husband would have been embarrassed under the circumstances as there were people including the complainant herself all sleeping together in the same room.

She also said that normally she is a very heavy sleeper and when she wakes up it usually takes her a couple of hours before she becomes fully awake.

She also confirmed that she did not wake up the people in the house when the accused indecently assaulted her in the vagina more than once because her husband and his brother in law were both drunk then and has she woken them up they were likely to have caused some violence and then they could be locked in gaol.

In any case she said she was in the least feel afraid of the accused and she was prepared to fight him then by herself if necessary. In answer to a challenge put to her by counsel that she said she was not in least afraid of the accused and could have fought him if necessary yet she had allowed him to lick her vagina more than one occasion, she said she confirmed that fact however she did so because she thought it was her husband who was around the house during that early morning of 25 April 2003 otherwise she would not have hesitated to fight him in order to prevent him from indecently assaulting her as described above.

She also said that she knew that when the accused first licked her vagina it was not her husband as her husband usually would have woken her up first or have prior arrangement that he wished to do something to her. And during that morning in question her husband did not do any of those things to her at all. And as far as lighting inside and outside the house is concerned the complainant admitted that it was somewhat dark inside the house and thus vision was poor but vision outside was reasonably good as there was bright moonlight shining that early morning in question.

When the complainant was asked by the court as how long has she known the accused for and she stated that she has known the accused for a long time since he was a child and they have both lived in the same neighbourhood of Betio for a long time, and have grown up together but she is older than the accused.

She also stated that she saw the accused during the night before the incident in question as the accused had visited the complainant's house and asked the complainant whom he called "my sister" to give him a can of beer which she did. The complainant's husband and her husband's brother in law were also drinking beer that night before the incident in question and as the result they were both drunk. She also said that the accused was also drinking the night before the incident in question took place.

She also said she did not tell her husband about the incident in question but he had heard about it between about 7 and 8 in the morning in the course of the complainant's argument with and allegation about the accused having had indecently assaulted her by licking her vagina.

The complainant's husband was cross with her when he saw and heard her arguing with the accused about the incident in question that early morning

whilst the accused was enjoying some drink with his friends in a sour toddy place.

The second prosecution witness is Avita Aviu, a man of 29 years, he lives at Saunaine, Temakin, Betio. The witness testified that he is the nephew of the complainant.

On 25 April 2003 between about 4 am and 5 am or 5 am and 6 am the witness was sleeping in the kiakia (raised floor house) which was about 2½ metres away from the complainant's masonite house. As he was sleeping he woke up because he heard the complainant shouting: "I recognise you, you are Kaitaake. I feel sorry for you: you are the last man a woman would ever fancy". And as the complainant uttered these words the witness saw the accused rushing out of the door and started to run away wearing shorts and a hat. The witness said that he knows the accused well as the accused is a long time neighbourhood friend of his.

The witness further testified that it was about 6 am when all this happened and by then there was sufficient sunlight to see and recognise people also. He said he wanted to catch the accused but he could not as he ran away and disappeared quickly out of sight.

The witness also testified that the kiakia in which he was when all this happened was partly walled as it was walled on one side and the other side is not and he slept on the unwalled part.

The next witness Korea Tio is a police officer who took the caution statement of the accused. The parties however formally admitted the caution statement by consent during the trial. Thus Korea Tio was not called to give evidence. The caution statement is admitted in evidence as Exhibit 1P.

In his caution statement the accused admitted having indecently assaulted the complainant by licking her vagina. That concluded the case for the prosecution.

The accused then elected to give evidence but did not call any evidence or witnesses.

Kaitaake Bureua (Accused)

He is 23 years of age, unemployed, went as far as primary school and he is from South Tarawa.

On the early evening of 24 April 2003 the accused testified that he with some six student friends generally went about enjoying themselves drinking sour toddy around Temakin area at Marion's house, near the complainant's house.

Nothing exciting happened there so the accused left his drinking companions and went to the complainant's house where he saw the complainant and her husband having beer with friends and enjoying themselves singing away in the course of the night. On seeing this the accused then asked the complainant for a couple of cans of beer which were given to him.

After this the accused went back to again join his drinking companions at Marion's house and had more sour toddy till about 12 o'clock midnight when the accused and his friend left for the Gateway, Betio to dance. The Gateway was already closed by the time the accused and his friends got there. It was then about 1 am so the accused and his companions went back to Temakin and looked for another sour toddy place to drink. The accused and his friends then selected Baurerei's sour toddy place and stayed and enjoyed themselves there for some time. In the meantime the accused fell asleep at Baurerei's sour toddy place. When he woke the accused and his friends went back to Marion's sour toddy's place near the complainant's house again to have some more sour toddy.

It was then very early in the morning about between 7 and 8 am. And whilst at Marion's house the complainant came apparently to look for her missing lighter and cigarettes and when she saw a packet of cigarette and lighter she immediately scolded at the accused and blamed him for having indecently assaulted her in her house by licking her vagina earlier on in the morning.

The witness further stated he never went near the house of the complainant in the early morning of that day of 25 April 2003. The witness testified also that he knows Avita Aviu (PW2) well as he was his classmate and friend in school.

In cross-examination the witness confirmed that the Police did take his caution statement in the normal way but because he was very drunk and became very nervous when he was interviewed he consequently has lied to the police when he confessed that he did in fact indecently assault the complainant by licking her vagina.

That concluded the case for the defence. I then heard addresses from counsel for the prosecution and counsel for the defence.

Counsel for the prosecution Ms Ruria Iteraera then submits that the prosecution has proved its case beyond reasonable doubt since all the elements of the offence of indecent assault had all been proven.

Ms Ruria Iteraera argued that the evidence of complainant herself clearly proved that the accused had unlawfully and indecently assaulted her by licking her vagina when she was sleeping without her consent.

This account of indecency committed on the complainant by the accused was unchallenged in cross-examination by the defence and was also corroborated by the confession of the accused in his caution statement to the police where he admitted having indecently assaulted the complainant by licking her vagina on more than one occasion.

As to whether the complainant was consenting to the act of indecency committed on her by the accused, Ms Iteraera argues that the complainant's evidence clearly shows that she did not consent as she was not happy at all when the accused indecently assaulted her as he was not her husband. And despite attempt in cross-examination to prove otherwise she remained firm and unshaken all throughout in her not consenting to the act of indecency of the accused.

Further the evidence of Avita Aviu (PW2) that he heard the complainant shouting angrily to the accused and called him names corroborated and confirmed that the complainant was not consenting at all to the act of indecency of the accused. On the defence of identification Ms Ruria argues that despite a blunt denial by the accused that he went to the complainant's house and assaulted her at the relevant time in question there is evidence that the complainant herself actually saw and heard the voice of the accused speaking when she asked her to suck her breast and as the result she then recognised that person as the accused himself. Further Avita Aviu (PW2) also actually saw the accused walking out of the door of the complainant's house and ran. And these identification evidence are all the more convincing and reliable as both witnesses (the complainant and Aviu) know the accused well as they all came from the same neighbourhood in Betio and had grown up in same area since they were children though the complainant is older than the accused. Aviu in particular knew the accused well as they had been classmate in primary school and are friends also. Further there was bright moonlight at relevant time in question when the witnesses saw the accused. Further the description of the appearance of the accused they both painted when they saw him that early morning in question was consistent.

The prosecution further submits that in view of the accused having raised the defence of identification without any supporting alibi witnesses such defence therefore should be rejected altogether.

The prosecution also draws the attention of the court to the fact that in the accused's caution statement which he gave to police on 5 June 2003 at 1545 hours his evidence in court are in terms inconsistent and contradictory: in his caution statement the accused admitted having indecently assaulted the complainant by licking her vagina because he has been nervous and drunk then when he was interviewed whilst in his testimony he bluntly denied having done so.

In light of all the evidence the prosecution therefore submits that it has discharged the burden of proof beyond reasonable doubt.

The next submission is that of counsel for the defence Taoing Taoaba. In her submission she urged the court to attach little weight or no weight at all to Nei Biineka's evidence as what she testified she did during the early morning of 25 April 2003 is unbelievable if not impossible to believe at all in normal every day life. For example she said that she knew that the person who assaulted her initially was not her husband, yet she raised no alarm about it or called her husband or others in the house to help her that early morning of 25 April 2003. Instead she went to sleep again. And again she was assaulted for the second time.

Counsel for the defence further submits that the complainant should not be believed at all as she is untruthful and unreliable witness as she had concealed from the court the fact that she had been drinking before the incident in question took place. Further counsel for the defence submits that the second prosecution witness should not be believed too as his evidence in court that the complainant mentioned the name of the accused when she shouted out to the accused as he walked out of the room is inconsistent with what he said in his written statement which was taken a month earlier.

Counsel for the defence further submits that even though the accused's caution statement was admitted in evidence in court without any objection on the part of the accused, the accused in evidence testified that he admitted to the allegation not because it is true that he assaulted the complainant but because at the time he gave such statement he was nervous and confused. This fact is borne out in the caution statement of the accused in the answers he gave to the questions put to him by the police. Counsel for the defence therefore submits that the court accepts the testimony of the accused in court and disregards the evidence in his caution statement.

Before I consider the evidence I direct myself the burden of proof beyond reasonable remains upon the prosecution from the beginning of the trial to the end. The prosecution must prove the charge and each element of the charge beyond reasonable doubt and if it fails to do so then the accused is entitled to be acquitted. The accused on the other hand needs not prove its innocence as "he is presumed to be innocent until . . . he is proved guilty" (S. 10(2) of the Constitution).

In the present case, to discharge that burden of proof in respect of the charge of indecent assault under section 134(1) of the Penal Code, the prosecution must prove beyond reasonable doubt that

- (i) the accused intentionally assaulted the complainant

- (ii) that the assault or the circumstances accompanying it are capable of being considered by right-minded people as indecent, and
- (iii) that the accused intended to commit such assault as is referred to in (ii) above (see R v Court (1988) 87 CR App R 144 and Archbold 2004 para 20-149(e)).

I further direct myself that in cases of this nature it is dangerous to convict on the uncorroborated evidence of the complainant. However bearing the warning in mind, if I have no doubt that the complainant is speaking the truth, then I may convict on her evidence, even though uncorroborated.

Having said that, I found the complainant to be a credible witness who emerged from cross-examination unshaken and I believe her and accept her evidence. Her evidence is corroborated by the second prosecution witness. I also found Avita Aviu - second prosecution witness to be a credible witness who have also emerged from cross-examination unshaken. However I am aware that Avita is a nephew of the complainant but I still found him as a truthful witness and I accept his evidence.

As the issue in this case is one of identification and having considered the evidence of the complainant herself and Avita - the second prosecution witness, and applying the Turnbull Guidelines (see Archbold 2004 paragraph 14-2-10) especially paragraphs 14-3, 14-4, 14-5 and 14-6 which relate to the quality of the identification I am satisfied that the quality of the identification in the evidence of the complainant and Avita is good. Both the complainant and Avita knew the accused as they all come from the same neighbourhood of Betio where they grew up and have known each other for years. Avita in particular has been classmate of the accused when they were in primary school and are still living in the same neighbourhood of Betio now.

And as far as the condition of light is concerned during that early morning of 25 April 2003 there was bright moonlight and sunlight or dawn was starting to break in as it was then between 5 am and 6 am.

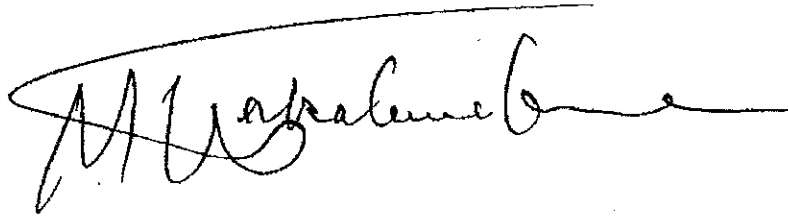
I am satisfied beyond doubt therefore that the person whom the complainant and Avita saw on the early morning of 25 April 2003 was the accused.

I am also satisfied beyond doubt that force was applied to the complainant by the accused without her consent, that the assault is indecent and that the accused intended to commit it.

So taking the whole of the evidence into account I am satisfied the prosecution has proved the charge of indecent assault against the accused beyond reasonable doubt.

I therefore find the accused guilty and convict him accordingly.

Dated this 18th day of May 2004

A handwritten signature in black ink, appearing to read 'M Takabwe', with a long horizontal flourish extending to the right.

THE HON MR JUSTICE MICHAEL N TAKABWEBWE
Judge