



HIGH COURT OF KIRIBATI

Criminal Case No 25/2018

THE REPUBLIC

v

ATANAERA BWAIBWA

Tewia Tawita, Senior State Attorney, for the Republic
Raweita Beniata for the accused

Dates of hearing: 27-28 August 2018

Date of judgment: 31 August 2018

JUDGMENT

- [1] The accused is charged with 1 count of engaging in sexual intercourse with a person under the age of 15 years, contrary to section 135(1) of the *Penal Code* (Cap.67). He has pleaded not guilty.
- [2] To my knowledge this is the first prosecution for an offence in the High Court under Part XVI of the *Penal Code* since significant amendments were introduced by the *Penal Code (Amendment) and Criminal Procedure Code (Amendment) Act 2017*. The amending Act commenced on 23 February this year. The offences of rape and defilement no longer exist, and the definition of 'sexual intercourse' has been significantly broadened. Penalties for several offences (including the one alleged against this accused) have been dramatically increased.
- [3] This prosecution has progressed with admirable swiftness. The offence is alleged to have occurred on 1 May this year, and the original information was filed on 21 May. When the matter was mentioned before me on 16 July 2018, counsel for the accused advised that he would be applying for the information to be quashed, on the ground that it failed to comply with section 70 of the *Criminal Procedure Code* (Cap.17) (see *Republic v Manibwewe Baon and anor*¹). By the next mention date, the Attorney-General had rectified the defect by filing a fresh information, dated 18 July 2018 and signed by her. Save for 2 minor amendments (to which counsel for the accused did not object), the trial proceeded on the fresh information.

¹ High Court Criminal Case 28/2018.

- [4] Four witnesses were called for the prosecution.
- [5] The complainant (who is not named here because of her young age) is a 13-year-old girl, having been born on 5 September 2004. She does not go to school, and has not been to school since Class 3. The complainant testified that, in the early hours of 1 May, she was asleep on her family's *buia* in Temakin, Betio. Her parents and siblings were sleeping on the same *buia*. The complainant awoke suddenly with the sensation that she was falling to the ground. The accused was pulling her roughly from the *buia*. The complainant had no difficulty recognising the accused, who lived next door. He walked her towards the beach, with one hand around her waist and the other covering her mouth.
- [6] On the beach the accused kissed the complainant and had sexual intercourse with her, inserting his penis into her vagina. She struggled, but did not scream out, for fear of what the accused might do. The sexual intercourse continued for a while, but the complainant was unable to say whether the accused ejaculated or not. She felt pain in her vagina and was crying. The accused sucked on the complainant's neck, leaving a 'love bite'. He did not say anything while they were on the beach. The complainant did not consent to anything done by the accused.
- [7] The accused left the complainant on the beach. She went home and bathed, before returning to her position on the *buia*. Although her vagina was painful, the complainant did not wake her parents, for fear of being punished. She went back to sleep. The next day the complainant was confronted by her mother, who saw the mark on her neck and sand in her hair. The complainant told her mother what had happened, and they went to the Police station to file a complaint.
- [8] The complainant's story was not shaken under cross-examination. She denied being the accused's girlfriend, and denied having had sexual intercourse with the accused on a number of occasions previously.
- [9] The second witness for the prosecution was the complainant's mother. The complainant is the eldest of her 4 children. She makes some money selling fish at the market. She testified that the family had been living in Temakin next to the family of the accused since April 2017. The complainant's mother and the accused's mother are both from the same village in Butaritari, and their families grew very close over the months that followed. There was a suggestion that the 2 women were related, but the complainant's mother was not sure. In July 2017 a *botaki* was held to mark the occasion of the complainant's first menstrual period. The *botaki* was held at the house of the accused's family, because they had more room.
- [10] On 1 May this year, some time after midnight, the accused came to the complainant's mother and asked to borrow a charger. He then left. She thought nothing of it. Later that day, while the complainant was doing her chores, the complainant's mother saw a bruise on the complainant's neck and sand in her hair. She confronted the complainant, who told her that the accused had had sexual intercourse with her. They went to the Police station to file a complaint.

- [11] Under cross-examination, the complainant's mother admitted that the complainant had initially refused to tell her what had happened, and that it was only after the complainant's father returned from work and threatened the complainant with a beating that she revealed what had happened with the accused on the beach.
- [12] The third prosecution witness was Kootuku Iakobu, a 32-year-old man who lived with his wife and children not far from the complainant. Sometime after midnight, in the early hours of 1 May this year, he was awake, having been woken by his young child. He saw the accused and the complainant walk past his house. The accused had his right arm around the complainant's waist. He was concerned about what they might be up to, so he followed them towards the sports field. They were walking quite fast, and he lost sight of them, so he returned to his house. Under cross-examination, Kootuku testified that the accused's left hand was by his side, and the complainant did not appear to be under any coercion or duress. He did not see them again that night.
- [13] The final prosecution witness was Dr Tanebu Tong. She is a medical officer at the Tungaru Central Hospital in Nowerewere, having graduated from the Fiji School of Medicine in 2010. In 2012 Dr Tanebu attended specialist training in New Zealand in sexual abuse care. When she examined the complainant on 1 May this year, there were no obvious bodily injuries. The complainant's genitals were covered with sand, and further examination revealed a whitish vaginal discharge and a small tear at the base of the hymen. Dr Tanebu testified that the discharge was indicative of recent repetitive penetration of the vagina, resulting in secretion of mucus. The hymenal tear was recent, and Dr Tanebu could see inflammation of the hymen, which suggested that the tear had occurred within the preceding 24 hours, likely caused by penetration of the complainant's vagina. She said that the complainant's presentation was not consistent with someone who had previously had penetrative sexual intercourse on a number of occasions.
- [14] That brought the prosecution case to a close. Counsel for the accused made no submissions, and I found that the accused had a case to answer. I then informed the accused 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, and counsel for the accused advised that one other defence witness would be called.
- [15] The accused is 21 years old. He is not employed. He testified that, on the night of 30 April this year, he had been drinking at the Gateway night club in Betio. He walked home after the club closed. He was quite drunk. When the accused got home, he went next door and woke the complainant's mother and asked if she had a charger for his speaker. She did not. He thought that it was maybe 2:00am or 3:00am, on 1 May. He took his sleeping mat from his *kiakia* to the beach nearby. He then returned to the complainant's house and woke the complainant by tapping her on the shoulder. The accused helped the complainant down from the *buia*, and told her to be quiet, as he didn't want to wake anyone. They then walked away from his house, past Kootuku's *buia*. The accused had his arm over the complainant's shoulder. He did not tell the complainant where they were going, and she did not say anything.

- [16] They went to the beach, to a spot between 2 boats. The accused told the complainant to sit down, and she did. He sat next to her. She lay down on her back and the accused lay on top of her. He pulled up the complainant's skirt and tried to pull down her underpants. The complainant told him to just pull the crotch of her underpants to one side. The accused unzipped his shorts and took out his penis. He then put his penis in the complainant's vagina and they had sex. The complainant had her arms around the accused, and did not struggle or object. After a minute or 2 of thrusting, he withdrew his penis and ejaculated. The complainant then returned home. The accused accompanied her part of the way. He then went back to his sleeping mat on the beach and slept.
- [17] The accused testified that this was not the first time he and the complainant had had sexual intercourse. He thought that it was maybe their fifth or sixth time together. The accused considered the complainant to be his girlfriend, and they had been in a relationship for several months prior to May. He did not know how old she was, but he knew that she did not go to school, and had not gone to school in 2017 either. He testified that the complainant's main responsibility was to care for her younger siblings while her mother sold fish at the market. The accused recalled attending the *botaki* in the middle of last year to celebrate the complainant's first menstrual period.
- [18] Under cross-examination, the accused admitted that he made no enquiries as to the complainant's age. He said that he had seen her playing with other children, who he knew to be in Form 2 or Form 3 (and therefore 13 or 14 years old). The accused denied taking the complainant away from her *bua* against her will on 1 May, and insisted that the complainant was a willing participant in the sexual intercourse. He never asked the complainant how old she was, and it never occurred to him to do so. He had no idea how old she was.
- [19] In re-examination the accused testified that, to him, the complainant was "old enough", although he did not explain what that meant. He formed that view because the complainant was almost as tall as him, and because she did not go to school.
- [20] The other defence witness was the accused's older sister, Bakiau Bwaibwa. She is 25 years old. She knows the complainant, who is friends with one of her younger sisters, Teureura. Teureura is 13 or 14 years old. Bakiau described 2 occasions in March this year at their house in Temakin where she had seen the accused and the complainant behaving in an intimate manner. On the first occasion, the accused and complainant were lying down together, hugging. Bakiau was angry, and wanted to chase the complainant away but did not, as her husband urged her not to make a fuss.
- [21] Some time later that month, Bakiau found the accused and the complainant on her bed together, kissing. She felt ashamed, and dragged the complainant out of the house by her hair. Bakiau told the complainant that if she found them together again, she would tell the complainant's parents.
- [22] That brought the defence case to a close.

[23] 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.

[24] In order to convict the accused of the offence of engaging in sexual intercourse with a person under the age of 15 years, contrary to section 135(1) of the *Penal Code*, I must be satisfied to the required standard of each of the following elements:

- a. the accused engaged in sexual intercourse with the complainant (as defined in section 127A of the *Penal Code*); and
- b. the complainant was at the time under the age of 15 years.

[25] The first of these is admitted by the accused himself, and the second was the subject of a formal admission as to the complainant's date of birth under section 126A of the *Criminal Procedure Code* at the start of the trial. As such, unless he can avail himself of one of the defences under section 135, the accused must be convicted of the offence as charged.

[26] The relevant portions of section 135 are as follows:

135 Sexual intercourse, indecent assault or indecent behaviour involving a person under the age of 15

(1) Any person who engages in sexual intercourse with a person under the age of 15 is guilty of a felony and is liable to imprisonment for life.

...

(5) Subject to subsections (6) and (7), it is not a defence to a prosecution for an offence against this section that the other person consented.

(6) It is a defence to a prosecution for an offence against this section that at the time of the alleged offence—

- (a) the accused was not more than 2 years older than the other person; and
- (b) the other person wished to consent to the sexual intercourse, indecent assault or act of indecency.

(7) It is also a defence to a prosecution for an offence against this section that—

- (a) the accused—
 - (i) took reasonable steps to determine the age of the other person; and
 - (ii) honestly believed on reasonable grounds that the other person was 15 years old or older; and
- (b) the other person wished to consent to the sexual intercourse, indecent assault or act of indecency.

(8) Subsections (6) and (7) do not apply if the accused was a person in a position of trust towards the other person as defined by section 155A.

[27] The accused was born on 24 November 1996. As he is almost 8 years older than the complainant, the defence under section 135(6) is not available to him.

- [28] That leaves only the defence under section 135(7). It is conceded by counsel for the prosecution that the accused was not in a position of trust towards the complainant.
- [29] There are 3 limbs to the defence under subsection (7), each of which must be satisfied in order for the defence to apply:
- a. the accused must have taken reasonable steps to determine the complainant's age;
 - b. the accused must have honestly believed, on reasonable grounds, that the complainant was at least 15 years old; and
 - c. the complainant must have been a willing participant in the sexual intercourse.
- [30] At the beginning of closing submissions, I asked counsel to address me on the question of where the burden of proof lies – does the prosecution need to negative each limb, beyond a reasonable doubt, or does the defence need to prove that each limb has been positively established, on the balance of probabilities. Perhaps unsurprisingly, counsel for the accused contended that the accused had only an evidential burden. Once the defence had been raised, it was for the prosecution to prove that the accused had not taken reasonable steps and did not have the requisite belief, and that the complainant was not a willing participant. On the other hand, counsel for the prosecution contended that the burden rested on the accused. Unfortunately neither counsel was able to refer me to relevant authorities to support their respective positions.
- [31] Prior to the amendments to the *Penal Code*, section 135 provided for the offence of defilement – unlawful sexual intercourse with a girl over the age of 13 years and under the age of 15 years. It was a defence to such a charge:
- if it shall be made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of 15 years.
- [32] That defence resembles the second limb of the defence under section 135(7). This court has previously held that the burden of proving the existence of the requisite belief, and the reasonableness of that belief, under the former section 135 fell on the accused, on the balance of probabilities.² This is also the case in the Northern Territory of Australia, where the equivalent provision in their *Criminal Code* is expressed in similar terms.³
- [33] I had hoped to find some authority from New Zealand that might assist in resolving this issue. Sections 134 and 134A of the New Zealand *Crimes Act* 1961 (as inserted in 2005) are in almost identical terms to the provisions of the new section 135 of the *Penal Code*. The similarities suggest that the drafter of the Act to amend the

² *Republic v Maaman Kooki*, High Court Criminal Case 6/2001, and *Republic v Wiiri Temakei*, High Court Criminal Case 32/2006.

³ *R v Cole* (1994) 77 A Crim R 91.

Penal Code relied heavily on the New Zealand provisions. Unfortunately I have been unable to find any case where the matter has been considered.

[34] In the circumstances, I take the view that the clear language of section 135(7) places the burden of proof on the accused, thus reversing the usual onus. Each limb of the defence under section 135(7) must be established by the accused on the balance of probabilities. I am supported in this view by legal advice provided to the New Zealand Attorney-General dated 9 December 2003, which discussed whether a Bill to amend the *Crimes Act* (which ultimately became the Act that inserted sections 134 and 134A) was consistent with the *New Zealand Bill of Rights Act* 1990.⁴ That advice makes the point that:

the nature of the matters in issue are, largely speaking, ones falling peculiarly within the knowledge of an accused – he or she would know for example what (reasonable) steps had been taken to ascertain the complainant’s age, and ought to be able to articulate and demonstrate why he or she believed that consent existed prior to sexual conduct occurring.⁵

[35] So, has the accused discharged his onus? I will first address the matter of whether the complainant “wished to consent to the sexual intercourse” (section 135(7)(b)). On her testimony, she did not. On the testimony of the accused, she did. The complainant cannot, in law, consent to sexual intercourse⁶ – the question is whether I can be satisfied, on the balance of probabilities, that she was a willing participant.

[36] The complainant’s version of events was consistent throughout her evidence. However, I found it odd that she made no effort to wake her parents at the point when she was dragged from the *buia*. Ordinarily, one might expect a person in such circumstances to cry out, even from surprise. The complainant’s parents and siblings were sleeping so close by that they could not have failed to hear her.

[37] There is nothing to corroborate her testimony. While I acknowledge that there is no legal requirement for corroboration,⁷ none of the indicators that might support an absence of consent (such as defensive injuries) are present. When Kootuku saw the accused with the complainant, he saw no signs that the complainant was being led away against her will. The recent complaint to her mother turned out to be not as recent as the Court was first led to believe, and only made in response to threats from the complainant’s father. I cannot accept that as being of any assistance to the prosecution.

[38] Furthermore, I accept the evidence of the accused’s sister that there had been prior occasions where the accused and the complainant were intimate, despite the complainant’s denials. Given the complainant’s admitted fear of receiving a

⁴ At [22]. The advice was accessed on 29 August 2018 at the following internet address: <<https://www.justice.govt.nz/assets/Documents/Publications/bora-crimes-amendment-bill-no-five.pdf.pdf>>.

⁵ *ibid.* at [25].

⁶ *Penal Code* (Cap.67), section 128(2)(c)(i).

⁷ *Evidence Act* 2003, section 11(1).

beating at the hands of her father, it is perhaps unsurprising that she would claim that she had not gone with the accused willingly. Of the competing versions given by the complainant and the accused as to the encounter on the beach, I prefer the evidence of the accused. On balance, I am satisfied that the complainant was a willing participant in the sexual intercourse.

- [39] However, that only satisfies one of the 3 limbs of the defence.
- [40] Did the accused take reasonable steps to determine the complainant's age? In undertaking this assessment, I must look at the steps taken by the accused (if any) and assess them against the steps that a reasonable person would take in the same situation. The steps that are reasonably required will vary from case to case. For example, it is not always going to be necessary that an accused ask a complainant his or her age. Indeed, even if an accused does that, that might not always be sufficient, as young people have been known to lie about their age from time to time.
- [41] In this case, the accused says that he took into account the fact that the complainant was not going to school, and that she was almost as tall as him. Against this, it was clear to the Court that, while she was in some respects physically mature, the complainant's manner and general demeanour were those of a girl in her early teens. That should have been obvious to the accused. Her friends all appeared to be around her age. Most significantly, the accused knew that the complainant had had her first menstrual period only 9 or so months before the night in question. In the circumstances, it would have been extremely unlikely that the complainant was at least 15 years of age by 1 May this year. The accused needed to take clear positive steps to find out the complainant's age before having sexual intercourse with her. He took no steps.
- [42] While it is strictly unnecessary for the Court to reach a conclusion as to whether the accused "honestly believed on reasonable grounds" that the complainant was aged 15 years or older, it is a relatively easy point to address. The accused admitted that he had no belief as to the complainant's age. He simply had not turned his mind to the matter.
- [43] The accused has proved, on the balance of probabilities, only one of the 3 matters required under section 135(7). The defence under that subsection is not available to him. I therefore find him guilty of the offence of engaging in sexual intercourse with a person under the age of 15 years, contrary to section 135(1) of the *Penal Code*, and he is convicted accordingly.
- [44] I should add for the record that, if I am wrong in my view that the accused has the onus of establishing the matters giving rise to the defence under section 135(7), I would in any event have been satisfied that the prosecution proved, beyond reasonable doubt, that the accused took no steps to ascertain the complainant's age. I am also satisfied, beyond reasonable doubt, that the accused did not believe that the complainant was aged 15 years or older. On either approach, the result would have been the same – the accused is guilty of the offence as charged.

[45] Atanaera Bwaibwa, you have been convicted by this Court of the offence of engaging in sexual intercourse with a person under the age of 15 years. Do you have anything to say why sentence should not be passed upon you according to law?

[46] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court

