



## HIGH COURT OF KIRIBATI

*Criminal Case No 67/2017*

**THE REPUBLIC**

**v**

**TAMAROA MIKAERE**

*Pauline Beiatou, Director of Public Prosecutions, and Tumai Timeon for the Republic  
Teetua Tewera for the accused*

*Dates of hearing: 12-13 and 15-17 October 2018*

*Date of judgment: 18 October 2018*

### **JUDGMENT**

- [1] The accused has pleaded not guilty to 1 count of rape, contrary to section 128 of the *Penal Code* (Cap.67), and punishable under section 129 of the *Penal Code*.
- [2] Despite the repeal and replacement of sections 128 and 129 by section 3 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case proceeds under the *Penal Code* as it was on the date of the alleged offence (section 10(2) of the amending Act).
- [3] The original information in this case, filed on 25 September 2017, did not comply with section 70 of the *Criminal Procedure Code* (Cap.17). A fresh information dated 14 September 2018 (in similar terms) was filed by the Attorney-General, and signed by her. The trial proceeded on the fresh information.
- [4] Three witnesses were called for the prosecution. The first was the complainant in this matter, Karewennang Aobure. She is 32 years old, and lives with her husband, Beretitara Terube, in Tabwakea village here on Kiritimati. They are not legally married, but have been settled together for some time. The complainant gave evidence with considerable difficulty. She has significant problems with her hearing and also appears to be living with some mild intellectual impairment.
- [5] The complainant testified that, late in the evening of 5 August 2016, she was with her husband on their *buia*. They were having sexual intercourse when they were interrupted by the accused (who lived close by, on the same plot of land) shining

his torch on their mosquito net. Beretitara leapt off the complainant and lay down beside her. The accused asked Beretitara if he had a smoke, and Beretitara said that he did not. The accused then asked Beretitara to go with him to look for a smoke. Beretitara left with the accused. The complainant stayed behind on the *buia* alone and went to sleep.

- [6] Sometime later, the complainant was woken by someone entering the mosquito net. She could not see who it was as it was very dark. She assumed that it was her husband returning. That person kissed the complainant and removed her shorts and underpants. After 2 unsuccessful attempts, the person inserted his penis into her vagina and had sexual intercourse with her. They were facing each other, but it was so dark she could not see who the man was. She assumed at all times that the man was her husband. He did not use a condom. The sexual intercourse continued until he ejaculated inside the complainant's vagina.
- [7] The man then quickly got off the complainant and left the *buia*. This surprised the complainant, as it was not the normal behaviour of her husband, so she climbed down from the *buia* and called her husband's name twice. She could see someone smoking nearby and, as he approached, she saw that it was the accused. He asked her, "Who was the person who came to you inside your mosquito net?" The complainant responded that she thought that it was her husband. The accused repeated his question and she responded, "It was my husband." The accused then said, "No, it was not your husband. It was me."
- [8] The complainant became angry and said to the accused, "How could you do that? You are my uncle from Nei Aana." She told him that she was not happy with what he had done. The accused told her not to tell anyone what had happened. She tried to leave, but the accused grabbed her by the shirt. She got away, but the accused grabbed her again. The light from her *buia* came on, and the accused went and crouched underneath it. The complainant's husband had returned.
- [9] The complainant asked Beretitara if he had told the accused to come to her on the *buia*. She told him that the accused had entered their mosquito net and had sex with her. This angered Beretitara and he fought with the accused until they were restrained by others from the nearby houses.
- [10] The complainant maintained her version of events under cross-examination. Throughout the sexual intercourse she had assumed that the man with whom she was having sex was her husband, and would not have permitted it had she known that it was someone else. The complainant agreed that the accused and her husband looked and sounded alike. She was asked about her husband's penis and said that there was nothing unusual about it. The complainant said that she had not seen the penis of the accused.

- [11] The next prosecution witness was Beretitara Terube, the husband of the complainant. He testified that he and his wife had been at the *mwaneaba* earlier on the evening of 5 August 2016, to attend a rehearsal. They had returned home at about 11:00pm. He and the complainant went to their *buia* and began having sexual intercourse. They were interrupted by the accused shining his torch on to them. The accused said, "Are you having sex?" He was standing at the edge of the *buia*. Beretitara and his wife quickly separated.
- [12] The accused asked Beretitara, "Do you have a smoke?" Beretitara replied, "No." The accused suggested that Beretitara come with him to look for a smoke. Beretitara accompanied the accused to the accused's house, where he found a smoke. They saw Tewaie and Tioti drinking nearby, and the accused suggested that they all go and drink somewhere else. The 4 of them went some distance away, to a place near to the house of Naborion. They stayed there for a while, drinking fermented yeast. The accused then left, saying that he would go and buy more drink from Tiitau. Before leaving, the accused told Beretitara to wait for him and not to go anywhere. He said it 3 times.
- [13] After a while, when the accused had not returned, Beretitara went home. As he approached his *buia*, he could hear an argument between the accused and the complainant. He heard the complainant say, "Let go of me." The accused said, "Beretitara is like my brother." It was very dark. As the switch for the light in his *buia* is in Iotene's house, Beretitara went there to try and turn on the light. In the end he asked Tawaia, who was sleeping there, to turn on the light. When the light came on, Beretitara could see the accused, crouching under the *buia*.
- [14] The complainant then said to Beretitara, "Is it true that you sent Tamaroa to accompany me?" The accused said something that he did not comprehend. Beretitara then hit the accused and they began to fight, until they were restrained by Obeta and Tieraata. Beretitara then left. Before leaving, he saw on his *buia* the accused's torch. He took it with him.
- [15] In cross-examination, Beretitara was asked if he had made any modifications to his penis, such as having beads inserted or having Vaseline injected under the skin of the penis. He testified that he had made no modifications and his penis was normal. He said that he had not seen the accused's penis. Beretitara maintained that it was the accused who had left the drinking group first, and rejected the suggestion that, in fact, it was he who had left first.
- [16] In answer to a question from the Court, Beretitara said that he did not have sex with his wife again that evening after they had been interrupted by the accused.
- [17] The third prosecution witness was Obeta Teribwa. On the night of 5 August 2016 he was sleeping on a *buia* with Tawaia and Karawaiti. This was next to the *buia* occupied by the complainant and Beretitara. Obeta was woken by Tawaia and

told to go and restrain the men who were fighting. He restrained Beretitara, and then he restrained the accused. The accused said, "Let me go, as I have to go and apologise to my brother because I didn't do anything." Obeta let the accused go and he again fought with Beretitara, and had to be restrained again.

- [18] The final prosecution witness was Tantan Arikintarawa. On 5 August 2016 she was living close by to the complainant and Beretitara. There was a fight, and she heard a woman crying. She went to Beretitara's *buia* and talked to the complainant, who told Tantan that she had had sexual intercourse with someone she had mistaken for her husband.
- [19] That brought the prosecution case to a close.
- [20] I formally found that the accused had a case to answer, and informed him 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. Three other defence witnesses would be called.
- [21] The accused is a 43-year-old man. He works onboard a local ship. He testified that, on the evening of 5 August 2016, he was in Tabwakea, campaigning for the council elections. At around 7:00pm he passed by Aobure's *buia*, which was occupied by Beretitara and the complainant. He heard a commotion and shone his torch on the *buia*, saying, "What are you doing? Are you having sex?" He could not see inside the *buia*, as it was surrounded by blinds woven from coconut fronds (*inaai*). Beretitara came down from the *buia* and the accused asked him if he had a smoke. When Beretitara said that he did not have any, the accused said, "Let's go to my house and look for a smoke there." The accused told Beretitara that they would go for a drink as well.
- [22] At the accused's house, they saw Tamaa lying in the hammock. The accused had with him a torch and a 1.5 litre bottle that contained a small amount of sour toddy. He and Beretitara finished the sour toddy and decided to go and get more drink from Tiitau's house. On the way they saw Tewae and another person drinking. The accused suggested that they should all go and drink at another place, near to the house of Naborion. By this time it was after 8:00pm. They continued drinking for some time, before the accused told the group that he had to leave because he would be campaigning the next day. Beretitara asked to borrow the accused's torch and the accused agreed. The accused left the other 3 men and returned home.
- [23] About 10 minutes after getting home, the accused remembered that he needed the torch, as he intended to go and collect crabs. He returned to the place where they had been drinking, but nobody was there. The accused then went looking for Tamaa, but he had left the hammock where he had been earlier. The accused found Tamaa at their other house, woke him up and asked if he had a smoke.

Tamaa gave him a cigarette and his lighter. The accused told Tamaa that he would go and get his torch from Beretitara and then they would go together to collect crabs. The accused went to Beretitara's *buia*, lit his cigarette and called for Beretitara, but received no response. He believed it to be about 9:00pm or 10:00pm. The accused then called for Tawaia in the other *buia*. Tawaia said, "Beretitara was with you." The accused said, "I was with him, but now I'm looking for him to get my torch."

- [24] The accused was then surprised when Beretitara came and hit him with the torch. The accused fought with Beretitara until he was restrained by Tieraata. He then went looking for his wife, Nei Aana.
- [25] The accused then back-tracked in his evidence to the point where he had gone to Beretitara's *buia*, looking to retrieve his torch. He said that, when he had called out for Beretitara, it was the complainant who had responded, saying, "He was with you. You went away with him." Then Beretitara hit him with the torch and they fought.
- [26] After the fight, the accused was taken home by Tieraata. There he talked with his wife. He asked his wife to go and find out from Beretitara why he had hit the accused, as he had only gone there to retrieve his torch. The accused told his wife to go and get Beretitara so that he could fight him again, because he did not know why Beretitara had hit him with the torch. He insisted to his wife that he did not do anything. The accused and his wife started fighting, and she ran away. He conceded that he was very drunk by this time. The accused then slept on the hammock until he was woken by the Police the next morning.
- [27] Under cross-examination, the accused agreed that he is the complainant's uncle by marriage, and he has known the complainant since she was a child. He maintained that his first visit to Beretitara's *buia* was quite early in the evening, and he was surprised that Beretitara and the complainant would be having sex so early. The accused was asked why, if he needed to sleep before campaigning the next day, did he decide that he needed the torch back so that he could go out collecting crabs. He responded that he had only remembered that he wanted to collect crabs once he had returned home.
- [28] The accused denied having had sexual intercourse with the complainant, and he denied being under the *buia* later when the light came on. He maintained that he had no idea at the time why Beretitara hit him and fought with him.
- [29] In answer to questions from the Court, the accused said that he could think of no reason why the complainant would make up such a story about him. He agreed that he and Beretitara had been friendly throughout their time together that evening.

- [30] The next defence witness was Tamaa Temangotii, a 47-year-old man from Tabwakea village. In August 2016 he was staying with the accused and Nei Aana. At about 8:00pm on 5 August, he was sleeping in the hammock at the accused's house. The accused and Beretitara woke him and asked him to drink with them. He declined, because he could see that the accused did not have very much sour toddy left. The accused and Beretitara finished what they had and went away. Tamaa then went and slept at Tebuatanga's house. At around 11:00pm the accused came to him and asked for a smoke. He gave the accused a cigarette, and the accused said that he was going to get his torch from Beretitara. Once the accused had the torch, he wanted Tamaa to come with him to collect crabs. The accused walked away and, not long after, Tamaa heard people fighting. He saw many people at the scene of the fight, but he did not go and look.
- [31] The next defence witness was Tawaia Obeta. At about 8:00pm on 5 August 2016, he was trying to get to sleep at Tebuatanga's house when the accused came looking for him. He knew that the accused would want to go out drinking, so he hid himself and the accused left. He saw the accused go away with Beretitara. Tawaia then went to Aobure's house to sleep. Only about 5 or 10 minutes later, he heard the accused calling Beretitara's name. He heard the complainant say, "Beretitara is not here. You took him away to drink." There was more talking, then Beretitara came to Aobure's house, looking to turn on the light in his *buia*. Tawaia turned on the light, and he saw Beretitara go up to the accused and hit him. The 2 men then fought, and Tawaia asked Obeta to go out and restrain them. He heard the accused ask Beretitara what he was doing, and he heard the complainant say that the accused had had sex with her.
- [32] The final defence witness was the wife of the accused, Nei Aana Tabwi. She testified that, at about 7:00pm or 8:00pm on 5 August 2016, she was sleeping at her house. The accused came to her. He was drunk. He asked her to go and call Beretitara because he wanted to correct what Beretitara had said about the accused having had sex with his wife. Aana asked the accused why he had gone there, and the accused said that he had gone to get his torch. She refused to do what he asked, and went back inside the house. She told the accused, "You're drunk, and now you're going to disturb me." The accused tried to open the door, so Aana cried out. She was afraid of the accused, because he was drunk. He threatened to hit her, and then hit her in the ear. Aana's parents came, and scolded the accused for being drunk. Aana took the children and went and slept in the village.
- [33] The next day, Aana was drying coconuts when the complainant came to her. She asked the complainant, "Were you really raped?" The complainant replied, "Yes, by Beretitara." Aana asked the complainant why she had blamed the accused. The complainant responded, "I thought it was Beretitara. Usually, when he is done, he gets off from on top of me slowly, but this time he jumped off me and got off the *buia*, so I followed him." Aana said, "How could you not recognise your

husband? Why would you blame Tamaroa?" The complainant said, "He came to me and asked, 'Were you raped?'" Aana said, "How could you blame Tamaroa? Your husband's penis is very different to my husband's penis. Has your husband been a seafarer? Because you know my husband has a marble inserted in his penis, and it was injected with Vaseline." Tawaia then emerged from the bathroom nearby and said, "She is lying."

- [34] Under cross-examination, Aana testified that the complainant is her brother's daughter and she has known her a long time. Aana considers the complainant to be a bit 'simple-minded'. Aana said that the accused had been with her at the house all day on 5 August until Tebuatanga came and took him away in the early evening to attend a birthday party for one of his children. Aana now said that it was perhaps 10:00pm or 11:00pm when the accused returned to the house, drunk. At no time had Aana thought to tell the Police about the conversation she had with the complainant on the day after the incident.
- [35] That brought the defence case to a close.
- [36] 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.
- [37] In order to convict the accused of the offence of rape in the circumstances of this case, I must be satisfied to the required standard of the following elements (from section 128 of the Penal Code):
- a. the accused had sexual intercourse (that is, as defined by section 161 of the Penal Code, penile penetration of the vagina) with the complainant;
  - b. that the complainant did not consent to the sexual intercourse;
  - c. alternatively, if she did consent, that consent was obtained by force, by means of threats or intimidation, by fear of bodily harm, by means of false representations as to the nature of the act, or by the accused impersonating the complainant's husband.
- [38] Before I move to consider the relevant law, it is convenient for me to set out the facts as I find them to be. There are significant differences in the evidence of the witnesses, and I must first resolve the competing versions of events.
- [39] Despite the difficulties that the complainant experienced in giving evidence, I found her testimony credible. I accept her evidence that a person entered her mosquito net and had sexual intercourse with her. I also accept that, when confronted shortly afterwards, the accused admitted that he was the intruder, and that he was the one who had had sex with the complainant.

- [40] I found Beretitara to also be a credible witness. I do not accept that he and the complainant have concocted this story, particularly given the damage that it must inevitably have caused to the relationships within their extended family.
- [41] I consider that the accused was evasive in his testimony, and I do not accept his version of events. I found his attempt to pretend that he had no idea why Beretitara fought with him, despite the evidence of all other witnesses to the contrary, particularly telling. That was clearly a lie. The other defence witnesses struck me as having colluded with the accused in their testimony. I found it odd that every defence witness, including the accused, insisted that almost everyone in their compound was asleep by 8:00pm that night, and the place was in complete darkness. In my experience, this would be extremely unusual in any household in Kiribati, and even more so on Kiritimati where electric lighting is available. I reject the evidence of the accused and the defence witnesses where it differs from the evidence given by the complainant and Beretitara.
- [42] I reject completely the evidence of Nei Aana of her supposed conversation with the complainant the day after the incident. The complainant was not provided with an opportunity to refute that account and, to me, it came across as a desperate attempt by Aana to protect her husband.
- [43] I find no evidence to support the contention that the accused has modified his penis, such that the complainant could not have possibly mistaken him for her husband. The complainant was not asked whether she had noticed anything unusual about the penis of the man with whom she had sexual intercourse. Even the accused was not asked about this, and there was only a collateral reference to it by his wife.
- [44] I therefore find, beyond a reasonable doubt, that it was the accused who entered the mosquito net of the complainant that night and had sexual intercourse with her. As I said to counsel during closing submissions, it would have been a remarkable coincidence if the accused, a man bearing such a striking physical resemblance to Beretitara, just happened to be innocently standing next to the complainant's *bua* immediately after she had been misled into having sex.
- [45] The next matter to be addressed is the question of consent. I had initially considered this case to be one where the complainant consented to sexual intercourse with the accused, albeit in the mistaken belief that the man with whom she was having sex was Beretitara. As none of the other matters provided for in section 128 that vitiate consent are relevant in this case, I was working on the premise that, unless the accused had impersonated the complainant's husband, the charge of rape could not be sustained.



- [46] However, where the complainant is not legally married, can the accused be said to have impersonated her husband? In *R v Merembu Bongab*<sup>1</sup>, a decision of the Supreme Court of Papua New Guinea, it was found that the complainant had consented to sexual intercourse with the accused in the mistaken belief that he was her *de facto* husband. Frost SPJ held that the facts of that case fell outside the scope of section 347 of the Queensland *Criminal Code* (as adopted in Papua New Guinea), which is in essentially the same terms as our section 128. The fact that the complainant was not legally married was fatal to the contention that the accused had impersonated her husband, and he was accordingly acquitted.
- [47] Is it correct to say that the complainant in this case consented to having sexual intercourse with the accused? At common law, in *Papadimitropoulos v The Queen*<sup>2</sup> the High Court of Australia has held that consent to sexual intercourse “demands a perception as to what is to take place, *as to the identity of the man* and the character of what he is doing”.<sup>3</sup> If that approach applied in this case, the complainant could not be said to have truly consented, as she was not aware that it was the accused with whom she was having sexual intercourse. In *Merembu Bongab*, Frost SPJ did not accept the submission that, where the offence of rape had been codified, the common law principles set out in *Papadimitropoulos* could be imported into the section creating the offence. He held that “consent” should be given a narrower construction than would be the case at common law.
- [48] However, in *R v Pryor*<sup>4</sup> the Queensland Court of Appeal rejected the approach taken in *Merembu Bongab*. In upholding a conviction for rape in circumstances where the complainant had believed the accused to be her sexual partner, Dutney J said:<sup>5</sup>

With respect to Frost SPJ it is wrong, in my view, to suppose that giving the word “consent” in the first limb of section 347 a meaning consistent with that given to it at common law in *Papadimitropoulos* necessarily imports into the first limb of section 347 all of the common law principles relating to circumstances in which consent is vitiated (see p438). It is not necessary for the purposes of this case to decide whether all or any of such principles are in fact imported. It is sufficient for present purposes that the requirement of knowledge of the identity of the man as explained in *Papadimitropoulos* is an element of consent...

- [49] In the same case, Williams JA said:<sup>6</sup>

Given section 347 of the Code as it stood at the material time, consent involved not only an appreciation that sexual intercourse was about to take place, but also

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<sup>1</sup> [1971-72] PNGLR 433

<sup>2</sup> (1957) 98 CLR 249

<sup>3</sup> *ibid.* at 261 (emphasis mine)

<sup>4</sup> [2001] QCA 341

<sup>5</sup> *ibid.* at [73]

<sup>6</sup> *ibid.* at [21]

an awareness of the identity of the male about to effect that penetration. Here the complainant had no reason to believe that any male person other than her 'sexual partner' was in the house at the material time. ... This was a clear case of intercourse without consent, all that is required by the Code to establish the crime of rape.

- [50] While *Pryor* is not binding on this Court, I accept that it is of highly persuasive authority. I therefore hold that, under section 128 as it stood on 5 August 2016, consent required "not only an appreciation that sexual intercourse was about to take place, but also an awareness of the identity of the male about to effect that penetration".
- [51] I should add, as an aside, that this issue would not arise if this case came to be decided under the law as it stands today. Section 128(1) now provides that "a person consents to an activity only if the person freely and voluntarily agrees to the activity", and, under section 128(2)(b)(vii), "[a] person does not consent ... if the person consents because the person ... is under the mistaken belief about the identity of the person with whom the activity happens".
- [52] I note that the accused has not raised the defence of mistake of fact (section 10 of the Penal Code). In any event, in all the circumstances, there is no way that the accused could have formed an honest and reasonable but mistaken view that the complainant consented to sexual intercourse with him.
- [53] I am therefore satisfied, beyond reasonable doubt, that the complainant did not consent to sexual intercourse with the accused. I find the accused guilty of the offence of rape, contrary to section 128 of the *Penal Code*, and he is convicted accordingly.
- [54] I will hear counsel as to sentence.

  
**Lambourne J**  
Judge of the High Court

