



HIGH COURT OF KIRIBATI

Criminal Case N° 6/2019

THE REPUBLIC

v

TAAUA BAIAA

*Ateti Tekawa for the Republic
Batitea Tekanito for the accused*

Dates of hearing: 7-8 May 2019

Date of judgment: 13 May 2019

JUDGMENT

- [1] Taaua Baiaa is charged with rape, contrary to section 128 of the *Penal Code*.¹
- [2] The offence is alleged to have occurred on 10 April 2017, at Betio on South Tarawa. The information was filed on 14 March this year. At a mention on 12 April, defence counsel advised that her client would be pleading not guilty, and the matter was fixed for trial.
- [3] Three witnesses were called for the prosecution, the first of whom was the complainant, Nei Kaekea Riiki. She is 24 years old. In April 2017 she was employed as a waitress at the Jen-Zi restaurant in Betio. On 10 April she had started work at 8:00am, and was expecting to finish her shift at 10:00pm. She was working that day with 1 other waitress, Nei Tebwebwe. Nei Bwebwera, who is the wife of the owner, was doing the cooking. At about 8:00 or 9:00pm the accused came in. He was the only customer in the restaurant. Kaekea did not know him well, but she knew that he lived nearby. The accused ordered a meal and he ate. Kaekea returned to the kitchen. She was surprised when the accused entered the kitchen, grabbed her by the wrist and led her out the

¹ Despite the repeal and replacement of section 128 by section 3 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case has proceeded under the *Penal Code* as it was in force on the date of the offence (as provided for under section 10(2) of the amending Act).

side door of the restaurant. She was too shocked to scream. Both Bwebwera and Tebwebwe were in the kitchen at the time, but they did not do anything.

- [4] The accused led her to a very dark area at the rear of the restaurant. He told her not to make any noise. He took her close to a derelict store. The accused told Kaekea to undress. She was very scared and did not want to do what he had asked. The accused then put 1 hand on her throat and squeezed, but not so tightly as to prevent her from breathing. He was very strong. He told her that if she did not take off her clothes he would beat her or kill her. He pushed her up against the wall of the store and was blocking her way with his other hand. Kaekea was very afraid. She removed her shorts and underpants. The accused took off his shirt and shorts. He placed his shirt on the ground and told her to lie down. She did what he asked because she was afraid. The accused then proceeded to have sexual intercourse with her by inserting his penis into her vagina. He did not use a condom. The sexual intercourse seemed to go on for a long time; almost half an hour. Kaekea did not move or say anything. She was crying.
- [5] After some time the accused rolled over and lay next to Kaekea. She does not know whether he ejaculated. He told her to get on top of him. She stood up, put on her underpants and shorts and ran away towards the road. There she met Tebwebwe and a woman named Lisa, whose father owned a nearby store. They headed towards the main road, in order to catch a bus to go to the police station. On the way they met the wife of the accused. Kaekea told her that the accused had threatened her and forced her to have sexual intercourse. The accused's wife told Kaekea to lodge her complaint with the police. Kaekea then went to the police station with Tebwebwe. After several hours they were taken to the hospital in Nawerewere so that Kaekea could be medically examined.
- [6] In cross-examination, Kaekea rejected the suggestion that she accompanied the accused willingly. She did not see anyone else outside the restaurant and did not hear anyone call out. The area to which she was taken was very dark; even though there were houses around, none of them had their lights on. She did not call out because the accused had threatened to beat her to death if she made any noise. She also feared that he would choke her. She denied that she had any opportunity to escape prior to the sexual intercourse. Kaekea only removed her shorts and underpants because the accused said that he would beat her if she refused. She was adamant that she did not consent to sexual intercourse with the accused.
- [7] Kaekea did not accept the suggestion from counsel for the accused that there had been signs of people with torches approaching. She said that she did not hear the accused tell her that people were coming and she should be

quiet. She said that she had been scratched on the neck by a nail or rusted security wire from the derelict store. When asked if she had done anything to prevent the accused from having sexual intercourse with her, Kaekea said that she had tried to push him off her, but he was too heavy. She rejected the suggestion that she had asked the accused to suck her breast. He tried to kiss her, but she turned away.

- [8] After she escaped, Kaekea had told Tebwebwe that she was worried that the accused would come to the restaurant looking for her and cause trouble. She feared that he might kill her.
- [9] The second prosecution witness was Nei Bwebwera Tenanai. She is 37 years old. Her husband owns the Jen-Zi restaurant. On the night of 10 April 2017 she was working at the restaurant with Kaekea and Tebwebwe. At around 8:00 or 9:00pm the accused came for a meal. He was served by Nei Kaekea. At one point Kaekea came to Bwebwera in the kitchen and said that she was afraid because the accused was going to take her away. Bwebwera told her to stay next to her in the kitchen. Kaekea was in the corner. The accused came to the door of the kitchen and said to Bwebwera, "I just want to go out with that girl and spend some time with her outside. I will be quick, like 3 minutes." Before Bwebwera could respond, the accused grabbed Kaekea by the wrist and led her outside. Bwebwera was afraid; the kitchen was very small, the accused was very big, and she thought that he was drunk. He had come to the restaurant earlier in the day to buy beer.
- [10] After the accused left, Bwebwera told Tebwebwe to go and look for Kaekea. She needed to recharge her phone so that she could call the police. She suggested to Tebwebwe that she go to the accused's house and tell his family what was happening and ask them for help to look for Kaekea.
- [11] In cross-examination, Bwebwera said that she had not seen where the accused went with Kaekea after they left the restaurant. She did not accept that Kaekea went with the accused willingly. She had not called the police straight away because she believed that they would take too long to respond. She felt that it would be quicker to ask the accused's relatives to help. Bwebwera was not sure whether Kaekea was in danger but she was very worried for her safety because she had said that she was afraid to go with the accused.
- [12] The final prosecution witness was Tebwebwe Teanga. She is 27 years old and is still working as a waitress at the Jen-Zi restaurant. When the accused came to the restaurant on the night of 10 April 2017, Tebwebwe took his order. Kaekea served him after that. After having delivered his meal, Kaekea came to Tebwebwe and Bwebwera in the kitchen and told them that the accused had asked her to go outside with him when he had finished eating.

Shortly after that the accused came to the door of the kitchen and said to Bwebwera, "I want that girl to come outside with me." Before Bwebwera could reply, the accused grabbed Kaekea by the wrist and led her outside. Kaekea looked very afraid. Tebwebwe stood at the side door of the restaurant and watched as the accused led Kaekea towards the lagoon-side. She did not recall seeing anyone else outside the restaurant.

- [13] Tebwebwe returned to the kitchen and spoke to Bwebwera. She decided to go to the accused's house and speak with his father. She knew the house because she used to live in the area. When she got to the accused's house she met instead with the accused's mother, who told Tebwebwe to call the police. She returned to the restaurant with the wife of the accused and began searching for Kaekea and the accused. They searched for quite some time, without success. After a while they were joined by Lisa, whose father owned a nearby store. After what seemed like an hour, Tebwebwe met up with Kaekea near the restaurant. Kaekea said that she was worried that the accused would come back to the restaurant and cause trouble, so they left to catch a bus to the police station.
- [14] Tebwebwe recalled that the accused had come to the restaurant earlier in the day to buy beer. She could not recall how much he had to drink, but she thought that he was drunk when he returned in the evening.
- [15] Tebwebwe did not accept the suggestion from counsel for the accused that, when the accused had asked Bwebwera if Kaekea could accompany him outside, Bwebwera had responded that it was almost time for Kaekea to finish work, so she could do what she liked. When the accused had grabbed Kaekea by the wrist, Tebwebwe could see what looked like fear on her face. She accepted that the accused had not dragged Kaekea away, but he had put his arm around her shoulders after they left the restaurant. Tebwebwe was very worried about Kaekea. She did not call the police because Bwebwera had said that she would do that while Tebwebwe went to see the accused's father.
- [16] Tebwebwe testified that, while they were searching for Kaekea, they did not call out her name. She said that she was afraid to do so, because they had no man with them to protect them if something happened. She did not accept the suggestion that Kaekea had appeared to go with the accused willingly. She agreed that at no time did she hear a scream, even while they were searching close to the derelict store to the lagoon-side of the restaurant.
- [17] That brought the prosecution case to a close. 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*. Defence counsel advised that

her client would be giving evidence, and that 1 other defence witness would be called.

- [18] The accused is a 33-year-old resident of Betio. He is not employed, and is married with 2 children. He is an imposing figure. He does not know his height or weight, but I estimate that he would be close to 2 metres tall and weighs over 150 kilograms.
- [19] On 10 April 2017 he went to the Jen-Zi restaurant around 8:00 or 9:00pm. He had a crush on Nei Kaekea and thought that he would 'try his luck' with her. When she brought his food, he told her that he had something to tell her when she was not busy. He was flirting with her. Kaekea told him that she could not go with him as she was still working, She suggested that he ask the restaurant owner's wife for permission. After he finished eating, the accused went to the wife of the owner and asked if he could have a conversation with Kaekea outside. The owner's wife replied, "It's almost time and we are about to close, so it's up to her if she wants to go with you." He told the owner's wife that he would be back later to collect his change. He then went to Kaekea, who was in the main dining room of the restaurant and told her that he had talked to the owner's wife, who had said that it was all right for her to go with him. Kaekea did not reply. She looked like she was shy.
- [20] The accused and Kaekea left the restaurant by the side door, not the main entrance. The accused had his arm around her shoulder. There were some boys outside, sitting on bricks near the 24-hour store. One of them called out, "Taaua, you've scored!" Kaekea seemed embarrassed by this. The accused told her that they were going to have a short conversation and after that he would drop her back home. His reference to a 'conversation' was intended as a euphemism for sexual intercourse. Kaekea did not respond. They went to a derelict house, not far from other houses. Kaekea removed her clothing. The accused told her that she had to be quick. He took off his shirt and placed it on the ground for Kaekea to lie on. They then had sexual intercourse. Kaekea was a willing participant. The accused kissed her and she kissed him back. She asked him to suck her breast, and she lifted up her bra so that he could do so. The accused ejaculated inside Kaekea's vagina, after which he was exhausted, so he rolled off her and lay on the ground next to her. He thought that Kaekea had also had an orgasm during the intercourse. The sex lasted for no more than 10 minutes, maybe only 6 or 7 minutes. There was nothing that Kaekea had said or done that led him to think that she had not consented to sex with him. At one point the accused had thought that he heard voices, so he told Kaekea to be quiet. She never gave him the impression that she was afraid.

- [21] Immediately after the accused rolled off Kaekea, she stood up, put on her clothes and left. The accused had offered to drop her off, but he thought that maybe she was embarrassed, which is why she left in a hurry. He stayed on the ground for a while after Kaekea left, then he got up, put his clothes back on and returned to the restaurant to collect his change. He then went home.
- [22] The accused admitted that he did not know Kaekea very well, although he had seen her at the restaurant before. He attributed her limited responses to the fact that she was very shy. He denied choking Kaekea or using any force. He did not push her up against the wall of the derelict building. He had not seen her crying at any time. She had gone with him willingly. He was not drunk – he did not have beer with his meal. While he had bought 3 cans of beer from the restaurant early that morning, he had consumed the contents shortly after buying them.
- [23] In cross-examination, the accused conceded that Nei Kaekea did not respond when he flirted with her. He did not accept that she had ignored him. He maintained that she had told him that she was going to go and ask the owner's wife for permission to go with him. She then told him that he would have to ask, which is why he went and spoke to the owner's wife. He denied going into the kitchen and denied grabbing Kaekea by the wrist. When the boys outside had called out to him, Kaekea had said she was embarrassed.
- [24] The accused agreed that he had never spoken to Kaekea before she brought him his food that night. Despite this, she had agreed to go with him. He rejected the suggestion that he had put his arm around Kaekea's shoulders to stop her from running away. He had done that to show his affection. She did not put her arm around him because she was too small to reach. He denied threatening Nei Kaekea or forcing her in any way. The accused maintained that, after sex, she walked away and did not run. He thought that she left because she was shy and did not want anyone to see them together. He insisted that Kaekea consented to sexual intercourse with him.
- [25] The only other defence witness was Takaa Ruaia, a 39-year-old labourer at Kiribati Fish Ltd. He lives in the Santo Mikaere area of Betio, which is where Jen-Zi restaurant is located. At around 8:00 or 9:00pm on 10 April 2017, he was with 3 other men, sitting on an unfinished wall near the restaurant. They were chatting and smoking. He saw the accused walk past, with 1 of the waitresses from the restaurant (he did not know her name). They were behaving like lovers. The accused had his arm around the woman's shoulder. He could not see the accused's other hand, but he thought that she was holding it. She appeared to be trying to hide herself from Takaa and the others – maybe she was shy or ashamed. Takaa called out to the accused, "Where are you off to Taaua? You've scored!" They walked away and he lost

sight of them. He recalled briefly seeing 2 or 3 unidentified men at the door of the restaurant. Takaa and his friends left shortly after that. They had only been on the wall for about 5 minutes.

- [26] In cross-examination, Takaa said that he had known the accused for a very long time. They had grown up together. He did not consider the accused his friend, but he conceded that they had been out fishing together a few times.
- [27] Takaa said that he had only been approached to testify the day before. He denied that the accused had told him what to say, and he had never been asked by the police to provide a statement.
- [28] That brought the defence case to a close.
- [29] 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.
- [30] In order to convict the accused of the offence of rape, I must be satisfied to the required standard of each 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 Nei Kaekea;
 - b. she 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 her husband.
- [31] There is no dispute that the accused had sexual intercourse with Nei Kaekea. It is contended for the accused however that the intercourse occurred with her consent. Counsel for the accused submits that Kaekea's evidence should not be accepted, and that it was inherently unbelievable.
- [32] I found Kaekea to be an impressive and credible witness. She was consistent throughout in her account of the night in question. While the accused need not satisfy me of anything, I do not accept the evidence he gave to the Court. Where the accounts of Kaekea and the accused differ, I accept Kaekea's evidence and reject that of the accused. The suggestion that Kaekea willingly accompanied the accused cannot sit alongside the evidence of the other prosecution witnesses that she told them that she was afraid of the accused. That this occurred is borne out by Tebwebwe's subsequent actions in seeking assistance from the accused's family and then searching for Kaekea for an

extended period. This would not have happened had Kaekea happily gone with the accused. Also wholly inconsistent with the suggestion that Kaekea consented to sexual intercourse with the accused is her conversation with the accused's wife shortly afterwards. Had she been a willing participant, it is unlikely in the extreme that almost her first action after sex with the accused would be to complain to the accused's wife that he had raped her.

[33] Although it is of little consequence, I also reject the evidence of the defence witness Takaa, which I consider to be the product of collusion with the accused. For him to have such a detailed recollection of such fleeting events more than 2 years later is simply unbelievable.

[34] Having carefully considered the evidence before me, I am satisfied beyond reasonable doubt that Kaekea did not consent to sexual intercourse with the accused. Counsel for the accused submits that, in the event of such a finding, I should nevertheless acquit the accused on the basis that he acted under an honest and reasonable, but mistaken belief that Kaekea did, in fact, consent.² An honest belief is one that the accused genuinely holds. To be reasonable, the belief must be held by the accused on reasonable grounds. It is not for the accused to prove that he honestly and reasonably believed that Kaekea was consenting, but for the prosecution to prove beyond reasonable doubt that the accused did not honestly and reasonably believe that she was consenting.

[35] Given that I accept Kaekea's testimony, it follows that I accept that she was led from the restaurant against her will, that the accused threatened to beat her to death if she made a noise, and that the accused held her by the throat and squeezed while pushing her up against the wall. In such circumstances, even if the accused somehow mistakenly believed that Kaekea was consenting, there is no way that it was reasonable for him to hold such a belief. I find the accused guilty of the offence of rape and he is convicted accordingly.

[36] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court



² Section 10(1) of the *Penal Code*.