



HIGH COURT OF KIRIBATI

Criminal Case N° 10/2018

THE REPUBLIC

v

TOUM TAAKE

*Eweata Maata for the Republic
Raweita Beniata for the accused*

*Dates of hearing: 30 April, 1-3 May 2019
Date of judgment: 13 May 2019*

JUDGMENT

- [1] Toum Taake is charged with attempted murder, contrary to section 208(a) of the *Penal Code*, and, in the alternative, causing grievous harm with intent to do grievous harm, contrary to section 218(a) of the *Penal Code*.
- [2] The offence is alleged to have occurred on 24 June 2017, at Tabiteuea village on North Tarawa. An information, which also included a charge of engaging in domestic violence, in contravention of section 33(1) of *Te Rau n Te Mwenga Act 2014*, was first filed in this case on 14 December 2017. For reasons unclear, the case was not mentioned by the Court until August 2018, and the accused did not make his first appearance until the following month. As the information did not comply with section 70 of the *Criminal Procedure Code*, the Attorney-General filed a fresh information on 25 October 2018, which omitted the domestic violence offence. At a mention on 9 November, defence counsel advised that his 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 Eretiata Tareiti. She is 25 years old and, in June 2017, had been living with the accused for about 3 or 4 months. They were looking after a house in Tabiteuea village. On the evening of 23 June the accused left to go drinking at about 10:00pm. He returned an hour or 2 later, smelling of alcohol. He woke her and told her that she was to come with him to his parents' house at the southern end of the village, a place known as Namwakaina.

- [4] Namwakaina was quite some distance away. They initially walked along the main road but, when they were close to Namwakaina, they took a path on the ocean-side. This had been at the suggestion of the accused, who said that he was worried about dogs on the main road. Little was said as they walked. Not far from the house of Rarei, they sat on the beach. Eretiata asked the accused what they were doing, and he told her that they were pausing to catch their breath.
- [5] The accused then took his lavalava and tied it loosely around Eretiata's neck. He said to her, "You have committed adultery." He pushed her to the ground and started punching her in the face. She tried to fend off his blows by covering her face with her hands. As the accused hit her, he said, "This time you will die. There's no one around." He also said, "I will kill you. Your life is pointless because you have committed adultery." She denied the accusation.
- [6] The accused then dragged Eretiata by her hair into the sea. He pushed her head under the water and held it down using his foot. He kept her under the water for what seemed like several minutes. He then pulled her up. She just had time to take a quick breath before he pushed her head back under the water and held it there again. Eretiata was struggling, and thought that she was going to die. Twice more he pulled her up out of the water, only to push her down again. After being held under the water 3 or 4 times, he pulled her up and punched her in the face, before dragging her back to the beach.
- [7] On the beach, the accused continued punching Eretiata in the face. He also kicked her in the side. The accused repeated that he was going to kill her. He dragged her back into the water and held her down. She struggled, but could not break free from his grasp. The accused held her under the water 2 or 3 more times, before again dragging her back to the beach, where the beating resumed. Eretiata felt numb. Her eyes were swollen shut and she felt pain in many areas of her body. She wanted to run away but could not. Eventually the beating stopped, and she heard the accused's footsteps moving away.
- [8] Eretiata lay there on the beach. She lost consciousness for a period, before being roused by the incoming tide. She was cold and wet, and took off her shirt. She was in great pain, and could not see without forcing open an eyelid. She managed to crawl off the beach, and got to her feet. It was perhaps 7:00am. She could not see any houses. She walked for a short distance, and then crawled again. She could only see through 1 eye, and only while she was holding the eyelid open. She alternated between walking and crawling until she finally got to the house of Mwemwe. He was still asleep, but Eretiata cried and begged him to take her to her parents. He took her to the house of her parents on a bicycle.

- [9] In cross-examination, Eretiata agreed that she and the accused had argued some days before the incident, after which she had left him. The argument had been over the items they were going to sell at the market. The matter was resolved when Eretiata apologised and the accused had agreed to take her back, 2 or 3 days before the attack.
- [10] When asked about the night in question, Eretiata conceded that the accused might have left to go drinking as early as about 7:00 or 8:00pm, which is what she had told the police at the time. She also agreed that it might have been about 1:00 the next morning when he returned. Eretiata did not accept the suggestion that the accused was very, very drunk on his return. She also rejected a suggestion that there had been an occasion earlier in the evening when the accused had come back to the house to confront her about having had an affair, after which he returned to his drinking group. It was put to Eretiata that Toum had accused her of having an affair with a man named Taniera. She denied that the accused had made such an accusation.
- [11] Eretiata was challenged on her testimony that the accused had tied his lavalava around her neck. She insisted that he had, although she accepted that she had not mentioned it to the police. She rejected counsel's suggestion that the accused was not even wearing a lavalava that night. Eretiata testified that she had shouted and called for help when the accused had started to beat her, but that nobody had come to her aid. She said that Mwemwe's house is next to the road, quite some distance from the beach. It would not have been possible to hear her from there.
- [12] When Eretiata was asked about the accused's intoxication, she testified that he smelt of alcohol. He was drunk, but knew what he was doing.
- [13] In answer to a question from the Court, Eretiata said that it was quite far from their house to the place where she had been beaten. The accused had not had any difficulty walking, and there was nothing unusual about his mood. He seemed happy. She could not recall whether there had been any conversation while they walked.
- [14] At the conclusion of Eretiata's testimony, counsel for the prosecution tendered, by consent, a medical report prepared by Dr Tanebu Tong. She had examined Eretiata at 7:00pm on the day of the beating, at which time Eretiata was "semi-conscious and in severe pain". Dr Tanebu observed a deep cut between Eretiata's eyebrows that was still bleeding. Her whole face was very swollen and tender. Both eyes were swollen and bruised. There were abrasions on both cheeks, and Eretiata's eyes and ears were full of sand. Both lips were swollen, with a cut on her upper lip still bleeding. Her front teeth were loose, and her gums were bleeding. She was tender to the touch over

her chest, abdomen and pelvis. Both hands were bruised, and there were abrasions to 3 of the fingers on her right hand.

- [15] The second prosecution witness was Mwemwe Kaeka, a man in his early 50s from Tabiteuea village. Early in the morning of 24 June 2017, at about 6:00 or 7:00am, he was woken by a woman calling to him. Mwemwe did not know who his visitor was until she told him. Despite having known Eretiata for some time, he did not recognise her because her face was swollen and her hair was a mess. She asked him to take her to her father's house. Mwemwe was of the view that Eretiata was very afraid. He placed her on his bicycle and walked the bicycle to the village. She could barely move, and was not capable of getting there unassisted.
- [16] The final prosecution witness was Tareiti Tebano, Eretiata's father. He is 50 and also lives in Tabiteuea village. He was at home on 24 June 2017 when Mwemwe arrived with Eretiata on his bicycle. Tareiti carried her into the house. She could not walk and could hardly talk. He took some photos of her injuries, 2 of which were tendered as evidence. They show extensive swelling and bruising on Eretiata's face. He took her to the clinic on a handcart and then hired a boat to bring her to the hospital at Nawerewere. Eretiata was in hospital for almost a month, but has now fully recovered.
- [17] At the close of the prosecution case, counsel for the accused submitted that his client did not have a case to answer. With respect to the attempted murder charge, it was submitted that the requirements for an attempt had not been made out, and that everything alleged to have been done by the accused could be described as being merely preparatory in nature. I held that, putting the prosecution case at its highest, the repeated statements of intent on the part of the accused, coupled with several attempts to drown the complainant, were sufficient to meet the requirement of section 256(1) of the *Criminal Procedure Code*, namely that there be some evidence that the accused had committed the offence. I found that he had a case to answer with respect to attempted murder.
- [18] On the alternative count of causing grievous harm with intent, it was clear from the evidence that the complainant's injuries did not amount to grievous harm, as that term is defined in section 4 of the *Penal Code*. However, both counsel agreed that, in considering my verdict, if I were not satisfied beyond reasonable doubt that the accused was guilty of attempted murder, it would still be open to me to convict him of assault occasioning actual bodily harm, by reason of the saving provision in section 157(2) of the *Criminal Procedure Code*. I held that there was no case for the accused to answer with respect to the charge of causing grievous harm with intent, but that the case could proceed with assault occasioning actual bodily harm as the alternative count.

- [19] I then informed the accused of his rights, as required by section 256(2) of the *Criminal Procedure Code*. Defence counsel advised that his client would be giving evidence, and that 3 other defence witnesses would be called.
- [20] The accused is 28 years old, from Tabiteuea village. He had been living with the complainant for about 2 months prior to this incident. They did not have any children, although Eretiata had a child from a previous relationship. On 23 June 2017 he left the house to go drinking at about 7:00 or 8:00pm. He was drinking fermented yeast with a group not far from the house. At some point in the evening, after he had consumed 3 cups of yeast, a man named Taabu came to the accused and told him that his wife had been having an affair. The accused felt uneasy and went back to the house to confront Eretiata. He asked her if she had been having an affair with Taniera and she said that she had. He told her that she was to go back to her parents. He then returned to his drinking group.
- [21] The accused continued drinking for several hours. There were 7 of them in the group. In the course of the evening they finished 1 bucket of fermented yeast, so a second bucket was obtained. At about 2:00am, he was feeling drunk, so he returned home. When he got to the house he woke Eretiata and told her that they were going to Namwakaina. He remembers leaving the house, but recalls nothing more until he woke up alone several hours later on the beach, not far from Namwakaina. Dawn was breaking. He was not exactly sure where he was, but he found a path that he knew led to his parents' house, so he went there and slept on the *buia*.
- [22] At about 8:00am the accused was woken by his mother. She asked him where Eretiata was. He told her that he was not sure, but maybe she had gone to the market. He went back to sleep. At around 10:00am he woke up and cycled to the house of his brother-in-law in the village. When he arrived there he again went to sleep. He woke up at about midday and went to leave. His brother-in-law told the accused not to leave, as he had heard that Eretiata's father was very angry with him for having beaten his daughter. The accused said that he was very surprised to hear this, as he had no memory of assaulting Eretiata.
- [23] The accused testified that this had been his first experience of drinking fermented yeast. He was not a regular drinker, and had previously experienced loss of memory when drinking alcohol.
- [24] In cross-examination the accused maintained that he had no recollection of having beaten Eretiata, or of trying to drown her. He could not recall if she had come with him when he left the house to walk to Namwakaina. He was very drunk and was having trouble walking. He testified that he had not been worried when he woke up alone as he assumed that his wife had returned to her parents. When he awoke on the beach, he had sobered up and was "back

to normal". He admitted that he had lied to his mother when he told her that he did not know where Eretiata was, but said that he was not ready to talk to his mother about their separation.

- [25] In answer to a question from the Court, the accused said that, when he woke up on the beach, he was covered in sand. He had no injuries.
- [26] The next witness was the mother of the accused, Nei Tearaoi Tebukei. She is 65 years old and a resident of Tabiteuea village. She recalled waking the accused as he slept on their *buia* at Namwakaina. She had not seen him arrive. Tearaoi asked her son where his wife was, and he told her that Eretiata had gone to the market. It was around 8:00 or 9:00am. The accused was wearing a lavalava. He appeared to be sleeping normally, and she had had no difficulty waking him. Apart from sounding a little sleepy, she had noticed nothing unusual about him that morning.
- [27] The defence then called Tirikai Matakite. He is in his early 30s and is married to the accused's sister. In June 2017 he was living at the northern end of Tabiteuea village. At about 8:00am on 24 June the accused came to his house on a bicycle, climbed on to a *buia* and went to sleep. They did not speak to each other. From the way that he walked and the look of his face, Tirikai formed the view that the accused was drunk. Shortly after that Tirikai left to go to a village meeting. At the meeting he heard that the accused had beaten his wife. When he returned home at about midday, he told the accused what he had heard. The accused looked very surprised. The accused stayed at Tirikai's house until evening, when he left.
- [28] The final defence witness was Taabu Winta, a 22-year-old resident of Tabiteuea village. On 23 June 2017 he began drinking sour toddy at lunchtime. When his drinking group broke up he was left with some fermented yeast in a bucket. He was very drunk. It was dark. He saw some others at a store and invited them to help him finish off his bucket. They invited Taabu to join them instead. That was when he saw the accused. The accused's drinking group had about 10 members. He told the accused that he had heard that Eretiata had been having an affair. The accused then left the group, returning a short while later. He said to Taabu that he had told Eretiata to leave. Taabu remembers very little of the rest of that night.
- [29] That brought the defence case to a close.
- [30] 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.

- [31] Section 208(a) of the *Penal Code* provides that any person who attempts unlawfully to cause the death of another is guilty of a crime. 'Unlawful' in this context simply means not authorised, justified or excused by law. In this case there are no issues to suggest authorisation, justification or excuse.
- [32] Section 371(1) of the *Penal Code* defines an 'attempt' in the following way:
- When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
- [33] In order to convict the accused of attempting to murder Eretiata, I must be satisfied to the required standard of each of the following elements:
- a. the accused had an intention to kill Eretiata at the time he attacked her;
 - b. he put his intention to kill into execution by means adapted to its fulfilment;
 - c. he manifested the intention to kill by some overt act.
- [34] I need only consider the alternative count if I am not satisfied as to the guilt of the accused on the attempted murder charge.
- [35] Eretiata's account of what happened on the beach and in the water that morning was not seriously challenged. I found her to be a credible witness, and I have no difficulty in accepting her account.
- [36] I must first consider whether the accused had an intent to kill Eretiata. Anything less than an intention to cause death is insufficient. Intention is a state of mind, so it is necessarily a matter of inference as to whether there was an intention to kill. To ascertain the accused's intention I must look to his words and his actions at the relevant time. There must be a logical and rational connection between these matters and the inferences I draw from them. Where more than 1 inference is reasonably open to me, I must give the accused the benefit of an inference in his favour over 1 that is adverse to him. In order to convict the accused, I must be satisfied beyond reasonable doubt that the inference of an intention to kill Eretiata is the only reasonable inference available on the evidence.
- [37] There is evidence that the accused was intoxicated at the time. He had consumed 3 cups of fermented yeast prior to his conversation with Taabu, and then an unspecified quantity after that. This is relevant to the issue of intent. As an intention to kill is an element of the offence, intoxication may

be regarded for the purpose of ascertaining whether such an intention in fact existed.¹

- [38] If I am not satisfied beyond reasonable doubt that the accused did in fact form the necessary intent to kill, whether because of his intoxicated state or otherwise, I must find him not guilty of attempted murder.
- [39] The mere fact of the accused's intoxication does not automatically entitle him to a verdict of not guilty, because an intoxicated person might still form the requisite intent, and a person who has formed that intent does not avoid liability because intoxication has lowered his ability to resist the temptation to carry it out. It is for the prosecution to satisfy me beyond reasonable doubt that, although intoxicated, the accused in fact had the requisite intention.
- [40] Counsel for the accused submits that his client's claimed memory loss is clear evidence that he had consumed such a quantity of alcohol in the hours prior to the incident that I could not find that he formed the necessary intent to kill. I do not accept that this is the inevitable conclusion to be drawn. Just because a person experiences memory loss, it is not necessarily the case that their actions during the period of the blackout are unintended. I accept the complainant's evidence that the accused walked a considerable distance without difficulty. While little was said on the journey, what conversation they had was lucid and coherent. I reject the accused's evidence that he was as drunk as he claimed to have been. When he woke up only a few hours later, he was sober and "back to normal". His mother noticed nothing unusual about him when she woke him on the *buia* at about 8:00am. Tirikai formed his opinion as to the accused's state without speaking to him, so I give little weight to that evidence. It is unnecessary for me to determine whether the accused is being honest about his inability to recall the events of that night. As I have said, the memory loss alone is conclusive of nothing.
- [41] At the time of the attack, the accused said to Eretiata, "This time you will die... I will kill you." He subjected her to a savage beating and used his foot to keep her head under the water for long periods of time. I am of the view that there is only 1 inference that can be drawn from this evidence – he intended to kill Eretiata. The first element of the offence has been proved.
- [42] The second element to be proved is that the accused put his intention to kill into execution by means adapted to its fulfilment. Did the accused begin to carry out his intention to kill in a way suited to bringing about the intended outcome? The accused beat Eretiata senseless and tried to drown her. The attempted drowning in particular was certainly capable of killing someone. However, counsel for the accused submits that I could not be satisfied that

¹ Section 13(4) of the *Penal Code*.

the accused had moved beyond mere preparatory measures in executing his plan. He referred me to the recent case of *Katawati lotebwa*.² There the Chief Justice referred favourably to the ‘last act’ test laid down by Parke B in *R v Eagleton*.³ The last act test requires an offender to have done essentially everything but actually commit the offence before they can be found guilty of an attempt. This test has been heavily criticised by courts in several jurisdictions,⁴ and, with respect to the Chief Justice, I do not accept that the last act test is part of the law of Kiribati.

- [43] As Kiribati is a jurisdiction that has codified its criminal law, it is preferable to look to other Code jurisdictions for guidance in interpreting section 371(1) of our *Penal Code*. Section 4 of the Queensland *Criminal Code* is essentially identical to our section 371. The leading authority on attempts under the Queensland Code is the decision of the Court of Criminal Appeal in *Williams*.⁵ There the Court rejected the last act test. Stable J, with whom Wanstall J agreed, endorsed the view expressed by Dr Norval Morris that:

the *actus reus* necessary to constitute an attempt is regarded as complete if the [accused] does an act which is a step towards the commission of the specific crime, and that act cannot reasonably be regarded as having any other purpose than the commission of that specific crime.⁶

- [44] Stable J went on to adopt the following statement of Salmond J of the New Zealand Court of Appeal in *R v Barker*:

Subsequent authorities make it clear that the [last act test] so suggested and adopted is not the true one. It is now settled law that to constitute an attempt, it is not necessary that the accused should have done his best or taken the last or proximate step towards the completed offence. The suggested rule was definitely rejected by the Court of Criminal Appeal in *R v White* (1910) 2KB 124. It was held that the first administration of poison in a case of intended slow poisoning by repeated doses amounted in itself to attempted murder. It is said by the court: “The completion of one of the series of acts intended by a man to result in killing is an attempt to murder, even though the completed act would not, unless followed by other acts, result in killing. It might be the beginning of an attempt but would nonetheless be an attempt.”

Although the test adopted by Parke B has been rejected, no definite substitute for it has been formulated. All that can be definitely gathered from the authorities is that to constitute a criminal attempt, the first step along the way of criminal intent is not necessarily sufficient and the final step is not necessarily required. The dividing line between preparation and attempt is to be found somewhere between these two extremes; but as to the method by which it is determined the authorities give no clear guidance.⁷

² *Republic v Katawati lotebwa* [2019] KHC 4, at [21]-[22].

³ [1854] EngR 35; [1843-60] All ER 363; [1855] Dears CC 515; 169 ER 826.

⁴ For example, *Director of Public Prosecutions v Stonehouse* (1977) 65 Cr App R 192, also referred to by the Chief Justice in *Katawati lotebwa*.

⁵ *R v Williams, ex parte The Minister for Justice and Attorney-General* [1965] QdR 86.

⁶ (1955) Crim LR at 293.

⁷ (1924) NZGLR 393, at 397-398 (also reported at [1924] NZLR 865).

