HIGH COURT OF KIRIBATI

Criminal Case N° 76/2017

THE REPUBLIC

v

KAUTUNAMAKIN MANTAIA

Teanneki Nemta for the Republic
Teetua Tewera for the accused

Dates of hearing: *10-11 June 2019*
Date of judgment: *17 June 2019*

JUDGMENT

[1] Kautunamakin Mantaia has pleaded not guilty to 1 count of indecent assault, contrary to section 133(1) of the *Penal Code*, and 4 counts of defilement of a girl under the age of 13 years, contrary to section 134(1) of the *Penal Code*.[1]

[2] An information was originally filed on 8 November 2017, under which the accused was charged with 4 counts of defilement of a girl under the age of 13 years. As that information did not comply with section 70 of the *Criminal Procedure Code*, the Attorney-General filed a fresh information (in identical terms) on 28 September 2018. Every charge on that information was bad for duplicity, in that each count alleged the commission of the offence "on several occasions" during the period covered by the count. It is not permissible to charge more than 1 offence in a single count (section 118(2) of the *Criminal Procedure Code*). As a consequence, the Attorney-General entered a *nolle prosequi* and filed the current information on 18 April 2019.

[3] The present information originally alleged 5 counts of defilement. At the start of the trial the accused was arraigned and pleaded not guilty to each count. In her opening address, counsel for the prosecution set out the case against the accused with respect to count 1 as being one of indecent assault.

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[1] Despite the repeal and replacement of sections 133 and 134 by section 4 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).

I queried counsel as to whether that count was framed appropriately. She then applied to amend the count to substitute a charge of indecent assault, with a minor consequential amendment to the particulars of count 2. There being no objection from counsel for the accused, I allowed the amendment. The accused was re-arraigned on these counts and maintained his pleas of not guilty. The trial then proceeded.

[4] The complainant was the only prosecution witness. She is now 16 years old and is the niece of the accused; the accused is her mother's brother. She was born on 15 March 2003.

[5] In 2013 the complainant was 9 or 10 years old and in Class 4 at primary school. She was living with her maternal grandmother at the house of the accused in Kabuna village on Tabiteuea North. The complainant's father had died, and her mother was on South Tarawa. The accused was also living at the house, along with 2 of the complainant's siblings.

[6] The complainant recalled an evening in 2013. She was at home alone, as her grandmother had gone to play bingo. She was woken from her sleep by the accused, who was wearing a lavalava. He held a kitchen knife to her throat and told her that he was going to have sexual intercourse with her. The accused removed the complainant's t-shirt, skirt and underpants and got on top of her. He was no longer wearing the lavalava and had pulled down his underpants. He attempted unsuccessfully to insert his penis into her vagina. She felt pain in her genital area. The accused told the complainant not to say anything about what had happened. This act is the subject of count 1.

[7] At around 5:00pm the next day, the accused sent the complainant to fetch some food for the pigs – *te wao*, a kind of plant. The place where she was to get *te wao* was quite far from the house; it took her about 15 minutes to get there by bicycle. There were no houses nearby. Shortly after the complainant arrived at the place, the accused showed up on a motorcycle. He pushed her to the ground and told her to take off her clothes. She refused. The accused, who was armed with a small knife, then forcibly removed her clothes. She was wearing a t-shirt, shorts and underpants. The accused then lay on top of the complainant and inserted his penis into her vagina (count 2). It was very painful, and she could feel that she was bleeding. He repeatedly thrust his penis into her vagina. He was not wearing a condom. After some time the accused stood up and told the complainant to get dressed. She is not sure whether he ejaculated. The accused told the complainant that she should go back and tell her grandmother that she was having her first period.

[8] The complainant put her clothes back on and cycled home. As she was about to tell her grandmother what the accused had done, he arrived on his motorcycle. She was then too afraid to tell her grandmother the truth, so she

said that she was having her period. Her grandmother gave her a pad for the bleeding, and then began to prepare for the family feast to celebrate the complainant's first period.

[9] After that, the accused had sexual intercourse with the complainant at least once or twice a week. She described him as treating her like his wife. It would take place inside the house if no one else was home, or in the bushes nearby.

[10] The complainant was able to recall 1 particular instance that occurred during 2014. She was in Class 5 at primary school, and would have been 10 or 11 years old. She and the accused were walking to Utiroa village to do some shopping. They stopped at the Taumwa-Kabuna causeway, in an isolated area where people have picnics, on the Taumwa side of the causeway. The accused had sexual intercourse with the complainant by inserting his penis into her vagina (count 3). He did not wear a condom and she does not know if he ejaculated. The complainant accepted that she was a willing participant. After the frequent acts of sexual intercourse with the accused she had come to believe that she was in love with him.

[11] The regular acts of sexual intercourse continued throughout 2015 and into 2016, although the complainant could not recall any particular instances (counts 4 and 5). She turned 13 on 15 March 2016. Sometime in mid-2016, when she was in Form 1 at junior secondary school, the complainant ran away from home. She still believed that she was in love with the accused, but she wanted the sexual intercourse to stop. She finally told a friend what had been happening, and the friend told the complainant to come and stay with her. The complainant later told another person what the accused had been doing, and the matter was reported to police.

[12] Under cross-examination, the complainant said that, on the first occasion in the house, the accused's penis may have penetrated her vagina "a little bit". She rejected the suggestion that she was not telling the truth about that incident. With respect to the events of the following day, the complainant denied that it had been a person named Karaiti, not the accused, who had sexual intercourse with her in the bush. She agreed that she told her aunt Meeribwa that it had been Karaiti who took her virginity, but she said that had been a lie, in response to persistent questioning from Meeribwa. She had not wanted to tell Meeribwa the truth. The complainant conceded that she had never told her grandmother what the accused had been doing to her. It was put to her by counsel for the accused that she was lying when she said that the accused had sexual intercourse with her in the bush and at the causeway. She insisted that she was not lying. She rejected the suggestion that the accused had never had sexual intercourse with her.

[13] The complainant's birth certificate was then tendered by consent, and counsel for the prosecution closed her case. She then applied to amend the particulars of counts 1, 2 and 3. The particulars for count 1 had alleged that the assault occurred "inside Koru's house" (Koru being the father of the complainant). The particulars for count 2 had alleged that the first act of sexual intercourse had occurred "a day after the incident at Koru's house". According to the complainant's testimony, the house in question belonged to the accused. Counsel for the prosecution sought to amend both references to refer instead to "Kautunamakin's house". For count 3 the particulars had alleged that the act of sexual intercourse had occurred at Kabuna village, whereas the complainant testified that it occurred on the Taumwa side of the causeway. Counsel for the prosecution applied to amend the particulars to replace "Kabuna village" with "the Taumwa-Kabuna causeway". Against the objections of counsel for the accused, I allowed all amendments, on the basis that to do so would not in any way prejudice the accused. Section 241(2) of the *Criminal Procedure Code* permits amendment of a defective information at any stage of the trial, as long as the amendments can be made without injustice. A defect in this context need not be a formal one. As the English Court of Criminal Appeal said in *R* v *Pople*,[2] when considering section 5(1) of the *Indictments Act* 1915 (which is in similar terms to section 241(2)):

> The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore was bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person.[3]

[14] Given that the case for the accused had, to that point at least, been to deny all and any sexual acts against the complainant, I was of the view that the defence case would not have been conducted any differently had the particulars been as amended from the outset. Counsel for the accused declined an opportunity to further cross-examine the complainant. The amendments were made and the trial continued.

[15] Counsel for the accused then submitted that his client had no case to answer with respect to counts 4 and 5. The submission was based on the failure by the complainant to identify an act of sexual intercourse in either 2015 or 2016 with any degree of specificity. Furthermore, the complainant turned 13 in March 2016, whereas the date range for count 5 covered all of 2016.

[16] The inability to recall precise details of a particular instance of offending is not uncommon in a case such as this. This is particularly so where offences

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2 [1951] 1 KB 53.

3 *ibid.*, at 54.

are perpetrated against young victims, and where the offending continues over a prolonged period. In such cases, adequate particularisation will always be challenging for the prosecutor.

[17] The problem that arises when there is a lack of specificity is one of latent ambiguity. The charges are not *prima facie* duplicitous. However, once the facts as alleged by the prosecution are laid out, it is clear that there is no way of identifying which of the acts actually gives rise to the charge. Latent ambiguity has the potential to embarrass an accused in the conduct of his or her defence, by forcing the accused to meet a charge based on an uncertain number of occasions, the proved occurrence of any one of which during the period alleged would constitute proof of that charge. For this reason both the High Court in Australia[4] and the Court of Final Appeal in Hong Kong[5] have taken the position that latent ambiguity is impermissible. However the New Zealand Court of Appeal[6] has rejected the doctrine of latent ambiguity and endorsed the established practice in that country of specimen counts. The practice of specimen counts is also permitted in England.[7]

[18] I am not aware of any such established practice in Kiribati, and I am reluctant to sanction such an approach by judicial fiat alone, particularly when there has been only limited legal argument on the point before me. I am of the view that this issue is best resolved legislatively. For now, I intend to adopt the approach taken in Australia and Hong Kong.

[19] As both counts 4 and 5 suffer from latent ambiguity that cannot be remedied, I find that the accused has no case to answer on both charges, and I record a finding of not guilty on each charge.

[20] Before continuing, I wish to add that this kind of issue is best addressed at the start of the trial, rather than waiting for the close of the prosecution case. The defence should have sought further and better particulars with respect to counts 3, 4 and 5. The problem created by the fact that the period covered by count 5 extended beyond the complainant's 13th birthday should also have been identified at the beginning of the trial.

[21] I formally found that the accused had a case to answer with respect to counts 1, 2 and 3, and informed him 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 no other witnesses would be called.

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4 *S* v *R* (1989) 168 CLR 266.

5 *Chim Hon Man* v *Hong Kong Special Autonomous Region* [1999] HKCFA 14.

6 *R* v *Accused (CA 160/92)* [1993] 1 NZLR 385.

7 See *R* v *Shore* (1989) 89 Cr App R 32 and *R* v *Funderburk* [1990] 2 All ER 482, cited by Cooke P (as he then was) in *R* v *Accused (CA 160/92)*, at 390.

[22] The accused is now 31 years of age. He has previously been married, and he has 1 child. He testified that the mother of the complainant is actually his first cousin. The accused has known the complainant since her birth. He denied the complainant's allegations of indecent assault and of sexual intercourse. He said he would never have sent her to a place so far away to collect plants for the pigs' food. He cannot recall anything particularly significant occurring in 2013.

[23] The accused testified that the complainant was not living in his house for some of 2014. His mother had travelled to Tarawa that year and his wife had died. As it would have been inappropriate for the complainant to stay with him as the only female in the house, she was sent to live with a person named Autiong, who lived nearby. She stayed with Autiong for 2 months, until the accused's mother returned to Tabiteuea North. The accused denied having sexual intercourse with the complainant at the causeway.

[24] The complainant was described by the accused as disobedient. She liked boys too much. She had caused trouble at Autiong's house in 2014 by going out at night. When she was in Form 1 at the JSS she frequently drank alcohol.

[25] In cross-examination, the accused said that the complainant was lying about many things. His mother never went to play bingo at night. The complainant would never have been left at the house alone. It was not her responsibility to collect food for the pigs, and there was no time when he sent her to do that chore. He can recall the day that the complainant had her first menstrual period. He had been out fishing that day and was informed about the family feast on his return.

[26] That brought the defence case to a close.

[27] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. His evidence is to be assessed like the evidence of any other witness. Even if I reject his evidence, I still need to be satisfied beyond reasonable doubt of the prosecution case before the accused can be convicted. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offences charged.

[28] In order to convict the accused of the offence of indecent assault, I must be satisfied to the required standard of each of the following elements:

a. the accused assaulted the complainant;

b. the assault was unlawful;

c. the assault was indecent.

[29] An assault is an application of force to the person of another, either directly or indirectly, without the consent of that person. Under section 133(2) of the *Penal Code*, a girl under the age of 15 years cannot consent to an indecent assault. An assault is unlawful unless it is authorised, justified or excused by law. The word 'indecent' bears its ordinary everyday meaning. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.

[30] In order to convict the accused of defilement of a girl under the age of 13 years, I must be satisfied to the required standard of each of the following elements:

a. the accused had sexual intercourse with the complainant;

b. at the time of the sexual intercourse, the complainant was aged under 13 years.

[31] 'Sexual intercourse' is defined in section 161 of the *Penal Code* as penile penetration of the vagina. The accused need not have ejaculated.

[32] The accused categorically denies committing these offences. Assessment of the evidence is not a competition between the complainant and the accused, nor is it a balancing act, but it is necessary for me to make a finding as to the complainant's credibility. The prosecution case rises or falls on my view of her evidence. While it is no longer a requirement that I warn myself of the dangers of convicting on a complainant's uncorroborated testimony,[8] it is still the case that I must consider her evidence very carefully. However, if I find her to be a credible witness, then it is open to me to convict the accused, even on the evidence of a single witness.

[33] I observed the complainant closely as she testified, and I found her to be an impressive and credible witness, particularly given her age. I saw nothing of the lying trouble-maker that the accused would have me believe her to be. She remained consistent in her account of the various incidents and was not shaken under cross-examination. While the accused need not satisfy me of anything, I do not accept the evidence he gave to the Court. Where his account differs from that of the complainant, I accept the complainant's evidence and reject that of the accused.

[34] With respect to count 1, I am satisfied beyond reasonable doubt that the accused assaulted the complainant and that the assault was indecent. There is nothing to suggest that the assault was authorised, justified or excused by law.

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[8] Section 11, *Evidence Act* 2003.

[35] With respect to counts 2 and 3, it is not disputed that the complainant was under the age of 13 years, being 9 or 10 at the time of the events giving rise to count 2, and 10 or 11 at the time of the events giving rise to count 3. I am satisfied beyond reasonable doubt that the accused had sexual intercourse with the complainant in the bushes the day after the indecent assault. I am also satisfied beyond reasonable doubt that the accused had sexual intercourse with the complainant at the Taumwa-Kabuna causeway in 2014.

[36] Having carefully considered the evidence before me, I am satisfied of the guilt of the accused on each of counts 1, 2 and 3. I find the accused guilty on each count and he is convicted accordingly.

[37] I will hear counsel as to sentence.

Lambourne J
Judge of the High Court

HIGH COURT OF KIRIBATI
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