



defence. For that reason, a trial was ordered to commence on the 10<sup>th</sup> April 2017.

- [3] The trial lasted a number of days before and after Easter and was adjourned on the 18<sup>th</sup> April 2017 for me to deliver this verdict. Although the evidence, particularly of the complainant and the accused was quite lengthy and there were a number of other witnesses as well, I am able to summarise it reasonably succinctly.
- [4] The complainant was aged 16 and a schoolgirl. On the day in question, the 18<sup>th</sup> April, 2016 she had been with another witness in town whom I shall refer to as P. She was also about the same age and also attending school. Both girls had been in or about the Kings Road, in Tongatapu where there was a funeral, and had been allowed to go into the markets by the complainant's mother to shop for toiletries for the complainant who was to attend school where she was a boarder, that evening. The complainant and P were in the area of the One Way road in the town when they were approached by the accused, who had his young child in the car, and asked if they wanted to go for a ride. They accepted and after getting them some food, he drove them to an area at Utulau where P went into a house with an older man who gave evidence that the accused had worked for him, and whose car the accused had borrowed. The complainant gave evidence that the accused took her to a smaller house on the property where she says that the accused threw her on a bed and an indecent assault took place. She then said that the accused drove them back into town and around the area of the Kings' road, her mother rang and this was answered by her friend P who was outside. The complainant said she went to get her purse in the car when the accused grabbed her and forced her to remain in the car as he drove off.

[5] She said they drove to an area in the vicinity of the Ocean of Light school where there was a track and a mango tree. They spent a considerable amount of time in that area, the accused still having his child with him. During this time, the complainant says she was forcibly raped by the accused, who ripped a part of her shirt in removing her clothing and subjected her to an indecency. It would seem the couple spent several hours together before the accused, at the complainant's request, drove her to another destination to meet her boy friend. Her boyfriend saw that she was with the accused whom he says she introduced as family. He said he had been her boyfriend for about six months which the complainant denied saying that they had not been in such a relationship for much more than a week. The accused left her there and drove home to his residence where he lived with his wife and family. He gave evidence he was woken up the next day to find the complainant, her mother, P and the police present. Later, he was taken to the police station where investigators gave evidence that he had made a signed record of interview admitting that he had had consensual sexual intercourse with the accused in the area of the mango tree. Later, at trial, he gave evidence disputing this record of interview, and denied he had ever signed or initialed it. He asserted that he never had intercourse with the complainant despite the fact that she had made overtures to him.

[6] The evidence of the complainant who had given evidence first, I found unremarkable. She appeared to me to give a clear account of what had happened. However, the second witness, P, gave me reason for considerable concern when she gave her evidence. Although she confirmed much of the complainant's earlier evidence about being taken to Utulau and going into a big house with an older man and later seeing the complainant outside chasing the accused in the area of the smaller house, it was her evidence that when they returned later to the area of the Kings' Road that gave me real concern.

[7] For no apparent reason, she burst into tears when about to recount what had arisen when the girls got out of the car, at the Kings' Road after returning from U'tulau. She said that outside the car she had been given the complainant's phone to talk to the complainant's mother who she said had been angry with her daughter. She said that she had not told the complete truth in her statement to the police when she had said she turned around to see the accused driving off with the complainant. According to Crown counsel, Ms Moa, she had twice maintained to her that her statement was the truth before she gave evidence. Her evidence, however, at trial was that the complainant had got out of the car when she was talking with her mother, on the phone and had later got back into the car because she was concerned at what her mother might do to her, and told the accused to drive off. This was in conflict with the complainant's evidence (which P did not support) that she had gone to retrieve her purse from the car and that, when she had tried to do so, the accused had grabbed her and driven off. Later P said that after she had made her statement the complainant had told her to say she had been kidnapped.

[8] At this point, I indicated to the Crown I was very concerned about this evidence, and I adjourned the case in the late afternoon for the Crown to make such inquiries as it thought fit regarding this unforeseen evidence. The trial continued with the mother and other witnesses being called including the accused who gave evidence. The complainant, however, was not recalled about P's evidence. No evidence was adduced to suggest that P was a witness I should not find credible and indeed her rather spontaneous teary outburst inclined me to the view that she was telling the truth. If so, the complainant was embellishing her evidence that the accused had abducted her from the Kings' Road and had driven off to an area under the mango tree where

the complainant said non consensual sexual intercourse had taken place.

[9] The remaining evidence did not advance the essential issue as to whether indecencies had taken place and, or rape as the complainant had testified. There was no evidence adduced which had the effect of supporting the complainant's testimony aside from a partially ripped shirt, which she had said had been ripped in the encounter, so I was dependent upon the credibility of her evidence alone in relation to the charges. I direct myself that before I can convict on any of the charges I must be satisfied beyond reasonable doubt that the complainant is telling the truth.

[10] I have not overlooked the accused's evidence, which I did not find satisfactory, concerning his denial that he did not sign the admission of consensual intercourse, or, indeed much of his explanation by way of denial. I did not find the police to have overborn his will as he suggested at the police station. I found him an evasive and unsatisfactory witness whose evidence I could not rely upon. However at the very most, he had admitted only to consensual intercourse in his record of interview. In disclaiming his admission as to consensual intercourse and in maintaining at trial that intercourse had not taken place, he was advancing plainly inconsistent accounts of his actions, that afternoon or early evening which rendered him, in my view a very unreliable witness. However, his denials and unsatisfactory evidence went no further than to impeach his credit, and could not, in my view, be advanced affirmatively to support the prosecution's case of rape and indecency.

[11] I remind myself that an accused person in electing to give evidence assumes no burden of establishing innocence. The Crown, throughout a criminal trial, bears the onus and burden of proof to establish the elements of the offending beyond

reasonable doubt. Although I accept that the accused, as the Crown pointed out, was with the complainant under the mango tree for a very long time, that in itself does not prove they had intercourse whether consensual or not. At the end of the day, I am left with considerable concern about P's evidence which suggests that the complainant had embellished her account when she said the accused had forcibly taken her away from the Kings' Road area leaving P behind. As a consequence, there being no apparent reason why I should reject P's account, I am left in a state of doubt as to the reliability of the complainant's evidence and cannot exclude the possibility that her account of rape and indecency is also embellished. In that state of mind, I cannot convict the accused of any of the charges. I am left in doubt as to where the truth lies. He is acquitted on all charges and discharged from the indictment.



A handwritten signature in black ink, appearing to read "C. B. Cato", is written over the seal.

C. B. Cato

**DATED: 21 APRIL 2017**

**ACTING CHIEF JUSTICE**