



mother. The accused did not give evidence but a record of interview dated the 7<sup>th</sup> February 2017 was admitted by consent into evidence. He said that the activity was consensual and that he had consensual sexual contact with the complainant the day before the incident.

[3] The complainant claimed that she had been present with her mother at a third person's residence where they had gone to do some washing, and her mother some weaving. This was, apparently, a reasonably regular occurrence. The accused had lived at the premises with his wife for a lengthy period. The wife was the third person's daughter. The complainant said that she had been doing some washing and told by her mother to return to their home which was close by to bring back two younger children who were in their home. She returned to her home and was away for over half an hour. The complainant said that she had been locked up when she was confronted by the accused, who came into the house uninvited, grabbed her and proceeded to take her into a rear room, where he threatened her, removed her lower body clothing, touched her breast and proceeded to undo the zip on his shorts when her mother appeared. She said she had struggled. The accused left and mother proceeded to beat the complainant with a broom handle. The complainant admitted apologizing to her and said nothing happened. She said in evidence that she had told her mother, as she was beaten, that it was not her that had initiated this but the accused. She said her mother had beaten her because she thought she had been consenting.

[4] Mother gave evidence and admitted being concerned about the complainant not returning with the children and a premonition had caused her to return to her house and she heard her daughter say don't do it as she entered the room to find she thought the accused fiddling with his zip area. She saw her

daughter had no clothes in her lower area. Later that day, a complainant was made to Vaini Police.

- [5] At the trial, it emerged during cross-examination of the complainant, that the complainant's statement that had been disclosed as a part of the police brief was dated 19<sup>th</sup> August 2016 many months after the incident had occurred. I remarked upon this and counsel for the Prosecution rightly chose to lead evidence on this topic. It emerged, in later evidence, that the complainant had made a statement, as did her mother, at or about the time of the complaint in December, 2014. I am satisfied that this was the case having heard evidence from the interviewing officer, Loni Pakelani, both as to the taking of a statement from the complainant in 2014 that is at the time of the incident, and, later in 2016, after it had been requested by Senior constable Lelea who was the investigating officer. The complainant also confirmed that a statement had been taken when the complaint had been filed. SC Lelea said in evidence that the file which he had given to prosecutions at Vaini in February 2015 had later been returned to him for further action on the 19<sup>th</sup> August, 2016. His station diary note which was exhibited evidenced this. He noticed, after seeing the file on its return, that there was a record of interview taken by Sergeant Fuavai, who was the head of prosecutions at Vaini, that he had not seen before. He also noted that the statement of the complainant and her mother which had been on the file before were missing. Officer Lelea said that he decided to re-interview the complainants because the defence in the record of interview, which he had not seen before, had suggested that there was previous sexual activity between the two prior to the incident of the 17<sup>th</sup> December, 2014.

- [6] I note that, in Lelea's investigation diary No 378, of which I received a translation there is an entry recording (No 20) that on

the 10<sup>th</sup> February 2015 he had handed the case to the Prosecution for trial. He said that was to the prosecuting officer at Vaini, Sergeant Fuavai. That was after he had interviewed the accused on the same day and the accused had said that he chose to only speak at trial. (Note 19 of his investigation diary which was exhibited). I note that this was after Sergeant Fuavia had taken a statement from the accused on the 7<sup>th</sup> February which Lelea had said he knew nothing about until he saw the file again in 2016.

[7] Sergeant Fuavai, who said he was the prosecuting officer at the Vaini police station, gave a different account. He said that he had given the file to officer Lelea after taking it to the Magistrate's Court for preparation and its submission to prosecution but despite several attempts to get the file back from SC Lelea, he had not been given it. Although he expressed some concern at this, he admitted that he had not insisted on its return. He said he did not know that any statements were missing, nor that the complainant and her mother had been re-interviewed by Lelea before the file had been submitted to the Crown for committal in 2016. He said the first he had known of this was when the Prosecution had contacted him the day before to give evidence, at trial. Officer Lelea had given evidence before Sergeant Fuavai and was not recalled to answer the claim that Sergeant Fuavai had repeatedly called for the file to be returned which was plainly in conflict with Lelea's evidence.

[8] I found the evidence concerning, both because two important original statements had gone missing and had not been accounted for, and because the case had only been committed for trial on the 19<sup>th</sup> August 2016, apparently after the file had been handed back to Lelea for further work to be done on it. Consequently, the case had reached this Court in early December 2016 that is nearly two years after the alleged

incident. SC Lelea said that when he received the file the mother had asked him to withdraw the complaint which he said he could not do. Later at trial, the mother confirmed that she had said this because the case had taken so long and matters had been resolved.

- [9] I do not know where the truth lies and who was responsible for causing the loss of the statements and the unacceptable delay in the case proceeding to committal which are plainly serious omissions. A failure by the prosecution to be able to produce an original statement by a complainant or witness may have very serious consequences. A witness's statement that is consistent may assist to further the reliability or otherwise of the witness's evidence. Counsel are entitled to expect that original statements are available for examination before trial so that the reliability of a witness's evidence may be considered and assessed both before and during trial. A later statement may be the product of recall affected by the passage of time or later events and may be a less reliable basis for assessing the consistency of the complaint evidence. The delay in having the case committed for trial is also serious. Justice delayed may cause justice to be denied because witnesses may not be able to be located for trial, or they may with time have a diminished recollection of events. As was the case here, it seems the complainant and or her mother's wish for the prosecution to proceed had diminished by the time they were re-interviewed. Prosecutions should proceed in a timely way which was plainly not the case here, and neither the loss of the statements nor the delay in committal were adequately addressed by the evidence I heard. Delays add to the stress associated with the prosecutorial process for all concerned. For this reason, I recommend that this case be referred to the Commissioner for appropriate investigation which I was able to undertake only in a limited way.

[10] Returning to the facts of the case, I was concerned at an aspect of the complainants' evidence at trial, however, that she had not seen the accused on the 17<sup>th</sup> December 2014 when the first paragraph of her statement of 19<sup>th</sup> August, 2016 plainly suggested the contrary. I did not find her answers when questioned about this inconsistency convincing, she mentioning a second and younger Mateo being at the house. This suggested to me that that she may have been trying to distance herself from seeing the accused that day and eliminating any opportunity for the two to arrange a meeting at the complainant's house. There was evidence also that the accused had lived with the third party and her daughter for about three years and their residence, was close to where the complainant lived. The mother and her daughter, the complainant, it seems reasonably regularly visited the home where the accused lived yet she said she was not familiar with him until the day of the incident and knew him only by face. I considered this rather unlikely.

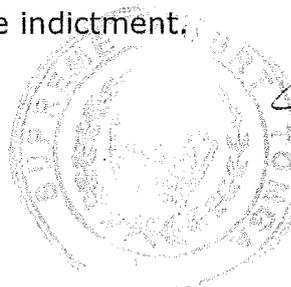
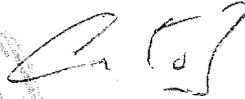
[11] The accused, when he had been interviewed by Sergeant Fuavai, in early February 2017, had stated an earlier incident of consensual sexual activity between them the day before this incident which the complainant did not accept. Nor had she accepted that the meeting at her home had been arranged between her and the accused.

[12] Mr Fili submitted that the mother had said she had been away longer than half an hour and when the children came without her she commenced to get a premonition that something was wrong and returned. He submitted that instead of remaining in the house after the children had gone that the complainant should have returned with them, and the fact she had not gone with them but she said had stayed to lock up, lent some weight to the defence case that the meeting at the complainant's house was planned.

[13] As well, the complainant said in her evidence that when her mother walked in the accused was fiddling with his fly when in her statement he had said his shorts were off. She said she was meaning his zipper was already down and he was about to take off his trousers. I did not find her answers convincing, in this respect.

[14] She also said that she and her mother after a month sought to withdraw the complaint. She said that she volunteered to her mother that it had been the accused's doing after what appeared to be a beating by her mother of her with a broom stick. A complaint was made to the police after this.

[15] I was left consequently in a state of mind of uncertainty about the reliability of the complainant's evidence that she had not known the accused and had not been involved with him in consensual sexual activity prior to the 17<sup>th</sup> December 2016. She did not strike me as a timid child then of 16 who would be readily overborn by the accused, then about 19. Although she may have been telling the truth about the incident and that what occurred had not been consensual, I was left in reasonable doubt about this. Accordingly, I acquit the accused of all the charges, and he is dismissed from the indictment.



C. B. Cato  
**JUDGE**

**DATED: 12 MAY 2017**