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**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR 65 of 2017

BETWEEN: REX - Prosecution

AND: SIONE FANGATUA MAFI - Defendant

BEFORE THE HON. JUSTICE CATO

Mr. Finau and Ms. Kafa for the Prosecution
The Accused unrepresented

VERDICT

[1] The accused, Sione Mafi, was charged with three counts of rape contrary to section 118(1)(a) of the Criminal Offences Act and one count of abduction of a woman contrary to section 128 of the Criminal Offences Act arising out of an incident on the 15th February 2017, at Haveluliku.

THE EVIDENCE

[2] The complainant was aged 19 at the time of the incident which occurred on the 15th February 2017 at Haveluliku on the eastern area of Tongatapu. She and two friends had been drinking vodka in the village of Kolonga at about 9 or 10 pm when the accused drove up in his car. By that stage, the complainant and her friends Viliami and Manitisa, whom the complainant said were her cousins, had consumed two bottles of vodka. Manitisa was about to go and buy another. The accused stopped and Manitisa got into his car. The complainant said she had not met the

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accused before that evening. After that, the complainant and Viliami got into the car also and they drove and purchased another bottle. The complainant said that they then went to a beach area at Kolonga and she then asked to be driven closer to where her mother lived. It was decided they would go and drink at a cemetery which was closer to where the complainant lived with her parents.

[3] They drank there for a lengthy period in the car. The complainant said Viliami asked that they be driven home about 3am but the accused appeared to have passed out. Viliami asked why had he passed out when they were about to leave? Viliami got out of the vehicle and said that they would walk home. Manitisa, she recalled, was still drinking with the accused in the car. She did not recall anything else until she was later dragged into the car. She said she felt her head bang and she woke up inside the vehicle on her own with the accused. She was in the back seat.

[4] She said she was a bit sober after she had dozed off to sleep. She said when she had woken up the car was being driven by the accused. She said she asked the accused where Manitisa and Viliami were? He said that Manitisa and Viliami had beaten her and left her at the cemetery and he was the one that had helped her. She said this was at about 4-4.30. The accused said that they were at Fua'amotu. He parked in a bush area. He came to the backseat. She said she was crying and said her cousins would not treat her like that. She then asked to be taken home. He said he would not do that until they had intercourse. He threatened her when she said no and said he would shoot her and leave her in the area. He then, she said, took off her clothes, touched her body and forced her to have intercourse. She said she kept moving around and that it was not easy for him to insert his penis into her vagina. She cried afterwards, and was

concerned about her mother not knowing where she was. She said she had not consented to intercourse and was concerned about his threats.

[5] There was then discussion about marriage. The accused asked her if she wanted to get married and she said no. He said if she wanted to go home they should get married. She said yes because she was afraid of what he might do to her if she refused namely that he might beat her to death and leave her there.

[6] He then said they would go to his aunt's home and pick her up and then go back to her house and talk marriage. She said they left the bush area about 11am. She said the accused was walking around looking for a can and found one which he used to smoke some leaves. He then forced her to take her clothes off and told her not to shout or yell, because nobody would hear her. He took off her clothes and had intercourse with her. It was she said without her consent.

[7] He then said they would pick his aunt up and go and arrange the wedding. They then came out onto the East coast road at an area between Haveluliku and Niutoua. They went to his aunt's place she thought at Fatumu but she was not there. He then drove into Nukualofa and went to an ATM machine and said he was going to buy goods to take to her place. He locked the car and told her if she tried to escape he would kill her. He stopped at a Chinese shop and purchased some chicken, in Havelu as they drove out of town. At about 3-4pm, they arrived at an area around Niutoua. He asked to have sexual intercourse again. He had turned into a bush area. He said if she wanted to go home she should have sexual intercourse and arrange their marriage. He said to do what he says if she wanted to stay alive. He took her clothes off the bottom part and sexual intercourse took

place. She said she did not consent. After that, he said they would go home to arrange their marriage.

- [8] She said he had wanted them to go into her home together but she went in and saw her mother and cried and explained to her that she had met the accused whilst drinking, had not known him, and that he had raped her and she was glad she got home alive.
- [9] The mother then saw the accused and told the complainant that was the man who had propositioned her in Fiji. The complainant rang her cousins to find out why she was beaten and explained to them that Sione had raped her and she had just got home. Villiami and Manitisa came around and attacked the accused. Her mother rang the police whilst the complainant had a shower.
- [10] She denied she was drunk during any of the sexual intercourse episodes. She said intercourse was painful because she did not consent to it.
- [11] Under cross-examination by the accused, she denied trying to get money out of the accused. She denied dancing in front of him. She denied asking him to go into the bushes with her. She denied going to sleep in his car. She said she did not recall vomiting in the car. She denied asking to go to the accused's home. The accused put to her that it was not at Fatumu but Ha'asini they had tried to locate his aunt. She denied asking him for money or chicken. She said she told him she wanted some slippers at Veitongo so that he would travel along the main road, and not go by way of a coastal route back. She admitted that at one point he had asked if she loved him. She said she had told him she did not love him and the only thing they talked about was marriage. She said that he said if they did not get married he would kill her. She denied that the third episode occurred

after the car engine was cooling down. She denied saying they could have a quick one or her taking her clothes off. He questioned her about whether her mother had told her they had sex in Fiji and she said only that he had propositioned her. The accused put to her there was only one incident of sex and that was around Niutoua before he took her home. She said that he had ejaculated during all the episodes.

[12] The accused participated in a record of interview, in which he admitted meeting up with the complainant her friends who were looking to buy a bottle of liquor. He did not know them. He said they were drunk and they purchased liquor then drove to a beach and a cemetery where they parked and drank. They were drinking about an hour when the complainant passed out drunk. Later Mani (Manitisa) and Pila (Viliami) got angry with him and pulled the complainant out of his car. Mani, he said, then told him to go to Kolonga to buy some marijuana. He gave Mani money who walked to a house to buy marijuana, and he was doubtful that he would return so he left him and went back to the others. Pila and the complainant had passed out drunk. The complainant was woken up by him to have a drink and he said that she got up and vomited into the back of his car. He said he did not drag her into the car. The complainant had passed out drunk when he left the cemetery. He said he was already thinking of her whilst they had been drinking.

[13] He had parked in a bush area when she woke up so no one would know them when they went by. He admitted that he had lied about being at Fua'amotu. He said the complainant said she wanted to go back home. He said to her they should get married and tell her parents and ask to get married. He said it was lies that he had said he would shoot her. He said he passed out drunk at about 9am. Later, they went to Ha'asini to see a woman to come to her parents for them to get married but they

could not find her so the plan changed to getting a box of chicken and money to be given to her family. He said he got \$500 from an ATM and some chicken in town. He said they drove back to the same area they had come from in the East. They drove to an area and waited for the car to cool down. The accused said that he asked her to have sex with him if she loved him. He claimed that she took off her clothes and consensual sexual intercourse took place. He said after that he went to ask for her parent's consent to marry. He said she got off first and walked to her place and he came with the chicken and was attacked by Mani and Pila. He said he spoke with her father and said he had come to marry the complainant and asked for his forgiveness for going with her. Her mother had shouted at him that is the man who had asked of me in Fiji. He maintained that the complainant had consented to sexual intercourse. The accused elected not to give evidence, nor did he call any evidence. I draw no adverse inference against him because of his election not to give or call evidence.

[14] In his written statement of charges form, he admitted the charge of abduction but denied rape.

[15] In his voluntary statement, he said;

"We did plan to marry and the plan to go to Ha'asini to bring my aunty so that we can go and speak with her parents. That is why we turned to have sex to show that she loves me and I feel that I really love her. I know that she is hurt because of her mother saying that we had something in Fiji and that is the reason why she didn't do what we had promised, and I am still striving for her and keeping our promise.

[16] The complainant's mother gave evidence and said that she had encountered the accused by chance on a trip to Fiji. They had ended up in a motel but, although the accused had propositioned her for sexual intercourse and also had got on top of her

intercourse had not taken place. She said that she had only discussed this with her husband and had told the complainant on the 15th February, 2017 that the accused had propositioned her in Fiji only after she had seen him at her home in Kolonga.

[17] Manitisa gave evidence and said they had been drinking from 8-9pm on the 14th February 2017. The accused had joined them at 10.30 to 11. He accused had said he had resided at Kolonga a long time ago and was at Niutoua doing tattoos. They went in his vehicle to get another bottle. They went back to the cemetery and consumed alcohol and marijuana. All of them smoked. The complainant and Viliami passed out on the grass outside the vehicle. After that bottle was finished, he said the accused wanted to get more alcohol and he went with the accused to get a bottle. The store they had been to earlier was closed so he went to another place to purchase, and the accused drove off and left him. After running back to the cemetery, he saw the accused's car leaving Niutoua. Viliami was asleep on the ground. He could not wake him up so he left him and went home. He said the complainant had rung him the next day and asked him why they had left her for the accused to take her. She told him she had been raped. He denied the accused's suggestion in cross-examination that they had gone to get marijuana. He denied that the accused had given him money to buy marijuana. He said the complainant informed him that the accused had told her that he and Viliami had beaten her up and left her at the cemetery.

FINDINGS

[18] This case essentially involves an issue of credibility. The central issues are whether there was beyond a reasonable doubt an abduction, and whether beyond reasonable doubt there were three instances of non consensual sexual intercourse and not just

the one as the accused's claimed in his record of interview and maintained in his cross-examination.

[19] I considered closely the complainant's evidence as she was giving her evidence, and also took into account that conviction relied beyond any reasonable doubt on the integrity of her evidence. Although she admitted having passing out at the cemetery and was plainly seriously affected by a combination of alcohol and drugs, before she says being dragged into the car, I consider that she did sober up after finding that she was alone in the car with the accused and was driving in an unknown area. I consider that she was a mature witness in the sense that she gave her evidence carefully and I do not think that she embellished her account. The accused did, in his record of interview, admit that she had asked to go home, and I find that she did on more than one occasion. This would have been a very frightening and indeed harrowing experience for any woman. I accept beyond reasonable doubt that she was telling the truth that the accused had sexual intercourse with her on three occasions that evening, all without her consent. I accept also that he had threatened to harm her that evening if she resisted and would only take her home if they had intercourse.

[20] I do not accept the accused's account as stated in his record of interview that over such a long period between what I find, beyond a reasonable doubt, was the commencement of an abduction at the cemetery to her arrival home there was only one episode of sexual intercourse and that it was consensual. That episode according to the accused took place in the later stages of the abduction that is several hours after they had left the cemetery at Kolonga. Given the accused said in his record of interview that he had developed some feelings towards her as they were drinking together, I consider it most unlikely that the

evening developed as he explained with some kind of courtship ending in a sole act of consensual intercourse. I accept beyond any reasonable doubt that all acts of intercourse were non-consensual.

[21] I find also that the complainant told her mother about the rape and her detention prior to the mother stating that was the man who had propositioned her. Her actions in telling her mother what had occurred was entirely consistent with her being raped, and not those of a person contemplating marriage after a consensual but short lived affair. I reject entirely any suggestion that the mother and complainant conspired together to falsely implicate the accused because of his action with the mother in Fiji. I heard mother give evidence and formed the view that, although she had rather foolishly allowed herself to be involved in a compromising situation in the motel room with the accused, that she was an honest woman who had rung the police out of concern for her daughter and not for any collateral, personal or vindictive reason. Indeed, the account she gave of the accused's behaviour in Fiji was reminiscent I consider of the way the accused opportunistically and in a predatory way had pursued her daughter. The accused's conduct in Fiji was no more than a very unusual coincidence in this case. I am satisfied it was no more than that, and whatever did happen in Fiji between the accused and the mother, it was not causative of any false complaint.

[22] I consider that the accused was probably adversely affected by alcohol and by the consumption, during the evening, of marijuana. I have no doubt he had designs on the complainant at an early stage of their meeting and that is why he left Manitisa and went back to the cemetery, on his own hoping to take up with the complainant. Aware that she and Viliami had passed out he dragged her into the car and made off leaving Viliami behind,

asleep. In his record of interview, the accused said when he came back to the cemetery the complainant and Viliami had passed out drunk. The complainant said she felt she was being dragged into the car and woke up when she felt a bump. I think it most unlikely the complainant would have got up and voluntarily got into the car, alone. I think it likely that the accused was able to do this only because Viliami had passed out on the ground because, if he had been awake, I doubt that he would have allowed the accused to put the complainant in his car, and drive off. I accept the evidence of Manitisa also that he had been left behind by the accused, having attempted to buy more alcohol and not drugs as the accused claimed. I accept that when he arrived back at the cemetery, he had seen the accused departing Niutoua with the complainant and he had left Viliami asleep to go to his home. I consider that the only reason the accused left Manitisa behind was, as I have said, to have access to the complainant.

[23] I consider the accused's assertions in his record of interview that he had designs of marrying the complainant from the outset to be no more than a fantasy at best. He had barely known her before dragging her into the car and driving away and she was plainly at that time in a rather intoxicated state, and vulnerable. I am satisfied that this was no genuine courtship ending in a sole act of consensual intercourse as some seal of approval prior to seeking the parent's approval to marriage. I consider that it is likely that the accused in an attempt to minimize the criminality of his actions and in a somewhat deluded state, befuddled by alcohol and marijuana, wanted to present to her parents a picture of the two falling in love and wishing to marry as a justification for her being away for so long with him, and as a cover for his actions. The fact he chose to deliver chicken to the family and possibly money to appease them, also is consistent with this motive. I consider his actions brazen. I find the

complainant understandably went along with his talk of marriage and really had no other choice if she was to get home, safe. It is to her credit that throughout this ordeal she appears not to have panicked but to have acquiesced in the accused's suggestion of marriage so as to ensure that she arrived home without harm.

[24] I find beyond reasonable doubt that during the evening of the 15th February 2017, the complainant had non-consensual sexual intercourse and was raped by the accused on three occasions. I also find that there was no basis for the accused to have an honest but mistaken belief that she was consenting to intercourse, on any occasion.

[25] On the count of abduction, I consider that beyond any reasonable doubt, she was taken by force that is she was dragged into the car by the accused, and also beyond reasonable doubt that was with the intent of carnally knowing her. In this regard, I accept that, on more than one occasion, she asked to be taken home after coming to her senses and that the accused had threatened her at times, taken her to remote areas, all with the intent from the time of taking her away to have carnal knowledge of her. I note and accept the Mr Finau's submission that when in his record of interview after the complainant had got into his vehicle, the accused stated "I said to myself I have food as she was already in the van", as evidence of his contemporaneous state of mind and of his desire to have carnal knowledge of her. Indeed, he seems to admit abduction when the charges were read to him, but I do not rely on this in coming to this verdict. The passage of events speaks emphatically of his intention to take her away from the cemetery at Kolonga and have carnal knowledge of her.

VERDICTS

[26] I find the accused guilty on all counts beyond reasonable doubt, convict him accordingly and remand him in custody for sentence.

DATED: 21 JULY 2017



A handwritten signature in black ink, appearing to read "C. B. Cato".

**C. B. Cato
JUDGE**