



during the day. She had a meal at the wedding and two glasses of wine. They left the Vakaloa at about 5 or six pm. She said she felt none of the warm effect of alcohol. Later, she and relatives went to the Reload bar in Nuku'alofa at about 9pm. She said she had not consumed any alcohol before that. She said they danced and drank beer. She said she had brought two beers. She had only started to drink the second beer before closing time about 12.30.

[3] They then went to Digicel square. She said they looked for a vehicle to take them to Ma'ufanga. There was herself, two sisters, a girl named Koletu, a boy named Sepeti, a friend of a cousin Marian and a boy named Sitaleki. Her cousins got into a vehicle driven by another. The accused, who was known to Sepeti, was parked under a mango tree. She said that she knew him by face as she had gone to the bar before. She said that she had danced with the accused inside at times in the bar and had smoked with him and there was one night had given her and a cousin a lift to the market area around the Billfish, about a month before. She said she had socialized with him once at the bar before this incident. She said there were two occasions when they had socialized and he had shown attraction to her but she had not shown him any. She said she had travelled in the front seat with Marian and Sitaleki being in the back. Her sisters and the others were waiting to be taken in the next load by the accused. The vehicle had a backseat for three and a sliding door. It was small car with two seats in the front.

[4] They initially went to her aunt's place in Ma'ufanga and then decided to go to the free market area to wait for the others. This was close to her aunt's house. When they got there, Sitaleki wanted to be dropped home with Marian. They went to Sitaleki's residence but Marian did not want to get off. Marian wanted food so A said they should go to the Fiesta restaurant in Salote Road

but instead Sitaleki wanted to go to Talahiva. They then proceeded to the Talahiva restaurant in Town.

[5] Before that, she told the Prosecutor, Mr Kefu, that, in the short time that they had been at the market area, the accused had kissed her and she had kissed him. She said it was short not even a minute. She said she did this to try to convince him to drop them at her aunt's home so he could go and get the others. She said she stopped the kissing and he did not try again.

[6] Sitaleki and Marian got off at the Talahiva and she sat in the car and waited with the accused. The accused proposed that they drive to the area of Digicel to pick up the rest of the group. She said she told him to wait so she could tell Marian and that she was about to get out when she was pulled inside and he started to drive off and speed up. She said they had a struggle over the steering wheel of the car and got to the Salote memorial round about, and turned left. She ceased to hold the wheel as a car was approaching and the accused turned to the left and drove up to the frontage of the residence of the Church Minister. She said that he told her to get off so he could go because he had got some food preparation to do. That was at about 2pm.

[7] She then said she got out of the vehicle and intended to go back to Talahiva. It was close by. She said she started to walk back but the accused came around the vehicle and tackled her towards the vehicle, opened the door, pushed her and she fell into the car. She said that he had hit her with his shoulder and opened the door and pushed her inside. He then climbed on to her and was seated on the lower part of her body. When she tried to sit up, he would force her down. He had one hand wrapped around her and one hand was trying to close the sliding door that she thought he had locked from inside because she could not open it.

[8] After he closed the door, he took his pants off and underwear. He still had clothes on the upper body. He proceeded to take off her underwear. The dress ended above her knees. Her tights came off but they fought over the removal of her underwear with him trying to pull it down and she holding it up. He did this with one hand. The underwear was stretched and had come down to her knees. She said she bit him on the ear hard. He got up and then came down with his weight on her. The door was close to her feet. She tried to open it. She also bit his shoulder. He got up. He was still pulling her underpants when she noticed the police pass by and she screamed and called the police. He then moved to the side and pulled on his pants. She said that she was sitting up when she called. The police vehicle stopped in front of their vehicle.

[9] One of the officers got out of the car with a torch and shone it on their vehicle. The accused was sitting beside her. She said the door would not open. She said the police officer opened the door from the outside. The police officer asked what is happening and she said that the accused was trying to rape her. She got into the police vehicle and one other officer came and drove the accused's vehicle. The accused was also brought to the Nuku'alofa Police Station. She said that, at the station, she swore at the accused. She said she told police that she wanted to continue with her complaint. She said that her tights had not been put back on. The accused had put his clothes on when the police came and parked. She said she took her underwear off and washed it and took it back to the police station, a few days later.

[10] The under wear was produced in evidence. It was, the witness said, navy blue. She said they were stretched. She said of the accused's statement that the never laid a hand on her and that

she just screamed when the police came that was a big lie. She said he was trying to force her.

[11] Under cross-examination, it emerged her first statement to the police was made at 2:30am on the 7<sup>th</sup> October, 2016. A second statement was taken on the 9<sup>th</sup> October, 2016. She said she had danced with the accused before he became a security. She said she did not know his name and was not well acquainted with him. She had known him a month or two before he became a security officer. She denied that she had approached the accused at his car on the evening of the incident for a lift home. She said it was the second time the accused had taken her home. She denied she was drunk. She said that they had been waiting for a taxi but the accused had offered to take them home. She confirmed that she had once smoked with the accused and danced with him and the second time he had taken her home with her cousin. She said on the night of the incident, she had not asked the accused to take her home; it was a friend of the accused known to them called Sepeti who had arranged the trip for them to Ma'ufanga. She said she had not talked to the accused that night. She said the accused liked her. She denied being drunk on the evening in question. The idea she said was to drink at the beach near her aunt's place where they would be able to get alcohol.

[12] She said they went to Talahiva and Marian and Sitaleki got off to buy food. She said the accused told her that they should go and get the rest, and she told him to wait while she told Marian. She denied the accused had said that what you people are doing is annoying and he had to go. There was cross-examination about whether the accused had told her to get off and join the others whilst he picked up the others at Digicel with her account that she had been grabbed when she got out and he had driven off with her. On the 7<sup>th</sup> October 2017 she had made no mention of

this but simply had said that they had been waiting for a long time and she was surprised when the vehicle started running. They had argued over the gear of the vehicle and we almost had an accident. She also agreed in evidence that the accused had said what she was doing was annoying.

- [13] She confirmed that she had kissed the accused but not for any amorous reason at Ma'ufanga but because she wanted him to take her to the aunt' place. She said the accused had kissed her. She denied that the accused had told her he would go to his home and would take her to her home at Ma'ufanga. She said she had waited and the accused had asked her if she and he can go and pick up the other and take them to Ma'ufanga. She had said that she told him to wait while she went and saw the other girl. She was about to pull open the door and about to get out when he grabbed her, pulled her back inside and left because the engine was on the whole time. She said on several occasions that police had not taken down all she said. There was cross-examination about different versions as to what happened at Talahiva before the accused drove off. She said that when he took off she thought he wanted simply to get her away from the other two because he had thought they were annoying. She did not think he would rape her. She said that they had stopped outside the church not because she had tried to get off but because the accused had stopped there. She said the reason she had been pulling on the steering wheel was because she had wanted to go back to Marian. She said when they had stopped the accused had told her to get off so he could go home and make food. It was put to her that he told her several times to get off and then the accused went to the back seat and sat there whilst she was in the front seat which she said was a lie. She had then, it was put to her in cross-examination, gone to the back seat and she said that was a lie. It was put to her that the accused had said it was annoying after she had asked whether

he was angry with her and then the police car had driven by and she had told the police that he had tried to rape her.

[14] She said she did not shout out she was being raped but asked for help and it was when the police came that she had told them rape. She said she had told police that she did not have her tights (which she said had been taken off in the car) on the 7<sup>th</sup> October at the station, but her statement did not reveal this. She said she made her statement about 5 minutes after being taken to the police station. She later agreed that she had not told police about her tights on the 7<sup>th</sup> October. She said she had told police about her panties being stretched in her statement on the 9<sup>th</sup>. She said that she had made a second verbal statement to an officer before the formal statement on the 9<sup>th</sup> was taken. She said her tights were taken off in the car and her purple panties were stretched. She said that she had told police the panties were ripped. It was pointed out that she had said her panties were violet. She said in answer to a question that those were not the pants she wore that night that the ones produced in evidence were. She also said that in her first statement she had said that she bit the accused's ear but there was no record of that in the first statement. It was, however, recorded in the second statement. She confirmed she had a conversation with police at 11am on the Friday before her second recorded statement was taken on the 9<sup>th</sup>. She stated that she had told police she was grabbed in her conversation of the 7<sup>th</sup> but it did not show in her first statement.

[15] Kapine Havea was one of the officers who arrived at the scene. They had stopped a vehicle nearby and parked in front of the accused's vehicle. They heard someone shouting for help maybe three times. He saw two people by flash light in the car. He said the male was grabbing one hand on the female and one hand on the chest like they were wrestling. He went to the car and saw

the girl was crying. She asked for help because the male was forcing her. The accused whom he knew said that nothing happened. The girl and the accused were both sweating. There was no search of the accused's vehicle. The distance between the police car and the accused's car was about ten metres. The distance between he, with his torch and the accused's car, was also about ten metres. He said he flashed the torch to the front of the car. He said that when he flashed the light the boy was on the left and the girl was on the right.

[16] Samiuela Pekipaki was another police officer who was present and confirmed that someone called out police. He walked to the vehicle and saw that there were two people inside and the girl shouted there is rape. He asked her to open the door but she could not. But he was able to open it from the outside. He said he opened the left door at the back and it was the boy who was closest to him. He said the girl said that he was trying to rape me. He said they had their clothes on. The boy said she was lying. He noticed they were both sweating. He said in answer to a question suggesting the girl was on the left side that it was the boy and that they were sweating.

[17] Officer Laveni said that he talked with the complainant on the 7<sup>th</sup> October at her place of business at about 11am. In that statement, which was recorded in his diary of action but unsigned by her, she had said that when she tried to get out of the car the suspect pulled her back inside, grabbed her mouth, took off his trousers and his underwear, he reached in, touched between her legs, massaged her breast, kissed her mouth and lay on top of her. He had taken off his clothes when the police showed up. She called the police and because of that she had said that the accused put on his clothes. He said her statement was later recorded on the 9<sup>th</sup> October 2016 because of the new evidence. Leveni gave evidence also that he interviewed the

accused on the 9<sup>th</sup> October 2016. The time of the record of interview was 10:23am.

[18] In it, the accused denied any sexual misconduct. He said he had not been working that night. He said he had been in security at Reload bar but was not working that night. He said that, at about midnight, he had gone into the bar, brought 2 beers and had drunk there until the bar closed. He said he walked outside and the complainant had asked him to take them to Ma'ufanga. He said he knew the complainant and this was the third time she had asked him to drop her at Ma'ufanga. He drove them to the fair in Ma'ufanga but they did not want to get out and he drove them to Talahiva. He said that the couple, a boy and girl, went in and then he said to the complainant who was in the front passenger seat that he was tired of what they were doing and that she should get off and let him return. He said that she asked to be taken home and he drove straight ahead and turned left at the roundabout at Tonga Power. He said they drove down that road and at Mosimani she opened the door to get out. He veered the car to the side and parked it at the front of the Church close to Mosimani. He told her three times to get out but she swore at him. He got out and got into the back seat. She got off and got into the back seat. At the same time, a police vehicle drove by and parked in front of his car. She had asked whether he was angry and he said yes because she was tiring. She then yelled out three times "polisi ko e tohotolo" (Police its rape)

[19] He said they were parked at the front of the Church for about 5 minutes before Police came. He denied any incident that was stopping the complainant from getting out of the car. He said that she was lying. He had already told her to get off but she insisted that he take her to her house and that is why he drove off. He also denied that he had run after her when she got out of the car at the church, smothered her mouth with his hand and

put her into the car. He said she did not get out. She was lying. She just sat in the car.

- [20] He denied any sexual activity in the car. He said she was wearing a blue dress. He did not know whether she was wearing shorts or not. He said he did not touch her. He later said in his voluntary statement that all allegations were false.

Leveni was cross-examined and said that he did not examine the accused after learning in the complainant's second statement that she had bitten his ear. Nor did he examine the accused's shoulder.

- [21] Meleseini Fetu'u a police officer, took a second statement from the complainant on the 9<sup>th</sup> October 2016. She gave evidence that before her statement was taken the complainant was cautioned about giving truthful evidence or she could be charged with a crime. In that statement, A said that she had bitten his ear and when, he came down, his shoulder.

- [22] Officer Toutai was the officer in charge of the traffic group. He confirmed that he heard a female voice calling out police. He saw Pekipaki open the left door as he saw the girl get off. He heard her say he was forcing her. She was on the backseat but on the right side. He could see she was sweating. She was crying. Then they went to the police station. Tu'utafaiva put to him they were not sweating but the officer maintained they were. He said they were at the scene for about 5 minutes. The girl was very angry. They were trying to settle her down. He said they arrived at the station about 2pm.

- [23] The accused gave evidence. He said he was satisfied with his statement forming part of his evidence. He said he went into town to watch TV and then go back to preparation of food. He

said that the complainant asked him to take her to Ma'ufanga inside the bar. She came up to him outside. He said she was drunk. She could not control her walking when she came out of the bar. He denied kissing the complainant at Ma'ufanga. He denied that she had ever bitten him. He said the police evidence that she was crying outside the church area was wrong. He denied they were sweating. He said when the door is locked from the inside you cannot open it from the outside. He said the complainant's tights were not in his car.

[24] Under cross-examination from Mr Kefu the accused denied that she was trying to get away from him at the church. It was put to him there was a conflict in his saying she had tried to get off causing him to drive and stop at the church and her getting in to the back seat with him. He said he went to the backseat because she had sworn at him. He said he did not want to sit with her in the front seat. He said at Talahiva he left because she had asked him to take her home. Mr Kefu suggested that was in conflict with her trying to get out of the car. He put to him that the complainant would not close the door and sit in the back seat if she was trying to get away from him. He said it was the complainant who had closed the door. He was asked why he came to sit in the back seat if he was in a hurry to prepare food.

[25] He said he had already asked her to leave and that is why he had parked there. He denied he was sweating when the police arrived. He said the police were all lying. He denied that she was crying or that he had rushed her from Talahiva or that it was his chance because he had known her before. He denied that he had pushed her into the back seat. He said the complainant was making up her evidence about rape. He denied doing anything inside the vehicle. He said he was on the right when the police came and opened the sliding door and not on the left closest to the door. He did not know any reason why the complainant got

into the back seat with him. He did not know why she had cried out rape. He said she asked me if he was angry and he had said he was.

### SUBMISSIONS

Mr Tu'utafaiva submitted;

[26] That there were difficulties in accepting the complainant's evidence when she had failed to mention things of importance to the police when first taken back to the police station such as the fact that her undergarment tights had been removed in the car, and further she had not mentioned biting the accused until her second statement on the ninth October.

[27] He emphasized the onus and standard of proof.

[28] He said that there were important inconsistencies in A's accounts between the first and second statements when in her first statement she made no mention of being grabbed as they left Talahiva and did in her second statement. He pointed out she had mentioned grabbing a gear in the first statement but steering wheel in the second.

[29] He criticized her for not mentioning in her statements important matters such as she had known him before, kissing at the market in Ma'ufanga, or for crying out for help earlier outside the Church.

[30] He said it was illogical that the accused would try to rape the complainant outside the Church, with windows up and in the road area under lights.

[31] He said the door was not locked as the police man appeared to be able to open it from the outside.

[32] He submitted that there was a conflict as to who sat where in the car. One officer said the accused was on the left side where as others placed him on the right, the argument as I understand it being that if he had pushed her in the left side one would have expected him to be on that side.

[33] He submitted that officer Havea from the distance he said could not have seen the accused with his hand on the complainant's mouth even with the assistance of a flashlight.

[34] He was critical of the underwear which he said had been described by the complainant in her second statement as violet when it was a dark blue. He also said she had complained only of her panties being stretched when they had been it appeared ripped in two places.

[35] He said the accused had given his explanation for moving into the backseat that is because the complainant had refused to get out of the car and she was abusive. He had given that explanation to police on oath.

[36] He submitted her complaint was nothing more than a false complaint as the accused had said in evidence.

Mr Kefu in his submission emphasised;

[37] The conflict and implausibility of the accused on the one hand stating that the complainant had tried to get out of the car causing him to park in the Church area and then her getting into the back seat with him, the accused maintained on a voluntary basis.

[38] He maintained that the panties were ripped and that violet was not so different from their appearance which he suggested was purple.

[39] He criticized the submission that this was a false complaint. Why would she call out for police assistance and then allege rape exposing herself to this ordeal unless the allegations had substance. He emphasized in this regard that she was only 19. Aside from the accused, there was no evidence that she was drunk.

[40] He emphasized also the fact that the complainant had called out for help and that this was inconsistent with her getting into the back seat and nothing happening between the two. It was entirely consistent with what she had said occurred as was the evidence of the police officers that both were sweating.

#### FINDINGS

[41] Although the complainant, as Mr Tu'utafaiva emphasized, had not apparently mentioned relevant matters in her initial statement to the police such as her undergarment leggings being removed, or biting the accused, being with the accused on a previous occasion, and kissing him exposing her to the criticism that she was embellishing her evidence and accordingly unreliable, I can well understand that, at or about 2am in the morning after what to her, if true, must have been a traumatic experience she would be unlikely to give a settled or detailed account of all that had occurred.

[42] I can well understand that the next day police would want to take a more detailed account from her which was forthcoming on the 9<sup>th</sup> October only two days later.

[43] It was concerning for me that she had said on more than one occasion that she had told police matters that had not been recorded on the first occasion. However, on that night the police said she was very angry and in these circumstances she may well have considered she had told police details which she had not without being dishonest. In assessing her reliability as a witness and considering all of Mr Tu'utafaiva's criticism of her evidence, it is important for me to pay regard to the whole of the evidence adduced in the case.

[44] In my view, her allegation of attempted rape was consistent from the time she first encountered the police and asked for help, making the first complaint to the police at the scene; and then supporting this in two written statements and in her trial evidence, albeit that there may have been some inconsistencies and lateness in revealing some matters. But on the material allegation of attempted rape, she was quite consistent and adamant that this had occurred.

[45] I cannot see any reason why the complainant would make a false complaint of attempted rape, in this case. The natural inference to be drawn from the fact of her crying out for help and her very recent, if not spontaneous complaint, is that an attempted rape had taken place.

[46] Further her cry for help is consistent with police finding her in a distressed state and witnessing her crying. The accused denied this but I see no reason to disbelieve the three police officers who were simply on the scene by chance and took no further part it seems in the investigation once she had been taken back

to the station. Likewise, the police noted that both parties were sweating consistent again with the complainant's account that she had resisted the accused's advances in the back of the vehicle shortly before police observed them.

[47] I also find inconsistent with the accused account in his record of interview that the accused had attempted to get out of the car and consequently he had stopped close to the church that she should then voluntarily get into the back seat with him, it seems for no good reason at all. Likewise, I consider it most unlikely that the accused would simply get into the back seat after telling her to go even if she was abusive as he alleges. I think it much more likely he would have driven her back to either Talahiva or the Dateline area or even home to Ma'ufanga to get rid of her so he could get home. I prefer her explanation that she did try to get out but that he bundled her into the back seat and if that is true, as I find it to be beyond a reasonable doubt, it follows that I believe her also beyond reasonable doubt that he attempted to rape her.

[48] I have taken on board the fact that it was a somewhat unlikely place for sexual activity to occur near a church, on a roadside in a built up area, with lighting and car windows open, but I see no available inference other than the accused took this course of action perhaps rather opportunistically when faced with her leaving the car. Again, I consider the evidence of the police officers, her cry for help, her complaint, the fact she was distressed and the fact both parties were sweating as important supporting evidence that an attempted rape did take place.

[49] I find the police evidence in this case of compelling importance. Whilst the evidence of the torn panties in my view is also supportive of her account, it is the independence of the police's observations and the timing of those observations that is of

much greater importance than the panties. Mr Tu'utafaiva suggests in his submission that the panties were not the ones she was wearing but she was never really cross-examined on this point, the cross-examination being more at her assertion that they were stretched. But as I have said it was the Police's observations that I found compelling in this case, and not the panties.

[50] I also consider that though there may have been some difference between the statements in the account of the departure from Talahiva, the essential fact is that the departure from the complainant's aspect was unexpected and shortly after led to the incident at the church, not far away.

[51] I accept the complainant's account of what happened and that she was a witness of the truth. Although only 19, she was robust in her defence of her position. I note that prior to making her second statement the evidence revealed that she had been warned of the serious consequences of not telling the truth. I detected at times she was frustrated with what was a lengthy and skilled probing of her evidence by a very experienced counsel, but for all his criticism of her, I found her evidence of attempted rape reliable when the police observations at the scene were considered together with what I considered was an unlikely explanation by the accused for the parties to be found in the backseat together. The accused suggested she was drunk but none of the police officers said that she was that night, one observing that she was very angry. I accept her evidence she was not drunk.

[52] I accept her evidence beyond a reasonable doubt that the accused had removed his pants and that could only be because he intended to have sexual intercourse with her which he knew she did not want. His actions went beyond mere preparation.

VERDICT

[53] I find beyond a reasonable doubt the accused is guilty of attempted rape. It is unnecessary for me to proceed to consider the alternative counts in the indictment.

**DATED: 22 AUGUST 2017**



*C. B. Cato*

C. B. Cato

**JUDGE**