

3. Rape contrary to section 118(1)(a) of the Criminal Offences Act particulars of which were that, on or about April 2011 at Haveluloto, he had carnal knowledge of A against her will;
4. Attempted rape contrary to sections 4, 118(a) and 120 of the Criminal Offences Act particulars of which were that, on or about October 2011 at Haveluloto, he did attempt to carnally know B against her will
5. Rape contrary to section 118(1)(a) of the Criminal offences Act particulars of which were that, on or about September 2015 at Haveluloto, he had carnal knowledge of A against her will.

THE EVIDENCE

Count one : Rape

- [2] The complainant, A aged 24, gave evidence that in or about the end of the year 2006 when she was 13 she was raped at the home of the accused in Havelu. She said she used to hang out with twins in the accused's family and their father was a bishop in their church ward. He was also her grand uncle. The incident occurred on the weekend and she was sleeping in the twin's room. She was there for a church activity. She felt touching and woke up with a person on her. She said that she was really scared. The person was strangling her and she tried to call out. He pulled off her pants and inserted his penis. She tried to move but he was too strong and after he had finished he left the room.

[3] She said that she was not able to see him very well until he exited the room when a light on the porch revealed it was the accused. She said he would have been about 17 or 18 at the time. She said she wiped his shirt on her body around her vagina that he had left behind and there was blood on it. She went to the bathroom and then went to the toilet. She said she told the twins. She said she did not tell anyone else because she was embarrassed and ashamed thinking how people would think of them. She went to her mother's house, after that, to Tofoa. She did not tell her what happened. She said that nobody else had been sleeping in the room. She had thrown the shirt in the laundry. The accused, she said, was not living at the home. He had been kicked out of the house.

[4] She said that, after that, she saw the accused in church and sometimes received texts from him and sometimes replied. She said between mid 2008 to mid 2010 she had a consensual sexual relationship with the accused. She said that, during this time, he would, however, often swear at her. He had said that he enjoyed "fucking her" and would say she was worthless and useless. He would say he could kill for her and will die if she would go to him. She said she felt broken and lonely and felt hopeless. She said she would go to him because he would promise that would be the last time he would ever bother her. She said she felt trapped. She had sex with him once or twice a month between 2008 to 2010. She said she stopped when she realized she was being fooled and changed her phone number. At times she evinced self blame for the position she had found herself in.

Count 2 : Serious Indecent Assault

[5] She said in September to October 2010, she was in school where she was in the sixth form and she received a text message saying it was the accused's mother and they knew what

happened and want to talk about it. She left school and went to the accused's home and there found him alone. She confirmed it was he who had texted her from his mother's phone which she said probably had contained her number. He grabbed her, touched her on her breast and mouth and pushed her into a room. He pulled off her tights and then she said "fucked her". She told him to fuck off. She said that a few months had passed since they had consensual sex. She did not tell anyone. She said she felt self-blame. She said she felt she could have done something to change what happened and she felt nobody would believe her.

Count 3 : Rape

- [6] She said in April 2011 that her mother was renting a residence next door to the accused's family. She said her grandfather and the accused's father were brothers. Her mother and the accused were first cousins. She said she had lived with an Aunt before moving to this residence. She was still at school. She was at the hospital and got a text message from the accused's sister saying that she had money in the house and could she get it. When she entered, the accused was there. He grabbed her and told her to take off her pants and she did not. He strangled her and pushed her into the room and when she fell on the bed he tried to take off her pants and she punched him and he punched her. He proceeded to strangle her and try to take off her pants. He told her this is what he would call rape. He inserted his penis into her vagina. She asked him to stop. He then just went. She went to a nearby beach to think and then to her cousin's house. She said she was ashamed and did not tell anyone.

Count 4 : Attempted Rape

- [7] She said that September 2015 was the next incident. She said that she had lived in her mother's cousin's house in Mu'a and then in Ha'apai for almost a year and a half. From 29th January 2014, she had been a missionary in Vanuatu returning on the 15th August 2013. This time she lived next door to the accused. This incident had taken place in her house. She said she had been sick and was in the living room. She woke and someone was standing on her foot. She said that it was the accused. He asked her to come outside and she refused to do so. He pulled her through the house and outside the door on to a porch area. She said she pulled at an internet wire knowing it was connected with her cousins' phone. He pushed her on the floor where she banged her head on the door which had fallen on the floor. He removed her tights and his penis in her vagina for about 2 minutes when her younger sister B and her cousin walked in. Her cousin grabbed a broom and hit the accused on the head. Her sister slapped him. Her sister was aged 18 then. The accused said sorry and her sister was shouting get away from our property before she would call the police.
- [8] She said she told her mother by text message he being in Sydney that the accused had come into their house and there was something he had done. Her mother returned about a week and a half later. She said she did not want her to be worried with the details because her mother was ill with cancer.
- [9] She went to London on the 30th October 2015 and returned about 10th March 2016. She returned home later. It was then that she opened up to mother who wanted to know what had happened. Then the accused's father came over to the house. He wanted to patch things up. Nothing happened so they decided to go to the police. That was on the 5th April 2016.

[10] Under cross-examination she gave her date of birth as 10th September 1993. In 2006, she had been staying at Tofoa with her mother's cousin. Her mother was in Ha'apai. Her father was in America where he resided. She was in Form 3 in 2006. She said she used to hang out with the twins and go for church activities to the twin's house. The accused's father would pick her up for church. She said she trusted him. The accused's mother she trusted as well. She denied there had been an earlier occasion before the first rape where the accused had kissed her and touched her body but she said that had not happened until they had commenced a relationship. She denied a familiarity with the accused before the relationship and she denied any voluntary sex when she had come home from school, sex allegedly, according to the defence, taking place outside the house.

[11] She said she had called out to one of the twins on the first occasion. They were about 20 metres away. She said she was being strangled and she couldn't say anything. It was not that loud. She said she called her first but the strangling meant she could not call a second time. She said there was a t shirt left behind that she had used. She said that she had told both twins the next morning what had happened. She said that she was really scared. She said she did not know then what her vagina was called only that it was her womanhood. She agreed that she had not told her mother's cousin. She said she did not tell because she thought 'the society what would they think of me if they knew I had lost my virginity?'

[12] She denied consensual sex between them after 2010. The consensual sex had lasted from mid 2008 to mid 2010. It did not occur after that. She told of having consensual sex with the accused after he had begged her for it in their house at night when she was 15. She denied that this was a continuation of the

consensual sex that had taken place from 2006. She said he used to say things to him ridiculing her when she did not have sex with him during the relationship period. She said that she did not have the courage and had fears about stopping having sex in that period. I lost confidence in myself and she felt hopeless. She said in 2010 that she realised that she was being fooled by the accused he saying it would be the last time he would ask her for sex. She talked about the twins talking about her and the accused and the accused's sister had told her to stay away from him.

[13] She denied that, in October 2010, what occurred was part of the consensual period. She said she was scared of the accused's father. She maintained sexual intercourse had taken place.

[14] She also maintained that she said after this incident that she had enough. She denied the consensual relationship went into 2011. She maintained punching and strangling had taken place in the 2011 incident. She went to the beach to think about what had happened. She said she never went to anybody because she thought nobody would believe her.

[15] As to the 2015 incident, she maintained she was forced. She said it was not consensual sex and denied that it had only stopped when her sister and cousin found out. She said things had moved quickly and she barely had woken up. She had been sick with a fever after she came back from Vanuatu. She agreed she had not called out. Her mother was not there. She was the oldest in the house. She denied that he had contacted her by phone and she had gone outside voluntarily. If that was the case why did she pull out the internet wire, she asked? She said that she had done this because she knew Alisi's would be up, and she would come and figure out she had pulled it. She said that she made the complaint in April because she was still haunted by the things

that happened. She said she went to the police because there had been arguing between the families and rumours going around the village saying that she was wrong and the accused was right. She said that there was no other place when she could justify herself than come to the police.

[16] In re-examination, she told Mr Aho that she had been in Ha'apai for about a year and a half and that was in 2012 and 2013. She also said she had the courage to speak out to her mother and that she had heard rumours that the accused's twin sisters had said that the accused had taken the virginity of she and her sister. She said when she came back from overseas and she was waiting for the moment so she could finally get rid of the haunted feelings and the loneliness she felt.

[17] B was A's younger sister and gave evidence that on Sunday in 2011 in a bedroom in the house they were living in Havelu, at about 3am she felt someone touching her body, her chest and her mouth. He was squeezing her throat with one hand or both. He strangled her with strong force. He proceeded to take off her pants. He was without a shirt. She tried to grab something to hit him. He came on top of her but got off when the light was turned on. She saw it was her mother and her assailant was the accused. He was wearing boxer shorts and had no shirt. She was 13. She got up and ran to her mother and hugged her. At the time, the accused was living in a room on the verandah because his father, she said, had kicked him out. She then told her everything after the accused had walked out. The mother went over and discussed the matter with the accused parents. No complaint was made but an apology was forthcoming. A was not living with them at that time.

[18] She also gave evidence of another incident involving A after A had arrived back from Vanuatu. On this occasion in late evening,

she and another cousin went to an outer room on a deck looking for A when they found she was not present in the house and found her lying down with the accused on top of her. The accused was naked on the lower part of his body. He was shouted at by the girls and he said sorry and left. Her mother was in Australia at the time. He was kicked out of the house by their mother, after that. It was put to her that strangulation did not happen and she said it did. She said he held her mouth.

[19] She confirmed on this occasion that she was in the house with her cousin and there was an incident with the accused and A, and that there were three boys also in the house, 11 and younger.

[20] A third person, Alisi, a cousin also gave evidence of seeing this incident. She noted the internet was off and that it had been disconnected. A was not in the living room where she had been sleeping. She looked for her with B and found her with the accused. She slapped him on the face and told why you are doing this because he was blood. He said he was going to apologise and she told him to get off the property. This was in September 2015. She did not tell the police. She said A called her mother in Australia. She said A had gone to London with her after that.

[21] The complainants' mother gave evidence. She confirmed the incident with B had occurred in 2011 when she was 13. Her birthday was 17th January 1998. She said she had turned on the light and her daughter who had no clothes on came and hugged her. She swore at the accused and chased him out of the house. She said her daughter was quivering and crying. She said that the accused was strangling her when asked why she had not called out. She said she did not have the strength to overcome the accused. Mother admitted that she had invited the accused

to live with them because she was sorry for him when his family kicked him out. She went to see the accused's father but he was ill so she went home without discussing what had happened. She told his mother what happened. Later, she received an apology and there was no complaint made to the police. She told him not to enter the house again or she would call the police. She confirmed that, whilst in Australia, her daughter had contacted her and texted her that the accused was having his way to do what he likes in our house. She said that he had come and made an attempt on her.

[22] She said that she had heard from a cousin in Hawaii that the accused was having a relationship with both her daughters. After this she had discussed the matter with A and she was present when both her daughter made complaints.

[23] Investigator Paea Penisoni conducted two interviews with the accused. The first in relation to A was conducted on the 7th April 2016. The accused admitted A was his niece. His birthday was 22nd January 1990. He admitted 6-7 years ago a thing had happened in his house, and whilst she was asleep he had touched her and kissed her. He said she was surprised when she kissed back. After a month they had sex. She said first time they had sex was at her home. He said she enjoyed our sex and did not want to stop. He said she was in form 5. He said when they had sex for the first time it was at the back of their house. He said they had sex more than 10 times. He said it was a lie that the first time he had grabbed her mouth when she tried to scream, had taken off her clothes and had raped her. He said that the first time they had sex it was consensual.

[24] The second record of interview taken also on the 7th April 2016 relating to his dealings with B. He said he had been drunk and entered into her room. It occurred in her house. He did not recall

what happened. He said he thought it took place in 2011. He said that he had gone to see A but she was not there. He said he touched her, kissed her mouth, and breast and vagina and took off her clothes. He said that he did not achieve his intention of having intercourse because the mother had entered the room. He said that may be that he would have fulfilled his intention to have sex if she had not entered the room. He denied his actions were forced.

[25] The accused did not give evidence. Nor did he call evidence. That is his right and I remind myself that no adverse inference can be drawn against him because of this. The Crown has the burden of proof and must establish the case against him on each count beyond a reasonable doubt.

[26] I raised with both counsel whether I could treat the evidence of B as to what the accused had allegedly done to her as evidence supporting A's account of what he had done to her, that is was this case of the kind that might once have been described as mutual corroboration. Both counsel, following the approach of the House of Lords in *DPP v P* [1991] 2 AC 447 agreed that I could treat the evidence that way. I will return to this issue in para 38.

[27] Counsel's submissions were brief but to the point. Mr Tu'utafaiva stressed the burden of proof and acknowledged that his defence in relation to A was that consensual sex had taken place on all occasions. He pointed to the very long period, as he described it, when the complainant had admitted that she had a consensual relation with the accused between mid-2008 and mid-2010. The reality, he submitted, was that this had been a consensual relationship throughout. He emphasised that, in three of the incidents, the complainant could have called out to the occupants of the house, or could have made complaint later to various

available adults about the accused's behaviour but had not done so until a complaint was laid in 2016. He submitted that the evidence about her receiving text messages in the name of the accused's mother and sister and returning to the house was unlikely and had never been put to the accused by the interviewing officer. He accepted the case turned on credibility but submitted that it was incredible that she had not made complaint earlier or protested if the accused's actions had been with criminal intent. As to the complainant of B he simply maintained, this was the accused believed, consensual.

[28] Mr Aho maintained that both complainants were reliable and I should have no difficulty in convicting on their evidence beyond a reasonable doubt. Both complainants were very young when the accused sexually engaged with them. A was a virgin and the incident would have been a memorable and painful experience. She was no more than a child and not at all experienced in matters of this kind. She did not know her private parts were called a vagina but only that it was her womanhood. He maintained that in the consensual period the accused had dominated her, had ridiculed her and humiliated her. The fact that the accused was related to her made this, as she had said, embarrassing. Further the fact that the accused's father was a bishop in her Church made reporting even more difficult. It was understandable that she had not come forward earlier

FINDINGS

[29] I listened closely to all that both complainants had to say. I was impressed with A who despite what had happened did not impress me as a vindictive witness with an axe to grind but one who gave her evidence in a mature and dispassionate way. She was now in her early twenties, had attained it seems well enough

in school to reach the sixth form, was plainly committed to her church, had been a missionary for over a year in Vanuatu, and was worldly having travelled to England for a short period before returning and making the complaint in April 2016.

[30] I believed her account of what happened. I accept on the first occasion she was a virgin and that she had little experience of sexual matters even to the extent of knowing her private parts as her womanhood. I accept her evidence that she was strangled and could not yell out. That evidence is similar to that B gave in regard to her encounter with the accused also as a 13 year old, and I shall say more about that later. I have taken into account all that Mr Tu'utafaiva has said about her failure to report the incident, to anyone of a number of persons but I accept her assertion that she was embarrassed and ashamed by what had happened to her, and the position she had found herself in. I accept that she was in a very difficult position. She had been the subject of a sexual assault by a close relative and the son of the Bishop of her Church. Her mother and the accused's parents, were related and it seems were on close terms. I accept that in her position she would feel humiliated, embarrassed and trapped, as she said.

[31] I accept entirely her evidence that she was raped in or about November, 2006, beyond any reasonable doubt, and that the sexual violation was non-consensual and the accused could not have thought otherwise.

[32] I view the relationship that she described as consensual which did last for a lengthy period as probably rather less than truly consensual. She was still a very young woman at the time and I accept her evidence that she felt trapped, as I have said and tended on the evidence I heard to acquiesce in or submit to sexual intercourse in the rather misguided and optimistic hope

that, if she did, it would end. I accept that the accused would try to humiliate her if she refused. Again, I understand why she did not speak out in the circumstances in which she was placed. I do not accept Mr Tu'utafaiva's submission that this was a truly consensual relationship throughout, it indeed the period in mid-2008-2010 was truly consensual, about which I have some reservation.

[33] I accept that, after this period, she tried to terminate involvement with the accused by ending contact and also ending any phone connection with him. I do not find fanciful her evidence that on two occasions in September - October 2010 and in September 2011 the accused was brazen enough to dupe her into coming to his home where he was alone by sending her emails from his mother or sister's telephones her numbers being she thought in those phones. I accept her evidence as to what occurred on those occasions including fondling or touching her breasts as particularised. As to the incident in September - October 2010 although the complainant went further than the particulars and claimed that "he fucked her" also on that occasion, no application was made by the Crown for amendment of the charge from one of serious indecent assault, and I accept serious indecency did take place and he is convicted on this count also.

[34] I accept also that she entered the house to assist the accused's sister concerning the placement of money pursuant to a text she had received and was physically attacked by the accused and sexual intercourse followed in rather brutal circumstances. I accept that she was ashamed and remained silent about this incident. The accused is convicted of rape.

[35] The final incident of attempted rape in September 2015 I accept also took place at her home when the accused entered uninvited

and took her from the living room when she was ill and only half awake into a room on the porch outside which he had occupied when staying in the house. I accept that he had removed his pants and hers, and had intercourse for a short time before the intervention of her cousin and her sister. I also note that, on this occasion, the accused did apologise for his conduct, as he did after the attempted rape of B in September 2011. I do not accept that the complainant encouraged or in any way consented to his actions. I convict him of rape. I note that, in this incident, the complainant said that she interfered with an internet wire as she was taken out of the house and indeed, it was this that led her cousin to make inquiry and find she was missing from the room where she had been sleeping and caused them to look and find her in the outside room.

[36] In so far as B is concerned, I have no hesitation in finding also that the complainant was telling the truth when she said that the accused had attempted to have intercourse with her, in her house and, but for the intervention of her mother as he appears to indicate in his record of interview, intercourse would have taken place. Like her elder sister A, complainant B, now married, was a careful witness and I did not sense any embellishment which would cause me to be troubled about the reliability of her testimony. I did not sense in either A or B's evidence that they might have any motive to lie and make false complainant, either, and indeed expose themselves to the ordeal of trial. On this occasion, steps were taken to discuss the matter with the parents of the accused and an apology was forthcoming. It did not, however, deter the accused, when several years later despite being warned not to come back to the house by A's mother, he brazenly went inside her house and again I find, raped her elder daughter A. That time it ultimately led to his arrest and prosecution. I convict him of the attempted rape of B, on this occasion.

[37] I note that, in this case, I have not applied in coming to my decision any principles of mutual corroboration as laid down by the House of Lords in DPP v P [1991] 2 AC 447 but there is much to be said for the view that the predatory actions of the accused in taking sexual advantage of his very young relatives and in both cases entering rooms where they were sleeping, strangling them to keep them from crying out it seems and, in proceeding to have or attempt to have sexual intercourse, gives the lie also to any suggestion on his part that either complainant had consented to having sexual intercourse with him. There was here no suggestion raised by Mr Tu'utafaiva that A and B had conspired together to manufacture false evidence against him. However, as I have said I have considered their evidence quite separately and individually find them credible and reliable witnesses of the truth without considering their evidence as mutually corroborative.

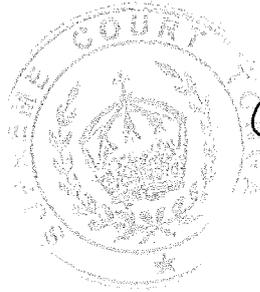
[38] I reject any suggestion also, although Mr Tu'utafaiva did not put his case this way, that the accused had any reasonable grounds for an honest belief that either A or B were consenting to any sexual activity with him in relation to any of the charged incidents.

VERDICTS

1. Count 1 : I find beyond a reasonable doubt that the accused did, in or about November 2006, rape complainant A;
2. Count 2 : I find beyond a reasonable doubt that the accused did, in or about September and October 2010, seriously indecently assault A;

3. Count 3 : I find beyond a reasonable doubt that the accused did, in or about April 2011, rape A;
4. Count 4 : I find beyond a reasonable doubt that the accused did, in or about September 2011, attempt to rape B;
5. Count 5 : I find beyond a reasonable doubt that the accused did, in or about September 2015, rape A.

DATED: 25 AUGUST 2017



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

C. B. Cato

JUDGE