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

CR 92 of 2014

BETWEEN: R E X - Prosecution

AND: LUI LOMU - Defendant

BEFORE THE HON. JUSTICE CATO

Counsel: Ms. Moa and Ms. Fineanganofa for the Prosecution
Mrs. Vaihu for the Defendant

VERDICTS AND REASONS

[1] The accused was charged with;

- a. Indecent assault of complainant A in 2012 at Kolomotu'a in that he committed a serious indecent assault namely fondled her breasts and her vagina against her will contrary to section 124(3) of the Criminal Offences Act;
- b. In 2012 at Kolomotu'a he committed rape against complainant B when he inserted his penis into her vagina against her will contrary to section 118(1) (a) of the Criminal Offences Act;

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- c. In 2013 at Kolomotu'a he committed rape against complainant B when he inserted his penis into her vagina against her will contrary to section 118(1) (a) of the Criminal Offences Act;
- d. In 2014, at Kolomotu'a he committed rape against complainant B when he inserted his penis into her vagina against her will contrary to section 118(1) (a) of the Criminal Offences Act.

[2] The indictment originally included two further counts;

- e. That in 2013, at Kolomotu'a, he carnally knew complainant C who is a girl under the age of 15 contrary to section 121(2) of the Criminal Offences Act;
- f. That in 2014, at Kolomotu'a, he committed a serious indecent assault on complainant C contrary to section 124 (3) of the Criminal Offences Act in that he fondled her breasts and her vagina against her will.

[3] On the 3rd October 2014, he had pleaded guilty to counts five and six. He, on the same day, had pleaded not guilty to the other charges against complainants A and B, and had elected trial by Judge alone.

[4] His trial commenced on the 25th May 2015. There was a lengthy adjournment from the 28th May 2015, caused in part by the illness of complainant B who was taken to hospital after an epileptic attack after her evidence in chief had been completed. An adjournment was requested and granted after other evidence was granted until the 1st June, when the trial proceeded.

[5] After the evidence had concluded, on the 2nd June, I was concerned that the indictment did not adequately allow me to return sensible verdicts on the various acts alleged there being more than one of rape in years 2012 and 2013. I did not see any prejudice in the Crown being able to amend the indictment to reflect the evidence, as it was given at trial. The defence had not sought the indictment be clarified by further particulars, before the trial commenced and it became clear to me that the single counts were not representative or specimen counts, and so the incidents or acts alleged should be the subject of individual counts to meet the evidence for which individual verdicts could be sensibly given. The further amended indictment read.

1. Indecent assault contrary to section 124(1)(3) of the Criminal Offences Act.

Particulars in the year 2012, at Kolomotu'a, in the bedroom of HH's residence the accused committed a serious indecent assault on A when he fondled her breasts against her will.

2. Rape contrary to section 118(a) of the Criminal Offences Act.

Particulars that in 2012 during night time, in the bedroom of HH's residence at Kolomotu'a did carnally know B when he inserted his penis into her vagina against her will.

3. Rape contrary to section 118(a) of the Criminal Offences Act.

Particulars that in 2012 during night time, in the living room of HH's residence at Kolomou'a did carnally know B when he inserted his penis into her vagina against her will.

4. Rape contrary to section 118(a) of the Criminal Offences Act.

Particulars that in 2013 during night time, in the living room of HH's residence at Kolomotu'a did carnally know B when he inserted his penis into her vagina against her will.

5. Rape contrary to section 118(a) of the Criminal Offences Act.

Particulars that in 2013 during day time, in the at HH's hurricane house at Kolomotu'a did carnally know B when he inserted his penis into her vagina against her will.

6. Rape contrary to section 118(a) of the Criminal Offences Act.

Particulars that in 2014 during day time, in the bathroom of HH's residence at Kolomotu'a did carnally know B when he inserted his penis into her vagina against her will.

At the conclusion of submissions on the 3rd June, 2015 I reserved my verdicts until today.

1. THE LAW.

g. Indecent assault – the essential elements

[6] In order for the accused to be convicted of indecent assault I must be satisfied that the evidence establishes beyond a reasonable doubt;

1. That he assaulted complainant A in circumstances;

2. that were indecent.

- [7] An assault is an intentional touching or deliberate physical contact of the complainant without her consent.
- [8] An indecent assault is one that right-minded persons would consider so offensive to contemporary standards of modesty and privacy as to be indecent.
- [9] In R v Court [1988] 2 All ER 221 (HL) considered in R v C [1992] Crim LR 642 (CA) it was held that where an assault was indecent itself, it was unnecessary to establish a specific intent. Both cases were referred to in R v Lasike [2006] Tonga LR 18

h. Rape

The essential elements

- [10] In order to convict the accused of rape, the Crown must prove beyond reasonable doubt in relation to each count considered individually that the accused;
1. carnally knew complainant B, that is had intercourse with her by his penis entering her vagina;
 2. and that it was against her will.
- [11] For the purpose of considering whether the accused carnally knew the complainant B against her will I must be further satisfied beyond a reasonable doubt under section 118 (2) that at the time of the sexual intercourse;

3. the accused knew that she did not consent to the intercourse;
4. or he was reckless as to whether she consented to it.

i. Consent and submission

[12] Further, I also direct myself that submission, even in the absence of threats of or acts of force to the complainant, is not consent. Consent must be a true consent namely by a woman who is able to understand the significance of what was to happen and who was able to make an informed and rational decisions as to whether she would consent or not. Consent must be freely given to the act of intercourse by the accused. R v Fonua [2002] Tonga LR 4, at 11. R v Lasike [2006] Tonga LR 161, 164

j. Recklessness

[13] Recklessness as to consent, requires me to direct myself that the prosecution have proved the accused committed rape if at the time of intercourse, the accused actually knew there was a possibility that the accused was not consenting to intercourse and he carried on regardless. Smith and Hogan, 10th ed, Lexis Nexis Uk, at pp 471-2 Smith and Hogan further state;

"Though the mens rea is formulated in various ways, it seems there is, in substance, a return to Cunningham recklessness. If D is aware that there is any possibility that P is not consenting and proceeds to have intercourse, he does so recklessly. Lord Hailsham in Morgan required, "an intention of having intercourse, willy- nilly, not caring whether the victim consents or not". Another way of putting it is to ask, "was D's attitude one of "I could not care less whether she is consenting or not I am going to her intercourse with her regardless."

§

k. Honest belief on Reasonable grounds

[14] As the evidence evolved, there was room in my view also for the defence to contend that if complaint B, as he contended was the case, had not consented to intercourse, he honestly believed on reasonable grounds that she was consenting. I approach the case also by asking myself in relation to this aspect of the defence, has the Crown also negative, beyond reasonable doubt, this possibility?

§

l. The effect of the Accused's guilty pleas to sexual offending relating to complainant C

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[15] I record that I approached counsel about how I should deal with the matter that the accused had pleaded guilty before me in relation to carnal knowledge and indecency of a third complainant referred to here, as C, who was the younger sister of the complainants A and B, who was under the age of 15 on an earlier occasion. During the course of the evidence, it became plain also that complaints against A and B came to light as a consequence of the allegations against C. No objection had been taken to the fact of this evidence being led by the prosecution. As a consequence, of his actions, the mother or caregiver of the three sisters A, B and C became aware of the sexual offending of the accused, who was well known to the complainant's and their mother because he was married to the mother's cousin, and she was referred to as an aunt. The girls and mother, the evidence revealed, had regularly visited the accused residence and had stayed there from time to time overnight during the periods in question. It was, as a consequence of the mother's inquiries of sisters A and B after offending against C had come to the notice of the third party who was not called to give evidence (who had also discussed the offending with A and B before referring it to

the mother) that his alleged offending came to light. I propose other, than as it becomes relevant as to the way in which the allegations relating to A and B came to light, to put his offending with C to one side in considering the separate cases of A and B. The Crown⁸ did not submit that I should take the offending in relation to C into account as similar fact evidence within Boardman [1974] 3 All ER 887, and P [1991] 2 AC 447 principles and so I approach the matter on the basis of assessing each complainant's evidence individually without considering the accused's offending with C, or complainants A or B as mutual corroboration. Each complainant's case will be separately considered on the evidence relevant to the counts in issue.

m. Sexual Complaint

- [16] I also record that I do not intend, in this case, to view complaints by B to her mother in May 2014, as evidence assisting her credit or of lack⁹ of consent that is as sexual complaint evidencing consistency. I am concerned that both complainant A and B were spoken to together by a third party who later suggested to her mother that she pursue the matter with her daughters. That third party was not called to give evidence as to just what the girls told her first. Accordingly, I put that aspect of the mother's evidence to one side also, other than that it supports when the fact of complaint was made, and how that arose.

n. Corroboration

- [17] Finally, I advert to the issue of whether I am required to give myself a corroboration warning. The Crown has in other cases suggested that I did not have to do so and referred me to the judgment¹⁰ of the Court of Appeal in Teisina v R [1999] Tonga LR 145 but I am not certain that the Court did intend to abrogate the common law practice in that case. I note by 1999, however, the rule relating to sexual offences and accomplices had been

abrogated by statute in England (section 32 Criminal Justice and Public Order Act, 1994) and it may well be that any Tongan requirement, based on English practice, could also be said now no longer to apply. I proceed to warn myself, however, out of an abundance of caution that it is dangerous to act on the uncorroborated evidence of the complainant, accepting, however, that it is possible to do so if the evidence satisfies me beyond reasonable doubt that the complainant is telling the truth. I pause simply to say that statutory reform concerning corroboration in sexual cases and accomplices (where it still applies under the Evidence Act) should be expeditiously considered.

2. THE EVIDENCE

Complainant A

[18] Complainant A was aged 21 when she gave her evidence. She said in May 2012 she was at the accused's residence when the accused came and fondled her breast. It was at night time. She said she cried when the accused touched her. She said she told complainant B this when B had said what had happened to her. She said that she had told her mother what happened in 2014 when a complaint was made to the police.

[19] Under cross-examination from Mrs Vaihu she said she was upset by what had happened to B. She said that was the reason she spoke out about the accused. She had learned about what happened to C and that had upset her. She said she had been afraid to tell her mother because of a threat by the accused to chop her up with a knife. She also gave evidence about another incident involving the accused putting his penis onto her vagina. That was not the subject charge by the prosecution because she

had not told the prosecution about it. She later said he had put it in her and that was the truth. She spoke about the accused taking away her future and that of her sisters. She said she had seen the knife when he said he would chop her up. She said the fondling had taken about half an hour. She felt pain. She did not scream because she was afraid.

[20] In re-examination, she said the breast handling incident had taken place in 2012.

[21] This witness had received an injury to the brain during a car accident, and attended also a special school.

Complainant B

[22] The accused's wife was an aunt to her, although her mother and the wife were cousins. She gave evidence of staying at the accused's residence in 2012 when he had entered her bedroom, took the bed sheet off her and removed her clothes. She said his wife came into the room and found him naked. She said he inserted his penis and it was painful. He told her he would kill her if she told anyone. She said she did not consent to intercourse. She told her mother about this in 2014. She said he did this about three times in 2012.

[23] In 2013, there was an incident in the living room. She slept there and the light went off. The accused felt heavy on her and she felt his penis inside her. She was in the room with a child of the accused. She said she pushed the accused. He left.

- [24] He did this kind of thing twice in 2013. The second time she said was in the hurricane house. She had gone to collect water and the accused had called her over to assist. She said he caught her there and forced her to have intercourse. She had not consented. He told her not to tell. She said she told her mother about this in 2014.
- [25] She said in 2014, when only she and the child were in the house, there was an incident where he sucked her breast and also her vagina. He then put his finger in to fiddle with her vagina. That was during the day. She had watched movies from a small square like^{the} thing he had brought before that.
- [26] In 2014, she also gave evidence that she was in the bathroom and he forced his way in and she pushed him away but he took her clothes off and he put his penis inside her vagina. She did not consent. Only she and the child were present. It took place she said last year. She told her mother about this in 2014. Later in another incident she spoke of he putting his finger in her beside a shop.
- [27] She went to the police with her mother and complainant B and C in 2014. She said she had not told earlier because she was afraid to do so. She said he had threatened her with a knife she said he held the knife and, when the police came, he took it and hid it.
- [28] Cross-examination was delayed due to her illness – a medical certificate was produced stating she had a epileptic fit and had been admitted to hospital. She told Mrs Vaihu she was 18 now.

She did not know the year she was born. She said she would reside many times with the accused. She said she helped them with household chores.

[29] As to the first incident, she said the accused was lying when he said he had seen her touching her vagina in the bedroom. She denied she had touched her vagina in the bedroom before intercourse had taken place. She admitted she did not scream out. She said she pushed him and his wife came in and caught them. The accused had already jumped off. The accused's wife had not spoken to her. Nor had she as the accused said spoke to her in the kitchen. She said she did not enjoy intercourse. She said the accused had told her not to tell his wife.

[30] Mrs Vaihu asked her about a second incident in 2012 which she agreed took place in the living room. The child was present. She said she was on a couch. She denied she had been masturbating. She denied ever having been aroused and desiring to have sexual intercourse with the accused. She said she used to push him during intercourse. That would stop him. She said she did not know what ejaculation was or an orgasm. She denied sexual intercourse with him was with her consent. She also agreed sexual intercourse had taken place in a bedroom in 2012. There were incidents, she agreed, relating to his inserting his finger in her vagina; she said he ate her vagina, and her breasts, also.

[31] She admitted he had intercourse with her in the hurricane house and that this took place during 2013. It was in the day time. She said she did not consent. She said she did not like it. She could not recall other occasions in 2013. She said that the hurricane house was the second incident.

[32] She said she had had intercourse with the accused in 2014 contrary to the accused's assertion that she had not.

[33] She admitted she was angry with the accused about what had happened to complainant C. She said she wanted the accused punished. She said she was not lying in her evidence.

[34] In re-examination, she maintained the bathroom incident had occurred in 2014, and she had not consented.

The Mother's Evidence

[35] The mother of complainant B and C gave evidence that C was 17 now. B was born on the 26th February, 1997. As to complainant A she was her aunt. She confirmed she was 21. The accused was her sister's husband. She had known him for 8 years. They used to live at the accused's mother's house in Kolomatu'a. She had been customarily adopted by the accused's wife's parents.

[36] She would visit and sleep over there. All of her children would visit. C was living at the accused's residence because she had been customarily adopted by the accused's wife. A was living with the witness but would visit the accused's residence at Kolomotu'a. Sometimes she said they went and slept over and A went and stayed temporarily. She said they would visit in 2012 and in 2013 because complainant C was living there in 2013. She said they would also go also in 2014. She said she only stayed there herself in 2014, staying elsewhere in Tofoa when the

children went to the accused's residence. She said when she stayed there only the accused, his wife and their child were present. It was a three bedroom house. The bathroom is inside the house. It has a living room.

[37] She said B in 2012, 13, 14 would stay over on her own. She told of staying there herself in 2014. During that incident, she was sleeping in the living room, with complainant C. She heard the accused getting back from kava at around three or four. She observed the accused receiving a slap and his wife asking him what he had done to the complainant C. C was crying. She was aged 16. C told her that the accused had touched her breast and vagina. It was after a conversation concerning C that the accused and his wife apologised.

[38] She said B had told her in May 2014 what the accused had done to her in March 2014. Complainant A and C had told her at the same time what had happened to them. B had told her of the accused being naked in March but she had not believed her because of her mental state. She was slow. She was unable to write her name and unable to read.

[39] As a consequence of a relative of the accused's sister coming from Australia, in 2014 discussions took place with the children, and as a consequence the mother was told to listen to what they had to say she said in October 2014. The accused and his wife had by then moved elsewhere. After that a complaint was made to the police in 2014. She went to the three complainants.

[40] She confirmed that B attended normal school only to class 3. She then went to OTA special school in 2010. She had health issues when she was born. She was normal until she was hit by a van in class 3. She also went to OTA after that.

[41] She recounted what the complainants B had told her but I do not, as I have said regard this as admissible as sexual complaint evidence, and will not act upon it, as consistency.

[42] In cross-examination, it seemed that it was only after the relative from Australia had told the mother what had occurred that A and B spoke to her. It was earlier than October she admitted that she went to the police. Her statement was recorded as 13th May 2014. In that statement she records that B told her about a matter concerning the accused namely he coming into her room naked in January 2014, rather than March. She confirmed that B was not able to write her name until she was taken to the special school. She was about 8. She was not able to write more than her name. She said she did not know about intercourse with C until after the police interview. She had not discussed that with the girls. She said A was also slow and they were not able to think financially or support themselves. They were unable to study or be educated. She also gave evidence that she noticed nothing adverse after A and B returned to her home after staying with the accused.

The Accused' Evidence

[43] The officer in charge Paea Penisoni gave evidence of an interview he had with the accused. This related to B only. He admitted he had known her for 7 years. She used to stay and then go home. She, he said attended OTA, a school he knew as one for the mentally unstable, feeble-minded and sometimes they become

mentally affected. He said that, on a couple of occasions, he found her masturbating and he said he knew she wanted sex, so he just went and had sex with her in her room. He said he was rubbing her vagina and then he had sex with her. He denied on the first occasion she was bleeding. He said he had sexual intercourse with her in 2012, usually in the bedroom and living room. He said he would touch her breast and then they would have sex.

[44] He said sex took place around the afternoon hours. He said he had sex approximately 3 times in 2012. In 2013 he had sex with her 3 to 4 times. He admitted he had sex in the hurricane house. He denied sex had taken place in 2014. He denied having sex with her in 2014 because there were too many people in the house and they usually went to Tofoa so it was difficult to have sex. He said there was no talking after sex. He denied that he would tell her not to say anything; that was a lie, he said.

[45] He said she was between 15-16 when he first had sex with her. When asked whether she consented to this, his answer was, 'Yes, if she did not consent, she would have screamed or told someone on the first sex.' He said he felt sexually aroused when he found her touching her vagina. Then he thought of having sex with her.

[46] He admitted he knew she was feeble-minded and mentally unstable when he had intercourse with her. He was charged with rape and indecencies being aware that she was feeble-minded and insane. He said the charge upon me is true. I was informed that the charge of rape was not laid on the basis of section 118(1) (c) of the Criminal Offences Act because the opinion of

Dr Puloka, a psychiatrist, did not support a clinical diagnosis that B was feeble-minded, as opposed to being merely slow intellectually.

[47] The accused gave evidence essentially consistent with what he had said in his record of interview. He said he was 36 and a carpenter. He married in 2007 and had one adopted child. He admitted A had come and stayed with them in 2012. A was the daughter of his wife's first cousin. He denied touching her.

[48] He admitted B had come and stayed with them in 2011, 2012, and 2013. He said he caught B in the act of masturbation in 2012, about three times, and he became sexually aroused. He touched her between her vagina and legs and also her breast. It took place three times, twice in the bedroom and once in the living room. He said he asked B in the living room and she went to the bedroom and waited for him there. He talked of foreplay and she consented, he thought, because she had waited in the bedroom for him. She copulated back. Sexual intercourse would last 20 minutes. She never pushed him to stop.

[49] The first incident in 2012 took place in the bedroom; there was no blood – she was not in pain. She would caress him and copulate back. The second time was in the living room. He had been drinking kava and came back. She consented. He had come back from Kava about 1am. He had sexual intercourse on the couch. The third occasion occurred after he had asked her in the living room to have sex and she had gone into the bedroom and waited for him. He touched her and she did not move. He touched her breast, sucked on it, and she did not object or refuse. She had an orgasm and he ejaculated.

[50] He said he never stopped B from telling anyone. In 2013, the first time they had intercourse was in the hurricane aid house which he said he had invited her to for the purpose of intercourse. He had gone first and waited. She had consented to it because he had gone ahead to wait for her. There was no one else aside from the child in the house. She did not show any objection in the hurricane house and copulated back. The second occasion took place in 2013, in the living room at night time. She again consented to it without objection. The third occasion took place in the hallway to the bathroom and toilet. She consented to it.

[51] He spoke of a fourth occasion, when he had been drinking and she was sleeping in the bedroom. This was about 2pm. He was drunk. He said that he had sexual intercourse with her and his wife pushed the door open and he jumped up. He told her he was looking for cigarettes and some marijuana. He said he had a conversation with his wife in the kitchen and he denied doing anything to B. He said that his wife woke B up and asked her if anything happened to her and she said no. He said he was standing by the door. This was denied by B, under cross-examination by Mrs Vaihu.

[52] He denied intercourse in 2014 because she had stopped living with them. She did not sleep over he said in 2014. He said after the witness from Australia came there was a fight and they left to reside elsewhere in March or April 2014. He said B's mind was fine because she could do well in every chore. B could explain clearly what the movie means to her. He talked of Filipino movies that when played back B could read the text of the subtitles in English. He also described A as fine. He denied

any allegations concerning her. He maintained his statement to the police was true.

[53] Under cross-examination, he admitted that A and B would say that his wife was their mother. It was put to him his evidence concerning innocent association with A and B was a lie. He said they both lied. He admitted that in 2012 he had sexual intercourse with B in a bedroom but that it was consensual. He did not threaten her. He maintained that a second incident had taken place in the living room. He also admitted a third act of intercourse in the bedroom. He admitted again intercourse in the hurricane shed and the living room in 2013. He maintained she had consented. He said of the incident when she was sleeping in the lounge on a couch, B consented to it because she could have screamed out to his wife who was sleeping in the bedroom or she could have told her after sexual intercourse if she did not consent. On one occasion, when he had been drinking the issue of recklessly proceeding regardless of her consent was the subject of cross-examination and he denied this.

[54] He maintained the sexual intercourse took place in the bathroom not in 2014 but in 2013. He said there was a fourth incident after he had got drunk and she was asleep. This took place in a bedroom. He denied that she ever pushed him or that he forced her to have intercourse in the hurricane house. He denied ever threatening her. He maintained B and A had manufactured their evidence because they wanted to see him falsely convicted. He said he had argued with his wife's brother, who was the husband of the Australian visitor and they left the house in March or April 2014. He denied any act of intercourse in 2014.

3. SUBMISSIONS

1. Mrs Vaihu submitted that I should give the accused the benefit of the doubt in relation to all the charges, and contended that I should accept that he was telling the truth or might be telling the truth, and given the benefit of the doubt.
2. She said that in relation to complainant B her client had in his police record consistently maintained his innocence of non – consensual intercourse, as he did at trial. Indeed, she said he had stated it had happened on additional occasions, and gave detailed accounts of this at trial.
3. She emphasised that the complainants had plenty of opportunity to inform their mother and others concerning the fact that the accused had sexually abused them if this indeed had been the case. They did not do so until May 2014.
4. She submitted that there was a motive for the complainants to manufacture false charges that was to strengthen the case of sexual abuse in support of their younger sister C.
5. She accepted that findings of credibility were for me but that, in all the circumstances, I should have doubts about the credibility of the complainants' testimony and acquit her client of all charges. She said the accused had denied any sexual activity in 2014 and I should accept that. All other sexual activity was consensual.

6. Ms Moa for the Crown accepted also that issues of credibility were for me, but she said that the complainants' accounts were credible. Both girls were for different reasons intellectually of limited intelligence, and had attended special schools. She contended that the accused, knowing this, had taken advantage of them.
7. She submitted that I should accept beyond reasonable doubt that the indecency alleged by Complainant A had occurred. She had been the subject of a threat and it was understandable she had not made a complaint to her mother earlier, if as she said, she had been threatened.
8. She submitted also this of complainant B. She said that the accused had admitted intercourse on several occasions with the complainant who was a much older man and the husband of their mother's cousin whom she visited frequently. She submitted that I should accept the evidence of the complainant that she had not consented pointing to her learning disability, slowness, and that consent meant a genuine consent and that she had given evidence of attempting to push the accused away and she said he had forced her to go into the hurricane house and have sexual intercourse against her will, there.
9. She submitted that I should accept beyond reasonable doubt that, knowing of her intellectual limitation, that the accused must have known she was not giving a true consent to intercourse or was reckless as to whether she was truly consenting or not. She

submitted that there was no room for any honest belief on reasonable grounds on the accused's part that she was consenting, in this case.

10. She also submitted that it was understandable the complainant would not make a complaint earlier to her aunt or mother if she had been threatened by the accused as she submitted had been the case.
11. She submitted that, although it was a matter for me, that the complainants had not manufactured false evidence. They were simply disadvantaged young persons whom the accused had sought to take advantage of in a predatory way.

4. FINDINGS

1. I considered the evidence of complainant A to be credible. I did not find any suggestion that she was making her evidence up concerning the accused having sexually caressed her breasts. That is the only allegation in regard to her in the amended indictment that the Crown proceeded with though she did give evidence of other acts that the accused performed upon her, of a more serious nature. Although it may well be that other acts were performed which she had not spoken about earlier to the police, I did not detect in her evidence any malicious motive to lie as had been suggested by the defence so as to support or strengthen the case against the accused of performing sexual acts with her sister C. The accused denied that any sexual activity had taken place with A. I prefer in this regard, beyond any reasonable doubt, the evidence

of A to that of the accused. As frequent visitors, with the knowledge their mother was related to the accused's wife, who was their aunt, in what was a closely meshed family, I would have thought it most unlikely that A would have engaged in consensual sexual activity with the accused, a man many years older than herself. She, like her sister B, was slow academically as I have said being taught at a special school, although her disability was attributable to childhood injury, rather than any inherent condition, as was her sister's B. I did not detect in her the guile required to consistently maintain a false allegation as the accused maintained; still less to contrive false allegations to support claims made by a younger sister.

2. Further I accept beyond reasonable doubt that the accused had threatened her to preserve her silence, and had used the threat of a knife. The accused would not want to have risked his conduct being exposed to his wife, as on one occasion with complainant B it nearly was, and he on his own admission lied about that to his wife. I consider that, in these circumstances, it was understandable the offending did not come to light until she was spoken to much later in 2014.
3. Even though there was no corroboration of her evidence, I am satisfied beyond any reasonable doubt that she told the truth concerning the indecent assault by touching of her breasts and that it was without her consent. More may well have occurred to her as she said but the indictment is limited to the charge of touching of her breasts. I find the charge proven beyond a reasonable doubt.

Complainant B

4. As to complainant B, I found her a more retiring, shy witness than A. She was hesitant in her evidence, at times. She obviously found the experience a physical strain and bearing in mind her health, that is understandable. She is an epileptic and her very limited education, means that for her the proceedings would have been very stressful. The trial had to be adjourned because, after her evidence in chief, she had been admitted to hospital with an epileptic fit. I accept her mother's evidence that she could only write her name after she attended a special school and could do little more. I did not find convincing the accused's suggestion that she was able to read the English subtitles of foreign films, and I consider he was asserting this deliberately and conveniently because he knew full well that she was a slow learner and he wanted to place her ability to consent to sexual intercourse and his involvement with her in a more positive light. Like her elder sister, I found her evidence credible beyond a reasonable doubt as to the offending. She was aged about 15 when the offending commenced and I have no doubt that with her limited intellect, (a person described as slow), she would have essentially submitted to the accused's approaches with little resistance. She, however, said she tried to push him away and I accept that. Like her sister, she knew that her mother was related to the accused's wife, and I find it most unlikely that she would have ever voluntarily engaged in sexual activity with the accused whom she knew to be her aunt's husband. As well, the accused was much older than her. The complainant did not strike me as anything but a quiet and retiring girl, very simple, and again one who

was incapable of having the guile to sustain false allegations of rape to wrongly accuse the accused or to bolster a case against him to benefit her younger sister.

5. Again, I accept that the accused, who on his own admission had lied to his wife about sexual activity taking place after she had come into the bedroom where they were, on, the complainant says the first occasion and I accept this, did not want his misconduct exposed. I accept B was also seriously threatened. In those circumstances, I consider it perfectly understandable that her complaint was not ventilated until 2014; a point Mrs Vaihu for the accused made much of, after the offending against complainant C had come to light. In any event, I consider it would be a difficult and very embarrassing matter for a young person such as her to bring a complaint against a man who she knew was married to her aunt. I accept she did not scream out and continued it seems to return to the home notwithstanding the unwanted sexual activity but, whilst in a young person, who was not impaired intellectually, that might have required greater scrutiny, I do not find it surprising that she did not reveal what had happened to her until there was some more positive intervention by a third party and inquiry of her in 2014; particularly, as I find, she had been threatened with serious harm if she did. It seems from the evidence that an attempt by her to do so in January or March 2015 was not taken seriously by her mother and indeed she only did so after the third party had told her what A and B said had occurred to them later in probably May 2014.
6. I find that she would have been compliant in the hands of the accused. He well knew, as with A, that she was a

young person with a serious learning disability, and indeed went to a special school, and that she would be very unlikely in these circumstances to consent to intercourse in the home of a person she regarded as an aunt. His attempt to portray her as "fine" in that regard, and able to read the subtitles of Filipino films I consider convenient, and a lie to distance himself from the suggestion that she was so limited she could not truly consent to intercourse. I remind myself that people tell lies for various reasons, sometimes inconsistently with guilt, but I see no other reason for his assertion. I prefer the mother's evidence she was only able to write her name and did not know about ejaculation or climax. I consider beyond any reasonable doubt he opportunistically, and in a predatory way, decided to take advantage of her presence and have intercourse with her, and possibly on his own admission on occasions when under the influence of kava or alcohol. He, I consider must have known that she was not truly consenting on each occasion that he had intercourse with her. Further, and in any event, because she was to his knowledge very slow, her failure to scream out or do much more than push him to resist his actions, as I accept occurred, must have meant that, at the very least, there was always the possibility that her silence meant she was not truly consenting but at most was submitting to his advances being those of an older and strongly built man who had threatened her with harm if she told. I consider that he was determined to have his way with her, regardless, and I reject his assertions beyond any reasonable doubt that he saw her masturbating, as if this were some overture to him, or that she went willingly with him into the hurricane shed or anywhere else to have consensual sexual intercourse

with him. I consider beyond any reasonable doubt that he must have known that, either she was not consenting to intercourse that is giving a true consent in the Fonua sense, or was indifferent or reckless as to whether she was in circumstances where he must at least have known that there was a real possibility that she was not consenting. I find beyond reasonable doubt that she was not consenting in any Fonua sense. The accused came across to me as a reasonably astute person. I gained the impression that he would be well able to assess for himself the true position as to whether she was truly consenting, in the circumstances he knew existed namely her youthfulness, very limited intellect, her limited attempts to resist, but chose opportunistically to proceed with intercourse (on two occasions on his admission having consumed intoxicants), regardless of whether the complainant was truly consenting. In those circumstances, I reject beyond any reasonable doubt that he had any genuine belief that she was consenting to any act of intercourse, for the reasons I have given, and that is my view in relation to each of the counts.

7. I emphasise also that I have considered all the circumstances put to me by Mrs Vaihu why I should not convict, and I have also out of an abundance of caution directed myself that in the absence of clear corroboration of absence of consent, (and I approach this on the basis there is no item here of that quality) that it is dangerous to convict. However, I consider for all the reasons I have given that complainant B was giving a truthful account and I prefer her evidence to that of the accused. I find all the complaints proven

beyond a reasonable doubt, notwithstanding the absence of corroboration.

8. The only matter, that caused me some difficulty was the allegation of the bathroom incident which the complainant said took place in 2014, and the accused said in 2013, there not being any activity he said in 2014. I have carefully considered all the evidence on this point and accept the complainant beyond reasonable doubt on this matter also. It was not until May 2014 that the complaints were made to police, and on the accused own admission he was residing at the residence until March or April 2014. The mother gave evidence she was present with C in 2014 at the accused's residence in Kolomotu'a when she learned of the accused's interference with her, and I accept that she overheard a conversation between the accused and his wife concerning this. She said in other years she used to stay in Tofoa and the children at his residence but in 2014 she stayed at his and his wife's residence. I do not regard this as a year when it was impossible for the incident to have taken place as the complainant said happened, and I prefer her evidence, on this point. I find all the counts proven beyond a reasonable doubt.

5. VERDICTS

1. As to complainant A, I find the charge of indecent assault as pleaded in the amended indictment proven beyond a reasonable doubt and I convict him accordingly.
2. As to complainant B, I find him guilty of four counts of rape as alleged in the counts in the amended indictment and i convict him accordingly.

[55] He is remanded in custody for sentence.

NUKU'ALOFA: 5 JUNE 2015



Calvin T.

JUDGE