IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0080 of 2014
[High Court Criminal Case No. HAC 80 of 2013)

BETWEEN	**:**	**INOKE RAIKADROKA**
	:	**MOHAMMED SHEEFAZ SAGAITU**
		Appellants
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Gamalath, JA** **Prematilaka, JA** **Nawana, JA**
Counsel	**:**	**Mr. Fesaitu M for the 01st Appellant**
	:	**Ms. Nasendra S for the 02nd Appellant**
	:	**Mr. Vosawale M for the Respondent**
Date of Hearing	**:**	**13 February 2020**
Date of Judgment	**:**	**27 February 2020**

JUDGMENT

Gamalath, JA

[1] I have read the draft Judgment, reasons and conclusions of Prematilaka, JA. I agree with them.

Prematilaka, JA

[2] This appeal arises from the conviction of the appellants on slavery contrary to section 103(1)(a) and domestic trafficking in children contrary to section 117(1)(a)(b)(c)(i) of the Crimes Decree, 2009.

[3] The amended information dated 23 May 2014 upon which the appellants were tried reads as follows.

'COUNT 1

Statement of Offence

***SLAVERY**: Contrary to section 103(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***INOKE RAIKADROKA**, between the 1st day of June 2012 and the 31st day of December 2012, at Suva in the Central Division, exercised over Girl 'X', the power to sell Girl 'X' for sex in an unrestricted way and to use the proceeds of Girl 'X's work as his own.*

COUNT 2

Statement of Offence

***SLAVERY**: Contrary to 103(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***INOKE RAIKADROKA**, between the 1st day of June 2012 and the 31st day of December 2012 at Suva in the Central Division exercised over Girl 'Y', the power to sell Girl 'Y' for sex in an unrestricted way and to use the proceeds of Girl 'Y's' work as his own.*

COUNT 3

Statement of Offence

***DOMESTIC TRAFFICKING IN CHILDREN**: Contrary to section 117(1)(a)(b)(c)(i) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***INOKE RAIKADROKA**, between the 1st day of June 2012 and the 31st day of October 2012 at Suva in the Central Division facilitated the transportation of Girl 'X', a 17 year old from Suva City to Raiwai with intent that Girl 'X' be used to provide sexual services.*

COUNT 4

Statement of Offence

***DOMESTIC TRAFFICKING IN CHILDREN**: Contrary to section 117(1)(a)(b)(c)(i) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***INOKE RAIKADROKA**, between the 1st day of July 2012 and the 31st day of October 2012 at Suva in the Central Division facilitated the transportation of Girl 'X', a 17 year old from Raiwai to Suva City with intent that Girl 'X' be used to provide sexual services.*

COUNT 5

Statement of Offence

***DOMESTIC TRAFFICKING IN CHILDREN**: Contrary to section 117(1)(a)(b)(c)(i) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***MOHAMMED SAGAITU**, between the 1st day of June 2012 and the 31st day of December 2012 at Suva in the Central Division facilitated the transportation of Girl 'X', a 17 year old from Raiwai to Suva City with intent that Girl 'X' be used to provide sexual services.*

COUNT 6

Statement of Offence

***DOMESTIC TRAFFICKING IN CHILDREN**: Contrary to section 117(1)(a)(b)(c)(i) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***INOKE RAIKADROKA**, between the 1st day of October 2012 and the 31st day of December 2012 at Nadi in the Western Division facilitated the transportation of Girl 'X' a 17 year old from Suva to Nadi with intent that Girl 'X' be used to provide sexual services.*

COUNT 7

Statement of Offence

***DOMESTIC TRAFFICKING IN CHILDREN**: Contrary to section 117(1)(a)(b)(c)(i) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***INOKE RAIKADROKA**, between the 1st day of June 2012 and the 31st day of October 2012 at Suva in the Central Division facilitated the transportation of*

Girl 'Y', a 15 year old from Suva City to Raiwai with intent that Girl 'Y' be used to provide sexual services.

COUNT 8

Statement of Offence

DOMESTIC TRAFFICKING IN CHILDREN*: Contrary to section 117(1)()(b)(c)(i) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MOHAMMED SAGAITU*, between the 1st day of June 2012 and the 31st day of October 2012 at Suva in the Central Division facilitated the transportation of Girl 'Y', a 15 year old from Raiwai to Suva City with intent that Girl 'Y' be used to provide sexual services.*

COUNT 9

Statement of Offence

DOMESTIC TRAFFICKING IN CHILDREN*: Contrary to section 117(1)(a)(b)(c)(i) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

INOKE RAIKADROKA*, between the 1st day of October 2012 and the 31st day of December 2012 at Suva in the Central Division facilitated the transportation of Girl 'Y', a 15 year old from Suva City to Nadi with intent that Girl 'Y' be used to provide sexual services.*

[4] According to the amended information dated 23 May 2014 there are two counts of slavery (counts 01 and 02) against the 01st appellant with two alternate counts of aggravated sexual slavery (count 03 and 04), five counts of domestic trafficking in children against the 01st appellant (counts 03, 04, 06, 07, and 09) and two counts of domestic trafficking in children against the 02nd appellant (counts 05 and 08).

[5] After trial, the three assessors had returned a unanimous opinion of guilty on all counts (except alternate counts) against both appellants. The Learned Trial Judge on 06 June 2014 delivered the judgment and convicted the appellants on all charges except alternate counts. On 09 June 2014, the learned trial judge sentenced the 01st appellant to 14 years of imprisonment on counts 01 and 02 and 16 years of

imprisonment on counts 03, 04, 06, 07 and 09; all sentences to run concurrently with a non-parole period of 14 years. The 02nd appellant was sentenced to 12 years of imprisonment each on counts 05 and 08 to run concurrently with a non-parole period of 10 years.

[6] The appellants appealed against convictions and sentences. On 18 May 2018 the single Judge of the Court of Appeal granted leave to appeal against convictions and sentences regarding both appellants.

[7] The grounds of appeal urged on behalf of the 01st appellant before the single are as follows.

> *'1. The learned Trial Judge erred in law and in fact when he failed to take into account the fact that the complainants had consented to stay with the Appellant which was contrary to the notions of slavery.*
>
> *2. The learned Trial Judge erred in law and in fact when he failed to take into account the fact that the complainants had intended to pursue sexual services to earn.*
>
> *3. That the learned Trial Judge had uttered prejudicial comments against the appellant prior to his summing up which resulted in the trial being miscarried.*
>
> *4. The learned Judge erred in law when he sentenced the Petitioner to a term of imprisonment which is harsh and excessive considering the facts of the offending, his prejudgment comments and the fact that there was no established tariff.'*

[8] The 02nd appellant's grounds of appeal considered by the single judge are as follows.

> *'1. The Learned Trial Judge erred in law and in fact when he failed to take into account the fact that girl 'X' and girl 'Y' (collectively referred to as "the two girls") had always intended to use the Appellant in order to get the clients for their own benefit by providing sexual services and that the intention was always moving from the two girls to provide sexual services.*
>
> *2. The learned Trial Judge erred in law and in fact when he failed to consider the capacity of the two girls and their background before affirming a verdict which was unsafe and unfair giving rise to a grave miscarriage of justice.*

3. *The Learned Trial Judge erred in law and in fact when he prejudged this case before the verdict was given by the Assessors by stating that the Appellant hung himself when he gave evidence despite the fact that his Lordship had given the Appellant his rights whether to remain silent and/or to give evidence which ultimately led to a conviction and a harsh sentence. The learned Trial Judge readily admitted the above and apologized thereafter however this gave rise to a grave miscarriage of justice.*

4. *The learned Judge erred in law when he sentenced the Appellant to a term of imprisonment which is harsh and excessive considering the facts of the offending, his prejudgment comments and he failed to take into consideration the case authorities provided on behalf of the Appellant.'*

[9] Section 103(1) of the Crimes Decree is as follows

*103. — **(1) A person who, whether within or outside Fiji, intentionally —***

(a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or

(b) engages in slave trading; or
(c) enters into any commercial transaction involving a slave; or
(d) exercises control or direction over, or provides finance for –
(i) any act of slave trading; or
(ii) any commercial transaction involving a slave;

commits an indictable offence.

Penalty — Imprisonment for 25 years.'

[10] Section 117 (1) of the Crimes Decree reads

'117. — (1) A person commits an indictable offence of domestic trafficking in children if—

(a) the first-mentioned person organises or facilitates the transportation of another person from one place in Fiji to another place in Fiji; and

(b) the other person is under the age of 18; and

(c) in organising or facilitating that transportation, the first-mentioned person:

(i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first-mentioned

person or another, during or following the transportation to that other place; or

(ii) is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first-mentioned person or another, during or following the transportation to that other place.

Penalty — Imprisonment for 25 years.'

[11] The term 'slave' is not defined in the Crimes Decree but slavery is defined in section 102 of the Crimes Decree (now Crimes Act, 2009). Section 102 states

> *'102. for the purposes of this Division, slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.'*

[12] Given that 'slave' is not defined, it has to be necessarily assumed and it is only logical to do so that 'slave' is a person who is subject to the condition of slavery.

Facts in brief

[13] The learned High Court Judge has given an adequate summary of the facts that came to light at the trial in the summing-up as follows.

> *'[33] The thrust of the Prosecution Case of course comes from the three sisters, two of whom are the underage subjects of the charges. The first and eldest sister Loraini said that she had 4 brothers and 2 younger sisters Mabel and Melita. She left home at the end of 2011 and "worked the streets". In other words she said she became a sex worker in Suva. In 2012 she met Darren and also got to know Kiki (whom she subsequently identified as the first accused). She met him in June or July 2012 in Sukuna Park when he came to her, her two sisters and Amy. He asked about Darren who had been pimping for her. He invited them to go and have a drink. They went to the Elixir Apartments and to Room 2-1 which she said was Kiki's room. When they were there Kiki brought in a guy and asked who wanted to "take him"; i.e. have sex with him. Loraini says she did because Amy said she would but the client didn't want her and Loraini wanted to protect her younger sisters. She said that they had no-where else to go. Mabel left the party because she wanted to go back to school leaving Loraini and Merewalesi (also known as Melita). But Mabel came back on the Friday night. They stayed at Elixir for about two months. They got paid but Kiki kept all the money, Loraini says she decided to give it to him because she had nowhere else to go. Her sisters had nowhere else to go and they were being fed. Her Grandmother had chased her out of her Dad's house and told*

her never to return. In those two months she saw her sisters with clients. Kiki would call the clients into the room and they got to pick which girl they wanted to go with. After about 2 months they moved into a flat in Raiwai. It was Kiki's flat but the six of them living there including Mabel and Melita. They stayed at Raiwai for about 4 months. They continued the sex business while they were there.

[34] Mabel told much the same story as Loraini. She said that she was born on August 4th 1995 which made her in June/July 2012 just 17 years old. She started the sex business in Kiki's room at Elixir during the school holidays when she found her sisters there doing the same thing. She went there with her friend Maeve. It was her first time, so some other girl came and showed her what to do to "please" a man. That was in the Elixir in Kiki's room. She identified Kiki as the first accused. She had sex when living at Elixir about 20 times, maybe more. She would normally give Kiki all the money and if she went out with a client she had to give all the money. Sometimes for example if the client gave $200 for full service, she would get $20. She stayed at Elixir for about 2 months and then she moved to Raiwai. She would go to hotels, motels, apartments, especially Annandale Apartments. Sometimes Margie (identifying the 2nd accused) would bring clients and sometimes Kiki would arrange the clients. Kiki would arrange for the clients to come and pick her up. Later in the year she left Suva and went to Nadi. She went to stay with Kiki there in a house in Martintar with one of Kiki's friends. When she was with Kiki, she said that there were rules. She couldn't go out without permission. She wanted to go home but she didn't because she was scared of Kiki and anyway her Grandmother had chased her out and she couldn't move back.

[35] In cross-examination, Mabel said that Kiki had slapped her at Raiwai and he had also slapped her when they were in Nadi. In answer to Mr. Vananalagi as to why she was working as a sex worker, she said that when she heard that her sisters were doing it she cried and had no choice but to start to do it herself. She also said that she had gone into the trade quite willingly and of her own free will.

[36] The third sister who gave evidence was the youngest, Merewalesi Grace, also known as Melita. She produced her birth certificate showing that she was born on the 15th January 1997 which means that in the middle of 2012 she was 15 years old. She has been in school that year but dropped out to join Loraini as a sex worker because they were close and she "wanted to follow her" . She told the same story of meeting Kiki and how they became to be living at Elixir where she did sex work for 2 months. After that they all went to Raiwai to do sex work where Kiki and Margie got clients for them. She would go to apartments or motels around Suva. She would go by car or taxi. Everything was arranged by Kiki or Margie. At some stage in 2012 she left Suva and went to Nadi. There was a fight at Raiwai and the landlord told them to move. In Nadi she did sex work. She went to Nadi by car which was arranged by Kiki. She was with him when he arranged the vehicle. She understood that in going to Nadi she was going to engage in the same kind of work. As for the money that she was paid for her work she said that she was

not given any of it back as a "cut" but sometimes she would ask for money if she needed it.

[37] In cross-examination she denied that she was ever forced or threatened to do the work.

[38] You will remember that the girls' grandmother told us that she was very close to the girls because their mother had gone abroad and she was the only one there for them. She said that living with their father was tough because they had no food there and sometimes they had to go to school with no lunch. They had at one time done very well at school with Melita being first in the class, but in 2012 she saw a change in them. They started dressing in tight shorts. She heard that they had left Laucala and were living with friends in Raiwai and she heard that they were "call girls", not that she knew what that meant. She heard that Mabel had gone to Nadi so she told their father, her son, to get her back. When Mabel did come back she told Grandma the whole story including how Kiki and Margie were using them to sell their bodies – Kiki took the money and didn't give them anything. He said just do your job. She told Grandma that she was afraid. She said that Kiki told her if she walked out he would kill her. Grandmother then took her to the Police to report the matter. She thought it might have been in October/November 2012 but accepted on seeing her statement that it was in February 2013.

[14] However, I would like to narrate a few more matters of evidence which are important to come to a decision in this appeal. Both complainants had willingly joined the 01st appellant to become sexual workers, having on their own decided to do so, following their elder sister Loraini who was already in the business of providing sexul services . At the 01st appellant's invitation, it was their decision to stay at Elixir apartment rented out by the 01st appellant with the others to engage in their chosen profession. The 01st appellant had given a business proposal to Loraini and Mabel at Elixir. Mabel had left her sister and the 01st appellant to go back to go school but come back after a week on her own. At the time of giving evidence she was again back in school. The appellants had introduced or arranged clients for them, who would either come to the apartment or take them out. Sometimes they had solicited clients from the 02nd appellant. They got paid directly and sometimes the clients paid the 01st appellant or part of what they got was taken by the 01st appellant. After 02 months they moved from Elixir apartment to a flat in Raiwai along with the 01st appellant on their own free will where they stayed for 04 months. From there they had moved to Nadi. According to Merewalesi Grace (Melita) before going to Nadi they had first gone to

Hexagon, then to McGregor road and from there to grandmother's' place for less than a month and from her place to Nadi. The 01st appellant seems to have had no involvement in the affairs in Hexagon or McGregor road where the appellants were engaged in their 'business'. According to Mabel their life style improved due to prostitution in that she was able to buy things and go places. Lorani shed more light on their relationship with the 01st appellant. According to her she could leave whenever she wanted but her sisters *i.e.* the complainants had nowhere to go as the grandmother had chased them from her father's place. She was not forced to stay at Elixir apartment and she decided to give the money to the 01st appellant as she had no place to go. She had asked the sisters to go home but they did not as they were earning money. According to Lorani her sister Grace (Melita) had got friendly with a friend of the 01st appellant called Jack and had engaged in sex with him too. Though Mabel says that she wanted to go home but did not do so because of fear of the 01st appellant she in fact had gone home and come back after a week on her own. She claims to have been assaulted by the 01st appellant at Raiwai and slapped by him in Nadi over money but according to Grace the 01st appellant never mistreated or assaulted her. Neither had she seen him forcing the sisters. They had not complained to police until early 2013 despite having many opportunities to do so. Their father, Eroni Vuniwai Daucakacaka had visited them in Raiwai and given them even pocket money. Though the three sisters' grandmother, Merewalesi Taoi states that Mabel came from Nadi and told her that she was afraid and that Kiki told her if she walked out he would kill her, Mabel has not said anything to that effect in her evidence.

<u>01st appellant's appeal</u>

[15] I shall now proceed to consider the first ground of appeal of the 01st appellant.

> *'1. The learned Trial Judge erred in law and in fact when he failed to take into account the fact that the complainants had consented to stay with the Appellant which was contrary to the notions of slavery.*

[16] The contention of the counsel for the 01st appellant is that the learned trial judge should have, when dealing with the offence of slavery, addressed the assessors that the complainants with their consent stayed with the 01st appellant and wrongly held in the judgment that consent of those who suffered under the condition of slavery was

not a defense to a charge on slavery. The single judge of this court had thought that it was arguable whether the complainants' consent to stay with the 01st appellant was a matter that should have been addressed by the learned trial judge when dealing with the elements of the charge of slavery.

[17] I think this argument is fundamentally flawed. The physical element of slavery under section 103 (1) (a) is possession of slave or exercise of any of the other powers (other than possession) attached to the right of ownership over a slave. The fault element is the intention which is defined in section 19 of the Crimes Act. The offence of slavery is constituted whether these elements take place within or outside Fiji. Therefore, lack of consent on the part of the slave is not an element of the offence of slavery.

[18] If the definition of an offence includes the elements such as 'use of force' or 'threats' as in sexual servitude under section 104(1) of the Crimes Decree or if want of consent is one of the elements of an offence expressed by the words such as 'without consent' as in the offence of rape under section 207 of the Crimes Decree, it may be reasonably argued that consent on the part of the victim may negate criminal liability. However, the legislature has not made lack of consent an element in the definition of slavery to sustain an argument that consent is a defense to a charge of slavery. In **The Queen v Tang** [2008] HCA 39 a similar charge was upheld by the High Court of Australia despite the subjects of slavery had joined and remained in that condition willingly. Consent was not even argued as a defense in ***Tang.*** Therefore, in my view there is little merit in that contention.

[19] However, the real question is whether the 01st appellant had possessed the complainants or whether he exercised over them any of the other powers attached to the right of ownership. There is little authority in Fiji on this topic. Therefore, one has to necessarily consult and draw assistance from relevant authoritative judicial pronouncements and writings in other jurisdictions.

[20] To start with, I shall refer to the definition found in the 1926 Slavery Convention (25 September 1926, 60 LNTS 253) which reads: *'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised'.* This legal definition of slavery established in 1926 has been confirmed

twice: first, by being included in substance in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 07 September 1956, 226 UNTS 3 (Supplementary Convention) and, more recently, in the 1998 Rome Statute of the International Criminal Court (Rome Statute). Legal literature revels that the genesis of the 1926 Slavery Convention emerged out of the provisions of Articles 22 and 23 of the 1919 Covenant of the League of Nations, which dealt with the Mandate Territories that were transferred from the vanquished to the victors of the First World War and, more specifically, those colonial possessions of Central Africa.

[21] Therefore, in the above context the main focus was to try to understand what constitutes those *'powers attaching to the right of ownership'*. Antony Honoré, emeritus regius professor of civil law at Oxford University has considered the very notion of slavery from both a legal and philosophical perspective, pointing out that ultimately what we object to in slavery is the inability of a person to exercise their natural capacities when they find themselves in a "state of unlimited subordination to another individual" (See Antony Honoré, "Slavery: From Ancient to Modern," in Jean Allain, ed., *The Legal Understanding of Slavery: From the Historical to the contemporary* (Oxford: Oxford University Press, 2012), 9–39)

[22] However, for the purpose of the definition of slavery in Fiji one also has to understand what 'possession' means in the legal context.

[23] The link between this property paradigm and slavery, in one word, is control. In any situation of ownership, the owner controls the thing owned. This is normally understood a possession. Typically, possession means physical possession, but it can also mean the ability to control access to a thing, such as when a person possesses the content of their house by simply controlling access to that house by means of the front door key. With this in mind, slavery should be understood as the ability of one person to control another as they would possess a thing. Ownership implies such a background relationship of control. Where a slave is concerned, this control is tantamount to possession. It is control exercised in such a manner as to significantly deprive that person of their individual liberty. Normally, this control is exercised through violence and later through threats of violence or coercion, but it may also

emerge through deception and/or coercion. One need not physically control a person, in the same way that one need not physically possess the contents of one's house; control tantamount to possession of a person goes beyond their physical control (See *Contemporary Slavery and Its Definition in Law* page 39 - **Jean Allain** Monash University Melbourne, Victoria, Australia**)**

[24] Slavery can only be present if possession is present; if control tantamount to possession is being exercised. It is foundational, as the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery* make plain – possession is a hallmark of slavery – and only if possession is exercised can any or all of the other powers attaching to ownership be exercised [see **Jean Allain** (supra) page 39**].**

[25] **Jean Allain** identifies other powers attaching to the right of ownership as

(i) The power to buy or sell a person. To involve a person as the object of a transaction *may* provide evidence of slavery. Such transactions fail to meet the threshold of slavery if there is a lack of control over the slave that would amount to possession. The person enslaving is dictating what the enslaved is to do and backing up these dicta with violence either actual or latent. What is required is to establish whether control tantamount to possession is present.

(ii) The power attaching to the right of ownership is the ability to use a person. Again, one person can use another, but this need not necessarily amount to slavery. Nevertheless, such use may amount to slavery if the background relationship of control is present to such an extent that it is tantamount to possession. By using a person, what is meant is the deriving of benefit from his or her service or labour. In the case of slavery, such benefit might be the savings incurred as a result of paying little or no salary for labour or the gratification from sexual services.

(iii) The power attaching to the right of ownership manifest in the ability to manage the use of a person. In general terms, it goes without saying that to manage a person is not to enslave them. Where it will amount to slavery is when there exists control tantamount to possession, and then management of the use of a slave takes place. Such management will include direct management, where, for instance, a brothel owner delegates powers to a day manager in a case of slavery within the context of sex work.

(iv) The power attaching to the right of ownership of profiting from the use of a person. In the case of slavery, this will be where, once control tantamount to possession has been established over a person, money can be made from his or her use In concrete terms, this would mean that a slave is used and the money received from the toil of that slave – either his or her salary or the product of his or her labour goes to the person who has enslaved.

(v) The power attaching to the right of ownership that is often thought to be less common, yet fits into the property paradigm, is the ability to transfer a person to an heir or successor. In this situation, it would be difficult to see how such a transfer would be able to truly take place without the background element of control tantamount to possession being in place. Regardless, such control would need to be present for such an inheritance to constitute slavery.

(vi) Ownership can entail the ability to use up property; to exhaust a thing owned; to consume it. In the case of slavery, this power attaching to the right of ownership may be understood in relation to the disposal, mistreatment, or neglect of a person. Having established control tantamount to possession, slavery will be manifest where the disregard for the well-being of the person is evidenced by severe physical or psychological exhaustion, which, if allowed to carry on to its logical conclusion, would entail the death of the enslaved.

(vii) A final power attaching to the right of ownership is worth mentioning, but more for its inapplicability to human beings than for its value in seeking to establish evidence of slavery taking place. With regard to what in property law is called "security of holding," the owner of property can exercise a power attaching to the right of ownership against an attempt by the state to expropriate. However, in a contemporary setting where individuals can no longer own slaves *de jure*, such ownership of slaves is no longer protected from expropriation by the state. Where slavery is concerned, one might think of an "insecurity of holding," "a duty on the state to expropriate"; to confiscate human beings held in situations tantamount to possession, so as to liberate them.

[26] In seeking to make a determination as to whether slavery exists in such a situation, it would be important to evaluate the specific circumstances and not make a judgment based on what the specific practice might be called. As a result, it is best to look at the substance of the relationship and simply ask: is there an exercise of any or all of the powers attaching to the right of ownership.

[27] European Court of Human Rights (ECtHR) in **Siliadin v France** (ECtHR, *Siliadin v France*, Application no. 73316/01, 26 July 2005) in considering the fate of a Togolese girl who had been exploited as a domestic worker by her French hosts, determined that both forced labour and servitude had transpired in breach of Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 4 November 1950, 213 UNTS 221, but it failed to find a case of slavery. By reference to the 1926 definition, the court stated at para 122 that

> '*this definition corresponds to the "classic" meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object."*

[28] However, in **Rantsev v Cyprus and Russia 280**, ECtHR moved away from its 2005 position, recognizing, in the case of trafficking into Cyprus for the purposes of prostitution – which had left a young Russian woman dead – that it *"considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership"* although there was no question of *de jure* ownership transpiring in this case.

[29] The decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), in **Prosecutor v Kunarac et al.** (Case nos. IT-96–23 and IT-96–23/1-A, 12 June 2002) is instructive. The case dealt with the Serbian commanders of the ethnically cleansed town of Foca, Bosnia-Herzegovina, who, in maintaining a detention centre, used it as a means for regularly raping scores of Muslim women. With regard to this case, the Appeals Chamber said on the cases of contemporary forms of slavery that

> *'the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery," has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.'*
>
> *'the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree".*

[30] However, the most in-depth consideration on the topic is found in the decision by the High Court of Australia in 2008 in the case of **The Queen v Tang** [2008] HCA 39. The charges in ***Tang*** arose from section 270.3(1) of the Australian Criminal Code Act 1995 which states that

> *'(1) A person who, whether within or outside Australia, intentionally: (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or (b) engages in slave trading; or (c) enters into any commercial transaction involving a slave; or (d) exercises control or direction over, or provides finance for: (i) any act of slave trading; or (ii) any commercial transaction involving a slave; is guilty of an offence. Penalty: Imprisonment for 25 years.'*

[31] Section 270.1 of the Australian Criminal Code Act, 1995 on the definition of slavery provides that

> '*For the purposes of this Division, slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.'*

[32] Thus, section Section 270.1 of the Australian Criminal Code Act is similar to section 102 of the Crimes Decree, 2009 (now Crimes Act, 2009) and section 270.3(1) of the Australian Criminal Code is similar to section 103 (1) of the Crimes Decree, 2009. Therefore, the decision in ***Tang*** is most relevant to understand and interpret section 102 and 103 (10 of the Crimes Decree, 2009.

[33] In ***Tang*** a Melbourne brothel owner was found guilty of five counts of both *'intentionally possessing a slave, and ... of intentionally exercising over a slave a power attaching to the right of ownership'*. The women, who had worked in the sex industry at home, had come to Australia voluntarily to work as prostitutes. They were escorted during their flight and upon arrival were "treated as being 'owned' by those who procured their passage", with a sum of $20,000 having been used to 'purchase' each woman. The amount which the women were to pay back was set at $45,000 (this included the purchase price of $20,000, plus airfare and living expenses while working off the debt). This was to be achieved by working six days a week and reducing their debt by $50 for each customer serviced. In other words, these women were bonded through a debt of between AUS $42,000 and AUS $45,000 related to their purchase, travel, and accommodation expenses, which was to be repaid through sex work. When the brothel, Club 417, in the Fitzroy neighbourhood of Melbourne, was raided in May 2003, two of the women had worked off their debt, but remained as prostitutes. The High Court of Australia quoted the language used by the buyers as *'the amount for this girl,' 'the amount of money we purchased this woman'* and *'the money for purchasing women from Thailand to come here.'*.

[34] The High Court of Australia in ***Tang*** noted that the definition found in section 270.1 derives from the definition found in Article 1(1) of the 1926 Slavery Convention and is repeated – in essence – in the 1956 Supplementary Convention and most recently in the 1998 Rome Statute of the International Criminal Court and the majority of the Court concluded that the 1926 definition found in Slavery Convention applies to both *de jure* and *de facto* slavery. The High Court held that for many States, including Australia, which became party to the Convention in 1926, the legal status of slavery no longer existed and the aim of the Convention was to bring about the same situation universally and that the *"definition turns upon the exercise of power over a person"*; and that in *de facto* conditions *the "definition was addressing the exercise over a person of powers of the kind that attached to the right of ownership when the legal status was possible"*. The Court also held that the phrase 'status or condition', found within the 1926 definition makes the distinction between *de jure* ("status is a legal concept."); and, the evident purpose of the reference to "condition" is to cover slavery *de facto*.

[35] The Australian High Court in considering what should be understood by such powers which are manifest when ownership is legal based itself on a consideration of the powers attaching to the right of ownership made by the United Nations Secretary General in 1953[1]. As the 1926 definition speaks of '*any or all*' of the powers attaching to the right of ownership, Gleeson CJ mentions those powers relevant to the case including the

(1) The capacity to make a person an object of purchase

(2) The capacity to use a person and a person's labour in a substantially unrestricted manner

(3) An entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour.

[1] See United Nations, Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, p. 28 as found in Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, 2008, p. 497.

[36] Each of those powers was of relevance to ***Tang*** case. The three final powers noted by the UN Secretary General, but not mentioned by Gleeson CJ, are:

(4) The ownership of the individual of servile status can be transferred to another person;

(5) The servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;

(6) The servile status is transmitted *ipso facto* to descendants of the individual having such status.

[37] The Chief Justice then followed this by giving the High Court's assessment of the concept of slavery as defined by the 1926 Slavery Convention:

> '*It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term 'slave' is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance. Some of the factors identified as relevant in Kunarac, such as control of movement and control of physical environment, involve questions of degree. An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee's freedom of movement. Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.'*

[38] Regarding the Australian legislation namely section 270.1 of the Criminal Code Act the High Court stated that section 270.1 speaks only of 'condition' not 'status', and that the legal status of slavery does not exist in Australia, and thus the Australian law "is concerned with de facto slavery" and consequently, "the reference to powers attaching to the right of ownership, which are exercised over a person in a condition described as slavery, is a reference to powers of such a nature and extent that they are attributes of effective (although not legal, for that is impossible) ownership. Secondly, the concluding words of the definition in s 270.1 ("including where such a condition results from a debt or contract made by the person") do not alter the meaning of the preceding words because it is only where "such a condition" (that is,

the condition earlier described in terms of the 1926 Slavery Convention) results that the words of inclusion apply. The words following "including", therefore, do not extend the operation of the previous words but make it plain that a condition that results from a debt or a contract is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it. As a result of this and a consideration of the phrase 'including where such a condition results from a debt or contract made by the person', the High Court determined that:

> *the definition of 'slavery' in s 270.1 falls within the definition in Art 1 of the 1926 Slavery Convention, and the relevant provisions of Div 270 are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under that Convention. They are sustained by the external affairs power. They are not limited to chattel slavery.*

[39] About the problem presented by s 270.3(1)(a), at least in a borderline case as to "how is a jury to distinguish between slavery, on the one hand, and harsh and exploitative conditions of labour, on the other?" Gleeson CJ, for the High Court, answers the question:

> *The answer to that, in a given case, may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services. The answer, however, is not to be found in the need for reflection by an accused person upon the source of the powers that are being exercised. Indeed, it is probably only in a rare case that there would be any evidence of such consideration.*

[40] The High Court went on to conclude that:

> '*In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make the complainants an object of purchase; and that for the duration of the contracts the owners had a capacity to use the complainants and their labour in a substantially unrestricted manner and that the power to control and restrict their movements, and the power to use their services without commensurate compensation. As to the last three powers, their extent, as well as their nature, was relevant. As to the first, it was capable of being regarded by a jury as the key to an understanding of the condition of the complainants. The evidence could be understood as showing that they had*

been bought and paid for, and that their commodification explained the conditions of control and exploitation under which they were living and working.

It was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants, although it is interesting to note that, in deciding to order a new trial, the Court of Appeal evidently took the view that the evidence was capable of satisfying a jury, beyond reasonable doubt, of the existence of the knowledge or belief that the Court of Appeal considered necessary.'

There was cogent evidence of the intentional exercise of powers of such a nature and extent that they could reasonably be regarded as resulting in the condition of slavery'

[41] Since slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership is exercised in terms of section 102 of the Crimes Decree, 2009 and a slave is a person who is subject to that condition, the primary task is to determine whether the complainants could be regarded as slaves. If only they were slaves they could be possessed or any of the other powers attaching to the right of ownership could be exercised over them by the appellants constituting the offence under section 103(1).

[42] It is pertinent to remind ourselves again the powers attached to ownership as judicially determined in ***Tang*** and recognized by the UN Secretary General (*Supra*) . They are

(1) The capacity to make a person an object of purchase

(2) The capacity to use a person and a person's labour in a substantially unrestricted manner

(3) An entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour.

(4) The ownership of the individual of servile status can be transferred to another person;

(5) The servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;

(6) The servile status is transmitted *ipso facto* to descendants of the individual having such status.

[43] The High Court of Australia upheld the convictions because *'it was open to the jury to conclude that each of the complainants was made an object of purchase (although in the case of one of them the purchaser was not the respondent); that, for the duration of the contracts, the owners had a capacity to use the complainants and the complainants' labour in a substantially unrestricted manner; and that the owners were entitled to the fruits of the complainants' labour without commensurate compensation.'*

[44] When the amended information is examined it becomes clear that the two counts under section 103(1) of the Crimes Decree have been framed not on the first limb of 'possession' in section 103(1) but the second limb of 'any of the other powers attaching to the right of ownership'. The two counts specifically allege that the 01st appellant had the power to sell the complainants for sex in an unrestricted way and to use the proceeds of their work as his own.

[45] However, the learned trial judge had directed the assessors to consider only the following questions to determine whether the complainants were being kept as slavery or not. It is clear that they do not reflect accurately and sufficiently the relevant questions that need to be posed. Those questions are as follows.

1. Were the girls able to keep the money they earned?
2. Were they free to see clients of their own choice?
3. Were they dependent on him for the basic essentials of life?

[46] Possession is fundamental to ownership and thereby to slavery. It is only if possession is exercised can any or all of the other powers attaching to ownership be exercised. Thus, slavery is the ability of one person to control another as he would possess a thing. Ownership implies such a high degree of control. As far as a slave is concerned, this control amounts to possession. It is control exercised in such a manner as to significantly deprive that person of his individual liberty.

[47] Therefore, it is control and more precisely that high degree of control that encompasses and defines the whole concept of ownership. In the modern society there are all species of controls imposed on people in their domestic and professional lives by beliefs, morals, contracts, rules, regulations, laws etc. Such controls are deemed to be necessary evils and part and parcel of daily life in any orderly and disciplined community and they do not make people slaves in the legal sense. Therefore, if someone is to make another suffer from slavery he should either possess the latter as a thing or should exercise any or all powers attaching to ownership as to significantly deprive that person of his individual liberty. Needless to say that therefore, slavery requires a high degree of control of one person over another. That control can manifest in a number of ways as already adverted to.

[48] Unfortunately, the learned trial judge had not considered these two aspects namely possession and control in relation to the facts of this case in their correct perspective in the summing-up or the judgment. This, in my view, constitutes an error of law.

[49] In addition, it begs the question whether the evidence taken in its totality and considered holistically would support the verdict of slavery. I do not think that there was sufficient evidence placed by the prosecution to prove the charge of slavery and the assessors and learned the trial judge properly guided on the law would have arrived at such a finding.

[50] There is not sufficient and unequivocal evidence that the 01st appellant exercised the power to sell the complainants for sex in an unrestricted way and to use the proceeds of the complainants' work as his own as alleged in the first and the second counts in the amended information as appearing from the summary of evidence in paragraph 13 and 14 above. At least there is a reasonable doubt in these respects arising from the evidence. The 01st appellant cannot be said to have 'possessed' the complainants and the degree of control he is supposed to have exercised on them does not reach the high degree required to sustain the charges of slavery. Neither can he be said to have exercised over the complainants any of the other powers attaching to the right of ownership.

[51] The evidence suggests more of a mutually beneficial arrangement between the 01st appellant and the complainants and he obviously has had some influence over the affairs in that arrangement and appears to have played a somewhat dominant part in it. However, in my view that his overall part in it still falls short of what is required to establish and sustain a charge of slavery. The learned trial judge has relied on an answer of the 01st appellant in his caution interview where he had referred to the complainants as his 'products' to infer ownership but he has explained the use of that term at the trial saying that it is a street slang for a pimp's girls and does not imply ownership. What matter is not the label but the substance of the relationship. The learned High Court Judge has also relied on the fact that the 01st complainant had claimed to have kept a low profile at Elixir at the beginning due to threats from Darren who had procured clients for the elder sister Loraini for two nights and wanted to become the 'pimp' for the complainants to draw an inference that the 01st appellant had taken control or ownership of them from Darren and was exercising ownership over the complainants. I cannot agree. The 01st appellant's claim of threats from Darren may well be a business rivalry between two people who vie for the same source. It would have been completely different had Darren transferred the complainants to the 01st appellant for valuable consideration.

[52] Therefore, I am of the view that the conviction on first and second counts against the 01st appellant cannot be supported having regard to the evidence and should be set aside.

[53] Before parting with the first and second counts I may state that though there are two alternate counts under section 106(1) and sections 108 and 109 of the Crimes Decree on aggravated sexual servitude, it is clear that the basis for an offence under section 106 is sexual servitude described in section 104 of the Crimes Decree. The definition of sexual servitude clearly shows that use of force or threats is an indispensable element of the offence. Thus, without proof of use of force or threats beyond reasonable doubt a charge on sexual servitude and consequently charges under section 106 read with section 108 and 109 cannot be sustained. In the case before this court there is a paucity of evidence of use of force or threats by the 01st appellant and therefore no count based on aggravated sexual servitude could be sustained.

01st and 02nd appellants- Counts 03-09 in the amended information.

[54] I shall now proceed to consider the convictions of both appellants on counts based on section 117(1)(a)(b)(c)(i) of the Crimes Decree namely domestic trafficking in children. There are 05 such charges against the 01st appellant and two against the 02nd appellant.

[55] Section 117 (1) of the Crimes Decree, 2009 is as follows.

> *'Offence of domestic trafficking in children*
>
> *117. — (1) A person commits an indictable offence of domestic trafficking in children if—*
>
> *(a) the first-mentioned person organises or facilitates the transportation of another person from one place in Fiji to another place in Fiji; and*
>
> *(b) the other person is under the age of 18; and*
>
> *(c) in organising or facilitating that transportation, the first-mentioned person:*
>
> > *(i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first-mentioned person or another, during or following the transportation to that other place; or*
> >
> > *(ii) is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first-mentioned person or another, during or following the transportation to that other place.*
>
> *Penalty — Imprisonment for 25 years.*
>
> *(2) In this section —*
>
> *"sexual service" means the use or display of the body of the person providing the service for the sexual gratification of others.'*

01st appellant- 02nd ground of apeal

[56] The 01st appellant was convicted of counts 03, 04, 06, 07 and 09 under section 117(1)(a)(b)(c)(i) of the Crimes Decree. Counts 03, 04 and 06 relate to Mable Daucakacaka and while counts 07 and 09 relate to Merewalesi Grace *alias* Melita. The charges allege that Mable was 17 years and Grace was 15 years at the time of the

commission of the offences. The gist of all charges is that the 01st appellant facilitated the transportation of both complainants during different time periods to different destinations in Fiji.

[57] According to the written submissions the 01st appellant's second ground of appeal is based on domestic trafficking in children. It is as follows

> *'The learned Trial Judge erred in law and in fact when he failed to take into account the fact that the complainants had intended to pursue sexual services to earn.*

[58] The 01st appellant's contention is that the complainants consenting made way for the 01st appellant's to assist the two in their endeavors. In other words the counsel for the 01st appellant seems to argue that complainants' consent to be transported would negate the criminal liability.

[59] The single Judge of this Court had the following to say in granting leave to appeal.

> *'[16] One of the elements necessary to prove this charge was the age of the girls, which had to be under 18. That element was satisfied. The other elements related to the charge were the transport of the girls and the intention for such transport.*
>
> *[17] The defence case had been run on the basis of the consent of the girls in their dealing with the Appellants. As to whether such consent should be considered in determining whether the Appellants were guilty of the charge is a matter that is arguable and I would grant leave.'*

[60] The learned trial judge's directions to the assessors on the counts on domestic trafficking in children are in paragraphs 27 and 28 of the summing-up.

> *'[28] "Trafficking" just means trading in or dealing in, or in this case dealing with girls for sex. To prove to you, so that you are sure, that Kiki and Margie, for the respective offences they are charged with, are guilty of this crime, they have to prove to you*
>
> *a. That he facilitated the transport of the girl in question from one place in Fiji to another place in Fiji; and*
> *b. The girl was under 18, and*
> *c. he intended by facilitating that transport that the girl would be used to provide sexual services.*

[29] There is no more to the crime than that. So you must decide on the evidence when looking at the particular charge and looking at the particular accused whose case you are considering; did he play a part in having the girls transported somewhere? And did he know that he was helping to transport her so that she could provide sexual services? And ***was*** *she (****not*** *did he know) under the age of 18?*

[30] I think you will have little trouble with the under 18 part, you have seen the birth certificates of the two girls in question, and you have heard evidence of transporting. There is merely the factual finding for you to make whether the particular accused whose charge you are looking at knew that on arrival the girl would be providing sexual services.

[61] In **State v Werelagi** [2019] FJHC 1147; HAC425.2018 (5 December 2019) Goundar J elaborated the elements of domestic trafficking in children in the following terms.

'[26] To prove domestic trafficking in children, the prosecution must prove three elements beyond reasonable doubt.

[27] Firstly, the prosecution must prove that on the alleged dates the Accused facilitated the transportation of the complainant from one place to another in Fiji. Facilitate means to make a process or action easy or easier. The prosecution alleges that the Accused made it easier for the complainant to be transported from Nausori to Rewa Street by accompanying her in a vehicle arranged by him. If that is what occurred then the element of facilitation has been proven. That is matter for you to determine on each count of domestic trafficking in children.

[28] Secondly, the prosecution must prove that the complainant was under the age of 18 years at the relevant times.

[29] Thirdly, the prosecution must prove that in facilitating that transportation the Accused intended the complainant will be used to provide sexual services during or following the transportation to that other place. An accused has intention with respect to result if he means to bring it about or is aware that it will occur in the ordinary course of actions. For example, if I intent to cause physical injury to someone by throwing a rock at him I must mean to cause the injury when I throw the rock or I am aware that the injury will occur when I throw the rock. So for the Accused to have the relevant intention you must feel sure that when he facilitated the transportation of the complainant from Nausori to Rewa Street he either intended the complainant will be used to provide sexual services or was aware that the complainant will be used to provide sexual services at Rewa Street.

[62] Though, the learned trial judge's directions on elements of domestic trafficking in children are not as elaborate as in ***Werelaqi*** I think it still captures the essence of the offence and is adequate.

[63] It is clear from a plain reading of the definition of domestic trafficking in children under section 117(1) of the Crimes Decree, that the physical elements of the offence are either organizing or facilitation of transportation and the age of the person so transported should be under the age of 18. The fault elements are either intention or recklessness as to the declared purpose. In **State v Laojindamanee** [2013] FJHC 20; HAC323.2012 (25 January 2013) the term facilitate' was defined as follows

> *'[42] Facilitate is the physical element. The legislature has not defined the word 'facilitate'. Ordinarily, the word 'facilitate ' means 'make easy or easier; promote; help forward (an action result etc)': New Shorter Oxford Dictionary (Oxford University Press, 1993) 903. In P J v The Queen [2012] VSCA 146, the Victorian Court of Appeal said at [48] that the word facilitates is an active verb, describing conduct directed at producing a result or outcome.'*

[64] The consent of the person subjected to transportation is immaterial and the transportation need not be against the will of the person being transported or by the use of force or threat. The purpose of the section is to protect the people under the age of 18 from sexual exploitation. Their consent does not matter. It is in the interest of the society that children are not used for provide sexual services or subjected to sexual exploitation.

[65] I need not repeat the same matters already mentioned above regarding the argument based on 'consent' under the 01st appellant's first ground of appeal relating to slavery and the same would apply to domestic trafficking in children as well.

[66] Accordingly, I hold that there is no merit in the second ground of appeal and I reject it.

01st appellant and 02nd appellant's third ground of appeal

[67] I propose to deal with the 01st appellant's third ground of appeal against conviction along with the 02nd appellant's third ground of appeal as they relate to the same complaint. I shall accordingly record them together.

> *'That the learned Trial Judge had uttered prejudicial comments against the appellant prior to his summing up which resulted in the trial being miscarried.'(01st appellant)*
>
> *'The Learned Trial Judge erred in law and in fact when he prejudged this case before the verdict was given by the Assessors by stating that the Appellant hung himself when he gave evidence despite the fact that his Lordship had given the Appellant his rights whether to remain silent and/or to give evidence which ultimately led to a conviction and a harsh sentence. The learned Trial Judge readily admitted the above and apologized thereafter however this gave rise to a grave miscarriage of justice. (02nd appellant)*

[68] The impugned comments, the content of which is not very clear, are supposed to have been made after the evidence of the last witness for the 02nd appellant was concluded on 03 June 2014 and the assessors had been sent out, at an informal meeting between the learned trial judge and the counsel for the prosecution and the appellants prior to the summing-up due on the following day. On 04 June 2014 both counsel for the appellants had made an application for mistrial and/or recusal of the learned trial judge and the judge had refused it and proceeded to deliver the summing-up (see pages 192-194 of the copy record).

[69] It appears from what had been recorded after the conclusion of taking evidence on 03 June 2014 that all counsel and the learned trial judge had discussed matters of law to be briefed to the assessors. The counsel for the 01st appellant appeared to be complaining of a view expressed by the trial judge on 'threat or force' when discussing on the elements of the offences. The counsel for the 02nd appellant had raised concern over the learned judge's alleged comment that his client should not have given evidence. The state counsel had also expressed his views that what he understood by the use *'he went into the witness box or hung himself'* was that the 02nd appellant had virtually admitted all elements of the offences while giving

evidence. The 02nd appellant complains of the following paragraph in the summing-up too.

> *'[51] The second accused ("Margie") gave evidence on oath. As you remember he was not an easy witness because he would not stop talking even when asked a simple yes or no question. That is certainly not to his prejudice but it means that it is not easy to encapsulate the information that is important to our case.'*

[70] The learned judge had recoded that all what he did when discussing informally with them as to what should go into the summing-up was to state the law as he saw it and the 01st appellant's counsel had not liked it because that view was not favorable to his client. Regarding the reservations of the counsel for the 02nd appellant, the learned judge had put on record that *'my comment on the strength of the case against his client, perhaps unhappily worded, was an informal remark after all the evidence was heard and in the absence of the assessors'.* The record does not bear out any apology tendered by the trial judge as alleged.

[71] In his summing-up too the learned trial judge had referred to this issue relating to the trial counsel for the 01st appellant on the following terms

> *'5. Very unfortunately counsel for the first accused seemed to be unaware of the authorities on human trafficking or indeed of the legislative provisions to the extent that when I reminded counsel of the previously decided law on lack of option manipulation he asked me to recuse myself and declare a mistrial. His submission was that my statement of the law as I saw it was an adverse view I had formed of his client's case and that he was not going to receive a fair trial. The misconceived application was dismissed immediately but it served to demonstrate the serious lack of preparedness in defence of his client's case.'*

[72] The counsel for the 02nd appellant has cited a passage from **Seniloli v State** [2004] FJCA 46; AAU0041.2004S (11 November 2004) in support of the above ground of appeal. However, it must be borne in mind that in ***Seniloli's*** case the complaint arose from the relationship between one of the assessors and the counsel for an accused who was acquitted whereas the appellants were convicted. However, the more relevant authority is **Koya v State** [1998] FJSC 2; CAV0002.1997 (26 March 1998) where a suggestion had been made of bias on the part of the trial judge.

[73] It is pertinent to understand the background facts leading to the allegation of bias in ***Koya***. They are as follows.

> *The petitioner appealed to the Court of Appeal against the conviction on a number of grounds mainly relating to the directions given by the trial judge and against the sentence of three years imprisonment. On a motion to add an additional ground, namely that the trial judge was biased or alternatively that there was a likelihood of bias against the petitioner, the Court of Appeal granted leave. The case of bias arose out of an affidavit sworn by Mr. I.Q.A. Khan, a barrister and solicitor who formerly lived and practiced in Fiji but now lives in Australia and principally practises there. Mr. Khan said that on 30 April 1997, during a chance telephone call, he learned that Lyons J. had presided at the trial and thought that the trial might have been vitiated by bias on the part of the judge. Mr. Khan, who had formerly worked for* ***Koya*** *and Company as a clerk for four years, and later as a barrister and solicitor for four years, was instructed by the petitioner to defend her on the charge of arson with Mr. H. A. Shah as junior counsel.*
>
> *Mr. Khan went on to say that he discussed the case on numerous occasions with Mr. Lyons who was then a barrister in Brisbane. He informed Mr. Lyons in detail of the allegations against the petitioner and of the general thrust of the case against her. In the discussions, in which Mr. Lyons played the part of devil's advocate, they reached a consensus that the case against the petitioner was inherently very weak. Mr. Lyons referred Mr. Khan to certain authorities which, it is said, supported the proposition that the magistrate should throw the case out, authorities which Mr. Khan cited to the magistrate, albeit unsuccessfully*

[74] The Supreme Court went onto deal with ground of appeal on bias as follows.

> *'The Court of Appeal in its reasons and the parties in their submissions to this Court approached the issue of bias as if it were a question of law, an affirmative answer to which would result in the petitioner's conviction being set aside. That approach overlooks s.23(1)(b) of the Court of Appeal Act (Amendment Decree 1990)…*
>
> *It is necessary therefore for the petitioner to establish that the existence of bias or the appearance of bias resulted in a miscarriage of justice within the meaning of s.23(1)(b). at the Court of Appeal, on an appeal against conviction……..*
>
> *'There is some controversy about the formulation of the principle to be applied in cases in which it is alleged that a judge is or might be actuated by bias. In Australia, the test is whether a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case (Livesey v NSW Bar Association [1983] HCA 17; (1983) 151 CLR 288 at 293-294, 300; Re J.R.L; Ex parte C.J.L. [1986] HCA*

39; (1986) 161 CLR 342 at 349, 351, 359, 368, 371; Vakauta v Kelly [1989] HCA 44; (1989) 167 CLR 568 at 575, 584; Grassby v The Queen (1989) 168 CLR 1 at 29). In England, however, the House of Lords, in R v Gough (1993) AC 646, decided that the test to be applied in all cases of apparent bias involving Justices, tribunal members, arbitrators or jurors is whether in all the circumstances of the case there is a real danger or real likelihood, in the sense of possibility, of bias. In a later case, Webb v the Queen [1994] HCA 30; (1994) 181 CLR 41, which concerned a juror, the High Court of Australia, despite Gough, decided that it would continue to apply the reasonable apprehension or suspicion of bias test, and held that in the circumstances of the case a fair-minded but informed observer would not have apprehended that the juror or the jury would not have discharged their task impartially.

Subsequently, the New Zealand Court of Appeal, in Auckland Casino Ltd v Casino Control Authority (1995) 1 NZLR 142, held that it would apply the Gough test. In reaching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias

[75] The Supreme Court concluded

'If the test favoured by the High Court of Australia is applied, the fair-minded observer, knowing the facts, would not conclude that the petitioner failed to receive a fair trial. Such an observer might think that the judge, having been approached by Mr. Khan and having expressed the view that the magistrate should hold that there was no case to answer, might be inclined to approach the trial with a pre-disposition in favour of the petitioner. With knowledge of the trial as it unfolded, such an observer could only conclude that, whatever the initial state of mind of the trial judge, there was nothing to show a lack of impartiality on his part. Indeed, nothing in the conduct of the trial was identified as suggesting a bias of any kind. In this respect, we should say - and we say it emphatically - that the directions given to the assessors exhibit complete impartiality. They leave the issue to the assessors without any attempt to influence their judgment on matters left for their opinion. The directions are not flawless but the flaws are relatively minor and they do nothing to detract from the fairness and the impartiality of the summing-up.

'In all the circumstances, it cannot be said that there was a danger that the trial was affected by bias or that a fair-minded observer, knowing the facts, would apprehend or suspect that the trial was affected by bias. And, at the end of the day, we have a trial which appears in all respects to have been conducted fairly and impartially.

[76] An examination of the summing-up in this case reveals that the learned trial judge has delivered a balanced and an objective address on available facts and evidence to the assessors. A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defense in the course of a summing up in a way that is fair, objective and balanced (see **Tamaibeka v State** Criminal Appeal No.AAU0015 of 1997S: 08 January 1999 [1999] FJCA 1. There is no suggestion by any of the appellants to the contrary. In terms of suspected prejudice or gravity the comments attributed to the learned trial judge does not come anywhere near those of **Koya's** case. The learned trial judge has not expressed any views that can be regarded as biased against the appellants in the summing-up or in the judgment. While it would have been desirable for the learned trial judge to have refrained from making the alleged comments even informally and privately to the counsel, I am convinced, having applied the test of bias as formulated in ***Koya*****,** that that there was no danger that the trial was affected by bias or that a fair-minded observer, knowing the facts, would apprehend or suspect that the trial was affected by bias. The same goes with what the learned trial judge has said in paragraph 51 of the summing-up. Accordingly, there has not been any miscarriage of justice.

[77] Accordingly, I reject the 03rd ground of appeal of both appellants.

02nd appellant- 01st ground of appeal

[78] I shall now deal with the 01st ground of appeal of the 02nd appellant. It is as follows

> **'***The Learned Trial Judge erred in law and in fact when he failed to take into account the fact that girl 'X' and girl 'Y' (collectively referred to as "the two girls") had always intended to use the Appellant in order to get the clients for their own benefit by providing sexual services and that the intention was always moving from the two girls to provide sexual services.*

[79] The 02nd appellant's counsel argues that the prosecution has failed to substantiate the element in section 117(1)(c)(i) *i.e. 'intention that the victim be exploited'* against the 02nd appellant. However, it is only the second limb in section 117(1) (c)(i). The first limb is that the offender should intend that the victim will be used to provide sexual services. Proof of either of the limbs would establish the requirement under section 117(1)(c)(i). Both need not be present simultaneously.

[80] The learned trial judge in paragraph 53 of the summing-up has summarized the 02nd appellant's act of either organizing or facilitating transportation of the complainants for sexual work which is not challenged by the 01st appellant.

> *'[53] The second accused did say in his evidence however that he would go with the girl, drop her to the client, knowing that she was going to perform sexual services for the client. He would wait for the client to call when it was finished so that he could get his tip. Normally he said they would get a random cab to take the girl to the client to provide sexual services*

[81] I also find that Grace has said specifically that she used to meet the 02nd appellant 2-3 times a week at Elixir and both would go to apartments and motels by car or taxi. Mabel had spoken about the 02nd appellant bringing clients. The 02nd appellant had specifically said in evidence that he took or drop the complainants to the clients to provide sexual services and sometimes waited for them to do the sexual service and then get a 'cut' from the clients. His caution interview provides more proof of that.

[82] The learned High Court Judge in the judgment in paragraph 11 has said referring to the transportation of complainants for sexual services as follows. The 02nd appellant had not joined issue with it.

> *'11. Although each accused freely admitted transporting the two girls for sexual services ……'*
>
> *14.The evidence led against the second accused was in respect of his participation in arranging or "facilitating" transport for their attendance on clients for sexual service. The girls 'X' and 'Y' gave clear evidence of his complicity in that for most times he would take them in a taxi driven by his personal friend (an Indo-Fijian) or by "random" taxi from the street.*
>
> *'15. In his evidence in chief the second accused readily admitted transporting the girls to appointments knowing they were going to provide sexual services.'*

[83] Therefore, there is ample evidence of the 02nd appellant having organized or facilitated the transportation of the complainants intending that they will be used to provide sexual services. Therefore, there is no merit in the 01st ground of appeal raised by the 02nd appellant. Accordingly, I reject it.

02nd appellant- 02nd ground of appeal

[84] Appeal ground two of the 02nd appellant is as follows

> *'The learned Trial Judge erred in law and in fact when he failed to consider the capacity of the two girls and their background before affirming a verdict which was unsafe and unfair giving rise to a grave miscarriage of justice.*

[85] This ground of appeal is not well articulated in that it is difficult to understand what the complaint of the 02nd appellant regarding the conviction is. The counsel for the 02nd appellant has submitted that the fact that the complainants were already familiar with the sex trade and not novices introduced to it by the 02nd appellant and that the 02nd appellant simply accommodated their request, should have been considered in relation to their criminal liability. Thus, it seems to be the argument that the complainants' consensual participation may affect the criminality on the part of the 02nd appellant.

[86] Prosecution did not allege that the 02nd appellant acted against the will of the complainants or he ever forced them to engage in sexual services. Neither the complainants nor the 02nd appellant stated that it was the case. In fact Grace had said that the 02nd appellant did not do anything bad but he was pimping for them. However, none of these considerations matter when it comes to incur criminal liability for domestic trafficking in children under section 117(1) of the Crimes Decree. Even if the complainants had offered their services to the 02nd appellant and requested his help in finding clients, still the 02nd appellant cannot escape criminal liability under section 117(1) of the Crimes Decree. I have dealt with a similar argument under the 02nd ground of appeal of the 01st appellant and do not intend to repeat the same.

[87] Therefore, I hold that second ground of appeal of the 02nd appellant is devoid of merits and rejected.

Grounds of appeal against sentence by both appellants.

01st appellant

[88] The grounds of appeal against sentences by both appellants are as follows.

> ***'****The learned Judge erred in law when he sentenced the Petitioner to a term of imprisonment which is harsh and excessive considering the facts of the offending, his prejudgment comments and the fact that there was no established tariff.'(01st appellant)*
>
> ***'****The learned Judge erred in law when he sentenced the Appellant to a term of imprisonment which is harsh and excessive considering the facts of the offending, his prejudgment comments and he failed to take into consideration the case authorities provided on behalf of the Appellant.'(02nd appellant)*

[89] In view of my decision to set aside the conviction for slavery the sentence appeal has to be considered only in relation to domestic trafficking in children. In his sentencing order the learned trial judge has said of domestic trafficking in children as follows before deciding upon the sentences.

> ***'****[21] As with slavery, this offence has never come before the Courts in Fiji before and therefore there are no authorities that establish an appropriate sentence for the offence.'*
>
> *'[26] The accepted tariff for rapes of children is from 10 to 16 years (**Anand Abhay Raj** AAU 0038. 2014) and there is no reason why domestic trafficking in children should not attract a sentence which is similar if not greater than that range. While not detracting from the crime of rape of a child which is an abominable crime, trafficking a child for sexual services is more serious in that it is not one single act of violence, but is the making available a child for innumerable sexual acts for money. This money is not recompensed directly to the child as a reward but is used by either the first accused or the second accused as profit that they would spend on themselves and the girls. The sexual services to be demanded of the child after transportation were of course unknown and the potential for sexual abuse is immeasurable. The knowledge and intent of either of the accused that a payment had or would be paid to "perform" the sexual acts demanded removes any power the child might have had to consent or not to whatever act that was demanded of her. This exploitation for financial gain is unspeakably loathsome.*

[27] ***There is no reason why this crime should not attract sentences in the range of 12 to 18 years.***

[28] I take a starting point for each of the trafficking convictions of 15 years. In looking at the ***first accused*** *separately I add to that a term of 3 years for the fact that Girl 'X' told the Court that when the first accused "took her in", she had no idea of what to in being a sexual worker, and at the initial "orientation" party in the Elixir Motel, the first accused was a party to a "training" demonstration set up by another girl to show her how to "please" a man. To pervert a 17 year old girl in such manner is seriously aggravating. From the interim total of 18 years, I deduct 2 years from that total for the first accused's relative youth and pathetic childhood which forced him into the trade. He does not have a clear record which would allow any further discount. The final sentence for the first accused for each of the trafficking charges will be a term of 16 years. These terms are to be served concurrently with each other and concurrent to the term imposed for slavery, making a total term of imprisonment for the first accused to be one of sixteen years. He will serve a minimum of 14 years imprisonment before being eligible for parole.*

[29] For ***the second accused*** *I take the same starting point of 15 years imprisonment for each of the two trafficking offences he has been convicted of.*

[30] The second accused is also 24 years old and from a broken home. He has supported himself by odd jobs and sex work since he was 12 years old. He has a clear record. His counsel says that he is remorseful which I have indeed seen throughout the trial, unlike the first accused who has shown no remorse whatsoever and has even an occasions shouted out his views from the dock.

[31] To his credit, the second accused has devoted time and effort to a sex workers' union known as SAN. Little is known of what the union does for the sex workers, but if nothing else education on the severe penalties contained in our Crimes Decree for offences of slavery and trafficking should be high on their agenda. The second accused's membership of the union does in some respects work against him because a union should be in a position to protect children from the more wretched and ignominious facts of sex work.

[32] There is no aggravating features of the second accused's crimes to add to the sentence. The crime itself subsumes the unsavoury and despicable features of the offence. He does have a good deal of mitigation in his favor:

i. Clear record
ii. Relative youth
iii .Time in remand
iv. A wretched childhood forcing him to live by his own wits since 12 years old
v. Obvious remorse.

[33] His work in the sex workers union cancels itself out by credit for such help as opposed to the union's essential role to educate sex workers.

[34] For the mitigating features above I deduct a period of three years meaning that the second accused will serve a total term of 12 years for each of the two trafficking offences he has been convicted of. These terms will be served concurrently and he will serve a minimum term of 10 years before being eligible for parole.

[90] The learned trial judge has cited **State v Murti** [2010] FJHC 514; HAC195.2010 (17 November 2010) and **State v Laojindamanee** [2013] FJHC 20; HAC323.2012 (25 January 2013) but has said that neither ***Murti*** nor ***Laojindemanee*** is applicable to this case where the trafficking was of children and the children were being exploited for gain and the maximum penalty is 25 years.

[91] In ***Murti*** the accused was charged *inter alia* of one count of trafficking in persons under section 112(3) of the Crimes Decree, 2009 carrying a maximum sentence of 12 years. The accused had deceived seven Indian nationals into promises of employment in New Zealand and then in obtaining large amounts of cash from each victim he facilitated their transport from India, through Fiji. Unknown to the victims, the accused intended to abandon the men in Fiji, there being no jobs in New Zealand as promised. The crime was discovered fortunately at the border. Goundar, J said

'[18] The Crimes Decree 2009, which came into effect on 1 February 2010, creates a number of offences designed to fulfill Fiji's obligation under the United Nations Convention Against Transnational Organised Crime and two of its three protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol), and the Protocol against the Smuggling of Migrants by Land, Sea and Air (the Migrant Protocol).

[19] Although Fiji has not signed these international conventions, by criminalizing human trafficking and smuggling under the domestic law, Fiji has shown commitment to effectively address this global problem.

[20] Trafficking in persons is a human right issue. Traffickers are motivated by greed to take advantage of vulnerable victims. Traffickers use coercive tactics including deception, fraud, intimidation, isolation, threat and use of physical force, and/or debt bondage to control their victims. The victims are generally subjected to degrading forms of exploitation such as forced prostitution, domestic servitude and other kinds of work.'

[92] Justice Goundar did not consider the case to be the worst case of human trafficking. According to him, the victims were only exposed to exploitation but they were not physically exploited and therefore a sentence of 06 years imprisonment was imposed.

[93] In ***Laojindemanee*** the traffickers had brought three Thai girls into the country. The girls having been told that they were going to work as masseurs in an idyllic setting by the sea, it was only on arrival that they learned that they were to become sex workers. Although there was international trafficking from Thailand, there was one element of domestic trafficking in the case where there was a driver employed to bring the girls from Nadi Airport to Suva City where they were to be based. He was one of the accused and was convicted of domestic trafficking in persons under section 115(3) of the Crimes Decree, 2009 and sentenced to 8 years imprisonment. One of the factors in his favour was that he was a rather small cog in this wheel of crime syndicate of trafficking. The girls were all adults and there was no evidence that he knew he was driving them to exploitation. The maximum penalty for the crime was 12 years. However, 10 years of imprisonment was imposed on the two accused who were convicted of trafficking in persons under section 112(5) of the Crimes Decree, 2009 where the maximum sentence again was 12 years.

[94] None of the above cases was concerned with children and therefore the sentence range under section 117(1) was not discussed. However, both cases had international elements present in the offences. Though, no tariff has been set for domestic trafficking in children in Fiji as yet, this court is unable to pronounce a guideline judgment in terms of section 06 of the Sentencing and Penalties Act as the State had not complied with section 08 of the Sentencing and Penalties Act in that the Legal Aid Commission had not been made a party to the appeal and could not be heard regarding sentencing guidelines.

[95] Counsel for the 01st appellant argues that the learned trial judge had committed an error in taking the tariff of 10-16 years for rape of juveniles (under the age of 18 years) set in **Raj v State** [2014] FJCA 18; AAU0038 .2010 (5 March 2014) and endorsed in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) in respect of domestic trafficking in children as a guidance, for the offence of rape under the Crimes Decree, 2009 carries a maximum sentence of life imprisonment whereas

domestic trafficking in children section 117(1) of the Crimes Decree carries a maximum sentence of 25 years.

[96] As to why the learned trial judge decided that domestic trafficking in children should attract a tariff similar to (if not greater) that of rape is described in paragraph 26 of the sentencing order and I must say that the reasons given therein are convincing and compelling. It should be borne in mind that since the impugned sentences were handed down by the learned trial judge in June 2004, the Supreme Court in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) had increased the tariff for child rape to 11 - 20 years.

[97] There are some very helpful observations by Goundar, J in **State v Werelagi** [2019] FJHC 1159; HAC425.2018 (12 December 2019) on sentencing an accused found guilty of domestic trafficking in children. The facts in ***Werelagi*** have a lot in common with those in the instant case. It is worth repeating them as found in the sentencing order.

> *'[2] The Accused is a hairdresser and a sex worker. His first contact with the victim was in Nausori town on the evening of 18 July 2015. She was 15 years old at the time and living with her mother after dropping out of school. He knew her mother but not her. After a brief encounter, she accompanied him to Samabula on that night for a meal. He facilitated the transport from Nausori to Samabula and when they arrived in Samabula he took her to a bus stop at Rewa Street and introduced her into sex industry. On this night she had sexual intercourse with two adult males in exchange for a payment, which she shared with the Accused. After providing sexual services, she accompanied the Accused to his home. She remained with him until 23 July 2015 when she was rescued from the street by a police officer. She got the attention of the police officer because she appeared very young to him.*
>
> *[3] While under the control of the Accused, the victim accompanied him from Nausori to Samabula on two other nights to provide sexual services. On both occasions he facilitated her transportation and also groomed her to make her look older. He controlled her by giving instructions and he made sure that she returned to him after providing sexual services to clients. He sold her to clients and demanded his share of payment for the sexual services she provided. The clients were adult males. The sexual services were penetrative in nature. She feared him and she felt like a slave.'*

[98] On the matter of sentence Goundar, J had also referred to the sentence range of 12- 16 years for domestic trafficking in children suggested by the learned trial judge in the present case and finally imposed sentences of 14 years imprisonment on all counts of domestic trafficking in children. He said

> *'[4] The maximum penalty prescribed for aggravated sexual servitude is 20 years imprisonment. Domestic trafficking in children is more serious offence. The maximum penalty prescribed for this offence is 25 years imprisonment.*
>
> *[5] The offences are grave because they involve a vulnerable child. There is no established tariff or a starting point for these offences. ……. The overseas cases are of little relevance because of different sentencing regimes or different circumstances of offending.*
>
> *[6] In this case, I select a starting point of 12 years' imprisonment based on the objective seriousness of the offences involving a child victim.*
>
> *[10] I consider the following as aggravating factors. The offences were repeated over a period of four days. The sexual services provided by the victim were penetrative in nature. The incidents occurred at night times and in an environment dangerous to the child victim (dark secluded locations and with adult males). The incidents had both physical and mental toll on the victim – evidence of which she gave at the trial and in her victim impact statement.*
>
> *[11] The principle purposes of sentence in this case are to denounce the conduct of the Accused and deter him and other like-minded people from sexually exploiting children. In the present case, a child was commercially exploited for penetrative sex. The need for deterrence is therefore high despite there was no physical violence or weapon used.*

[99] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained. In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then

the sentencing court should provide reasons why the sentence is outside the range [vide **Koroivuki v State [**2013] FJCA 15; AAU0018.2010 (5 March 2013)]

[100] Therefore, in principle I cannot find fault with the rage of sentence or tariff of 12-18 years for the offence of domestic trafficking in children. Nor can I criticize the starting point of 15 years being the middle of the range or the aggravating and mitigating circumstances considered by the learned trial judge.

[101] Like in almost all trafficking cases, I am convinced that the 01st appellant has taken advantage of the desperate and vulnerable situation of the complainants to advance part of his business *i.e.* procuring clients for them to provide sexual services and in return obtaining financial gains. He was not certainly the Good Samaritan. It was his initial approach and the ensuing dialogue with the three sisters that led the whole saga surrounding this case. He had been protective of his assets or business tools namely the two complainants in different ways. However, like in most such cases I cannot find the appellants having used coercive tactics, deception, fraud, intimidation, isolation, threat and use of physical force, and/or debt bondage to control their victims. Nor have the complainants been subjected to degrading forms of exploitation such as forced prostitution, domestic servitude etc. On the other hand the complainants too were under no illusions about what they were getting into. They had decided to be sexual workers following the footsteps of their elder sister. The appellants had no hand whatsoever in that decision. The 02nd appellant's involvement is even less. These aspects have not entered the mind of the learned trial judge.

[102] Considering all the circumstances including what the learned trial judge had narrated in the sentencing order and what I have stated above, I feel that the 01st appellant's sentence of 16 years may be a little too tilted towards the high end. However, this court would not interfere with a sentencing discretion of the trial judge unless the judge had fallen into any of the errors set out in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 where the Supreme Court said

> *'[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in* ***House v The King*** [1936] HCA 40*;* (1936) 55 CLR 499 *and adopted in* ***Kim Nam Bae v The State*** *Criminal*

Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[103] I would act under the last limb of errors enumerated in ***Naisua*** and acting under section 23(3) of the Court of Appeal Act quash the sentence of 16 years imposed on the 01st appellant at the trial and substitute that with a sentence of 15 years with a non-parole period of 12 years and 06 months.

02nd appellant

[104] Other than urging that the sentence is harsh and excessive (which contention is common to both appellants) the specific complaint of the 02nd appellant is that the learned trial judge had deducted 03 years for mitigating factors and the time in remand custody from the starting sentence of 15 years and he had therefore erred in not separately reducing the period of remand from the head sentence. However, in the mitigation submissions filed in the High Court there is no mention of the 02nd appellant's period of remand. Even in the written submissions tendered to this court I do not find that information. In the circumstances the learned High Court Judge cannot be faulted for not separately counting the period of remand, if any. In any event, having taken 15 years between 12-18 years as the starting point, the learned trial judge had deducted 03 years for mitigating factors and for the period of remand and ended up at the lowest of the rage of sentence. I do not find any reason to interfere with the sentence of the 02nd appellant except that I think a non-parole period of 09 years would meet the ends of justice. I think 03 years from the starting point is an adequate discount for what the trial judge had mentioned in the sentencing order and also to account for the migratory factors I have mentioned above. Thus, the 02nd appellant's sentence should be varied to read as 12 years of imprisonment with a non-parole period of 09 years.

[105] In dealing with the sentences I have been mindful of the provisions of the Sentencing and Penalties Act, 2009 and more particularly of section 4(1) and 4(2).

Nawana, JA

[106] I agree with the reasons, conclusions and orders proposed by Prematilaka, JA.

The Orders of the Court are:

1. *01st appellant's appeal against conviction on counts 01 and 02 is allowed.*
2. *Conviction against 01st appellant on counts 01 and 02 is set aside.*
3. *01st appellant's appeal against conviction on counts 03, 04, 06, 07 and 09 is dismissed.*
4. *Conviction against 01st appellant on counts 03, 04, 06, 07 and 09 is affirmed.*
5. *01st appellant's appeal against sentence is allowed.*
6. *A sentence of 15 years of imprisonment is imposed on the 01st appellant with a non-parole period of 12 years and 06 months to run from 09 June 2014.*
7. *02nd appellant's appeal against conviction on counts 05 and 08 and sentence is dismissed.*
8. *Conviction against 02nd appellant is affirmed.*
9. *The sentence of 12 years of imprisonment imposed on the 02nd appellant is affirmed subject to a non-parole period of 09 years to run from 09 June 2014.*

COURT OF APPEAL FIJI

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL