

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

CRIMINAL APPEAL NO. AAU 62 of 2020
[In the High Court at Suva Case No. HAC 425 of 2018]

BETWEEN : **JOSEVATA WERELAGI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Prematilaka, RJA**
Clark, JA
Winter, JA

Counsel : **Ms. S. Prakash for the Appellant**
: **Mr. R. Kumar and Ms. L. Latu for the Respondent**

Date of Hearing : **07 November 2024**

Date of Ruling : **28 November 2024**

JUDGMENT

Prematilaka, RJA

- [1] The appellant had been charged and found guilty in the High Court at Suva on a single count of aggravated sexual servitude contrary to section 106 read with section 108 of the Crimes Act, 2009, an alternative count of buying minors under the age of 18 years for immoral purpose contrary to section 227 of the Crimes Act, 2009 and three counts of Domestic trafficking in children contrary to section 117 of the Crimes Act, 2009.
- [2] The particulars of the count of aggravated sexual servitude (first count) were that the appellant between 18 July 2015 and 22 July 2015 at Suva in the Central Division by the use of threats or force caused the complainant, a 15-year old child to enter into or remain in sexual servitude with intent to cause that sexual servitude. The alternative charge alleged that the appellant between 18 July 2015 and 22 July 2015 obtained possession of the complainant with the intention to employ or use her for the purpose

of prostitution. Counts two, three and four alleged that on three separate dates, that is, 18, 20 and 22 July 2015, the appellant facilitated the transportation of the complainant from Nausori to Rewa Street and that he did so with the intention that the complainant will be used to provide sexual services.

[3] At the conclusion of the summing-up¹, the assessors were of unanimous opinion that the appellant was guilty of all four substantive counts as charged. The learned High Court judge in his judgment² agreed with the assessors' opinion, convicted him and sentenced the appellant on 12 December 2019³ to a total effective period of 14 years' imprisonment with a non-parole period of 10 years.

[4] On 02 June 2023, the single Judge having considered the appellant's timely appeal against conviction allowed leave to appeal on the 02nd and 03rd grounds of appeal⁴. The appellant pursued both grounds at the appeal hearing together. They are:

'Ground 2

That the Learned Trial Judge caused a grave miscarriage of justice by accepting the prosecution's evidence against the Appellant when there was insufficient evidence to prove beyond a reasonable doubt that the Appellant engaged in a conduct that caused the complainant to remain in a condition to commercially use her body for sexual gratification of others.

Ground 3

That the Learned Trial Judge erred in law and fact in convicting the Appellant when the evidence in totality does not support the conviction.'

Facts in brief

[5] The evidence reveals that the appellant was a hairdresser and a sex worker whose first contact with the complainant was in Nausori town on the evening of 18 July 2015. According to her birth certificate, the complainant was 14 years old at that time and living with her mother after dropping out of school. The appellant knew her mother but not her. After a brief encounter, the complainant accompanied him to Samabula

¹ **State v Werelagi** - Summing Up [2019] FJHC 1147; HAC425.2018 (5 December 2019)

² **State v Werelagi** [2019] FJHC 1145; HAC425.2018 (9 December 2019)

³ **State v Werelagi** - Sentence [2019] FJHC 1159; HAC425.2018 (12 December 2019)

⁴ **Werelagi v State** [2023] FJCA 86; AAU62.2020 (2 June 2023)

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 the sex industry. On that night she had sexual intercourse with two adult males in exchange for a payment, which she shared with the appellant. After providing sexual services, she accompanied the appellant to his home. She remained with him until 23 July 2015 when she was rescued from the street by a police officer. The complainant got the attention of the police officer because she appeared very young to him.

[6] While under the control of the appellant, the complainant 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.

[7] The appellant's evidence was to the effect that the complainant had tagged along with him to Suva at night on her own free will. He denied making arrangements and taking payments from the complainant's clients in return for her providing sexual services. According to him, he felt sorry for her and invited her to stay at his house. They shared rides together on some days. He tried to ask the complainant to return to her home but she refused. He tried to reach out to the complainant's mother to inform her about the complainant. He did not see the complainant again after 22 July 2015.

Ground 1 and 2

[8] The appellant's submissions under both grounds of appeal relate to the first count of aggravated sexual servitude under section 106(1) of the Crimes Act. He submits that there was insufficient evidence for the learned trial judge to be convinced that it was his conduct which caused the complainant to enter into or remain in sexual servitude thereby challenging the assessment of evidence by the judge regarding some elements in the offence of aggravated sexual servitude.

[9] In order to understand the appellant's contention, it is necessary to examine the elements of the offence of aggravated sexual servitude.

Definition of sexual servitude

104. (1) for the purposes of this Division, **sexual servitude** is the condition of a person who provides **sexual services** and who, because of the use of force or threats —

- (a) is not free to cease providing sexual services; or
- (b) is not free to leave the place or area where the person provides sexual services.

(2) In this section—

"threat" means—

- (a) a threat of force; or
- (b) a threat to cause a person's deportation; or
- (c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

Sexual servitude offences

106. — (1) A person —

- (a) whose conduct causes another person to enter into or remain in **sexual servitude**; and
- (b) who intends to cause, or is reckless as to causing, that **sexual servitude**; commits an indictable offence.

Penalty —

- (i) in the case of an aggravated offence under section 108 - imprisonment for 20 years; or
- (ii) in any other case - imprisonment for 15 years.

Aggravated offences

108. (1) for the purposes of this Division, an offence against section 106 or 107 is an aggravated offence if the offence was committed against a person who is under 18.

(2) If the prosecution intends to prove an aggravated offence, the charge must allege that the offence was committed against a person under that age.

(3) In order to prove an aggravated offence, the prosecution must prove that the defendant intended to commit, or was reckless as to committing, the offence against a person under that age.

[10] Thus, the physical elements of sexual servitude is the offender's conduct that causes another person to (a) **enter into sexual servitude** *or* (b) **remain in sexual servitude**. When sexual servitude is committed against a person under 18 years of age, it becomes aggravated sexual servitude in terms of section 108(1). 'Conduct' means an act, or omission to perform an act or a state of affairs [section 15(2) of the Crimes Act].

[11] **Sexual servitude** is the condition of a person who provides **sexual services** and who, because of the use of force or threats —

(a) is not free to cease providing sexual services; or

(b) is not free to leave the place or area where the person provides sexual services.

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(a) a threat of force; or

(b) a threat to cause a person's deportation; or

(c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person

[12] In terms of sections 4(1) and 107(4) of the Crimes Act, "sexual service" means the commercial use or display of the body of the person providing the service for the sexual gratification of others.

[13] The appellant's appeal against conviction is only in respect of the physical element of aggravated sexual servitude and in particular whether it was his conduct which caused the complainant to enter into or remain in sexual servitude and whether the appellant by his conduct caused the complainant to believe that she was not free to cease providing sexual services or leave the place or area where she provided the services. However, there cannot be any doubt on the available evidence that the complainant did provide sexual services between 18 July 2015 and 23 July 2015.

Section 104: Definition of Sexual Servitude

[14] The provisions in Fiji's Crimes Act 2009 regarding sexual servitude reflect a serious legislative stance on human trafficking and exploitation, aligned with broader commonwealth jurisprudence on human rights and protection from exploitation. The definition provided in section 104 aligns with international and commonwealth

standards on sexual servitude, as it captures the condition of coercion by force or threats, which restricts a person's freedom to cease providing sexual services or leave the area where they are being held. This mirrors definitions seen in anti-trafficking laws across the commonwealth, such as in Australia and the UK.

'Use of Force or Threats'

- [15] The term 'threat' is broadly defined to include threats of force, deportation or other detrimental actions. This wide scope accommodates varied forms of coercion used in cases of sexual exploitation. Commonwealth courts have upheld broad interpretations of "threats" in similar statutes, recognizing that non-physical forms of coercion can still significantly impede a person's autonomy (e.g., **R v Wei Tang** (2008) 237 CLR 1, [2008] HCA 39 in Australia). There may be overlap between "use of force" and "threat".
- [16] The High Court of Australia in ***Wei Tang*** addressed slavery in the context of forced labor and exploitation, where Ms. Wei Tang was convicted of possessing and using five women as slaves in her Melbourne brothel. The victims were Thai nationals who entered into "contracts" that obligated them to perform sexual services under restrictive conditions. They had significant debts imposed on them, were controlled by threats, and had limited freedom. The High Court upheld the broad definition of slavery under Australian law, noting that physical force was not required to establish a condition of servitude or slavery. The court emphasized that any coercive environment—whether through threats, debt bondage, or psychological control—that effectively removes a person's freedom qualifies as servitude. This decision reinforced that coercion in any form, not only physical force, can establish servitude, aligning with the interpretation of sexual servitude in section 104 of Crimes Act 2009.
- [17] In the absence of an explicit definition of "use of force" in line with the definitions of "threat", a broader definition encompassing both physical and psychological forms of force would reflect contemporary understandings of coercion in exploitation and provide clarity. Courts in Fiji may have to establish precedents, drawing from other jurisdictions, international conventions, and principles of statutory interpretation. Drawing from instruments like the UN Protocol to Prevent, Suppress and Punish

Trafficking in Persons (Palermo Protocol), which defines exploitation comprehensively, can inform legislative or judicial interpretations in Fiji.

[18] Drawing from commonwealth jurisprudence, "use of force" generally refers to (i) physical coercion *i.e.* the use of physical violence or restraint to compel an individual to act against their will (for example holding persons against their will or physically preventing them from leaving a location where sexual services are provided) and (ii) implied force *i.e.* situations where physical dominance or intimidation creates a coercive environment, even without direct violence (for example gestures or physical presence that convey an implicit threat of violence, even without verbalizing a threat).

[19] Commonwealth case law often addresses "use of force" in broader terms, integrating both direct and indirect applications:

- *Australia: In Wei Tang*, while the case focused more on threats and coercion, the court noted that any "control" over a victim, including physical restraint, could amount to force in servitude contexts.
- *United Kingdom: Under the Modern Slavery Act 2015*, the courts have broadly interpreted coercive acts, including physical impositions, as equivalent to "force" in servitude cases (**R v K and another** [2011] EWCA Crim 1846).

[20] **R v K and another** dealt with charges under the UK's Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, specifically the offense of trafficking for exploitation, and whether the defendants' actions amounted to exploitation as defined under the law. K and another individual, were accused of trafficking two young women from Nigeria to the UK for the purposes of sexual exploitation. The victims were coerced into prostitution through a combination of threats, cultural rituals (including voodoo ceremonies), and economic manipulation. The victims were made to believe that breaking the traffickers' rules would result in severe harm to themselves or their families, reinforcing their compliance. Neither defendant used overt physical violence, but the victims were effectively controlled through psychological manipulation, financial exploitation, and threats of supernatural punishment. The legal issues were whether the defendants' actions amount to trafficking for exploitation, even in the absence of direct physical force or overt threats and how should the court interpret "exploitation" under the statute. England and Wales Court of Appeal (Criminal Division) upheld the convictions, emphasizing

that exploitation under the trafficking provisions can be established without physical violence or explicit threats of harm and found that psychological control, rooted in cultural and emotional manipulation, was sufficient to constitute trafficking for exploitation.

[21] Key legal principles in *R v K and another* are

1. Broader interpretation of exploitation:

- *Exploitation includes situations where the victim is controlled through psychological, financial, or cultural means.*
- *Coercion does not need to be explicit; indirect and non-physical means, such as exploiting cultural beliefs or creating a climate of fear, can suffice.*

2. Cultural and contextual coercion:

- *The court acknowledged the significance of cultural practices (e.g., voodoo rituals) in creating psychological domination. These rituals reinforced the victims' belief that disobedience would lead to harm, effectively removing their autonomy.*
- *The traffickers exploited the victims' cultural beliefs to achieve control without resorting to physical violence.*

3. Freedom and autonomy:

- *The judgment reiterated that the essence of exploitation lies in the victim's loss of freedom, regardless of the means used to achieve it.*
- *A victim's perception of harm, even if based on cultural superstitions, can be a powerful tool for exploitation.*

[22] This decision broadened the understanding of coercion, recognizing that exploitation can manifest through subtle or culturally specific methods that go beyond traditional notions of threats or force. The court highlighted the need to assess exploitation from the victim's perspective, taking into account their cultural background, vulnerabilities, and belief systems. The principles from *R v K and another* are particularly relevant to sexual servitude under Crimes Act 2009, as they emphasize that coercion can occur without physical force. Exploitation through psychological means or cultural manipulation would fall within the scope of definitions in the Crimes Act. It provides valuable guidance for interpreting sections 104 and 106 of Crimes Act. It supports the view that exploitation does not require physical violence; psychological manipulation and cultural pressures can suffice to establish servitude. Courts should consider

cultural factors that may influence how victims perceive threats or coercion, especially in diverse societies like Fiji. The victims' perception of their ability to leave or cease providing services is central to determining whether exploitation or servitude exists.

[23] In interpreting the undefined term of "use of force", I may draw on the purposive approach to statutory interpretation, where "use of force" is understood in light of the broader objective of protecting individuals from coercion and exploitation. In cases like **R v Singh** [2011] EWCA Crim 1434; [2006] EWCA Crim 660, the UK courts emphasized that the essence of servitude lies in the victim's loss of autonomy, regardless of whether the coercion stemmed from threats, force, or other means.

[22] ***Singh*** concerned the exploitation of vulnerable individuals and whether coercion and threats, without direct physical force, constituted servitude under the law. Singh was convicted under the UK's anti-trafficking laws for exploiting workers in degrading and coercive conditions. The victims were recruited under false pretenses and were promised fair work and wages. However, they were subjected to harsh living conditions, psychological manipulation, and threats. The victims were not physically restrained but were made to believe they had no realistic option to leave due to (i) fear of consequences, including threats of harm or deportation (ii) financial dependence created by withholding wages and (iii) isolation and lack of understanding of their rights. Legal issues involved were whether the conditions imposed by Singh amount to "servitude" under Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (now replaced by the Modern Slavery Act 2015) and the absence of physical force preclude the finding of servitude. The England and Wales Court of Appeal (Criminal Division) upheld Singh's conviction, affirming that servitude does not require physical force or overt violence and emphasized that psychological coercion, manipulation, and threats can establish servitude if they effectively remove the victim's autonomy.

[23] Key legal principles to be deduced from ***Singh*** are:

1. Autonomy and coercion:

- *Servitude involves a situation where the victim's autonomy is compromised to such a degree that they feel unable to leave or cease work, irrespective of physical force.*

- *Psychological pressures, such as fear of deportation, financial manipulation, or isolation, are as significant as physical threats in undermining freedom.*

2. *Context matters:*

- *The court stressed that servitude must be evaluated in the context of the victim's personal circumstances, including their vulnerabilities (e.g., economic dependence, immigration status).*

3. *Broad interpretation of servitude:*

- *The Court recognized that servitude extends beyond classical slavery and physical restraint to encompass more subtle forms of control and domination that render victims powerless.*

[24] Significance of ***Singh*** is that it reinforced the principle that servitude does not require the use of physical force, expanding the scope of protection for victims of modern slavery and trafficking. It also underscored the importance of considering the victims' circumstances in determining whether their freedom has been compromised. The judgment is highly relevant to cases of sexual servitude, where coercion often involves psychological manipulation, threats, or economic dependence rather than outright physical force.

[25] The case is instructive for interpreting "use of force" and "threats" under section 104 of Crimes Act 2009 in that the absence of direct physical force does not negate the existence of servitude and courts should assess the overall coercive environment, including psychological and economic factors, to determine whether the victim's freedom was curtailed and the vulnerabilities of victims—such as immigration status, financial dependence, and isolation—should be central to legal analysis.

"Not free to cease providing sexual services"

[26] The phrase "to cease providing sexual services" in section 104(1) of Crimes Act 2009 is critical to the concept of sexual servitude. It establishes a key condition for determining whether a person is held in servitude. The phrase "to cease providing sexual services" reflects the modern understanding of coercion and exploitation. To "cease providing sexual services" means that the person must have the genuine freedom to stop engaging in the activity of offering sexual services, whether temporarily or permanently. The phrase emphasizes the element of autonomy and free will in a person's decision-making about continuing to provide sexual services.

Conditions that impair freedom to cease include physical restraint or violence to compel continuation, financial exploitation, such as debt bondage, traps a person in a cycle of providing sexual services and exploitation of societal norms, family honor, or cultural practices to force compliance.

[27] Thus, "to cease providing sexual services" captures not only overt force but also subtler forms of pressure, such as financial manipulation, threats, or cultural influences. For persons to be free to cease providing sexual services, they must have an option to stop without facing adverse consequences or not be compelled by circumstances created by another, such as fear, dependency, or lack of alternatives. Courts must evaluate the victims' perception of their freedom, considering their circumstances, vulnerabilities, and the realistic consequences of cessation. This aligns with the *Palermo Protocol* (The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children) which Fiji has acceded to and other international instruments that recognize the diverse means by which exploitation can occur.

[28] In *Wei Tang* the court examined whether the women involved in the case could freely cease working. Their inability to do so due to fear of repercussions (e.g., being sent back to their home country, financial debts) was a decisive factor in establishing servitude.

[29] **R v Sieders; R v Somsri** [2008] NSWCCA 187 concerned charges of people trafficking and exploitation under Australia's Criminal Code Act 1995 (Cth), particularly sections addressing debt bondage and forced labor, and whether the actions of the defendants amounted to exploitation. It may be noted that sections 270.4 and 270.6 of Australia's Criminal Code Act 1995 (Cth) respectively mirror sections 104 (1)-(3) and 106(1) of the Crimes Act, 2009. The Court of Criminal Appeal held *inter alia* that

'(a) "Sexual servitude" is a condition of a person. It is a state of affairs or set of circumstances in which the person in question lives that person's life and provides sexual services. (423 [87]–[88])

(b) It involves a limitation on freedom of action to do either one of the two specific things identified in par (a) and par (b) of the definition in s 270.4(1). This

condition does not necessarily involve the person actually wanting to cease or leave, within s 270.4(1)(a) or (b). What is involved is if that person “were to want to” there would be some circumstance or set of circumstances in which the person lives that would prevent or seriously inhibit that person from taking that action. (424 [91]–[95])

(c) The person’s lack of freedom arises “because of the use of force or threats” but these do not have to be in actual operation. Rather, if the person wanted to be free it “would be” the use of force or threats that “would provide” a cause for the person not to take action. The use of force or threats does not have to be the sole cause of the person not taking action. Whether a person is “not free” is a matter for evaluation in the circumstances. (425 [96]–[97])

(d) There is no need for the force or threats to be used “by the accused” before the accused commits an offence under s 270.6(2). The force or threats can be used by anyone. (426 [98])

(e) The statutory definition of “threat” in s 270.4(2)(c) when it includes “threat of any other detrimental action” can be a threat of any disadvantage at all, whether to the provider of the sexual services or anyone else. (426 [99])

[30] Sieders and Somsri were involved in trafficking women from Thailand to Australia to work in brothels under exploitative conditions. The women were recruited under false pretenses, with promises of well-paying jobs but were subjected to debt bondage. The women were brought to Australia on temporary visas. Upon arrival, they were informed that they owed significant amounts of money (up to AUD 45,000) for travel and other expenses. To repay these "debts," the women were forced to work in brothels under strict supervision, without control over their earnings, and with limited freedom to leave the premises. The women were required to work long hours, providing sexual services, until their debt was repaid. Threats of deportation, isolation, and the withholding of passports reinforced compliance. Physical force was not used, but the circumstances rendered the women unable to freely cease work or leave the brothels.

[31] The legal issues involved in this case were whether the defendants’ conduct amounted to exploitation under the provisions of the Criminal Code and the debt bondage was sufficient to establish the loss of autonomy necessary for exploitation or servitude. Court of Criminal Appeal in New South Wales upheld the convictions of both defendants, emphasizing that the debt arrangements imposed on the women, combined with their lack of freedom to leave or negotiate conditions, amounted to

exploitation and even though there was no physical violence, the psychological and economic pressures effectively removed the victims' autonomy. The court highlighted that the women were not free to choose whether to work or not and cease providing sexual services without severe financial repercussions or the threat of deportation. This lack of freedom established the presence of servitude. The women's initial consent to travel to Australia did not negate the coercive circumstances they faced upon arrival. The court recognized the power imbalance and the victims' vulnerabilities, including their limited English skills and dependence on the defendants for basic needs.

[32] Key legal principles to be taken away from *Sieders; Somsri* are:

1. Exploitation through economic and psychological means:

- *Exploitation does not require physical force or overt threats; economic manipulation (e.g., debt bondage) and psychological coercion can suffice.*

2. Autonomy and choice:

- *The essence of servitude or exploitation lies in the victim's inability to make free choices about their work conditions, including the freedom to leave or cease work.*

3. Victim's perspective:

- *The court adopted a victim-centered approach, considering how the circumstances and actions of the defendants impacted the victims' ability to act autonomously.*

[33] The judgment reinforced that exploitation encompasses a wide range of coercive behaviors, including psychological, financial, and situational pressures, not just physical violence and clarified that debt bondage, even if initially agreed upon, can amount to exploitation if it effectively traps individuals in servitude. The court emphasized the importance of recognizing and addressing the vulnerabilities of victims, such as their economic dependence and isolation, which traffickers exploit to maintain control.

[34] The principles from *R v Sieders; R v Somsri* are highly relevant to interpreting sections 104 and 106 of Crimes Act 2009, particularly in cases involving sexual servitude. The case highlights that servitude can exist without physical restraint if a person is unable to stop working due to financial or psychological pressures. Debt bondage is a significant factor in determining servitude. Courts in Fiji could similarly view financial manipulation as a form of coercion under section 104. As in *R v*

Sieders; R v Somsri, Fijian courts should focus on the practical realities faced by victims, including their perception of threats or coercion.

[35] Therefore, the phrase "to cease providing sexual services" in section 104(1) goes beyond mere physical ability. It examines the practical realities of whether a person feels free to stop providing such services without facing significant harm or adverse consequences. This provision ensures that courts take a holistic view of coercion, addressing both overt and covert forms of control in cases of sexual servitude. Two hypothetical examples in practice are:

1. Clear case of sexual servitude:

A person is told they must repay a large "debt" by continuing to provide sexual services. If they refuse, they are threatened with deportation. In this scenario, the person is not free to cease providing sexual services because the consequences of refusal are coercive.

2. Borderline case:

A person voluntarily enters a contract to provide sexual services but is later threatened with financial penalties if they stop early. If the penalties are so severe that the person feels they cannot realistically leave, this could meet the criteria for servitude.

‘Not free to leave’

[36] The condition that a person must be “not free to leave” aligns with the principle that true consent cannot exist in situations of coercion or restriction, which is central in trafficking cases across the commonwealth. Courts in the commonwealth (e.g., UK cases on Modern Slavery Act offenses) have considered both physical and psychological restrictions as relevant factors in determining servitude.

[37] The phrase "not free to leave the place or area where the person provides sexual services" in section 104(1)(b) of the Crimes Act 2009 is critical to defining sexual servitude. It focuses on the physical and situational aspects of coercion, emphasizing control over a person’s mobility. The phrase means that the individual providing sexual services is unable to leave the physical location or geographical area where they work. This inability may result from physical restraint, surveillance, or conditions imposed by another person. The law targets circumstances where the

restriction on freedom is not voluntary but imposed through (i) physical barriers, locked premises, or physical restraint (ii) fear of violence, deportation, or other adverse consequences (iii) creating a perception that leaving is dangerous or impossible and (iv) tying mobility to financial constraints or debt.

[38] Courts in Commonwealth jurisdictions have examined similar provisions in trafficking and exploitation cases. The courts have emphasized that freedom to leave must be real and practical, not merely theoretical and restrictions can result from direct control (locks, physical barriers, or guards) or indirect coercion (fear of retaliation, shame, or threats to family members).

Wei Tang

- *The High Court of Australia found that the women working in a brothel were not physically locked in, but the constant supervision and their belief that they could not leave due to debt bondage effectively restricted their freedom.*
- *This demonstrates that "not free to leave" includes psychological and economic constraints, not just physical barriers.*

Sieders; Somsri

- *The victims were subjected to close monitoring and financial dependency. While they were not explicitly locked in, their lack of access to passports and fear of deportation rendered them unable to leave the brothels.*

[39] The inability to leave can arise from various factors such as physical restraint (locked rooms or facilities, guards or surveillance systems), psychological control (threats of violence or harm if the individual attempts to leave, use of fear, such as threats of deportation or harm to family members, cultural or social pressures that instill a sense of obligation or fear of consequences), economic dependence (financial penalties for leaving, such as forfeiting wages or repayment of fabricated debts, deprivation of basic necessities unless the person complies) and isolation and dependency (taking away passports or identity documents, social isolation, such as limiting communication with the outside world).

[40] Under section 104(1)(b), "not free to leave" should be interpreted broadly to include both overt physical restraint and more subtle forms of control, such as threats or

dependency. This aligns with the legislative intent to combat modern forms of slavery and exploitation, which often involve psychological manipulation rather than overt violence. Courts in Fiji should consider the victim's circumstances, such as their economic status, cultural background, or immigration status, to determine whether they were realistically free to leave. For example: a foreign worker who fears deportation if they leave a brothel may not be "free to leave" even if the door is unlocked or a local worker who is told they will lose their home or face public shame if they stop working is similarly coerced. The concept mirrors similar provisions in other jurisdictions, such as Australia's Criminal Code Act 1995 (Cth), which defines servitude to include psychological and economic constraints and the UK's Modern Slavery Act 2015, which takes into account the victim's perception of their ability to leave.

[41] The provision ensures that courts account for the realities of exploitation, where physical barriers are often replaced by psychological or economic controls. It reflects a victim-centered approach, focusing on the victim's actual ability to leave, rather than the perpetrator's methods of control. By criminalizing scenarios where individuals are not free to leave, the law holds perpetrators accountable for a wide range of exploitative behaviors, from direct violence to indirect coercion. The phrase "not free to leave the place or area" in section 104(1)(b) captures the essence of coercion and control in cases of sexual servitude. It ensures that both overt physical barriers and subtler forms of control—such as threats, psychological manipulation, or economic dependence—are addressed under Crimes Act 2009. This broad interpretation aligns with international standards and ensures that victims are protected, regardless of the methods used by perpetrators.

Section 106: Sexual Servitude Offences

[42] Section 106 establishes an indictable offense for any individual whose conduct causes another person to enter or remain in sexual servitude. The offense requires intent or recklessness, broadening the scope to cover those who may not explicitly intend harm but disregard the high likelihood of servitude resulting from their actions.

- ***Intent or Recklessness:*** *This dual standard of liability is consistent with commonwealth principles, where recklessness has been recognized as sufficient for serious exploitation offenses. Australian courts, for instance, have upheld*

convictions for servitude based on recklessness when defendants were aware of the risk but continued with their actions (Sieders and Yotchomchin v The Queen [2014] VSCA 156 in Australia).

- **Penalties:** *The penalties (15 years and up to 20 years for aggravated offenses) reflect the gravity of such offenses, paralleling penalties seen in other jurisdictions (e.g., under Australia's Criminal Code). The severity of punishment underscores the commitment to deterrence and reflects similar trends in commonwealth countries.*

[43] The fault elements of sexual servitude under section 106(1) are the offender's (a) intention *or* (b) recklessness as to causing that sexual servitude. If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [section 21(4) of the Crimes Act]. Therefore, in order to prove the fault element of sexual servitude, the prosecution can prove intention, knowledge or recklessness as defined in sections 19, 20 and 21 respectively in the Crimes Act.

[44] The case of **Yotchomchin v The Queen** [2014] VSCA 156 is a notable Australian decision related to human trafficking, forced labor, exploitation and initial consent in the sex industry. It provides critical insights into the application of trafficking laws, the role of consent, and the nature of coercion in establishing servitude or exploitation. The case is a significant precedent in Australia for interpreting trafficking and servitude laws, particularly in the context of exploitation in the sex industry. It underscores the importance of addressing both overt and subtle forms of exploitation, including psychological and economic control. The principles established in ***Yotchomchin*** are consistent with international standards, such as the Palermo Protocol on trafficking.

[45] Ratchada Yotchomchin was convicted in Victoria, Australia, of offenses related to causing and harboring illegal non-citizens for the purposes of sexual exploitation, contrary to the Migration Act 1958 (Cth) *and the* Criminal Code Act 1995 (Cth). Yotchomchin recruited Thai women to work in Australia's sex industry. The women were brought into the country under false pretenses, typically on tourist visas, and were required to repay significant debts (allegedly for their travel and visa expenses). While the women initially appeared to have consented to work in the sex industry, they were subjected to economic exploitation through debt bondage, control over their

movements, including restrictions on leaving their workplace and threats that created fear of deportation or financial consequences if they refused to comply.

[46] This case highlighted the use of debt bondage as a tool of coercion in that the women were told they owed debts as high as AUD \$45,000 and the repayment system was structured to ensure they had minimal ability to save or leave, despite earning money from their work. The court found that such conditions amounted to servitude, even though the women were not physically restrained. The victims' status as undocumented immigrants and their lack of familiarity with Australian laws were significant factors in their exploitation. The court recognized that Yotchomchin had exploited their vulnerabilities, including their fear of law enforcement and deportation. The Victorian Court of Appeal upheld Yotchomchin's convictions, affirming that servitude does not require physical force or overt threats; economic and psychological manipulation can suffice and the victims were not "free to leave" their work arrangements due to the combination of debt bondage, fear of legal consequences, and Yotchomchin's control over their circumstances.

[47] Key legal principles from *Yotchomchin* are that economic exploitation and psychological pressure (e.g., fear of deportation) are sufficient to establish coercion for servitude offenses and physical confinement or direct threats are not necessary. The case reinforced the importance of considering the victims' vulnerabilities, such as their immigration status, economic dependence, and lack of access to legal protections.

[48] The principles established in *Yotchomchin* align closely with the definitions of sexual servitude under sections 104 and 106 of Crimes Act 2009. Main parallels include

1. Role of 'Use of force or threats'

- *In Yotchomchin, threats of deportation and economic control (through debt bondage) created conditions akin to "force or threats" under section 104 of Crimes Act 2009.*

2. "Not free to leave"

- *The restricted freedom of the victims in Yotchomchin mirrors the requirement in section 104(1)(b) of Crimes Act 2009 that a person is "not free to leave the place or area" where they provide sexual services.*

Section 108: Aggravated Offences

[49] Section 108 provides for aggravated offenses when the victim is under 18, requiring the prosecution to allege and prove intent or recklessness concerning the victim's age.

- ***Protection of minors:*** *The emphasis on aggravated offenses for cases involving minors mirrors the heightened protection of vulnerable individuals across the commonwealth, with similar provisions seen in the UK's Modern Slavery Act 2015 and Canada's Criminal Code. Courts have routinely recognized that minors in sexual servitude are especially vulnerable, warranting more severe penalties.*

- ***Evidentiary requirements:*** *The requirement that the prosecution must allege and prove that the defendant knew or was reckless about the victim's age ensures due process while balancing the protective intent. In *R v D'Souza (UK)*, similar principles were applied, where the court scrutinized knowledge and recklessness in trafficking cases involving minors, emphasizing the duty on perpetrators to be vigilant about age when exploiting individuals.*

[50] The case of **R v D'Souza** (2016) EWCA Crim 291; 2 Cr App R 12 (UK) involved the trafficking of vulnerable individuals under the UK's Modern Slavery Act 2015, with specific focus on the elements of control, coercion, and exploitation. The defendant exploited vulnerable individuals, including minors, who were manipulated into providing services with minimal freedom to cease. The court had to examine D'Souza's knowledge of the victim's age and vulnerability. England and Wales Court of Appeal found that a defendant's awareness of the risk that the victim was underage or vulnerable (even if not fully certain) could satisfy the requirement for recklessness. The court highlighted that vulnerability could increase the severity of the offense, particularly for minors, reinforcing the aggravated offense provisions in section 108 of Crimes Act.

[51] This case vindicates provisions in section 108 requiring proof of intent or recklessness concerning the victim's age in aggravated offenses, as this aligns with judicial interpretations in cases involving vulnerable groups in other commonwealth countries. These cases collectively support Fiji's framework in the Crimes Act 2009, particularly on aspects of consent, coercion, intent, recklessness, and aggravated offenses involving minors, consistent with broader commonwealth approaches to human trafficking and exploitation.

Analysis of facts

- [52] I shall now examine the appellant's complaint that there was insufficient evidence for the learned trial Judge to be convinced that it was the appellant's conduct which caused the complainant to enter into or remain in sexual servitude. What was disputed at the trial was whether the appellant by force or threat caused the victim to enter or remain in sexual servitude (section 104) and whether the appellant by his conduct intended or was reckless as to cause the complainant to so enter into or remain in sexual servitude (section 106).
- [53] The real issue is whether the prosecution had proved beyond reasonable doubt the existence of sexual servitude as defined in section 104. In other words, whether the complainant was in a condition of sexual servitude. If the elements in section 104(1) & (2) are not satisfied then the elements in section 106(1) cannot be proved, for section 106(1) requires an accused to intentionally cause or be reckless as to causing another to enter into or remain in the condition of sexual servitude as defined in section 104(1) & (2).
- [54] The trial judge had correctly concluded that it was not in dispute that at the relevant time the complainant provided sexual services for money. The complainant's account is that between 18 July 2015 and 22 July 2015, she had sex with many clients in exchange for money.
- [55] Thus, other crucial questions were whether there was any use of force or threats on the complainant as a result of which she was not free to cease providing sexual servitude or to leave the place or area where she provided sexual services. Put simply, was she in a condition of sexual servitude or was she merely a willing partner in this venture to earn money and did she not cease providing sexual services or leave the area due to reasons other than the appellant's force or threats.
- [56] The complainant's evidence was that she first met the appellant on the Saturday evening of 18 July 2015 in Nausori town. After a conversation she accompanied him to Samabula for a meal. They first went to Manoca in a taxi flagged down by him. From Manoca they returned to Nausori and boarded a minivan near the old bridge.

The appellant had told her to get on the van. She accompanied him and both got off at BSP, Samabula. She did not pay the fare but he paid the fare. After getting off the vehicle, they walked down to Gospel bus stop at Rewa Street. She saw other transgender people at the bus stop. While she was at the bus stop, a man approached them and had a conversation with the appellant. She saw the client pass something to the appellant in his hand and then went behind the bus stop. She was handed a packet of condoms by the appellant and told to follow the client to the vacant house behind the bus stop. She complied because she was afraid of the appellant. She said she was afraid of his appearance, that is, he had a hard face and a hard look.

- [57] On this evidence which the assessors in unanimity and the trial judge had accepted as truthful, it is clear that the appellant's conduct had caused the complainant to enter into sexual servitude and also he had clearly intended or if not, at least been reckless as to causing sexual servitude (section 106). I agree with the trial judge when he said in the judgment that the appellant's instructions to follow clients after handing condoms to her show his intention to use her for sexual services.

The interplay between sections 106(1) and 104 of Crimes Act 2009

- [58] The interplay between sections 106(1) and 104 of Crimes Act 2009 raises an important legal question: whether use of force or threats is required for both entry into and remaining in sexual servitude, or if it applies only to the latter. Section 106(1)(a) explicitly includes causing entry into sexual servitude. For an initial entry to qualify as sexual servitude under section 104, the condition must be imposed through force or threats. For example a person coerced through threats of violence into providing sexual services is in servitude from the outset and similarly, psychological manipulation (e.g., threats of deportation or financial ruin) at the time of entry satisfies the requirement.

- [59] Section 106(1)(a) also criminalizes conduct that causes a person to remain in sexual servitude. Once the individual is in servitude, their continued inability to leave or cease providing services must still be maintained by force or threats to qualify as servitude under section 104. For example, even if initial entry was consensual or voluntary, subsequent threats or use of force to prevent leaving transforms the situation into sexual servitude. The statutory language makes no distinction

suggesting that force or threats apply to only one phase (entry or remaining). Instead, both phases must meet the definition of sexual servitude in section 104. Force or threats must cause the condition of servitude, whether the person is entering or remaining.

[60] These provisions aim to protect individuals from exploitation, whether they are coerced from the start or later trapped in servitude through force or threats. A narrow interpretation that limits force or threats to only the "remaining" phase would leave gaps in protection and enforcement. Modern slavery laws recognize that servitude often involves a continuum of coercion. Initial consent or voluntariness may be vitiated by subsequent use of force or threats. Conversely, initial coercion does not necessarily imply continued servitude unless the condition is actively maintained.

[61] Case law and comparative jurisprudence.

Wei Tang

- *In this case, the High Court emphasized that servitude can arise from conditions at entry, during, or after commencement of work.*
- *The court highlighted that what matters is whether the individual was, at any time, deprived of their freedom due to coercion.*

R v K and Another

- *The court held that even if entry into exploitation was voluntary, subsequent restrictions on freedom through threats or force could create servitude.*
- *This aligns with a view that force or threats may apply at either the point of entry or the stage of remaining.*

Sieders; Somsri

The case illustrated that servitude could arise when individuals were initially misled (not coerced) into providing sexual services but were later prevented from leaving through psychological and financial manipulation.

[62] Thus, a person trafficked into Fiji under threats of harm or violence and forced into sexual services is in servitude from the outset. The use of force or threats establishes the condition at the point of entry. When a person willingly agrees to work in the sex industry but is later subjected to threats of deportation or violence if they attempt to leave, the servitude arises during the "remaining" phase due to force or threats. If force or threats are continuously applied to maintain the person's condition, both the

entry and remaining aspects are covered under sections 104 and 106. Force or threats under section 104 are essential elements of sexual servitude and apply to both entry into and remaining in servitude. Section 106(1) criminalizes conduct causing either condition, ensuring that the law addresses both the initial act of coercion and any continued deprivation of freedom. This interpretation aligns with the legislative intent to combat exploitation comprehensively and is consistent with Commonwealth jurisprudence.

[63] The complainant's evidence clearly suggests that she provided sexual services initially on the first day due to perceived use of force or threats in that she complied because she was afraid of the appellant and his appearance because he had a hard face and a hard look. For a 14 years old girl, who was alone in the night with only the appellant as her acquaintance and whose promise of a meal lured her to accompany him to Samabula, the appellant's conversation with a client who passed 'something' to him, and the appellant handing over a packet of condoms to her and instructed her to follow the client to a vacant house behind the bus stop coupled with his appearance would have been enough psychological manipulation and subtle intimidation to force her into sexual servitude. There is no evidence at all that the complainant agreed to come with the appellant to Samabula for the purpose of entering into sexual servitude by providing sexual services to the appellant's clients. What matters is the complainant's perception of her freedom to act independently considering the circumstances, her vulnerabilities, and the realistic consequences of not acceding to the appellant's instructions both at the entry point and remaining in sexual servitude. The complainant had clearly lost her autonomy irrespective of whether coercion emanated from direct or indirect threat, force or other forms which should be understood in light of the broader objective of protecting vulnerable individuals from coercion and exploitation. Equally clear is, that the complainant was compelled to enter into sexual servitude and provide sexual services by the above circumstance created by the appellant including fear, dependency, and lack of options and alternatives.

[64] The complainant had further said that on 18 July after she went to the vacant house on the appellant's instructions, she had sexual intercourse with the client. She had felt tired and pain and she also had empty stomach. After having sex she returned to the

appellant at the bus stop. She had said that it was the first time for her to be sold on the street. She had given two reasons for not walking away from the situation. She said she wanted money to repay her aunty for raising her and that she was also afraid of the appellant in case he might do something like assault or kill her because he had sold her for money. She returned to him at the bus stop on his instruction. She knew that the client had given money to him for having sex with her. She had said she received a portion of money from the appellant when she returned to the bus stop after having sex but she cannot recall the exact amount.

[65] From the bus stop the complainant accompanied the appellant to the Samabula Hot Bread Kitchen by foot on his instruction. While they were at the bakery, a taxi driver approached her and after a conversation she boarded the taxi and went to a secluded location where she had sex with the driver in exchange for money. She said although she was tired she had sex so that she could get money for her and the appellant. She said she hid the money in her bra as she was afraid that he might take all of it. She was dropped off at the bakery where the appellant was waiting. He had told her to come back to him. She said she returned to him because she was afraid of him. She said she followed his instructions because she feared his appearance. He asked her for money she had earned and she gave some of it to him.

[66] On Sunday (19 July 2015) the complainant spent the day with the appellant's family at his home. The following evening, 20 July 2015 (Monday), the appellant groomed the complainant by doing her hair and makeup. She wore a mini skirt and a tight top chosen by him. She thinks he groomed her to make her look older. They left home at about 7.00pm and walked to the main road where they boarded a vehicle and arrived at Rishikul bus stop. She got on the vehicle because the appellant told her that he knew the driver. After getting off at Rishikul bus stop, the appellant flagged down a minivan and told the complainant to board the van. He accompanied her on the van and both got off at Samabula and walked to the Gospel bus stop at Rewa Street. While they were at the bus stop, a vehicle (Pajero) stopped. She saw the appellant have a conversation with the driver, after which he handed her a condom and told her to get on the vehicle. She accompanied the driver to a motel and had sex in exchange for money. She was dropped off at the same bus stop after sex where the appellant was waiting. The appellant told her to come back to the same spot. She shared some of the

money that she got from the client with him while she hid some in her bra for herself as she was afraid that the appellant might take all of it

[67] While she was still at Rewa Street, another vehicle stopped. She got in the vehicle and went to a secluded location and had sex with the driver in exchange for money. When she returned, she gave a portion of money to the appellant. They then walked to the main road at Samabula and boarded a minivan to Nakasi. They got off at Nakasi and after buying fish and chips, they boarded another vehicle to Dilkusha. They got off at Waila Service Station and walked to the appellant's aunt's house. She accompanied him to Waila because she was afraid of him. She was afraid to escape because he had threatened her on the evening of 20 July 2015 when she returned to Rewa Street after sex with the first client (Pajero driver) that evening by saying "not to be cunning towards him because he has a lot of transgender friends who can run after her and assault her". She spent the night and the day in Waila with the appellant and his family.

[68] On the evening of 22 July 2015, the appellant groomed the complainant again in the similar manner as the previous occasion so that they could go back to Rewa Street. They walked to Lelean where they boarded a minivan and got off at Samabula. They returned to the same bus stop at Rewa Street. While they were sitting at the bus stop a twin cab stopped. She heard the driver saying that she looked young but the appellant told him she was not. She heard him telling the driver to take her. She boarded the vehicle and she heard the appellant telling the driver to drop her off at the same spot. The driver of the twin cab took the complainant to a house and had sex with her in exchange for money. After sex he dropped her back at the bus stop where the appellant was waiting. When she got off, he asked her about the money but she lied to him saying the client had given the money to him. She said she was tired of doing the work while he was sitting at the bus stop. While they were sitting at the bus stop, a taxi stopped. The appellant passed a condom to her and told her to get on the taxi. She accompanied the driver to a motel and had sex in exchange for money. After sex the driver dropped her off at the same bus stop from where she was picked up. She did not share the money with the appellant. When she returned to the bus stop the appellant was waiting. They decided to go to Suva city. They got on a vehicle and came to a nightclub. She was spotted outside a club by a police officer who took her

to Totogo Police Station. She said she lied to the police regarding her presence outside the club because she was afraid of the repercussions of going back home after being missing from home.

[69] In the early hours of 23 July 2015, SC Kelemedi spotted the complainant loitering near a club at Caravon Street. The complainant got the officer's attention because she was a small child. He did not see the appellant with the complainant. He took the complainant to Totogo Police Station.

[70] This testimony of the complainant when believed provide ample evidence that the appellant at all times from her initial entry into sexual servitude until 23 July 2015 was substantially in control of her movements not only arranging clients but also making sure that she would return to him and prepared her for her to provide sexual services for money. The totality of her narrative also unequivocally demonstrates that her freedom to cease providing sexual services or to leave the place or area of her providing sexual services had been significantly limited due to the circumstances created by the appellant in which she lived that prevented or seriously inhibited her from taking either of the actions as a result of the appellant's possible overt and covert use of force or subtle threats. His imposing figure and direct and subtle threats of force had been omnipresent all the time. The fact that use of force or threats did not eventually materialize is immaterial. What is necessary is that they were a cause for the complainant not to cease providing sexual services or leave the place or area of her providing sexual services. On the other hand, the actual or possible use of force or threats need not have been the sole cause of her not taking action to cease providing sexual services or to leave the place or area of her proving sexual services. It is sufficient if the explicit or surreptitious use of force or subtle threats as perceived by the complainant were a cause for her not to cease providing sexual services or to leave the place or area of her proving sexual services.

[71] I shall now examine the final element that the prosecution had to prove *i.e.* whether the appellant intended to commit or was reckless as to committing sexual servitude against a person under 18.

[72] It is not in dispute that the complainant was 14 at the relevant time though her age was taken as 15 during the trial. SC Kelemedi rescued the complainant from the street on the early hours of 23 July 2015 and took her to Totogo Police Station because she was a child. On two occasions the appellant groomed her to look older before she was taken to Rewa Street by him to provide sexual services. When a potential client suggested that she looked young, the appellant remarked that she was not. Thus, I have no doubt that the appellant intended to commit or if not, was at least reckless in committing sexual servitude against the complainant who was just 14 of years of age. He knew that she was under 18 or at least was aware of the risk but continued with his actions.

[73] Therefore, in summary, I agree with the trial judge's following conclusions in his judgment regarding all elements of aggravated sexual servitude.

'[8] It is not in dispute that the complainant was a child at the relevant time. She was about 15 years of age. The Accused in his evidence has said that he was not aware of the age of the complainant but he has not suggested that he honestly and reasonably believed that the complainant was over the age of 18 years. I accept the evidence of SC Kelemedi who rescued the complainant from the street on the early hours of 23 July 2015 and took her to Totogo Police Station because she was a child. I accept the evidence of the complainant that on two occasions the Accused groomed her to look older before she was taken to Rewa Street by him. I accept the evidence of the complainant that when a potential client suggested that she looked young, the Accused remarked that she was not. I find the Accused knew that the complainant was a child at the relevant time. I feel sure that in respect of each charge the prosecution has proved that the complainant was a child.

[9] It is not in dispute that at the relevant time the complainant provided sexual service for money. The complainant's account is that between 18 July 2015 and 22 July 2015, she had sex with many clients in exchange for money, some of which she gave it to the Accused as part of his share. I feel sure that the prosecution has proved that the complainant entered into a condition to provide sexual service for money at Rewa Street on 18 July 2015 and that she remained in that condition until 23 July 2015 when she was rescued by a police officer.

[10] I believe the complainant's account that she was initially lured by the Accused to accompany him from Nausori to Samabula in the pretext of having a meal on the night of 18 July 2015. I believe her account that on all occasions the Accused accompanied her on the same vehicle as hers from Nausori to Samabula for her to provide sexual services from a location at Rewa Street. This particular location which the complainant described as the Gospel bus stop was a pick up point for the clients for sexual services and is frequented by sex workers. I believe

the complainant's account that the Accused created a condition for her to provide sexual services at the relevant time. I believe her account that he controlled that condition by giving instructions, which she perceived as force or threat. His instructions to follow clients after handing condom to her show his intention to use her for sexual services.

[11] I believe the account of the complainant that she was afraid of the Accused's physical appearance despite him not using any physical force. On one occasion he accused her of being cunning and threatened her with assault by his transgender friends. It is not necessary for the prosecution to prove that the complainant was physically restrained from leaving the area where she provided the sexual service. Force or threats can be shuttle to create a condition of sexual servitude. The question is whether the Accused by his conduct caused the complainant to believe that she was not free to cease providing sexual service or that she was not free to leave the place where she provided the service.

[12] I believe the complainant's account that on all occasions after providing sexual services she returned to the Accused on his instructions. She described her condition as "a slave to look for money". I find that the child complainant honestly and reasonably believed that the threat of force in the form of control and instructions were real and that she was not free to cease providing sexual service or was not free to leave the place or area where she provided the service.

[13] On the charge of sexual servitude I feel sure that between 18 July 2015 and 22 July 2015, the Accused by use of a threat of force caused the complainant who was a child to enter into or remain in a condition to provide commercial sexual service and that he intended to cause that sexual servitude. I find the Accused guilty of sexual servitude as charged on count one.

(emphasis mine)

Appellant's defense

[74] In a nutshell, the appellant's defence was that the complainant had tagged along with him to Suva at night on her own free will. He denied making arrangements and taking payments from the complainant's clients in return for her providing sexual services. He felt sorry for her and invited her to stay at his house. They shared rides together on some days. He tried to ask the complainant to return to her home but she refused. He tried to reach out to the complainant's mother to inform her about the complainant. He did not see the complainant again after 22 July 2015.

[75] The appellant admits that there are conflicting versions from the complainant and the appellant on how the complainant arrived at Samabula, Suva on the night of 18 July

2015 and what happened till 23 July 2015. The assessors and the learned trial judge believed the complainant's account.

[76] I have examined the appellant's written submissions in paragraph 3.18 to 3.19 on the 'complainant's entry into sexual servitude', 3.20 & 3.21 and 3.22 to 3.30 on 'force and threats', 3.31 to 3.36 on 'controlling conditions for sexual servitude and freedom to cease/leave' and 3.37 to 3.39 on 'credibility of the complainant'. All these propositions were matters for the fact finders namely the assessors and the trial judge both of whom have rejected them by accepting the complainant's version of events. I see no reason to interfere with their finding of fact which was quite reasonably open to them on evidence. However, I shall still consider a matter of law raised by the appellant.

'Consent' or 'willing partner in the venture'

[77] The appellant submits based on **Raikadroka v State** [2020] FJCA 12; AAU80.2014 (27 February 2020) that it may be reasonably argued that consent on the part of the victim may negate criminal liability and that the complainant was a willing partner in the venture to earn money. What ***Raikadroka*** refers to is genuine and informed consent and not pseudo consent. That the complainant consented or that she was a willing partner in the venture were not part of the appellant's defence at the trial, for his was one of denial as far as sexual servitude was concerned. He had denied both the physical and fault elements of the alleged offences. He also had given an innocent explanation regarding his association with the complainant during the relevant period and said that those parts of his cautioned statement (Q.136 onwards) in his record of interview that incriminates him were fabricated by the investigating officer. Both positions were rejected by the assessors and the trial judge.

[78] Consent generally refers to a voluntary agreement to an act or condition, made free from coercion, undue influence, or deception. In the context of sexual servitude, consent must be informed and free and coercion through force or threats negates consent. I have no doubt that the alleged consent, if any, on that part of the complainant was neither informed nor free. If there was consent, it was obtained by the appellant through deception and false promise. He intentionally or knowingly

exploited the complainant's young age and lack of maturity among other things in terms of her ability to making an informed decision, to lure her to accompany him to Samabula under the pretext of a meal in order to cause her to enter into sexual servitude and remain in it which he ensured by direct and indirect threat of force. Thus, there was no genuine consent on her part at all.

[79] Sexual servitude is defined in section 104 as a condition where a person, because of the use of force or threats (a) is not free to cease providing sexual services; or (b) is not free to leave the place or area where the services are provided. This suggests that force or threats vitiate consent. Even if an individual initially agrees to provide sexual services, any subsequent force or threats that undermine their ability to leave or stop work nullifies that consent.

[80] Section 106 criminalizes conduct causing a person to enter into or remain in sexual servitude. The language does not include consent as a defense, focusing instead on whether the condition of servitude exists as defined in section 104. 'Without consent' is not an element of sexual servitude unlike for example the offence of rape.

[81] Initial Consent, continuing consent & consent to enter vs. remaining.

***Initial consent-** initial consent to provide sexual services does not bar a finding of servitude if the condition of servitude later arises due to force or threats. For example a person agrees to work in a brothel voluntarily but is later threatened with deportation or harm if they stop. At this point, the condition of servitude is created, and the earlier consent is irrelevant.*

***Continuing consent** - once force or threats are introduced, any continued provision of sexual services is considered coerced, even if the individual appears to "consent" in practice. Courts will focus on whether the individual had the practical freedom to leave or stop working, rather than their outward behavior.*

***Consent to enter vs. Remaining** - the law treats entry into servitude differently from the condition of remaining in servitude. If force or threats are used only after entry, the initial consent to enter does not preclude a finding of servitude once coercion begins. Conversely, if a person freely consents to both entry and continued work without force or threats, the condition of servitude may not be established.*

[82] Commonwealth jurisprudence on consent in sexual servitude cases.

1. Wei Tang

- *The High Court of Australia held that even if individuals initially consented to work in the sex industry, their later lack of freedom to leave or stop working due to debt bondage and supervision amounted to servitude.*
- *Consent was not a defense once coercive conditions were established.*
- *Absence of consent is not a necessary attribute of slavery and consent is not necessarily .*

2. Sieders; Somsri

- *The victims in this case initially agreed to travel to Australia to work. However, their consent was rendered meaningless when they were subjected to exploitative conditions, including threats of deportation and economic coercion.*
- *The court ruled that consent is irrelevant if the elements of servitude—force or threats removing freedom—are proven.*

3. R v K and Another

- *The court emphasized that the perception of the victim matters. If the victim feels they cannot leave or stop working due to threats or coercion, their apparent consent is not genuine.*

[83] Consent as a defense to sexual servitude charges.

1. Statutory silence on consent - neither section 104 nor section 106 explicitly addresses consent as a defense. This implies that the existence of sexual servitude hinges on objective conditions (force, threats, and lack of freedom) rather than subjective issues like consent.

2. Practical impossibility of genuine consent - in cases of sexual servitude, genuine consent is practically impossible where coercive factors are present. Threats of harm or deportation, economic dependence, or psychological manipulation undermine any claim of free and informed consent.

3. Burden of Proof

- *The prosecution must prove the existence of sexual servitude (force or threats leading to lack of freedom).*
- *The defense may attempt to argue that the alleged victim consented, but this will fail if the prosecution establishes coercion.*

[84] Modern laws on servitude adopt a victim-centered approach, recognizing that apparent consent is often the result of manipulation or fear and courts must consider the broader context, including the victim's vulnerabilities (e.g., immigration status, economic dependency). Allowing consent as a defense would undermine the legislative intent of combatting exploitation, as traffickers could manipulate

individuals into giving apparent consent. International instruments, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), emphasize that consent is irrelevant where coercion, deception, or abuse of power is present. Therefore, in the context of sexual servitude under the Crimes Act 2009, consent is not a defense where the prosecution establishes the use of force or threats leading to a lack of freedom to cease work or leave. The focus is on the existence of coercion and the victim's inability to exercise autonomy, rather than their apparent agreement to work. This aligns with Commonwealth jurisprudence and international norms, ensuring robust protections against exploitation.

[85] In *Yotchomchin*, the defense argued that the women had voluntarily agreed to work in the sex industry and were aware of the debt arrangements. The court ruled that initial consent was irrelevant where the women were subsequently subjected to exploitative conditions that deprived them of meaningful freedom. Even if victims initially agree to work, subsequent exploitation that undermines their freedom to leave negates any claim of consent. The court emphasized that freedom must be real and practical, not theoretical.

[86] Therefore, the complainant's evidence in re-examination that it became sweet for her to look for money like that on the street and it was also easier and she chose to follow her friends around rather than going to school and she made choices to enter and remain providing sexual services in order to receive money, would not negate the appellant's criminal liability for sexual servitude in the light of the totality of the complainant's evidence, the appellant's defense of denial and the true construction of section 106 read with 104 of the Crimes Act 2009 viewed and interpreted in light of Commonwealth jurisprudence and international norms, ensuring robust protections against exploitation.

Is the verdict unreasonable or cannot be supported by evidence?

[87] When examining whether a verdict is unreasonable or cannot be supported by evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of

other evidence including defence evidence, the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt which is to say whether the assessors *must* as distinct from *might*, have entertained a reasonable doubt about the appellant's guilt⁵. The same test could be applied *mutatis mutandis* to a trial by a Judge alone (without assessors) or a Magistrate.⁶

[88] Having read the transcript, keeping in mind the above guiding principles, I have no doubt that it was clearly open to the assessors and the trial judge, being the ultimate judges of facts and law, to have reasonably arrived at a verdict of guilty against the appellant. The appellant has not pointed out any material inconsistencies, discrepancies, omissions, improbabilities or other such inadequacies of the complainant's evidence which would make the verdict unreasonable or 'cannot be supported having regard to evidence' even in the light of defence evidence.

[89] I am convinced that the view which the trial judge took was one which could reasonably have been taken on the totality of evidence. As Keith, J said in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018)

'[72].....The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'

[90] In **Pell v The Queen** [2020] HCA 12 it was held that in a criminal case, the prosecution is required to prove the case beyond all reasonable doubt and if there is any evidence that would raise doubt, then the accused cannot be convicted, however, the prosecution is not required to prove the guilt of the accused "beyond any possible doubt" but only beyond reasonable doubt. I have no doubt, that the prosecution has accomplished its task to this criminal standard in this case. In coming to this

⁵ **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)

⁶ **Filippou v The Queen** (2015) 256 CLR 47

conclusion, while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses⁷, I have evaluated the evidence and made an independent assessment thereof⁸. I am fully convinced that the trial judge could have reasonably convicted the appellant on the evidence before him⁹.

[91] Further, in the judgment, the trial judge had directed himself according to the summing-up. When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter¹⁰. Nevertheless, the trial judge had independently analyzed, given his mind to all crucial issues of law and facts and provided cogent reasons in agreeing with the assessors.

[92] Moreover, the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision even when he disagrees with the majority of assessors as long as he had directed himself along the lines of his summing-up to the assessors, for it could reasonably be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge [vide *Fraser*].

⁷ **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024); **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)

⁸ **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012)

⁹ **Kaiyum v State** [2013] FJCA 146; AAYU 71 of 2012 (14 March 2013)

¹⁰ **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)

Clark, JA

[93] I have read the comprehensive judgment of Honourable Prematilaka, RJA and concur in the reasoning and orders made.

Winter, JA

[94] I agree with this judgment. However I feel compelled to add a small commentary below;

When considering crimes of child trafficking and sexual servitude all too often we are confronted by the big picture of desperate migrants trapped into sexual slavery. I completely endorse my brother Prematilaka's judgment however feel compelled to add that this headline grabbing crime can equally happen in the backstreets of home, for as State counsel reminded the court, prostitutes are not born they are made. This appeal illustrates that well.

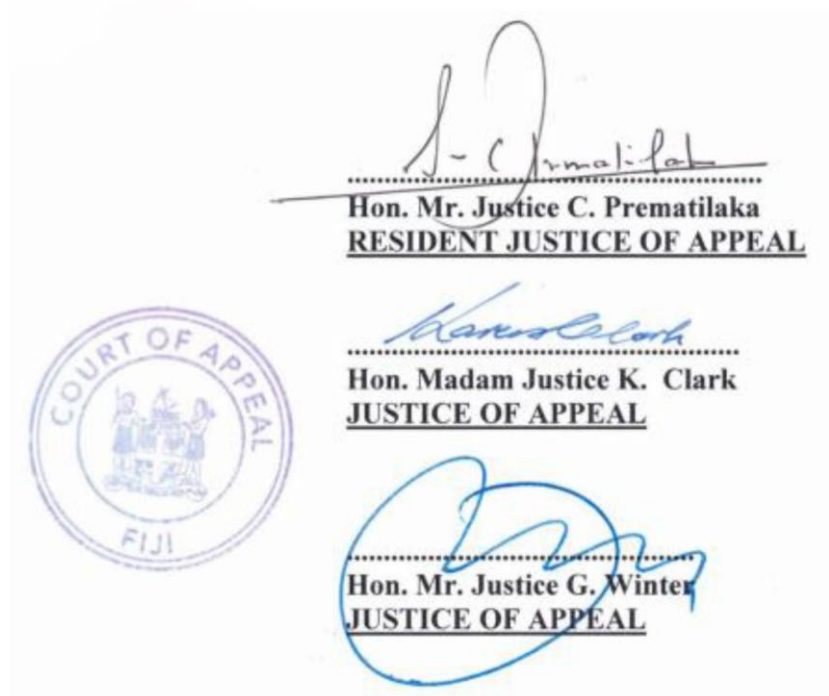
Judged objectively, a poor, lonely, hungry child, a 14 year old girl was lured by the promise of a meal to accompany the appellant to Samabula where enticed by the promise of money and threatened by his 'hard face' the child was told to follow a stranger, her first 'client,' to a vacant house behind a bus stop where that client could gratify his sexual urges and pay for his pleasure.

I agree entirely with my brother that what matters is this 14- year-old child's perception of these events. The appellant lured her, enticed, and entrapped her to have sex with a stranger. The appellant then used her, controlled her, made her fearful, his dominance of her increasing as he exploited her vulnerability and relieved her poverty and hunger and loneliness by trapping her into a life dependent on small money earnt from strangers sometimes paying the appellant for her sexual services.

As the appellant did so, surely, just as the hustler exploits another's vulnerability by trapping poor migrants into the commercial use of their bodies for sexual gratification of others, in a similar way, so did the appellant exploit this 14 year old girl from the back streets of Suva, when he made her a prostitute.

Order of Court

1. Appellant's appeal is dismissed.



Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent