

The WARNATH GROUP

# **RESPONDING TO HUMAN TRAFFICKING**

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**MARCH, 2020**

## **HANDBOOK**



This training was funded by a cooperative agreement from the United States Department of State. The opinions, findings, and conclusions stated herein are those of the authors and do not necessarily reflect those of the United States Department of State.



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**Responding to Human Trafficking Workshop for  
Fijian and Tongan Front Line Officers  
Suva, Fiji – March 9 - 11, 2020**

**AGENDA**

**Day 1 – March 9, 2020**

**Introduction**

08:30 - 09:00	Registration
09:00 - 09:20	Welcome and Opening Remarks
09:20 - 09:50	Introductions Workshop Course Overview and Objectives Day 1 Pre-Course Learning Assessment
09:50 - 10:15	Discussion: Obstacles to Investigating TIP cases in Fiji and Tonga
10:15 - 10:30	<i>Coffee Break and Group Photo</i>

**Module 1: Human Trafficking Law**

10:30 - 11:00	Presentation: International Law on TIP Elements of TIP Short Case Studies (Clicker Exercises) - Part 1
11:00 - 12:00	Presentation by ODPP Experts: Fijian Law on TIP
12:00 - 13:00	<i>Lunch</i>
12:45 to 13:00	<i>(during lunch) Tongan participants only – Presentation on Tongan Law</i>
13:00 - 13:45	Elements of TIP Short Case Studies (Clicker Exercises) -Part 2
13:45 - 14:30	Discussion: Victim Identification
14:30 - 15:15	Small group work: Analysis Tamatoa Family Case Study
15:15 - 15:30	<i>Coffee Break</i>
15:30 - 16:30	Feedback: Tamatoa Family Case Study
16:30 - 17:00	Wrap up: Day 1 Post-Course Learning Assessment Q & A

**Responding to Human Trafficking Workshop  
Day 2 – March 10, 2020**

**Welcome Activities**

- 09:00 - 09:20            Brainstorm: Review
- 09:20 - 09:30            Day 2 Pre-Course Learning Assessment

**Module 2: Human Trafficking Indicators**

- 09:30 - 10:00            Discussion: Indicators of Trafficking
- 10:00 - 10:15            *Coffee Break*
- 10:15 - 10:45            Small Group Work: Indicator Short Case Study Scenarios
- 10:45 - 11:30            Feedback: Indicator Short Case Study Scenarios

**Module 3: Initial Interview**

- 11:30 - 12:00            Discussion: The Initial Interview
- 12:00 - 13:00            *Lunch*
- 13:00 - 14:00            Presentation: Victim Psychology and Support
- 14:00 - 15:00            Presentation: Overview of the Initial Interview
- 15:00 - 15:15            *Coffee Break*
- 15:15 - 15:45            Exercise: Establishing Rapport
- 15:45 - 16:30            Exercise: Active Listening
- 16:30 - 17:00            Wrap up: Day 2 Post-Course Learning Assessment  
Q & A

**Responding to Human Trafficking Workshop  
Day 3 – March 11, 2020**

**Welcome Activities**

09:00 - 09:30          Brainstorm: Review

**Module 3: Initial Interview Continued**

09:30 - 10:00          Discussion: Screening Questions for Initial Interview

10:00 - 10:45          Small Group Work: Developing Screening Questions

10:45 - 11:00          *Coffee Break*

11:00 - 11:30          Feedback: Developing Screening Questions

11:30 - 12:00          Exercise: Preparation for Mock Victim Interview

12:00 - 13:00          *Lunch*

13:00 - 14:45          Exercise: Mock Initial Interview

14:45 - 15:00          *Coffee Break*

**Module Four: Local Practice**

15:00 - 16:00          Discussion: TIP Case Procedures, Referrals and Cooperation  
with Victim Service Providers

16:00 - 16:30          Wrap up: Presentation: Post-Training Information  
Q & A  
Course Evaluation

16:30 - 17:00          Closing Remarks  
Presentation of Course Certificates

# The WARNATH GROUP

## **ABOUT THE WARNATH GROUP**

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The Warnath Group, LLC provides strategic advisory services, customized training, and professional/technical skill development to advance work by government, business, philanthropy, international organizations and private industry regarding human trafficking, rule of law, humanitarian issues, and global women's leadership and empowerment. The Warnath Group works with leaders in countries throughout the world to design and implement strategies, laws, policies, and programs to address these issues more effectively and appropriately.

The Warnath Group (WG) team includes among the foremost professionals working on the issue of human trafficking in the world. Our trainers and advisors have served at the forefront of the development of law and policy on these and related issues around the world. The depth and breadth of specialized expertise that we bring to our work on this issue spans nearly two decades. Our collective experience includes advising governments at the highest levels and training (and developing training material) for many hundreds of law enforcement and other professionals.

WG's trainers and advisors include former high-ranking government officials, police, prosecutors and judges as well as prominent and award-winning experts in providing legal assistance and other care to those who have escaped human trafficking. The WG team includes former White House staff; former officials from the U.S. Department of Justice (particularly former prosecutors) and Department of State; former State Attorneys General (with experience addressing human trafficking and victims of crime issues); sitting members of the state and federal judiciary who have presided over human trafficking cases; attorneys who have served as counsel representing victims of human trafficking and working with NGOs to advance the rights of victims; and experts in victim service provision who conduct research and analysis on human trafficking and collaborations between NGOs, law enforcement and other government officials.

The Warnath Group has been funded by the U.S. State Department to provide training and technical assistance to government officials, law enforcement, victim service providers and other professionals combating human trafficking in countries around the world for nearly a decade.

The head of the Warnath Group is Stephen Warnath who has worked to bring about policy, legal and social change to abolish contemporary forms of slavery for over twenty years. These efforts grew out

of serving on the staff of the White House where his portfolio of justice policy issues included matters ranging from migration and refugees to civil rights and exploitation crimes. He also led the White House's interagency policy development of many of the Executive Orders. Later, he moved to the U.S. State Department and participated in the creation of seminal anti-trafficking instruments, including as a senior member of the U.S. delegation negotiating the U.N. Palermo Protocol and as an architect of development of the U.S. anti-trafficking law. Subsequently he worked for several years with the Organization for Security and Co-operation in Europe (OSCE) in Vienna serving as Chief of Staff of the Stability Pact Task Force on Trafficking in Human Beings (where, among other things, he participated in negotiations of the Council of Europe Convention on Action against Trafficking in Human Beings and the development of laws, policies and national action plans in many countries of South East Europe).

Mr. Warnath is also the founder and President of the NEXUS Institute, a policy and action-based research center on human rights and rule of law, specializing in research and analysis to identifying best practices to combat human trafficking ([www.NEXUSInstitute.net](http://www.NEXUSInstitute.net)). He is a co-author of a casebook on the law and policy of human trafficking. Before his public service in the government, Mr. Warnath was a litigation partner at a law firm in Washington D.C. He is a graduate of Harvard Law School and Brown University.

For more information, please contact us at:

The Warnath Group  
1440 G St NW, Suite 9118  
Washington, D.C. 20005  
[info@WarnathGroup.com](mailto:info@WarnathGroup.com)  
+1 301-857-7842

## **ABOUT THE WARNATH GROUP TEAM**

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**Albert Moskowitz, J.D., M.A.** is a specialist trainer on human trafficking investigations, prosecutions and adjudications with the Warnath Group team. From 1999 to 2005, Mr. Moskowitz served as Chief overseeing the Criminal Section of the Civil Rights Division in the US Department of Justice (DOJ). In this position Mr. Moskowitz supervised federal prosecutions of human trafficking cases. His tenure saw a dramatic increase in the number of human trafficking cases investigated and successfully prosecuted. Mr. Moskowitz spearheaded the implementation of a victim-centered approach to human trafficking prosecutions. From 1992 to 1998 Mr. Moskowitz was Deputy Chief of the DOJ section he would later lead, overseeing a team of 26 trial attorneys and handling the section's most sensitive cases and obtaining a landmark Supreme Court decision upholding the sexual assault prosecution of a Tennessee State Court judge. Before that Mr. Moskowitz spent eight years as a trial attorney in that same section, prior to which he had served as a trial attorney in the federal public defender's office in the Western District of Missouri.

Mr. Moskowitz has years of international experience training and mentoring criminal justice actors, especially prosecutors, around the world. In South East Asia he served as judicial and prosecutorial advisor on AUSAID's Asia Regional Trafficking in Persons Project (ARTIP), overseeing the project's initiative to strengthen prosecutorial and judicial response to human trafficking in the ASEAN region.

Mr. Moskowitz's extensive international legal experience also includes serving as Legal Advisor to the International Criminal Tribunal for the Former Yugoslavia (ICTY), conducting war crimes investigations and prosecutions. From 2006 to 2007, Mr. Moskowitz was Director of the Department of Justice at the UN Mission in Kosovo (UNMIK), overseeing all aspects of the justice effort in Kosovo, including international prosecutions of major corruption and organized crime cases.

Mr. Moskowitz received his J.D. from the University of Missouri at Kansas City School of Law in 1978, and his M.A. in English Literature from the University of Michigan at Ann Arbor in 1972.

**Willem Pretorius** is an experienced manager of anti-trafficking projects and leader of multidisciplinary and multinational teams. He has over 17 years' experience on both trafficking and criminal justice projects for the Department of Foreign Affairs and Trade (DFAT) – Australia, the Australian Agency for International Development (AusAID), the International Organisation for Migration (IOM) and the United Nations High Commission for Refugees (UNHCR).

Prior to working internationally Mr. Pretorius was a police officer in the South African Police Service for 19 years and worked in a variety of positions including investigation of crime and training and development. When he resigned from the South African Police Service, he held the rank of Colonel. He recently completed a job as the Deputy Team Leader of the successful AUD \$50 million Australia-Asia Program to Combat Trafficking in

Persons (AAPTIP 2013-2018). Prior to that, he was the Team Leader for the Asia Regional Trafficking in Persons Project (ARTIP 2006-2013).

Mr. Pretorius is currently employed as the Deputy Team Leader of the European Union funded Support to the Reform of the Myanmar Police Force (MYPOL) project. He is a technical expert in the area of criminal justice reform, anti-trafficking, law enforcement and technical and management training. He possesses an excellent understanding of the key human rights, gender and law enforcement implications of trafficking gained through his leadership roles in aid projects. He has substantial experience in the management of national and international teams of consultants in multiple countries in the implementation, monitoring and evaluation of programs and is adept at the design, development and delivery of capacity-building interventions. He has worked in multi-stakeholder environments, across several regions, and possesses the interpersonal and consultative skills to facilitate and motivate team members and counterparts to achieve results.

Mr. Pretorius has a Graduate degree in Human Resource Management and a Master of Business Administration.

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## Human Trafficking and International Law

### Fiji March 2020



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### WHAT is Human Trafficking?

- Extreme exploitation of one person by another
- Violation of a person's human rights – modern day slavery
- Legal definitions will be discussed in detail:
  - International law
  - Fijian law
  - Tongan law

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### WHERE does trafficking occur?

- It happens in the United States
- It happens in Fiji and Tonga
- It happens **all around the world**



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**WHO are the traffickers?**

- Neighbors, friends, family members
- Business owners
- Diplomats and governments
- Organized crime rings /gangs
- Pimps
- Labor recruiters
- Men and/or women



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**WHO are Victims?**

- Men, women, children
- All ages, nationalities, genders
- Citizens
- Non-citizens with or without legal status
- Any class and any level of education
- Any income level

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**HOW are people exploited?**

**USE OF  
FORCE, FRAUD OR COERCION**

A SMALL sample of some of the common tactics used by traffickers (many others exist):

- False Promise (kind of work)
- False Promise (quantity or quality of work and/or living conditions)
- Abduction
- Debt Bondage
- Unscrupulous Labor Brokers
- False Romance (trafficker pretends to "love" victim to gain control over the victim)
- False Religious / Spiritual Leadership (trafficker exploits followers)
- Child Labor/Child Sexual Exploitation
- Addiction

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**WHERE are trafficked persons forced to work?**

**ANYWHERE AND EVERYWHERE**

- Brothels
- Homes
- Tourism & Hotels
- Fishing Boats, Farms, Fields
- Construction
- Drug Transportation, Drug Peddling
- Restaurants, Bars, Markets,



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**Vulnerability Factors**

- Desire for a better life for self and family
- Poverty
- Fewer choices/opportunities
- Inequality
- Lack of access to education
- Familial domestic violence/abuse
- Discrimination
- Disability
- Country conditions
- Natural disaster

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**What are People Seeking?**

- Economic stability
- Ability to help family
- More opportunity
- Better job
- Improved living situation

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**Trafficking in Human Beings is:**

“ . . . the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception of the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

*(Art. 3, UN Trafficking in Persons Protocol)*

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**Elements**

- **ACT** - the recruitment, transportation, transfer; harboring or receipt of persons
- **MEANS** - by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception of the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person
- **PURPOSE** - for the purpose of exploitation

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**Elements of Trafficking**

***The ACT***

***(Action related to the Victim)***

*ONLY NEED TO SHOW ONE OF THE FOLLOWING:*

- Recruitment
- Transporting
- Transfer
- Harboring
- Receipt

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**The MEANS**

**(How the Trafficker gets the Victim to do what the Trafficker wants)**

- Threat or use of force
- Coercion - physical or psychological
- Abduction
- Fraud or deception
- Abuse of (trafficker's) power
- Abuse of (victim's) position of vulnerability
- Giving a third party (often a victim's parent or guardian) a benefit or payment in exchange for control over the victim
- Receiving (from a trafficker) a benefit or payment in exchange for consenting to let someone else take control of the victim.

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**The PURPOSE**

**(What Trafficker has the Victim do)**

for **EXPLOITATION**:

- Sexual exploitation (including child sex tourism)
- Forced labor
- Slavery
- Slavery-like practices
- Removal of organs
- Other forms of exploitation

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**Victim's Consent is not a Defense**

The consent of a victim of trafficking in persons to the intended exploitation . . . shall be irrelevant where any of the means (threat or use of force, deception, coercion or abuse of power) has been used.

*UN Trafficking in Persons Protocol, Art. 3(b)*

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**The special situation of children:**

**Act + Exploitation = Trafficking**  
**(“means” not necessary)**

*UN Trafficking in Persons Protocol, Art. 3(c)*

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**Examples of Types of Trafficking**

- Sex Trafficking
  - Forced prostitution of another
  - Child sex tourism
  - Temporary “girlfriend” status aboard fishing vessels
- Domestic Servitude
- Forced Labor
  - Fishing
  - Agriculture
  - Construction
  - Service industry (hotel, restaurant, stores)
- Use in Criminal Activity
  - Sell drugs
  - Transport drugs
- Debt Bondage

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**Victim Rights**

- Non-criminalization / non-punishment
- No detention
- Physical protection (*UN Trafficking in Persons Protocol, Art. 6(5)*)
- Housing, food, medical treatment
- Protection of privacy (*UN Trafficking in Persons Protocol, Art. 6(1)*)
- Information on court proceedings and their legal rights (*UN Trafficking in Persons Protocol, Arts. 6(2)(a) and 6(3)(b)*)
- Legal assistance and right to participate (*UN Trafficking in Persons Protocol, Art. 6(2)(a)*)
- Compensation for damages (*UN Trafficking in Persons Protocol, Art. 6(6)*)

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**Child Victim:  
Special Considerations**

- Best interests of the child
- Presumption of age (minor)
- Appointment of a guardian
- Interviewing the child victim
  - In presence of appropriate guardian
- Protection at trial
  - Consider having child testify via video link

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**Smuggling of Migrants is:**

**“ . . . the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”**

*(Art. 3, UN Migrant Smuggling Protocol)*

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**Elements of Migrant Smuggling**

- Assisting a person;
- Across an international border;
- The border crossing must be illegal;
- The smuggler’s purpose is to make a profit from moving the migrant across the border.

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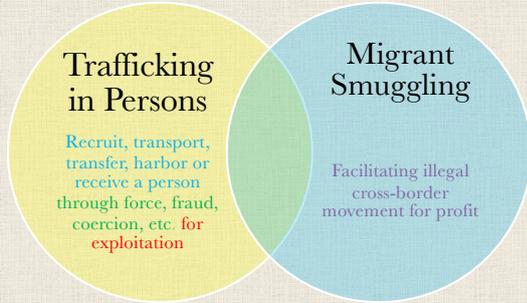
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## Compare & Contrast



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## Human Trafficking and International Law

### *KEY POINTS*

- Human trafficking is about EXPLOITATION
- Trafficking elements: Act-Means-Purpose
- Children have extra protection from exploitation (no means required)
- Trafficking victims have protections and rights
- Human smuggling and human trafficking are different crimes

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*CRIMES ACT 2009*

*Division 5 — Slavery, Sexual Servitude and Deceptive Recruiting*

*Definition of slavery*

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.

*Slavery offences*

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.

(2) A person who —

(a) whether within or outside Fiji —

(i) enters into any commercial transaction involving a slave; or

(ii) exercises control or direction over, or provides finance for, any commercial transaction involving a slave; or

(iii) exercises control or direction over, or provides finance for, any act of slave trading; and

(b) is reckless as to whether the transaction or act involves a slave, slavery or slave trading;

commits an indictable offence.

Penalty — Imprisonment for 17 years.

(3) In this section —

"slave trading" includes —

- (a) the capture, transport or disposal of a person with the intention of reducing the person to slavery; or
- (b) the purchase or sale of a slave.

(4) A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section.

(5) The defendant bears a legal burden of proving the matter mentioned in sub-section (4).

#### *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.

#### *Extended jurisdiction for offences against this Division*

105. A person commits an offence against all sections of this Division—

- (a) whether or not the conduct constituting the alleged offence occurs in Fiji; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Fiji.

#### *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.

(2) A person —

- (a) who conducts any business that involves the sexual servitude of other persons; and
- (b) who knows about, or is reckless as to, 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.

(3) In this section —

"conducting a business" includes —

- (a) taking any part in the management of the business; or
- (b) exercising control or direction over the business; or
- (c) providing finance for the business.

*Deceptive recruiting for sexual services*

107.—(1) A person who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about—

- (a) the fact that the engagement will involve the provision of sexual services; or
- (b) the nature of sexual services to be provided (for example, whether those services will require the person to have unprotected sex); or
- (c) the extent to which the person will be free to leave the place or area where the person provides sexual services; or
- (d) the extent to which the person will be free to cease providing sexual services; or
- (e) the extent to which the person will be free to leave his or her place of residence; or
- (f) if there is or will be a debt owed or claimed to be owed by the person in connection with the engagement—the quantum, or the existence, of the debt owed or claimed to be owed; or
- (g) the fact that the engagement will involve exploitation, debt bondage or the confiscation of the person's travel or identity documents;

commits of an indictable offence.

Penalty —

- (i) in the case of an aggravated offence under section 107 - imprisonment for 9 years; or
- (ii) in any other case — imprisonment for 7 years.

(2) In determining, for the purposes of any proceedings for an offence against sub-section (1), whether a person has been deceived about any matter referred to in a paragraph of that sub-section, a court may have regard to any of the following matters—

- (a) the economic relationship between the person and the alleged offender;
- (b) the terms of any written or oral contract or agreement between the person and the alleged offender;
- (c) the personal circumstances of the person, including but not limited to:
  - (i) whether the person is lawfully entitled to be in Fiji; and
  - (ii) the person's ability to speak, write and understand English or the language in which the deception or inducement occurred; and
  - (iii) the extent of the person's social and physical dependence on the alleged offender.

(3) Sub-section (2) does not —

- (a) prevent the leading of any other evidence in proceedings for an offence against sub-section (1); or
- (b) limit the manner in which evidence may be adduced or the admissibility of evidence.

(4) In this section —

"deceive" has the same meaning as in section 111.

"sexual service" means the commercial use or display of the body of the person providing the service for the sexual gratification of others.

#### *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.

*Alternative verdict if aggravated offence not proven*

109. If on a trial for an aggravated offence against section 106 or 107, the jury is not satisfied that the defendant is guilty of an aggravated offence, but is otherwise satisfied that he or she is guilty of an offence against that section, it may find the defendant not guilty of the aggravated offence but guilty of an offence against that section.

*Double jeopardy*

110. If a person has been convicted or acquitted in a country outside Fiji of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against this Division in respect of that conduct.

*Division 6 — Trafficking in Persons and Children*

*Definitions*

111. In this Division —

"confiscate", in relation to a person's travel or identity document, means to take possession of the document, whether permanently or otherwise, to the exclusion of the person, or to destroy the document.

"deceive" means mislead as to fact (including the intention of any person) or as to law, by words or other conduct.

"threat" means—

- (a) a threat of force; or
- (b) a threat to cause a person's removal from Fiji; or
- (c) a threat of any other detrimental action

unless there are reasonable grounds for the threat of that action.

*Offence of trafficking in persons*

112. — (1) A person (the first person) commits an indictable offence of trafficking in persons if—

- (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and
- (b) the first person uses force or threats; and
- (c) that use of force or threats results in the first person obtaining the other person's compliance in respect of that entry or proposed entry or in respect of that receipt.

Penalty — Imprisonment for 12 years.

(2) A person (the first person) commits an indictable offence of trafficking in persons if—

(a) the first person organises or facilitates the exit or proposed exit of another person from Fiji; and

(b) the first person uses force or threats; and

(c) that use of force or threats results in the first person obtaining the other person's compliance in respect of that exit or proposed exit.

Penalty — Imprisonment for 12 years.

(3) A person (the first person) commits an indictable offence of trafficking in persons if —

(a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and

(b) in organising or facilitating that entry or proposed entry, or that receipt, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt.

Penalty — Imprisonment for 12 years.

(4) A person (the first person) commits an indictable offence of trafficking in persons if—

(a) the first person organises or facilitates the exit or proposed exit of another person from Fiji; and

(b) in organising or facilitating that exit or proposed exit, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after that exit.

Penalty — Imprisonment for 12 years.

(5) A person (the first person) commits an indictable offence of trafficking in persons if —

(a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and

(b) the first person deceives the other person about the fact that the other person's entry or proposed entry, the other person's receipt or any arrangements for the other person's stay in Fiji, will involve the provision by the other person of sexual services or will involve the other person's exploitation or debt bondage or the confiscation of the other person's travel or identity documents.

Penalty — Imprisonment for 12 years.

(6) A person (the first person) commits an indictable offence of trafficking in persons if—

(a) the first person organises or facilitates the exit or proposed exit of another person from Fiji; and

(b) the first person deceives the other person about the fact that the other person's exit or proposed exit is for purposes that involve the provision by the other person of sexual services outside Fiji or will involve the other person's exploitation or debt bondage or the confiscation of the other person's travel or identity documents.

Penalty — Imprisonment for 12 years.

(7) A person (the first person) commits an offence of trafficking in persons if—

(a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and

(b) there is an arrangement for the other person to provide sexual services in Fiji; and

(c) the first person deceives the other person about any of the following:

(i) the nature of the sexual services to be provided;

(ii) the extent to which the other person will be free to leave the place or area where the other person provides sexual services;

(iii) the extent to which the other person will be free to cease providing sexual services;

(iv) the extent to which the other person will be free to leave his or her place of residence;

(v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services—the quantum, or the existence, of the debt owed or claimed to be owed.

Penalty — Imprisonment for 12 years.

(8) A person (the first person) commits an indictable offence of trafficking in persons if —

(a) the first person organises or facilitates the exit or proposed exit of another person from Fiji; and

(b) there is an arrangement for the other person to provide sexual services outside Fiji; and

(c) the first person deceives the other person about any of the following:

(i) the nature of the sexual services to be provided;

(ii) the extent to which the other person will be free to leave the place or area where the other person provides sexual services;

(iii) the extent to which the other person will be free to cease providing sexual services;

(iv) the extent to which the other person will be free to leave his or her place of residence;

(v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services - the quantum, or the existence, of the debt owed or claimed to be owed.

Penalty -Imprisonment for 12 years.

(9) Absolute liability applies to sub-sections (1)(c) and (2)(c).

*Aggravated offence of trafficking in persons*

113. — (1) A person (the first person) commits an aggravated offence of trafficking in persons if the first person commits the offence of trafficking in persons in relation to another person (the victim) and any of the following applies —

(a) the first person commits the offence intending that the victim will be exploited, either by the first person or another:

(i) if the offence of trafficking in persons is an offence against sub-section 112(1), (3), (5) or (7) - after entry into Fiji; and

(ii) if the offence of trafficking in persons is an offence against sub-section 112(2), (4), (6) or (8) - after exit from Fiji;

(b) the first person, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;

(c) the first person, in committing the offence —

(i) engages in conduct that gives rise to a danger of death or serious harm to the victim; and

(ii) is reckless as to that danger.

Penalty — Imprisonment for 20 years.

(2) If, on a trial for an offence against this section, the court is not satisfied that the defendant is guilty of the aggravated offence, but is satisfied that he or she is guilty of an offence against section 115, it may find the defendant not guilty of the aggravated offence but guilty of an offence against that section.

*Offence of trafficking in children*

114. — (1) A person (the first person) commits an indictable offence of trafficking in children if—

(a) the first person organises or facilitates the entry or proposed entry into Fiji, or the receipt in Fiji, of another person; and

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

(c) in organising or facilitating that entry or proposed entry, or that receipt, the first person –

(i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt; 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 person or another, after that entry or receipt.

Penalty — Imprisonment for 25 years.

(2) A person (the first person) commits an indictable offence of trafficking in children if —

(a) the first person organises facilitates the exit or proposed exit from Fiji of another person; and

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

(c) in organising or facilitating that exit or proposed exit, the first person:

(i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit; 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 person or another, after that exit.

Penalty — Imprisonment for 25 years.

(3) 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.

*Offence of domestic trafficking in persons*

115. — (1) A person (the first person) commits an indictable offence of domestic trafficking in persons if —

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

(b) the first person uses force or threats; and

(c) that use of force or threats results in the first person obtaining the other person's compliance in respect of that transportation or proposed transportation.

Penalty — Imprisonment for 12 years.

(2) A person (the first person) commits an indictable offence of domestic trafficking in persons if —

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

(b) in organising or facilitating that transportation or proposed transportation, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after that transportation.

Penalty — Imprisonment for 12 years.

(3) A person (the first person) commits an indictable offence of domestic trafficking in persons if —

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

(b) the first person deceives the other person about the fact that the transportation, or any arrangements the first person has made for the other person following the transportation, will involve the provision by the other person of sexual services or will involve the other person's exploitation or debt bondage or the confiscation of the other person's travel or identity documents.

Penalty — Imprisonment for 12 years.

(4) A person (the first person) commits an indictable offence of domestic trafficking in persons if —

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

and Penalty — Imprisonment for 12 years.

(b) there is an arrangement for the other person to provide sexual services; and

(c) the first person deceives the other person about any of the following—

(i) the nature of the sexual services to be provided;

(ii) the extent to which the other person will be free to leave the place or area where the other person provides sexual services;

(iii) the extent to which the other person will be free to cease providing sexual services;

(iv) the extent to which the other person will be free to leave his or her place of residence;

(v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services—the quantum, or the existence, of the debt owed or claimed to be owed.

*Aggravated offence of domestic trafficking in persons*

116. — (1) A person (the first person) commits an aggravated offence of domestic trafficking in persons if the first person commits the offence of domestic trafficking in persons in relation to another person (the victim) and any of the following applies—

(a) the first person commits the offence intending that the victim will be exploited, either by the first person or by another, after arrival at the place to which the person has been transported;

(b) the first person, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;

(c) the first person, in committing the offence —

- (i) engages in conduct that gives rise to a danger of death or serious harm to the victim; and
- (ii) is reckless as to that danger.

Penalty — Imprisonment for 20 years.

(2) The offence in sub-section (1) is an indictable offence.

(3) If, on a trial for an offence against this section, the court is not satisfied that the defendant is guilty of the aggravated offence, but is satisfied that he or she is guilty of an offence against section 115, it may find the defendant not guilty of the aggravated offence, but guilty of an offence against that section.

#### *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.

#### *Offence of debt bondage*

118. — (1) A person commits a summary offence of debt bondage if—

(a) the person engages in conduct that causes another person to enter into debt bondage; and

(b) the person intends to cause the other person to enter into debt bondage.

Penalty — Imprisonment for 12 months.

(2) In determining, for the purposes of any proceedings for an offence against sub-section (1), whether a person (the first person) has caused another person (the second person) to enter into debt bondage, a court may have regard to any of the following matters—

- (a) the economic relationship between the first person and the second person;
- (b) the terms of any written or oral contract or agreement between the second person and another person (whether or not the first person);
- (c) the personal circumstances of the second person, including but not limited to—
  - (i) whether the second person is lawfully entitled to be in Fiji; and
  - (ii) the second person's ability to speak, write and understand English or the language in which the deception or inducement occurred; and
  - (iii) the extent of the second person's social and physical dependence on the first person.

(3) Sub-section (2) does not —

- (a) prevent the leading of any other evidence in proceedings for an offence against sub-section (1); or
- (b) limit the manner in which evidence may be adduced or the admissibility of evidence.

#### *Offence of aggravated debt bondage*

119. — (1) A person commits an offence of aggravated debt bondage if the person commits an offence of debt bondage in relation to another person (the victim) and the victim is under 18.

Penalty — Imprisonment for 2 years.

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

(3) If, on a trial for an offence against this section, the court is not satisfied that the defendant is guilty of the aggravated offence, but is satisfied that he or she is guilty of an offence against section 118, it may find the defendant not guilty of the aggravated offence but guilty of an offence against that section.

#### *Extended jurisdiction for some offences against this Division*

120. A person commits an offence against sections 112 – 114 (inclusive) and sections 118-119 —

- (a) whether or not the conduct constituting the alleged offence occurs in Fiji; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Fiji.

*Double jeopardy*

121. If a person has been convicted or acquitted in a country outside Fiji of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against this Division in respect of that conduct.

*Division 7 — People Smuggling and Related offences Offence of people smuggling*

122. — (1) A person (the first person) commits an indictable offence if —

(a) the first person organises or facilitates the entry of another person (the other person) into a foreign country (whether or not via Fiji); and

(b) the entry of the other person into the foreign country does not comply with the requirements under that country's law for entry into the country; and

(c) the other person is not a citizen or permanent resident of the foreign country; and

(d) the first person organises or facilitates the entry —

(i) having obtained (whether directly or indirectly) a benefit to do so; or

(ii) with the intention of obtaining (whether directly or indirectly) a benefit.

Penalty — Imprisonment for 10 years or 500 penalty units, or both.

(2) Absolute liability applies to the sub-section (1)(c) element of the offence.

(3) for the purposes of this Decree, an offence against sub-section (1) is to be known as the offence of people smuggling.

*Aggravated offence of people smuggling (exploitation etc.)*

123. — (1) A person (the first person) commits an indictable offence if the first person commits the offence of people smuggling in relation to another person (the victim) and any of the following applies —

(a) the first person commits the offence intending that the victim will be exploited after entry into the foreign country (whether by the first person or another);

(b) in committing the offence, the first person subjects the victim to cruel, inhuman or degrading treatment;

(c) in committing the offence, the first person's conduct —

(i) gives rise to a danger of death or serious harm to the victim; and

(ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty – Imprisonment for 20 years or 1,000 penalty units, or both.

(2) In this section —

"forced labour" means the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:

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

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

"sexual servitude" has the same meaning as in section 104.

"slavery" has the same meaning as in section 102.

"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 labour or services by a person.

*Consent of Director of Public Prosecutions required*

124. — (1) Proceedings for an offence against this Division require the written consent of the Director of Public Prosecutions.

(2) A person may be arrested, charged, remanded in custody or released on bail in connection with an offence against this Division before the necessary consent has been given.

*Division 8 — Document offences Related to People Smuggling and Unlawful Entry Into foreign Countries*

*Meaning of travel or identity document*

125.—(1) for the purposes of this Division, a document is a travel or identity document if it is—

(a) a travel document; or

(b) an identity document.

*Meaning of false travel or identity document*

126. — (1) for the purposes of this Division, a travel or identity document is a false travel or identity document if, and only if —

(a) the document, or any part of the document —

(i) purports to have been made in the form in which it is made by a person who did not make it in that form; or

(ii) purports to have been made in the form in which it is made on the authority of a person who did not authorise its making in that form; or

(b) the document, or any part of the document:

(i) purports to have been made in the terms in which it is made by a person who did not make it in those terms; or

(ii) purports to have been made in the terms in which it is made on the authority of a person who did not authorise its making in those terms; or

(c) the document, or any part of the document:

(i) purports to have been altered in any respect by a person who did not alter it in that respect; or

(ii) purports to have been altered in any respect on the authority of a person who did not authorise its alteration in that respect; or

(d) the document, or any part of the document:

(i) purports to have been made or altered by a person who did not exist; or

(ii) purports to have been made or altered on the authority of a person who did not exist; or

(e) the document, or any part of the document, purports to have been made or altered on a date on which, at a time at which, at a place at which, or otherwise in circumstances in which, it was not made or altered.

(2) for the purposes of this Division, a person is taken to make a false travel or identity document if the person alters a document so as to make it a false travel or identity document (whether or not it was already a false travel or identity document before the alteration).

(3) This section has effect as if a document that purports to be a true copy of another document were the original document.

*Making, providing or possessing a false travel or identity document*

127. A person (the first person) commits an indictable offence (which is triable summarily), if

(a) the first person makes, provides or possesses a false travel or identity document; and

(b) the first person intends that the document will be used to facilitate the entry of another person (the other person) into a foreign country, where the entry of the other person into the foreign country would not comply with the requirements under that country's law for entry into the country; and

(c) the first person made, provided or possessed the document—

(i) having obtained (whether directly or indirectly) a benefit to do so; or

(ii) with the intention of obtaining (whether directly or indirectly) a benefit.

Penalty — Imprisonment for 10 years or 500 penalty units, or both.

*Providing or possessing a travel or identity document issued or altered dishonestly or as a result of threats*

128. — (1) A person (the first person) commits an indictable offence (which is triable summarily), if —

(a) the first person provides or possesses a travel or identity document; and

(b) the first person knows that —

(i) the issue of the travel or identity document; or

(ii) an alteration of the travel or identity document;

has been obtained dishonestly or by threats; and

(c) the first person intends that the document will be used to facilitate the entry of another person (the other person ) into a foreign country, where the entry of the other person into the foreign country would not comply with the requirements under that country's law for entry into the country; and

(d) the first person provided or possessed the document—

(i) having obtained (whether directly or indirectly) a benefit to do so; or

(ii) with the intention of obtaining (whether directly or indirectly) a benefit.

Penalty — Imprisonment for 10 years or 500 penalty units, or both.

(2) for the purposes of sub-section (1), a threat may be —

(a) express or implied; or

(b) conditional or unconditional.

(3) for the purposes of sub-section (1), dishonest means —

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.

*Providing or possessing a travel or identity document to be used by a person who is not the rightful user*

129. A person (the first person) commits an indictable offence (which is triable summarily), if —

(a) the first person provides or possesses a travel or identity document; and

(b) the first person intends that the document will be used to facilitate the entry of another person (the other person) into a foreign country, where the entry of the other person into the foreign country would not comply with the requirements under that country's law for entry into the country; and

(c) the first person knows that the other person is not the person to whom the document applies; and

(d) the first person provided or possessed the document—

(i) having obtained (whether directly or indirectly) a benefit to do so; or

(ii) with the intention of obtaining (whether directly or indirectly) a benefit.

Penalty — Imprisonment for 10 years or 500 penalty units, or both.

*Taking possession of or destroying another person's travel or identity document*

130. A person (the first person) commits an indictable offence (which is triable summarily), if —

(a) the first person takes possession of, or destroys, a travel or identity document that applies to another person (the other person); and

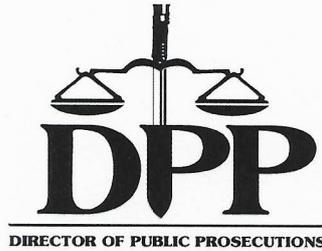
(b) the first person does so intending to conceal the other person's identity or nationality; and

(c) at the time of doing so, the first person intends to organise or facilitate the entry of the other person into a foreign country —

(i) having obtained, or with the intention of obtaining, whether directly or indirectly, a benefit to organise or facilitate that entry; and

(ii) where the entry of the other person into the foreign country would not comply with the requirements under that country's law for entry into the country.

Penalty — Imprisonment for 10 years or 500 penalty units, or both.



**ODPP Guidelines on  
Prosecuting Child Sexual Abuse Cases  
& Other Crimes Against Children**

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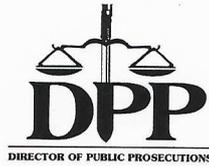
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## Introduction

1. The Director of Public Prosecutions is mindful of *inter alia*:
  - Article 41(2) and 15(9) of the Constitution of the Republic of Fiji;
  - The Child Welfare Act 2010;
  - The Convention on the Rights of the Child, adopted by the General Assembly in its resolution 44/25 of 20 November 1989 ratified by the Republic of Fiji in 1993;
  - The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005; and
  - The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly by way of Resolution A/RES/40/34 on 29 November 1985.
2. These guidelines are to assist Prosecutors of the Office of the Director of Prosecutions (ODPP) efficiently prosecute child sexual abuse cases and cases where children are victims of crimes in a manner that will ensure the best interests of the child are identified and met at every stage.
3. For the purposes of these guidelines “child” refers to both victims and witnesses who are children and is gender-neutral.
4. Children below the age of 14 years are the most vulnerable victims.<sup>1</sup>
5. It is recognised that “[w]ith the dramatic increase of child sexual abuse cases in Fiji, a greater number of children are being brought into contact with the criminal justice system. Accompanied by this trend are the legal and psychological dilemmas that such cases pose raising fears that child victims of sex offences will be further harmed by the courts. One of these dilemmas concerns how to prosecute an offender without causing additional trauma to children and without infringing the right to a fair trial of the accused. There can be no doubt that childhood sexual abuse is often a traumatic experience. Courtrooms are ascetic, formal settings capable of intimidating adults, let alone children. It is common knowledge that testifying can be a traumatic experience even for adult witnesses”.<sup>2</sup>

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<sup>1</sup> State v A.V unreported Criminal Case No. HAC 192 of 2008, paragraph 34; 2 February 2008; Kumar v State [2015] FJCA 32; AAU0049.2012 (4 March 2015) paragraphs 30-31

<sup>2</sup> Justice Aruna Aluthge, State v Cawi - Ruling [2018] FJHC 965; HAC124.2016 (19 September 2018) “Ruling on Child Friendly Court Procedure”.



6. These guidelines replace the ODPP “Child Protection Guidelines” dated 21 August 2009 and shall be effective from 1<sup>st</sup> September 2019.

## **Co-ordination between the Director of Public Prosecutions and the Director of the Criminal Investigations Division**

7. The Director of Public Prosecutions and the Director of the Criminal Investigations Division agree that:
  - all complaints in which a child is a victim shall be investigated expeditiously;
  - unless obviously impractical, all interviews with child victims shall be video-recorded;
  - all matters in which a child is a victim or a witness shall be referred to the ODPP for prosecution without delay;
  - in cases in which the police are unsure whether there is sufficient evidence, the police shall not charge the suspect but should refer the case to the ODPP for advice without delay.

## **Referral to Victims & Witness Assistance Unit (ODPP-VWU)**

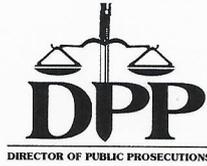
8. Upon being allocated the file, the Prosecutor will make necessary inquiries at the outset from the Investigating Officer and the Social Welfare officer assigned to the case (if applicable) and submit a referral to the ODPP Victims & Witness Assistance Unit (ODPP-VWU) with the following information:
  - i. Name and age of the victim (in the case of child victims include names of parents/guardians);
  - ii. Name of school or other learning institution;
  - iii. Statement of facts;
  - iv. Contact details for the victim and the parents/guardians (e.g. phone/address);
  - v. Police Docket Number;
  - vi. Name of the accused;
  - vii. Charges;
  - viii. Status of the Accused and information concerning Bail. The information should include any bail conditions concerning the victim;
  - ix. Information on previous referrals for counselling and support;



- x. Information concerning the victim's particular vulnerability and/or relevant personal circumstances (e.g. age, intellectual/physical disability, mental health issues)
9. The ODPP-VWU will establish and maintain contact with agencies providing support services for victims including the Department of Social Welfare.
10. The ODPP-VWU will request the relevant counselling service to prepare a Victim Impact Statement.
11. The ODPP-VWU will keep parents/guardian/child apprised of the progress of the case through the court system.
12. The ODPP-VWU is to ensure that the child is kept informed of the progress and disposition of cases including the prosecutorial decision not to pursue the case or to withdraw charges, the custodial status of the accused, and progress of the trial and the outcome of the case (including of any appeals).

## Pre-Trial Matters

13. The Prosecutor shall take cognizance of the following in deciding what pre-trial measures may be necessary to safeguard the interest and wellbeing of the child:
  - (i) The age, personal circumstances and any particular vulnerabilities of the child;
  - (ii) The circumstance of the offending;
  - (iii) The relationship between the offender and the child;
  - (iv) The current residential address of the victim and the address of the school the child attends;
  - (v) The means by which the report was lodged;
  - (vi) The involvement or intent to involve Social Welfare and/or any other agency providing support services for victims;
  - (vii) The attitude of the child's immediate family or immediate caregiver/s towards the victim;
  - (viii) The attitude of the child's immediate family or immediate caregiver/s toward the accused person
  - (ix) The academic schedule of the child to ensure that any scheduled case meeting or trial does not interfere with the child's schooling.
14. Prosecutors should request early trial dates and avoid seeking adjournments unless absolutely necessary. For these reasons, prosecutors should ensure that child files are not placed on court floating lists or are brought forward for trial unilaterally. The Prosecutor must have information regarding dates when it will



not be suitable for the child to testify or be involved in any trial preparation meetings. Such periods may include, for example, periods when the child will be having school examinations or on the child's birthday.

### Response to Bail Applications

15. The Prosecutor shall assess the strength of the case, the likelihood of the accused person appearing in Court and the public interest in deciding whether to concede or object to bail.
16. In considering the public interest, the Prosecutor shall give due regard to:
  - (i) The need to protect the child witness;
  - (ii) The need to protect state evidence; and
  - (iii) The potential for and protection of any other children placed at risk by the release of the accused person.
17. If bail is granted to the accused person, the Prosecutor shall ask for the necessary conditions to be present that best ensures the continued protection of the child.
18. In the event that bail is granted, the Prosecutor shall request, *inter alia*, the following orders:
  - (i) The accused not to directly or indirectly interfere with witnesses;
  - (ii) The accused be restrained from coming into direct or indirect contact with the child victim;
  - (iii) The accused be restrained from entering the vicinity of the school the child attends or being within 100 metres of the school;
  - (iv) The accused be restrained from entering the area in which the child victim resides without first obtaining permission from the Court;
  - (v) The accused to surrender all travel documents to the Court;
  - (vi) The Prosecutor, having established the reactions of family members to the accused and the child victim, shall apply to the Court for no, or, at the very least, limited supervised access to the child, by other members of the family who have shown an affinity to or for the accused person.
  - (vii) The accused be required to report to a particular police station / police post weekly.



## Preparation for Trial

### Building Rapport

19. The Prosecutor shall introduce him/herself in person to the victim as soon as practicable after a decision is made by the Director of Public Prosecutions to file charges.
20. Before meeting the child, the Prosecutor will first get acquainted with the child's personal circumstances concerning any particular vulnerability and/or relevant personal circumstances including the age, intellectual/physical disability, mental health issues of the child. The Prosecutor may seek guidance or advice from the child's guardian and/or counsellor on the best way to interact with the child.
21. The Prosecutor shall conduct a follow-up visit with the victim 14 days before the trial to introduce the victim to the Court room in which the victim shall likely give evidence.
22. Unless unavoidable, there should not be a change in the Prosecutor who has been assigned to prosecute the case and who has interacted with the child in preparation for trial. Where there will be a change, the Prosecutor first assigned to the case will personally introduce the new Prosecutor to the child and explain briefly the need for the change.

### Pre-testimony meeting and interview

23. The Prosecutor may, in exceptional cases, have pre-testimony meetings with the child victim if considered necessary in order to enable the Prosecutor to reach a better informed decision about any aspect of the case.
24. During these meetings, the Prosecutor will explain the court process and answer any questions or concerns the child may have about giving evidence in court.
25. The purpose of the pre-trial interview is for the Prosecutor to be able to assess the credibility and reliability of the child's evidence. The Prosecutor must not rehearse, practice or coach the child in relation to the child's testimony. The Prosecutor must not directly or indirectly encourage the child to give testimony which is untruthful. Leading questions should be avoided.<sup>3</sup>

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<sup>3</sup> Momodou, R v [2005] EWCA Crim 177 (02 February 2005); Pre-Trial Witness Interviews Code of Practice issued by Director of Public Prosecutions of England, Ken Macdonald QC, on 22 February 2008, paragraph 7.1



26. During the pre-testimony meeting, the child will be provided with a copy of the written police statement which will be handed to the child to read or it will be read back to the child to refresh the child's memory. Where the police have conducted a video-recorded interview with the child, the child will view the video. The Prosecutor shall go through the child's written statement or video-interview. The Prosecutor may seek any clarifications or ask further questions that may be relevant to any aspect of the child's testimony. The Prosecutor must avoid suggestive questions.
27. Avoid asking the child to demonstrate intimate touching of his/her own body.
28. The Prosecutor will review with the child any exhibits or documents that the child will be required to identify or testify about during the child's testimony.
29. Persons that may be present during pre-trial meetings with the child may include a police officer, the support person who may be a counsellor or the child's guardian. The Prosecutor must take all necessary steps to ensure that such person is not also a witness in the case.
30. If such support person is present at the pre-trial interview, he/she plays a passive role and must not respond to questions or provide information on behalf of the child. The support person or guardian must not influence or prompt the responses of the child in any way.<sup>4</sup>
31. If during the pre-trial interview the child provides further inculpatory or exculpatory information which is material to the case, this shall be recorded in a further witness statement by a police officer and disclosed to the defence.
32. The Prosecutor shall request the ODPP-VWU to arrange a court-room familiarisation visit for the child. The counsellor or support person who will be present in court with the child during the child's testimony should also attend this familiarisation visit. It is advisable for the Prosecutor to also attend this visit and explain the testimony process and address any concerns or fears the child may have.

### Agreed Facts

33. The Prosecutor shall work closely with Defence Counsel in the preparation and submission of agreed facts pursuant to section 135 of the Criminal Procedure Act with a view to:

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<sup>4</sup> Pre-Trial Witness Interviews Code of Practice issued by Director of Public Prosecutions of England, Ken Macdonald QC, on 22 February 2008, paragraph 5

- (i) Minimizing time spent in trial;
- (ii) Clarifying the issues under contention; and
- (iii) Minimizing any discomfort or embarrassment for the child victim in terms of the giving of his/her evidence in a court of law.

### Requests for Special Measures for Testimony

34. The Prosecutor is to assess the needs of the child and apply to the court pursuant to section 295 and section 296 of the Criminal Procedure Act for any special measures that may be required for the child to testify at the trial. The court retains the authority to decide whether to grant the application or to grant the request with any modifications it deems fit in the circumstances of each case.
35. Prosecutors are to be mindful that “[t]he Constitution, the Criminal Procedure Act and the Juveniles Act in particular, allow the promotion of child friendly courts and procedures in the best interests of child victims and witnesses. The use of videotaped testimony, the extension of hearsay exceptions, and closed-circuit television, early docketing of cases involving child victims, and the use of expert witnesses to testify about the effects of sexual abuse are some of the special measures that can be taken under legislative provisions. In addition, courts are being asked to rule on the use of innovative procedures in individual cases. The purpose of these reforms is to minimize the presumed traumatic effects on children of court appearances and maximize children's ability to provide accurate testimony.”<sup>5</sup>
36. The special measures the Prosecutor may request include but is not limited to the following:

#### (i) Name Suppression Application

37. The Prosecutor shall apply for a name suppression order for the victim and/or the child witness depending on the nature and circumstances of the offending and/or the child's involvement in the offending itself at first call.

#### (ii) Closed- Circuit Television/ Screen

38. The Prosecutor may apply for provision for the taking of the child's evidence through CCTV or for the provision of a screen to separate the child witness from the accused during the taking of the child's evidence.

#### (iii) Closed Court

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<sup>5</sup> State v Cawi - Ruling [2018] FJHC 965; HAC124.2016 (19 September 2018)



39. The Prosecutor will request that the child's evidence be taken in closed court.

***(iv) Support Person to be present***

40. The Prosecutor may apply to the Court for permission to have a child support officer or mother/relative/adult friend present in Court and seated close to the child witness during the taking of his/her evidence.

***(v) Attire and courtroom setting to be less formal***

41. The Prosecutor may make applications for the Judge and the parties to reduce formal court attire for instance by removing wigs and court robes.
42. An application may also be made for the courtroom setting to be less formal wherein the Judge is to be seated level to the child witness and for all parties to remain seated during questioning.
43. These measures will assist to reduce the anxiety of the child in a courtroom setting.

***(vi) Self-represented Accused not be allowed to cross-examine the child***

44. In case an accused is representing himself/herself at the trial, the Prosecutor shall make an application that he/she not be permitted to cross-examine the child directly.<sup>6</sup>

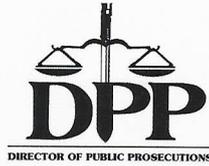
***(vii) Alternative modes of receiving the child's testimony***

45. The Prosecutor will make an assessment as to whether it would be in the best interest of the child that a prior recorded witness statement<sup>7</sup> or video-recorded interview is admitted in lieu of examination in chief. The child will be made available for any additional questioning by the Prosecutor, for cross-examination and for questioning by the Court. The Prosecutor must make this assessment in a timely manner and abide by any notice and other procedural requirements of the law.
46. Where an early trial date is not feasible for reasons beyond the control of the Prosecutor and it is in the interest of the child that his or her testimony be taken without delay, the Prosecutor will seek to have the child's testimony taken in

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<sup>6</sup> Oral Ruling of Justice Morais 17<sup>th</sup> of October 2018 in State v Tevita Lewai [2018]FJHC HAC 129. 2018; Rusiata Tuidravu v State [NO. AAU0035 OF 2005] (10 November 2006) at paragraphs 23 and 24; Sections 34 and 35 of the Youth Justice and Criminal Evidence Act 1999 [UK]

<sup>7</sup> Section 134 Criminal Procedure Act 2009; State v Cawi - Ruling [2018] FJHC 965; HAC124.2016 (19 September 2018).



advance of the trial in accordance with applicable laws and procedures including sections 295 and 296 of the Criminal Procedure Act.

## The Trial Process

47. The Prosecutor shall ensure that the child is comfortably situated at designated waiting areas at the court premises whilst awaiting the call of the case for trial.
48. The Prosecutor shall ensure that the child is accompanied by the support person and/or an adult and/or legal guardian with which the child is comfortable.
49. The Prosecutor shall ensure that the screen is in place prior to the child entering the room to give evidence, or in the event of the use of CCTV, that the camera is focused on the Judge and the Prosecutor and not on the accused person.
50. The Prosecutor shall ensure that court sessions where a child will be testifying will not be lengthy and are adapted to the child's age and attention span. Applications for breaks shall be made as necessary.

## Questioning Child Victims & Witnesses – General

51. The trial process must accommodate the needs of the child and the child must be able to give the best evidence possible.<sup>8</sup>
52. All Prosecutors must be aware of relevant developments on questioning child victims and witnesses during trials. It is now accepted that *“if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round.”*<sup>9</sup>

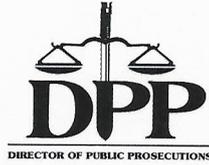
## Examination-in-Chief by the Prosecutor

53. In the course of examination-in-chief the Prosecutor shall adopt language, tone and facial expression that is child friendly.
54. The Prosecutor shall ensure that age-appropriate questions are posed. The child must be advised that if he or she does not understand the question, the questions may be rephrased and restated.

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<sup>8</sup> R v Barker [2010] EWCA Crim 4

<sup>9</sup> Lubemba, R. v [2014] EWCA Crim 2064 (09 October 2014)



55. The Prosecutor should not ask long, excessive or repetitive questions.
56. The Prosecutor should be guided by the child's choice of vocabulary and terminology for describing the accused and other persons who feature in the testimony, for body parts and/or objects.
57. As far as possible and where relevant, the Prosecutor may elicit any victim impact information from the child during his/her testimony in chief.

### **Cross Examination by Defence lawyer**

58. The Prosecutor shall ensure that the best interest and welfare of the child is safeguarded during cross-examination by raising appropriate objections to unfair and improper questions and manner of questioning.
59. Prosecutors are to recognise that there are limitations on cross-examination of a child. The importance of the limitation on cross-examination is to protect vulnerable witnesses and enable them to give the best evidence they can.<sup>10</sup>
60. The Prosecutor shall object to questions which are complex, confusing, not clear or which may not elicit reliable testimony from the child.
61. The Prosecutor may request the Court to dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of the child failing to understand, becoming distressed or acquiescing to leading questions.<sup>11</sup>
62. The Prosecutor shall object to any hint of badgering, intimidation, sarcasm, ridicule or aggression directed at the child.
63. Any comment on the credibility of the child or of inconsistencies in the evidence of the child shall be made in the absence of the child.<sup>12</sup>

## **CONVICTION & SENTENCE**

64. The Prosecutor shall ensure that detailed sentencing submissions addressing all relevant sentencing considerations and applicable case law is submitted to the court.

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<sup>10</sup> Wills v R [2011] EWCA Crim 1938 (02 August 2011); R v B [2010] EWCA Crim 4 ]

<sup>11</sup> Criminal Practice Directions Amendment No 2 paragraph 3E.4; Lubemba, R. v [2014] EWCA Crim 2064 (09 October 2014)

<sup>12</sup> R v B [2010] EWCA Crim 4 (21 January 2010) ; R v Wills [2011] EWCA Crim 1938, [2012] 1 Cr App R 243

65. The Prosecutor will state the tariff for child rape as **11-20 years imprisonment**<sup>13</sup> and address any aggravating factors in sentencing submissions. Factors that may be considered in sentencing include but are not limited to<sup>14</sup> :

- (i) whether the crime had been planned, or whether it was incidental or opportunistic;
- (ii) whether there had been a breach of trust;
- (iii) whether committed alone;
- (iv) whether alcohol or drugs had been used to condition the victim;
- (v) whether the victim was disabled, mentally or physically, or was especially vulnerable as a child;
- (vi) whether the impact on the victim had been severe, traumatic, or continuing;
- (vii) whether actual violence had been inflicted;
- (viii) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;
- (ix) whether the method of penetration was dangerous or especially abhorrent;
- (x) whether there had been a forced entry to a residence where the victim was present;
- (xi) whether the incident was sustained over a long period such as several hours;
- (xii) whether the incident had been especially degrading or humiliating;
- (xiii) if a plea of guilty was tendered, how early had it been given? No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;
- (xiv) time spent in custody on remand;
- (xv) extent of remorse and an evaluation of its genuineness;
- (xvi) if other counts or if serving another sentence, totality of appropriate sentence.

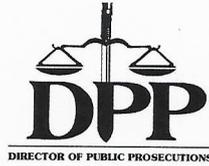
66. The Prosecutor may call witnesses at a sentencing hearing to testify about the impact of the crimes and the harm caused to the victim including expert witnesses and counsellors.

67. The Prosecutor shall ensure that the duly completed Victim Impact Statement (VIS) is submitted to the Court after conviction and prior to the sentencing hearing.

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<sup>13</sup> Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018)

<sup>14</sup> Ram v State [2015] FJSC 26; CAV12.2015 (23 October 2015)



## POST-TRIAL

68. The Prosecutor shall advise the Director of the Public Prosecutions following Judgment and/or the delivery of Sentencing Remarks whether an appeal against an order of acquittal or leniency of sentence should be pursued. The advice shall be given within seven (7) days from the date of Judgment or Sentence.
69. The Prosecutor will undertake a debriefing session with the child and the child's guardian(s) and explain the outcome of the trial and receive any information from the child and the guardian(s) regarding the child's experiences during the process.
70. The Prosecutor shall advise the child and the guardian(s) that any acts of reprisal or retaliation against the child as a result of the child testifying may be reported to the police.
71. The ODPP-VWU shall inform the appointed counselling service of the outcome of the process and obtain information on continuation of counselling and support that may be required. The ODPP-VWU shall continue to receive updates about the well-being of the child periodically until such time as is deemed necessary.

Dated this 6<sup>th</sup> day of August, 2019

A handwritten signature in blue ink, appearing to read 'C. Pryde', is written above the printed name.

Christopher T. Pryde  
Director of Public Prosecutions

**IN THE COURT OF APPEAL, FIJI**  
**On Appeal from the High Court of Fiji**

**JUDGMENT**

Criminal Appeal No. AAU0044/2013  
Criminal Appeal No. AAU0047/2013  
Criminal Appeal No. AAU0050/2013  
(High Court Case No. HAC323/2012)

**BETWEEN** : PHANAT LAOJINDAMANE  
LUM BING  
ZHANG YONG  
JASON ZHONG

*Appellants*

**AND** : THE STATE

*Respondent*

**Coram** : Calanchini, P  
S. Fernando, JA  
Goundar, JA

**Counsel** : Mr. S. Sharma for the 1st Appellant  
Ms B. Malmali for the 2nd and 4th Appellants  
Mr. A. Singh for the 3rd Appellant  
Mr. V. Perera for the Respondent

**Date of Hearing** : 11, 13, 28 and 29 May 2015

**Date of Judgement** : 30 September 2016

**Calanchini P**

[1] I have had the advantage of reading the draft judgment of Goundar JA and agree with his reasoning and his conclusions.

**S. Fernando JA**

[2] I agree with the conclusion in the judgment of Goundar JA and his reasons.

**Goundar JA**

**Introduction**

[3] In September 2012, two young women arrived in Fiji from Thailand to work as masseuses. Upon arrival, they were allegedly forced into sexual servitude. As a result of that allegation, the appellants were charged with various human trafficking offences under the Crimes Decree 2009.

[4] The appellants pleaded not guilty to the charges. The trial commenced on 19 November 2012 before a judge sitting with three assessors. On 13 December 2012, the assessors found the appellants guilty. Based on the assessors' opinions, the learned trial judge instead of convicting Phanat Laojindamane and Lum Bing of the charged offence of aggravated trafficking in persons convicted them of two counts of the lesser offence of trafficking in persons. Zhang Yong was convicted of two counts of domestic trafficking in persons. Jason Zhong was convicted of two counts of sexual servitude.

[5] On 25 January 2013, the appellants were sentenced to concurrent terms of imprisonment as follows:

*Phanat Laojindamane - 10 years' imprisonment with a non-parole period of 9 years (counts 1-2).*

*Lum Bing - 10 years' imprisonment with a non-parole period of 9 years (counts 1-2).*

*Zhang Yong - 8 years' imprisonment with a non-parole period of 7 years (counts 3-4).*

*Jason Zhong - 11 years 9 months' imprisonment with a non-parole period of 10 years (counts 5-6).*

These are appeals against both conviction and sentence.

#### **Background facts**

[6] The two complainants, Kwanchanok Kunok and Aimpika Jumrat were Thai nationals. In August 2012, a woman by the name Man contacted Kwanchanok Kunok with a proposal to work in a resort in Fiji as a masseuse. After discussing the proposal with her friend, Aimpika Jumrat, both women agreed to take on the offer to work in Fiji as masseuses. All travelling arrangements were made by Man.

[7] On 5 September 2012, the complainants turned up at the Bangkok International Airport as arranged by Man. There they met a lady called Nikki, Phanat Laojindamane and Lum Bing (aka Ah Ho) for the first time. Lum Bing gave US\$300,000 each to the complainants to be shown to the immigration officials in Fiji. All five of them flew to Hong Kong and arrived on the same day. All five stayed overnight in the same hotel in Hong Kong. The following morning they flew to Fiji and arrived in Nadi on 7 September 2012. They met Zhang Yong (who they referred to as "Bald Head") at the Nadi International Airport. Zhang Yong transported all five to Suva in a vehicle hired by Jason Zhong.

[8] When they arrived in Suva they went to Fong Lee restaurant where they met Jason Zhong for the first time. Phanat Laojindamane introduced Jason Zhong to them as 'the boss in Fiji'. From the restaurant they went and checked in at the Holiday Inn. The three women stayed in one room while Phanat Laojindamane and Lum Bing shared one room. After arranging the rooms, Jason Zhong spoke to the complainants. He told them that he is 'the big mafia here' and will look after them. All five stayed at

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the Holiday Inn till 9 September when they checked out and moved to a two-storey building in Walu Bay. The bottom floor of this building was used as a restaurant while the top floor was used as a massage parlour. The complainants were accommodated in one of the rooms in the massage parlour. While they were there Nikki told them that it was not only massage but sex as well. When Kwanchanok Kunok heard this, she started crying and wanted to go home. Phanat Laojindamane, translating for Jason Zhong said that if they went back home they had to give \$1900.00. When Jason Zhong said this he was angry and started banging the table.

[9] Later on the same day, the complainants were taken and kept in a place they referred to as the Pink House at Laucala Beach for about two days. On one of the days when Kwanchanok Kunok was in the Pink House, she performed oral sex on a man who was brought there by Jason Zhong. Kwanchanok Kunok said she was afraid of Jason Zhong. Since she did not have the money to pay Jason Zhong, she felt she had to comply and have sex with clients.

[10] From Laucala Beach, the complainants were moved to the Peninsula Hotel. After moving to the Peninsula Hotel, Zhang Yong took the complainants to the nightclubs to solicit clients. They attended to clients brought to the hotel by Zhang Yong until the Fiji Immigration officials rescued and took them away.

[11] The second complainant, Aimpika Jumrat gave similar evidence except that the money given to them by Lum Bing at the Bangkok International Airport was to be shown to the immigration officials in Hong Kong and not in Fiji. She said that she performed sexual services for clients brought to the Peninsula Hotel by Zhang Yong because she did not have the money to pay back Jason Zhong.

[12] The vehicle in which the complainants were transported from Nadi to Suva was a rental vehicle. The rental company's agent gave evidence that the vehicle was hired by Jason Zhong and Zhang Yong was nominated as the driver.

[13] All four appellants gave evidence at the trial.

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[14] In his evidence, Phanat Laojindamane first suggested that his association with the complainants was an innocent association. But in cross-examination, he admitted that

he had met Lum Bing and one Allen twice in Bangkok and had discussed about bringing people to Fiji. He said that he was the one who had passed on US\$300.00 each to the complainants given to him by Allen. Phanat Laojindamane said Lum Bing paid for everything while they were transiting in Hong Kong to come to Fiji. Phanat Laojindamane also confirmed that he translated for Jason Zhong when Jason Zhong told the complainants to repay \$1900.00. From Watu Bay, Phanat Laojindamane moved to the Peninsula Hotel. In his caution interview, Phanat Laojindamane admitted facilitating the entry of the complainants into Fiji and that the complainants were deceived, but in his evidence, Phanat Laojindamane said that those statements were fabricated by police.

[15] Lum Bing in his evidence said that he was a businessman doing import and export of timber and seaweed. Lum Bing said Allen is his friend and through him he met Phanat Laojindamane once in a coffee shop in Bangkok. The second time Lum Bing met Phanat Laojindamane was on 5 September 2012 at the Bangkok International Airport. Lum Bing came to know about the three women for the first time when they were on the plane to Hong Kong. When they arrived at Hong Kong, Lum Bing said he was just being a nice guy looking after the three women and paying for their expenses. Lum Bing accompanied Phanat and the three women from Nadi to Suva in the vehicle driven by Zhang Yong. When they arrived in Suva, they went and had lunch. After lunch he checked in at the Holiday Inn. On 10 September 2012, Lum Bing flew to Savusavu for business. He returned to Suva on 12 September 2012 and checked in at the Peninsula Hotel because Zhang Yong had told him that there was a room for him that had already been paid. In cross-examination, Lum Bing admitted that he had also accompanied the complainants to the massage parlour at Watu Bay and to the Pink House at Laucala Beach. Lum Bing's defence was that his association with the complainants was innocent as he came to Fiji on a genuine business trip.

[16] Zhang Yong in his evidence admitted that he had transported the complainants from Nadi to Suva on request from a "Chinese friend". He knew the ladies were coming to Fiji accompanied by Phanat Laojindamane. He said he had requested Jason Zhong to

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be translator for the Thai people. He said that he knew that the group from Thailand had come to Fiji to operate massage parlours. He took the complainants to several massage establishments and when they were not happy with the facilities they saw, he took the complainants to his home – the Pink House. He said he did not know the complainants were brought to Fiji to work in the sex trade. His defence was that all the time his association with the complainants was as their driver.

[17] Jason Zhong in his evidence said his association with the complainants was as their translator at the request of Zhang Yong who was interested to start a massage parlour in Fiji. Jason Zhong admitted saying to the complainants that they had to repay \$1900.00 but only because he was translating that for Zhang Yong.

#### **Grounds of appeal**

[18] Counsel for Phanat Laojindamane advances three grounds of appeal against conviction and three grounds of appeal against sentence. The grounds in summary are:

##### *Conviction*

1. *Misdirection on the elements of trafficking in persons.*
2. *Guilty verdict is not supported by evidence.*
3. *Inadequate direction on joint enterprise.*

##### *Sentence*

1. *Irrelevant factors taken into account.*
2. *Relevant factors not considered.*
3. *Starting point was too high.*

[19] Counsel for Lum Bing advances four grounds of appeal against conviction and one ground of appeal against sentence. The grounds in summary are:

##### *Conviction*

1. *Failure to direct on the fault element, namely, intention.*

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2. *Inadequate direction on separate consideration of charges.*
3. *Lack of direction on the legal difference between trafficking in persons and aggravated trafficking in persons.*
4. *Inadequate direction on joint enterprise.*

*Sentence*

1. *Penalty is harsh and excessive.*

[20] Counsel for Zhang Yong advances seven grounds of appeal against conviction and two grounds of appeal against sentence. The grounds in summary are:

*Conviction*

1. *Misdirection on closing address of trial counsel.*
2. *Misdirection on joint enterprise.*
3. *Erroneous direction on joint enterprise.*
4. *Lack of direction on common intention required for joint enterprise.*
5. *Misdirection on the circumstantial evidence.*
6. *Lack of essential directions.*
7. *Error in holding a joint trial.*

*Sentence*

1. *Relevant matters not taken into consideration.*
2. *Sentence is manifestly excessive and cannot be justified.*

[21] Counsel for Jason Zhong advances two grounds of appeal against conviction and two grounds of appeal against sentence. The grounds in summary are:

*Conviction*

1. *Lack of direction on the defence of "translating".*
2. *Lack of competent and accurate translation of the Thai complainants' evidence.*

*Sentence*

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1. *Sentence is excessive when compared to other similar cases.*
2. *Sentence is harsh and excessive in all the circumstances.*

**The summing up**

[22] As can be seen from the grounds of appeal, the complaints against convictions mainly relate to the directions in the summing up. The court records show that the appellants did not take up any of the complaints that are now being pursued on appeal with the trial judge when an opportunity was accorded to them to seek redirection after the summing up was delivered. It has been said by the Supreme Court in *Raji v State* unreported Cr App No. CAV0003 of 2014; 20 August 2014 at [35]:

*The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge.*

[23] When ascertaining whether the direction gave rise to any miscarriage of justice, the fact that no objection was taken is relevant because the absence of objection may be taken as an indication that counsel, absorbed in the atmosphere of the trial, saw that no injustice or error occurred in what the trial judge said or failed to say (*R v Tripodina and Morabito* (1988) 35 A Crim R 183, 191). However, the absence of objection to a trial judge's direction is not fatal to reliance on an error if it occasions a miscarriage of justice, but there are reasons to pause before embracing that conclusion (*Murray v The Queen* [2002] HCA 26; (2002) 211 CLR 193; [73]).

[24] A passage frequently cited by appellate courts regarding the contents of a summing up is the passage from *R v Lawrence* [1982] AC 510, 519 where Lord Hailsham said:

*A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it*

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must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.

[25] Similarly, in *Siliatolu v The State* unreported Cr App No AAU0024 of 2003S; 10 March 2006 this Court emphasized at [13]:

*When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts: R v Lawrence [1982] AC 510. It should be an orderly, objective and balanced analysis of the case: R v Foru [1995] 3 NZLR 129.*

[26] One of the important functions of a trial judge is to correctly explain to the assessors the relevant law as it applies to the facts and issues presented in a trial. There is a real risk of miscarriage of justice when the trial judge fails to correctly explain to the assessors the relevant law. In *Mraz v R* [1955] HCA 59; (1955) 93 CLR 493 Fullagar J said at 514:

*If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.*

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#### Consideration of Phanat Laojindamane's appeal

[27] Phanat Laojindamane was charged with aggravated trafficking in persons contrary to sections 112(5) and 113(1)(a)(i) of the Crimes Decree 2009, but was convicted of the lesser offence of trafficking in persons contrary to section 112(5) of the Crimes Decree 2009.

[28] Section 112 (5) states:

*A person (the first person) commits an indictable offence of trafficking in persons if*

- (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and*
- (b) the first person deceives the other person about the fact that the other person's entry or proposed entry, the other person's receipt or any arrangements for the other person's stay in Fiji, will involve the provision by the other person of sexual services or will involve the other person's exploitation or debt bondage or the confiscation of the other person's travel or identity documents.*

[29] Section 113 (1) (a) (i) states:

- (1) A person (the first person) commits an aggravated offence of trafficking in persons if the first person commits the offence of trafficking in persons in relation to another person (the victim) and any of the following applies —*
  - (a) the first person commits the offence intending that the victim will be exploited, either by the first person or another;*
  - (i) if the offence of trafficking in persons is an offence against sub-section 112(1), (3), (5) or (7) - after entry into Fiji; ...*

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[30] The charges alleged that Phanat Laojindamane and Lum Bing between 5th and 7th September 2012 with intent that the complainants be exploited after arrival in Fiji, facilitated their entry into Fiji, and deceived them about the fact that the arrangements for their stay in Fiji would involve their exploitation.

[31] The learned trial judge explained the elements of the offence in paragraph 10 of the summing up as follows:

*Trafficking in persons has two elements which the prosecution must prove to you beyond reasonable doubt.*

*(i) The accused must either individually or part of group in agreement, facilitate the entry, or proposed entry of another person into Fiji, and*

*(ii) That the accused either individually or part of a group in agreement, deceive the other person about the fact that she will be exploited during her stay in Fiji.*

[32] The element of aggravation was explained in paragraph 11 of the summing up as follows:

*You will have seen that Phanat Laojindamane and Lum Bing (the first and second accused) have been charged with "aggravated" trafficking in persons. Trafficking in persons becomes aggravated if the State proves to you so that you are sure that Phanat Laojindamane and Lum Bing intended, or were part of a group that intended that the girls would be exploited once they arrived in Fiji.*

[33] Section 113 (2) of the Crimes Decree 2009 gave the learned trial judge power to consider an alternative charge. Section 113 (2) states:

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*If, on a trial for an offence against this section, the court is not satisfied that the defendant is guilty of the aggravated offence, but is satisfied that he or she is guilty of an offence against section 115, it may find the defendant not guilty of the aggravated offence but guilty of an offence against that section.*

[34] The learned trial judge on his own motion directed the assessors to consider an alternative charge in paragraph 64 of the summing up:

*For the first two charges involving the first and second accused, your possible verdicts are guilty of aggravated trafficking in persons or not guilty. If your opinion is not guilty, you will be asked if each accused is guilty or not guilty of the alternative charge of trafficking in persons (that is without the aggravated). You can only find the accused guilty of the alternative if you think they did facilitate the entry of the girl in to Fiji and did deceive her as to her duties once here but you do not think that the accused or the group of which he was part, had the intention to exploit the girl.*

**Elements of offence and joint enterprise**

[35] Grounds one and three can be dealt together. Mr Sharma submits that the trial judge erroneously imported extra words, namely "part of group in agreement" when directing on the elements of the offence under section 112(5) of the Crimes Decree 2009.

[36] It is clear that section 112(5) does not require proof of 'being part of a group in agreement' to be culpable. All that is required is that the accused organised or facilitated the entry of the complainant into Fiji and that the accused deceived the complainant about the fact that the complainant's stay in Fiji would involve sexual services or exploitation or debt bondage or confiscation of travel or identity documents.

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[37] In the present case, the learned trial judge tailored his direction on the elements of the offence based on the principle of joint enterprise. This is evident when immediately after directing on the elements, the learned trial judge gave direction on joint enterprise in paragraphs 12 and 13 of the summing up:

*I digress now to tell you about the law of what is called joint enterprise. The prosecution's case is that Phanel and Lum Bing committed this offence in conjunction with others. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, then each of them is guilty. The plan or agreement does not have to be formal written plan but the essence shared a common intention to commit the offence and played a part, however, great or small, so as to achieve that aim. Your approach to the case should be therefore that in looking at the case of each of these accused separately, you are sure that with the intention that I have mentioned, he took some part in the offence, then he is guilty of the offence.*

*Let me give you an example of how that principle operates. If four men (A, B, C and D) decide that they are going to rob the ANZ Bank in Sigatoka, they divide up their roles. A is to drive them there and wait to drive them quickly away. B and C are to go into the bank and take the money at knife point. D is to stand guard outside and warn them if the Police happen to come along. Now because they have all agreed to rob the bank, by playing a part they are each guilty, even though A the driver, and D the lookout man, didn't go into the bank and take the money.*

[38] When a person commits an offence, he or she is principally liable for the offence. However, there are circumstances where two or more persons commit the same offence, but their participation in the commission of the offence is different. This is where the secondary responsibility for the offence is imputed on the offender based on the principle of joint enterprise. In Fiji, the law on complicity or joint enterprise is

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governed by Part 7 of the Crimes Decree 2009. The prosecution did not rely on any of the provisions regarding complicity or joint enterprise under the Crimes Decree 2009.

[39] Mr Sharma submits that the direction on joint enterprise is inadequate in the sense that the learned trial judge failed to direct on the state of mind that is required for aiding or abetting. I think this submission is misconceived. None of the accused was charged as an aider or abettor. All four accused were charged as principal offenders. The joinder of the accused persons on counts one and two was justified on the ground that the two accused committed the same offence in the course of the same transaction. The joinder on this ground was permitted under section 60 (a) of the Criminal Procedure Decree 2009.

[40] When presenting her opening address to the assessors and the trial judge, Ms Puanau (the trial prosecutor) did not attribute criminal responsibility on any accused based on the principle of joint enterprise. The prosecution case was that all four accused persons were principal offenders. The State maintained that position on appeal. Counsel for the State submits that the learned trial judge's direction on joint enterprise cannot be justified. I accept the State's concession. In my judgment, the learned trial judge misdirected when he wrongly incorporated the principle of joint enterprise as an element of the offence under section 112 (5) to impute secondary liability on the accused contrary to the prosecution's case.

#### **Sufficiency of evidence**

[41] Mr Sharma submits that there is insufficient evidence to support the guilty verdict for trafficking in persons. Trafficking in persons is made of two essential elements. In the context of the present case, the elements were:

1. *That the accused facilitated the entry of the complainants into Fiji;*
2. *That the accused deceived the complainants about the fact that the arrangements for their stay in Fiji would involve their exploitation.*

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[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.L 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.

[43] The prosecution case was that Phanat Laojindamane and Lum Bing facilitated the entry of the complainants into Fiji by escorting them from Thailand to Fiji. The result was that the complainants were brought to Fiji by Phanat Laojindamane and Lum Bing. The real issue was whether the complainants were deceived about the fact that their stay in Fiji would involve their exploitation.

[44] Section 111 defines "deceive" as "mislead as to fact (including the intention of any person) or as to law, by words or other conduct". Section 4 states "exploitation, of one person (the victim) by another person (the exploiter), occurs if—  
(a) the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude:..."

[45] What the prosecution was required to prove was that the accused had misled the complainants by words or conduct about the fact that the arrangements for their stay in Fiji would involve their exploitation.

[46] In the present case, the only time the learned trial judge briefly defined deception was in relation to the charges of domestic trafficking in persons against Zhang Yong. Deception was also an essential element of trafficking in persons. But the learned trial judge gave no direction as to how the assessors were to consider this element. The evidence was that a woman by the name Man made the representation to the complainants that the work in Fiji entailed massage in a tourist resort. Phanat Laojindamane and Lum Bing had not made any representation to the complainants regarding their work in Fiji. There was direct evidence that Phanat Laojindamane and Lum Bing facilitated the complainants' entry into Fiji by escorting them from Thailand to Fiji. However, there was no direct evidence that Phanat Laojindamane

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and Lum Bing deceived the complainants regarding their work in Fiji. But there was evidence from which an inference could have drawn that Phanat Laojindamane and Lum Bing knew that the complainants would be exploited after their entry into Fiji and that they deceived the complainants by their conduct by making them believe that they would be working as masseurs and not providing sexual service.

[47] But instead of explaining the element of deception to the assessors in the summing up, the learned trial judge erroneously attributed liability on the accused based on the principle of joint enterprise. The error is not that the verdict cannot be supported having regard to the evidence. A miscarriage of justice occurred as a result of the erroneous application of the principle of joint enterprise to attribute criminal liability on Phanat Laojindamane. For these reasons, I would allow Phanat Laojindamane's appeal against conviction.

#### **Consideration of Lum Bing's appeal Intention**

[48] Grounds one and three can be dealt together. Ms Malimali submits that the learned trial judge did not clearly explain the element of intention required for aggravated trafficking in persons and the legal difference between aggravated trafficking in persons and trafficking in persons. This complaint is moot. The additional element of intention makes the offence of trafficking in persons an aggravated offence under the Crimes Decree 2009. Lum Bing was charged with aggravated trafficking, but he was convicted of the lesser offence of trafficking in persons, which did not require proof of intention. The guilty verdict for the lesser offence meant that when Lum Bing facilitated the entry of the complainants to Fiji, but he did not intend that the complainants would be exploited after their entry into Fiji. These grounds fail.

#### **Separate consideration of charges**

[49] Ms Malimali submits that the learned trial judge did not direct the assessors to consider the evidence on each count separately. In paragraph [8] of the summing up, the learned trial judge clearly directed the assessors that they "must consider each

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count separately and the case against and for each accused separately". This ground fails.

#### Joint enterprise

[50] Ms Maimali submits that the learned trial judge did not identify the role each accused played in the joint enterprise to commit aggravated trafficking or trafficking in persons. I think this submission is misconceived. The issue is not the role each accused played in the joint enterprise. The issue is whether the principle of joint enterprise applied to Lum Bing. The State says the principle of joint enterprise did not apply to Lum Bing. As I have said earlier in my judgment, a miscarriage of justice occurred when the learned trial judge erroneously directed that the prosecution was relying on the principle of joint enterprise to prove the element of deception required for trafficking in persons. The prosecution did not rely on the principle of joint enterprise. The prosecution relied on an inference of deception by conduct because there was no direct evidence of deception. For these reasons, I would allow Lum Bing's appeal against conviction.

#### Consideration of Zhang Yong's appeal

##### Closing address of trial counsel

[51] In his closing address, Zhang Yong's trial counsel, Mr Naco said that "*the Police had not done enough to investigate this case*". The learned trial judge dealt with that comment in paragraph [4] of the summing up:

*You must judge this case solely on the evidence that you heard in this Court room. There will be no more evidence and you are not to speculate on what evidence there might have been or should have been. You judge the case solely on what you have heard and seen here. In this regard you are to ignore the submissions of Mr. Naco who told you that the Police had not done enough to investigate this case. Nobody, including Mr. Naco is to speculate on what evidence should be before you, nor should he tell you how this case should have been investigated.*

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[52] Mr Singh takes an issue with the strong language used by the learned trial judge to admonish Zhang Yong's trial counsel, saying that the direction had the potential to cause the assessors not to pay any regards to inadequacies in the prosecution case. I disagree.

[53] The assessors are not bound by a closing address. If what is said in the closing address appeals to the common sense of the assessors then they may accept the submission when considering the guilt of an accused.

[54] When presenting a closing address, counsel may confine himself to the facts or may relate the facts to the law. If there are weaknesses in the evidence, the weaknesses may be addressed in the closing address. What is not permitted is to invite the assessors to speculate on what evidence that could have been led but was not led by the prosecution. The law is that the opinions of the assessors and the verdict of the trial judge must be based on the admissible and relevant evidence led at the trial.

[55] In the present case, Mr Naco did not support his submission that "*the Police had not done enough to investigate this case*" with evidence led at the trial. By making an unsubstantiated submission, Mr Naco was inviting the assessors to speculate on evidence that was not led at the trial. In these circumstances, although the tone of the direction was strong, the learned trial judge was correct to direct the assessors to ignore that aspect of Mr Naco's closing address.

[56] Under this existing ground of appeal, Mr Singh added new grounds for the first time in his written submissions. The raising of a new ground for the first time in the written submissions not only violates the Court of Appeal Rules, but is also an unfair practice that should not be encouraged. Mr Singh offered no explanation why he did not apply for leave to amend the grounds of appeal by adding the new grounds rather than raising it for the first time in his written submissions. I have decided to consider the new grounds, but in the future, the court may require compelling reasons to consider new grounds raised for the first time in the written submissions.

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### Standard of proof

[57] Mr Singh submits that the trial judge made references to objectionable phrases like *'where the truth lies'* and *'fanciful doubt'* when directing on the standard of proof.

[58] The phrase *'where the truth lies'* was used by the learned trial judge at the beginning of the summing up when he explained the role of the assessors. The learned trial judge said in paragraph [2] of the summing up:

*I remind you that I am the Judge of the law and you must accept what I tell you about the law. You in turn are the Judges of the facts and you and only you can decide where the truth lies in this case. If I express any particular view of the facts in this summing up then you will ignore it unless of course it agrees with your view of that fact. (Underlining mine)*

[59] Later in paragraph [25] of the summing up, the learned trial judge returned to the role of the assessors and said:

*Madame and Gentlemen, having dealt with directions on the law which you must accept, it is now my duty to summarise the evidence for you. Once again you do not have to accept my summary, because you are the Judges of the facts. If in my summary, I omit to mention the evidence of a witness who you think is important then you must give that evidence due weight and if I stress something as important you do not have to agree with me - you and only you can decide where the truth lies in this case. (Underlining mine)*

[60] In *Naynigasau v State* unreported Cr App No. AAU 0012 of 1996S; 14 November 1997 this Court accepted that a direction that the assessors must determine where the truth lies carries with it the implication that they must come to a firm conclusion as to the existence or non-existence of the facts and cannot remain in a state of doubt about them. The Court agreed that a direction in a summing up having that effect could

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deprive a defendant of being of a reasonable doubt. However, the Court did not find the direction to be misdirection for the reasons explained at p5.

*If a summing-up contains such directions, their effect may be to vitiate it notwithstanding that the judge has included also proper directions in respect of the standard of proof. That was found by the Full Court of the Supreme Court of South Australia to be the situation in R v Calides (1983) 34 SASR 355. However, the inclusion of such a direction or directions in a summing-up will not necessarily have that effect. Whether it does so or not depends on the content of the summing-up as a whole. We have examined carefully Scott J's summing-up in the present case and, although he should have avoided giving any directions couched in terms of finding where the truth lies - indeed references to where the truth lies are seldom helpful - we are satisfied that, taken as a whole, it did not misdirect the assessors and was not a misdirection to the judge himself.*

[61] Another complaint regarding the direction on the standard of proof is the use of the phrase *'fanciful doubt'* to explain the standard. The impugned direction is in paragraph [7] of the summing up:

*It is most important that I remind you of what I said to you when you were being sworn in. The burden of proving the case against this accused is on the Prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt. If you have any doubt then that must be given to the accused and you will find him not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. The accused do not have to prove anything to you. If you are sure however that these men committed the crimes they are charged with, then you will find them guilty. (Underlining mine)*

[62] After summarising the prosecution case, the learned trial judge returned to the burden and standard of proof and said in paragraph [40] of the summing up:

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*All four accused, having given evidence, it becomes evidence for you to take into account when you are deliberating. However if you do not believe the evidence of any one of them, that does not relieve the State of the burden to prove to you, so that you are sure, that the accused whose case you are looking at committed the offence as charged. Just because you don't believe an accused does not necessarily mean that he is guilty of the offence that he is charged with. You still have to be sure that the State has proved the case against him.*

[63] When looking at the summing up in its entirety, I do not think that the use of the phrase '*fanciful doubt*' had the effect of vitiating the direction on the standard of proof. In my judgment, the summing up adequately conveyed to the assessors that they must feel sure before expressing an opinion of guilty against an accused. As Lord Hoffmann said in *Brown & Anor v The State (Trinidad and Tobago)* [2003] UKPC 10 (29 January 2003) at [26]:

*The appellants say that the reference to a reasonable doubt, which was something other than a fanciful doubt, vitiated the effect of the summing up. This was based upon some remarks of Lord Goddard CJ in R v Hepworth [1955] 2 QB 600, 603. He said that a reference to a reasonable doubt, by contrast with a fanciful doubt, was in itself unhelpful because these expressions did not explain themselves. The jury needed more help and it was better to tell them that they must feel sure of the prisoner's guilt. Of course the criminal standard of proof is not some point on a mathematical scale of probability and it would not help the jury very much if it were. Any choice of words to convey the appropriate degree of persuasion is bound to have some element of approximation. But Lord Goddard in Hepworth emphasised that there was no set formula. It depended upon the summing up as a whole. Their Lordships think that this summing up adequately conveyed the appropriate standard.*

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[64] For these reasons, I do not think that there was a misdirection on the standard and burden of proof that resulted in a miscarriage of justice.

#### **Joint enterprise**

[65] Grounds two, three and four can be dealt together. Only Zhang Yong was charged with domestic trafficking in persons contrary to section 115 (3) of the Crimes Decree 2009.

[66] Section 115 (3) states:

*A person (the first person) commits an indictable offence of domestic trafficking in persons if—*

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

*(b) the first person deceives the other person about the fact that the transportation, or any arrangements the first person has made for the other person following the transportation, will involve the provision by the other person of sexual services or will involve the other person's exploitation or debt bondage or the confiscation of the other person's travel or identity documents.*

[67] The prosecution alleged that Zhang Yong on 7 September 2012 facilitated transportation of the complainants and deceived the complainants about the fact the arrangements made for them following transportation would involve the provision by them of sexual services.

[68] The learned trial judge explained the elements of the domestic trafficking in persons in paragraph [16] of the summing up as follows:

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*I now move on to the legal definition of Domestic Trafficking in Persons which is the subject of the third and fourth counts, the third relating to Ms Kanok and the fourth relating to Aimpika Juvra.*

*Domestic trafficking in persons has two elements which the prosecution has to prove to you beyond reasonable doubt.*

*(i) the accused facilitates the transportation of another person from one place in Fiji to another place in Fiji;*

*(ii) the accused deceives that other person about the fact that the arrangements that have been made after she has been transported will involve the provision by her of sexual services; and*

*"Deceive" means to mislead as to fact, or as to law by words or other conduct.*

[69] Immediately after directing on the elements, the learned trial judge attributed criminal responsibility on Zhang Yong by directing on the principle of joint enterprise in paragraph [17] of the summing up:

*Once again the doctrine of joint enterprise comes into play. If you accept the evidence that it was the third accused (Zhang Yong), whom they call "Bald Head" who did drive them from Nadi to Suva, (and that is not in dispute) then you must go on to decide whether he was part of the group with the common intention to deceitfully traffic these girls. So to find Zhang Yong guilty you must accept that he drove them across Viti Levu and that he knew that they were going to have to provide sex and he knew that they had been told that it was only massage they were here for, in other words was Zhang Yong (or Bald Head) in on the plot?*

[70] Mr Singh submits that the direction on the principle of joint enterprise is inadequate and that the direction is erroneous because the prosecution did not rely on the

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principle of joint enterprise to prove the charges against Zhang Yong. I accept this submission. The prosecution did not rely on the principle of joint enterprise to impute criminal responsibility on Zhang Yong. Zhang Yong was charged with the specific offence of domestic trafficking in persons on a specific date. The prosecution could have alleged that Zhang Yong was a part of a group in Thailand with the common intention to deceitfully traffic the complainants into Fiji to provide sexual service, but the prosecution chose not to allege joint enterprise. The separation of power does not allow the courts to question the prosecutorial discretions. The bringing of charges involves prosecutorial discretion. The courts lack jurisdiction to question that discretion.

[71] Counsel for the State maintains that the direction on the principle of joint enterprise cannot be justified. Like Phanat Laojindamane and Lum Bing, the learned trial judge erroneously attributed criminal liability on Zhang Yong based on the principle of joint enterprise when the prosecution was relying on an inference to prove the element of deception required for domestic trafficking in persons. The error has resulted in a miscarriage of justice. On this ground I would allow Zhang Yong's appeal against conviction.

#### Circumstantial evidence

[72] Mr Singh submits that the direction on circumstantial evidence was inadequate. Mr Singh submits that the learned trial judge should have directed the assessors not to convict, if there was a reasonable hypothesis or reasonable possibility consistent with innocence. The impugned direction is in paragraphs [21] - [24] of the summing up:

*Now those are specific directions on the law of the individual charges that the accused are being charged with and those are directions that you must accept. Just before I leave the law and turn to the evidence, there is one more area of law that I will direct you on that will assist you to analyse the evidence. That is called the law on circumstantial evidence.*

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Sometimes assessors are asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw an accused commit a crime, or if there is a video of the crime or reliable evidence from the accused that he committed it, these would all be good examples of direct evidence against him. On the other hand it is often the case that direct evidence of a crime is not available and the prosecution relies on circumstantial evidence to prove guilt. That simply means that the prosecution is relying on evidence of various circumstances relating to the crime and to the accused which they say taken together will lead to the sure conclusion that it was the accused who committed the crime.

Circumstantial evidence can be powerful evidence - indeed it can be as powerful as, or even more powerful than direct evidence, but it is important that you examine it with care - as with all evidence - and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient reliability and strength to cast doubt upon or destroy the prosecution case.

Finally, we should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation. Speculation in a case amounts to no more than guesses or making up theories without good evidence to support them and neither the prosecution, the defence, nor you, should do that.

[73] Reliance on the circumstantial evidence to prove guilt of an accused does not require special direction (*Kaiser v The State* unreported Cr App No. AAU0041 of 2007S; 12 March 2008 at [8]). What is required is to make it plain to the assessors that if they are relying on the circumstantial evidence to infer guilt then they must not convict unless they are satisfied of the guilt beyond reasonable doubt (*Boila v The State* unreported Cr App No. CAV005 of 2006; 25 February 2008).

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[74] In the present case, while the assessors were told that the prosecution was relying on evidence of various circumstances which leads to sure conclusion of guilt, the learned trial judge in the summing up did not identify those circumstances relied upon by the prosecution from which an inference of guilt could be made beyond reasonable doubt. However, I accept the State's submission that the prosecution case was not wholly depended upon circumstantial evidence, and therefore, any deficiency in the direction could not have caused a miscarriage of justice. This ground fails.

#### **Essential directions**

[75] Mr Singh submits that the summing up lacks essential directions on the following matters:

- a. *On the elements of the offence*
- b. *Presumption of innocence*
- c. *Actus reus*
- d. *Identification*
- e. *Drawing of inferences*
- f. *Assessing the evidence of witness generally.*

[76] Mr Singh submits that the learned trial judge erroneously directed that there were two elements of domestic trafficking in persons. In paragraph 16 of the summing up, the learned trial judge directed the assessors that the prosecution was required to prove that Zhang Yong facilitated the transportation of the complainants from one location to another within Fiji and when he did that he deceived the complainants about the fact that arrangements made for them following the transportation would involve the provision for sexual service. Mr Singh contends that intention is also an element of domestic trafficking in person. He cites *Smyth v The Queen* (1957) 98 CLR 163 as an authority to support his submission that "the Assessors must have mistakenly believed that a man intends the natural and probable consequences of his act". However, *Smyth v The Queen* concerned the element of specific intent required for murder. Unlike

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murder, the offence of domestic trafficking in persons does not require proof of a specific intent.

[77] Mr Singh further argues that the learned trial judge failed to direct the assessors that honest belief means no intent. Zhang Yong did not put his belief as an issue. His defence was that his association with the complainants was an innocent association because he did not know they were brought to Fiji to provide sexual service. Domestic trafficking not being a crime of a specific intent, the learned trial judge was not obliged to give a direction on intention or honest belief.

[78] Although the learned trial judge did not refer to the presumption of innocence in the summing up, the direction on the standard and burden of proof made it clear that the accused did not carry any burden to prove anything.

[79] Identification was a non-issue at the trial. Zhang Yong admitted he transported the complainants from Nadi to Suva in the vehicle he drove. His defence was innocent association and not mistaken identity. The learned trial judge was not required to give special direction on identification.

[80] Mr Singh did not expound his submissions on the lack of directions on *actus reus*, drawing of inferences and assessing the evidence of witnesses generally. Counsel says the trial miscarried as a result of these errors. Without particulars, the alleged errors are vague. These are not valid grounds and for that reason cannot succeed.

#### Joint trial

[81] The question of whether to hold a joint trial or separate trials was within the discretion of the trial judge. The State relied upon section 60 of the Criminal Procedure Decree 2009 to justify a joint trial. Section 60 states:

*The following persons may be joined in one charge or information and may be tried together —*

*(a) persons accused of the same offence committed in the course of the same transaction;*

*(b) persons accused of an offence and persons accused of—  
(i) aiding or abetting the commission of the offence; or  
(ii) attempting to commit the offence;*

*(c) persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character; and*

*(d) persons accused of different offences committed in the course of the same transaction.*

[82] The State's case was that Phanat Laojindanamee and Lum Bing were accused of the same offence committed in the course of the same transaction (s 60 (a)), while Zhang Yong and Jason Zhong were accused of different offences that were founded on the same facts and which formed part of a series of offences of similar character as Phanat Laojindanamee and Lum Bing.

[83] The discretion to hold a joint trial is also guided by the wider interests of justice that includes the public interest factors. The relevant factors were summarised by Shamen J in *State v Beila* unreported Cr Case No. HAC0031 of 2005S; 17 June 2005:

*There are many public interest reasons why such offenders should be tried together. One is the public expense involved in conducting several trials based on the same law and evidence. Another is that witnesses would be greatly inconvenienced by having to give the same evidence many times. A third is that a joint trial is more likely to lead to uniform treatment in respect of all connected defendants. Lastly, separate trials usually lead to delay in the hearing of cases.*

[84] When the discretion to hold a joint trial is based on the interests of justice, an appellate court will intervene only if satisfied that the judge's decision has caused a miscarriage of justice (*R.v. Morhal* 65 Cr. App. R. 56).

[85] Mr Singh submits that Zhang Yong was prejudiced by the joint trial because the learned trial judge did not direct that the case of each accused should be looked at separately. This submission flies in the face of the clear direction contained in paragraph [8] of the summing up where the learned trial judge told the assessors that they "*must consider each count separately and the case against and for each accused separately*".

[86] Mr Singh further submits that the learned trial judge did not direct the assessors that what one accused says about another is not evidence against that other. This submission is misconceived. When an accused gives evidence against his co-accused in a joint trial, the evidence is admissible against the co-accused. In paragraph [41] of the summing up the learned trial judge told the assessors to examine the evidence with the particular care because the accused may have been more concerned about protecting himself than about speaking the truth. As far as the caution interview of the accused was concerned, the learned trial judge told the assessors that they "*must not accept what one accused says about another unless he repeats that in evidence*".

[87] The final submission was a mere repeat of the ground that the learned trial judge erred in giving direction on joint enterprise. The direction on joint enterprise had no bearing on the learned trial judge's discretion to order a joint trial. For these reasons, I conclude that there was no error in the trial judge's discretion to order a joint trial. This ground fails.

#### **Consideration of Jason Zhong's appeal**

##### **Defence of 'translating'**

[88] Ms Malmali submits that the learned trial judge failed to direct the assessors that they should acquit if they were not satisfied that Jason Zhong was acting as a translator for another then he should not be found guilty. Defence of '*translating*' is not a legal

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defence. Jason Zhong relied upon this defence on the facts. The learned trial judge fairly summarised Jason Zhong's evidence in paragraphs [58]-[60] of the summing up. The assessors and the trial judge did not believe Jason Zhong was only translating for another and that his association with the complainants was an innocent association. This ground fails.

[89] Ms Malmali advances new grounds of appeal for the first time in her written submissions. As I have said earlier in my judgment, this practice of raising grounds of appeal for the first time in the written submissions should not be encouraged. However, in the interests of justice, I have decided to consider the new grounds.

##### **Fault element – intention**

[90] Ms Malmali submits that the learned trial judge did not explain the mens rea for the offence of sexual servitude in the summing up.

[91] Jason Zhong was charged contrary to section 106 (1) of the Crimes Decree 2009. Section 106 (1) states:

- (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.*

[92] Section 104 of the Crimes Decree 2009 defines sexual servitude as:

- (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*

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*(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.*

[93] The learned trial judge explained the elements in paragraphs [18]-[19] of the summing up:

*The last two counts are charged against Jason Zhong and are counts of sexual servitude, one count for PW1 and one for PW2.*

*To prove this offence, the Prosecution must show to you so that you are sure, that Jason Zhong, that is the fourth accused, caused another person to enter into sexual servitude, and secondly, that he intended to cause that sexual servitude.*

*Now servitude is a fancy word for slavery and a slave doesn't have to be an african picking cotton in the USA in the mid 19th century. In law sexual servitude is defined as the condition of a person who provides sexual services and who because of the use of force or threats (i) is not free to cease providing sexual services; or (ii) is not free to leave the place or area where the person provides sexual services.*

[94] Clearly, the offence of sexual servitude under section 106 (1) has two disjunctive fault elements. The first is intention. The second is recklessness. The prosecution alleged the fault element of intention in the charge. Section 19 (1) states that "a person has intention with respect to conduct of *he or she* means to engage in that conduct". In the

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context of the present case, the learned trial judge was required to direct the assessors that when Jason Zhong threatened to enforce a claimed debt of \$1,900,00 against the complainants he intended or meant the complainants to enter into a condition of sexual servitude. In my judgment the learned trial judge gave adequate direction on the fault element, namely, the intent.

#### **Physical element - the use of threat**

[95] Another complaint relates to the accuracy of the direction contained in paragraph [20] of the summing up. Paragraph [20] reads:

*The prosecution are saying to you that because Jason Zhong was demanding the return of \$1,900 from each of the two girls, they had no choice but to "work" for him by providing sex to customers and that they were not free to stop providing sexual services. If you agree, then you will find Jason Zhong guilty; if you do not agree or if you are not sure then you will find him not guilty of each of these two offences.*

[96] Ms Malimati submits that the learned trial judge should have directed the assessors to consider whether Zhong's action of demanding money fell within the Crimes Decree definition of threat.

[97] The use of force or threat is an essential ingredient of sexual servitude. Sexual servitude is the condition of the victim who provides sexual service. That condition is caused by the use of force or threats. The prosecution did not allege force. The prosecution alleged a threat. The prosecution relied on the definition of threat under section 104 (2) (c), that is, "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".

[98] In paragraph [20] of the summing up the learned trial judge directed the assessors to consider whether Zhong's demand for return of \$1,900,00 from the complainants constituted sexual servitude. Not every demand for return of a debt necessarily

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constitutes a threat. The prosecution was required to prove that as a result of a threat, the complainants were not free to cease providing sexual services or they were not free to leave the place or area where they provided sexual service. The learned trial judge did not clearly explain this aspect of sexual servitude in the summing up. Instead the learned trial judge substituted the use of threat with the use of demand as the basis of the condition of sexual servitude.

[100] By directing the assessors to consider whether the demand for return of debt constituted sexual servitude instead of a threat of a detrimental action, the learned trial judge virtually imposed a lesser burden of proof on the prosecution. Since the use of threat was an essential element of the condition of sexual servitude, the learned trial judge erred in law when he gave a direction that had the effect of reducing the prosecution's burden to prove the physical element of threat of a detrimental action for Jason Zhong to be guilty. The error has resulted in a miscarriage of justice. I would allow Jason Zhong's appeal against conviction on this ground.

#### Accuracy of translation

[100] The complainants elected to give evidence in Thai language. The evidence was then translated in English for the court. Ms Malmali contends that the translation was inaccurate. The court record does not support this contention. Any issue regarding the accuracy of the translation should have been taken with the trial judge and not for the first time on appeal. Jason Zhong's trial counsel did not take any issue regarding the competency of the Thai translator or the accuracy of the translation from Thai to English. When Jason Zhong was called to give evidence, his trial counsel told the trial court that Jason Zhong spoke good English. Jason Zhong gave evidence in English. Clearly, Jason Zhong understood the complainants' evidence after it was translated in English for the court. This ground fails.

[101] Given the outcome of the conviction appeals, it is not necessary to consider the sentence appeals.

#### Conclusion

[102] The misdirection on the elements of the offence is a basic error. The appellants were not convicted according to law. This is not a case for the proviso. Consequently, I would allow the appeals of all four appellants and set aside their convictions and sentences pursuant to section 23 (1) of the Court of Appeal Act.

[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In *Chu Pui-kuen v Attorney-General of Hong Kong* [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (*Azamatala v State* unreported Cr App No AAU0060 of 2006S; 14 November 2008).

[104] The alleged offences are now more than four years old. The complainants who were Thai nationals returned to Thailand immediately after the conclusion of the trial in 2012. All four appellants have served nearly 3 1/2 years imprisonment for their alleged offences.

[105] On the other hand, there was a strong body of evidence upon which a court with assessors properly directed might well have convicted the appellants. I am mindful that the complainants may no longer be available to give evidence, but I believe due to the seriousness of the charges of human trafficking and the strength of the evidence led in the first trial, the interests of justice will be served by an order for a retrial.

#### The Orders of the Court are:

1. Appeals allowed.

2. Convictions and sentences set aside.
3. Case to be retried before a differently constituted bench.
4. The appellants are remanded in custody pending retrial and the case is listed for mention in the High Court on 12 October 2016 at 9.30 am.

*M. Balachari*  
 .....  
 Hon. Mr. Justice W. Calanehni  
**PRESIDENT, COURT OF APPEAL**



*S. Fernando*  
 .....  
 Hon. Mr. Justice S. Fernando  
**JUSTICE OF APPEAL**

*D. Goundar*  
 .....  
 Hon. Mr. Justice D. Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**  
 Office of the Legal Aid Commission for the 1st Appellant  
 Pacific Chambers for the 2nd and 4th Appellant  
 Anil J Singh Lawyers for the 3rd Appellant  
 Office of the Director of Public Prosecutions for the State

**IN THE HIGH COURT OF FIJI  
AT SUVA**

**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 80 of 2013**

**STATE**

**v**

**1. INOKE RAIKADROKA  
2. MOHAMMED SAGAIFU**

Counsel: Mr. L. Fotofili with Ms. R. Uce for the State  
Mr. J. Savou (L.A.C.) for the First Accused  
Mr R. Vananalagi for the Second Accused

Dates of trial: 26 - 29 May 2014 and 2-3 June 2014  
Date of Judgment : 6 June 2014.

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**JUDGMENT**

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1. **INOKE RAIKADROKA** and **MOHAMMED SAGAIFU** you were charged with the offences set out in the schedule annexed hereto.
2. After trial, three assessors have returned with unanimous opinions of guilty on each and every count with which you have been individually charged. In reviewing the evidence and after directing myself on my own summing up I come to the following judgment of the Court.

**Slavery**

3. Count One and Two charges the first accused (known throughout the trial as Kiki) with slavery over Girl 'X' and Girl 'Y' respectively. Slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised and the elements of the offence charged are that the accused (identity not in dispute) intentionally exercised over a slave any of the powers attaching to the right of ownership. It was the State's case that the first accused in "taking in" both Girl 'X' and Girl 'Y', he arranged all of their clients for whom they provided sexual services and he kept all the money earned by them providing those services. In return he provided accommodation, food, clothes, alcohol and beauty treatments. When the clients were few and the expenses too much, he moved operations from a downtown motel room to a flat in Raiwai where they all lived and where the two girls (X & Y) were sent out to clients to provide sexual services. Consent to this condition or state of affairs is not relevant to the offence. Many sex workers are happy to be sex workers. The offence is proved by the manipulation and subjugation of girls, and especially young girls as these were (17 and 15 years at the time) and these girls became the property or products of the first accused for him to exploit by using them to provide sexual services for money that was given to him directly. Admittedly he used the money to provide for himself and the girls but in having them work for him he would have to do that anyway but not to the lavish extent he appears to have done while they were staying at the Elixir. In addition to the circumstances in which the girls were kept, there is additional evidence of ownership from two independent sources. First in an answer to a question (Q.96) in his cautioned interview, the first accused said that he beautified the girls because they were his "products". At trial he disputed this by saying that "products" is street slang for a pimp's girls and he certainly didn't mean to imply ownership of them. However there was no evidence before the Court of the slang meaning apart from his claim and even if he were correct it still implies a degree of ownership. Secondly and crucially there is evidence that Girls

X' and Y' were previously under the control of "Darren" and the circumstances of their going to stay with the first accused suggest that he took over control or ownership of them from Darren in the full knowledge that they were Darren's "girls". He gave evidence himself of Darren calling and making threats because he had stolen the girls and for all the time they lived at Elixir they kept a low profile to avoid Darren. This scenario strongly suggests that the first accused was exercising a right of ownership over them, and intentionally so to the extent that he deprived Darren of their services as workers and assumed them himself. As any owner would be he was protective of them to the extent that he was doing all he could to keep them away from their previous "owner".

4. Counsel for the first accused stressed throughout the trial that the two girls were free to leave at anytime and that there was no force applied to make them stay. This defence could not possibly succeed because consent is not a defence to the charge. In addition, force and threat have been defined by the authorities to also mean a lack of option on the part of the workers to go anywhere else. Sociologists refer to the phenomenon as "situational coercion". The first accused had "stolen" the girls from Darren, he had manipulated them into staying by spending extravagantly on them and their only alternative was to return to live with an alcoholic father and an erratic grandmother and where there was no food in the house. It was not really an option for them, hence the manipulative force or pressure to remain in servitude with Kiki.
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.

6. There really was no defence to the slavery charges given the authorities on manipulative coercion but the Court is ever mindful of the need for the Prosecution to prove the case to the requisite standard.
7. In the light of clear evidence of intentional acquisition of the girls and at the time of such acquisition discussing the sex industry with them and how much they could earn, and given that they were treated like they had never been treated at home, being given everything they wanted, they had no option but to remain in sexual servitude.
8. I find that all of the elements of the offence of slavery have been proved beyond reasonable doubt and I find the first accused guilty of Count 1 and Count 2 and convict him of the two counts of slavery.
9. The crime of domestic trafficking in children is predicated on three clearly defined elements:
  - 1) Organising or facilitating movement of a person from one place in Fiji to another, and
  - 2) The person being moved is under 18, and
  - 3) The facilitator/organiser intends that the person being moved will perform sexual services or will otherwise be exploited on arrival.
10. The evidence to support most of the counts came from the two girls, as well as from the cautioned interviews that were produced in evidence by consent.

11. Although each accused freely admitted transporting the two girls for sexual services, the charges as framed by the prosecution creates a lot of difficulty for the trial and for the Judge in particularising and identifying specific instances of transport. It would have been far better and much easier for the Court if the State had laid one representative charge against each accused for transportation. There is no doubt whatsoever that Inoke (the first accused) transported both Girl X' and Girl Y' for sexual services (see Q.588, & Q.394 - 403 in his cautioned interview), with Girl X' saying that Kiki would arrange it, and Girl Y' saying also that Kiki and another would arrange it. There is an abundance of evidence before the Court that Girl X' was moved from Elixir in Suva to the Raiwai flat where she would carry on the business of sex service (Count 3). That she was transported from that flat to various motels in Suva (Count 4). An abundance of evidence that he had moved Girl X' from Suva to Nadi for sex (see 394 - 403 cautioned interview) Count 6. There is also evidence beyond doubt that he moved Girl Y' from Elixir in Suva to the flat in Raiwai to continue the sex trade (Count 7) and that he went with her from Suva to Nadi for the same purpose. (Q.394 - 493 of caution interview)
12. At all times X' and Y' were 17 and 15 respectively, their birth certificates having been produced.
13. I find beyond reasonable doubt that all of the elements required to prove domestic trafficking in children have been made out in respect of the charges 3, 4, 6, 7 and 9 against the first accused. These have been proved to me beyond reasonable doubt. Accordingly I agree with the unanimous opinions of the assessors and find the first accused Raikadroka guilty of those 5 counts and I convict him accordingly.
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.
16. All of the elements of the offence having been adduced in evidence, I concur with the unanimous opinions of the assessors and find beyond reasonable doubt that the second accused is guilty of Counts 5 and 8 on the Information. I convict him of both counts accordingly.
17. That is the judgment of the Court after trial.



**P. Madigan**  
Judge

**SCHEDULE:****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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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.

**ALTERNATIVE TO COUNT 1***Statement of Offence*

**AGGRAVATED SEXUAL SERVITUDE** : Contrary to section 106(1) and section 108 and 109 of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**INOKE RAIKADROKA**, between the 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> day of December 2012, at Suva in the Central Division by the use of threats, caused Girl 'X', a 17 year old to enter into sexual servitude, with intent to cause that sexual servitude.

**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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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.

**ALTERNATIVE TO COUNT 2***Statement of Offence*

**AGGRAVATED SEXUAL SERVITUDE:** Contrary to section 106(1) and section 108 and 109 of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**INOKE RAIKADROKA**, between the 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> day of December 2012 at Suva in the Central Division by the use of threats caused Girl 'Y', a 15 year old to enter into sexual servitude, with intent to cause that sexual servitude.

**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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of July 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of October 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of October 2012 and the 31<sup>st</sup> 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.

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION**

**Criminal Case No. HAC 80 of 2013**

**STATE**

**v**

**1. INOKE RAIKADROKA  
2. MOHAMMED SAGAITU**

Counsel: Mr. L. Fotofili with Ms. R. Uce for the State  
Mr. J. Savou (L.A.C.) for the First Accused  
Mr R. Vananalagi for the second accused

Dates of trial: 26 - 29 May 2014 and 2-3 June 2014  
Date of Sentence : 9 June 2014.

**SENTENCE**

**SLAVERY & TRAFFICKING IN CHILDREN**

[1] The two accused, **Inoke Raikadroka** and **Mohammed Sagaitu** were convicted after trial of the offences as set out in the schedule hereto.

[2] The facts of the case were that in the middle of the year in 2012, the first accused ("Inoke") had met four girls in a Suva City park one night. Three of the girls were sisters aged 18, 17 and 15 at the time and the fourth was their friend. All had been working as sex workers under the control of one Darren. The two younger sisters are Girl 'X' (aged 17) and Girl 'Y' (aged 15) referred to it in the charges. At the time the girls appeared to be destitute with no place to go so he, knowing that they were Darren's "girls" made them a proposition. He took them for dinner followed by a drink party in his room at the Elixir Motel. At that party they discussed the sex business, fees, the splitting of fees for commission, and he asked them if they were prepared to work for him. They agreed but then immediately arose the "Darren" problem. Darren had heard that his girls had gone with Inoke and he was therefore texting Inoke, making vile threats and demanding to know where they were. Inoke kept the two younger sisters there for 2-3 months at the Elixir Motel, having them provide sexual services for clients that he arranged. At first he received a commission from the fee paid but later he asked from them for all of the money which they gave to him in return for their "keep". That keep consisted of the room charge being paid, food, entertainment by way of drugs and alcohol, beautification and nice clothes and shoes – all to make more attractive his "products" as he referred them as in his cautioned interview. The girls had come from a dysfunctional family where the parents were separated, the father was an alcoholic, there was a domineering and erratic grandmother. Many times there was no food in the house and they were sent to school without lunch or lunch money.

[3] When the clients became scarce and the expenses too high, Inoke moved operations from the motel room to a flat he rented at Raiwai. He moved the girls with him and from there they continued the business of providing sexual services, Inoke arranging clients and arranging for them to go to hotels or motels to service the clients. The

second accused from thereon figures prominently in that he too arranged clients and took the girls by taxi usually to their assignments. There was no doubt that he knew what the girls were going to do on those occasions.

- [4] After a few months in Raiwai, they all went their own ways after an altercation with the neighbours. The girls moved to a motel and the first accused went to Nadi to try something new because as he said in evidence "sex work has a shelf life". It would seem that nothing "new" eventuated because at different times the two sisters ('X' and 'Y') went to Nadi on arrangement by Inoke to provide sexual services to clients that he had secured there.

#### The Offences

- [5] **Slavery** is committed when a person either inside or outside Fiji intentionally owns a slave or exercises over a slave any of the powers attaching to the right of ownership<sup>1</sup>. There are other limbs of the offence which do not pertain to this case. The maximum penalty for the offence is 25 years imprisonment.
- [6] Reduced to simple terms then the offence denotes having a person with you and doing things in respect of that person which would be indicative of ownership.
- [7] In this case the evidence of "ownership" came from three sources:
1. A description by the accused of the girls as his "products",
  2. His fear of, and hiding the girls from their previous owner "Darren" and
  3. The manner in which he kept the girls both at the motel and in the flat at Raiwai – selling them for sexual services to clients that he

<sup>1</sup> s.103 Crimes Decree

arranged and keeping the money that they earned. This money he spent extravagantly on the girls indulging them in new clothes, shoes, food and alcohol but then slaves can live in palaces as well as sordid hovels. The life of slavery these girls were subjected to was a life of having to provide sexual services on demand and in not retaining the money earned by those services for themselves but all of it going to the "controller" or pimp.

- [8] Slavery is the utter abuse of the human right to freedom (as recognized in clauses 10 and 11 of Fiji's Constitution 2013) No person may be held in slavery or servitude and every person has the right to freedom from inhumane and degrading treatment.
- [9] The treatment of these teenage girls at the hands of the first accused was egregious: they were sold like objects and forced to work with no pay. They were used by him to make profit.
- [10] It is perhaps tempting to say that the girls were willing and agreed to this arrangement and therefore they cannot be said to be slaves. Such a proposition however ignores two very important factors. First is that a 15 year or a 17 year old girl is hardly mature enough to know what is good for her, and to realize she is being exploited because she is slim and very attractive; secondly they were inveigled into this servitude by coercive manipulation. It is a condition (and slavery is a condition) that sociologists refer to as "situational coercion". The girls coming from a broken, alcoholic home with no food are suddenly confronted with food every day, new clothes, beauty treatments, entertainment and with no real alternative place to go, they were coerced or manipulated by the situation to remain in servitude. A dependency was created which is just as powerful a force as physical threat or force by violence or locks on the door. The situation sadly removed their power of choice.

- [11] Apart from this condition of slavery which is obnoxious in itself the situation was aggravated by the fact that the "slaves" were children being 17 years and 15 years. Further aggravation can be seen that the condition was extended over a long period of at least seven months and even thereafter the girls were "on call" to go to Nadi to service more clients for Inoke.
- [12] There has never been a case of slavery in Fiji before, nor has either defence counsel been able to provide authorities from other commonwealth jurisdictions.
- [13] Because it is such an outrageous and shameful crime, denying the victim(s) their constitutional and community rights a long term of imprisonment must be imposed.
- [14] Fiji has ratified the international treaty called "Convention to Suppress the Slave Trade and Slavery" (1926) (ratified by Fiji in 1972) whereby Article 5 the parties undertake to promulgate severe penalties for slave trading, slave-holding and enslavement. Fiji, being a signatory to the treaty has now enacted laws against slavery with severe penalties, and it is incumbent on the judiciary to honour that sentiment and pass heavy sentences accordingly.
- [15] In recognition of the maximum penalty this Court takes a starting point for the crime of ten years imprisonment. For the aggravation of the slaves being children which the Court regards as being very serious indeed I add a further term of 5 years to the sentence. For the aggravation of long term enslavement, I add a further period of two years to the sentence, bringing the interim total to a term of 17 years imprisonment.
- [16] In mitigation, counsel for the first accused tells me that Inoke is 24 years old and currently unemployed. He comes from a broken family

- and was reared by an Aunt. He dropped out of school early – making a living by doing odd jobs before becoming a sex worker. He met the two girl victims in the course of his work and he says they spent 8 months together because they shared the experience of coming from broken homes and of having to survive through sex work. He still maintains that he had no interest in being a slave master but wanted merely to provide for them and treat them as family.
- [17] Inoke has one previous charge for theft and he is still serving a suspended sentence for that offence. He can therefore have no credit for being of good character. Nor do his family circumstances afford any great degree of credit.
- [18] However in recognition of his time spent in custody, his pathetic upbringing which forced him "onto the streets" and his generosity towards his girls I deduct two years from the sentence. I deduct a further year for his relative youth meaning he will serve a total sentence of 14 years for this crime.
- [19] This is the sentence I pass for each of Count One and Count Two.
- [20] Each term (for Count One and Count Two) will be served concurrently.
- Domestic Trafficking in Children**
- "Trafficking is a breach of human rights because it objectifies human beings".<sup>2</sup>*
- [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.

<sup>2</sup> N.Shameem in a paper "Human Trafficking in Fiji" (26 Feb 2013)

[22] Domestic trafficking in children created by s.117 of the Crimes Decree 2009 is proved by:

- (i) Moving a person from A to B in Fiji.
- (ii) The person is under the age of 18.
- (iii) The mover intends that after he moves the person to point B the person will be used for sexual services or otherwise exploited.

[23] "Moving" the child is a very widely defined term – it can be arranging or facilitating. In this present case, the first accused at times organized transport to collect one of the girls, at other times accompanied a girl to the place of assignation. The second accused more often that not would accompany the girl in a taxi to the motel/apartment and wait in the hope that he would get a "tip".

[24] There have been two previous trafficking cases in Fiji, but not of children and both were international trafficking. In the case of Murti [2010] FJHC 514 per Gounder J. (November 2010) it concerned an Indian national who organized the transportation of seven fellow countrymen to travel to New Zealand claiming that he had work for them there. Each paid about 150,000 rupees for the transport. He had them transit through Fiji, where he planned to abandon them. At the border, an official became suspicious and detained all 8 men. The facilitator was charged with trafficking under s.112(3) of the Crimes Decree (an offence which has extra-territorial jurisdiction). After trial, the learned Judge found that the act of abandoning them without funds was an act of recklessness as to exploitation. In his sentence, Gounder, J. said:

*"The Crimes Decree 2009 which came into effect in February 1<sup>st</sup>, 2010 create a number of offences designed to fulfill Fiji's obligations under the United Nations Convention Against Transitional Organised Crime and two of its three protocols, the protocol to prevent, suppress &*

*punish trafficking in persons, especially women and children (the Trafficking Protocol) and the protocol against the smuggling of migrants by Land, Sea and Air.*

*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. Trafficking is a human rights issue. Traffickers are motivated by greed to take advantage of vulnerable victims. Traffickers are motivated by greed to take advantage of vulnerable victims. Traffickers use coercive tactics including deception, fraud, imitation, isolation treat and use of physical force.....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".*

[25] In the Murti case the Judge sentenced the trafficker to 6 years imprisonment while saying that there was no evidence of physical exploitation.

In the case of Laoinde mane and Others HAC 323/12, a case decided in this Court, the traffickers had brought three Thai girls into the country. The girls having been told that they were going to work as masseuses 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 sentenced to 8 years imprisonment; factors being in his favour that he was a rather small cog in this wheel of crime syndicate 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.

Neither Murti nor Laojindemane are applicable to this case where the trafficking is of children, the children were being exploited for gain and the maximum penalty is 25 years.

- [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



**SCHEDULE:****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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of July 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of October 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> 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 1<sup>st</sup> day of October 2012 and the 31<sup>st</sup> 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.

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO. HAC 425 OF 2018**

**BETWEEN** : STATE

**AND** : JOSEVATA WERELAGI

**Counsel** : Ms S Tirao with Ms L Bogitini for the State  
Ms S Nasedra with Ms T Kean for the Accused

**Date of Hearing** : 25 – 29 November 2019, 2 – 4 December 2019

**Date of Summing Up:** 5 December 2019

**Date Judgment** : 9 December 2019

**JUDGMENT**

[1] After deliberating, the assessors expressed unanimous opinions that the Accused is guilty of aggravated sexual servitude as charged on count one and domestic trafficking in children as charged on counts two, three and four. The assessors' opinions are not binding on me. However, if I do not agree with their opinions I am obliged to give cogent reasons. I now pronounce my judgment. I direct myself in accordance with my summing up.

[2] The legal burden of proof in respect to the charges lies with the prosecution. The standard is proof beyond reasonable doubt.

[3] The Accused gave evidence. He carries no burden to prove anything in respect to these charges. He denies the allegations. He denies both the physical and fault elements of the alleged offences. He gives an innocent explanation regarding his association with the complainant during the relevant period. He says that parts of his statement (Q 136 onwards) in his record of interview that incriminates him were fabricated by the investigating officer.

[4] The assessors have obviously rejected the evidence of the Accused as untrue. I too reject his account that his association with the complainant at the relevant time was innocent and was out of concern for her after learning her predicament. His evidence is inconsistent with his caution statement made to Police. In his evidence he denies taking the complainant from Nausori to Samabula on the night of 18 July 2015. In his caution interview he admits taking the complainant from Nausori to Rewa Street on the night of 18 July 2015. But he denies taking her there to provide sexual services. He claims she voluntarily tagged along with him like other girls who join sex industry.

[5] I accept the evidence of the investigating officer that she accurately recorded the caution statement of the Accused and that she did not fabricate anything. The statement is mixed, that is, evidence for and against the Accused. The Accused's evidence that the incriminating parts of his statement were fabricated by the investigating officer is too convenient to be true. I feel sure that the Accused made the incriminating statements and that the statements are true.

[6] I now consider whether the prosecution has proved the charges beyond reasonable doubt. For the offence of aggravated sexual servitude as charged on count one, the prosecution must prove beyond reasonable doubt that the Accused by use of force or a threat of force caused a child under the age of 18 years to enter or remain in a condition to commercially use her body for the sexual gratification of others and that he intended to cause that sexual servitude.

[7] For the offence of domestic trafficking in children as charged on counts two, three and four, the prosecution must prove beyond reasonable doubt that on the alleged dates the

Accused facilitated the transportation of a child under the age of 18 years from one place to another within Fiji with the intention that the child will provide sexual service.

[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 Totoغو 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 shuttled 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.

[14] On each charge of domestic trafficking in children I feel sure that the Accused facilitated the transportation of the complainant who was a child from Nausori to Samabula with the intention that the complainant will provide sexual services at Rewa Street. I find the Accused guilty of domestic trafficking of a child as charged on counts two, three and four.

[15] The Accused is convicted as charged on all four counts.



.....  
**Hon. Mr. Justice Daniel Goundar**

**Solicitors:** Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused

IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 425 OF 2018

BETWEEN : STATE

AND : JOSEVATA WERELAGI

Counsel : Ms S Ti'vao with Ms L Bogitini for the State  
Ms S Nasedra with Ms T Kean for the Accused

Date of Hearing : 25 – 29 November 2019, 2 – 4 December 2019

Date of Summing Up: 5 December 2019

Date of Judgment : 9 December 2019

Date of Sentence : 12 December 2019

SENTENCE

[1] Following a trial, the Accused was found guilty of one count of aggravated sexual servitude and three counts of domestic trafficking involving a child.

[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.

[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 only comparable case is *State v Raiakabroka* - Sentence [2014] FJHC 409; HAC80.2013 (9 June 2014), in which Madigan J suggested a range of 12 to 18 years' imprisonment for offences of a similar nature. That case involved slavery and trafficking of two children aged 15 and 17 years. 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.

[7] I now consider the subjective circumstances of the Accused. He is 38 years old and supports his elderly parents and a younger sister. He has a long list of previous convictions but none involve offences against children. His personal or family circumstances and his character are of little mitigating value.

[8] Counsel for the Accused submits that the duration of the exploitation mitigates the offences. I disagree. The duration of the exploitation is short because of an intervention by the law enforcement and not due to the conduct of the Accused. Apart from giving a mixed statement to police, the Accused did not cooperate or offer any assistance to police investigation, deserving credit.

[9] I do not hold against the Accused for exercising his right to a trial and for not expressing any remorse by taking responsibility for his actions. However, if he had done so, he would have been given some credit for his expression of remorse as a mitigating factor.

[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.

[12] Finally, I take into account that the Accused had been in custody on remand since 8 November 2018 – a period which I take into account to reduce the sentence.

[13] I would have imposed a term of 16 years' imprisonment but for the remand period and the delay in bringing the prosecution from the date of the offences. I sentence the Accused as follows:

- Count one – Aggravated Sexual Servitude – 14 years' imprisonment.
- Count two – Domestic Trafficking in Children – 14 years' imprisonment.
- Count three – Domestic Trafficking in Children – 14 years' imprisonment.
- Count four – Domestic Trafficking in Children – 14 years' imprisonment.

[14] The sentences are made concurrent. The total effective sentence is 14 years' imprisonment with a non-parole period of 10 years.



.....  
**Hon. Mr. Justice Daniel Goundar**

**Solicitors:**  
Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused

## TIP LAW EXERCISE

### THE TAMATOA FAMILY: SMALL GROUP WORK

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#### Instructions:

Each small group will be assigned one of the members of the Tamatoa family in the following fact scenario. Participants will work in their groups to identify any instance of a crime involving that family member. For each instance identified, the group should create a list of the victim(s), traffickers(s) and evidence (actions, comments, or other corroborating evidence). Include all instances where there is not enough evidence to convict, but enough to require further investigation.

#### The Facts:

The Tamatoa family, Leyla (42), her husband Keoni (46), and their three children, Clair (19) Tad (18), and Jena (15) were eager to leave Samoa where they were deep in debt and had no prospects. Keoni found a fisherman named Iosefa in Samoa who had a big boat and agreed to take the family to Fiji for a fee and drop them off at a beach where his friend Jo would pick them up. Jo took a smaller craft out to meet the fishing boat in Fijian waters and ferried the Tamatoas to the beach. When they got to shore, Jo told the Tamatoas they would have to work on his farm for a week if they wanted a ride into town, food, and a place to sleep.

Jo put the whole family to work harvesting his banana crop immediately upon arrival at the farm. He let them sleep in the barn and fed them two meals a day. The Tamatoas finished the harvest in four days and were preparing to leave. Jo told them their debt wasn't fully paid, and that they would also have to help rebuild the barn, which was falling down. Keoni complained that the family had more than paid their debt and they should be paid money for any additional work. Jo threatened to report them to immigration officials if they did not stay and rebuild the barn in exchange for food and shelter. Tad was the only one with a passport and the family did not know what would happen if immigration officials found them, so they agreed to stay and work. After the barn was completed, Jo told the family they had one more task to complete to pay off their debt. They had to help Jo's neighbor harvest his crops. Jo offered to split the money the neighbor would pay for their labor so they could continue on their journey. The Tamatoas agreed, but later decided it was a bad deal for them, so they left the farm in the middle of the night and went looking for other work.

Tad and Clair found work at a farm 30 kilometers away from Jo's farm. They were paid minimum wage and worked ten-hour days on the farm.

Keoni found a job with a traveling harvest crew. Vijay the leader of the crew, told Keoni he was old and slow but would do him a favor and give him a job that paid \$10 FJD a day. Keoni was desperate for work and took the job. Keoni had to pay Vijay \$20 FJD for transportation whenever they moved on to a new farm, and he was not paid for days the crew did not work. Vijay paid Keoni every week, but the pay varied. Some weeks Keoni worked only one or two days and did not have enough money to cover the transportation costs he owed Vijay. Other weeks Keoni earned enough to pay Vijay what he owed.

Leyla and her daughter Jena found domestic work at the home of Cama and Petero. They were each paid minimum wage, shared a small bedroom in the house, and were well fed. At the end of three weeks, Petero told Jena to gather up some supplies so she could clean the store he managed. Petero took Jena to the store, raped her, and then told her to start cleaning. Jena was embarrassed and ashamed and did not want anyone to know what happened. The next time Petero told her to gather supplies to clean the store she did not resist. She went with him. This went on for several months and Jena did not tell anyone. Cama realized her husband was having sex with Jena and she was furious. Cama got Jena alone, called her a whore and demanded to know why she seduced her husband. Jena begged Cama not to tell her mother. The next day Cama told Leyla that a friend of hers was looking for a nanny and would pay Jena double the minimum wage if Jena started immediately. Leyla thought it was a good opportunity for her daughter, and Petero did not object because he realized his wife knew what he had done. Cama, who wanted to punish Jena and get her out of the house, drove Jena to a nearby tourist town and dropped her off on the street, telling her that she was a dirty evil whore, that no one would ever hire her to take care of children, and she would never find respectable work or love. Cama told Jena that if she tried to go to anyone for help that she would tell Leyla that Jena was an evil temptress who seduced men.

A man lounging at a nearby café, Timi, overheard Cama's comments to Jena and approached Jena after Cama drove off. He told her that she looked sad and asked if she needed help. Timi was kind and he wooed Jena. He listened to her, provided her with food and a comfortable place to live, and even gave Jena money to send to her mother so she would think Jena was working as a nanny. The two started dating and, after a while, Timi asked Jena to marry him. Two weeks later Timi told Jena he had lost his job and they needed money for their apartment. He bought her some make-up and sexy clothes and taught her how to get tourists to pay for sex. He told her it was just for a little while until he found another job. He told her that they needed the money so they could stay together, and she could keep sending money to her mother so she would not worry or come looking for her and take her away.

Meanwhile, Clairia had been working on the farm for several months when Daniella, the farmer's cousin, came for a visit. Daniella lived in a popular tourist town and had beautiful clothing and lots of money. Daniella told Clairia how much fun she had partying with rich tourists. Daniella commented on Clairia's beauty and told Clairia she would have no problem getting a job or a rich boyfriend to take care of her if she wanted to move to the tourist town. Daniella gave Clairia a ride into town and introduced her to a shopkeeper who offered her a job as a clerk. Clairia disliked working at the shop but enjoyed drinking and dancing with the tourists at the clubs. Clairia quit the job at the shop and started working as a prostitute, which was far more profitable. She made a deal with a man named Adi, the owner of a popular club, in which she paid him a small fee to use one of the rooms in the back of the club to meet her clients.

## Short Indicator Scenario: Case 1

### On the Farm

A Labor inspector received a tip from an NGO that workers on a small farm are being mistreated. The inspector decided to make an unannounced visit to the farm and found that the workers were mostly undocumented immigrants from Vietnam. They were living on the premises in a barn under primitive conditions – no running water, no electricity, and no toilet facilities. The workers used an outhouse in the back of the barn.

The inspector noted that the field was open, and anyone could have easily walked away, although the nearest settlement was 11 kilometers away. He also noted that there were several Doberman and Rottweiler dogs on the farm.

The owner of the farm told the inspector that he hired the Vietnamese because they worked cheap and didn't mind living in a barn. He paid them a salary of \$10 FJD per week. He also gave them room and board on credit.

The workers told the inspector in broken English that they were not victims of trafficking, that they stayed on the farm because they needed the money to pay off debts to their recruiter back home who covered their transportation to Fiji. They said they owed the recruiter \$8000 FJD. They also owed money to the farmer who charged them \$5 FJD per week on credit for food and lodging. That bill kept getting bigger every week.

The inspector noticed deep bite marks on the leg of one of the workers. The worker explained that one of the dogs was playing around the other day and the bite was accidental.

## Short Indicator Scenario: Case 2

### Construction Workers

Early one morning, a labor inspector made a surprise visit to a construction site in Suva. The site was completely enclosed by a high fence topped with barbed wire. The gate at the entrance to the site was locked. The inspector announced himself to the guard at the front entrance and asked that he be let in to conduct a routine inspection. The guard appeared to make a phone call, and after a little while, he unlocked the gate.

The site seemed deserted. There were no workers to be seen. After a few minutes, the inspector heard noises coming from a shed located on the site. He tried to open the shed door but it was locked. He found the site foreman in the office and demanded to know who or what was in that shed. The foreman seemed upset but said nothing. He went over to the shed and said something through the door. After a few minutes, the door opened and 10 workers filed out.

None of the workers had visas or work permits. The foreman said that their passports were located in a locked desk draw in the office, and he went to get them. While he did so, the inspector tried to speak with the workers. A few spoke some English. He asked them whether they had been trafficked or forced to work. Those few English speakers all denied that they were victims. He asked them where they lived. They pointed to the shack. The inspector saw that the shack was a makeshift dormitory with bedding on the floor, an open toilet, a sink and a few hotplates. There were no windows and only that one door. It was dark, dirty and smelly.

The foreman told the inspector that the workers mostly came from Asia. He admitted that they did not have proper paperwork. That is why they hid in the shed, afraid that they would be deported and lose a good paying job.

The inspector referred the matter to immigration.

### Short Indicator Scenario: Case 3

#### Bar "Girls"

A female working in a bar phoned the local police station to complain that she was being forced to engage in prostitution by the bar owner. She sounded scared and upset. She begged the police to rescue her.

When the police arrived at the bar, they interviewed the owner who denied any knowledge of prostitution at his establishment. He admitted, however, that he has two "girls" working there serving drinks to customers. He further admitted that they both had recently come from Tonga. They were both desperate for work and a place to stay. He took pity on them, and offered them employment in exchange for room and board above the bar. They did not have work visas. When the police asked to see the females' passports, the owner went to a safe under the bar and produced them. The passports showed that both of the females were over the age of 18.

The police then tried to interview the two females in the presence of the owner. They both refused to speak with the police. One of them had a black eye and appeared to be quite young. She did not look at the officer when he spoke to her. The officer noted that the photo in her passport seemed to be of an older looking woman.

The officers asked to see the room above the bar where the females lived. The room had two beds, a sink, a hot plate, and a window. The window had bars over it. The only door in the room had a lock on the outside.

Finding no evidence of prostitution, the police referred the case to immigration based on the illegal status of the two females.

## Victim Psychology The Victim-Centered Approach

**Fiji**  
**March 2020**



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### Traffickers May Use Multiple Means To Control Their Victims That Can Cause Psychological Trauma

- Beatings, burnings, rapes, and starvation
- Isolation
- Psychological abuse
- Drug or alcohol dependency
- Document withholding
- Debt bondage
- Threats of deportation
- Threats against the victim's family or friends in his/her home country

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### What do Victims of Trafficking Experience

- Betrayal
- Violence
- Loss of identity, choice, independence
- Reputational harm
- Uncertainty
- Emotional abuse
- Helplessness



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## Common Emotional Reactions of Trafficking Victims

- Anger
- Fear
- Self-protective reactions (include shutting down, or showing no emotion)
- Loyalty or gratitude to trafficker who the victim has come to depend upon
- Shame, fear of rejection and punishment
- Sadness or depression

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## Physical Symptoms (normal reaction to abnormal events)

- Crying
- Nausea
- Headaches
- Loss of appetite
- Panic attacks
- Shaking or muscle aches
- Fatigue
- Nightmares



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## What is “Trauma”?

Trauma is a psychologically wounding experience; it includes physical, emotional, sexual, and institutional abuse and neglect.

Traumatic experiences shake the foundation of our belief about safety and shatter our assumptions of trust.

A traumatic experience usually includes:

- Overwhelming feelings of not being able to cope
- Threat to physical or mental safety and well-being
- A sense of loss of control over self or helplessness.

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### Impact of Trauma

- Stress hormones affect brain function
- **Fight, flight or freeze reactions**
- Time slows down
- Brain takes “snap shots” and breaks them up to process.
- The memories stored all over the place

*“She gave no details. Said she couldn’t remember.”  
“If it really happened, there’s no way she’d forget.”*

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### Impact of Trauma

Neurobiological changes during Trauma



Can affect memory and storage and make recall more difficult.



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### Resulting Behaviors

(you may see these during initial interviews)

- Inability to recall different aspects of an experience
- Inability to recall dates, time
- Inability to concentrate
- Irritability/angry outbursts
- Anxious and fearful
- Shame and humiliation (withdrawal and isolation)
- Complete withdrawal into self

Victims attitudes and behaviors can be confusing to you and make you question the person’s truthfulness. Understand they may be the result of trauma/and or trafficking experience.

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## Victims Have Trouble Trusting (this includes trusting law enforcement)

- Victims have experienced betrayal and broken promises
- Victims of trafficking have difficulty trusting
- Victims attitudes and behaviors are often confusing to others, not what one might expect, but are a result of trauma/and or trafficking experience

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## What is “Victim-Centered”?

### A focus on the needs and concerns of the victim

Adopting a Victim-Centered approach in Human Trafficking cases can help to:

**Identify victims** so more perpetrators can be brought to justice

**Stabilize victims** so they are in a better position to serve as witnesses

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## Avoid Re-Traumatization

Avoid any activity or interaction that results in the victim feeling:

- Coerced
- Abused
- Helpless
- Trapped or Cornered



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### **Common Victim Fears**

- Physical harm (to self, family, friends)
- Financial harm
- Emotional harm
- Prosecution for criminal behavior
- Outcast from community
- Lack of privacy
- Separation from family
- Not being understood (no common language)

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### **“Victim-Centered” Actions for Investigators**

- Identification of victims
- No prosecution or detention of victims
- Engage victims
- Empower victims
- Provide information for victims
- Protection and support for victims
- Understand victim trauma

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### **Protection and Support**

- Refer for “victim services” - a wide range of support
- Victim’s needs vary from case to case
- Often victims can tell you what kind of services they need
- Think about what you would want in their situation

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**Possible Immediate Needs**

- Protection
- Medical treatment
- Food
- Appropriate clothing
- Safe place to sleep
- Time to recover/prepare
- Contact with family
- Information about next steps / options

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**Possible Long Term Needs**

- Protection
- Medical treatment (physical & psychological)
- Food
- Shelter (housing)
- Work or other source of income
- Transportation and/or reintegration
- Education or vocational training
- Information about criminal justice system/civil court options
- Family reunification

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**Benefits of “Victim-Centered” Approach**

- Right thing to do – it is the humanitarian approach
- International best practice
- Build better case and build trust with victim
  - Establish better relationship with the victim
  - Stabilized victim has clearer memory of the facts
  - Victim more comfortable talking about the trafficking situation/present information more coherently
  - Your interview does not traumatize victim

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**Victim Psychology**  
**The Victim-Centered Approach**

***KEY POINTS***

- People who are exploited may experience psychological symptoms as a result
- The resulting behaviors do not mean the victim is lying or intentionally uncooperative
- Investigators must be patient and honest with victims to gain their trust and cooperation
- Using a victim-centered approach helps the victim heal and can dramatically help your case.

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## Initial Interview

**Fiji**  
**March 2020**



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### What is the Purpose of the Initial Interview?

- Obtain basic information
- Not a detailed, full evidentiary interview
- Look for sufficient indicators of human trafficking to support referral for further investigation
- Provide protection and support for the potential victim as required by law

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### Getting Information

- Talk to the person in private
- Introduce yourself and explain why you want to talk to them
- Use informal conversation
- Use open ended questions
- Avoid going into too much detail
- Don't ask if he or she is a "trafficking victim."
- Be aware that victims may have been coached to tell a story.
- Keep an open mind - do not judge or blame
- Watch for and respond to nonverbal cues

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### Ask the Right Questions in the Right Way

- Keep questions simple
- Do not use jargon
- Do not use abstract concepts
- Do not ask multi-part questions
- Questions should not be suggestive
- Focus on what is important: indicators of trafficking
- Avoid going into too much detail

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### Ask Open-Ended Questions

- Begin questions with WHAT, HOW, WHY, DESCRIBE, EXPLAIN
- These questions require answers that are more than one or two words
- They ask the respondents to think and reflect
- It requires more time to listen to the answers to these questions, BUT they yield more information
- Follow up with more open questions

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### Examples of Open-Ended Questions

- What information do you have about that?
- What was the most difficult part of your situation?
- What happened to your documents?
- How did you contact your family?
- Explain how you met the trafficker?
- Describe what you saw (heard) next?

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## Open-Ended Questions Getting to "Why"

<i>Instead of...</i>	<i>Try...</i>
Why didn't you leave once you realized it was a brothel?	Did you ever think about leaving?
	When was that?
	Tell me about that...
	What was going through your mind?

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## Closed Questions

- Can be answered with a single word or short phrase
- They give facts and are easy to answer
- They keep control of the conversation
- But they discourage the person from telling their story in their own words. As a result, important information may be lost.
- Resist asking too many closed questions

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## Examples of Closed Questions

- Did your employer hold your documents?
- What year did you start working?
- Did you earn any money?
- How many customers did you see each day?
- How many hours a day do you work?
- Are you a victim of trafficking?

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## Leading Questions

- The answer is contained in the question.
- Often demands a YES-NO answer.
- Do not ask leading questions in an initial interview.
- They are suggestive and render the information unreliable.
- This is also an aggressive form of questioning that may undermine trust with the victim.

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## Examples of Leading Questions

- You were living in Samoa in August 2019, weren't you?
- The boss frightened you, didn't he?
- Didn't Luisa send you to Nadi?
- Isn't it true that you worked at the club for a full year before you left?

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## Earning Victims' Trust



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## Building Rapport and Gaining Trust is Important

- Victims have difficulty trusting officials
- They have experienced betrayal and broken promises
- They may fear they could be sent to jail or deported
- Their attitudes and behaviors are often confusing and may be a result of trauma, fear, or shame
- Victims may feel that talking to you puts them in danger
- They may give a false story to police, at first

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## How to Build Rapport

- Show interest and respect: eye contact, body language
- Have a **conversation** with the person (do not question them as you would a suspect)
- Start with small talk
- Do not use labels that might offend the victim like “prostitute” and “delinquent”
- Reassure the person you are there to help; ask how you can help
- Answer questions honestly

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## The Setting

- Make it private but comfortable, not intimidating
- Provide breaks at victim’s request
- Offer water, pen, paper and tissues if necessary
- Be careful of timing
- Several short interviews may be needed instead of one longer one
- Consider how to best take notes or record

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## Practice Active Listening

- Giving your full attention to what the person is saying
- Being sensitive to body language and voice
- Do not focus on your next question, focus on the response
- Listen carefully to every word; repeat answers you want to focus on and to show you understand
- Ask logical follow-up questions
- Use open-ended questions: hear what the person has to say and show you are willing to spend the time; encourages cooperation

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## Considerations for Initial Interviews with Child Victims

- The Key Consideration: **Act in the Best Interest of the Child**
- Children may be told by traffickers to lie about their age
  - *Treat potential minors as such until you have reliable proof of their age*
- Children may be told what they should say when asked questions; be prepared for rehearsed stories from children
  - *A rehearsed story may be an indicator of trafficking*
- Use a specialist to determine if a child can be interviewed (when possible)
- Have reasonable expectations; understand the victim's account may evolve over time—gradual disclosure of the truth is typical of victims including children

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## Initial Interview

### KEY POINTS

- The purpose of the initial interview is to determine whether there is a basis for further investigation
- Ask open-ended questions designed to elicit the most information
- Building rapport and gaining trust is key
- Always act in the best interest of a potential child victim

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## CASE SCENARIOS FOR INTERVIEW STRATEGY

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### *Scenario 1*

A man phoned the police station and said that he met a woman in a bar in Suva. The man would not give his name but said a woman, who called herself “Lola,” confided in him that she was being forced to engage in prostitution by the bar owner. The man does not think Lola is her real name. The man described the woman as being in her 20s with long dark hair and brown eyes. The woman seemed scared and upset, and she asked the man to help her and give her money so she could escape and go back home. He wanted to give her money, but the woman said she could not take it while the owner was at the bar, because he would see and take it away from her. The woman asked the man to return to the bar early the next day, before the owner arrived for the evening, to give her the money. The man reported the situation to the police and planned to go back and give the woman some money.

### *Scenario 2*

A labor inspector made a surprise visit to the construction site of a new building. The site was completely enclosed by a high fence topped with barbed wire. The gate at the entrance to the site was locked. He heard people inside the compound yelling “utavi” and “help.” The labor inspector called the police.

An officer arrived at the site and, after consulting with the labor inspector, cut off the lock on the gate and entered the site where he found ten men who appear to be from South Asia and do not speak much English. In plain view was a campsite with some tents and food, cups, dishes, and jugs of water near a firepit. One man, Deepak, who appears to be the leader of the group, repeatedly tried to talk to the officials on behalf of the entire group. Some of the other men seem afraid of Deepak. One of them, Rohan, makes eye contact with the labor inspector and quietly says, “help me.”

### *Scenario 3*

A police officer is in line at the pharmacy and overhears Maari, who appears to be a teenager, asking for medicine because her employers won’t give her any more medicine for her fever and body aches. She tells the pharmacist she just needs enough medicine so she can take care of the children. She asks the pharmacist to hurry because her boss is at the shop next door and will come in any minute. Before the officer can talk to Maari, her employer walks in. Maari looks at her employer with a very frightened expression and walks away from the pharmacy counter.

### *Scenario 4*

There is a fire one night at an office building. When the police and fire departments arrive, there are five people outside – three people who have offices in the building and two other people Fan (male) and Song (female), who appear to be the cleaning

crew based upon the fact that one of them ran outside still clutching a mop. They are both extremely thin and seem quite frightened. They don't say anything when the police and firefighters try to talk to them in English. They do understand Chinese, but it appears all they are saying is they do not want to talk to the police. They try to walk off down the road, but they are stopped by another officer.

March 2020

**RE: Post-Training Surveys**

Dear Colleague:

Thank you for your joining the Warnath Group for our anti-human trafficking training in Suva!

After your training experience, we will contact you at six-month intervals to learn about your experiences fighting human trafficking in Fiji through an online survey.

You will receive an email from us inviting you to take a survey on any internet enabled device. The first question of the survey will ask you to select your role in anti-human trafficking efforts including 1) Prosecutors & Investigators, 2) Judges, 3) NGO Staff, and 4) Ministry Official and Other (choose 4 if you do not fall under category 1, 2, or 3). Your answer to this question will direct you a set of 12 – 15 questions specific to your role, including multiple choice and open-ended questions. The second through fourth pages of this letter include the complete sets of questions for the survey.

We hope that you will have the opportunity to use the knowledge and skills that the training covers in human trafficking cases – to participate in investigating and prosecuting traffickers and/or identify and support victims of trafficking receiving care. Whether or not you are currently working on anti-human trafficking cases or issues, your participation in responding to the survey is still extremely valuable and we still want to hear from you.

Should you have any questions, please contact us at [LegalAnalyst@WarnathGroup.com](mailto:LegalAnalyst@WarnathGroup.com). We look forward to communicating with you in the future and wish you the best.

Sincerely,

The Warnath Group Team  
1440 G St NW, Suite 9118  
Washington, D.C. 20005  
[www.warnathgroup.com](http://www.warnathgroup.com)  
[info@warnathgroup.com](mailto:info@warnathgroup.com)  
(+1) 301-857-7842

## Survey Questions

### Prosecutors & Investigators:

1. What is the total number of cases that you prosecuted or investigated as possible human trafficking?
2. What is the total number of human trafficking victims you have worked with?
3. What is the total number of NGO's you have worked with?
4. What is the total number of cases you investigated or prosecuted where charges were brought under your country's human trafficking law?
5. What is the total number of cases you prosecuted or investigated under the human trafficking law that resulted in a finding of not guilty or were dismissed by the court?
6. What is the total number of cases you prosecuted or investigated under the human trafficking law that resulted in a finding of guilt?
7. Of those found guilty, how many served time in prison?
8. What is the total number of your cases originally investigated as human trafficking that resulted in criminal charges other than human trafficking? (for example, prostitution, kidnapping, assault, etc.)
9. What is the total number of your cases originally investigated as human trafficking that resulted in a finding of guilt on criminal charges other than human trafficking?
10. Of those found guilty, how many served prison time?
11. How many cases did you prosecute or investigate as possible human trafficking that resulted in no charges being brought?
12. In how many cases did you seek a financial penalty as part of the trafficker's sentence?
13. What do you think are the biggest challenges of prosecuting more human trafficking cases?
14. What ideas do you have for ways to identify more cases of human trafficking?
15. Is there anything significant about any of your recent cases that you would like to share with us?
16. What victim-centered approaches or techniques have you used while working on human trafficking cases?

### Ministry Officials/Other:

1. How many victims of human trafficking have been assisted by your ministry?
2. How many alleged perpetrators of human trafficking has your ministry handled?
3. What is your role in anti-human trafficking efforts in your country?
4. What type(s) of assistance or information does your ministry provide to victims of human trafficking?
5. What successes has your ministry had in responding to reports of human trafficking?
6. What challenges does your ministry face in responding to reports of human trafficking?
7. What did you learn at the Warnath Group training that has been helpful in formulating a response to reports of human trafficking?

8. What types of interactions does your ministry have with alleged perpetrators of human trafficking?
9. What do you think are the biggest challenges of prosecuting more human trafficking cases?
10. What do you think are the biggest challenges to supporting the recovery of victims of trafficking?
11. Is there anything significant about any of your recent cases that you would like to share with us?
12. What victim-centered approaches or techniques have you used while working on human trafficking cases?
13. What ideas do you have for identifying more cases of human trafficking?

# The WARNATH GROUP

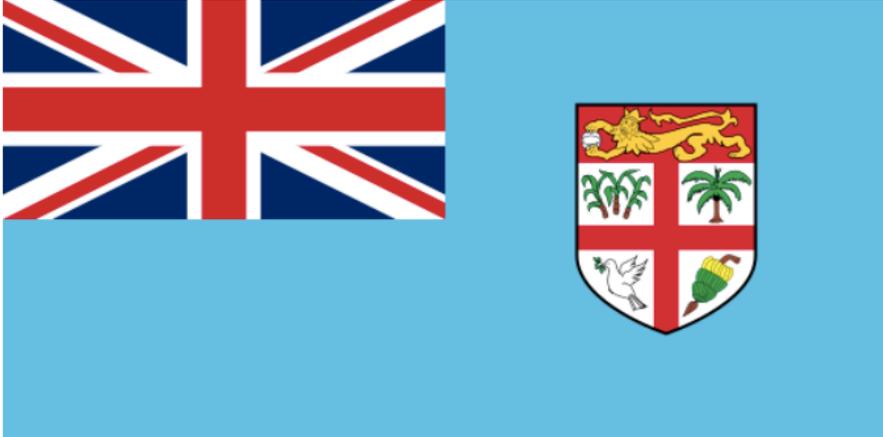
## Dear Fiji Anti-Human Trafficking Training Participants: We created a web page just for you!

The WARNATH GROUP

Home Services Resources News About Contact

### FIJI: RESPONDING TO HUMAN TRAFFICKING (MARCH 9 - 11, 2020)

by The Warnath Group | Feb 6, 2020 | TTA Resources



**HI, WARNATH GROUP ALUMNI!**

We've created this web page to share some resources with you that you may find helpful as you handle trafficking cases and encounter trafficking-related questions in the course of your work in the future. Our objective is to ensure that our contact with you does not begin and end in the classroom. Instead, we believe it should be an ongoing process. We are at your disposal whenever and however you think we can be of assistance. Together, we can ensure that trafficking victims get the help they need, and that traffickers do not escape justice.

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**PROTOCOL TO PREVENT, SUPPRESS AND PUNISH  
TRAFFICKING IN PERSONS, ESPECIALLY WOMEN  
AND CHILDREN, SUPPLEMENTING THE UNITED  
NATIONS CONVENTION AGAINST  
TRANSNATIONAL ORGANIZED CRIME**

Advance copy of the authentic text. The copy certified  
by the Secretary-General will be issued at a later time.



**UNITED NATIONS  
2000**

**PROTOCOL TO PREVENT, SUPPRESS AND PUNISH  
TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND  
CHILDREN, SUPPLEMENTING THE UNITED NATIONS  
CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME**

**Preamble**

*The States Parties to this Protocol,*

*Declaring* that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

*Taking into account* the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

*Concerned* that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

*Recalling* General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

*Convinced* that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

*Have agreed as follows:*

**I. General provisions**

*Article 1*

*Relation with the United Nations Convention  
against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

*Article 2*  
*Statement of purpose*

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

*Article 3*  
*Use of terms*

For the purposes of this Protocol:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

*Article 4*  
*Scope of application*

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

*Article 5*  
*Criminalization*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

**II. Protection of victims of trafficking in persons**

*Article 6*  
*Assistance to and protection of victims of*  
*trafficking in persons*

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of

trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

#### *Article 7*

##### *Status of victims of trafficking in persons in receiving States*

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

#### *Article 8*

##### *Repatriation of victims of trafficking in persons*

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of

that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

### **III. Prevention, cooperation and other measures**

#### *Article 9*

#### *Prevention of trafficking in persons*

1. States Parties shall establish comprehensive policies, programmes and other measures:

- (a) To prevent and combat trafficking in persons; and
- (b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

#### *Article 10*

##### *Information exchange and training*

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

#### *Article 11*

##### *Border measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent

possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

#### *Article 12*

##### *Security and control of documents*

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

#### *Article 13*

##### *Legitimacy and validity of documents*

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported

to have been issued in its name and suspected of being used for trafficking in persons.

#### **IV. Final provisions**

##### *Article 14* *Saving clause*

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

##### *Article 15* *Settlement of disputes*

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

*Article 16*  
*Signature, ratification, acceptance,*  
*approval and accession*

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

*Article 17*  
*Entry into force*

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of

the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

*Article 18*  
*Amendment*

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

*Article 19*  
*Denunciation*

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

*Article 20*  
*Depositary and languages*

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.



The WARNATH GROUP

**RESPONDING TO HUMAN TRAFFICKING PARTICIPANT INFORMATION**

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Name: \_\_\_\_\_

Sex: Male / Female

Agency/Office: \_\_\_\_\_  
\_\_\_\_\_

Position: \_\_\_\_\_  
\_\_\_\_\_

E-mail: \_\_\_\_\_  
\_\_\_\_\_

Opt Out of Receiving Warnath Group Emails \_\_\_\_\_

Cell Phone: \_\_\_\_\_  
\_\_\_\_\_

Work Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_