Supreme Court of Queensland - Court of Appeal

R v Dobie [2009] QCA 394 (18 December 2009)

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Last Updated: 18 December 2009

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dobie* [2009] QCA 394
PARTIES:	**R**
	v
	DOBIE, Keith William
	(applicant)
FILE NO/S:	CA No 5 of 2009
	DC No 1221 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 December 2009
DELIVERED AT:	Brisbane

HEARING DATE: 30 September 2009
JUDGES: Fraser JA and Cullinane and P Lyons JJ

Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Application for leave to appeal against sentence refused.**
2. **Application for extension of time within which to appeal against conviction granted.**
3. **Appeal against conviction dismissed.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST DECENCY AND MORALITY – OTHER OFFENCES – where applicant convicted on plea of guilty of two counts of trafficking in persons under s 271.2(2B) *Criminal Code* 1995 (Cth) – where applicant argued that he did not deceive the complainants about the extent to which they were free to cease providing sexual services once and for all and therefore, that the element in s 271.2(2B)(c)(iii) was not made out – whether "cease" in s 271.2(2B)(c)(iii) means to cease providing sexual services *permanently* or includes ceasing to provide those services *in a particular period or to particular persons*
CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted on pleas of guilty of two counts of trafficking in persons (counts 1 and 2), one count of dealing in proceeds of crime in excess of $10,000 (count 3) and four counts of presenting a false document (counts 4 to 7) – where applicant sentenced to concurrent terms of fours years imprisonment on counts 1 and 2; to 12 months imprisonment for count 3; and to concurrent terms of 12 months imprisonment for counts 4 to 7 – whether four year sentence on counts 1 and 2 excessive – whether the sentence on counts 4 to 7 should be made cumulative upon the sentence for counts 1 and 2 – whether sentence manifestly excessive

Acts Interpretation Act 1901 (Cth), s 15AB

Criminal Code 1995 (Cth), s 11.2, s 270.4, s 270.6, s 270.7, s 271.2, s 400.6

Migration Act 1958 (Cth), s 234
Attorney-General v Tichy (1982) 30 SASR 84, cited

Beckwith v The Queen (1976) 135 CLR 569; [1976] HCA 55, cited

Borsa v The Queen [2003] WASCA 254, cited

Maxwell v The Queen (1996) 184 CLR 501; [1996] HCA 46, cited

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited

Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57, cited

Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7, cited

Project Blue Sky v Australian Broadcasting Association (1998) 194 CLR 355; [1998] HCA 28, cited

R v Carkeet [2009] 1 Qd R 190; [2008] QCA 143, cited

R v GV [2006] QCA 394, cited

R v Johnson (2004) 205 ALR 346; [2004] HCA 15, cited

R v Lloyd, unreported, Bradley DCJ, 13 June 2007, considered

R v Mundraby [2004] QCA 493, cited

R v Myers [2002] NSWCCA 162, cited

R v Nagy [2004] 1 Qd R 163; [2003] QCA 175, cited

R v Rose (2009) 227 FLR 433; [2009] QCA 83, cited

R v Tait [1989] 2 Qd R 667; [1998] QCA 304, cited

R v Sieders; R v Somsri (2008) 186 A Crim R 540; [2008] NSWCCA 187, distinguished

R v Toro-Martinez (2000) 114 A Crim R 533; [2000] NSWCCA 216, cited

COUNSEL: S Di Carlo for the applicant

P J Flanagan SC, with P Morreau, for the respondent

SOLICITORS: Hannay Lawyers for the applicant

Director of Public Prosecutions (Commonwealth) for the

respondent

[1] FRASER JA: On 18 December 2008, the applicant pleaded guilty in the District Court to seven offences: counts one and two on the indictment, trafficking in persons (s 271.2(2B) Criminal Code 1995 (Cth) ("the Code")); count three, dealing in proceeds of crime in an amount exceeding $10,000 (s 400.6(1) of the Code); and each of counts four to seven, presenting a false document (s 234(1)(a) Migration Act 1958 (Cth) and s 11.2(1) of the Code).

[2] On each of counts one and two, the trafficking counts for which the maximum penalty was 12 years imprisonment, the applicant was sentenced to concurrent terms of four years imprisonment. On count three, dealing in the proceeds of crime, he was imprisoned for 12 months (against a maximum of 10 years). On each of counts four to seven, presenting false documents, he was sentenced to 12 months imprisonment (against a maximum of 10 years). The sentencing Judge ordered that the concurrent terms of 12 months imprisonment imposed on counts six and seven be served cumulatively upon the effective four year term otherwise to be served. Her Honour fixed a non-parole period of 22 months for the effective five year term.

[3] The applicant has applied in this Court for leave to appeal against sentence. He has also applied for an extension of time within which to appeal against his convictions on the most serious counts, trafficking in persons.

[4] The main question in the proposed appeal against the convictions turns upon the proper construction of s 271.2(2B) of the Code. The applicant organised the entry into Australia of two Thai women under arrangements he had made for each of them to provide sexual services here. He deceived the first complainant when he told her that it would be up to her how much work she did in Australia and he deceived the second complainant when he told her that she would have two days off work every week: in fact he intended to pressure them to provide sexual services on demand, that is to say, whenever a customer called and on any day of the week. The question is whether, on the proper construction of 271.2(2B)(c)(iii) of the Code, each deception was a deception about “the extent to which [the complainant] will be free to cease providing sexual services”.

Procedural history

[5] The court order sheet shows that on 20 October 2008 the applicant was arraigned on counts one and two and pleaded not guilty. A jury was empanelled. Following an adjournment, the applicant was re-arraigned later in the day and pleaded guilty to those counts. He was not then sentenced, and the matter was mentioned again in court on 9 December 2008. Defence counsel then intimated that the applicant would be filing an application to set aside the pleas of guilty. That application was filed on 16 December 2008. On 18 December 2008, the day of sentencing, counsel for the applicant agreed to the dismissal of that application, which the sentencing judge said appeared to have been “abandoned”. It was then that the applicant was re-arraigned on the whole indictment, and entered pleas of guilty to all counts.

[6] On 5 January 2009 the applicant filed an application for leave to appeal against sentence. When that application came before this Court on 7 July 2009 no appeal against

convictions and no application to set aside the pleas of guilty in respect of counts one and two had been filed, yet counsel for the applicant in his written outline appeared to advocate that those convictions should be set aside. The contentions included that the Judge failed to ensure that the facts put before her Honour established the commission of the offences, the applicant pleaded guilty without a full appreciation of the elements of the offences to which he was pleading guilty, he pleaded guilty because he was pressured and threatened, and the offences were not established because the prosecution could not establish the element of deception. Because the applicant's material was in disarray the application was adjourned.

[7] On 30 July 2009 the applicant filed an application for an extension of time within which to appeal against conviction and an amended notice of appeal and application for leave to appeal against sentence. The amended notice of appeal confined the grounds of the proposed appeal against conviction to the contention that there was a miscarriage of justice because the sentencing judge erred in law by accepting a guilty plea to counts 1 and 2 (trafficking in persons) when the facts said to constitute the offence were incapable of supporting the elements of that offence. The applicant's amended outline of argument filed on 29 September 2009 limited the argument to that ground. At the hearing of the applications the applicant's counsel expressly abandoned reliance upon the applicant's previous assertions that he was pressured and threatened and that he had pleaded guilty without a full appreciation of the charges.

Application for extension of time to appeal against conviction

[8] In an application for an extension of time within which to appeal against conviction the Court considers the length of the delay, any explanation for the delay, and whether it is in the interests of justice to grant the extension, having regard to the question whether the proposed appeal is viable.[1] An extension might be granted even in the absence of any satisfactory explanation for the delay if refusal of the extension would result in a miscarriage of justice.[2]

[9] The respondent's senior counsel acknowledged that the applicant's affidavit material adequately explained the delay of some seven months with reference to unwanted delays in obtaining legal assistance and advice. The respondent argued that the application should be refused because the proposed appeal lacked merit. The appeal is, however, fairly arguable. In these circumstances I would grant the necessary extension of time.

The proposed appeal

[10] In Meissner v The Queen,[3] Brennan, Toohey and McHugh JJ said that there is no miscarriage of justice if a court acts on a plea of guilty entered in open court by a person who is of full age and apparently of sound mind and understanding where the plea is entered in the exercise of a free choice in the interests of the person entering the plea, even if that person is not in truth guilty of the offence. It is also established that an application subsequently to withdraw a plea of guilty should be approached with considerable caution.[4] Furthermore, a plea of guilty is an admission of all of the elements of the offence and that all available defences have been negatived.[5] Nevertheless, it may be open to the Court to find a miscarriage of justice which permits the withdrawal of a plea of guilty and the setting aside of a conviction entered on that plea if, on the facts put forward as constituting the facts of the offence with reference to which the person was charged and sentenced, the person could not in law have been convicted of that offence.[6] It is,

however, not necessary to consider whether and in what circumstances the Court should embark upon such a course, since I have concluded that the facts put forward and accepted at the sentence hearing established that the applicant was guilty of the offences charged in counts 1 and 2.

The factual basis of the trafficking charges

[11] At the sentence hearing on 23 December 2008 the respondent's senior counsel tendered a statement of facts. The statement of facts set out an extensive set of facts from which it was inferred, amongst other things, that the applicant had intentionally deceived each complainant. Defence counsel unreservedly accepted the accuracy of those facts. He made it plain that the applicant did not intend to challenge anything in relation to the stated facts. There was no such challenge at the sentence hearing or in this Court.

[12] The factual background included that the applicant was in dire financial circumstances. His intention was to make as much money out of the complainants as possible to pay off his mounting debts. The complainants were vulnerable in their dealings with the applicant for several reasons: their limited English language skills; their disadvantaged backgrounds; they had never travelled outside Thailand before; and they were to be in Australia illegally. The applicant also knew that the complainants' sex work in Thailand was such as to allow them to choose when and how often they worked and the number of customers each would expect to see.

[13] Count 1 charged the applicant with a contravention of s 271.2(2B) between 13 November 2005 and 23 January 2006. The statement of facts explained that the applicant organised the entry into Australia of the complainant, who was a sex worker in Thailand. He arranged a three month visa for her and she was to work during that period, although in the end she stayed for only 36 days. The applicant told her that it was up to her how much she would work and that the more she worked the more she would get paid. The statement of facts asserted that the applicant intentionally deceived the complainant when he told her that it was up to her how much work she did in Australia because in fact he was not going to let her work when she wanted.

[14] Instead, the applicant intended to pressure the complainant to work whenever a customer called. In that respect, the Crown relied upon the applicant’s conduct after the first complainant’s arrival in Australia as reflecting his true intention when he made the statements to her. Once the complainant arrived in Australia she lived with the applicant. The applicant pressured the complainant to work whenever a client called. When the complainant first started, she did not want to commence work immediately but the applicant became angry with her; the applicant insisted she see customers if it had not been busy; even after she had said she wanted to go back to Thailand early, he would still pressure her and get angry if she refused to work. The applicant pressured the complainant to work, even when, on one occasion, her vagina was sore from work. The complainant saw up to five customers per day, and worked between 10 – 18 days in the period she was in Australia. The applicant abused the complainant verbally, saying things like she "cannot leave" and she has to work, that if she did not work for him she would be arrested. The applicant transported the complainant to and from each job and left her unaccompanied and without a mobile phone. The money received (save for tips) would go directly to the applicant. The applicant would sometimes receive up to $1,000 per day. The applicant paid the complainant a daily amount of approximately $20 and upon urging, sent approximately $640 back to Thailand for her family. When the complainant indicated she

wanted to stop and return to Thailand, the applicant sought to delay this. The complainant obtained assistance from a third party to do so. The applicant once physically blocked and detained the complainant for 30 minutes when she took steps to leave.

[15] Count 2 charged the applicant with a contravention of s 271.2(2B) between 11 February 2006 and 17 April 2006. After the first complainant had returned to Thailand, the applicant arranged for the second complainant to travel to Australia to stay for a period of three months. The applicant sent the second complainant a text message and later an email in which the applicant stated that she would work on Tuesday, Wednesday, Friday, Saturday and have Sunday and Monday to holiday. In making those statements the applicant deceived the second complainant because, so the statement of facts asserted, the applicant had no intention of giving the second complainant days off: if customers rang on any day of the week she had to work. The applicant's true intention when he made the relevant statements to the second complainant was as he had intended for the first complainant: to apply pressure to her after she arrived in Australia so as to extract as much money as he could from her nearly constant work in providing sexual services.

[16] The Crown again relied upon the applicant's conduct after the second complainant's arrival in Australia as reflecting his true intention. The second complainant also lived with the applicant. The applicant pressured her to work whenever a client called. She worked every day from 27 February through until the end of March, save for two days. She saw three to four customers per day on average and up to five customers per day. The applicant did not give the second complainant any time off. He pressured her to work, even when she was menstruating. When she sought to have a day off and later said she wanted to leave, the applicant verbally abused her and got angry. He told her that he had paid for her travel, passport and accommodation and that she had to work; that she could not leave because he was her immigration sponsor. At other times he told her to get out but she had nowhere to go. The applicant transported the second complainant to and from each job and left her unaccompanied and without a mobile phone. The money (save for tips) which the second complainant received went directly to the applicant. He sometimes received up to $1,000 per day. The applicant paid the second complainant a daily amount of about $20 and upon urging, sent about $650 back to Thailand for the second complainant's family. The applicant pressured and verbally abused the second complainant when she did not wish to provide certain types of sexual services. She tried to comply with the arrangement to provide sexual services for an older man and with three men at once, but was unable to complete the task.

[17] Each complainant obtained help from a third party in order to leave. The second complainant ultimately reported the matter to the authorities.

The construction question

[18] Section 271.2(2B) of the Code, which is in Division 271 ("Trafficking in persons and debt bondage"), provides (I have emphasised the directly relevant parts):

"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 Australia; and

(b) there is an arrangement for the other person to provide sexual services in Australia; 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."

[19] Consistently with the applicant's pleas of guilty and the statement of facts, the applicant did not contend in this appeal that his dishonest intention to deceive each complainant in the way I have summarised was not sufficiently established by the uncontested facts at sentence. Rather, the argument for the applicant was that the deception revealed by the facts concerning each count was not a deception about "the extent to which the [complainant] will be free to cease providing sexual services."

[20] The term "deceive" is defined in s 271.1 of the Code to mean "mislead as to fact (including the intention of any person) or as to law, by words or other conduct". The respondent accepted that the effect of the section, read with ss 3.2 and 5.6 of the Code, is that proof of the offence required proof that the applicant intentionally deceived the complainants. And although s 271.2(2B) does not provide in terms that the deception must occur when the words are uttered or other relevant conduct occurs, the respondent also accepted that proof of the offence required proof that when the applicant made the representations relied upon in this case, the applicant knew that what he represented was false and that he made the representations in order to mislead the complainants into believing it was true.[7] Those matters are not in issue.

[21] The schedule to the Code defines the term "sexual service" ("the commercial use or display of the body of the person providing the service for the sexual gratification of others"), but there is no definition of any of the other terms in s 271.2(2B)(c)(iii). No decision was cited which concerns the proper construction of that provision and I have found none.

[22] The applicant's counsel argued that the word "cease" in s 271.2(2B)(c)(iii) means "permanently cease" and that a deception about the extent to which a person will be free to cease providing sexual services does not comprehend a deception about the extent to which the other person will be free to decline to provide services during a particular period or to particular persons. Senior counsel for the respondent presented the obverse argument, that the section renders the applicant guilty of an offence in circumstances in which the applicant intentionally deceived the complainants about the extent to which they would be required to work on demand or without having certain days off in the course of providing sexual services.

Construction of s 271.2(2B)(c)(iii)

[23] The ordinary meaning of "cease" is stop. So much is confirmed by dictionary definitions. The Macquarie Dictionary relevantly defines "cease" as meaning, "To stop; to come to an end; ...discontinue."[8] That is capable of comprehending a state of affairs in which an activity stops in circumstances in which it is intended that the same kind of activity will be resumed after an appreciable interlude. It is, for example, a perfectly natural use of the word to say that a person will “cease” work to eat lunch or to rest for an appreciable period where it is intended that the work will be resumed. No doubt questions of fact and degree are involved. A short break in one otherwise continuous activity might in some circumstances more naturally be described as a pause rather than a cessation. But the applicant’s deceptive statements contemplated potentially substantial intervals (two days, or such period as the complainant chose) between the end of one work period and the commencement of the next. The word “cease” is appropriate in that context.

[24] That view of the section is consistent also with the fact that, although the section perhaps contemplates that the sexual services described in paragraph (c)(iii) are those to be provided under the arrangement for the provision of sexual services specified in paragraph (b), the relevant deception is not about freedom to terminate the arrangement: rather, it concerns the sexual services which might be provided under the arrangement. Those services might cease and re-start whilst the arrangement continued in effect throughout. The applicant's argument seemed to require that the cessation under s 271.2(2B)(c)(iii) must be permanent or at least endure for the balance of the period during which the arrangement was intended to subsist (the three month period of each complainant’s visa), but that is not what the section provides.

[25] The composite expression "extent to which the other person will be free to cease providing sexual services" connotes that questions of degree may be involved. It was submitted for the applicant that it was only the word "free" which was qualified by the term "the extent". It may be accepted that it is possible to have different degrees of freedom to cease providing services with the intention of abandoning that activity, just as there may be different degrees of freedom to cease providing services with a view to recommencing similar services at a later time. But that the targeted deception is about the extent of the freedom comfortably accords with the view that the legislation was intended to catch deceptions about the freedom to cease providing sexual services upon certain conditions or during certain periods.

[26] Furthermore, it seems clear that paragraph (c) was intended to have a broad reach. For example, the topic of sub-paragraph (i), the nature of the sexual services to be provided, is so broadly expressed as to comprehend deceptions about a great variety of matters. Similarly, a deception about the quantum of a debt owed or claimed to be owed in connection with the arrangement for the provision of sexual services (sub-paragraph (v)) might comprehend a great variety of deceptions. The section may be open to the construction that immaterial differences between represented terms of the arrangement and what the representor actually intends are insufficient, but it was nevertheless plainly intended to comprehend a very broad range of deceptions. Presumably one reason for the breadth of this part of the section is that any such deception might induce a person to leave his or her own country and go to a place where that person will be vulnerable to sexual exploitation.

[27] That the provision was intended to have such a broad operation, including in relation

to what might conventionally be regarded as conditions of employment, is confirmed by the extrinsic evidence relating to the Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth) ("the Amendment Act"), which inserted Division 271 in the Code. The revised explanatory memorandum for the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005 stated that the purpose of the amendment was to "criminalise comprehensively every aspect of trafficking in persons" and to fulfil Australia's legislative obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[9] Australia signed that protocol on 11 December 2002 and it was ratified on 14 September 2005.[10] That protocol defined "trafficking in persons" as meaning "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..." (The definition also provided that the consent of a victim of trafficking in persons to the intended exploitation as so described was irrelevant where any of those means had been used.) In the second reading speech for the Amendment Act the Attorney-General described the amendment as creating "...specific offences where the trafficker transports the victim into or out of Australia by using force, threats or deception..." and, of particular relevance here, that it extended the existing offence "to capture traffickers who induce victims to provide sexual services by deceiving them about the conditions of their employment."[11] (That extrinsic material is admissible for the purpose of confirming what is, in my view, the ordinary meaning of s 271.2(2B)(c)(iii)[12]).

[28] The extrinsic material provides no support for the applicant's contention that s 271.2(2B)(c)(iii) should be construed in such a way as would confine the relevant deception to a deception about the victim's freedom permanently to stop providing sexual services, either during the victim's sojourn in Australia or otherwise. The applicant's counsel argued that the construction he propounded derived support from extrinsic evidence concerning the phrase "free to cease" where that phrase was used in s 270.7 of the Code. That section, which is in Division 270 ("Slavery, sexual servitude and deceptive recruiting"), creates the offence of deceptive recruiting for sexual services. So far as is presently relevant, it provides that a person who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about "(c) the extent to which the person will be free to cease providing sexual services" is guilty of an offence. The applicant's counsel referred to the following statement in the 1998 report of the Model Criminal Code Officers' Committee:

"It was...decided to remove from the definition [sexual servitude] the mention of being free to decline to provide services to a particular person or persons. The Committee is concerned that such a serious offence should not apply where someone is happy to provide sexual services, is free to leave, is not beaten or subject to other force; but simply refuses to kiss any clients. It should not be the case that an employer who threatens to sack the person on that basis should be able to be charged with the sexual servitude offence. While there are more serious issues, such as the policy in relation to condoms, the object of these offences is to regulate servitude, not prostitution."

[29] Those remarks concerned provisions which were enacted to create the sexual

servitude offences in s 270.6 of the Code. It provides that a person whose conduct causes another person to enter into or remain in sexual servitude and who intends to cause, or is reckless as to causing, that sexual servitude is guilty of an offence; and that a person who conducts any business that involves the sexual servitude of other persons and who knows about, or is reckless as to, that sexual servitude, is guilty of an offence. "Sexual servitude" is defined in s 270.4 as being the condition of a person who provides sexual services and who, "because of the use of force or threats", "is not free to cease providing sexual services" or “is not free to leave the place or area where the person provides sexual services”. (The word "threat" is defined in s 270.4(2) to mean a threat of force, a threat to cause a person's deportation, or 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.)

[30] The presence in the definition of "sexual servitude" of the element of force or threats renders that offence so different from that created by s 271.2(2B) that the extrinsic evidence identified by the applicant is of no particular assistance in construing the provision in issue here. In any event, the quoted extract from the 1998 report of the Model Criminal Code Officers' Committee did not essay any definition of the phrase "free to leave".

[31] The applicant's counsel referred to an extract from the revised explanatory memorandum for the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999, paragraph [45] of which stated that:

"In borderline cases, where there is doubt about whether a person is "not free" in relation to the matters listed in the definition, it is expected that the courts will resolve the matter in favour of the defendant."

[32] The differences between the terms of s 271.2(2B) and the terms and context of the proposed definition of "servile conditions" are so pronounced as to render unhelpful the extrinsic evidence upon which the applicant relied. Furthermore, my own view is that the present offences did not involve deceptions which could be described as being borderline in any relevant respect. The applicant was guilty of deceiving the complainants about matters concerning the extent to which they would be free to cease providing sexual services which, objectively speaking, were presumably of considerable importance to each complainant.

[33] For completeness I should refer to some passages in R v Sieders; R v Somsri[13] which the respondent’s senior counsel drew to our attention. In that case, the New South Wales Court of Criminal Appeal dismissed offenders’ appeals against convictions for conducting a business that involved the sexual servitude of others, contrary to s 270.6(2) of the Code. The decision is therefore not directly on point but Campbell JA (James and Johnson JJ concurring) considered the meaning of the essential condition of a person being in sexual servitude that the person is either "not free to cease providing sexual services" or "not free to leave the place or area where the person provides sexual services". Campbell JA observed that each such condition describes actions of the person in question but, so far as the definition of sexual services was concerned, they were not past actions but rather "potential actions" which the person in question might take in the future.[14] Campbell JA went on to make the following observations:

"[90] What the notion of a person being ‘not free’ to engage in a particular action seeks to

capture is that there is something about the state of affairs or set of circumstances in which the person lives that prevents, or seriously inhibits, the person from engaging in that particular action. Being not free to engage in a particular action can arise from a matter of law, as occurs when a person is not free to enter or leave a country without a valid passport, or a married person is at any particular time not free to marry the next day someone other than their present spouse. It can arise from physical constraint, as occurs when a person is kidnapped. It can arise from a social or moral pressure that the person in question cannot resist, as occurs if a child is not free to go out at night without parental permission, or in some cultural traditions a person is not free to wear any type of clothing they might choose in certain situations, such as being in public. It can arise from limitations on the person's economic resources, as when the vast majority of people in Australia aged between 25 and 60 are not free to spend a year without working. It can arise from limitations on the person's own abilities, in the sense that a person of below average intelligence is not free to become a university professor, or a person of ordinary physical skills is not free to compete in the Olympic Games. There may well be other sources of limitations on a person's freedom to act in a particular way.

[91] It is not necessary for the circumstance that makes a person "not free" to take some particular action to be one that renders that action absolutely impossible in all senses. ...

...

[93] Thus, for a person to be 'not free to cease providing sexual services', or 'not free to leave the place or area where the person provides sexual services', it is not necessary for them to actually want to cease providing sexual services, or to leave the place or area where the person provides the sexual services. Rather, what is involved is that, if they *were to want to*, there would be some circumstance or set of circumstances in which they live that would prevent, or seriously inhibit, their taking that action."

[34] Those observations are not directly applicable in the present context and the point made in this appeal was not in issue, but it may be noted that on the undisputed facts of this case there were circumstances which prevented or seriously inhibited the complainants from ceasing to provide sexual services.

[35] Applying the ordinary rules of construction I have concluded that the statutory language is not relevantly ambiguous or doubtful. There is therefore no room for the application of the principle of construction, a rule of last resort,[15] that ambiguity or doubts may be resolved in favour of the subject by refusing to extend the category of criminal offences.[16] On the facts presented by the Crown and accepted by the applicant at the sentence hearing, the applicant was guilty of the trafficking offences in counts 1 and 2.

Application for leave to appeal against sentence

[36] The grounds of the application for leave to appeal against sentence are that "the sentence is manifestly excessive; the prosecution used a comparative that was not a comparative in my case; Her Honour had comments in sentencing that may have helped make my sentence manifestly excessive; the Crown's submissions on sentence should be looked at as well as the Crown's statement of facts; plus a comparative sentence that was handed up by the Crown but never looked at." The arguments advanced in support of those grounds focussed upon the concurrent sentences imposed for counts 1 and 2 and the

order that the concurrent 12 month terms for counts six and seven be served cumulatively upon the former terms.

[37] The sentencing judge accurately summarised the relevant circumstances in the course of her Honour's following observations:

"Four times in the six month period from December 2005 to May 2006, you were responsible for the presentation of false immigration documents to Australian officials in Thailand.

The documents related to four different women whom you intended to bring to Australia to work for you as prostitutes. Within each document were false statutory declarations that the woman was travelling to Australia to visit close friends who would sponsor her.

Counts 5 and 7 each included a skilful fabrication about a pending wedding. You made the Thai women complicit in your deception of Australian Immigration.

You actually succeeded in getting two of the women into this country. Those were the complainants in counts 1 and 2 on the indictment.

Ms Hongthong and Ms Aunthso both knew they were coming to Australia to work as prostitutes. They were poor. They were lured to travel here by your promises of easy money and generous working conditions but those were promises you never intended to keep.

You had promised Ms Hongthong that she would only have to work when she wanted to. You had promised to permit Ms Aunthso two days off a week. Your true intention, however, was to make as much money as possible from these women by working them as often as possible so that you could pay off your own debts.

You paid for the air fares and the visas. You organised matters in advance with advertising and mobile phones. You ferried the women to clients and took all of the money, save the tips.

You took thousands and thousands of dollars from them earned from the sale of their bodies, grossing up to $1,000 a day. In return, you gave them a room and $20 per day for food and personal care.

Begrudgingly, you sent a very small amount to Thailand for their families. While you did not keep the women locked up, you did not need to. They were isolated by culture, by language and poverty. You manipulated their isolation and frightened them with threats.

Ms Hongthong had arrived in Australia on the 19th of December on a three month visa. She lasted only 36 days. She had serviced, in that time, a minimum of 50 customers with up to five men a day.

It was in stark contrast to her work in the Basa Pattaya where she had come from. You knew the conditions from which you brought her and to get her here, to get Ms Aunthso here, you had promised her that she would be able to work as little as she liked. Yet once you got her here, you intimidated her into working when she did not want too [sic].

You pressured her to keep working even when the frequency of intercourse caused her

physical pain. You deceived her about her ability to go home on the return ticket. She was a single mother, struggling for some financial security for her young children.

She had left the children in Thailand with her elderly parents. You released precious little money to her family. She was stressed and depressed. She had to turn to your friends for help to leave.

Even afterwards when her return ticket was booked and the flight imminent, you tried to force her to work, first by threatening to evict her and then by forcibly detaining her.

When Ms Hongthong left, you moved quickly to find a replacement income. In less than three weeks, you had targeted the second complainant, Ms Aunthso.

She landed here on the 26th of February 2006. You had promised Ms Aunthso two days off every week, yet she was put to work on her second day in the country and made to work every day of her stay except for two days when her period was heaviest.

She was with you for 33 days and she had had sex with at least 70 customers. On one occasion you pressured her to commit group sex to the point where she became so hysterical, the customers could not continue.

You took all of her earnings which was about $11,000. Of that, only $650 went back to her family. The treatment of Ms Aunthso was particularly demeaning and callous.

You treated her as if she was a piece of property that you had bought for the cost of a plane ticket and a passport. She only stayed on in the hope that you might return the money that she had earned for her children.

She stopped working after she had lost all hope that you would do that, but even after she had gained confidence and moved away from you, you continued to pressure her until she went to the police.

In Thailand, word about your interest in importing women had spread to the extent that the women in the last two counts on the indictment actually contacted you. One of them, at least, had wanted to work in your hairdressing salon.

In April 2006, when you still had Ms Aunthso in Australia, you travelled to Thailand to coach those women on how to deceive the Australian Embassy. You set in train funds and visa applications. You continued then the fraud from Australia.

These were energetic and protracted attempts, although fortunately for the women, they were ultimately unsuccessful.

In 2006, you pleaded guilty to a prostitution offence concerning Ms Hongthong and you were fined $750. That, of course, was a circumstance of the current offending, but it did not deter you from the scheme.

You had committed the offences with Ms Aunthso after you had been charged with the prostitution and you continued to seek the entry of the last two women after you had been convicted of that prostitution offence."

[38] The applicant had a relevant criminal history. At the time of committing the offences

he was 45 years old. From 1987, he had accrued 16 convictions for a variety of offending, including false pretences, fraud, stealing, prostitution, breach of bail and breach of suspended sentences. He had previously been imprisoned.

[39] The prosecutor contended for an effective overall sentence of four and a half years imprisonment, with a non-parole period fixed at 22 to 24 months. Defence counsel did not challenge the sentencing range proposed by the Crown but submitted that no cumulative term should be imposed. Defence counsel effectively submitted that the applicant's conduct in relation to the migration charges and the trafficking charges all amounted to part of the same course of conduct. The sentencing judge set an effective sentence not so far different from that proposed by the prosecutor, of five years imprisonment with a non-parole period of 22 months. Her Honour noted that general deterrence and denunciation should assume importance in the sentencing process, especially in relation to the trafficking charges: the applicant's past criminal history warranted special deterrence. As to the nature of the offending, the sentencing judge spoke of "the pernicious trade in vulnerable people across the world", observing that "The harsh reality is that Australia is a potential market for south-east Asia. The crime is difficult to police."

[40] Contrary to a submission made by the applicant's counsel in this Court, the prosecutor's reliance upon extensive material detailing the costs and difficulties in policing trafficking offences did not induce the sentencing judge to over-emphasise the necessity for deterrence. Her Honour was correct to identify the relevance of the fact that "many millions of dollars are being spent to combat trafficking in people" as bearing upon "the importance of general deterrence and denunciation in sentencing."

[41] The applicant's counsel referred to arguably comparable cases. He put the argument in this way in the first outline of argument in this Court (3 July 2009):

"The sentence was manifestly excessive taking into account the sentence imposed in the sexual servitude case of *Sieder and Somsri*, the sentences imposed in the *Migration Act* cases in particular the Lloyds case and considering the sentence proposed by the Crown which was less than was actually imposed."

[42] As to the last point, a sentencing judge is not bound by the sentences put forward by either side; and as I have indicated, there is in any event general comparability between the sentence imposed by her Honour and that put forward by the Crown. As to the Migration Act cases, the applicant's counsel relied particularly upon the nine month sentence imposed in the District Court in Lloyd[17] for 14 similar offences including the illegal entry of seven Solomon Islanders to work on the offender's crayfish boat. But those people worked on the boat for only five weeks, the offender had a low income, the venture was financially disastrous, and the offender was a 60 year old man with no relevant criminal record who pleaded guilty to an ex-officio indictment. In my view the comparison with Lloyd suggests that the applicant's sentence of 12 months for counts 6 and 7 was moderate.

[43] In the applicant's subsequent outline of argument (29 September 2009), the applicant's counsel submitted that there were no comparable cases directly on point for counts 1 and 2. Sieders and Somsri, in which the New South Wales Court of Criminal Appeal dismissed appeals against sentences of five years imprisonment with a non-parole period of two years and six months imposed upon Somsri and four years imprisonment with a non-parole period of two years imposed upon Sieders, was a sexual servitude case.

Those charges concerned arrangements under which Thai women came to Australia to work in brothels on the basis they were required to work under contracts until debts were repaid. The applicant's counsel presented a detailed comparison between the facts of those cases and the trafficking charges here in issue. That analysis was designed to demonstrate that this was a less serious case. But the sentencing judge recognised that the sexual servitude charges, which attracted the higher maximum penalty of 15 years imprisonment, were prima facie more serious charges. Her Honour carefully discussed the relation between the present case and that in Sieders and Somsri and said:

"You did not confiscate your victims' passports and you did not contract for a debt, but unlike your victims, the women in Sieders and Somsri cases were not deceived about the work arrangements. They knew what the arrangements would be before they left their own country.

Furthermore, Sieders and Somsri were not involved in the arrangements for the women to get here. They were also first offenders. They had good prospects of rehabilitation and in those cases, the impact of imprisonment on their families had to be taken into account. None of those mitigating features apply in your case."

[44] In those circumstances the sentencing judge was right to regard Sieders and Somsri as providing "some assistance". The comparison between the cases does not suggest that the sentences imposed here were not within the range of sentences open to the sentencing judge.

[45] The applicant's counsel stressed the applicant's pleas of guilty. The sentencing judge acknowledged that the applicant was entitled to some discount for cooperation in the administration of justice, but there was no error in her Honour's observation that "I have no doubt that you pleaded guilty to the trafficking charges simply because of the strength of the evidence against you. Your conduct after your plea, your affidavit requesting leave to withdraw your plea without real cause reinforces the absence of any contrition."

[46] As to the order for the cumulative sentence, the sentencing judge observed that it was made "to recognise the number of offences and the persistence of offending even after you had then been convicted of the prostitution offence." On 26 April 2006, the applicant was convicted and fined $750 for knowingly participating in the provision of prostitution. That concerned the first complainant, Ms Hongthong. Notwithstanding that conviction, by as late as 15 May 2006, the applicant was attempting to arrange the illegal entry into Australia of two further Thai nationals, the conduct the subject of counts six and seven.

[47] The reasons assigned by the learned Judge for her decision to impose the cumulative sentence justified that order. The sentencing judge was entitled to regard counts 6 and 7 as separate episodes of criminality warranting cumulative punishment. Her Honour might instead have imposed only concurrent sentences on the footing that the applicant was involved in "one multi-faceted course of criminal conduct";[18] but in that event her Honour might perhaps have increased the sentence imposed for one of the serious offences to reflect the applicant's overall criminality.[19] However that might be, it was within the sentencing discretion to impose cumulative imprisonment in circumstances in which there were no elements in common as between the trafficking offences and the last two counts of Migration Act offences,[20] those last two counts were not "substantially contemporaneous and connected" with the trafficking offences,[21] the term imposed cumulatively was relatively modest, and the resulting effective sentence was not

disproportionate or crushing.[22]

[48] In my opinion the sentencing judge did not err in any of the ways contended for by the applicant. The pernicious and callous nature of the applicant's offending, carried out in a persistent way over a period of time and where the applicant had a relevant criminal history, warranted the imprisonment which was visited upon him.

Sentence if the convictions on counts 1 and 2 were set aside

[49] If, contrary to my view, the convictions on counts 1 and 2 should be set aside, it would be necessary to re-sentence on the remaining counts. The Court received submissions on that potential issue. I think it appropriate to record my view on this question even though it does not arise for decision in light of the Court's rejection of the proposed appeal against convictions.

[50] There was no issue as between the parties about the appropriate terms of imprisonment. Each party contended that terms of the order of twelve months on each count as imposed by the sentencing judge were appropriate. The submission for the applicant was that all sentences should be served concurrently, with release on recognizance after six months. The respondent sought orders that concurrent 12 month terms for counts 6 and 7 be imposed cumulatively upon concurrent 12 month terms for counts 3 to 5, with release on recognizance after 16 months of the effective head sentence of two years.

[51] If I had concluded that it was necessary to re-sentence afresh on the basis that the applicant should be acquitted on counts 1 and 2, I would not have been persuaded that it was appropriate to order that any sentence be served cumulatively. In that event I would have imposed the sentences and recognizance release order for which the applicant contended.

Orders

[52] I would refuse the application for leave to appeal against sentence, grant the applicant an extension of time within which to appeal against conviction, and dismiss that appeal.

[53] CULLINANE J: I agree with the reasons of Fraser JA in this matter and the orders he proposes.

[54] P LYONS J: I have had the advantage of reading in draft the reasons for judgment of his Honour Fraser JA. I agree with them and the orders proposed by his Honour.

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[1] *R v Tait* [1989] 2 Qd R 667 at 668.

[2] *R v GV* [2006] QCA 394 at [3].

[3] [1995] HCA 41; (1995) 184 CLR 132 at 141.

[4] *R v Mundraby* [2004] QCA 493 at [21] per Jerrard JA; *R v Carkeet* [2008] QCA 143; [2009] 1 Qd R 190 at 194 per Fraser JA, with whom Keane and Holmes JJA agreed.

[5] *R v GV* at [6], citing *Meissner v The Queen* at 157.

[6] *Maxwell v The Queen* (1996) 184 CLR 501 at 522 per Toohey J, at 531 per Gaudron and Gummow JJ; see also at 510 – 511 per Dawson and McHugh JJ; *Mundraby* at [11], [14]; *R v GV* at [8], [31], [37] – [40]; *R v Toro-Martinez* [2000] NSWCCA 216; (2000) 114 A Crim R 533 at 539; *R v Carkeet* [2008] QCA 143; [2009] 1 Qd R 190 at [25], referring to *Borsa v The Queen* [2003] WASCA 254 at [20].

[7] See s 5.2(1) of the *Code* and *Peters v The Queen* [1998] HCA 7; (1998) 192 CLR 493 at 504-505 per Toohey and Gaudron JJ.

[8] The Macquarie Dictionary, revised edition, Macquarie University, 2005.

[9] United Nations, 2000, adopted by resolution A/IS/55/25 of 15 November 2000 at 55th session of General Assembly of United Nations; entry into force in Australia, 14 October 2005.

[10] House of Representatives, Commonwealth of Australia, p 2.

[11] Parliamentary debates, House of Representatives, 21 June 2005, Commonwealth of Australia, p 30 – 31.

[12] *Acts Interpretation Act* 1901 (Cth) s 15AB; *Project Blue Sky v Australian Broadcasting Association* [1998] HCA 28; (1998) 194 CLR 355.

[13] [2008] NSWCCA 187; (2008) 186 A Crim R 540.

[14] [2008] NSWCCA 187 at [89].

[15] *R v Rose* [2009] QCA 83 at [22] per McMurdo P, Muir JA and Atkinson J agreeing.

[16] *Beckwith v The Queen* [1976] HCA 55; (1976) 135 CLR 569 at 576 per Gibbs J.

[17] Unreported, Bradley DCJ, 13 June 2007.

[18] *Attorney-General v Tichy* (1982) 30 SASR 84 per Wells J at 92 – 93, cited by the Chief Justice in *R v Johnson* [2004] HCA 15; (2004) 205 ALR 346.

[19] *R v Nagy* [2003] QCA 175; [2004] Qd R 163 at [30] – [39], [66] – [71].

[20] *Pearce v The Queen* (1998) 194 CLR 610 at [40], per McHugh, Hayne and Callinan JJ.

[21] *R v Myers* [2002] NSWCCA 162 per Kirby J, Smart AJ agreeing, at [34].

[22] *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59; *Johnson v The Queen* [2004] HCA 15; (2004) 205 ALR 346.
