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R v NETTHIP [2010] NSWDC 159 (30 July 2010)

Last Updated: 6 August 2010

NEW SOUTH WALES DISTRICT COURT

CITATION:

R v NETTHIP [\[2010\] NSWDC 159](#)

FILE NUMBER(S):

2009/1560266

2009/0212661

HEARING DATE(S):

29 July 2010

JUDGMENT DATE:

30 July 2010

PARTIES:

Crown

Namthip NETTHIP

JUDGMENT OF:

Murrell SC DCJ

COUNSEL:

Mr O'Donnell (Crown)

Mr R Sutherland SC (Accused)

SOLICITORS:

Commonwealth Director of Public Prosecutions (Crown)

Armstrong Legal (Accused)

CATCHWORDS:

CRIMINAL LAW - Commonwealth Crime - Sentence - Sentencing Orders - Sexual Servitude - "threat of detrimental action" - "Detriment" and "disadvantage" - Debt bondage - Aid and abet making of false statement to Commonwealth officers

LEGISLATION CITED:

[Crimes Act 1914](#) (Cth)

Criminal Code Act 1995 Cth)

[Migration Act 1958](#) (Cth)

CASES CITED:

R v El Karhani ([1990](#)) [21 NSWLR 370](#)

R v Jones [[2010](#)] [NSWCCA 108](#)

Pearce v R [[1998](#)] [HCA 57](#)

R v Sieders; R v Somsri [[2008](#)] [NSWCCA 187](#)

TEXTS CITED:

DECISION:

JUDGMENT:

The Offences

1 On 30 March 2010 at the Downing Centre Local Court, the offender pleaded guilty to the following offences:

(i) Between about 30 August 2005 and about 1 April 2008 at Sydney, conducting a business that involved the sexual servitude of 11 other persons, knowing about that sexual servitude (contrary to s 270.6 (2) of the *Criminal Code* 1995 (Cth)).

(ii) On about 5 February 2007 at Sydney, counselling and procuring the commission of an offence by YS through the making of false statements by YS to an immigration official in connection with an application for further visa, being a protection visa that would permit her as a non citizen to remain in Australia (contrary to [s 234\(1\)](#) (b) of the [Migration Act 1958](#) (Cth) and s 11.2 of the *Code*).

The former offence carries a maximum available penalty of 15 years imprisonment. The latter carries a maximum available penalty of 10 years imprisonment.

2 Pursuant to s 16 BA of the [Crimes Act 1914](#) (Cth), when sentencing the offender for the offence against the [Migration Act](#) (Cth), the Court is asked to take into account a further 10 offences against [s](#)

[234](#) (1) (c) of that Act of causing a document containing a false statement to be delivered to a Department of Immigration and Citizenship (DIAC) officer. The offences occurred between 13 October 2005 and 12 October 2007.

The Facts

3 The offender was born in Thailand. In 1987, she came to Australia. In 1994, she became an Australian citizen. Since arriving in Australia, from time to time the offender has worked in brothels, either as a sex worker or as a receptionist. She has no prior criminal history.

4 Between about August 2005 and March 2008, the offender conducted a business through which she organised the placement of 11 Thai women ("the complainants") in brothels in Australian cities, including Sydney, Newcastle, Wollongong, Melbourne, Canberra, Adelaide and Perth. Each complainant was recruited in Thailand. A Thai facilitator arranged passports and visas and made travel arrangements. Each complainant agreed that, once in Australia, she would repay a "debt" of \$53,000.

5 On sentence, the offender gave uncontested evidence that, prior to the departure of each complainant from Thailand, the offender discussed the terms of the arrangement with her and each complainant informed the offender that she had previously worked in the sex industry, either in Thailand or elsewhere. I accept the offender's evidence. It is consistent with the contents of Exhibit 1 (the transcript of an intercepted telephone conversation between the offender and a prospective sex worker who is not a complainant). Seven of the 11 complainants have informed Australian authorities that they worked in the sex industry before coming to Australia.

6 The offender was responsible for organising food, work-related medical expenses and mobile telephones for the complainants. On arrival in Australia, each complainant stayed at accommodation that had been organised by the offender. Later, some moved to rental properties or other private accommodation, for which they paid themselves. Some complainants were driven to and from their place of work. Others travelled by public transport. Complainants had access to the Internet and could contact their families in Thailand.

7 The offender was responsible for supervising the placement of each complainant in an Australian brothel. If a complainant was dissatisfied with her placement, the offender facilitated acceptable work conditions or transferred the complainant to another brothel.

8 Except in the case of one Newcastle brothel, each brothel deducted its fee and paid the remainder of her earnings to a complainant. From her net earnings, the complainant repaid her debt to the offender by transferring cash or making a bank deposit. In the case of the Newcastle brothel, repayments were made directly by the brothel owner to the offender. The speed at which a debt was repaid depended upon the proportion of her earnings that a complainant elected to retain for personal purposes. On average, a complainant took about six months to repay her debt.

9 From the sum of \$53,000, the offender paid the agent in Thailand the sum of \$20,000. After paying the rent, food, telephone, medical and other expenses of the complainant, the offender received a net profit of between \$10,000 and \$18,000. The offender estimated that her net profit in relation to all complainants was probably about \$60,000 to \$70,000. Having regard to the average time taken to repay a debt and the net profit on each transaction, the estimated total net profit appears to be an underestimate. However, in the absence of more detail about individual transactions, the Court cannot be confident that the total net profit significantly exceeded of \$70,000.

10 It was part of the arrangement that, after a complainant arrived in Australia on a visitor's visa, the offender would assist the complainant to apply for a protection visa. Generally, about six weeks after a

complainant had arrived in Australia, the offender would assist her to apply for a visa. For the purpose of substantiating the claim for refugee status made by a complainant, the offender provided her with false factual information about the conditions that she had experienced in Thailand. The offender coached complainants about the manner in which they should respond to questions posed by DIAC officers. Once a complainant had applied for a protection visa, she was entitled to work while she awaited the outcome of the immigration assessment.

The Legislative Framework

11 Divisions 270 and 271 of the *Code* create a hierarchy of offences including slavery (the most serious type of offence of this nature), sexual servitude, trafficking and debt bondage. Inter alia, debt bondage arises if there is a pledge by a person of sexual services as security for a debt claimed to be owed and the debt is manifestly excessive. Debt bondage is a summary offence carrying a maximum term of imprisonment of 12 months.

12 Section 270.6 of the *Code* provides:

"(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;

is guilty of an offence."

Section 270.4 of the *Code* defines sexual servitude as follows:

"(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."

(emphasis added)

The Dictionary to the *Code* provides the following definitions:

"***threat***" includes a threat made by any conduct, whether express or implied and whether conditional or unconditional."

"***detriment***" includes any disadvantage and is not limited to personal injury or to loss of or damage

to property." (*emphasis added*).

13 In *R v Sieders; R v Somsri* [\[2008\] NSWCCA 187](#), the appellants had been convicted of conducting a business involving sexual servitude on the basis of facts somewhat similar to those in the present case. On appeal, they argued that, in the context of the recent introduction of the offence of debt bondage, the facts were insufficient to establish the offence of sexual servitude. The argument was rejected. In the leading judgment at [156], Campbell JA stated:

"When the tendency of the debt arrangement is to keep the women providing sexual services (in the business), it would be open to the jury to find that (the business) was one involving sexual servitude."

14 In the context of that decision, the offender accepted that the facts established an offence of sexual servitude because of the - albeit implicit and unspecific - threat associated with any failure to continue sex work for the purpose of repaying the debt. It was accepted that the debt arrangement tended to oblige the complainants to continue providing sexual services until the debt was repaid. However, Mr Sutherland SC submitted that the facts "had all the hallmarks of a debt bondage offence" as the only "threat" arose from the debt and there was no element of physical constraint or control. He submitted that this was an important respect in which the case differed from *Sieders*. In *Sieders*, the foreign sex workers were escorted on their flight and delivered to the offenders, who were brothel owners. Four of the five women were required to surrender their passports and return tickets. There was a high level of physical supervision of the women.

15 Having regard to the broad approach the concept of "a threat of detrimental action" taken in *Sieders*, it is plain that the facts do establish an offence of sexual servitude. The Crown could have charged the offender with one or more offences of debt bondage but, understandably, chose to proceed on the more serious offence because of the level of sexual exploitation associated with the offender's conduct.

16 The offence has considerable objective seriousness because of the period of offending conduct (more than 2 1/2 years), the number of complainants (11) and the fact that the offender actually knew of the sexual servitude (recklessness will suffice). On the other hand, no direct or specific threat was made to the complainants. The offender informed the complainants of the terms of the debt bondage before the complainants left Thailand, the complainants were not subject to physical control in Australia, they had access to money, and they were able to communicate by means of telephone and the Internet. The offender attempted to address any problems that the complainants experienced with their work conditions.

The Offender's Subjective Circumstances

17 The offender was born in a rural area in northern Thailand. She was the fifth of seven children. The family was impoverished. As a child, the offender had to walk a long distance to school each day. Before and after school, she assisted on the family's small farm and cleaned houses in order to contribute to the family's finances.

18 Having attained the equivalent of Year 10, the offender left school. When she was 18 years old, she moved to Bangkok, where she lived with her older sister and assisted in a small family cafe while undertaking evening studies in accountancy. She obtained a Diploma of Accounting. She worked as an accountant/accounts clerk for several years, sending money back to her family in northern Thailand.

19 In 1987, the offender came to Australia on a student visa and began to study English. She sought work but was unable to find employment because she could not speak English (the offender's English

... from her was unable to find employment because she could not speak English (the offender's English remains poor). After three months, she accepted work in the sex industry. In 1990, she married a former client, but the relationship was unsuccessful and the couple divorced in 1993. In 1994 she met her current partner, but the relationship was volatile and they separated. The couple's daughter was born in 1995. The offender went to Thailand to give birth. She was desperate to retain care of her daughter and feared that the child's father would take the child from her. She returned to Australia and resumed occasional contact with her partner, enabling him to develop a relationship with his daughter. The offender supported herself by working in Thai restaurants, as a receptionist in brothels and, from time to time, as a sex worker. The offender sent money to her father in Thailand as her brothers and sisters were not in a position to provide for him. In 2004, the offender purchased a small unit, which she sold in 2009 without significant profit.

20 Following her arrest in 2009, the offender and her daughter began living with the offender's current partner (the father of her child), who supports the family financially while the offender acts as homemaker and principal carer for the couple's child. The relationship is somewhat strained. However, both parents are devoted to their child.

21 The author of the pre-sentence report notes that the offender's current living arrangements are relatively modest and there is no visible evidence of financial affluence. She states:

"The offender presented as a person who has chosen to earn a living on the fringe of society, appearing to take an amoral view of her profession as the best available means to provide for her family. She appears to have few external resources, but for decades has displayed an apparently consistent level of internal fortitude ...

She has displayed a lifelong commitment to her birth family, and has, by her account, been driven by the need to financially support her parents and later her daughter.

To her credit, Ms Netthip appears to have avoided the pitfalls of alcohol or drug abuse and overt criminal activity often associated with her profession, until becoming involved in the current offences."

22 Similarly, Mr Borenstein, a clinical psychologist, states that the offender's "*motivation and life purpose has always been the welfare and care of others.*"

Sentencing Principles

23 I am required to impose a sentence of a severity "appropriate in all the circumstances of the offence": [Crimes Act](#) (Cth), [s 16](#) A (1).

24 The Court may not pass a sentence of imprisonment unless, having considered all other available sentences, it is satisfied that no other sentence is appropriate in all the circumstances of the case: section 17 A (1).

25 In relation to Commonwealth matters generally, consideration must be given to the principle of general deterrence: *R v El Karhani* ([1990](#)) [21 NSWLR 370](#). Where the crime involves the organised sexual exploitation of the relatively impoverished citizens of another country, there is a strong need for general deterrence and denunciation. In the Second Reading Speech on 24 March 1999 concerning the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (the Bill that resulted in the present offences becoming part of the *Criminal Code* (Cth)), the Minister referred to the need to "*(send) a firm message to the organisers and recruiters that Australia will not be a destination for their trade*".

26 In addition to any other relevant matters, the Court must take into account such of the matters mentioned in s 16 A (2) as are relevant. Section 16 A (2) (k) refers to the need to ensure that the offender is adequately punished for the offence, a consideration that is relevant in every case.

27 Section 16 A (2) (a) and (c) refer to the nature and circumstances of the offence and to the course of conduct that constitutes the offence. The evidence establishes an offence of sexual servitude that was planned and organised over a period of more than 2 1/2 years, and that involved a series of criminal acts in relation to 11 complainants. The sexual servitude offence was committed for financial gain and the total net profit was substantial.

28 The offence of aiding the making of a false statement (and the associated matters that are to be taken into account) is serious in itself, but the Crown accepts that it is ancillary to the principal offence in that it was part of the agreement between the offender and the complainants. The Crown accepts that, of itself, the offence does not call for full-time imprisonment. The Commonwealth Sentencing Database statistics support that approach.

29 Section 16 A (2) (g) refers to the plea of guilty. Although she may have been able to argue that the approach to "threat" taken in *Sieders* was too broad, the offender indicated her willingness to plead guilty at an early stage, avoiding the need for a lengthy and potentially problematic trial. The Crown agrees that the early plea of guilty to the sexual servitude offence significantly facilitated the course of justice, such that a discount on sentence of 25% would be not inappropriate.

30 Section 16 A (2) (j) refers to specific deterrence. Despite her disadvantaged background, the offender is a person with no prior criminal history who, above all, wishes to live with and support her daughter, and for whom prosecution and conviction will be deterrence enough.

31 Section 16 A (2) (m) refers to the character, antecedents, age, means and physical or mental condition of the person. I have already referred to the offender's strong subjective circumstances and lack of prior criminal history.

32 Section 16 A (2) (n) refers to the prospects of rehabilitation. The lack of any prior criminal history, the fact of these convictions and the offender's devotion to her daughter make it highly unlikely that the offender will reoffend.

33 Section 16A (2) (p) refers to the probable effect of a sentence on the offender's family. The offender is very concerned about the impact of imprisonment on her daughter, who is now 14 years old. However, the offender's partner is more than capable of caring for his daughter. In this regard, the offender's situation is no different from that of many persons sentenced to imprisonment.

34 Having regard to the maximum available penalty, the objective seriousness of this particular offence of sexual servitude and all the circumstances of the case, I am of the view that the only appropriate sentence for the offence of sexual servitude is one of full-time imprisonment. I have had regard to the sentences that were imposed in *Sieders*, where there was a conviction after a trial. In this case, the appropriate sentence is three years less 25%, i.e. two years and three months. Section 19 AC requires that I make a recognizance release order. When fixing a non-parole period, the usual practice is for the ratio of the non-parole period to the head sentence to be within the range of 60 to 67%, but that figure can be affected by special circumstances applicable to the particular offender: *R v Jones* [2010] NSWCCA 108. In relation to the recognizance release order that I fix in this case, having regard to the offender's prior good character and age (48 years), I vary the usual ratio such that it is slightly more generous than the usual range.

35 The offender has served five days in custody and, in accordance with s 16 F, I will back date her

35 THE OFFENDER HAS SERVED FIVE DAYS IN CUSTODY AND, IN ACCORDANCE WITH S 10 D, I WILL BACK DATE HER SENTENCE TO 25 JULY 2010. I SENTENCE THE OFFENDER TO TWO YEARS AND THREE MONTHS IMPRISONMENT FROM 25 JULY 2010 TO 24 OCTOBER 2012. THE OFFENDER IS TO BE RELEASED ON A RECOGNIZANCE RELEASE ORDER AFTER A PERIOD OF THIRTEEN MONTHS, ON 24 AUGUST 2011. THE TERMS OF THE RECOGNIZANCE ARE TO BE OF GOOD BEHAVIOUR FOR FOURTEEN MONTHS, I.E UNTIL 24 OCTOBER 2012. THE RECOGNIZANCE IS TO BE SECURED WITH \$100, WITHOUT SURETY.

36 IN RELATION TO THE OFFENCE AGAINST THE [Migration Act](#) (Cth) (AND TAKING THE ADDITIONAL 10 MATTERS INTO ACCOUNT) I ACCEPT THE VIEW OF THE PARTIES THAT, OF ITSELF, THE MATTER DOES NOT CALL FOR FULL-TIME IMPRISONMENT. THE COURT IS REQUIRED TO FIX AN APPROPRIATE SENTENCE AND THEN DETERMINE WHETHER THE SENTENCE SHOULD BE SERVED CONCURRENTLY OR CUMULATIVELY, IN ORDER TO ARRIVE AT AN OVERALL SENTENCE THAT REFLECTS THE TOTAL CRIMINALITY OF THE CONDUCT: *Pearce v R* [1998] HCA 57. THE CONTRAVENTIONS OF THE [Migration Act](#) (Cth) WERE PART AND PARCEL OF THE ARRANGEMENT THAT CONSTITUTED THE SEXUAL SERVITUDE AND OCCURRED IN THE COURSE OF THAT ARRANGEMENT. I INTEND TO RELEASE THE OFFENDER UNDER [s 20](#) (1) (a) OF THE [Crimes Act](#) (Cth) ON CONDITION THAT SHE BE OF GOOD BEHAVIOUR FOR A PERIOD OF THREE YEARS AND SIX MONTHS. THE RECOGNIZANCE IS TO BE SECURED WITH \$100, WITHOUT SURETY.

LAST UPDATED:

4 August 2010

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