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

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

BETWEEN	:	**JOSEVATA WERELAGI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. S. Prakash for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**01 June 2023**
Date of Ruling	:	**02 June 2023**

RULING

[1] The appellant had been charged and found guilty in the High Court at Suva on a single count of aggravated sexual servitude contrary to section 106 of the Crimes Act, 2009 and three counts of domestic trafficking in children contrary to section 117 of the Crimes Act, 2009. The fourth count was an alternative count to the first count.

[2] The particulars of the first count alleged that the appellant between 18 July 2015 and 22 July 2015 by the use of threats or force caused the complainant, a 15-year old child to enter into or remain in sexual servitude with intent to cause that sexual servitude. The alternative charge was buying a minor under the age of 18 years for immoral purposes which alleged that the appellant between 18 July 2015 and 22 July 2015 obtained possession of the complainant with the intention to employ or use her for the purpose of prostitution.

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

[4] The assessors had expressed a unanimous opinion that the appellant was guilty of all four counts as charged. The learned High Court judge had agreed with the assessors' opinion, convicted him and sentenced the appellant on 12 December 2019 to a total effective period of 14 years' imprisonment with a non-parole period of 10 years.

[5] The appellant's appeal against conviction is timely.

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[7] The learned trial judge has summarized the evidence in the sentencing order as follows:

> *[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.

[8] The grounds of appeal against conviction urged on behalf of the appellant are as follows. Grounds 01-03 urged by the Legal Aid Commission relate to the first court and the additional grounds of appeal (04-06) by the appellant in person too are on the first count. The LAC submits that grounds 4-6 are subsumed in the first three grounds.

Ground 1

THAT the Learned Trial Judge may have caused a miscarriage of justice in failing to independently and objectively analyse the admissions in the Appellants caution interview against the totality of evidence.

Ground 2

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

Ground 3

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

Ground 4

THAT the Learned Trial Judge's conviction of the Appellant for Aggravated Sexual Servitude is wrong in fact and law whereby he may erroneously assumed that the prosecution had satisfactorily proven all the elements of the offences charged beyond all reasonable doubts.

Ground 5

THAT the threat against the victim considered by the Judge was not an "immediate" threat and the assumption that it was present in the circumstances of the charges erroneous and wrong in fact and law.

Ground 6

THAT the Judge erred in law and in facts when he fails to adequately/sufficiently warned himself on the issues of lies.

Ground 1

[9] The trial judge had dealt with the appellant's evidence and his cautioned statement as follows in the judgment:

> *'[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.*

[10] In the summing-up the trial judge had referred to the prosecution evidence on the appellant's cantoned interview and the appellant's evidence as follows:

> *[53] The third and the final witness for the prosecution was WDC Arieta Buidei. She is the investigating officer in this case. She interviewed the Accused under caution. The Record of Interview is Prosecution Exhibit 3. The interview was conducted in two segments. The first segment was over a period of two days from 11 March 2016 to 12 March 2016. The second segment was conducted on 1 February 2017.*

[54] In the first segment the Accused did not make any incriminating statements. He admitted being involved in prostitution himself but he denied involving the complainant into prostitution. However, in the second segment he admitted some involvement with the complainant but he explained it was done out of care for her after learning of her personal and family circumstances.

[55] In cross-examination the officer denied fabricating any answers and said she recorded what the Accused told her. She said she overlooked to get the Accused sign the acknowledgment that he was advised of his rights on two occasions but she said the Accused had put his signature at the bottom of each page.

[68] ……. He said he did not read his caution interview because the whole process was overwhelming for him. He said the incriminating answers were not his but were fabricated by the interviewing officer.

[11] In the judgment, the trial judge had directed himself according to the summing-up. When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]

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

[13] Therefore, it is clear that the trial judge was fully conscious of the appellant's stand taken at the cautioned interview and his evidence at the trial *vis-à-vis* the rest of the evidence. Finally, the trial judge had concluded in his judgment:

> *[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.'*

02nd ground of appeal

[14] The appellant seems to challenge the availability of evidence to prove that he engaged in a conduct that caused the complainant to remain in a condition to commercially use her body for sexual gratification of others.

[15] The evidence regarding the elements in section 106(1) read with section 104 (1) & (2) of the Crimes Act, 2009 are at paragraphs 37-51 of the summing-up. The trial judge had considered whether the prosecution had proved count 01 at paragraphs 6 and 8-13 in his judgment. According to the judge, he felt sure that the prosecution had 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 and also that the appellant had 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. This evidence touches on the elements of section 106(1).

[16] The trial judge had believed the account of the complainant that she was afraid of the appellant'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. The trial judge had stated that it was not necessary for the prosecution to prove that the complainant was physically restrained from leaving the

area where she provided the sexual service but force or threats can be subtle to create a condition of sexual servitude. According to the judge, the question is whether the appellant 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. The trial judge had found 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. This evidence is on the elements of section 104(1) & (2).

[17] The summing-up reveals that the complainant had complied with the appellant's instructions because she was afraid of the appellant, his appearance, that is, he had a hard face and a hard look. At the same time, the she had given two reasons for not walking away from the situation; she wanted money to repay her aunty for raising her and she was also afraid of the appellant in case he might do something like assault or kill her because he had sold her for money. She said that she returned to him because she was afraid of him and she followed his instructions because she feared his appearance. However, she had admitted that the appellant did not physically force her to do anything but the only threat of assault was made on 20 July 2015 when she returned to the bus stop after having sex with the driver of the Pajero. In re-examination she had said that she followed the instructions of the appellant because both were looking for money and that she was afraid to go back to her home due to the repercussions for being missing from home.

[18] The trial judge had rejected the appellant's account that his association with the complainant at the relevant time was innocent and was out of concern for her after learning her predicament.

[19] The crucial questions were whether there was any use of force or threats on the complainant and as a result she was not free to cease providing sexual servitude or to leave the place or area where she provided sexual services. Put in simply, whether she was in a condition of sexual servitude or a willing partner in this venture to earn

money or whether she did not cease providing sexual services or leave the area due to reasons other than the appellant's force or threats.

[20] In the circumstances, to my mind the real issue is whether the prosecution had proved beyond reasonable doubt the existence of sexual servitude as defined in section 104(1) & (2). In other words, whether the complainant was in a condition of sexual servitude. If the elements in section 104(1) & (2) are not satisfied then the elements in section 106(1) cannot be proved, for section 106(1) requires an accused to intentionally cause or be reckless as to causing another to enter into or remain in the condition of sexual servitude as defined in section 104(1) & (2).

[21] Given the paucity of judicial precedents on these two sections and the complainant's evidence highlighted at paragraph 17 above , I think it best that the full court examines the whole of the trial transcripts and decide whether the evidence of the complainant along with the appellant's alleged admissions (which cannot be ascertained at this stage) unequivocally prove beyond reasonable doubt the existence of the complainant having been in a condition of sexual servitude as defined in section 104(1) & (2). However, I cannot assess the degree of the appellant's prospect of success at the full court hearing and granting leave to appeal on this ground on the available material should not be taken to indicate any such view on my part at this stage.

03rd ground of appeal

[22] The submission on behalf of the appellant on this ground of appeal also revolves around the interpretation and application of section 104(1) & (2) as to whether the complainant was in a condition of sexual servitude which therefore may be considered under the 02nd ground of appeal.

04th and 05th grounds of appeal

[23] These grounds of appeal could be considered under the 02nd and 03rd ground of appeal. 06th ground of appeal has no merits.

Order of the Court:

1. Leave to appeal against conviction is allowed only on the 02nd and 03rd grounds of appeal.

Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

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