

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 103 OF 2020

THE STATE

v.

LORAINI MARAMA

Counsel : Ms. Sheenal Swastika for State
Ms. Shaheen Ali with Ms. Kalesi Marama for Defence

Dates of Hearing : 12,14 and 15 March 2023
Date of Judgment : 17 March 2023

JUDGMENT

1. The accused is charged with one count of Trafficking in Person contrary to Section 112(4) (a) and (a) of the Crimes Act 2009.
2. The accused pleaded not guilty to the charge. The Prosecution presented the evidence only of the complainant. At the end of the Prosecution case, the accused was put to his defence. The accused exercised his right to remain silent. He did not call any witnesses on his behalf. The counsel from both sides tendered written submissions supplemented by oral submissions. Having carefully considered the evidence presented at the trial and the submissions, I now proceed to pronounce my judgment as follows.

3. The Prosecution bears the burden to prove all the elements of the offence. That burden must be discharged beyond reasonable doubt. The burden never shifts to the accused at any stage of the trial. The accused exercised his right to remain silent. No negative inference shall be drawn from his election to remain silent. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt.
4. The Prosecution alleges that the accused facilitated the exit of Sesenieli Lewatoga, the complainant of this case, from Fiji into Hong Kong and in facilitating the exit she was reckless as to whether the complainant could be at risk of being exploited after the exit. Accordingly, the Prosecution must prove the following elements:
 - (a). The accused- Loraini Marama between 11 December 2014 and 14 December 2014 at Rakiraki
 - (b). Facilitated the exit of the complainant Sesenieli Lewatoga, from Fiji to Hong Kong.
 - (c). In facilitating the exit of the complainant, the accused was reckless as to whether the complainant could be at risk of being exploited after the exit.
5. Section 21 (2) of the Crimes Act defines ‘recklessness’ as follows:

A person is reckless with respect to a result if —

 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
6. The question whether taking a risk is unjustifiable is one of fact.
7. According to Section 4 of the Crimes Act, “exploitation”, of one person (the victim) by another person (the exploiter), occurs if the exploiter’s conduct causes the victim to enter into slavery, forced labour or sexual servitude or where removal of organs take place.
8. Since the offence is named Trafficking-in-Person and the Fiji acceded to the UN Trafficking in Persons Protocol (Palermo Protocol), it is of academic interest to look how this particular offence is defined in international law. Trafficking in persons is universally defined in the

UN Trafficking in Persons Protocol. It supplements the United Nations Convention against Transnational Organized Crimes (UNTOC). Fiji acceded to the UNTOC and its three protocols (including the Palermo Protocol) in 2017.

9. Article 3, paragraph (a) of the Palermo Protocol states that trafficking in persons “shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” Article 3, (b) states that: “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.” Article 3, (c) states that: “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons even if this does not involve any of the means set forth in subparagraph (a)” [<https://www.undoc.org/glotip>].

10. Accordingly, Trafficking in Persons is a process comprising three distinct elements: the act, the means and the purpose (which is always exploitation). Each element of the trafficking process has a range of possible modes. The Protocol states that “the act” is the recruitment, transport, transfer, harbouring or receipt of persons. “The means” refers to the method used to accomplish “the act”. Possible means are the threat or use of force, deception, coercion, abduction, fraud, abuse of power or a position of vulnerability, or giving payments or benefits. These terms are not necessarily precise from a legal point of view and may be defined differently in different jurisdictions. “The purpose” is always exploitation of the victim. The Protocol definition refers to a list of exploitative practices: sexual exploitation, forced labour, slavery and slavery-like practices, and removal of organs. The Protocol also clarifies that the modes listed above comprise the minimum requirement for countries to fulfil their obligations in terms of Protocol compliance. National authorities have plenty of scope to broaden the range of exploitative practices to better tailor their legislation to the trafficking situation in their country. In fact, legislators and jurisprudence around the world

are continuously reshaping the legal concept of trafficking in persons by including new forms of exploitation in national legal frameworks.

11. The notable difference between the offence defined under Section 112 (4)(a)(b) and the definition in the Palermo Protocol is that in the former “the means” which refers to the method used to accomplish “the act” is missing. That means the offence defined in Section 112 (4) (a)(b) could be established even without proving any means used such as threat or use of force, deception, coercion, abduction, fraud, abuse of power or a position of vulnerability, or giving payments or benefits etc. I bear in mind that for the purpose of this case, I am bound by the provisions of the Crimes Act and will apply the same.
12. Having discussed the legal principles and the relevant definitions, I shall now proceed to summarise the salient parts of evidence led in this trial.

Sesenieli Lewatoga (The Complainant)

13. The complainant testified that in 2014, when she was working in Tappoo City, Suva, her cousin Analaisa came to see her. In a discussion that followed, she indicated her desire to go overseas for work. Analaisa said she knew someone who could arrange an overseas job for her.
14. On the night of 11 December 2014, she received a call from Loraini, the accused in this case, whom Analaisa had arranged for her to find a job overseas. Loraini asked her if she wanted to work in Hong Kong. She replied in the affirmative. Loraini told her not to worry about anything as she could arrange a job for her. She was happy because she knew she was going to work overseas. Loraini told her to text her passport number so that she could buy her airplane tickets. Accordingly, she texted her passport details to Loraini.
15. On the next morning (12 December 2014), she received a call from Analaisa and was informed that they had already bought the airplane ticket. Analaisa asked her to pack up clothes and come to her residence in Nakavukavu. When she went to Nakavukavu, she met Loraini for the first time. Loraini told her not to worry about anything and that she had already paid for the ticket and that the job had already been arranged in Hong Kong. Loraini

further informed that her job would be to take the cellular phones from one place to another, something like a mail girl.

16. She was happy about the job description and that she was going work overseas without spending any money. It was further informed that the work in Hong Kong was only for two weeks on a tourist visa and that her stay and food are also provided for. Loraini kept telling her that she did not have to worry about anything as everything was already arranged.
17. She relied on Loraini's words and agreed to take up the job in Hong Kong. She was told that she would receive money before leaving for Hong Kong and also upon completion of her job in Hong Kong.
18. On 13 December 2014, they came to pick her. She boarded a bus from Rakiraki with her father, Analaisa and Loraini and headed to Lautoka. When they reached Lautoka, Loraini asked her to go to an internet shop to print her airplane ticket. According to the ticket, she was to leave for HK at 1a.m. on 14 December 2014 and to return after two weeks. They boarded a mini bus and came to Nadi Airport by 9 p.m. Loraini did not pay the bus fare from Rakiraki to Nadi despite her initial promise that she will pay all the fares.
19. When they reached the Nadi airport, Loraini reassured her not to worry about anything as her tickets had already paid for and that she will receive money. She was instructed to tell the officers if questioned at the airport that she already had \$2,000 in her bank account. The only money Loraini gave was a plastic of coins. She was assured that that money was enough to buy a SIM card at the HK Airport. She also had \$200 on her own. Loraini didn't ask her if she had any money with her. She was informed that someone will be waiting at the HK Airport to receive her and that that person will be her boss and that he will take her to where she was going to work. She noted that when they were taking photos at the airport, Loraini was trying to move away from the camera.
20. She checked-in at 10 p.m. and the flight departed at 1 a.m. on 14/12/2014. She arrived in Hong Kong at 6 a.m. Upon arrival, she went to buy a SIM card as advised. The money that Loraini had given her was not enough to buy a SIM card. She then used her own money to purchase a SIM card. But the SIM card she bought did not work on her phone. She used a phone of a Fijian man who was at the airport to call Loraini. She called Loraini and

informed that she was in Hong Kong and that no one was waiting for her. Loraini promised to check and return a call on the phone she was calling. But Loraini did not call her back so she took another call. Loraini then told her that she had arrived earlier than expected and the boss was still sleeping. Loraini advised her to take a taxi from the airport and go to No. 44 Nathan road, Simshasui, Cologne city where her boss was supposed to be waiting for her. She was told that her boss will pay for the taxi.

21. She managed to catch a cab and went to the address provided. Upon her arrival, the 'boss' Loraini was referring to was not there. She informed the taxi driver about this. When she was still talking to the taxi driver, a man standing outside overheard their conversation and asked as to what had happened. This man by the name of Gabriel Ramoi paid for the taxi. Ramoi then invited her to his room to which she agreed. She told Ramoi that she had come alone from Fiji to work in Hong Kong. Ramoi asked her to be careful because that place was known for prostitution and she could be used either as a prostitute or as a drug mule.
22. She felt scared and started thinking about home. She gave Ramoi the phone number of her 'boss' which she had received from Loraini and asked Ramoi to call her boss to inform him of her arrival. When Ramoi called the boss, he responded angrily saying 'why should I pay for your taxi'. Ramoi informed her boss the place where she was staying. After the telephone conversation, she heard a knock on the door. She informed Ramoi not to open the door because she felt scared. She wanted Ramoi to explain more about that place. Ramoi then told her to be careful and not allow her to be used as a prostitute or to be injected with drugs or to be used to transport drugs from one place to another.
23. Ramoi then texted her boss for him to come and see her. Ramoi gave her one of his old phones and told her to insert the SIM card she had bought so she could contact him if something wrong was happening. The SIM she had bought worked on that phone. After texting her boss, they were waiting in the passage. One big black man came in their way and asked why her phone was off and what she was doing there. She got scared of what Ramoi had advised her about.
24. She explained the 'boss' that the SIM card was not working on her phone and that she had to use Ramoi's phone to contact him and that Ramoi had paid for the taxi. The boss then told her..."you follow me, you are still a kid.. you are not clever... I am clever". The boss didn't

like the fact that she was staying with Ramoi. She followed the boss and went to another room in the hotel. She overheard him inquiring from the receptionist the cost of the room they were going to stay. He was bargaining for a lower rate because he was a frequent customer.

25. When they came inside the room, the boss asked her if she had any money with her. When she told him that she had only \$200.00 and a plastic of coins, he took the \$200.00 and left the room. She was left with only \$10.00 worth of coins and she knew that it was not enough to take her to the airport or to buy food whilst staying in Hong Kong. She started to think back home.
26. After a while the 'boss' came back and asked her.. do you know what are you doing here ? She got scared and just kept quiet. He then left the room. She was tired and hungry so she gave him a call asking for help. He came to the door but didn't give her any money or food. She then went down and bought a banana, a bowl of rice and chicken. She called Loraini to inform that she did not have any money left with her. Loraini told her to text the number of the hotel so that she could send some money through Money gram. But Loraini had not sent any money.
27. She packed her clothes and wanted to come back to Fiji. When she was still packing her clothes, the boss entered her room and wanted her to move to another room. He took her bag and went to the lift with her. He went outside the lift and started talking to a black man who was standing outside. She told the boss to give her bag so that she could go back to Fiji. She managed to get the bags back and tried to log into her Facebook account to seek help from her friends. Failing of which she called Ramoi. Ramoi came and took her to his room. Ramoi managed to find out the next flight to Fiji that was leaving HK the same afternoon at 5 pm. She rushed to the airport but was late and unable to check-in. She called Ramoi once again and was told to return back to his room.
28. When he entered Ramoi's room, he was only wearing a singlet and underwear. She felt really scared. Ramoi pulled her and threw her on top of his bed. He then told her to relax and be prepared to stay with him for 7 days. He looked drunk. She then pushed him away and told him to let her go. She refused the juice that was offered. He again threw her on the bed. She managed to push him away and come out of the room. When she came down by

the lift, he met an Indian man who gave her a key to a room and \$40 to buy something to eat.

29. She then went to the room that the Indian man had provided and I rested there until the next morning. On 16 December 2014, she left for the airport by bus hoping that she would find someone that could help her to return to Fiji. At the airport, she saw a lady wearing a Fiji Airways uniform. She spoke to that lady, Litia Nawa, and explained everything. She asked for help to return back to Fiji. Litia agreed to help her and took her to the Novotel Hotel where Fiji Airways staff was staying.

30. When the crew members were shown the return ticket, they arranged a flight on 19/12/2014 in which she returned to Fiji. When she reached the village, her parents were shocked to see her back earlier than they expected. She explained everything to her parents that had happened to her. She said she told everything in Court so that no Fijian would go through what she went through. She tendered the airplane ticket in her evidence.

31. Under cross-examination, Sesenieli denied that the job Loraini had arranged for her in Hong Kong was to look after the boss's mother who was bedridden. She said she had no opportunity to get clarifications from Loraini to clear out certain doubts about the job that was offered although she spent the night with her. The reason being that Loraini had assured and Analaisa's father and Analaisa also kept on telling that everything was arranged in Hong Kong. Before she could ask Loraini why she was being sent only for two weeks, Loraini had told her that her airplane tickets had already been purchased for two week round trip.

32. She agreed that the reason why she did not ask anything because she had wanted to go overseas. She agreed that she was glad that she did not have to pay for anything for this trip and for the opportunity to go overseas. She agreed that there was no agreement as to what amount of money was supposed to be paid to her. She agreed that she wanted to get money before leaving for Hong Kong and upon returning back to Fiji so that her family could be happy with the money that she earned.

33. She agreed that upon her arrival at the Hong Kong Airport, she was supposed to call the boss but her phone could not work on the SIM she bought. She said she was scared of going into a stranger's room but she still chose to go with Ramoi because he had helped her. She

agreed that her boss had arranged a separate room in that hotel. She agreed that she refused to go with the boss when she saw him talking to a man at the elevator. She agreed that Loraini had arranged for her to meet her boss at Hong Kong Airport on her arrival on 14/12/2014. She agreed that Loraini had made all arrangement in her ability to make sure that she was safe in Hong Kong. She denied that she had failed to follow the instructions that had been given by Loraini.

34. She denied that she made up this story of having being abused to get the help of Fiji Airways crew to return to Fiji. She denied that she made up these allegations because she did not get the money that was promised.

Analysis

35. There is no dispute that the accused facilitated the exit of the complainant from Fiji in to Hong Kong. The accused had purchased the airplane ticket and accompanied the complainant to the Nadi Airport on 14 December 2014 from where she had exited into Hong Kong. The only dispute is whether the accused in facilitating the said exit was reckless as to whether the complainant could be at risk of being exploited.
36. The only witness for Prosecution was the complainant herself. I am not convinced that she told the whole truth in Court. Her evidence raised certain doubts in my mind as to the truthfulness of her evidence. Even if I accept that she told the truth in Court, I am not satisfied that the Prosecution has proved the contentious element of the offence beyond reasonable doubt. I now proceed to give my reasons as follows:
37. The complainant was 22 years old at the time of the offence. She had received education up to Form 5 and had had work experience at Tapoo City for some time. She had already got a passport. I would consider her to be a mature and sensible lady with a degree of common sense. Being a woman of that caliber, I was wondering if she had satisfactorily explained the numerous questions and cleared many doubts raised in her evidence.
38. She had agreed to the purported job only to earn some money and not to embark on an overseas trip. According to her evidence, she was fully aware that the job in Hong Kong was only for two weeks. She knew that she will be in Hong Kong on a tourist visa for that

period. She must have known that she was not allowed to work in Hong Kong on a tourist visa. She has not questioned about the apparent risk she was going to face in Hong Kong.

39. The complainant knew that the job arranged for her in Hong Kong was to courier the cellular phones for a limited period of two weeks. The job was to be all-inclusive full package. For the return ticket alone, the accused had already paid 3212.10 FJD. Quite surprisingly, the complainant had not queried as to what type of a job that would be if she were to return with a handsome amount of money.
40. Although she was assured some payments before and after the travel, there had been no agreement as to how much she would be getting at the end. Despite the fact that the accused had assured that all the expenses of the travel are included in the package, it had not taken long for her to realise that that was not the case when she had to pay her own bus fare from Rakiraki to Nadi Airport. Despite the prior assurance by the accused that she will receive some money before the departure, she had not questioned why she was given only a plastic of coins barely sufficient to buy a SIM card at the Hong Kong Airport.
41. Her evidence indicates that she was also suspicious of accused's conduct right throughout her journey from Rakiraki to Nadi and also at the airport when she shied away from the camera. She should have questioned why she would lie to the officers at the airport about the money in her bank account. With all these suspicions and unanswered questions, it is surprising that a lady of her caliber would ever embark on a journey like that without obtaining clear answers to those queries.
42. While in Hong Kong, complainant said that she had come to the Hong Kong Airport to catch an early flight on 15 December 2014 on Ramoi's instructions. According to her ticket, her return flight was scheduled for 28 December 2014 and she managed to arrange an early flight on 19 only because of the intervention of sympathetic Fiji Airways crew members. She did not explain how it would have been possible for her to arrange an early flight on 15 December 2014.
43. It cannot be ruled out the proposition of the Defence that the complainant made up a story because she was not happy about the payments and that she made up a story of attempted

sexual assault to get sympathy of the Fiji Airways crew to return back to Fiji. Taken as a whole, I find the evidence of the complainant to be implausible and not worthy of credit.

44. Now I turn to the element of the offence that was in contention- the recklessness on the part of the accused. Did the Prosecution prove that the accused, in facilitating complainant's exit, was reckless as to whether the complainant could be at risk of being exploited?

45. According to the Crimes Act definition of recklessness, a person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. The result in respect of the present offence is the risk of being exploited.

46. In *State v Murti* [2010] FJHC 498; HAC195.2010 (10 November 2010) Goundar J in his Summing –Up described the term 'exploit' in the context of Trafficking in Person as follows:

....The word "exploit" means to treat a person as an opportunity to gain an advantage for yourself or for another. The prosecution is not required to prove that exploitation of the complainants in fact occurred. What the prosecution is required to prove beyond reasonable doubt is that the accused was reckless as to whether the complainants will be exploited either by himself or another after the entry.

47. As I have stated before, according to Crimes Act definition, "exploitation", of one person (the victim) by another person (the exploiter), occurs if the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude or where removal of organs takes place. With respect, it is my considered opinion that the word exploitation in the context of Trafficking in Person should be defined in accordance with the Crimes Act definition.

48. The crucial question is whether the accused, in facilitating the complainant's exit from Fiji into Hong Kong, was aware of a substantial risk of the complainant being exploited in Hong Kong in any of the forms described above.

49. The secondary question whether the accused was justified in taking the risk in the circumstances known to her would arise only where it has been proved that she was aware of a substantial risk of complainant being exploited in any of the forms described in the

Crimes Act. The Prosecution appears to run its case on the premise that the accused, when she facilitated the exit of the complainant, was aware that the complainant ran a substantial risk of being exploited in sexual servitude.

50. The term sexual servitude has a definite meaning in legalese and it does not connote a situation where a person is voluntarily engaged in providing sexual services for money. The term 'sexual servitude' is an offence punishable under the Crimes Act (s 106). It is a crime to intentionally or recklessly cause a person who provides sexual services to continue to provide sexual services through the use of force or threats, or to limit person's ability to freely leave the place or the area where they are currently providing sexual services. This definition is almost similar to the New South Wales Crimes Act definition where it defines sexual servitude as follows:

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.

51. According to the complainant, she had been advised by the accused to contact her boss or the employer upon her arrival at the Hong Kong Airport so that he could come and accompany her to the work place. The complainant could not contact the boss because the SIM card she had bought in Hong Kong did not work on her phone. When she contacted the accused, using the Fijian man's phone, she was advised to hire a taxi and go to the address where her boss was supposed to be. When she could not locate the boss at that address, she had gone to the room of Ramoi, a stranger who had paid for the taxi. When the boss arrived at the room upon being informed of her presence there, she advised Ramoi not to open the door. When the boss came again to the passage in response to Ramoi's text message, he appeared angry because she was staying with Ramoi. At the elevator, she refused to go with the boss and wanted to come back to Fiji.
52. There is no evidence that the complainant was subjected to any form of sexual abuse at the hand of the boss or held in sexual servitude. It appears that she was scared to go with the boss because of what she heard from Ramoi about the notoriety of the area she was in.

53. She was in fact exposed to such a threat as a result of her own making when she went to Ramoi's room. Even there, the complainant was not in a condition of sexual servitude described above. In any event, the evidence does not suggest that the accused was aware of such a risk when she facilitated the travel to Hong Kong. In her evidence the complainant agreed under cross-examination that the accused had made all arrangement in her ability to make sure that she was safe in Hong Kong. In those circumstances, it is difficult to find the accused to be reckless in such a situation.
54. Taken as a whole, I am not satisfied that the Prosecution proved, beyond reasonable doubt, that the accused in facilitating complainant's exit from Fiji into Hong Kong was reckless as to whether the complainant could be at risk of being exploited.
55. I find the accused not guilty of Trafficking in Person as charged. The accused is acquitted and discharged accordingly.



Aruna Aulhge
Judge

17 March 2023

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Defence