NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE COMPLAINANTS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 110/2021
[2022] NZSC 16

BETWEEN	JOSEPH AUGA MATAMATA Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	N P Chisnall and L A Elborough for Applicant S K Barr and H S Cunningham for Respondent
Judgment:	3 March 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty after a High Court jury trial on 10 charges of human trafficking and 13 charges of dealing in slaves, affecting 13 different complainants between 1994 and 2019.[1] He was sentenced to 11 years' imprisonment.[2]

[2] The applicant appealed against conviction to the Court of Appeal. The Solicitor-General appealed against the sentence imposed on the applicant. The Court of Appeal dismissed the appeal against conviction and allowed the Solicitor-General's

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1 He was acquitted on one further charge of human trafficking.
2 *R v Matamata* [2020] NZHC 1829 (Cull J) [HC judgment].

appeal against sentence only to the extent of imposing a minimum period of imprisonment of five years.[3]

[3] The applicant now seeks leave to appeal to this Court against conviction. He says that the Court of Appeal erred in two respects:

(a) its conclusion that the jury was properly directed as to the elements of human trafficking in terms of s 98D(1) of the Crimes Act 1961; and

(b) its construction of the legal definition of "slave" for the purposes of s 98 of the Crimes Act.

[4] The facts are summarised in the Court of Appeal judgment.[4] For present purposes, it suffices to say that the applicant ran a business supplying labour to orchards. The complainants were individuals brought to New Zealand from the applicant's community in Samoa and put to work in the orchard business. The applicant arranged flights and visas for the complainants. The Crown alleged at trial that the applicant brought the complainants to New Zealand on the false promise that the money they would earn would be theirs after they had repaid the cost of bringing them to New Zealand and an allowance for lodging with him. But, although they undertook the work required of them, the applicant retained their income, restricted their freedom of movement, restricted their communications and used actual or threatened violence for breaching his rules or standards.

Human trafficking

[5] Section 98D of the Crimes Act was amended in 2015.[5] Seven of the 10 human trafficking charges on which the applicant was convicted relate to the pre-2015 period and are therefore governed by the old s 98D. Under the old s 98D, a person is guilty of human trafficking if he or she "arranges the entry of a person into New Zealand … by 1 or more acts of coercion against the person, 1 or more acts of deception of the

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3 *R v Matamata* [2021] NZCA 372 (Miller, Clifford and Collins JJ) [CA judgment] at [86].
4 At [4]–[8].
5 By s 5 of the Crimes Amendment Act 2015. For brevity, we will refer to s 98D as it was before and after the 2015 amendment as the old s 98D and the new s 98D respectively.

person, or both". Under the new s 98D, liability attaches when a person "arranges, organises, or procures … the entry of a person into … New Zealand … knowing that the entry … of the person involves 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both".

[6] The applicant highlights the difference in wording between the old and new s 98D (especially the omission of the additional words "organises, or procures" in the old s 98D in circumstances where the formula "arranges, organises, or procures" was used in another paragraph of the old s 98D and in other allied provisions).[6] He wishes to argue that this difference means that for the pre-2015 charges, the Crown was required to prove that the offender directly arranged the complainants' entry by coercion or deception, whereas after 2015 it was sufficient to prove that the offender had procured entry through a third party, knowing that deception or coercion exists.[7] Text, purpose and legislative history are all said to support the applicant's position.

[7] The applicant argues that this is a point of public importance, notwithstanding the amendment made in 2015, because historical offences may come to light, which would have to be dealt with under the old s 98D. He also argues that the applicant may suffer a miscarriage of justice if leave is not granted.

[8] The argument the applicant wishes to make involves a consideration of the legislative history of the old s 98D and the amendment leading to the new s 98D and relies substantially on the textual difference between them. However, the argument could affect the outcome only if the Court was satisfied that the wording of the old s 98D(1)(a) excluded acting through a third party, knowing that the person entering New Zealand was being deceived or coerced. We do not consider there is any real prospect of such an interpretation of the old s 98D being adopted.

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6 For example, the old s 98D(1)(a) (being the offence provision) referred to arrangements for entry into New Zealand, whereas subsection (1)(b) created liability for persons who arranged, organised or procured the reception, concealment or harbouring in New Zealand of a person, knowing that entry was arranged by one or more acts of coercion or deception or both.

7 This distinction mattered because on the Crown case, the applicant arranged entry by paying for flights, but a third party arranged visas and only some of the complainants were spoken to by the applicant in Samoa (the applicant said he never spoke to complainants directly): CA judgment, above n 3, at [48].

[9] That being the case, we do not consider that there is any risk of a miscarriage in the present case.[8] Nor do we consider the point is a matter of general or public importance, given the old s 98D applies only to pre-2015 offending and given our conclusion that there is no substantial difference between the old and new s 98D.[9]

Slavery

[10] The 13 slavery charges were brought under s 98(1)(b) of the Crimes Act: the Crown case was that the applicant had "used" each complainant "as a slave".

[11] The trial Judge directed the jury that a slave is a person held as property, meaning that the person is subject to controls tantamount to possession. The Judge said that the control must be tantamount to possession so as to "significantly deprive" a person of liberty. The applicant argued in the Court of Appeal that this direction was wrong. He said the jury should have been told the Crown had to prove as an essential element of the offence that the person was entirely deprived of their freedom and liberty. The Court of Appeal rejected this.[10]

[12] We see no appearance of error in the trial Judge's direction or the Court of Appeal decision. The Court of Appeal decision provides guidance for future cases. As the applicant's counsel accepted, the authorities and academic literature treat control (defined by reference to possession) as a proxy for slavery. The approach taken in the Courts below reflected that. We do not consider any matter of general or public importance arises and we do not consider there is any risk that a substantial miscarriage of justice may have occurred.[11]

[13] The applicant also wishes to challenge on appeal to this Court the Court of Appeal's approach to the mens rea requirement of the slavery offence. The Court of Appeal followed the approach of the High Court of Australia in *R v Tang*.[12] The direction given by the trial Judge was, the Court of Appeal said, more conservative

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8 Senior Courts Act 2016, s 74(2)(b).
9 Section 74(2)(a).
10 CA judgment, above n 3, at [33].
11 Senior Courts Act, s 74(2)(a) and (b).
12 *R v Tang* [2008] HCA 39, (2008) 237 CLR 1 at [42]–[51] per Gleeson CJ, with whom Gummow, Hayne, Heydon, Crennan and Kiefel JJ agreed. Kirby J dissented on the mens rea requirement.

than necessary. We see no appearance of error in the Court of Appeal's analysis. Accordingly, no mater of general or public importance arises[13] and there is no appearance of a miscarriage arising from the more favourable (from the applicant's point of view) direction given to the jury.[14]

[14] We do not consider it is necessary in the interests of justice to give leave to appeal.

[15] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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13 Senior Courts Act, s 74(2)(a).
14 Section 74(2)(b).