



HUMAN TRAFFICKING WORKING GROUP
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CASE REPORT

Current as on: August 20, 2009

| Case Name | <i>R v Wei Tang</i> |
|---------------------------|---|
| Reported in | <i>R v Wei Tang</i> [2006] VCC 637 <i>R v Wei Tang</i> (2007) 16 VR 454 <i>R v Wei Tang</i> [2007] VSCA 144 <i>R v Tang</i> [2008] HCA 39 <i>R v Wei Tang</i> [2009] VSCA 182 |
| Date(s) of hearing | Arrest: 31 May 2003 Conviction: 3 June 2006 VSCA Appeal: 27 June 2007 HCA Appeal: 28 August 2008 VSCA Sentence Appeal: 17 August 2009 |
| Location | Melbourne, Victoria |
| Charges | s 270.3(1)(a) <i>Criminal Code</i> (Cth): possessing a slave |
| Appeal | Court of Appeal, Victoria High Court of Australia (2008) |
| Other accused | John Davies Paul Pick DS: <i>R v DS</i> (2005) 153 A Crim R 194, [2005] VSCA 99 |
| Other | <i>VXAJ v MIMIA</i> [2006] FMCA 234: immigration case involving one of the victims of Wei Tang |

Table of Contents

| | |
|-------------------------------|---|
| Case Summary..... | 2 |
| Media Reports..... | 3 |
| High Court Challenge..... | 3 |
| Definition of ‘Slavery’ | 4 |
| Appeal against Sentence | 5 |

Case Summary

The case against the brothel owner Mrs Wei Tang was the first jury conviction under Australia's *Criminal Code* (Cth) slavery offences. Mrs Tang was accused of having purchased five women from Thailand to work in debt-bondage conditions in a legal brothel called Club 417 in Fitzroy, Melbourne (Vic).¹ The women had previously worked in the sex industry in Thailand and were aware that they would be working in brothels in Australia. They arrived in Australia separately between August 2002 and May 2003 on fraudulently obtained tourist visas. After their arrival, applications for protection visas were made on their behalf, thus enabling the women to work legally. It is unclear how much of this process was understood by the victims.

When they testified against the defendant, the women explained that they had voluntarily entered into a agreements with a broker in Thailand, and owed \$40,000- \$45,000 to the owner of these 'contracts'. Wei Tang had purchased these contracts from the Thai recruiter for \$20,000. Repayments of the \$20,000 formed the basis for the charges of slave trading that were brought against Wei Tang and her employee, Ms DS.

The debt owed to Wei Tang had to be repaid by working in a brothel six days a week over a period of seven to eight months. Mrs Tang also withheld the women's passports and their return airplane tickets which had been used to gain entry to Australia. There was no other evidence of physical maltreatment by the accused.² It was conceded that two of the five women had indeed repaid their debts and had voluntarily stayed on to work as prostitutes.³

Mrs Wei Tang was initially convicted to ten years imprisonment on five counts of possessing a slave and five counts of utilising a slave contrary to s 270.3 (1)(a) *Criminal Code* (Cth).⁴ She successfully appealed against the conviction arguing that the judge misdirected the jury on the meaning of the term 'slavery'. Specifically, she argued that it had to be established that she had acted with intent in dealing with the victims as though they were her property.⁵ Her conviction was overturned in June 2007 and the Victorian Court of Appeal ordered a retrial. In August 2008, the prosecution successfully appealed against that decision and Wei Tang's initial conviction was upheld by the High Court: *R v Tang* [2008] HCA 39.

DS, an employee of Wei Tang, pleaded guilty to two counts of slave trading and three counts of possessing a slave.⁶ Perhaps surprisingly, Ms DS was herself a previous victim of Wei Tang who had chosen to stay with her trafficker and work for Wei Tang in a managerial capacity.

The brothel manager and driver of the victims, Mr Paul Pick, was originally tried with Wei Tang, but was acquitted on eight charges, while the jury could not decide on a further two. He successfully applied for a nolle prosequi.⁷

¹ *R v Wei Tang* (2007) 16 VR 454, [457].

² Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 36, Global Alliance Against Trafficking in Women <www.gaatw.net/index.php?option=com_content&task=blogcategory&id=0&Itemid=179> at 21 July 2008.

³ *R v Wei Tang* (2007) 16 VR 454, 457.

⁴ *R v Wei Tang* [2006] VCC 637.

⁵ *R v Wei Tang* (2007) 16 VR 454, 471, 487.

⁶ *R v DS* [2005] VSCA 99.

⁷ *R v Wei Tang* (2007) 16 VR 454, 458. A nolle prosequi is an entry made on the record, by which the prosecution declares that it will not proceed against the defendant. Cf. Natasha Robinson, 'Second sex slave jury fails to deliver verdict', *The Australian* (Sydney), 28 May 2005, 8.

Media Reports

Initial media coverage of the incident dealt mainly with factual accounts of the arrests and arraignments of the offenders. A common quote came from Australian Federal Police agent Mr Graham Ashton, who stated: '[w]e believe they were [...] locked in the house, during the day and then worked at night'.⁸ This statement may lead readers to the conclusion that only physical custody was involved in the control of these women, while a more nuanced view of trafficking reveals that more subtle psychological, cultural, and economic factors are more commonly employed.⁹ Some articles were blatantly sensationalist¹⁰ and portrayed the complainants as naïve victims.¹¹ However, once the trial had begun, and as more facts became available, the standard of reporting increased.¹² Also, when the matter came before the High Court, there was an increase in expert or editorial commentary.¹³

High Court Challenge

Wei Tang's conviction was challenged firstly on the grounds that s 270.3 *Criminal Code* (Cth) was not within the legislative power of the Commonwealth Parliament. The definition of 'slave' in s 270.3 draws upon the definition of slavery in s 270.1. Slavery is defined as

the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.¹⁴

This definition is based on Article 1 of the *International Convention to Suppress the Slave Trade and Slavery* of 1926.¹⁵ The Commonwealth Parliament added the phrase 'including where such a condition results from a debt or contract made by the person', which was not included in the Convention. Parliament also removed the term 'status' from 'status or condition of a person'.¹⁶ This may be attributable to fact that the 1926 Convention was made in contemplation of de jure slavery, the status of chattel slavery, rather than any de facto conditions of slavery. Chattel slavery exists in instances where the slave is the legally recognised property of the owner. This form of slavery was abolished by the imperial acts, and this abolition is maintained under s 270.2. Thus the addition of the 'debt or contract' provision to the definition in s 270.1 is aimed at expanding the scope of the offence in s 270.3 to the more modern forms of slavery such as debt bondage or extremely exploitative contracts, as chattel slavery is legally impossible in Australia. The legality of Wei Tang's conviction was challenged on the basis that this expansion, going beyond the 1926 Convention on which the offence is purportedly based, was not within the legislative power of the Commonwealth Parliament under the external affairs power in s51(xxix) of the *Australian Constitution*.

⁸ 'Thai sex slaves locked in Melbourne house', *Australian Associated Press* (Sydney), 12 July 2003; 'Four people arrested, charged with slavery in Australia', *Australian Associated Press* (Sydney), 11 July 2003.

⁹ Lara Fergus, *Trafficking in Women For Sexual Exploitation*, Briefing 5, Australian Centre For the Study of Sexual Assault, 2005, 21.

¹⁰ Adam Morton, 'Woman who enslaved sex slaves denied bail; court', *Australian Associated Press* (Sydney), 5 Apr 2004.

¹¹ Steve Butcher, 'Sex slaves tell of trickery and terror', *The Age* (Melbourne), 22 Aug 2003.

¹² 'Brothel owner on sex slave charges', *Australian Associated Press* (Sydney), 12 Apr 2005.

¹³ Anne Gallagher, 'A question of bondage', *The Age* (Melbourne), 15 May 2008, 17; Karen Kissane, 'Judge warns many could be snared by slavery laws', *The Age* (Melbourne), 14 May 2008, 5.

¹⁴ Section 270.1 *Criminal Code* (Cth).

¹⁵ 212 UNTS 17.

¹⁶ Article 1 of the Convention states that '[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.

Chief Justice Gleeson of the High Court considered the phrasing of the definition in s 270.1, noting that the word ‘including’ is used to clarify that de facto slavery arising from a debt or contract falls within the definition of slavery when that debt or contract gives rise to a condition where any or all of the powers of ownership are exercised over a person. As such it does not expand the definition, as the condition must be met regardless.¹⁷ Justice Kirby also supported this conclusion.¹⁸ It was unanimously held that the offences were reasonably capable of being considered and ‘appropriate and adapted’¹⁹ implementation of Australia’s international obligations.

Definition of ‘Slavery’

The Victorian Court of Appeal found that defining the relevant mental element for the offence under s 270.3 *Criminal Code* (Cth), and the subsequent direction given to the jury by the trial judge, was the ‘critical issue’ in the case.²⁰ The Court of Appeal found that the trial judge had not directed the jury’s consideration sufficiently²¹ to the requisite mental element, intention.²² As a result the Court of Appeal ordered a retrial. The Victorian Attorney-General successfully appealed this finding to the High Court.

Chief Justice Gleeson found that the Court of Appeal erred²³ in requiring the defendant to have an ‘appreciation of the character’²⁴ of her actions. He instead found that ‘[i]t was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants’.²⁵ He took care to clarify that although there was an oral ‘contract’ involved in these proceedings, the inclusive language of s 270.1 made it clear that the existence of this contract did not exclude the finding of a condition of slavery. Thus it was irrelevant to construct what he termed a ‘false dichotomy’ between employment and ownership as the source of the powers being exercised.²⁶

Hayne J agreed with the reasons of Gleeson J,²⁷ but also gave extensive consideration to the definition of slavery, and the situations from which it could be inferred.²⁸ He considers that the offence poses two interlinked questions: ‘first, did the accused possess, or exercise some other power attaching to the right of ownership over, the complainant and second, was the complainant a slave?’²⁹ He noted that if it could be shown that the accused had exercised any of those powers, such as possession, it would be sufficient to show that the accused had contravened the offence, and that the complainant was a slave within s 270.1.

It was on this point that Justice Kirby dissented, agreeing with the Court of Appeal that a retrial was the correct course. He considered the structure given to the offence, specifically, that the adverb ‘intentionally’ was placed in the chapeau of the offence, thus applying to all subsequent clauses. He surmises that

¹⁷ *R v Wei Tang* [2008] HCA 39, [33]-[34] (Gleeson CJ).

¹⁸ *Ibid* [2] (Kirby J).

¹⁹ *Victoria v Commonwealth* (1996) 187 CLR 416 486–487.

²⁰ *R v Wei Tang* [2007] VSCA 134, [66].

²¹ *Ibid* [144].

²² *Ibid* [77].

²³ *R v Wei Tang* [2008] HCA 39, [43] (Gleeson CJ).

²⁴ *R v Wei Tang* [2007] VSCA 134, 144.

²⁵ *R v Wei Tang* [2008] HCA 39, [51] (Gleeson CJ).

²⁶ *Ibid* [45] (Gleeson CJ).

²⁷ *Ibid* [133] (Hayne J).

²⁸ *Ibid* [156].

²⁹ *Ibid* [144] (Hayne J).

it is not enough for the accused to 'possess' a slave or to 'exercise' control over a slave 'any of the other powers attaching to the right of ownership'. To be guilty of the offence provided by the Code, the accused must do these things, and all of them, 'intentionally'.³⁰

He thus agrees with the Court of Appeal that there must be an intention on the part of the accused to deal with the complainant as a slave, as if they were mere property.³¹ He finds support for this premise in that a penal statute which operates to deprive an individual of their liberty is traditionally construed strictly.³² It must be noted that despite the criticisms of Chief Justice Gleeson and Justice Hayne, Justice Kirby does not require an appreciation of the source of the powers exercised, but merely an appreciation of the result of exercising those powers, specifically, that it renders the complainant a slave.³³

In summary, the majority of the High Court favoured a definition that required intention only in relation to the exercise of any the powers attaching to ownership, following the 'common exercise of relating the fault element to the physical elements of the offence'.³⁴ Justice Kirby disagreed, requiring the prosecution to show that the accused intentionally exercised those powers in relation to a person the accused knew to be a slave.

What follows is that the offence of slavery is a viable option for use against human traffickers, as there is no requirement to prove consideration on the part of the traffickers that they were dealing with the complainant as a slave. It was noted by Chief Justice Gleeson that such evidence would be 'rare'³⁵. But the majority probably found comfort in the fact that even if such consideration was required, in this case, there was sufficient evidence for the jury to convict.³⁶ However, this may have resulted in the watering down of the high threshold historically required for a conviction for serious criminal offences.

Appeal against Sentence

As the Court of Appeal had upheld Wei Tang's initial appeal against conviction, her appeal against sentence was not heard. When this appeal was overturned by the High Court, the appeal against sentence was remitted to the Victorian Court of Appeal.³⁷ The matter was heard on 5 February 2009 and a judgement was delivered on 17 August 2009.³⁸

The court considered that the effect of sentencing Mrs Tang for the offences of both 'possessing' and 'using' a slave was to, in effect, punish her twice for the same conduct,³⁹ and that to draw a distinction between the two as separate offences would be 'a matter of semantics'.⁴⁰ This error of law required the Court of Appeal to exercise the sentencing discretion afresh, taking account of additional mitigating circumstances that had arisen since Mrs Tang was first sentenced three years ago. These included the distress suffered by Mrs Tang in being subjected to the judicial system for four years, including her being released on bail and subsequently returned to prison when the High Court upheld her conviction,⁴¹ and

³⁰ *R v Wei Tang* [2008] HCA 39, [93] (Kirby J).

³¹ *Ibid* [96] (Kirby J).

³² *He Kaw Teh v R* (1985) 157 CLR 523, [583].

³³ *R v Wei Tang* [2008] HCA 39, [126] (Kirby J).

³⁴ *He Kaw The v R* (1985) 157 CLR 523, [568].

³⁵ *R v Wei Tang* [2008] HCA 39, [44] (Gleeson CJ).

³⁶ *R v Wei Tang* [2007] VSCA 134, [194].

³⁷ *R v Wei Tang* [2008] HCA 39, [59] (Gleeson CJ); Michael Draper, 'Sex Slavery 'Dehumanising': Judge', *Australian Associated Press* (Australia), 5 February 2009.

³⁸ *R v Wei Tang* [2009] VSCA 182.

³⁹ *R v Wei Tang* [2009] VSCA 182, [35].

⁴⁰ *Pearce v The Queen* (1998) 194 CLR 610, [42].

⁴¹ *R v Wei Tang* [2009] VSCA 182, [71].

her continuing ill health, including depression and endometriosis.⁴² All other grounds of appeal failed.⁴³ In exercising the discretion the Court of Appeal sentenced Mrs Tang to nine years imprisonment with an effective non-parole period of five years.⁴⁴

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⁴² *R v Wei Tang* [2009] VSCA 182, [72].

⁴³ *R v Wei Tang* [2009] VSCA 182, [7].

⁴⁴ *R v Wei Tang* [2009] VSCA 182, [73].