IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2015-092-6886
[2016] NZHC 2223

THE QUEEN

v

FEROZ ALI

Hearing:	22, 23, 24, 25, 26, 29, 30, 31 August 2016 1, 2, 6, 7, 8, 9, 12, 13, 14 and 15 September 2016
Counsel:	L Clancy and J M Pridgeon for Crown P J Broad and S Leith for Mr Ali
Judgment:	12 September 2016
Reasons:	20 September 2016

REASONS FOR RULING (NO. 3) OF HEATH J

Solicitors:
Crown Solicitor, Manukau
Counsel:
P J Broad, Auckland
S Leith, Auckland

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Introduction

[1] Mr Ali was tried, over 18 sitting days, on fifteen charges alleging that he trafficked in human beings by deception (the trafficking charges),[1] fifteen of aiding and abetting a person to enter New Zealand unlawfully (the unlawfully entering charges),[2] and one charge of aiding and abetting a person to remain in New Zealand unlawfully (the unlawfully remaining charge).[3] The Crown case was completed on 8 September 2016. Mr Ali elected not to call or give evidence.

[2] On 9 September 2016, I heard argument on the way in which the jury should be directed on all charges. After the hearing, I asked the Registrar to advise the jury that they would not be required to attend for closing addresses until Tuesday, 13 September 2016. That was done to enable a ruling on all issues to be given on 12 September 2016, so that counsel were aware of the basis on which they could close to the jury.

[3] I gave a ruling on 12 September 2016.[4] I said that I would give reasons for my ruling later. These are those reasons.

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1 Crimes Act 1961, s 98D(1)(a). The charges fell to be considered in the context of the provision as it stood immediately before the enactment of s 5 of the Crimes Amendment Act 2015 on 7 November 2015.

2 Immigration Act 2009, s 343(1)(b), in the form amended by s 15(1) of the Immigration Act 2013 from 19 June 2013.

3 Ibid, s 343(1).

4 *R v Ali* [2016] NZHC 2153. Counsel closed to the jury on 13 September and I summed up on 14

[4] I deal with the issues raised at the hearing on 9 September 2016 in the following order:

(a) I explain the background to the trafficking charges and give my reasons for holding that the Crown was entitled to close on the basis either that Mr Ali was a principal offender or a party.[5]

(b) I explain why I admitted evidence about what was said by Mr Ali's wife and sister-in-law (both of whom were alleged to have played significant roles in the alleged offending) even though neither of them gave evidence.[6]

(c) I explain the reasons for the way in which I left defences to the jury on the "unlawfully entering" and "unlawfully remaining" charges.[7]

(d) I explain my reasons for deciding to give particular reliability warnings.[8]

Charges 1 – 15: the trafficking charges

(a) Background

[5] Section 98D of the Crimes Act 1961 was introduced into New Zealand law by the Crimes Amendment Act 2002 (the 2002 Amendment). It was one of five provisions, ss 98B to 98F, enacted by the 2002 Amendment to fulfil New Zealand's obligations under the *United Nations Convention Against Transnational Organised Crime*.[9] Section 98D is directly referable to one of three protocols under the Convention: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children*. A companion provision, s 98C, gives effect to the *Protocol Against the Smuggling of Migrants by Land, Sea And Air*.

September 2016. Verdicts of guilty on all charges were returned on 15 September 2016.

5 Ibid, at [3](a) and (c).

6 Ibid, at [3](b). For a description of their respective roles, see paras [9]–[15] below.

7 Ibid, at [3](d) and (e).

8 Ibid, at [6] and [7].

9 *United Nations Convention Against Transnational Organised Crime* GA Res 55/25, A/RES/55/25 (2001).

[6] The purpose of the 2002 Amendment was explained by the then Minister of Police, Hon George Hawkins MP, when the Transnational Organised Crime Bill was introduced into the House of Representatives. The Minister said:[10]

> One significant aspect of this international effort is to target those people who profit from the smuggling and trafficking of people. People smuggling and trafficking have become lucrative international activities for organised crime. Fifty percent of all illegal immigrants globally are assisted by such smugglers. Estimated profits from the trade amount to US$10 billion annually. New Zealand, even with its relative geographic isolation, is not immune from this trade.

[7] In *R v Chechelnitski*,[11] the Court of Appeal considered the origins of those two protocols and the different policy objectives each was designed to meet. Delivering the judgment of the Court, Glazebrook J said:

> [3] ... The offence of smuggling migrants is concerned with persons who, for material benefit, arrange for illegal migrants to enter or be brought to New Zealand, knowing, or being reckless as to whether, the migrant is unauthorised. *Trafficking*, conversely, *is concerned with the situation where the migrant's entry into New Zealand has been procured by acts of coercion or deception*. Both offences are punishable by imprisonment for a term not exceeding 20 years, a fine not exceeding $500,000, or both.
>
> [Emphasis added.]

(b) The Crown case in outline

[8] The essential aspects of the Crown case may be summarised shortly. The conduct that is said to amount to the crime of trafficking was alleged to have extended over about one year, from August 2013 to September 2014. Fifteen complainants were called to give evidence, all of whom, the Crown alleged, were trafficked to New Zealand during that time.

[9] Mr Ali's de facto wife, Ms Geeta Chandar (Geeta), operated a travel agency known as Deo's Travel Agency. Her twin sister, Ms Sanjana Ram (Sanjana) operated another travel agency, known as Ram's Travel & Immigration Services. Both businesses operated out of premises in the same suite of an office building in Suva, Fiji.

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10 (28 February 2002) 598 NZPD 14755.

11 *R v Chechelnitski* CA160/04, 1 September 2004.

[10] At various times, on behalf of their respective agencies, Geeta and Sanjana placed advertisements in the *Fiji Sun* newspaper. They were designed to excite the interest of people living in Fiji who were prepared to travel to Australia and New Zealand to earn a significantly better income than they could earn in Fiji.

[11] The fifteen complainants responded to those advertisements. Each consulted either Geeta or Sanjana (or one of their respective employees), about travelling to New Zealand to undertake the advertised work. A common aim was to make more money so that they could provide a better lifestyle for themselves, their families and wider village communities. It was represented to them that they could expect to earn up to seven or eight times more money per week than what they were able to earn in Fiji.

[12] In general terms, a complainant would be required to pay a consultation fee before being given any further information. The travel agency would also charge for filling out visa application forms to travel to New Zealand, and when the complainant's passport and visa were available for uplift. In total, those fees varied between about $FJ1500 and $FJ4000. Those amounts were grossly disproportionate to the amount of money that each of the complainants could earn in Fiji. Many borrowed significant sums from relatives, or from communal funds operated in their respective villages, to meet those costs.

[13] The general thrust of the evidence was that each complainant was asked to sign a visa application in blank. The required information was filled in by Geeta, Sanjana, or one of their employees. In all cases, the applications contained false or misleading information. A visitor's visa was sought on the basis that the applicant intended to travel to New Zealand to visit friends and family. Those false statements had the effect of concealing from those responsible for approving the application the fact that the applicants intended to work in New Zealand. A visitor's visa (or in one case a "limited visa") gave no right to the holder to work in New Zealand.

[14] A number of complainants noticed, when the visa was obtained, and handed over to him or her, that it was a visitor's visa, rather than a work visa. A theme of the largely unchallenged evidence was that each complainant was assured by one of Geeta or Sanjana (or in two cases, an employee, either Sanjeshni or Sabeena) that they could travel to New Zealand to work on the visitor's visa, and/or work permits

would be available on their arrival. I was satisfied that a jury could find that the complainants were naïve and vulnerable, and could have relied on those false assurances.

[15] Most of the complainants understood that their accommodation and food costs were covered by what they had paid in Fiji. However, in almost all cases, they knew that they had the responsibility to meet the cost of their airfare to and from New Zealand. Contrary to what most understood, costs of food and accommodation for almost all of the complainants were unlawfully deducted from monies paid to each.

[16] Most of the complainants were met at Auckland airport, by Mr Ali and/or an associate. Mr Ali operated a construction business in Auckland. Some of the complainants went to live at his home, a small unit in Papatoetoe, and worked in his business. They slept on the floor, or on a sofa in the lounge area of that unit.

[17] Others went to work for another man in Tauranga, Mr Jafar Kurisi (also known as "Tauranga Ali") pruning kiwifruit vines. One particular group, consisting of three women and one man, were housed by him in sub-standard rented accommodation, near Tauranga. All four were given a single room in which to sleep on the floor in a basement area that was originally a garage. All complainants say they were poorly paid.

[18] At the start of the trial, Mr Ali pleaded guilty, before the jury, to 18 charges that he exploited workers by failing to pay the minimum wage and holiday pay.[12] He also pleaded guilty to a further 8 charges that, for a material benefit, he aided or abetted named complainants to breach a condition of a visa; namely, to work whilst on a visitor's visa.

[19] Those convictions represent conclusive evidence of the elements of those charges.[13] As a result, the Crown had established beyond reasonable doubt that Mr Ali:

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12 Under the Minimum Wage Act 1983 and the Holidays Act 2003 respectively. The exploitation charges were brought under s 351(1)(a)(i) and (ii) of the Immigration Act 2009.

13 Evidence Act 2006, s 49.

(a) Employed those complainants in respect of whom guilty pleas were entered.

(b) Obtained a material financial benefit from employing those complainants.

(c) Knew that each of those complainants was in New Zealand on a visitor's visa but nevertheless employed him.

(d) Knew that each of those complainants was unlawfully employed at the time they were exploited.

(c) Section 98D(1)(b): elements of the trafficking charges

[20] Section 98D(1) of the Crimes Act 1961, in the form in which it stood as at the dates of the alleged offending, stated:[14]

> **98D Trafficking in people by means of coercion or deception**
>
> (1) Every one is liable to the penalty stated in subsection (2) who—
>
> (a) arranges the entry of a person into New Zealand or any other state by one or more acts of coercion against the person, one or more acts of deception of the person, or both; or
>
> (b) arranges, organises, or procures the reception, concealment, or harbouring in New Zealand or any other State of a person, knowing that the person's entry into New Zealand or that State was arranged by 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both.

[21] An "act of deception" includes "fraudulent action".[15]

[22] Mr Ali was prosecuted under s 98D(1)(b) – which involves *arranging the reception* of a person into New Zealand. By contrast, s 98D(1)(a) is directed at *arranging the entry* of a person into New Zealand.

[23] On the facts I have outlined, I determined that the jury should be directed that the Crown must prove beyond reasonable doubt, in respect of each complainant, that:

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14 The present version of s 98D was enacted by s 5 of the Crimes Amendment Act 2015, with effect from 7 November 2015.

15 Crimes Act 1961, s 98B (18 June 2002 – 7 November 2015).

(a) Mr Ali played a material role in arranging his or her reception in New Zealand.

(b) Geeta and/or Sanjana (or an authorised employee on behalf of one or the other) made intentional and material representations to him or her, knowing them to be false, to induce that person to enter New Zealand.

(c) Mr Ali knew that Geeta and/or Sanjana were making (or authorising) intentional and materially false statements to induce him or her to enter New Zealand.

(d) That person was, in fact, induced to enter New Zealand by one or more of the representations made to him or her.

(e) The representations made were false.

[24] At the end of the Crown case, it became necessary for me to rule on the legal basis for criminal liability that could be advanced by the Crown in closing. At the time of argument, there seemed to be an evidential foundation to support the view that Mr Ali was either a principal offender, or a party.

[25] Section 66 of the Crimes Act 1961 sets out the categories of persons who are regarded as parties to an offence. They include the person who actually commits the offence.[16] Section 66 provides:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—
>
> (a) Actually commits the offence; or
>
> (b) Does or omits an act for the purpose of aiding any person to commit the offence; or
>
> (c) Abets any person in the commission of the offence; or
>
> (d) Incites, counsels, or procures any person to commit the offence.
>
> (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a

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16 Crimes Act 1961, s 66(1)(a).

> party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

[26] I invited submissions about the basis on which the Crown proposed to close to the jury. Mr Clancy, for the Crown, identified two bases. The first involved an assertion that Mr Ali was acting as a principal offender.[17] The other rested on the proposition that Mr Ali, Geeta and Sanjana had joined together to prosecute a common purpose to bring the complainants to New Zealand to work, on the basis of false representations.[18]

[27] In written submissions, Mr Clancy put those alternative positions as follows:

> (a) Mr Ali is directly liable as a principal offender for acts that amount to arranging the reception of each complainant in New Zealand, he having committed those acts knowing that each complainant's entry into New Zealand was arranged by one or more acts of deception. The acts that amount to "arranging the reception" include collecting complainants at the airport, transporting complainants to a motel, arranging jobs for complainants with others providing accommodation and employment to complainants himself. Should the case be put on this basis, the Crown anticipates that the key issue for the jury will be how much Mr Ali knew about the alleged deception in Fiji.
>
> (b) Mr Ali is liable as a s 66(2) party to offending by Geeta Chandar and Sanjana Ram. This would be on the basis that the defendant, Geeta and Sanjana were engaged in a common purpose designed to induce people in Fiji to come to New Zealand to work based on false representations ... If the case is put to the jury on this basis the Crown would, again, anticipate that the key issue will be how much Mr Ali knew about the alleged deception in Fiji.

[28] After considering relevant authorities, I concluded that it was permissible for the Crown to close its case on either of those bases. As to principal liability, my conclusion rested on the approach taken by the Court of Appeal, in *Ngamu v R*.[19] Party liability is premised on the views expressed by members of the Supreme Court, in *Ahsin v R*.[20]

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[17] Ibid.

[18] Ibid, s 66(2).

[19] *Ngamu v R* [2010] NZCA 265, [2010] 3 NZLR 547.

[20] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

(d) Principal liability

[29] In *Ngamu v R*,[21] the Crown alleged that a cheque theft operation had been run by a gang involving seven "masterminds" and a number of secondary participants. Each played different roles: some were involved in stealing the cheques; others were engaged in making alterations to stolen cheques so that they could be banked; and others were involved in banking the cheques into the accounts of the secondary participants who allowed their accounts to be used for that purpose. Another's principal role was to recruit further secondary participants so that their accounts could also be used for illegal purposes. Steps were then taken to withdraw funds from the accounts of the secondary parties for the benefit of the principals.[22]

[30] The Court of Appeal considered that the trial Judge erred in formulating three issues for the jury to determine, on the basis of a generic, rather than a "charge-by-charge", analysis.[23] The Court considered that the Judge had fallen into error because of his reliance on a single "use" theory, rather than one of "continuing" use.[24]

[31] In the context of a charge of using a document to obtain a pecuniary advantage, Chambers J, delivering the judgment of the Court, said:

> [12] "Use" as used in s 228(b) is an elastic term. There is not one right answer to the question we have posed. Before us on appeal, all counsel agreed that the following acts could amount to separate uses:
>
> - altering the cheque;
> - arranging an account for the cheque to be paid into;
> - depositing the cheque in the false payee's account.
>
> [13] There was dispute as to whether stealing the cheque (in the circumstances of this case) could amount to "use" for the purposes of s 228(b). Mr Chisnall, senior counsel for the Crown on this appeal, submitted we did not need to answer that question, as none of the current appellants was alleged to have stolen the cheques.
>
> [14] It is undoubtedly the case that the matter is more easily put to the jury if each of the separate acts referred to in [12] above is considered a "use" in its own right. But, on balance, we have decided it is preferable to view the "continuing use" as a single use, a use not completed until the

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21 *Ngamu v R* [2010] NZCA 265, [2010] 3 NZLR 547.
22 Ibid, at [2]–[5].
23 Ibid, at [20]–[26].
24 Ibid, at [14].

> cheque was deposited in the false payee's account. This approach seems more in tune with the reasoning in *R v Baxter*, even though the facts of that case were quite different.
>
> [Footnotes omitted.]

[32] The Court of Appeal recognised that "an accused can be liable as a principal in respect of his or her part of the *actus reus*, provided that another does or others do the things necessary to complete the *actus reus*". Chambers J continued:[25]

> [16] ... A very good example is given in *Adams on Criminal Law*:
>
>> Where the actus reus of an offence consists of different elements, two persons can be guilty as joint principal parties by committing the elements between them, for example, if A steals while B threatens violence, both are principal parties to robbery. Although in the last example neither A nor B individually commits both physical elements of the offence, s 66(1)(a) may be applied distributively to include all persons who actually do one or more of the acts which constitute the offence.
>
> [17] Because of what follows, it is important to note at this stage that the line of authority supporting this theory of joint principals and a distributive application of s 66(1)(a) has nothing to do with that exception to the hearsay rule known as the co-conspirators' rule of evidence.
>
> [Footnotes omitted.]

[33] Although the cheque fraud in *Ngamu* is different in character from the trafficking offences with which Mr Ali is charged, the same principle applies. In each case more than one participant is involved in carrying out the acts that make up the offence. In this case, the acts of deception were carried out in Fiji by (or on behalf of) either Geeta or Sanjana. On the Crown case, it was they who induced each of the complainants to travel to and enter New Zealand on the basis of false representations as to good pay and working conditions, and an ability to work legally in New Zealand. Mr Ali's role was to make arrangements for the reception of the complainants into New Zealand; including the provision of some accommodation and work. On that approach, the acts Geeta and Sanjana carried out in Fiji, when taken together with the acts carried out in New Zealand by Mr Ali, completed the offence of trafficking people by deception. That analysis is the same as that on which the Court of Appeal based its decision in *Ngamu*.

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[25] The Judge's comments about the difference between the substantive law and the evidential co-conspirators' rule are set out at para [52] below.

[34] For those reasons, I ruled that the Crown could close on the basis that Mr Ali was a principal offender. Section 66(1)(a) is the foundation for that liability.[26]

(e) Party liability: s 66(2)

[35] The basis for party liability under s 66(2) of the Crimes Act was considered by the Supreme Court in *Ahsin v R*.[27] In delivering a plurality judgment,[28] McGrath J said:

> [89] Under s 66(2), proof is first required that the defendant formed a common intention with one or more others to prosecute an unlawful purpose and to assist the other(s) in doing that. Each participant in such a common purpose will become liable as a party if one of the others commits an offence while prosecuting the common purpose, whether or not that offence was an intended outcome, as long as that offence was known by the participant to be a probable consequence of the prosecution of that purpose.

[36] In so holding, the Supreme Court overruled a judgment of the Court of Appeal in *Bouavong v R*.[29] In *Bouavong*, the Court of Appeal held "that a participant in a common purpose was not liable as a party under s 66(2) where the offence which was committed by another participant, while prosecuting the common purpose, was the intended offence".[30] In rejecting that proposition, McGrath J said:

> [92] The Court of Appeal found support in the description of joint enterprise liability in the judgment of the Privy Council delivered by Sir Robin Cooke in *Chan Wing-Siu v The Queen*. In that case, the Privy Council explained the principle of party liability encapsulated in s 66(2) in the following way:
>
> > … a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. … The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.
>
> In *Bouavong*, the Court of Appeal said that it did not see any suggestion in the case law that the "extended form of liability" discussed in *Chan Wing-Siu* "could apply to the very crime intended to be committed".

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[26] Crimes Act 1961, s 66(1)(a) as set out at [19] above.
[27] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.
[28] McGrath, Glazebrook and Tipping JJ.
[29] *Bouavong v R* [2014] 2 NZLR 23 (CA).
[30] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [91].

> [93] The Court's reasoning, however, does not recognise the significance of the inclusion of "necessarily" in the passage from *Chan Wing-Siu* quoted above (despite using the same word in its own reasoning). Common purpose liability is a "wider principle" that is not confined to cases where the intended offence is committed. Nor are intended offences to be excluded from its ambit.
>
> [94] The offence that was intended by the participants falls naturally within the scope of the words in s 66(2): "every offence committed by any one of them … that … was known to be a probable consequence". Although there is perhaps some infelicity in the language, Parliament cannot have contemplated that s 66(2) was confined to offences other than those intended at the time of entry into the common purpose. If that were so, there would be circumstances where participants in a common purpose resulting in the exact crime intended could not be charged under s 66 at all, because assistance or encouragement could not be attributed with certainty to any individual. Such participants are at least as culpable as those involved in a common purpose that results in an unintended but foreseen offence.

[37] The Supreme Court was unanimous on this point. In separate judgments, both Elias CJ[31] and William Young J[32] agreed with the majority reasoning. As well, the majority endorsed others given by William Young J.[33]

[38] The first question is whether an evidential foundation exists for the Crown to assert that Geeta, Sanjana and Mr Ali had agreed to act together to achieve a common goal; namely, to entice persons in the position of the complainants (in Fiji) to come to New Zealand to earn good pay, on good working conditions and on a visa that permitted them to work in this country. The Crown case is that they agreed, unlawfully, to carry out that objective by deception, through false representations. As with the theory based on principal liability, Geeta and/or Sanjana were responsible for carrying out the relevant acts in Fiji, while Mr Ali undertook the same function at the New Zealand end of the operation.

[39] The probable consequence of the plan was that Geeta and/or Sanjana would arrange for a Fijian resident to travel to New Zealand on the basis of such representations, giving rise to the offence of trafficking in human beings by means of deception. The principles laid down by the Supreme Court in *Ahsin* enable the Crown to rely on the offence actually charged as the relevant "probable consequence".[34]

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31 Ibid, at [1] and [28].
32 Ibid, at [239]–[240].
33 Ibid, at [97].
34 See [36] and [37] above.

[40] I was satisfied that a sufficient evidential foundation existed for the Crown to put the case to the jury on a s 66(2) basis. On mostly uncontroverted evidence, Geeta and/or Sanjana placed advertisements in a newspaper in Fiji, and on a sign in proximity to each of the travel agents' offices, designed to entice prospective workers to contact their offices to explore the possibility of working in New Zealand. They were lured by the prospect of earning much better money than they could earn in Fiji, in good working conditions, on the implicit (and, sometimes, express) basis that they would be able to travel to New Zealand and work lawfully.

[41] Geeta and/or Sanjana then proceeded to make representations to each of the complainants about the amount of money they were to earn and the fact that their food and accommodation costs were included in the package being offered. They completed visa application forms for the complainants, including what they knew to be false information about the reason why they were travelling to New Zealand. Put another way, they concealed the fact that the complainants were travelling to New Zealand to work.

[42] Although a number of the complainants noticed that they had received visitor's visas and questioned whether that would entitle them to work, they were given false assurances that they could travel to New Zealand on such visas and that work permits would be arranged upon their arrival.

[43] In summary, there was evidence of acts carried out by Geeta and Sanjana in Fiji that would prove that they arranged for the complainants to travel to New Zealand on the basis of false and material misrepresentations; there was also evidence that Mr Ali knew that Geeta and Sanjana had intentionally made statements to that effect. Mr Ali's role in the execution of the plan was to meet a number of the complainants in New Zealand, and to arrange work and accommodation for them. In those circumstances, I ruled that the Crown could close on a s 66(2) party basis.

(f) Admissibility issues: hearsay?

(i) Direct evidence

[44] In a pre-trial ruling given on 20 May 2016, Keane J held that statements made in Fiji by Geeta or Sanjana to one or more of the complainants was admissible

against Mr Ali.[35] I indicated to counsel that I intended to reconsider Keane J's pre-trial ruling on the basis of the evidence actually adduced at trial. That course accords with views expressed by the Supreme Court, in *R v Qiu*.[36]

[45] For obvious reasons, Mr Clancy was anxious to ensure that all of the statements made by Geeta and Sanjana to third parties were admissible, both to demonstrate that statements had been made on which the complainants relied and to draw Mr Ali into the wider joint criminal enterprise.

[46] Keane J's ruling was premised on the proposition that the statements made by Geeta and/or Sanjana to complainants in Fiji were admissible as direct evidence, on the grounds that evidence of them was not being adduced to prove the truth of their content. The hearsay rule[37] does not apply unless the evidence is being adduced for the purpose of truth of content.[38]

[47] I agree with Keane J that statements made by Geeta and/or Sanjana to complainants in Fiji are admissible as direct evidence. The Crown is using that evidence to prove that representations were made to each of the complainants. Reliance is then placed on evidence about what happened in New Zealand to demonstrate the falsity of the statements. The need for the Crown to prove that the statements were false demonstrates unequivocally that they are not being admitted for the purpose of proving their truth. As Keane J said:[39]

> [31] In this case, in contrast to *Subramaniam*, the truth or rather the falsity of the statements, the representations, will be in issue at the trial. But the issue will not be whether they are inherently true or false. It cannot be. When they were made, the representations could have been either true or false. Their truth or falsity will only be able to be demonstrated by evidence as to events later in point of time, which were principally in New Zealand.
>
> [32] The resulting issue for the jury will be confined and clear. It will be whether Mr Ali is culpable of "acts of deception", which began in Fiji with those statements but came to fruition in New Zealand. The hearsay rule will not be engaged.
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> [Footnotes omitted.]

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35 *R v Ali and Kurisi* [2016] NZHC 1068.
36 *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1 at [31].
37 Evidence Act 2006, s 17.
38 Ibid, s 4(1), definition of "hearsay statement".
39 *R v Kurisi and Ali* [2016] NZHC 1068, at paras [31] and [32].

[48] I ruled that, provided proper directions were given as to the use and reliability of such statements,[40] they were admissible.

(ii) The co-conspirators' rule

[49] The Crown seeks to adduce some evidence of statements made by Geeta and/or Sanjana to third parties to prove the truth of their content. An example is a statement made by Sanjana to Mr Mishra, who was driving her to Mr Ali's home in Papatoetoe. Mr Mishra recounts a conversation in which Sanjana seeks to recruit his assistance as a driver for persons in the position of the complainants, and states that Mr Ali played a role in those activities. Such statements are, prima facie, hearsay and inadmissible.[41]

[50] The co-conspirators' rule is an accepted exception to the hearsay rule.[42] Its name is something of a misnomer. It applies in cases where allegations of conspiracy are not made. As long as two or more persons are engaged in a joint enterprise to do something criminal, the acts and statements made by each in furtherance of that common purpose will be admissible against others, whether or not they were present when the statements were made. The rule is designed to enable admission of statements made by co-conspirators in furtherance of a conspiracy or a joint criminal enterprise.[43] The theory underlying admissibility on this basis was discussed by the Supreme Court in *Qiu v R*.[44] Anderson J, delivering the judgment of the Supreme Court, said:

> [24] The juristic rationale for the admission of what would otherwise be hearsay is that statements made by one member of a joint criminal enterprise in furtherance of the common criminal purpose are attributed to all members on the basis that there is implied authority in each to speak on behalf of the others. ...
>
> [Footnotes omitted.]

[51] Anderson J added that there is "often an inference of complicity in a joint enterprise because of a connection or relationship between the conduct of an accused

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40 See para [73] below.

41 Evidence Act 2006, s 17 ("hearsay rule") and the definition of "hearsay statement" set out in s 4(1) of that Act.

42 Ibid, s 12A.

43 *R v Tauhore* (1966) 14 CRNZ 248 (CA) at 250.

44 *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1 at [24].

and the conduct of another or others, which cannot reasonably be explained by mere coincidence". The paradigm example was described as:[45]

> [14] ... the disguised driver of a car, parked with its engine running outside a bank in which an armed robbery is occurring. Evidence may be led against the driver of what the offenders inside the bank said and did, in order to prove the fact that a robbery occurred. The purpose for which such statements are admitted is not to prove the truth of what was said, but the fact that it was said. They therefore have the quality of verbal acts, not hearsay. In the present case the complainant gave evidence of coincidences supporting an inference that the appellant and the unknown callers were acting in a joint enterprise. These included the fact that there were threats, their nature, their timing and their monetary objective. For the purpose of drawing the inference the evidence was not hearsay. It was evidence of verbal acts.
>
> [Footnotes omitted.]

[52] In the context of a case where (as here) both principal and party liability are in issue, Chambers J observed in *Ngamu*:

> [29] With respect to the Judge, we consider he erred when he deduced from the cases cited the proposition that a "joint enterprise" assertion in some way altered what substantively the Crown had to prove. The co-conspirators' rule of evidence is just that – a rule of evidence. Where the circumstances for the rule's application arise, certain hearsay evidence otherwise inadmissible against a particular accused can become admissible. But the fact that more evidence may come in has no effect on the elements of the crime in question. Nor does it affect the fundamental nature of a joint trial, where each accused is entitled to be judged individually, solely on evidence admissible against him or her. Mr Chisnall, while he defended the Judge's approach on the appeal before us, accepted the Judge had moved the law "beyond the bounds of settled authority". He certainly did, and, in our view, in an impermissible way.
>
> [Footnotes omitted.]

[53] The threshold test for admitting evidence under the co-conspirators' rule is the need for "reasonable evidence" of the existence of a common purpose.[46] Once admitted, the assessment of such evidence is for the jury. Protections for defendants are provided by judicial direction on reliability to be given. In *Ahern v R*,[47] the High Court of Australia indicated the nature of directions to be given:

> It will be proper for [the judge] to tell the jury of any shortcomings in the evidence of the acts and declarations of the others including, if it is the fact,

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[45] Ibid, at [14].

[46] *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1 at [24]–[28]; see also *R v Buckton* [1985] 2 NZLR 257 (CA).

[47] *Ahern v R* (1988) 165 CLR 87 (HCA) at 104. This passage was expressly approved by the Supreme Court in *Qiu v R* at [16].

> the absence of any opportunity to cross-examine the actor or maker of the statement in question and the absence of corroborative evidence. Where it is appropriate, it will not be difficult to instruct a jury that they should not conclude that an accused is guilty merely upon the say so of another nor will that be an instruction which it is difficult to follow.

[54] I was satisfied that there was reasonable evidence that Mr Ali was engaged in an arrangement with Geeta and Sanjana that had, as its common purpose, the enticement of persons in the position of each complainant to travel to and work in New Zealand unlawfully. The out of Court statements by Geeta and Sanjana to third parties are admissible against Mr Ali, even though he was not present when they were made, because they were made in furtherance of the joint enterprise. Even if Mr Ali were regarded only as a principal offender, the same statements would be admissible, on the authority of *Ngamu.*

(g) Extra-territorial reach

[55] I also considered whether, if the Crown were to close on the basis of party liability under s 66(2), the fact that Geeta and Sanjana made their statements to the complainants in Fiji put the participation of Geeta and Sanjana beyond the reach of a New Zealand Court's jurisdiction.

[56] This point is resolved by s 7 Crimes Act 1961:

> 7 **Place of commission of offence**
>
> For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, *the offence shall be deemed to be committed in New Zealand*, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.
>
> [Emphasis added.]

[57] The effect of s 7 is to deem an offence committed in New Zealand, whether or not persons charged are in New Zealand at the time of any relevant act, omission or event, as long as something relevant was done in New Zealand to constitute the offence. There is evidence that Mr Ali did acts that were required to "receive" the complainants in New Zealand. On that basis, s 7 must apply.[48]

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[48] The relevant parts of s 98D is set out at [17] above. See also *R v Walsh* [2006] NZSC 111, [2007] 2 NZLR 109 at [20] – [26] (per Anderson J, delivering the judgment of himself, Elias CJ and McGrath J). See also a concurring judgment of Blanchard J in which he considered the

Charges 16 – 30: aiding and abetting unlawful entry into New Zealand

[58] Mr Ali is charged, in respect of the same complainants involved in the trafficking allegations, that he aided or abetted their unlawful entry into New Zealand, being "reckless" as whether such entry would be unlawful.[49] Section 343(1)(b) of the Immigration Act 2009 states:

> **343 Aiding and abetting**
>
> (1) Every person commits an offence against this Act who,—
>
> ...
>
> (b) whether in or outside New Zealand, and whether or not the other person in fact enters New Zealand, aids, abets, incites, counsels, or procures any other person to unlawfully enter New Zealand …,—
>
> (i) knowing that the other person's entry into New Zealand is or would be unlawful; or
>
> (ii) being reckless as to whether the other person's entry into New Zealand is or would be unlawful; or
>
> ...

[59] Mr Ali has already pleaded guilty to 8 charges in which he acknowledged, as an element of the offence, that he helped each of those complainants to breach conditions of their visas.[50] That, with other evidence, establishes that he knew that each of the complainants held a visitor's visa when entering New Zealand, and that they could not work in this country.

[60] In that situation, I asked Mr Broad, for Mr Ali on what basis he contended that Mr Ali could be found not guilty on these charges. Mr Broad submitted that there was a question whether Mr Ali *knew* that they were entering New Zealand to work. His argument turns, as I understand it, on the definition of the term "unlawfully enters New Zealand" which appears in s 343(3) of the Immigration Act 2009.

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person was acting as an agent. There is nothing in the more recent judgment of the Supreme Court in *LM v R* [2014] NZSC 110, [2015] 1 NZLR 23 that would affect this conclusion. *LM* was not a case to which s 7 of the Crimes Act 1961 applied; see [16] and fn 16 of *LM*.

49 Immigration Act 2009, s 343(1)(b)(ii).

50 See para [19] above.

[61] Section 343(3) and (4) of the Immigration Act 2009, in the form in which it stood as at the dates of the alleged offending, stated:[51]

> **343 Aiding and abetting**
>
> ...
>
> (3) For the purposes of subsection (1)(b), a person unlawfully enters New Zealand if the person—
>
> (a) arrives in New Zealand in a manner that does not comply with section 103; or
>
> (b) arrives in New Zealand without holding a visa, if the person requires a visa to travel to New Zealand; or
>
> (c) arrives in New Zealand as the holder of a visa, but the visa was—
>
> (i) granted in a false identity; or
>
> (ii) procured through fraud, forgery, false or misleading representation, or concealment of relevant information; or
>
> (d) is granted a visa on arrival in New Zealand but the visa is
>
> (i) granted in a false identity; or
>
> (ii) procured through fraud, forgery, false or misleading representation, or concealment of relevant information; or
>
> (e) is granted entry permission but the entry permission is–
>
> (i) granted on the basis of a visa granted in a false identity: or
>
> (ii) procured through fraud, forgery, false or misleading representation, or concealment of relevant information; or
>
> (f) enters New Zealand in any other manner and, in doing so, does not comply with the requirements of this Act.
>
> (4) To avoid doubt, a person unlawfully enters New Zealand within the meaning of subsection (3) whether or not any action has been taken under this Act in relation to the visa or entry permission used by the person for the purpose of entering (for example, conviction of the person for procuring a visa by fraud o revocation of the person's entry permission).

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[51] Immigration Act 2009, ss 343(3) and (4) were inserted on 19 June 2013 by s 15(2) of the Immigration Amendment Act 2013. Section 343(3)(c)–(e) were repealed and replaced on 7 May 2015 by s 83 of the Immigration Amendment Act 2015.

[62] The Crown relies on s 343(3)(c) of the Immigration Act; namely, that the visitor's visa was granted on the basis of false or misleading information; or, concealment of the intention to work in New Zealand. Mr Broad's position is that the visitor's visa was sufficient to enable each complainant to enter New Zealand; as a result, Mr Ali had no knowledge that the visa would not allow them to enter New Zealand lawfully. Mr Clancy also points out that the change is based on the "reckless" limb of s 343(1)(b), so actual knowledge[52] is not necessary to establish the offence.

[63] I was satisfied that there was sufficient evidence to leave this defence to the jury. While Mr Ali, contrary to his own interests, has acknowledged in interview that he knew that the workers had come into New Zealand on visitor's visas and, by his pleas of guilty to the charges of aiding and abetting breaches of their conditions of visa and exploitation, has acknowledged that when he employed them he knew that they did not have work visas, there is no direct evidence that he knew of the basis on which the visitor's visas were obtained. He had nothing to do with filling in the forms in Fiji; that function was undertaken either by Geeta or Sanjana, or an authorised employee.

[64] The question for the jury will be whether an inference can be drawn that Mr Ali knew that Geeta and/or Sanjana were making false representations to immigration officials in Suva that either the persons seeking the visas were travelling to visit friends and family; or, concealing information about their intention to work.

[65] In my view, there was more than sufficient to go to the jury for them to decide that Mr Ali was reckless as to that knowledge; namely, that he knew there was a risk that the worker was travelling to New Zealand on a visitor's visa but intended to work. In this context, the term "reckless" means that Mr Ali knew there was a risk but was prepared to carry on regardless.[53]

Charge 39: aiding and abetting a person to unlawfully remain in New Zealand

[66] Charge 39 relates to a Samoan man, [redacted] Mr [redacted] worked initially in New Zealand on a appropriate visa but that expired and he remained in

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52 Required by s 343(1)(b)(i) of the Immigration Act 2009, set out at para [58] above.

53 For example, see *R v Martin* [2007] NZCA 386 at [12] and *R v Banks* [Reasons for Verdict] [2014] NZHC 1244, [2014] 3 NZLR 256 at [46](b).

New Zealand unlawfully. The charge is brought under s 343(1)(a) of the Immigration Act:

> (1) Every person commits an offence against this Act who,—
>
> (a) for a material benefit, aids, abets, incites, counsels, or procures any other person to be or to remain unlawfully in New Zealand or to breach any condition of a visa granted to the other person; or
>
> ...

[67] There is no doubt on the evidence that Mr Ali employed Mr [redacted] He pleaded guilty to charges that he exploited Mr [redacted] by failing to pay money owing to him under both the Holidays Act 1982 and the Minimum Wage Act 1983.

[68] There is no direct evidence that Mr Ali actually knew that Mr [redacted] did not have a valid visa to work. There is much evidence from which the jury could infer that he was aware that was the position. The narrow point that Mr Broad asks me to leave to the jury is the question whether the evidence is sufficient to establish that Mr Ali intentionally helped or encouraged Mr [redacted] to remain in New Zealand to work.

Reliability directions

[69] Section 122 of the Evidence Act 2006 governs the circumstances in which a Judge is required to warn a jury about the need for care in assessing certain types of evidence.

[70] The general provisions of s 122 can be contrasted with the specific directions required in respect of lies,[54] children's evidence,[55] identification evidence,[56] and delayed complaints, or failure to complain in sexual cases.[57] Relevantly, s 122(1) and (2)(a) of the Evidence Act provide:

> **122 Judicial directions about evidence which may be unreliable**
>
> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may

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54 Evidence Act 2006, s 124.
55 Ibid, s 125.
56 Ibid, s 126.
57 Ibid, s 127.

> nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> (a) hearsay evidence:
>
> (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
>
> …

[71] I advised counsel that I intended to give reliability warnings in respect of hearsay evidence adduced under the co-conspirators' rule, but also in respect of the direct admissible evidence of statements made by Geeta and/or Sanjana (or an authorised employee) to complainants in Fiji.

[72] The reasons for providing a warning in respect of evidence admitted under the co-conspirators' rule is orthodox. The nature of the warnings to be given are set out in the passage from the judgment of the High Court of Australia in *Ahern*[58] to which I have referred, as adopted by our Supreme Court in *Qiu*.[59]

[73] Although, strictly speaking, what was said in Fiji to the complainants was not hearsay evidence, the jury have to be satisfied that those things were said in order to prove an element of the charge, namely that of deception. The jury must use the complainants' evidence to find an element of the offence proved beyond reasonable doubt.[60]

[74] In that situation, I considered that a warning about the need for caution was required, though it should be tempered by the fact that the evidence given by the complainants tended to establish a pattern of conduct. No allegation of collusion on the part of the complainants was made, and their evidence went largely unchallenged. Nevertheless, as it was part of Mr Ali's case that he did not know

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58 *Ahern v R* (1988) 165 CLR 87 (HCA)

59 *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1. The relevant extract from the High Court Australia's decision in *Ahern* is set out at [50] above.

60 *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647.

what was being said or done in Fiji, some caution is required in assessing this evidence.[61]

P R Heath J

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[61] Evidence Act 2006, s 122(2)(b). See more generally the Supreme Court's observations about reliability warnings in *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [42]–[53] (Elias CJ, McGrath and William Young JJ) and [61]–[72] (Glazebrook and Arnold JJ).