Supreme Court of Victoria - Court of Appeal

R v Wei Tang [2009] VSCA 182 (17 August 2009)

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SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 678 of 2006

THE QUEEN

v

WEI TANG

JUDGES	MAXWELL P, BUCHANAN and VINCENT JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	5 February 2009
DATE OF JUDGMENT	17 August 2009
MEDIUM NEUTRAL CITATION:	[2009] VSCA 182
JUDGMENT APPEALED FROM	*R v Wei Tang* (Unreported, County Court of Victoria, Judge McInerney, 9 June 2006)

CRIMINAL LAW – Appeal – Sentence – Slavery – Exercise of powers of ownership over immigrant sex workers – Unpaid work as prostitutes – Separate offences of 'using' and 'possessing' slaves – Whether offences overlap – Whether double punishment imposed – Whether seriousness of offending correctly assessed – Whether sentences manifestly excessive – Appeal allowed – Resentenced – Sentence reduced because successful Crown appeal to High Court imposed additional hardship – *Pearce*

v The Queen (1998) 194 CLR 610 applied – *Criminal Code Act 1995* (Cth) s 270.3(1)(a).

APPEARANCES:	Counsel	Solicitors
For the Crown	Ms W Abraham QC with Mr C Boyce	Commonwealth Director for Public Prosecutions
For the Appellant	Mr M Croucher	Slades & Parsons

MAXWELL P

BUCHANAN JA

VINCENT JA:

1 On 3 June 2006, the applicant, Wei Tang, was convicted by a County Court jury on five counts of possessing a slave, and on five counts of using a slave, contrary to s 270.3(1)(a) of the Criminal Code Act 1995 (Cth) (the 'Code'). That was her second trial for these offences. In the first trial, in 2005, the jury was discharged without verdict.

2 Wei Tang was sentenced to a total effective sentence of 10 years' imprisonment. Pursuant to s 19AB(1) of the Crimes Act 1914 (Cth), a single non-parole period of six years was fixed.

3 On 27 June 2007, this Court upheld Wei Tang's appeal against her conviction.[1] On 29 June the Court ordered that the convictions below be quashed and that there be a retrial.[2] The Director of Public Prosecutions appealed to the High Court, by special leave, from the decision of this Court. On 28 August 2008, the High Court[3] upheld the Director's appeal, set aside the orders made by this Court and, in their place, ordered that Wei Tang's appeal to this Court against conviction be dismissed.

4 This sequence of events highlights the need to ensure, so far as practicable, that critical legal questions affecting a criminal trial are adjudicated upon before the trial commences, rather than at its conclusion. In this case, it was not until after two lengthy trials of the applicant on the slavery counts that this Court was asked to rule on fundamental threshold questions regarding the slavery provisions – whether they were constitutionally valid and, if so, how they were to be interpreted. Those same questions were, in turn, ruled on by a seven-member bench of the High Court.

5 As Eames JA noted in R v Wei Tang,[4] the task facing the trial judge and trial counsel was one of considerable difficulty, there being no guiding case law on the elements of the offences or on the meaning to be attributed to the statutory language. It is to be hoped that the new provisions of the Criminal Procedure Act 2009 (Vic), introducing interlocutory appeals[5] and greatly expanding the case stated procedure,[6] will enable questions of fundamental importance to a trial to be decided – and, where necessary, considered by this Court – before the trial begins.

6 Wei Tang had also sought leave to appeal against the sentence imposed on her. Because this Court allowed her appeal against conviction, it was unnecessary to deal with the sentence application. Following the High Court decision, which restored the convictions, the sentence application was remitted to this Court for consideration.

7 For reasons which follow, we would reject all of the grounds of appeal against sentence save one.[7] In particular, we reject the argument that the sentence imposed was manifestly excessive in the

circumstances as they were known to the sentencing judge.

8 We are, however, satisfied that the effect of the sentence imposed was, impermissibly, to punish Wei Tang twice for the same conduct.[8] That sentencing error has the effect of reopening the sentencing discretion, which must be exercised afresh by this Court. In resentencing, we act on the basis of the latest information available. Developments since sentence was first imposed (more than three years ago) have given rise to additional mitigating factors which were not known to the sentencing judge. Taking those matters into account, we have concluded that on resentencing the total effective sentence should be nine years, with a non-parole period of five years.

The applicable provisions

9 Chapter 8 of the Code, which deals with 'Offences against humanity', contains the relevant provisions:

> **270.1 Definition of *slavery***
>
> For the purposes of this Division, ***slavery*** is 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.
>
> **270.2 Slavery is unlawful**
>
> Slavery remains unlawful and its abolition is maintained, despite the repeal by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* of Imperial Acts relating to slavery.
>
> **270.3 Slavery offences**
>
> (1) A person who, whether within or outside Australia, intentionally:
>
> (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or
>
> (b) engages in slave trading; or
>
> (c) enters into any commercial transaction involving a slave; or
>
> (d) exercises control or direction over, or provides finance for:
>
> (i) any act of slave trading; or
>
> (ii) any commercial transaction involving a slave;
>
> is guilty of an offence.
>
> Penalty: Imprisonment for 25 years.

10 Wei Tang was convicted, in relation to each of five complainants, of the twin offences of possessing a slave and using a slave, contrary to s 270.3(1)(a). In respect of each victim, the same sentence was imposed on the 'possession' count as on the 'use' count. The sentences imposed were as follows:

Count 1: possess	Seven years' imprisonment
Count 2: use	Seven years' imprisonment

Count 3: possess	Seven years' imprisonment
Count 4: use	Seven years' imprisonment
Count 5: possess	Five years' imprisonment
Count 6: use	Five years' imprisonment
Count 7: possess	Four years' imprisonment
Count 8: use	Four years' imprisonment
Count 9: possess	Three and a half years' imprisonment
Count 10: use	Three and a half years' imprisonment

11 The judge imposed lower sentences on counts 5 – 10 because he considered that they involved 'less serious' criminality. In his Honour's view, those counts involved

> a lesser period of activity, the production of much less actual profit and, in fact, individual contracts which, to a substantial degree, were not completed insofar as Wei Tang's interests were concerned.[9]

No issue was raised on the appeal about these sentence differentials. We have maintained them in the resentencing.

The relevant conduct[10]

12 The Director of Public Prosecutions alleged that, at various times between 10 August 2002 and 31 May 2003, the applicant possessed as slaves five women of Thai nationality, who came to Australia pursuant to agreements entered in Thailand for them to work as prostitutes in the sex industry in Australia. Each of the five women voluntarily entered an agreement, through a broker, whereby she incurred a debt of between $40,000 and $45,000[11] which she was required to pay off by having sex with men in Australia. All of the women had previously worked in the sex industry.

13 Under the agreements, they were to have their travel expenses paid and were to be provided with accommodation, food and incidentals while they were in Australia. They travelled on tourist visas that were valid but had been obtained without disclosure that the true purpose for their travel was to work in Australia. Three of the women admitted participating in subterfuge in order to obtain those visas, but the evidence was conflicting as to the extent of knowledge of the women as to the illegality of them working on visas. It seems they were aware that a new visa was to be obtained for them once they were in Australia, pursuant to which they could work.

14 When they arrived in Australia they were advised that they were to work at a brothel in Fitzroy, known as Club 417, which was owned by the applicant. They were there known as 'contract girls', to distinguish them from the other sex workers.

15 The women arrived in Australia at different times between August 2002 and May 2003. Usually the women were met by DS (who took them to meet the applicant), and also the manager of the brothel, one Paul Pick. (DS had herself been a contract worker but had paid off her contract and remained in the industry, serving as a recruiter of new sex workers.) The brothel was licensed pursuant to the Prostitution Control Act 1994 (Vic). The women said that upon their arrival in Melbourne they had little money. DS, or someone else, took their passports and return airline tickets from them upon arrival. The passports and airline tickets were placed in a locker at the brothel so that they could be produced if Immigration Department officials arrived. The prosecution contended that they were retained so that the women could not run away.

16 The women understood that, once they had paid off their debt, they would have the opportunity to earn money as prostitutes. Two of the women did pay off their debts, after approximately six months. The others were prevented from discharging their debts because of intervention by immigration authorities.

17 The Thai recruiters had to be paid a sum of money with respect to each contract worker, generally $20,000. As to four of the women, a percentage of that sum was paid by the applicant and other portions were paid by DS and another person. The applicant paid no sum at all with respect to the fifth woman.

18 The brothel was raided on 31 May 2003. Australian Federal Police also executed search warrants on the home address of the applicant in North Fitzroy. When arrested, the applicant, Pick and DS were each found to have keys to an apartment at 5/14 Rae Street, North Fitzroy. Some of the women had been residing there. Others had resided in Brunswick with a woman named Gaik Kim Ong, known as 'Mummy', who was employed as a manager at the brothel. Three or four women slept in each room at 'Mummy's house' and were told to remain within the house so as not to be seen by immigration officials. Without the involvement of the women, applications were made on their behalf for protection visas, making false claims of persecution. They were granted bridging visas which permitted them to work.

19 The prosecution contended that the women were controlled as to when and where they worked, and on what shifts. They were required to work long hours, effectively up to seven days a week, and their movements were restricted. Their place of residence was controlled. The women spoke little English and knew no-one in Australia. There was disagreement between counsel on the appeal as to the state of the evidence concerning the workers' freedom of movement outside their places of residence.

20 The brothel charged clients $110 for sex. The fee of $110 was divided as to $43 to the applicant and the balance to the owners of the contract[12] for the particular prostitute. The debt for each of the 'contract girls' was reduced at the rate of $50 per client, so it would take 900 clients before a debt of $45,000 would be repaid. The women were allowed one free day per week but were permitted to work on that day, too, if they chose and could retain any earnings they then made. On those days, the women would generally earn for themselves $50 for each client.

21 When the two women who paid off their debts had achieved that result, the restrictions that had been placed on them were lifted and their passports were returned to them. They were then free to choose their hours of work and they were paid for their prostitution. They were free to live in accommodation of their own choosing.

Ground 10: Double punishment? Possession and use of a slave

22 On the appeal against conviction, this Court rejected a contention that the guilty verdicts were unsafe and unsatisfactory, holding that the evidence was capable of satisfying a jury, beyond reasonable doubt, that the slavery offences had been committed.[13] Likewise, the High Court concluded that

> there was cogent evidence of the intentional exercise of powers of such a nature and extent that they could reasonably be regarded as resulting in the condition of slavery, and the conduct, to which s 270.3(1)(a) was directed.[14]

23 Gleeson CJ said that it was open on the evidence for the jury to conclude that

> each of the complainants was made an object of purchase (although in the case of one of them the purchaser was not [Wei Tang]); that, for the duration of the contracts, the owners had a capacity to use the complainants and the complainants' labour in a substantially unrestricted manner; and that the owners were entitled to the fruits of the complainants'

> labour without commensurate compensation.[15]

And further:

> In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements and the power to use their services without commensurate compensation. As to the last three powers, their extent, as well as their nature, was relevant. As to the first, it was capable of being regarded by a jury as the key to an understanding of the condition of the complainants. The evidence could be understood as showing that they had been bought and paid for, and that their commodification explained the conditions of control and exploitation under which they were living and working.[16]

24 The submission for the applicant was that the behaviour giving rise to the paired counts of 'possess' and 'use' in respect of each complainant overlapped – if not completely, then almost completely – in time and circumstance. Whenever the complainants were being 'used', it was argued, they were in 'possession'. They could not be 'used' unless they were in 'possession'.

25 Counsel for the applicant accepted that there were differences in the behaviour necessary to constitute possession on the one hand and use on the other. This meant, he conceded, that in the case of a particular complainant, convictions on both counts were sustainable. The submission was, however, that the sentences were 'infected with error by reason of double punishment'. This was said to be apparent from the overlapping behaviour giving rise to each pair of counts, the sentences actually imposed and the absence of reasons addressing the issue of double punishment.

26 Reliance was placed on what was said in Pearce v The Queen[17] ('Pearce'), as follows:

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.[18]

27 The submission for the Crown was that the sentences did not offend the rule against double punishment:

> The two counts referable to each complainant are different in their elements. Each of the counts concerns a separate and distinct form of culpable act. The convictions of the "possession" and "use" offences constitute different violations of the "community's right to peace and good order".[19]

The submission was that although evidence of each complainant's being 'possessed' by the applicant was also relevant to showing that the applicant 'used' that complainant – and vice versa – this did not mean that there had been double punishment. Whereas the use of the victim was in putting her to work as a prostitute, the possession was constituted by the conditions in which that use took place. Senior counsel for the Crown referred here to the taking of passports and the imposition of restrictions on movement. According to the argument, these conditions were necessary for the use to take place, but

were not part of it.

28 We disagree. As the High Court said in Pearce, we must obey Sir John Barry's injunction to 'avoid excessive subtleties and refinements'.[20] Approaching the question 'as a matter of common sense, not as a matter of semantics',[21] we have no doubt that the offences of 'possessing a slave' and 'using a slave' overlap when committed in relation to the same person. Put simply, there can be no 'use' unless there is 'possession', and 'use' is itself an illustration of 'possession'. As Brennan J pointed out in He Kaw Teh v R,[22] having something in possession is more easily seen as 'a state of affairs that exists because of what the person [who has possession] does in relation to thing possessed.' The conduct which here constituted 'possession' encompassed, though it was not limited to, the conduct which constituted 'use'.

29 So much is clear from the case which the Crown presented at the trial. Far from seeking to maintain any clear demarcation between 'use' and 'possession', the Crown took a global approach to the applicant's conduct. The Crown's submission – which the judge accepted – was that it had first to be established that the relevant complainant was a slave before any question could arise of whether the applicant had 'possessed' or 'used' the particular slave. And the critical feature which established the condition of slavery was the control to which the women were subject:

> They were put to work as prostitutes, used to earn an income for the accused and for the others that owned them. *All aspects of their lives were controlled and supervised, not just their working life*. How and where they lived was determined for them. Their personal freedom was restricted. They had little or no English, no contacts, at least initially, and they didn't have their passports or return tickets. They also had little money. I've already gone through with you that they had to work long hours, up to 13 hours a day with no pay. Effectively, they were required to work seven days a week and they had to do this for months on end if they were to discharge this debt, this debt that was imposed upon them.

Again:

> Physical and mental control was exercised over these women in a far more subtle but effective way [than imprisonment]. A relationship of dependence existed from the start and was fostered. Fear of the authorities was cultivated.

30 The regime of control was relied on, in turn, to show that the applicant 'possessed' each 'slave'. The prosecutor told the jury:

> The law is that one has in one's possession whatever is to one's knowledge physically in one's custody or control. Here we rely on the control that the accused exercised over these women. ... There is no requirement that the person be physically restrained or confined as long as they are controlled. And here the Crown relies on the same sort of factors as it relies on to prove slavery to prove the control.

On the count of 'using' a slave, the prosecutor said:

> Here it is alleged ... that the accused used [*scil.*] them, these slaves, by offering them for sexual services and by deriving income from the use of their bodies ...

31 In his charge to the jury, and again in his sentencing remarks,[23] the judge referred to 'the totality of the control' which was exercised over the women. Nothing was said to differentiate the conduct constituting 'possession' from the conduct constituting 'use'. Indeed, both 'possession' and 'use' were said to evidence the complainants' condition of slavery:

> The learned prosecutor would say to you that you should find that the powers attached to ownership which have been exercised in regard to these women are that they have been *possessed*. That they have been *used* as slaves as dictated by the owners of the contracts, or the women. That they have been *used* by the owners for beneficial benefit to satisfy customers and that the owners of the contracts have used them in order to receive proceeds from that use.

32 The trial judge sentenced the applicant to identical terms of imprisonment on the 'use' and 'possession' counts with respect to each complainant. Like the High Court in Pearce, we can only conclude that the sentence on each of the 'possession' counts contained a portion which was to punish the applicant for having 'used' the victim.[24] Prima facie, therefore, she was doubly punished for the same conduct.

33 This was not a matter which was ventilated on the plea. Given the novelty and complexity of the offence provisions, this is hardly surprising. When the prosecutor submitted that there should be cumulation between the sentences imposed with respect to different complainants, the sentencing judge asked what his approach should be within each pair of counts. The prosecutor's response was that it would be open to the judge to cumulate between the sentences imposed (with respect to a single complainant) for 'use' and 'possession'

> because the nature of the offences is quite different so your Honour could distinguish between them but on the other hand given that the time frames are the same *and a lot of the activities [are] the same*, then it would also be, in my submission, open to your Honour to make the sentences completely concurrent on those two counts.

34 In effect, the submission was that complete concurrency between the sentences for 'use' and 'possession' would deal with the problem of overlap between the offences. The judge accepted the submission.[25] But, as the High Court made clear in Pearce, full concurrency is no answer to a complaint of double punishment.[26]

35 We would therefore uphold this ground, and allow the appeal against sentence. We will defer the question of resentencing until we have addressed the other grounds of appeal.

Ground 2: The seriousness of the offending

36 Ground 2 was in these terms:

> **The learned sentencing judge erred in his categorisation of the seriousness of the offending behaviour in each count.**

The submission for the applicant was that her exercise of the powers of possession and use was 'minimal'. Reliance was placed on the findings of the sentencing judge that the complainants were not under lock and key, and that the women were effectively restrained by the nature of the contracts they had (voluntarily) entered into.[27] In these circumstances, it was submitted, it was not open to the judge to conclude that the applicant's offending was 'at the mid range level' of seriousness.[28] Instead, the surrounding facts and the jury verdict were indicative of 'slavery' at the lowest level.

37 This submission echoed the contention advanced on the plea, that this case was at the lowest end of the scale of culpability. Defence counsel submitted to the sentencing judge that it was '[d]ifficult to imagine the circumstance which would amount to a finding of guilt under this legislation with any less culpable facts'.

38 In our view, his Honour's characterisation of the conduct was unimpeachable. His Honour was, of

course, uniquely well placed to make an assessment, having undertaken that task in the earlier sentencing of DS for slavery offences relating to the same complaints.[29] He had presided over both trials of the applicant, at which very detailed evidence was given by the complainants of the circumstances constituting their enslavement.

39 His Honour took a strong view of the restrictions imposed on the women:

> [T]he effect of the restrictions imposed on the women amounted to what the learned prosecutor submitted to the jury was an insidious use of control by way of fear of detection from Immigration authorities or visa offences, advice to be aware of Immigration authorities, advice to tell false stories to Immigration authorities if apprehended, the hours of work involved, instructions that they were not to go out from their accommodation from either [DS], Wei or Paul, the manager of the Club 417.
>
> ...
>
> As to the work premises at Club 417, while the women were permitted to go out for the occasional bit of personal shopping, effectively, owing to a combination of the type of work and then the hours at which they worked, they were restricted to the premises.
>
> ...
>
> To comprehend the impact of such a regime of restriction, one has to marry such a regime to the circumstances. One asks the rhetorical question, how could they run away when they had no money: they had no passport or ticket; they entered on an illegally obtained visa, albeit legal on its face; they had limited English language; they had no friends; they were told to avoid Immigration; they had come to Australia consensually to earn income and were aware of the need to work particularly hard in order to pay off the debt of approximately $45,000 before they were able to earn income for themselves?
>
> ...
>
> Hence I find that these women, in order to achieve what they set out to do, adhered to the restrictions imposed in the main. [DS] gave evidence that such restrictions of movement were imposed by Wei Tang in order to ensure that the women were available to work at the club. Hence I find as a sentencing fact that owing to the combination of the circumstances rehearsed, while not locked in premises, all of the women were effectively restrained by the insidious nature of their contract.[30]

40 The applicant treated each of the five women as her property, as mere objects which she could use for her own profit.[31] In assessing the gravity of the enslavement it is, of course, necessary to take into account the character of the work which, as the applicant's slaves, the women were required to do. Counsel for the applicant agreed, but submitted – correctly – that in judging the seriousness of the applicant's conduct, the Court must avoid moral judgments about prostitution.

41 As set out earlier, the requirement was that each woman prostitute herself by having sexual intercourse on as many as 900 occasions without remuneration. Improbably, counsel for the applicant submitted that enslavement as a prostitute was less oppressive than – for example – enslavement as a worker in a coal mine. We disagree. The enslavement of the women robbed them not only of control over their lives but of control over their bodies. They were dehumanised. They became mere profit-making machines for the applicant.

Ground 3: Consent

42 Ground 3 raised a related question, in these terms:

> **The learned sentencing judge failed to have any or sufficient regard to the fact that the 'complainant' witnesses consented to the contract and the conditions under which they worked.**

In the reasons for sentence, the judge made findings that all of the complainants had 'consented to come to Australia to work in the sex industry'.[32] The complaint here advanced was that the issue of consent 'whilst not a defence to slavery, was highly relevant to an assessment of the level of culpability of the applicant.' Had this been a case where the victims had been kidnapped or coerced into agreeing to come to Australia to work in the sex industry, the applicant's culpability would undoubtedly have been much higher. Such circumstances would have significantly aggravated the seriousness of the offending.

43 But this was very serious offending nonetheless, for the reasons we have given. The women were, as the jury found, enslaved by the applicant. They were not free to choose whether or when they worked in the brothel. The evidence of one complainant was that she was not permitted to refuse customers. Two others gave evidence that, although they had never sought to refuse a customer, they did not believe they could do so. There was no error. This ground must fail.

Ground 6: Related offences in the Criminal Code

44 Ground 6 was in these terms:

> **The learned judge erred in failing to pay any or sufficient regard to the scheme of the *Criminal Code* (Cth) in respect of related offences; and in particular he erred:**
>
> **(a) in failing to find that the applicant's offences were similar in character to the offence of debt bondage contrary to s 271.8 of the Code, which was created by the legislature after the applicant's offending and which carries a maximum penalty of only 12 months' imprisonment;**
>
> **(b) in failing to have regard to the fact that objectively more serious offences than those committed by the applicant carry substantially lesser maximum penalties – for example, deceptive recruiting for sexual services (s 270.7 – seven years), trafficking and domestic trafficking in persons (ss 271.2 and 271.5 – 12 years) and sexual servitude (s 270.6 – 15 years).**

45 The written submission for the appeal advanced three contentions. The first was that the applicant's offending had been correctly characterised, by defence counsel on the plea as 'akin to debt bondage' and that it should therefore be considered as at the lower end of the scale of seriousness:

> It is difficult to imagine that the applicant would have been prosecuted under anything other than the debt bondage provisions had they existed at the relevant time, in which case she would subject to a maximum penalty of only 12 months' imprisonment for each complainant.

46 The second contention was that, even if the applicant's offending was more serious than debt bondage, it was still 'quite similar', and the sentencing judge should have taken account of this similarity and the 'vastly lower penalty for debt bondage' in sentencing the applicant. Thirdly, it was submitted that the judge erred in failing to have regard to the fact that 'objectively more serious offences than those committed by the applicant carry substantially lesser maximum penalties – for example, sexual servitude'.

47 We reject these arguments. They fail altogether to confront the reality that the applicant was convicted of slavery offences, that is, of intentionally exercising over each of the complainants powers (the power to possess and the power to use) attaching to the right of ownership. As the Crown submitted, the applicant 'purchased' the complainants and then subjected them to a regime of control in order to earn profits from their activities. The existence of other offences, whether debt bondage or sexual servitude, is irrelevant to the assessment of the seriousness of this conduct. The maximum penalty of 25 years emphasises how seriously Parliament, on behalf of the community, views offending of this character.

48 Contrary to the applicant's submission, the offences of sexual servitude, deceptive recruiting for sexual services, trafficking in persons and domestic trafficking in persons are not 'objectively more serious ... than those committed by the applicant'. As we have sought to make clear, what sets the slavery offences apart from those other – admittedly serious – offences is the enslavement, that is, the treating of other human beings as mere property.

Ground 7: Lack of knowledge

49 Ground 7 is in these terms:

> **The learned judge erred in failing to pay any or sufficient regard to the fact that the applicant did not know she was committing the offence of slavery and that she believed the complainants consented to the conditions of the contracts**.

It was common ground on the plea that the applicant did not know what slavery was and did not have any idea that she was committing the offence of slavery. The prosecutor accepted that, although the applicant 'knew precisely what she was doing', she did not believe that she was doing anything wrong.

50 We would respectfully endorse the comment of the sentencing judge that 'given [the applicant's] background and experience of repression, it is surprising that she chose to commence such serious crimes against humanity.'[33] We reject the suggestion that, because the applicant was unaware that her treatment of the women amounted to enslavement, her moral culpability must be viewed as 'relatively low'. As the jury found, the applicant intentionally possessed and used each of the women for her own profit. It is of no moment that she failed to appreciate that this amounted to treating them as her slaves. The applicant was, by her counsel's assertion, a person of intelligence and she cannot have failed to appreciate the repressive nature of the regime to which she subjected the women.

Ground 1: Factual findings

51 Ground 1 was in these terms:

> **The learned sentencing judge erred in making findings of fact which were not open on the evidence, in particular:-**
>
> **i. that the 'complainant' witnesses all had limited education;**
>
> ii. **that the 'complainant' witnesses were impelled by circumstances of economic vulnerability to enter into the contracts.**

52 The relevant finding was in these terms:

> Further, in addition to those matters of evidence, all of these women had limited education. All upon coming to Australia, and in order to do so, upon arrival, gave up possession of their passports. All of these women entered into contracts to work for no actual cash return

> over the period of a contract of some three to six months, servicing large numbers of men.
>
> All of the above factors were such that the women would only have put themselves into such condition by way of being impelled to do so, I find, because of economic vulnerability.[34]

53 The submission for the applicant was that there was insufficient evidence before the judge to enable either of these findings to be made. It was said that, whilst each complainant spoke broken English, the evidence did not establish the extent and nature of her intellect, worldly experience or formal education. According to the submission, the fact that each complainant had previously worked in the sex industry in Asia did not permit the conclusion that she had had limited education.

54 As the respondent pointed out, there are a number of answers to this submission. First, there was evidence – although it varied from one complainant to the next – that their education was limited. For example, one of the complainants had left school at 13 or 14 and had worked as a sex worker thereafter. She said that she had come to Australia because she did not have much education and wanted to earn enough money to have a better future than just as a sex worker. Secondly, the judge was fully entitled to draw upon his observations of the complainants as they gave evidence in the trials for which he presided. The judge noted his assessment of the complainants as, variously, 'very naïve', 'very uneducated', and 'simple'. The high risk of detection and deportation before the contract debt had been worked off would seem to support these assessments.

55 As to economic circumstances, the submission was that, although each complainant clearly desired to make more money than she could earn in Thailand, this did not permit the conclusion that the decision to work in Australia was a product of 'economic imperilment'. Once again, there was some evidence given by the complainants as to their financial circumstances. But, even without such evidence, the inference which his Honour drew was almost irresistible. Who but an economically vulnerable woman would enter into a contract 'to work for no actual cash return over the period of ... some 3 to 6 months, servicing large numbers of men'? For a woman to subject herself to sexual enslavement might be thought to bear eloquent testimony to her state of economic desperation.

56 In any case, as the Crown submission pointed out, these matters – of education and economic vulnerability – were not put forward by the prosecution as aggravating features of the offending. Rather, the judge's findings were made in response to a submission by defence counsel that the applicant's offending was at the low end of the scale. Counsel sought to establish that these complainants fell outside the category of persons 'who have a poor economic background', that being the type of person Parliament 'clearly' had in mind when the slavery legislation was enacted.

57 Thus understood, these issues were directed at mitigating the seriousness of the offending. The onus clearly rested on the defence to establish affirmatively the matters relied on. That onus was not discharged.

Ground 4: Manifest excess

58 Ground 4 is in these terms:

> **The individual sentences, the total effective sentence and the non-parole period are each and all manifestly excessive in all the circumstances.**

59 As Maxwell P said in R v Abbott:[35]

> The ground of manifest excess will only succeed where it can be shown that the sentence was "wholly outside the range of sentencing options available" to the sentencing judge.

> The "range" for this purpose is the range within which it would have been reasonable for a sentencing judge to sentence this appellant for this offence in these circumstances. It follows that the ground of manifest excess will only succeed if it can be shown that no reasonable sentencing judge could have imposed this sentence on this offender for this offence in these circumstances. That is a stringent requirement, difficult to satisfy. It reflects the oft-repeated policy that sentencing is for judges and magistrates at first instance. Sentencing is not the task of appellate courts, except where clear error is shown. Where the ground of appeal is manifest excess, error will only be shown where it can be demonstrated that the sentence is obviously wrong in the sense I have described, that is, it is a sentence which no reasonable judge could have imposed in the circumstances.[36]

60 Sufficient has been said already in relation to other grounds to demonstrate why this complaint must fail. Of the individual sentences imposed, only those imposed with respect to the first two complainants exceeded 20 per cent of the maximum of 25 years' imprisonment fixed by Parliament. The submission on this ground relied on contentions we have already rejected – that the applicant's moral culpability was low; that the conditions under which the complainants worked were not especially restrictive; and that the lack of coercion at the time the contracts were entered into was a significant mitigating factor.

61 We agree with senior counsel for the Crown that general deterrence is of great importance in this area. The sentences were, in our view, well within the range reasonably open to the judge.

Ground 8: Parity

62 Ground 8 is in these terms:

> **The sentences imposed on the applicant infringe the principles of parity amongst co-offenders when regard is had to the sentences imposed on DS.**

63 DS pleaded guilty to two counts of possessing a slave and two counts of slave trading. Her offences concerned the same five complainants. DS also undertook to give evidence for the Crown, and did so in the applicant's trial. On appeal, this Court resentenced DS to a total effective sentence of 6 years' imprisonment with a non-parole period of 2 years and 6 months and indicated that, but for the undertaking to cooperate, her sentence would have been 12 years' imprisonment with a non-parole period of 5 years.[37]

64 In the present case, the judge accepted that there were factual differences between the position of DS on the one hand and the applicant on the other. He did not, however, agree that DS's sentence could be disregarded:

> I see no basis to discriminate their roles but for the fact of comprehending that [DS] was involved on her own in so far as the transport of the women and arrangements therefore from Thailand. I also accept ... that of course, given the consent of the women, there was not present the element of force, entrapment, fraud or sexual or physical abuse or coercion frequently found in slavery situations.[38]

65 His Honour said that he was imposing a lower total effective sentence on the applicant than that which the Court of Appeal said it would have imposed on DS but for her offer to give evidence on behalf of the Crown. His Honour said that he did so because:[39]

- the plea for DS was considered on the basis of agreed facts, whereas the applicant's position had been investigated at two trials;
- the applicant was not responsible, as DS had been, for being 'party to the international scheme which brought these women to Australia';

- the women were not locked up or watched over by guards;
- the general treatment of the women – 'albeit restricted' – was 'not to the degree or as demeaning as was understood in the agreed ... facts scenario' for DS;
- the Court of Appeal had viewed two of DS's offences as 'mid-range' but the others as 'less serious'.

66 The submission for the applicant was that, even allowing for the mitigating factors which distinguished DS's case (in particular, the undertaking to give evidence), the matters to which his Honour referred 'compelled the imposition of sentences far closer to those ultimately imposed on DS'. Particular attention was paid to the non-parole period. Whereas the non-parole period fixed in relation to the applicant was 'a rather orthodox 60 per cent of the total sentence', in DS's case it was an 'unusually short 41.67 per cent' of the total sentence. It was submitted that, as a matter of parity, there was 'no justifiable reason for failing to fix – and every reason to fix – a similarly proportioned non-parole period in the applicant's case'.

67 The complaint of disparity cannot be maintained, in our view. Although the traditional test is expressed in terms of a 'justifiable sense of grievance', the essential enquiry is the same as in relation to a complaint of manifest excess. The question is whether it was reasonably open to the sentencing judge to differentiate – or fail to differentiate – between the applicant and the co-offender in the way he or she did.[40]

68 In this case, it was well open to the sentencing judge to differentiate between the applicant and DS in the way he did. As we have already said, his Honour was uniquely well placed to consider similarities and differences between the circumstances relevant to the respective sentencing tasks. As the Crown pointed out, it was of obvious relevance that, apart from her promise of future cooperation, DS had pleaded guilty; was remorseful and contrite; and had in the past offered to cooperate. None of those things could be said of the applicant.

Ground 9: fresh evidence

69 As noted earlier, the upholding of ground 10[41] means that the sentence imposed below must be set aside, and the sentencing discretion exercised afresh by this Court. The applicant relies, for the purpose of resentencing, upon two matters additional to those relied on at the time of sentencing. Both relate to events subsequent to sentencing.

70 The first concerns what is said to be 'the disappointment and delay occasioned by the successful appeal against this Court's orders on the conviction application'. When the applicant's conviction appeal was allowed by this Court in June 2007, the applicant was granted bail. Following the successful appeal to the High Court by the Crown, however, her bail was revoked on 29 August 2008 and she was returned to prison. Reliance is placed on an affidavit, affirmed by the applicant's husband in January 2009, in which he described her distress following the Crown's institution of the appeal and the grant of special leave to appeal in December 2007:

> She remained on tenterhooks for the ensuing months and was so distressed that she could not attend the appeal in Canberra in May 2008. Then she was crushed when the appeal was ultimately allowed in August 2008 and she was returned to prison.

71 There is no reason to doubt the accuracy of this account. It requires little imagination to appreciate the emotional impact on a person in the applicant's position of the events which have occurred. None of this alters in the slightest the gravity of the slavery offences of which she has been convicted. But, through no fault of her own, the applicant has been subject to criminal trial processes for four years, much of that time being taken up in the necessary process of appellate examination of these novel provisions. The additional hardship which that has imposed on her must, as a matter of fairness, be taken into account in

determining what is a just sentence to impose on her.[42]

72 Likewise, we are bound to take into account the uncontested evidence of her ill-health. According to the affidavit, the applicant

> [S]uffers periodic memory loss, blurred double vision and chest pains. ... The prison psychologist treats her for depression. ...
>
> The applicant also suffers from severe endometriosis. That condition has prevented her from conceiving children in the past and has recently caused her severe pain.

The details need not be elaborated here. We accept that the applicant's continuing ill-health is likely to have the effect that imprisonment is more burdensome for her than for someone who was not suffering from those conditions.[43]

Resentencing

73 We would resentence the applicant as set out in the following table. We have differentiated between the 'use' and 'possess' sentences on the basis that, although the use was an expression of the applicant's possession of each complainant, the use (in the brothel) was the exercise of power which most harshly exemplified the enslavement. The sentences on the 'possess' counts punish the other manifestations of the applicant's control over the complainants.

Resentencing

Count	Offence	Sentence	Cumulation
1	Possess	4y	—
2	Use	7y	Base
3	Possess	4y	—
4	Use	7y	9m
5	Possess	3y	—
6	Use	5y	6m
7	Possess	2y	—
8	Use	4y	6m
9	Possess	1y 6m	—
10	Use	3y 6m	3m
Total effective sentence: 9y Non-parole period: 5y			

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[1] *R v Wei Tang* [2007] VSCA 134; (2007) 16 VR 454.

[2] [2007] VSCA 144.

[3] [2008] HCA 39; (2008) 82 ALJR 1334, (2008) 249 ALR 200 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.)

[4] *R v Wei Tang* [2007] VSCA 134; (2007) 16 VR 454, [60].

[5] See s 295.

[6] See Division 7.

[7] Because the sentencing discretion is therefore reopened, ground 5 of the applicant's submissions need not be considered.

[8] See [22]–[35] below.

[9] *R v Wei Tang* (Unreported, County Court of Melbourne, Judge McInerney, 9 June 2006) ('Reasons'), [68].

[10] This section is taken from the judgment of Eames JA: *R v Wei Tang* [2007] VSCA 134; (2007) 16 VR 454, 456-8 [5]-[14].

[11] There was some dispute as to whether the evidence disclosed that final sums were known to all of the women in advance of their arrival in Australia.

[12] The identity of all of the owners of the contracts was somewhat unclear. Wei Tang paid 70% of the contract price with respect to R; 50% with respect to J, T and S; and no portion of the contract price with respect to K. In his directions his Honour named three other persons as having had shares in the contracts.

[13] The appeal succeeded on the ground that there had been a misdirection on the mental element of the offences.

[14] [56] (Gleeson CJ).

[15] Ibid [26]; see also [44].

[16] Ibid [50]; see also [166] (Hayne J).

[17] (1998) 194 CLR 610.

[18] Ibid [60]. See also *Interpretation of Legislation Act 1984* (Vic) s 51(1).

[19] Citing *The Queen v El-Kotob* [2002] VSCA 109; (2002) 4 VR 546, [7].

[20] (1998) 194 CLR 610, [42] (McHugh, Hayne and Callinan JJ), quoting Barry, *The Courts and Criminal Punishment* (1969), 14.

[21] *Pearce v The Queen* (1998) 194 CLR 610, [42] (McHugh, Hayne and Callinan JJ).

[22] [1985] HCA 43; (1985) 157 CLR 523, 564 (see Gleeson CJ in *Tang* [46]).

[23] Reasons, [33].

[24] (1998) 194 CLR 610, [43] (McHugh, Hayne and Callinan JJ).

[25] Reasons, [80].

[26] (1998) 194 CLR 610, 623–4 [44]–[49] (McHugh, Hayne and Callinan JJ).

[27] Reasons, [36].

[28] Ibid [55].

[29] See *The Queen v DS* [2005] VSCA 99; (2005) 153 A Crim R 194.

[30] Reasons, [31]–[36].

[31] See *R v Wei Tang* [2008] HCA 39; (2008) 82 ALJR 1334, (2008) 249 ALR 200 [166] (Hayne J). Gleeson CJ referred to the 'commodification' of the women at [44], [50].

[32] Reasons, [6].

[33] Reasons, [77].

[34] Ibid [44]–[45].

[35] [2007] VSCA 32; (2007) 170 A Crim R 306.

[36] [2007] VSCA 32; (2007) 170 A Crim R 306, [13]–[14] (citations omitted).

[37] [2005] VSCA 99; (2005) 153 A Crim R 194.

[38] Reasons, [71].

[39] Ibid [72]–[76].

[40] See *R v Wolfe* [2008] VSCA 284, [9] as endorsed in *Teng v R* [2009] VSCA 148, [17].

[41] Double punishment.

[42] Cf *R v Schwabegger* [1998] 4 VR 649, 659–60 (Vincent JA).

[43] Cf *R v Van Boxtel* [2005] VSCA 175; (2005) 11 VR 258.
