SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pulini; R v Pulini* [2019] QCA 258
PARTIES:	**In CA No 129 of 2019:** **R** **v** **PULINI, Malavine** (appellant/applicant) **In CA No 130 of 2019:** **R** **v** **PULINI, Isikeli Feleatoua** (appellant/applicant)
FILE NO/S:	CA No 129 of 2019 CA No 130 of 2019 DC No 770 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 12 April 2019; Date of Sentence: 16 April 2019 (Clare SC DCJ)
DELIVERED ON:	20 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2019
JUDGES:	Morrison and McMurdo JJA and Bradley J
ORDERS:	**In CA 129 of 2019:** **1. The appeal against conviction is dismissed.** **2. Set aside the sentences imposed on counts 2, 4 and 6, in lieu thereof impose the following sentences:** **(a) on count 2, two years' imprisonment;** **(b) on count 4, three years' imprisonment; and** **(c) on count 6, two years' imprisonment.** **3. Otherwise affirm the sentences imposed on counts 2, 4 and 6.** **In CA 130 of 2019:** **1. The appeal against conviction is dismissed.** **2. Set aside the sentences imposed on counts 3 and 5 insofar as they imposed the period of five years'**

imprisonment, and substitute in lieu thereof:

(a) on count 3, three years' imprisonment; and

(b) on count 5, two years' imprisonment.

3. Otherwise affirm the sentences imposed on counts 3 and 5.

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – MISCELLANEOUS OFFENCES – OTHER MISCELLANEOUS OFFENCES AND MATTERS – CAUSING PERSON TO ENTER OR REMAIN IN FORCED LABOUR – where the appellants were convicted on a plea of guilty of harbouring an unlawful non-citizen – where the appellants were found guilty after a trial of causing a person to enter or remain in forced labour contrary to s 270.6A(1) of the *Criminal Code* (Cth) – where the appellants had brought the complainant into Australia on a tourist visa to work as a domestic servant – where the complainant was expected to work every day, cooking, cleaning, taking care of the appellant's children and any other task the appellants required – where the complainant was paid for her work by the appellants between AUD $150 and $250 per fortnight – where the amount paid to the complainant was well below acceptable remuneration by Australian standards – where the appellants had taken the complainant's passport and not returned it until after it and her tourist visa had expired – where the appellants had told the complainant that they had a friend in Immigration that would sort out her visa to allow her to stay permanently – where the complainant was scared of being taken to prison by Immigration after the expiration of her visa – where the appellant wanted to leave but felt she was unable to do so – where the appellant's actions took advantage of the complainant through an abuse of power and by taking advantage of the complainant's vulnerability – where the appellants challenge their convictions – where the appellants seek leave to appeal their sentences – whether the verdicts were unsafe and unsatisfactory in all the circumstances – whether the sentences were manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellants challenge their convictions on the basis that the verdict was unsafe and unsatisfactory in all the circumstances – where it is contended that there was insufficient evidence for the jury to conclude beyond reasonable doubt that the appellants engaged in conduct that caused the complainant to enter or remain in forced labour – where it is contended that the appellant's conduct was not

proven beyond a reasonable doubt to be the use of coercion, threat or deception as defined in s 270.1A of the *Criminal Code* (Cth) – where it is submitted that it was not proven beyond a reasonable doubt that because of the appellant's conduct a reasonable person in the position of the complainant would not consider themselves to be free to cease providing labour or leave the place where they provided the labour – where it is contended that it was not proven beyond a reasonable doubt that they were aware of the substantial risk that due to the use of coercion, threat or deception by them a reasonable person in the position of the complainant would not consider themselves to be free to cease providing labour or leave the place where she provided labour – whether the verdict was unsafe and unsatisfactory in all the circumstances

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellants seek leave to appeal their sentences on the ground that they are manifestly excessive – where it is contended that the learned sentencing judge erred by imposing a sentence of five years in respect of each of counts 2, 3, 4, 5 and 6 – where it is contended that the finding and treating as an aggravating factor that the complainant was in forced labour during the period of counts 3 and 5 was incorrect – where it is submitted that the learned trial judge erred in finding that the appellants intended to cause the complainant to enter and remain in forced labour – where it is submitted that the learned trial judge gave too much weight to the possibility of community support when assessing the probable effect that any sentence or order under consideration would have on any of the appellant's dependants – whether the learned sentencing judge erred – whether the sentences imposed were manifestly excessive

Criminal Code (Cth), s 270.1A, s 270.6, s 271.2

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v MAZ [2008] QCA 110, followed
R v PBA [2018] QCA 213, cited

COUNSEL: L K Crowley QC, with M McCarthy, for the appellant/applicant
M J Copley QC, with D Holliday, for the respondent

SOLICITORS: Fisher Dore for the appellant/applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MORRISON JA:** Ms RM lived with her family in a village in Fiji. In 2001, when she was about 26, she left her family for the first time to become a domestic servant

in the household of Mrs Malavine Pulini and Mr Isikeli Pulini, in Tonga. Her work involved domestic duties and looking after their children.

[2] Ms RM worked in Tonga for the Pulinis between 2001 and 2006 for wages of about AUD $90-$170 per fortnight. From that she sent money back to her family in Fiji, and she visited them each Christmas. In 2006, Mr Pulini found work in Australia in his profession as a civil engineer. The Pulini family immigrated to Australia.

[3] The Pulinis asked Ms RM to come and spend three months with them in Australia. That was the length of time that a tourist visa permitted Ms RM to stay. She did so and worked for them in the same way as in Tonga. She was not paid, although there was an occasional gift of $50. At the end of the three month period, Ms RM went back to Fiji.

[4] About a year later, Mrs Pulini asked Ms RM if she would move to Australia to once again become the Pulini's domestic servant and look after their children. She was told that initially a tourist visa would be obtained, but that Mr Pulini would be able to make arrangements for a permanent visa. Ms RM accepted the offer. It took about six months to arrange for the tourist visa, and during that time Ms RM went to Tonga and worked for Mrs Pulini's relatives.

[5] In February 2008 Ms RM arrived on a flight into Sydney, where a relative of Mrs Pulini escorted her to the domestic airport, providing her with a pre-purchased ticket to Brisbane. On arrival Mrs Pulini told her of the arrangements they had made, which consisted largely of caring for the children as well as performing household duties. She was told that she would share a room with one of the young children.

[6] On the first morning Mrs Pulini took Ms RM's passport from her, telling her that Mr Pulini needed the passport in order to get assistance from a friend in immigration who would organise for papers to stay long term. Ms RM did not get her Fijian passport back until 2013, long after it had expired.

[7] Ms RM worked for the Pulinis from 2008, being paid between AUD $150 and $250 per fortnight. In 2013, Mr Pulini opened a bank account in his own name, as Ms RM could not do so, being an unlawful non-citizen. Money was paid into that account from time to time, generally once a fortnight. Ms RM had a key card for that account. The money paid to Ms RM was well below acceptable remuneration by Australian standards, and well within the combined gross income of the Pulinis.

[8] For the bulk of the time that Ms RM stayed with the Pulinis she was without a passport and without a visa. She was an unlawful non-citizen. Once she had overstayed her tourist visa, she was fearful about talking to the Pulinis about it. She had little money and no passport. She was frightened about whether she might be sent to prison.

[9] The Pulinis were aware that Ms RM had no visa and was therefore an unlawful non-citizen, and they must have been aware that her passport had expired. Eventually, in August 2016, she managed to leave the Pulinis.

[10] Out of these circumstances, each of Mr and Mrs Pulini were charged with various offences which can be summarised as follows:

- Counts 1 and 2: trafficking in persons contrary to s 271.2(2) of the *Criminal Code* (Cth);[1]
- Counts 3, 4, 5 and 6: harbouring an unlawful non-citizen contrary to 233(2) and s 233E(3) of the *Migration Act* 1958 (Cth);[2] and
- Counts 7 and 8: causing a person to enter into or remain in forced labour contrary to s 270.6A(1) of the *Criminal Code* (Cth).[3]

[11] Pleas of guilty were entered to counts 3, 4, 5 and 6 (harbouring an unlawful non-citizen). The jury found Mrs Pulini guilty on the other counts applicable to her, namely counts 2 and 8. Mr Pulini was also found guilty on counts count 7 (causing a person to enter into or remain in forced labour). He was acquitted on count 1 (trafficking in persons).

[12] Mrs Pulini was sentenced to five years' imprisonment upon each of counts 2, 4 and 6, and six years' imprisonment on count 8. All terms of imprisonment were ordered to be served concurrently, and a non-parole period was fixed at two years from the date of sentence.

[13] Mr Pulini was sentenced to five years' imprisonment on each of counts 3, 5 and 7, to be served concurrently, commencing on 12 April 2019 and with a non-parole period of two years.

[14] Each of the Pulinis challenge their convictions on those counts where the jury found them guilty, and seek leave to appeal against their sentences. Mrs Pulini contends that the verdict was unsafe and unsatisfactory in all the circumstances, and that the sentences were manifestly excessive.

[15] The Pulini's specific grounds challenging conviction on counts 7 and 8 all contend that there was insufficient evidence for the jury to conclude beyond reasonable doubt that:

(a) during the period of the charge they engaged in conduct, and that conduct caused Ms RM to enter into or remain in forced labour as defined in s 270.6 of the *Criminal Code* (Cth);

(b) their conduct amounted to the use of coercion, threat or deception as defined in s 270.1A of the *Criminal Code*;

(c) because of their conduct a reasonable person in the position of Ms RM would not consider herself or himself to be free to cease providing the labour or services, or to leave the place or area where she provided the labour or services; and

(d) they were aware of a substantial risk that because of the use of coercion, threat or deception by them during the period of the charge, a reasonable person in the position of Ms RM would not consider herself to be free to cease providing the labour or services, or to leave the place or area where she provided the labour or services.

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1 Count 1, Mr Pulini; count 2, Mrs Pulini.

2 Counts 3 and 5, Mr Pulini; counts 4 and 6, Mrs Pulini. From 2008 to 31 May 2010 s 233(2) applied; from 1 June 2010 to 2016 s 233E(3) applied.

3 Count 7, Mr Pulini; count 8, Mrs Pulini. Section 270.6A(1) came into effect on 8 March 2013.

[16] The Pulini's specific grounds on sentence are that the learned sentencing judge erred:

(a) by imposing a sentence of five years in respect of each of counts 2, 3, 4, 5 and 6;

(b) in finding and treating as an aggravating factor that Ms RM was in forced labour during the period of counts 3 and 5;

(c) in finding that the Pulinis intended to cause Ms RM to enter and remain in forced labour; and

(d) giving too much weight to the possibility of community support when assessing the probable effect that any sentence or order under consideration would have on any of the Pulini's dependants.

Admissions at the trial

[17] A series of admissions made at the trial may be relevantly summarised:[4]

(a) Ms RM was and remains a Fijian national;

(b) Ms RM's Fijian passport expired on 8 June 2011;

(c) while in Tonga, Ms RM's employment conditions were the result of a verbal agreement; her role included: (a) looking after the Pulini's children; (b) cleaning the house; (c) washing clothes; and (d) preparing meals;

(d) while in Tonga, Ms RM's remuneration for the duties performed consisted of: (a) meals and accommodation at the Pulini's residence; and (b) approximately AUD $90-170, paid into her bank account;

(e) in early 2006, the Pulinis and their children moved from Tonga to Brisbane;

(f) on 28 February 2006, Ms RM was granted an Australian tourist visa, valid for six months until 28 July 2006;

(g) on 29 April 2006, Ms RM travelled from Tonga to Australia and lived with the Pulinis in Brisbane until July 2006;

(h) on 28 July 2006, Ms RM returned to Fiji;

(i) on 25 January 2008, Ms RM was granted an Australian tourist visa, valid for three and a-half months until 11 May 2008;

(j) on 30 January 2008, the Pulinis booked, and paid for by credit card, return flights for Ms RM from Tonga to Sydney, and returning on 5 May 2008;

(k) on 4 February 2008, the Pulinis booked, and paid for by credit card, a flight for Ms RM from Sydney to Brisbane on 11 February 2008;

(l) on 11 February 2008, Ms RM arrived at Sydney; and

(m) on 15 April 2008, a Commonwealth Bank Account in the name of Mr Pulini was opened; Ms RM was in possession of the key card for that account.

Evidence at the trial

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4 Appeal Book (**AB**) 392.

[18] The evidence at the trial came from relatively few witnesses. One was Ms RM, another a Federal Police Officer,[5] and the third a friend of the Pulinis, Mr Walsh, made available for cross examination by the Crown. In addition, the jury were given an electronic record of interview with Mr Pulini.

Evidence of Ms RM

[19] Ms RM grew up in a Fijian village with her family. She left school when she was 16 and moved back with her family to look after her siblings. In 2001, when she was 26, the Pulinis organised her flight to Tonga because they wanted someone to look after their children while they worked. Her tasks were to look after the children and do housework. She was paid fortnightly the sum of about AUD $90-$170.

[20] Those arrangements continued between 2001 and 2006, at which time the Pulinis moved to Australia. They told Ms RM that they would like her to go with them, and provided a ticket and a tourist visa. She travelled to Australia with the Pulinis. For the next three months she worked doing the same tasks as in Tonga. She was given about AUD $50 a fortnight by Mrs Pulini. At the end of that period she moved back with her family because her visa had expired.

[21] In 2007 Mrs Pulini asked her if she would move to Australia to look after their children. She told Ms RM that Mr Pulini had a friend in Immigration that could help her to arrange a visa so she could stay in Australia. Until that was arranged she would travel on another tourist visa. Mrs Pulini said they would organise the tourist visa and sort out the long-term paperwork to stay in Australia.

[22] Ms RM trusted them and while she waited for them to organise the visa she went to Tonga and stayed with Mrs Pulini's family, looking after their children on an unpaid basis.

[23] The Pulinis arranged her flight to Brisbane in 2008. On arrival she was told that there was no spare room for herself, but she would share with one of the children.

[24] On the first morning Mrs Pulini came to her and asked for her passport because Mr Pulini needed it to get help from his friend in Immigration. She did not ask for it back because she was scared of them, but she trusted them because she had been told me that Mr Pulini had a friend in Immigration to help me out with the visa.

[25] From that point Ms RM worked at the Pulini household at the direction of Mrs Pulini, who would tell her every morning what work was to be done. She shared a room with the eldest boy (five years old). She was paid $150 to $200, sometimes weekly, and sometimes fortnightly. On average she was paid a fortnightly amount of $200.

[26] The Pulinis provided the food but Ms RM bought her own clothing and personal items. After 2008 Mrs Pulini told her that if she wanted to send some money home to Fiji, to give it to her so she could send it.

[27] Her usual daily routine was: waking at 6.00 am, providing the children with breakfast and preparing their lunches; dropping them off at school; then back to do the housework. Ms RM always cooked the dinner. While the Pulini family had dinner

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5 Banford; her evidence was as to a recorded interview with Mr Pulini, and the investigation.

she did not eat with them, except when they had guests to dinner. She worked every day, Monday to Sunday.

[28] When her visa was about to expire she told Mrs Pulini, and Mrs Pulini told her not to worry about it because Mr Pulini was going to sort it out with the friend in Immigration. When that did not happen she did not question Mr and Mrs Pulini as she was scared to ask them. She did not leave because she did not know what to do, and she was scared, believing Immigration would take her to prison. The Pulinis told her that if anyone asked her she was to tell them she was an Australian citizen and that she was Mrs Pulini's sister.

[29] In October 2009, she asked and obtained Mrs Pulini's permission to go with a friend she had met (called WL). As things turned out it was too late to return on the same day so Ms RM called Mrs Pulini and explained that. The next morning when she was dropped off, the Pulinis started screaming and swearing at her. The Pulinis told her that she was not allowed to see WL again, and they ignored her for two weeks.

[30] In about 2010 she first rang and spoke to her family in Fiji. Mrs Pulini told her she was not to tell them about her unlawful status. After that call Mrs Pulini said that if she wanted to contact her family she would have to ask permission. The only person in her family who she told, or who knew, that she was an unlawful non-citizen was her eldest brother, whom she told in 2016. Part of the reason she never told anyone else about overstaying in Australia was because she was embarrassed about it.

[31] When the Pulinis went on holidays she had to stay to look after the house and was not to leave the house except buy some food for herself. In the time she was in the Pulini household she never saw a doctor or a dentist in spite of needing to do so.

[32] She did not get her passport back until 2013 when Mr Pulini handed it to her. At that point it had expired. She applied to the Fijian authorities for a replacement Fijian passport which she eventually received in 2014. She did not try to leave, because she did not know what to do and was scared of what Immigration would do. She was also concerned that if she tried to leave the Pulinis would look for her or call the police to find her.

[33] By 2014 she was able to stay occasionally with a friend on a weekend. At that time she felt desperate and depressed and tired. That friend let her mobile phone be used so that Ms RM could call her family.

[34] The work never changed and every day she was tired and exhausted. In 2015 Mrs Pulini brought her own mother over to Australia. Mrs Pulini told her that Immigration was looking for her mother so she was not to answer the phone, and she must lock up the house. Eventually Mrs Pulini's mother came to live with the family and Ms RM was told that she would have to look after the mother as well. The mother has dementia and diabetes and looking after her included toileting and showering her, as well as making her food and feeding her. The mother stayed with the family for four months.

[35] Because she was an unlawful non-citizen she did not have a bank account. Eventually Mr Pulini gave her a Commonwealth Bank Card which had his name on it and a pin number. She was paid by money, varying between $150 and $200, going into that account. However, she was never shown the bank statements.

[36] Eventually she told her friend WL the truth about her situation. WL assisted her to meet representatives of the Salvation Army and eventually she left the Pulini household.

[37] In cross-examination she agreed that she had access to various services and could come and go from the house:

(a) in 2009 she was given an old phone by a friend and WL called her on it; it was the first phone she had, and she still had it when she eventually contacted police; she used the phone to send messages between herself and Mrs Pulini and the children, and to contact friends;

(b) in the years 2013 to 2016 she had a key to the house, could come and go at will, was alone for times during weekdays when the children were at school and the Pulinis were at work, and could go out for shopping;

(c) but she had to do what she was told in the house, and the only opportunity she had to leave was at the weekend;

(d) there was a computer connected to the internet which she sometimes used, in addition to accessing Facebook from her own mobile phone; she used the computer in the house to email friends, and would speak with her family in Fiji including the brother who was a policeman;

(e) from 2015 and 2016 she used Facebook when she was living with the Pulinis;

(f) she would speak to some of the pastors of the church, but just say hello, explaining that she "never told them my situation"; and

(g) she was shown various bank statements which showed transactions or withdrawals at Sunnybank, Great Western Shopping Centre, K-Mart at Arana Hills, the Myer Centre in the city, Woolworths at Ashgrove and Paddington, the Inala Civic Centre, Crossroads at Keperra and Woolworths at Browns Plains; she agreed that they were all places that she went to.

[38] When she met the Walsh family she did as Mrs Pulini asked, and told them that she was Mrs Pulini's sister. She denied the suggestion that she discussed her desires to come to Australia or not go back to Fiji with the Walshs. She denied the suggestion that she had told Mr Walsh that she was not Mrs Pulini's sister.

[39] During cross-examination on behalf of Mrs Pulini, two propositions were put to Ms R,, and denied by her. They were that she had invented the stories about of a friend in the Immigration Department, and being scared of Mrs Pulini.

Evidence of Mr Walsh

[40] Mr Walsh was a friend of the Pulini family. He had spoken to Ms RM. He asked her whether she wanted to stay in Australia or go back to Fiji, and "at no point she wanted to go back to Fiji". Ms RM told him that she was a friend of the family, and did not tell him that she was a sister.

Transcript of interview with Mr Pulini

[41] During the course of his interview Mr Pulini explained a number of matters, including the non-extension of Ms RM's tourist visa in 2008:

(a) they did not extend her visa in 2008 because they were "a bit cautious and scared that … she might not be allowed to come back, and we were a bit concerned about our kids, hence we went to the stupid option, if you like, of … getting her … just overstay her visa…";

(b) the main reason behind not extending the visa was that Ms RM was so attached to the children that it would affect the children growing up; he did not really look at it from a criminal point of view, but more from the children's benefit than anything else;

(c) she had her passport with her, and had every right to go if she wanted to do that, and no time was she kept against her will;

(d) Ms RM's passport was taken, but for security reasons and it was put in a safe; he asked Ms RM for the passport and then gave it back to her "for some reason, I don't remember exactly"; he was aware that it was illegal to keep people without a visa in Australia; he said he "figured that there might not be a chance for her to … so I've just take the risk of her staying on with us and hope for the best";

(e) he did not make inquiries with the immigration authorities about getting something more permanent;

(f) however, what to do when the visa expired was never discussed with Ms RM;

(g) in terms of paying for her work, he said that they gave her what was a "gesture of our … appreciation", but it was not to actually pay her for all her work; it was "just a gesture … it's nowhere near to what a normal payment would be … it was just more a token of appreciation for what … our kids have experienced"; the money paid to her was not an amount for a normal babysitter, "nowhere close to what it should be", it was "just an incentive", and "just a token of our appreciation";

(h) while she stayed there she was "just there as part of the family … for the welfare of my kids, we just give her money $250 was, very, very small as a token of appreciation"; the main reason he did not do more was that he was scared she might not be allowed to stay longer, or that she would be deported;

(i) Ms RM was basically minding the children at home while they were at work, cooking and "all those things"; she was basically staying with them as part of the family and her main task was to look after the children while they were are work;

(j) on the first occasion when she was in Australia, and had to go back to Fiji, he discussed with her the fact that her visa was due to expire because it was a visitor's visa, and a visitor's visa was the only thing they could legally apply for in her case;

(k) he denied that there was any discussion about trying to make the tourist visa more permanent, saying "… oh, me and my wife are talk about … getting more permanent and …we didn't look too hard into it in a fact that … it might be a negative outcome in our case for her … maybe they won't extend her visa or that sort of thing… we just decided to … let her just overstay and hope for the best …";

(l) he created the bank account in his own name because he could not create one in her name as she had overstayed her visa;

(m) on the second occasion she was in Australia, when the tourist visa was about to expire, the Pulinis thought that she might not be allowed to come back if they sent her home, so "… we thought she … might as well just take the risk … for her overstay in her visa … rather than her going home … and not being allowed to come back";

(n) he said he and his wife discussed what to do if people asked about Ms RM, and the answer was to tell their friends and other people that they just kept on extending her visa; and

(o) as for Ms RM staying on without a visa, he said "we knew it was illegal, but, given the circumstances, we thought … that might be our only option … in term of … having her with … for the kids".

Count 2 – trafficking by Mrs Pulini

[42] The offence with which Mrs Pulini was charged was the trafficking of persons contrary to s 271.2(2) of the *Criminal Code Act* 1995 (Cth). That section provided:

> "**271.2 Offence of trafficking in persons**
>
> (2) A person (the ***first person***) commits an offence of trafficking in persons if:
>
> (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia; and
>
> (b) the first person deceives the other person about the fact that the other person's entry or proposed entry, the other person's receipt or any arrangements for the other person's stay in Australia, will involve … the confiscation of the other person's travel or identity documents."

[43] There were two definitions which were relevant to that count, appearing in s 271.1 of the *Criminal Code*:

> "***confiscate***, in relation to a person's travel or identity document, means to take possession of the document, whether permanently or otherwise, to the exclusion of the person …
>
> ***deceive*** means mislead as to fact (including the intention of any person) or as to law, by words or other conduct."

[44] Count 2 as particularised was that between 8 January 2008 and 11 February 2008 inclusive, at Brisbane or elsewhere, Mrs Pulini organised or facilitated the entry or receipt of Ms RM into Australia, and deceived Ms RM about the fact that her stay in Australia would involve the confiscation of her travel or identity documents.[6]

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6 AB 480.

[45] The handout provided to the jury by the trial judge directed them as to the elements of which they needed to be satisfied beyond reasonable doubt. They were:[7]

(a) Mrs Pulini organised or facilitated (that meaning, make easy or easier) the entry of Ms RM into Australia;

(b) Mrs Pulini intended (meant) to do that (i.e. intended to organise or facilitate the entry of Ms RM into Australia); and

(c) before Ms RM arrived in Australia, Mrs Pulini deceived (meaning to mislead as to fact or intention by words or conduct) Ms RM about the fact that Mrs Pulini intended that her passport would be confiscated during her stay in Australia; and

(d) Mrs Pulini intended to deceive Ms RM about that (i.e., about the fact that she intended that her passport would be confiscated during her stay in Australia).

[46] The contention advanced on the appeal was that it was not open to the jury to be satisfied beyond reasonable doubt that Ms RM's passport was confiscated, or that Mrs Pulini deceived her about the fact that her passport would be confiscated. The contention focussed on the definition of "confiscate", and in particular that part which defines it by taking possession to the exclusion of the other person. Mr Crowley QC contended that there was no suggestion that Ms RM ever sought the return of her passport, or that she was at any time refused access to it, nor was there any suggestion that the passport did not remain in the Pulini household and was available to Ms RM upon request. At its highest, the evidence was that Ms RM was deceived about the purpose for which she was invited to share possession of her passport, not that it was taken to her exclusion and therefore confiscated. While the Crown case suggested that shared possession was obtained by deceit, the inference that it was done for the purpose of convincing Ms RM that a long term visa was being sought, when it was not, did not demonstrate exclusive possession. At best that suggested joint possession obtained by fraud, but that was not sufficient for confiscation.

[47] Further, because the admissions in Mr Pulini's record of interview were not admissible against Mrs Pulini, there was no evidence from which the jury could conclude that Mrs Pulini's statements at the time of receiving the passport, and when it was about to expire, were knowingly false and deceitful. The evidence did not exclude that Mrs Pulini may have thought that a long term visa was being sought.

[48] Mr Copley QC, for the Crown, contended that there was sufficient evidence from Ms RM which the jury could accept that proved the trafficking count. The effect of Ms RM's evidence was that her passport was confiscated. It had been impliedly represented to her that the passport was given to a person, whose name she did not know and who did not live with the Pulinis, to organise her visa. For that reason, there was no basis for her to think that the passport remained in the house. The taking of the passport, with the representation as to the purpose for it being taken, either alone or in combination with Ms RM's vulnerability, amounted to an exclusion of her possession of the passport.

Discussion – count 2

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7 AB 543.

[49] The principles governing how this ground of appeal must be approached are not in doubt. In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[8] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[50] In *M v The Queen* the High Court said:[9]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[51] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[10] As summarised by this Court recently in *R v Sun*,[11] in *Baden-Clay* the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",[12] in which the court must have "particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[13] The High Court said:[14]

> "With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'"

[52] Further, as was said by this court in *R v PBA*,[15] in the course of elucidating the applicable principles:

> "The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be

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8 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494.
9 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen*.
10 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35.
11 [2018] QCA 24, at [31].
12 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.
13 *Baden-Clay* at 329, citing *M v The Queen* at 494, and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56]; [2002] HCA 53.
14 *Baden-Clay* at 330 [66].
15 [2018] QCA 213 at [80].

> dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted."

[53] The evidence from Ms RM comprised the elements referred to in paragraphs [19] to [39] above, most of which was not seriously challenged in cross examination. As well there were the admissions in the interview with Mr Pulini, though they was only admissible against him.

[54] Though it was put to Ms RM that she had invented the account of being told that Mr Pulini had a friend in Immigration who need her passport to help organise a long term visa, it was open to the jury to accept her evidence. The alternative is, in my view, irrational. It would have the relatively unsophisticated and inexperienced Ms RM blithely ignoring the expiry of her tourist visa. She and the Pulinis had been conscious of the fact that it meant she had to leave Australia, as had occurred in 2006. When her visa was about to expire she had raised the need to do something about it at the time, she did not have possession of her passport; on the undisputed evidence, Mr Pulini had taken it, and had not handed it back.

[55] If the jury accepted that evidence, and it was open to them to do so, contrary to the contentions for Mrs Pulini, this was never a case where there was shared possession of her passport, or joint possession obtained by fraud. Ms RM was led to believe that she had to hand over the passport because someone in the Immigration Department needed the passport in order to organise appropriate visa requirements for a long term stay. Ms RM was told that before she arrived, when she arrived, and again when her tourist visa was about to expire. From what she had been told, she had no reason to believe that the passport was in the Pulini's house, or in the Pulini's possession. Her state of belief that it was in the possession of the friend in the Immigration Department could only have been reinforced when that message was reiterated at the time that her tourist visa was about to expire. She had already experienced the situation, in conjunction with the Pulinis, where she had to leave Australia to avoid breaching a tourist visa in 2006. She raised the impending expiry with Mrs Pulini, and therefore each of them were well aware of the impending expiry of the tourist visa and therefore of the impending unlawful status if Ms RM stayed. In the face of that, Mrs Pulini reinforced that the passport was needed by the friend in the Immigration Department.

[56] In my view, those circumstances amount to a confiscation within the meaning of s 271.1 of the *Criminal Code* (Cth). Possession was taken of the passport to the exclusion of Ms RM because, as far as she had been told and believed, that passport was in the possession of someone other than the Pulinis. Moreover, from what she had been told and believed, her passport was in the hands of someone in the very department whose possible response caused her to be scared about what would happen with her unlawful status.

[57] The case for Mrs Pulini, as put to Ms RM in cross examination was that the story of a friend in the Immigration Department was an invention by Ms RM to explain why she overstayed the tourist visa.[16] Mrs Pulini's case, therefore, was inconsistent with

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16 AB 221 lines 26-28.

the suggestion that she might have thought that a long term visa was being sought, and proceeded on the basis that there never was a friend in Immigration who was to assist with the long term authority to stay. The jury could well take that into account when assessing the general question of whether what was told to Ms RM was knowingly false and deceitful. The main point, however, is that there was simply no evidence of any attempt to obtain either an extension of the tourist visa, or any alternative which would permit Ms RM to stay long term. Mrs Pulini was well aware from her experience in 2006 that the tourist visa expired in three months, and that necessitated Ms RM leaving Australia. Mrs Pulini's deceit, the jury may well have thought, was amply demonstrated that she took the passport on the pretext of it being needed to arrange a long term visa and retained it well after the tourist visa expired, when there had been no steps taken to arrange a long term authority to stay.

[58] In my view, it was open to the jury to conclude that the elements of count 2 against Mrs Pulini had been proven beyond reasonable doubt. This ground fails.

Counts 7 and 8 – Mr and Mrs Pulini

[59] The offence the subject of these two counts was that of causing a person to enter into or remain in forced labour. The jury were given the elements of which they had to be satisfied beyond reasonable doubt.[17] They were:

(a) that the Pulinis engaged in conduct (meaning did an act or a series of acts); and

(b) they intended to engage in that conduct; and

(c) their conduct:

  (i) involved coercion through an abuse of power, or by taking advantage of Ms RM's vulnerability; and

  (ii) caused Ms RM to continue providing her labour or services, in circumstances where a reasonable person in her position would "not consider herself to be free" to stop providing the labour or services, or to leave the place where she provided that service; and

(d) the Pulinis either knew or were reckless as to whether their conduct caused Ms RM to remain in forced labour; to be reckless means that:

  (i) they were aware of a substantial risk that their conduct would cause Ms RM to remain in forced labour; and

  (ii) having regard to the circumstances known to the relevant defendant, it was an unjustifiable risk to take.

[60] The jury were also given explanation of "forced labour" and the phrase "not consider herself to be free from stopping or leaving". Forced labour was the condition of a person who provides labour services if, because of the use of coercion, a reasonable person in the position of Ms RM would "not consider herself to be free" to either stop providing the labour or services, or to leave the place where she did so. The phrase "not consider herself to be free" was explained as not necessarily requiring the person to be physically locked up, nor that the person must have

17 AB 548-549.

wanted to stop or leave. Rather, it referred to the existence of circumstances of such a type that a reasonable person in the same position would not consider herself to be free to stop or leave.

[61] The jury were also directed that the phrase "a reasonable person" imported an objective test, and did not refer to what Ms RM thought, but what a reasonable person standing in the same position would consider.

[62] The jury were also directed that a victim can be in a condition of forced labour whether or not escape from that condition is practicably possible, or the victim has attempted to escape.

[63] Those being the elements explained, it is useful to refer to s 270.6 of the *Criminal Code (Cth)* which creates the offences:

> "**270.6 Definition of *forced labour***
>
> (1) For the purposes of this Division, *forced labour* is the condition of a person (the *victim*) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free:
>
> (a) to cease providing the labour or services; or
>
> (b) to leave the place or area where the victim provides the labour or services.
>
> (2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.
>
> (3) The victim may be in a condition of forced labour whether or not:
>
> (a) escape from the condition is practically possible for the victim; or
>
> (b) the victim has attempted to escape from the condition."

[64] The Crown's case was that the coercion occurred through an abuse of power or the taking of advantage of Ms RM's vulnerability. Those two were included in the definition of "coercion" in s 270.1A of the *Criminal Code* (Cth). Mr Crowley QC on behalf of Mr and Mrs Pulini contended that there was insufficient evidence to conclude beyond reasonable doubt that:

(a) during the period of the charge the relevant appellant engaged in conduct that caused Ms RM to enter into or remain in forced labour as defined in s 270.6;

(b) the conduct of the relevant appellant during the period of the charge amounted to the use of coercion as defined in s 270.1A;

(c) because of the conduct of the relevant appellant, a reasonable person in the position of Ms RM would not consider herself to be free to cease providing the labour or services or leave the place or area where they were provided; and

(d) the relevant appellant was aware of a substantial risk that because of the use of the coercion a reasonable person in the position of Ms RM would not consider themselves free to cease providing the labour or services, or to leave the area where they were provided.

[65] It was contended that the Pulini's conduct could not amount to coercion which caused Ms RM to be in that condition of forced labour. The evidence only established that they received the benefit of her services under a favourable employment agreement which could not amount to coercion by an abuse of power or taking advantage of her vulnerability. It was said that each of those elements require exploitive conduct which deprives the other party of the choice to consent. Further, Ms RM made her own choice to be in the employment arrangement, and remain in it, therefore the Pulini's conduct did not cause her to be in a condition of forced labour. Ms RM chose to stay, and therefore it was not open to conclude a reasonable person would consider themselves unable to choose to leave.

[66] It was submitted that the fact that the provision of services was beneficial to the Pulinis did not amount to proof that their conduct caused Ms RM to provide the services. The offence is not one of receiving the benefit of services from a vulnerable person, or as a result of a power imbalance. It requires proof that the conduct caused the provision of services in such a way that a reasonable person in the position of Ms RM would not consider herself free to leave or cease providing the services. In that respect the submissions pointed to the evidence that by the time of the commencement of counts 7 and 8 (that being the period post 8 March 2013), Ms RM had sufficient resources and support available to her to cease working for the Pulini family, and leave if she chose to do so. She had her own phone, access to a bank account, received a new passport, had access to social media and the internet, had friends nearby and access to a church community, and family members with whom she could make contact. It was submitted that the evidence supported the conclusion that she simply did not wish to leave Australia and return to Fiji.

[67] Mr Copley QC, for the Crown, contended that the evidence established that Mr Pulini engaged in conduct where he arranged for Ms RM to come to work for them knowing she only had a tourist visa, he was party to the passport confiscation and deceived her into thinking he had a friend in Immigration who could arrange a legal visa, paid her a very low wage for the hours she worked and the duties she performed, made no provision for her medical or dental care, was aware of her personality and vulnerability, and told her to say that she was a lawful citizen and a friend of the family if anyone asked about her immigration status. It was not necessary to prove that Mr Pulini engaged in every aspect of the conduct particularised against him and it was open for the jury to infer that he had heard what Mrs Pulini said about obtaining the passport.

[68] Further, although the offences the subjects of counts 7 and 8 were alleged to have been committed between 8 March 2013 and 19 August 2016 (when Ms RM left), the prosecution case was that the conduct prior to that period continued into the charged period: the bank records showed the fortnightly deposits, there was no offer to provide resources to obtain medical or dental care, the instructions as to what she should about her immigration status (which were never changed), and the additional duties caring for Mrs Pulini's mother. Reference was made to Ms RM's evidence that she was scared to leave the job because she was scared to go to the immigration authorities for fear of being put in prison, and that fear persisted after she obtained

a valid Fijian passport. Further, that fear might have been reinforced in 2015 when Mrs Pulini told her that because the Immigration Department was looking for her mother, Ms RM was not to answer the phone, lock up the house and leave it for a time.

[69] Further, it was an admitted fact that the Pulinis booked and paid for Ms RM's flight to Australia, and told her she would be provided with a tourist visa. It was also an admitted fact that the visa was granted and lasted three months only. Ms RM's passport was confiscated, and she was paid a pittance each fortnight, it was said, with her only income being the money she was given by the Pulinis. If she left her employment she had no other income to support herself, and was an unlawful entrant in Australia. Her evidence was she did not feel that she could leave because she was not lawfully in Australia, and frightened of being imprisoned. Further, she had been told that a long term visa would be organised and it had not been. It was therefore open to the jury, it was submitted, to conclude that she was coerced by those circumstances. Those circumstances were the direct responsibility of the Pulinis.

[70] Further, it was submitted that access to friends, phones or the internet, or access to a bank account that might have had $1,000 in it whilst controlled by Mr Pulini, was not to the point. The issue was whether a reasonable person in her position would consider herself free to cease to providing the services or leave.

Discussion – counts 7 and 8

[71] The commencement point for discussion of these grounds is, in my view, the position in which Ms RM found herself in relation to Mr and Mrs Pulini, as at 8 March 2013.[18] By that time, on the basis, which in my view is correct, that it was open to the jury to accept the evidence of Ms RM, the evidence established the following:

(a) Ms RM was a village-raised Fijian woman who, though educated, had little experience of life or employment other than as a domestic servant of the Pulinis;

(b) Ms RM had been asked to come to Australia, and agreed to do so, on the basis that Mr Pulini's connection with Immigration authorities was such that a long term visa could be arranged or would be arranged, though without guarantees that it would come to pass;

(c) Ms RM and the Pulinis were aware of the requirement for someone to leave Australia if their tourist visa expired; that had happened to Ms RM in 2006 when she had first come to Australia to assist with the Pulini children;

(d) Ms RM's passport had been taken by the Pulinis, in the belief that she had been required to hand it over because Mr Pulini's contact in the Immigration Department needed it to try and arrange the long term visa;

(e) long term arrangements had not been made as the time for the expiry of the tourist visa came near, but Ms RM was told that the contact in the Immigration Department was working on it and she was not to worry;

(f) Mr Pulini's decision was that he would not seek an extension for fear that if she had to leave Australia she might not be allowed back;

(g) the extended visa never materialised, nor was her passport handed back;

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18 Prior to that date, there was no offence of causing someone to enter into or remain in forced labour.

(h) Mrs Pulini directed her as to her daily duties, which largely involved caring for the Pulini children, caring out domestic tasks and cooking for the family, though she would not eat with the family unless guests were present;

(i) she was paid irregularly in cash, in amounts of between $150 to $250 per fortnight; to Mr Pulini's knowledge the amount she was paid was well below a normal wage and intended by him as merely being a token of gratitude;

(j) until 2012, Ms RM had no access to a bank account, and even then because of her unlawful status the bank account was one opened and controlled by Mr Pulini; she had a key card for that bank account, but was not provided with bank statements; for that reason she was not in a position to know at any time how much was in the account; there was no evidence to suggest that she had used the key card to discover the balance in the account;

(k) she had developed a friendship with another person, but that was attended by a level of disapproval by the Pulinis;

(l) Mrs Pulini had instructed her not to tell her family about her unlawful status;

(m) the Pulinis had told her that if anyone asked about her status in Australia, she was to say that she was an Australian citizen, and Mrs Pulini's sister; Ms RM and the Pulinis knew those things were untrue;

(n) each of the Pulinis must have known, based on the experience with the tourist visa in 2006, the story that she had been told about getting an extended visa, the fact that had not happened, and Ms RM's concerns expressed at the three month mark, that Ms RM was concerned about her unlawful status in Australia; and

(o) Ms RM was fearful of what might happen to her if her unlawful status was discovered, scared to question it with the Pulinis and afraid to raise the question of her passport and visa.

[72] Those matters describe the position and personal vulnerabilities of Ms RM. They are relevant to construing what s 270.6(1) refers to as "a reasonable person in the position of the victim". That reasonable person has to a person "in the position" of the victim. In my view, that requires a construction that defines the reasonable person as having the situational and personal vulnerabilities of the victim. Reading the relevant part of the definition of "coercion" into s 270.6(1), and using the definition of victim, the provision reads: "… forced labour is the condition of the victim who provides labour or services if, because of the taking advantage of a person's vulnerability, a reasonable person in the position of the victim would not consider herself to be free …". Here the advantage was taken of the victim. The relevant conduct is taking advantage of the victim's vulnerability, which would cause a reasonable person in the same position as the victim to not consider herself free to act in either way provided in subsections 270.6(1) (a) or (b).

[73] Further, the case as particularised here[19] comprehended both situational (her unlawful status, continued deception and absence of a visa) and personal vulnerabilities (her fears of the authorities and the Pulini's, poor financial resources and personal vulnerability).

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[74] That being the situation in which the reasonable person under s 270.6(1) found herself, one can then turn to the conduct on behalf of Mr and Mrs Pulini.

[75] In essence, their conduct continued as it did before. Each of Mr and Mrs Pulini plainly knew that Ms RM was an unlawful entrant in Australia, as long term visa arrangements had never been made. As no step had been taken by either of them to correct the unlawful status, the jury could infer that there never was a friend of Mr Pulini's in the Immigration Department who might assist. That inference is more easily drawn in the case of Mrs Pulini, as her case as put to Ms RM was that the story of the friend in Immigration was a piece of invention by Ms RN. It is easily drawn in the case of Mr Pulini who admitted that he never intended to try to get an extended visa.

[76] Each of Mr and Mrs Pulini must have known, the jury could have found, that Ms RM was concerned about her status, based upon what had happened in 2006, the taking of her passport, the fact that no long term visa had been arranged, and her expressed concerns at the end of the three month tourist visa. In those circumstances, Ms RM continued to be required to perform domestic duties and child-minding while being paid at a rate nowhere near what was normal for those duties. Mr Pulini well understood that, as demonstrated in his responses during his police interview. In essence, he simply took the chance, at Ms RM's expense, that was involved in her staying on unlawfully. He did that selfishly, because it suited his children. It was open to the jury to find that he did it selfishly and recklessly, given that he knew her status was unlawful and the payments he was making for her services in no way reflected an adequate reward.

[77] It is also clear, as the jury could find, that Mrs Pulini was aware of what Ms RM was being paid. The cash amounts were given to Ms RM by Mrs Pulini, and it was Mrs Pulini who said that if she wished to send money back to her family in Fiji, that would done through Mrs Pulini. It was Mrs Pulini who directed the domestic duties including provision of cooking for the family, and therefore, one could infer, as the jury might, that Mrs Pulini had some reasonable grasp of the amount of money available to Ms RM to achieve the tasks that Mrs Pulini was setting. Bearing in mind that the responses of Mr Pulini in his police interview were not admissible against Mrs Pulini, nonetheless the jury could infer that Mrs Pulini was aware that Ms RM was being underpaid, at least from the fact that there was no attempt at any point to pay a proper wage, to provide the wherewithal to access medical and dental needs, or to keep an accounting of what Ms RM was paid or what she spent. Of course Ms RM's unlawful status explained why there was no attempt to make the arrangement taxation compliant.

[78] Further, the evidence of Ms RM was that when Mrs Pulini's mother, who had dementia and diabetes, came on the scene and required to be cared for, Ms RM was expected to do so without any increase in wages. Even though Ms RM conceded in cross examination that when Mrs Pulini was around, she would assist to care for own mother, nonetheless the jury could accept Ms RM's evidence that the bulk of the responsibility fell on her, without any compensating benefit.

[79] Each of Mr and Mrs Pulini knew, as the jury could find, that Ms RM's unlawful status was never resolved. True it is that her already expired Fijian passport was given back to her by Mr Pulini in 2013, and she obtained a new Fijian passport in 2014, but that did not solve the visa issue. Therefore there was a basis for the jury

to accept that each of Mr and Mrs Pulini knew of Ms RM's non-existent entitlement to remain in Australia and, inferentially based upon what happened in 2006, the prospect of her being forced to leave if her status was discovered.

[80] In my view, those acts were such that the jury could find that they were deliberate, and involved coercion through an abuse of power and by taking advantage of Ms RM's vulnerability.

[81] Further, it was open to the jury to find that their conduct caused Ms RM to continue providing her labour and services. She did not have any realistic prospect otherwise, given her unlawful status in Australia and the history of being bound to the Pulini family, providing constant domestic services for wages well below what was reasonable. Insofar as s 270.6(1) requires consideration of a reasonable person in the position of the victim, that reasonable person is in the position Ms RM found herself in. In other words, unlawfully in Australia, without proper income, concerned or fearful of discovery of her unlawful status, no financial resources beyond what she was given or what she could draw from a bank account not in her own name, and no credible alternative by which she could maintain herself if she left. Her unlawful status meant it was unlikely, as Mr and Mrs Pulini must have known, that she could get a job elsewhere. For that purpose, she would have to engage in the Australian administrative systems governing wages and taxation, not to mention other things an employer might be concerned with such as superannuation. Ms RM's ability to access social media in order to correspond with friends and family, her access to someone else's bank account for which she had no bank statements, and her unlawful status in Australia, were all matters, the jury could find, which meant that it was never a realistic prospect that she could either stop providing the labour or services, or leave the place where she was doing so.

[82] Further, the jury could find, on the basis of the matters identified above, that each of Mr and Mrs Pulini knew or was reckless as to whether their conduct caused Ms RM to remain in the position where she was providing the labour. In particular, Mr Pulini's responses in his police interview highlight the reckless nature of his approach. Whilst those responses were not admissible against Mrs Pulini, the other matters that could be accepted about her conduct, as reviewed above, could lead to the same conclusion.

[83] In my view, it was open to the jury to be satisfied, beyond reasonable doubt, of counts 7 and 8 in respect of each of Mr and Mrs Pulini.

[84] These grounds fail.

Application for leave to appeal against sentence

[85] Each of Mr and Mrs Pulini challenge the sentences imposed on them on the grounds that they are manifestly excessive, and then raise some specific grounds:

(a) error in imposing the sentence of imprisonment of five years in respect of each of counts 2 to 6;

(b) finding and treating as an aggravating factor that Ms RM was in forced labour during the period of counts 3 to 6, prior to 8 March 2013;

(c) finding that each of them intended to cause Ms RM to enter and remain in forced labour; and

(d) giving too much weight to the possibility of community support when assessing the probable impact of the sentence on the Pulini children.

Approach of the sentencing judge

[86] The learned sentencing judge was plainly well versed in the factual side of the offending conduct, having conducted the trial. The sentence commenced by noting that they had pleaded to guilty to harbouring, and that the jury convicted them of the balance of the offences. Her Honour then proceeded to characterise the offending conduct in the following way:

(a) each of the Pulinis had sought to advance the quality of their lives by oppressing another person into their domestic services in a cynical and callous way;

(b) each of the Pulinis had treated Ms RM like a servant, who was poorly paid and made to feel of little value;

(c) Ms RM was someone who had played a significant role in the raising of their children, and trusted the Pulini's;

(d) in return the Pulini's used her poverty and desire to be in Australia to exploit her as cheap labour, encouraging her to stay on after her visa had expired, and oppressing her with duties, expectations and poor pay;

(e) the longer Ms RM stayed without a legal visa, the more difficult it became for her to break free;

(f) the mistreatment was calculated and criminal, and the impact on Ms RM was substantial, as evidenced by her presentation in Court;

(g) Ms RM was someone who was naïve and shy, with limited life experience and who had never lived on her own; the only position she had ever held was as maid for the Pulinis in Tonga;

(h) Mrs Pulini told Ms RM that her husband had a contact in Immigration who could get her a long term visa; that was first said in a phone call in 2007, and repeated on the morning of Ms RM's arrival when Mrs Pulini took her passport, and then again three months later;

(i) the trafficking conviction meant that from the outset Mrs Pulini planned to create a situation where Ms RM could be exploited; the promise of a contact in Immigration was a device, and Mrs Pulini never had any intention of helping Ms RM to get a long term visa; rather, she intended to make Ms RM more vulnerable by building of her hopes for a future in Australia, and by concealing the true reason for the confiscation of her passport;

(j) Ms RM's handing over of her passport, and then overstaying her visa, made it increasingly difficult for her to leave;

(k) Mrs Pulini's early conduct indicated greater pre-meditation in the exploitation of Ms RM and her conduct of the trafficking offence facilitated or contributed to the subsequent offences;

(l) whilst Mr Pulini did not commit the offence of trafficking, he assisted his wife in organising Ms RM's travel to Australia; he knew the short-term visa was a sham because the Pulinis were bringing Ms RM over to work, and plans to have her stay on indefinitely;

(m) Mr Pulini had admitted that he and his wife had talked in detail about bringing Ms RM out, and they decided from the outset that they would get her here on a three month tourist visa, with the intention that she would stay on illegally; he also assisted in the confiscation of the passport; he did not return that passport until after it had expired;

(n) the conduct by the Pulinis took advantage of Ms RM's vulnerability, and their coercion effectively kept her trapped, which is what they wanted;

(o) the circumstances of the forced labour offences were intertwined with those of the harbouring offences, as Ms RM had not been free for a long time before the forced labour offences commenced;

(p) Ms RM had believed Mrs Pulini's claim that they could get her a long term visa, but by the time she realised that was not going to happen, she was stuck; she knew that under the terms of her visa she was not supposed to work, and that she could not stay beyond three months; in that way she had been made complicit in the breach of the immigration laws, and was scared of being charged and imprisoned;

(q) by 8 March 2013, Ms RM had been in Australia for five years, knowing she was vulnerable to deportation and worried that she could be imprisoned; she had been unable to talk with her family and had been sending what little money she could home, but for a very long time she was unable to have any contact with her family; in the second year she was allowed to use the phone, but then discouraged from using it again; it was six years before she got her own phone; she was an outsider to Australian culture and institutions, had limited language skills and few connections; by 2013, she had developed just one close friendship;

(r) Ms RM was dependent upon the Pulinis for her accommodation and access to any income; that created a marked power imbalance; if she left their house she would have had nowhere to live and no means of support in Australia; even the bank account that she was given access to was in Mr Pulini's name;

(s) Ms RM was frightened of the Pulinis, as they got angry if she was unable to do what was expected and unhappy if she visited friends;

(t) her Honour had no doubt that Ms RM was in a position of forced labour as early as 2008; at some point after her tourist visa had expired, her predicament was such that when viewed objectively, a reasonable person in that position would not have considered herself free to leave; and

(u) after 2013, there were developments in 2014 when she received a mobile phone and obtained a replacement passport; she did not attempt to leave until she was persuaded there was a way out; her Honour was in no doubt that if Ms RM had thought she could safely leave earlier, she would have done so; her Honour said:

> "I am satisfied that the operative coercion by the Pulinis remained until Ms RM (sic) found that opening. Her forced labour was a consequence of the way in which the Pulini's (sic) had harboured her. From 2013, keeping someone in forced labour was, as I said, an offence in its own right. But

> prior to that, the same conduct was relevant as an aggravating feature of the harbouring offence."

[87] The learned sentencing judge then examined more closely the nature of Ms RM's life in the Pulini household. Features of this included the low payment she received, its irregularity, the amount of work she had to do, the directions given by Mrs Pulini, the fact that Mrs Pulini would be angry with her if she was too tired to finish all of her work, the extra work looking after Mrs Pulini's mother, the absence of any access to a doctor or a dentist notwithstanding being ill and in pain, and the fact that she would eat her meals alone unless there were guests.

[88] Her Honour also noted the restrictions placed on her in terms of visiting friends and the inability to develop much in the way of friendships. Her Honour summarised the impact:

> "Ms RM's (sic) impact statement speaks of lost relationships, both actual and potential, and outlines the psychological trauma she has suffered. She was demeaned and intimidated. She felt voiceless and broken and hopeless. She is still depressed. She has not recovered her self-esteem or her capacity to enjoy life as she once did. The eight years have taken a terrible toll."

[89] The learned sentencing judge then noted the agreement of counsel on both sides that the circumstances of this particular offending are unlike other cases. Further, appellate assistance was very limited. Hence, her Honour said, the sentence must start from first principles examining maximum penalties assessing the level of seriousness of the offending, and the offenders' personal circumstances. Her Honour noted the need to have regard to the matters listed in s 16A(2) of the *Crimes Act* (Cth). Her Honour also noted the maximum penalties, being nine years for forced labour, 10 years for harbouring, 12 years for trafficking. Her Honour also noted that the verdict by the jury relating to forced labour meant that the Pulini's harbouring of Ms RM was for the purpose of exploiting her.

[90] Her Honour then noted the cooperation in respect of shortening the trial, characterising that as pragmatic, rather than an indication of remorse. Her Honour observed that there was no evidence of remorse in respect of the years in which Ms RM's life was restricted and impacted.

[91] Her Honour then noted the personal circumstances of Mr and Mrs Pulini, their age, employment, education and contributions to the community, and the absence of any criminal history.

[92] The learned sentencing judge then characterised the nature of the offending in the following way:

(a) it was hard to reconcile the Pulini's presentation for their friends in the church and neighbourhood with the way they treated Ms RM behind closed doors;

(b) privately they depersonalised Ms RM as the help, while publicly presenting the face of generosity and kindness;

(c) the offending was not an aberration as it continued for eight years and only ended when Ms RM ran away;

(d) it was sustained, protracted and callous; it took away a woman's freedom and seriously compromised her human rights and dignity for eight years; and

(e) contrary to the submissions made on behalf of the Pulinis, the offending conduct could not be framed as altruistic, or an expression of parental sacrifice, but was offensive to right thinking people, as the Pulinis used Ms RM to make their lives easier, allow them to both continue to work in well paid jobs, while their children and household were looked after.

[93] Her Honour considered the question of the impact upon the children:

> "The children have been thriving. The oldest is 18. Two children are still at school. The youngest is only 12. All of them are still dependent on their parents. If both parents are incarcerated, that will certainly be a hardship for the children, but it will be hardship created by the parent's own conduct. That is a fact that ought not have a significant impact upon the sentence, unless the degree of hardship is exceptional. No further information was put before the Court. If both parents are incarcerated, that would mean that the only remaining adult in the household would be the 18 year old. One might also infer from the strong support offered to the Prisoners, that there is likely to be a whole community to lend help to the children."

[94] The learned sentencing judge observed that whilst re-offending by either of the Pulinis may be unlikely, general deterrence remained of fundamental importance. There was also a need for adequate punishment in respect of what was serious and deliberate conduct over a long time. Consequently her Honour concluded that a sentence involving imprisonment was appropriate.

[95] For those reasons, her Honour imposed a sentence on Mrs Pulini of six years' imprisonment on count 8 (the forced labour), and five years on each of counts 2, 4 and 6 (trafficking and harbouring). A non-parole period of two years was fixed. All sentences were to run concurrently and to commence on 16 April 2019.

[96] On Mr Pulini the sentence was five years' imprisonment on each of counts 3, 5 and 7 (harbouring and forced labour), together with a non-parole period of two years. All sentences were to be served concurrently and to commence on 16 April 2019.

Discussion - Sentence

[97] The first error attributed to the learned sentencing judge was in the imposition of sentences of five years imprisonment in respect of each of counts 2 to 6. Counts 2 and 6 were applicable to Mrs Pulini, and counts 3 and 5 to Mr Pulini. Such an error was conceded to have been made by the learned sentencing judge, in that two days after imposing the sentence the parties were recalled in order to make submissions on that very fact. Her Honour opened that hearing by observing that she had "failed to impose individual sentences in respect of the discrete offending for those other lesser charges", and that the "over simplification of the sentence that resulted would amount to an error of law".[20] Ultimately no party supported the proposition that the error could be corrected on a reopening of the sentence under s 188 of the *Penalties and Sentences Act* 1992 (Qld), nor under s 19AHA of the *Crimes Act* (Cth). That led her Honour to observe:[21]

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20 AB 330 lines 4-7.

21 AB 339 lines 1-7.

> "Without the agreement of the parties I will not interfere with the sentence. But I can indicate that if I were to readjust sentences for the individual counts in accordance with an assessment of their individual criminality, it would be two years imprisonment for counts 2, 5 and 6 and three years for counts 3 and 4. That would not change at all the effect of the overall sentence for your clients because this is not about the head sentences of five years and six years respectively and the orders deferring release for two years and so forth."

[98] Mr Copley QC for the Crown referred to what the learned sentencing judge said two days later, but submitted that because her Honour clearly indicated that the terms of imprisonment otherwise were to remain unchanged, there was no material error which required the Court to exercise the sentencing discretion afresh in relation to the sentences imposed of six years imprisonment for Mrs Pulini on count 8, and five years' imprisonment for Mr Pulini on count 7.[22]

[99] In my respectful view the approach in *R v MAZ*[23] should be adopted. In that case there were multiple counts and for three of them the maximum penalty was one year's imprisonment. Those counts were of common assault, and relatively trivial as against most of the other counts which were for indecent treatment of a child under 16. In the course of sentencing those three counts were mentioned amongst those in respect of which a sentence of ten years imprisonment was imposed. Having determined that the ten year term applicable to the other counts was not manifestly excessive, the Court said as to the three for which the sentence had been wrongly imposed:[24]

> "[18] As mentioned, the maximum penalty for the three counts of common assault, counts 1, 54 and 61, was one year's imprisonment at the relevant times. These counts involved grabbing the complainant KL by the shoulders and telling and warning her that he would hurt her sister if she did not want him to do various things to her (count 1); grabbing the complainant IL by the arm (count 54); and holding the complainant KL very tightly and putting his hand on her head and trying to force it downwards, at a time when he was forcing her to masturbate him (count 61).
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> [19] The five year terms imposed in respect of those counts obviously cannot stand. Having regard to her Honour's otherwise careful approach, and her detailed explanation for her adoption of the overall 10 year terms, the errors in respect of counts 1, 54 and 61 should not be regarded as 'material' so as to require this Court to exercise the overall sentencing discretion anew. See *Baxter v R* (2007) 173 A Crim R 284, 294-5. As pointed out for the respondent, 'the errors related to the maximum penalties for comparatively trivial offences where the penalties imposed were to be served concurrently with very many longer sentences'."

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22 Respondent's outline, para 22.
23 [2008] QCA 110 at [19].
24 *R v MAZ* at [18] – [19].

[100] Here the learned sentencing judge would have imposed two year terms for counts 2, 5 and 6, and three year terms for counts 3 and 4. None of those counts were for terms of imprisonment that come close to the head sentences imposed on counts 7 and 8. As her Honour was at pains to point out below the recalling of the parties two days after the sentence was not for the purpose of interfering with the practical effect of the sentence, but merely to correct the sentences on counts 2 to 6. Thus the alterations are not material to the two sentences which matter for the purpose of the application by each of Mr and Mrs Pulini.

[101] However, error being demonstrated, the sentences in respect of counts 2 to 6 should be set aside and on counts 2, 5 and 6 a term of imprisonment of two years should be substituted, and on counts 3 and 4 a term of imprisonment should be substituted. Otherwise the sentences on those counts should be affirmed.

[102] The next two points raised by Mr Crowley QC on behalf of the Pulinis were that there was an error in treating as an aggravating factor that Ms RM was in forced labour prior to 8 March 2013, and in finding that the Pulinis intended to cause her to enter and remain in forced labour.[25] The outline focusses on something said by the learned sentencing judge when characterising the conduct of the Pulinis, and the impact upon Ms RM. The learned sentencing judge found that the Pulinis planned to bring Ms RM to Australia on a tourist visa, intending that she would stay on illegally so that she could work for them, particularly looking after their children.[26] Her Honour found that their coercion kept Ms RM trapped and Ms RM knew that the terms of her visa included that she was not supposed to work and could not stay beyond three months. Her Honour said that she had no doubt that Ms RM "was in a position of forced labour as early as 2008". Her Honour then explained why she made that finding. Ms RM's visa expired, by 8 March 2013 she had been in Australia illegally for five years, knowing she was vulnerable to deportation and worried that she would be imprisoned. She was also fearful of the Pulinis.

[103] It was on that basis that her Honour said:[27]

> "Her forced labour was a consequence in the way in which the Pulinis had harboured her. From 2013, keeping someone in forced labour was, as I said, an offence in its own right. But prior to that, the same conduct was relevant as an aggravating feature of the harbouring offence."

[104] In my respectful view, there is nothing exceptional in what her Honour said or found. The nature of the harbouring between 2008 and 2013 was not simply permitting Ms RM to stay secretly in the Pulini house, thus avoiding detection by authorities. The only reason she was there was because of the plan put into effect by the Pulinis, namely to have her outstay her visa and thus be forced into staying on and look after the Pulini children. The plan worked. For all the reasons outlined by the learned sentencing judge, Ms RM was trapped into a position of forced labour. That was the case from 2008 on. In those circumstances it was legitimate for the learned sentencing judge to treat the purpose of the harbouring, namely forced labour, as a factor which aggravated the offence.

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25 Appellant's outline paras 80(c) and (d).
26 AB 323 line 39 to AB 324 line 18.
27 AB 325 lines 22-25.

[105] The submissions here rely on the same contentions advanced in respect of counts 7 and 8.[28] I have already rejected those contentions. There is no need to rehearse them here, as they do not have the consequence of negating the legitimacy of her Honour's treatment of the forced labour aspect between 2008 and 2013 as an aggravating feature of the harbouring offence.

[106] The final specific point relied upon is that too much weight was given to the possibility of community support when assessing the probable effect on a sentence upon the children.[29]

[107] It is true to say that s 16A(2)(p) of the *Crimes Act* 1914 (Cth) obliged the learned sentencing judge to have regard to have "the probable effect that any sentence or order under consideration would have on any of the person's family or dependants". Her Honour did have regard to that factor as is signified by the passage referred to above at paragraph [93] above.

[108] Her Honour's reference to the "strong support offered" was plainly a reference to the material filed on behalf of the Pulinis for the purposes of sentence.[30] That material came from friends and fellow church members. They included statements that:

(a) the Pulinis attended the church for at least eight years and were "well regarded in our community";

(b) they were "both popular and respected in the area";

(c) Mrs Pulini was an active volunteer at church events;

(d) one friend and fellow church member had attended Court to provide emotional support for them;

(e) other friends and fellow church members had a son who spent so much time with the Pulinis that he was affectionately referred to as the Pulini's fourth son; and

(f) the current pastor of the church praised their good reputation amongst the congregation and the breadth of their friends, as well as the fact that they were well respected in the church.

[109] Counsel for Mr Pulini addressed the question of impact upon the family during the course of sentencing submissions.[31] However, beyond identifying the need to do so under s 16A(2) of the *Crimes Act*, and the statement of principle from the decision in *R v Buckskin*,[32] nothing was proffered to indicate any particular difficulty or impact upon the children. Whilst it is a factor that must be taken into account, there can be no doubt that it is a matter on which the evidentiary burden falls upon the offender whose children they are. No factual matters were put forward.

[110] In those circumstances, her Honour's findings in respect of the impact upon the children are not surprising. It was an inference that her Honour could draw from the letters of support that the local community, and in particular fellow members of the

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28 Appellant's outline paras 90 and 91.
29 Appellant's outline para 80(e).
30 AB 470-477.
31 AB 308.
32 [2010] SASC 138, per Kourakis J at [110].

church congregation, would likely step in to assist. That is for what her Honour referred to as "likely to be a whole community to lend help to the children".[33]

[111] That this factor goes no further than that is eloquently demonstrated by the fact that, notwithstanding that the contention before this Court was that the Court should re-sentence afresh, no evidence was put before the Court on this issue. Thus this Court would have been left in a slightly stronger position than that of the learned sentencing judge, in that a finding had been made that whatever impact upon the children there was, it was not to such degree as to influence the outcome further, and that finding having been made, no material was put before this Court to show that the circumstances had changed.

[112] On the general question of whether the sentences are manifestly excessive, one must bear in mind, as s 16A(1) of the *Crimes Act* (Cth) requires, that the sentence imposed is to be one of such severity as is appropriate in all the circumstances. In my respectful view, the learned sentencing judge properly characterised the offending conduct in the course of her sentencing remarks. Ms RM was brought to Australia under a plan to effectively force her to remain on as a poorly paid servant of the Pulini family, by making her overstay her temporary visa and with her passport confiscated. She was kept in that position, paid at a rate which Mr Pulini described as nowhere near a normal wage but merely a token of appreciation, for a period of eight years. During the vast bulk of that time she was an unlawful non-citizen, acutely aware of her position and vulnerability, and fearful of what might follow if she was discovered. Those fears were fed by the Pulinis telling her to lie about her status, on another occasion, to keep secret while they were absent, and telling her that the immigration authorities were looking for Mrs Pulini's mother and to therefore keep secret. The Pulinis callously exploited and oppressed Ms RM over an extended period of time, and with little regard for her welfare and wellbeing. She was even effectively denied proper treatment for medical conditions.

[113] In those circumstances it is, in my respectful view, simply not possible to conclude that the sentences on counts 7 and 8 were manifestly excessive. There are no yardstick decisions which compel that conclusion, and the seriousness of the offending conduct compels the contrary conclusion.

[114] Reliance was placed upon *R v Dobie*,[34] the only appellate authority. It involved an effective sentence of five years imprisonment was imposed on a plea of guilty to two counts of trafficking in persons, and several counts of presenting false documents. The offender arranged for two Thai sex workers to come to Australia, so that he could profit from their work. They knew they were coming to Australia to work as prostitutes. One stayed 36 days and worked 10-18 days in that period. The second one worked for about one month. They were isolated by culture, language, poverty, and threats. That review is sufficient to demonstrate why *Dobie* is of no assistance here.

[115] Reference was also made to a single judge decision, *R v Huang and Chen*.[35] That was a three year sentence imposed on a plea of guilty to one count of causing a person to enter into servitude. The offenders set up a call centre in Australia and

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33 AB 327 line 37.
34 [2009] QCA 394
35 Unreported, District Court of Queensland, 8 February 2017.

entice a Taiwanese person to come and work there. His passport and phone were taken, and he was verbally abused and threatened. He worked for 14 days, then escaped. That summary shows why *Huang and Chen* is of no utility.

[116] I am quite unable to come to the view that manifest excess has been demonstrated.

Conclusion

[117] The grounds of appeal in respect of conviction have failed. In respect of the sentences imposed, those on counts 7 and 8 are not manifestly excessive or otherwise tainted by error. For the reasons expressed above the only variations in sentence should be in respect of those imposed on counts 2 to 6. Therefore I propose the following orders:

In CA 129 of 2019:

1. The appeal against conviction is dismissed.
2. Set aside the sentences imposed on counts 2, 4 and 6, in lieu thereof impose the following sentences:
   (a) on count 2, two years' imprisonment;
   (b) on count 4, three years' imprisonment; and
   (c) on count 6, two years' imprisonment.
3. Otherwise affirm the sentences imposed on counts 2, 4 and 6.

In CA 130 of 2019:

1. The appeal against conviction is dismissed.
2. Set aside the sentences imposed on counts 3 and 5 insofar as they imposed the period of five years' imprisonment, and substitute in lieu thereof:
   (a) on count 3, three years' imprisonment; and
   (b) on count 5, two years' imprisonment.
3. Otherwise affirm the sentences imposed on counts 3 and 5.

[118] **McMURDO JA:** I agree with Morrison JA.

[119] **BRADLEY J:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.