

Digging Deeper to Uncover the Case Amid the Weaknesses

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I. The Core Difficulty in Trafficking Cases:

Every prosecutor who has dealt with a trafficking case knows that such cases require an enormous expenditure of effort. The main reason for this revolves around victims' behaviour and statements. It is hard to achieve cooperation with victims, because often, they have lost trust in the world at large; it is hard to explain victim behavior which seems irrational on the face of it like failure to escape or seek help at the first opportunity; it is doubly and trebly hard to explain away statements like "the trafficker was my best friend"; "I chose this situation as my best alternative."

As John Cotton Richmond<sup>1</sup> once said: **whereas the prosecutor's challenge in other cases is to uncover the weaknesses in the case, here, the challenge is to uncover the case amid the weaknesses.**

So how should police, prosecutors and judges approach such cases? What mindset can help them uncover the case amid the morass of weaknesses? **The key is to dig deeper** in order to uncover the whole picture, and especially the full picture of the victim's vulnerabilities and the circumstances surrounding his seeming consent.

Why is this so important? Because, whatever national legislation or case law says, courts have a hard time understanding victim behaviour unless prosecutors present the fullest possible picture, including the profile of the victim, and his circumstances before, during and after the trafficking process.

Without this information, courts tend to try to understand the victim's behaviour in the context of their own world and their own rationales. Inevitably this gives rise to the questions: **why is the victim not behaving as I would behave in this situation? why is he acting in such an unreasonable manner?** Such a comparison may lead to a finding that the victim has volitionally consented to a so called job opportunity, or alternatively, to a ruling that the victim's story is not credible.

Only if the court understands the victim's peculiar circumstances and vulnerabilities, can it rise beyond this mindset. If the victim is vulnerable, the judge can better understand why his or her behaviour differs from his own. As the Deputy Chief

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<sup>1</sup> John Cotton Richmond formerly worked in the United States Department of Justice Human Trafficking Prosecution Unit and rendered expert advice to teams dealing with trafficking cases. He also co-founded the Human Trafficking Institute that exists to decimate modern slavery at its source by empowering police and prosecutors to use victim-centered and trauma-informed methods to hold traffickers accountable and ensure survivors are treated with respect and care. He currently serves as the Ambassador at large of the Office to Monitor and Combat Trafficking in Persons

Justice of Namibia once said: **vulnerable people do not behave like you and me.**; one must understand their situation in order to understand their behaviour. <sup>2</sup>

For this reason, it is up to prosecutors to build a case which will allow the judge to dig deeper. In order to do this, they themselves must be prepared to leave no stone unturned and to probe and search and sift so as to unearth every fact that happened - before, during and after the trafficking process.

## II. Why Legislation Does Not Provide the Answers:

Prosecutors cannot rely on national legislations or indeed upon the Trafficking in Persons Protocol (the Protocol) <sup>3</sup> to do this work, even if they seem to solve these problems neatly.

**Consent:** Many national laws and the Protocol itself explicitly state that the consent of the victim is irrelevant to the trafficking offence.<sup>4</sup> This would seem to neutralize victim behaviour or statements which seem to denote consent. However, despite these explicit statements, UNODC has found that courts in such jurisdictions still need to understand why the victim consented in order to convict.

Why? Criminal justice practitioners are accustomed to viewing consent as making the whole difference between an act that is a crime and one that is not such, as in rape and assault. Moreover, .since the victim is the main "piece of evidence" in a trafficking case, this focuses the case on victim behaviour including consent. Finally, the modern world is imbued with the idea that a person's autonomy, to decide as he chooses, should be respected, even when the choice is clearly bad. <sup>5</sup>

Thus, despite what legislation or case law states, cases tend to revolve around victim consent, even if it is a subtext.

**Vulnerability:** While some jurisdictions include the 'means' of "abuse of a position of vulnerability" as an element of the trafficking crime, as does the Protocol, not all jurisdictions have legislations which explicitly mention vulnerability. However, whether or not they do, vulnerability is always a subtext of court decisions and if courts do not understand the victim's vulnerability, they will tend to exonerate.<sup>6</sup>

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<sup>2</sup> This was said in a Regional Colloquium on Trafficking in Persons for Regional Court Magistrates, held in Johannesburg, South Africa between August 22 – 24, 2018.

<sup>3</sup> The full name of the Protocol is the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention on Transnational Organized Crime.

<sup>4</sup> Some national laws condition this on the existence of 'means' as does the Protocol, whereas other do not (and for example, the trafficking law of Argentina).

<sup>5</sup> See UNODC's Issue Paper on the role of 'consent' in the trafficking in persons protocol at [https://www.unodc.org/documents/human-trafficking/2014/UNODC\\_2014\\_Issue\\_Paper\\_Consent.pdf](https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf)

<sup>6</sup> See UNODC's Issue Paper on Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons at [https://www.unodc.org/documents/human-trafficking/2012/UNODC\\_2012\\_Issue\\_Paper\\_-\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability.pdf](https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf)

**So if prosecutors wish to achieve convictions, they must dig deeper in order to give the court the background to understand the victim's behaviour. They cannot rely solely on what their national legislation says.**

### III. The Practical Impact of Digging Deeper

Digging deeper has resulted in convictions in cases which presented enormous evidential difficulties:

One example of such a process occurs in the Australian case of **Kovacs**.<sup>7</sup> Here, the victim, who was trafficked in the context of labour and sexual exploitation, worked in a takeaway store in full view of the public every day, and yet did not seek help or flee for five months. Furthermore, she had access to a telephone and to mail and was not locked in the premises.

The Court understood this behavior as a function of **her vulnerabilities**: Her family was in a situation of dire poverty; her mother was ill and she did not wish to add to her problems; she was not fluent in English and had no friends or family in Australia; because of her lack of familiarity with the cultural milieu she believed the accused person when he told her that divulging anything would lead to her arrest. She also told the court that in the Philippines there is a **stigma** attached to having sexual relations not in the context of marriage, even if they are not consensual. This gender vulnerability too caused her to refrain from seeking help. In view of this wider picture, the Court understood her failure to flee as, in itself, a mark of **the strength of the perpetrator's level of control** over her.

### IV. Digging Deeper to Uncover Hidden Emotional Vulnerabilities

Vulnerabilities can come in many shapes and sizes. Some can be clearly seen and for example, poverty, physical disabilities or age. However, **sometimes it is hard to see vulnerabilities with the naked eye**.

Thus, in the Israeli case of *Ambash*,<sup>8</sup> a charismatic man gathered around him a group of women and children and controlled every aspect of their lives. Although the alleged victims were articulate, intelligent, Israeli citizens, a deeper acquaintance with them revealed their emotional vulnerabilities. The judge found that the victims were *"lost and damaged souls, with some attraction towards religion who were in crisis and searched for direction and a path in their lives"*.<sup>9</sup> The court also stressed that some of them came from problematic families and had experienced some injury in their past lives. In regard to one, the court noted that she was an orphan who had no

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<sup>7</sup> R. v. Kovacs [2009], 2Qd R 51, 23 December 2008, Queensland Court of Appeal, Australia. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. AUS015).

<sup>8</sup> See Criminal Case 6749-08-11 in the Jerusalem District Court; later confirmed in Criminal Cases 8027,8104/13 before the Supreme Court; later confirmed in Additional Criminal Hearing 6022/18 before the Supreme Court of Israel.

<sup>9</sup> I note that this is my own rough translation into English.

father, was psychologically impaired, left her studies and was divorced 3 times. <sup>10</sup> In other words – the court dug deeper and in doing so better understood the victims' behaviour and was able to convict.

It is particularly interesting to compare this case with another Israeli case with similar facts. <sup>11</sup> The court exonerated the accused person from a charge of holding a person under conditions of slavery because it simply could not understand why intelligent Israeli women from normative backgrounds did not leave the accused. **Because the judges did not dig deeper to identify the victims' vulnerabilities, they judged them as they would have judged themselves. Viewed thus, the victims' behaviour seemed to denote voluntariness**

#### V. Last Words

Trafficking cases tend to present many difficulties and to require large investments of time and care. Instead of engaging in a vain attempt to limit the time and resources expended, it is important to recognize that without this investment, cases will fail.

This requirement is not limited to international cooperation or following financial trails, though these too, are important aspects of cases. Since the victim is usually the main "piece of evidence" in a trafficking case, his behaviour and statements must be well understood in order to present them to the court. To this aim, Prosecutors must establish rapport with victims and explore with them, every aspect of the trafficking process - before, during and after the crime was committed. They must plumb the depths of the victims' vulnerabilities and of the circumstances under which they seemingly consented.

A prosecutor who does so will uncover the case amid the morass of weaknesses; he will discover that the long way is actually the short way.

Rahel Gershuni Advocate

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<sup>10</sup> Ibid.

<sup>11</sup> See State v. A.G.G.R. Criminal Case 23751-02-10, Tel Aviv—Jaffa District Court State of Israel v. A.G.G.R., September 2014.