

**Why the Kim Jong-nam assassination raises the need for a human trafficking framework**



The half-brother of North Korean leader Kim Jong Un was assassinated at Malaysia airport in February 2017 by women squirting poisoned pens. News items suggest they thought they were part of a prank, were paid a limited fee and may have been from such a disadvantaged background that they were exploited. This raises issues of substantive law around their intention to kill when they committed the assault and any operative deception might be relevant to those issues. However, what is also important is to consider the effect of the UN human trafficking protocol which defines trafficking to include *the ....recruitment of persons...by means of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation....* Trafficking in human beings for the purpose of criminal exploitation is an increasingly significant phenomenon with victims being exploited through a variety of criminal activities. UN Guiding principles are that trafficked victims who commit crime should not be prosecuted or, if they are, should not be punished. Malaysia’s 2007 Anti-Trafficking in Persons Act prohibits all forms of human trafficking and the government has made some efforts to protect victims, including providing trafficking victims immunity from immigration offenses and raising public awareness. Whether there is protection for those committing assault resulting in death is not so clear.

The issue is topical in the UK since on the 9<sup>th</sup> of February 2017 (four days before the assassination) the Court of Appeal of England and Wales considered conjoined appeals and applications (R v VSJ 2017 EWCA Crim 36) by several appellants who appealed out of time on the basis that they should never have been prosecuted for drug trafficking because they were victims of human trafficking. Some appeals were allowed and some were not. The willingness of the Appeal court to entertain post-conviction appeals is good. Interestingly there is little reference to the requirement of ‘substantial injustice’ referred to as necessary in out of time joint enterprise appeals. There is reference to ‘clear injustice’ and if someone is a trafficking victim then it must be assumed that would follow. The approach was essentially to consider whether, had the full facts been known, there would have been a decision not to prosecute on the basis that it would not have been in the public interest to charge a human trafficking victim who committed

the crime. Those appeals that were successful saw convictions quashed effectively as a form of abuse of process where the available evidence was credible.

The court refused to develop the common law on duress which is a disappointment but perhaps not unexpected given the removal by David Cameron's government of the defence of marital coercion as a knee jerk reaction to the Vicky Pryce case. The legislative developments of under the Modern Slavery Act remain limited to certain offences and do not include victims of domestic abuse or coercion. This leaves human trafficking victims who fall within some of the terms of the UN protocol with little or no protection other than a CPS discretion to prosecute or not. Importantly, the prosecution, responding to these appeals, failed to concede any of the cases which leaves a query as to how decisions to charge will be made in future. In addition, the court commented on the lack of a system to investigate properly post-conviction. Many of these cases depended on the Appellant's account which was, at times, rejected in the absence of other evidence. If there is a requirement for other supporting evidence then of course there should be a system for investigating nationally and transnationally.

There are other concerns that the UK judgment raises including the maintenance of draconian sentencing in some of the appeals that were dismissed and a failure to consider gender issues but, in the context of killing, more importantly the court suggested (and counsel apparently conceded) that there may be some crimes that will always be too serious to engage in human trafficking defences. Since these were drugs cases, the implication is that a human trafficking victim would be denied protection where there was a killing. This is clearly erroneous. In international law child soldiers are not prosecuted and 'following orders' can be recognised in sentencing so there is no circumstance in which it is inappropriate to consider duress or coercion or even deception in the context of non-prosecution or non-punishment.

Taking into account the recent decision in *ZN v. SECRETARY FOR JUSTICE AND OTHERS* [2016] HKCFI 2179; HCAL 15/2015 (23 December 2016), this presentation considers the role that abuse of process can play in criminal appeals and the need for a transnational human trafficking framework both for investigation and the exercise of any discretion to prosecute victims of human trafficking who commit crime.

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