

Introduction

[1] Mr Sa Leavai appeals his sentence of seven years' imprisonment imposed by Judge Kellar¹ on the following charges:

- (a) sexual violation by unlawful sexual connection;²
- (b) assault with intent to injure (x2);³
- (c) indecent assault;⁴
- (d) theft (x2);⁵ and
- (e) wilful damage.⁶

[2] Mr Sa Leavai pleaded guilty to these charges. His overall submission is that the sentence is manifestly excessive. His grounds of appeal challenge, first, the correctness of the decisions Judge Kellar made in calculating the sentence and, secondly, the conduct of his previous counsel.

Facts

[3] On 20 May 2016, Mr Sa Leavai met the three victims at a bar. The group ended up at victim 1's address. The drinking continued. Victim 2 started to fall asleep because of her level of intoxication. She was on a bed and Mr Sa Leavai got into the bed and lay behind her. He put his hand under the victim's dress and started kissing the back of her neck. He then put his hand inside her underwear and rubbed and grabbed her bottom aggressively. Victim 3 told him to stop. This incident founded the charge of indecent assault.

¹ *R v Sa Leavai* [2017] NZDC 1859.

² Crimes Act 1961, ss 128(1)(b) and 128B(1); Maximum penalty 20 years' imprisonment.

³ Section 193; Maximum penalty 3 years' imprisonment.

⁴ Section 135; Maximum penalty 7 years' imprisonment.

⁵ Sections 219 and 223(b) and (c); Maximum penalty 1 year imprisonment and 7 years' imprisonment respectively.

⁶ Summary Offences Act 1981, s 11(1)(a); Maximum penalty 3 months' imprisonment or a \$2,000 fine.

[4] An argument developed and Mr Sa Leavai used his elbow to strike victim 2 across the face. She received a cut lip and facial bruising as a result.

[5] Victims 2 and 3 tried to force Mr Sa Leavai to leave the address. They threatened to make a phone call to get help. As a result, Mr Sa Leavai took victim 3's cellphone. This incident founds one of the charges of theft.

[6] Mr Sa Leavai then left the room and went downstairs, taking victim 3's cellphone with him. Victims 2 and 3 went after him to retrieve the cellphone. Mr Sa Leavai then grabbed victim 3 by the throat with one hand. She tried to pull his hand away. Mr Sa Leavai then let go of victim 3 and grabbed victim 2 around the throat and forced her into a sitting position on the stairs. He then punched both victims 2 and 3 several times to their heads, pulled their hair and swung their heads into the wall. At one point, victim 3 was punched so hard she fell over and injured her elbow. During this incident, Mr Sa Leavai shut and locked the front door. These facts gave rise to the two charges of assault with intent to injure.

[7] Mr Sa Leavai then grabbed victim 3 by the hair and dragged her into a toilet room and locked the door. Mr Sa Leavai removed his shirt and pulled his pants down while grabbing victim 3's hair. Mr Sa Leavai then forced victim 3 to perform oral sex on him by inserting his penis into her mouth. Mr Sa Leavai pulled victim 3's head up by her hair and told her to "suck his fucken dick". When she said "no", he pinched her windpipe really hard and pushed her back down. While still holding her hair, he smashed her head into a basin. Mr Sa Leavai then forced victim 3 to continue performing oral sex on him by inserting his penis back into her mouth. As a result of this incident, Mr Sa Leavai was charged with sexual violation by unlawful sexual connection.

[8] While all this was going on, victim 1, being scared of the violence, had hidden under the stairs. He called the Police.

[9] During the course of these events, Mr Sa Leavai threw and smashed an electronic game device, as well as damaging some blinds and a wall. As a result, the charge of wilful damage was laid.

[10] After all these events, Mr Sa Leavai decided to leave the address. Before going, he stole an Apple iPhone 6S and charging cable, a Sony PS4 controller, a gold chain link necklace and a gold watch. This property belonged to victim 1 and was valued at \$1,839. The second charge of theft was laid in relation to this offending.

Judge Kellar's sentence

[11] In setting the starting point, the Judge accepted that, to a large extent, the offending was spontaneous, albeit with an element of premeditation.⁷ The Judge noted that Mr Sa Leavai had taken a cellphone to prevent the victims calling for assistance. He noted also that victim 3 had been dragged into the toilet and the door then locked so as to prevent her from escaping and to prevent anybody assisting her.

[12] The second aggravating factor identified by the Judge was the use of violence and the degree of it.⁸ It was relatively prolonged and victim 3 was physically assaulted a number of times in the hall before being dragged by the hair into the toilet room and forced to perform oral sex. The violence continued in the toilet room when victim 3 said "no". That was when Mr Sa Leavai pinched her windpipe and smashed her head into a basin before forcing her to continue oral sex. The Judge noted that this was a very high degree of serious violence.

[13] The third aggravating factor identified by the Judge was that some of Mr Sa Leavai's attacks involved attacks to the head.⁹ These attacks carried serious potential for injury.

[14] The fourth aggravating feature, and the Judge acknowledged the overlap with the element of premeditation, was the aspect of detention.¹⁰ Mr Sa Leavai had locked the front door of the address to prevent people leaving and, more importantly, there was the detention of victim 3 in the toilet.

⁷ *R v Sa Leavai*, above n1 at [10].

⁸ At [11].

⁹ At [12].

¹⁰ At [13].

[15] Finally, the Judge identified the most serious aspect of the offending as being the harm to the victims.¹¹ They were frightened, degraded and injured. Quite apart from the physical aspects, there were the ongoing emotional effects of the offending.

[16] Having regard to the judgment of this Court in *R v AM (CA27/2009)*,¹² Judge Kellar adopted a starting point of eight years' imprisonment for the lead offence of sexual violation by unlawful sexual connection.¹³ He increased this by one year for the assault with intent to injure in respect of the victim of the sexual violation, victim 3. The Judge imposed a further uplift of two years' imprisonment for the indecent assault of victim 2 and the assault with intent to injure her. That led to an overall starting point of 11 years' imprisonment.¹⁴

[17] We note that although Mr Sa Leavai has three previous convictions for common assault (two in 2007 and one in 2010), the Judge did not increase the sentence to take account of them. Neither did the Judge increase his sentence because of the thefts and the wilful damage. He considered that these charges paled into insignificance and he dealt with them by imposing concurrent sentences.

[18] As to reductions for factors personal to Mr Sa Leavai, the Judge first reduced the starting point by one year for remorse.¹⁵ He then allowed some 20 per cent (two years) as a reduction for the guilty pleas.¹⁶ That left an overall end sentence of eight years' imprisonment.

[19] Judge Kellar then considered the weight of that sentence against his overall view of the totality of Mr Sa Leavai's offending. The Judge decided that a further reduction of one year's imprisonment was required. Thus, the final sentence was seven years' imprisonment.¹⁷

¹¹ At [14].

¹² *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

¹³ At [26].

¹⁴ At [26].

¹⁵ At [27].

¹⁶ At [30].

¹⁷ At [30].

The Appeal

Calculation of the sentence

[20] Mr Tennet for Mr Sa Leavai focused on the setting of the starting point. He does not challenge the discounts given, although he would add to them.

[21] Mr Tennet submits that Judge Kellar erred in setting the starting point in three respects:

- (a) The effective starting point of nine years' imprisonment in respect of victim 3 was too high.
- (b) The uplift of two years for victim 2 was too high.
- (c) The Judge should have given a discount for the willingness of Mr Sa Leavai to participate in a restorative justice conference.

[22] Mr Tennet submits that the starting point for the sexual violation charge should have been seven years' imprisonment with only a small uplift for all the remaining charges.

[23] In our view, there is no doubt that the sexual violation offending to which Mr Sa Leavai pleaded guilty is within band two of *R v AM (CA27/2009)* (with starting points between 7 and 13 years' imprisonment).¹⁸ We agree with Mr Barr for the Crown that the eight year starting point was unremarkable. The offending involved Mr Sa Leavai dragging victim 3 by her hair to a toilet room where he detained her by locking the door. He forced her to perform oral sex on him and, when she said "no", assaulted her using significant violence to overcome her resistance and then forced her to resume oral sex. A higher starting point could have been adopted.

[24] Likewise, the uplift of one year for the preceding assault with intent to injure is fully justified. It was a separate assault and had to be taken into account.

¹⁸ *R v AM (CA27/2009)*, above n 12, at [98].

[25] As for victim 2, the Judge had to impose an uplift for the indecent assault on her coupled with the assault with intent to injure her. This was in the context of the seizure of the cellphone and the locking of the front door to the address. Imposing an uplift of two years was within the range available to the Judge.

[26] We accept that the overall starting point of 11 years' imprisonment could be regarded as stern, given that this was a single series of events which did not result in serious physical injuries. However, the Judge did not impose any additional penalties for the offending against victim 1 – the theft and the wilful damage – and the remaining theft charge. Nor did he uplift the sentences for the assault with intent to injure charges to take into account Mr Sa Leavai's three previous assault convictions.

[27] The reductions made by the Judge for remorse and for entering pleas of guilty were appropriate. We do not agree that Mr Sa Leavai's willingness to participate in a restorative justice conference merits a discount beyond that which was given for his expressions of remorse.

[28] Finally, we consider that any doubt about the appropriateness of the sentence is dispelled by the Judge's final reduction of one year to account for totality.

[29] Sentencing is not a mathematical process. It requires a Judge to assess the particular offending against the broad sentencing precedents and the relevant circumstances. The evaluation includes the purposes and principles of sentencing as set out in ss 7-8 of the Sentencing Act 2002. The outcome is a range in which an appropriate sentence can be located. A final sentence of seven years' imprisonment is well within the range available to Judge Kellar for the totality of Mr Sa Leavai's offending against the three victims.

Conduct of counsel

[30] Mr Sa Leavai is unhappy with the way in which he was represented by his previous counsel. Mr Tennet has endeavoured to express that unhappiness in ways which might persuade us to reduce Mr Sa Leavai's sentence, which we have otherwise found to be within the range available to the sentencing Judge. However, we do not see that the matters raised by Mr Tennet can go to sentence.

[31] Mr Sa Leavai and his wife filed affidavits in support of his appeal to which we have had regard. Mr Sa Leavai's affidavit deposes that he did not expect to enter pleas of guilty on the day he did. He complains that he was not advised about the procedure for obtaining a sentence indication and that, although his counsel negotiated the removal of some of the charges he then faced, the summary of facts remained the same. Mr Sa Leavai deposes that he did not know that he could have a disputed facts hearing.

[32] Mr Sa Leavai appears to dispute that he indecently assaulted victim 2, that he stole the cellphone and that he assaulted victims 2 and 3 with intent to injure them. He alleges that the victims' statements contradict each other in this regard.

[33] Mrs Leavai deposes that Mr Sa Leavai's lawyer did not treat them with due professional courtesy and did not properly consult with them.

[34] We note at this point that, privilege having been waived, Mr Sa Leavai's former counsel has also filed an affidavit. He gives an account of his dealings with Mr Sa Leavai and with Mrs Leavai. On that account, the dealings were professional and appropriate. He deposes that he went through the summary of facts with them and explained the discounts available for guilty pleas. He annexes his workings which he created at the meeting, recording his assessment that the likely sentence would be seven years and three months' imprisonment. These workings proved to be remarkably accurate both as to the structure of the sentence and the outcome.

[35] The key point for us is that Mr Sa Leavai has not appealed his convictions. He does not seek to vacate his pleas and go to trial. That is understandable given the admissions he has made relating to the charge of sexual violation. We cannot reduce his sentence because he and his wife are unhappy with aspects of Mr Sa Leavai's legal representation.

[36] For completeness, we make the following points:

- (a) Mr Sa Leavai's former counsel persuaded the Crown to remove three charges of male assaults female and one charge of sexual violation by

unlawful sexual connection (laid in respect of the continuation of forced oral sex), but the Crown prosecutor was firm that the summary of facts would not be changed. This was because the Crown prosecutor was required to put before the Judge a summary of all material facts going to the essential criminality of the offending.¹⁹

- (b) The purpose of a sentence indication hearing is to enable a defendant to learn on a without prejudice basis the sentence likely to be imposed if they were to enter a guilty plea. It would be an abuse of process to seek a sentence indication as a means of gaining more time to discuss matters with family members.
- (c) A disputed facts hearing is not available for contests over facts which are essential to the validity of charges. Mr Sa Leavai's complaints go mainly to whether he is guilty of some of the charges. Guilt or innocence is determined by trial.

Result

[37] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁹ Crown Law Office, *Solicitor-General's Prosecution Guidelines* (1 July 2013) at [18.8].