

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF ANY COMPLAINANTS/PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA71/2014
[2014] NZCA 478**

BETWEEN	S (CA71/2014) Appellant
AND	THE QUEEN Respondent

Hearing:	21 August 2014
Court:	O'Regan P, Simon France and Mallon JJ
Counsel:	S J Gill and S R Lack for Appellant S K Barr for Respondent
Judgment:	3 October 2014 at 10 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is allowed.**
- C The sentences on the sexual violation counts of 14 years' imprisonment are quashed, and in their place we substitute concurrent sentences of 12 years' imprisonment. The sentences on the other charges are unchanged, meaning the overall term is 13 years' imprisonment.**

D The order imposing a minimum period of imprisonment of 10 years is quashed, and in its place we substitute a minimum period of imprisonment of six years.

REASONS OF THE COURT

(Given by Simon France J)

Introduction

[1] Following a four day jury trial before Judge Treston, Mr S was convicted of numerous charges involving his wife and one of his children:

- (a) Wife – sexual violation by rape (representative); sexual violation by oral sex (representative); indecent assault; injury with intent to injure (x 2); assault with a weapon; assault (x 4); and breach of protection order.
- (b) Son (C) – assault (x 2), one of which was representative (slapping while doing homework).

[2] Mr S was also convicted on two counts of attempting to pervert the course of justice. He was found not guilty on two additional charges of assault against his wife and one charge of assault against another son (A).

[3] Mr S was sentenced to a total term of 15 years' imprisonment, with a minimum period of imprisonment of 10 years.¹ He appeals conviction and sentence. The main ground of the conviction appeal is that the Judge's direction to the jury contained errors and was unfairly biased against the defence case. It is also contended propensity evidence should not have been admitted.

¹ *R v [S]* DC Wellington CRI-2011-032-3694, 4 February 2014 [sentencing notes].

Facts

[4] Mr and Mrs S were married in India in 2000. They had two sons whilst living there, before coming to New Zealand in 2010. Mrs S alleged a continuous pattern of rape, or of being forced to perform oral sex. She said one or other of the offences, or both, would be committed on an almost daily basis. Mrs S described Mr S as an angry man with a large sexual appetite who forced her to do what he wanted. It seems most times she complied out of fear or to keep him happy, or stop him otherwise being irrationally angry around the home.

[5] Concerning the other physical violence, Mrs S claimed Mr S had a temper, and that this would manifest itself in assaults on her. Several specific instances were alleged. The offending ended when she left the family home in December 2012. Shortly after Mrs S obtained a protection order. After she left, it is said that Mr S induced an associate to speak to the wife to discourage her from complaining. This sequence of events underlies the charges of breaching a protection order by psychological abuse and attempting to pervert the course of justice.

[6] Mrs S claimed that the conduct occurring in New Zealand was a continuation of what had happened when they lived in India. She described similar sexual abuse there, as well as other specific acts of violence. These alleged physical assaults were either equally as serious as, or more so than, the New Zealand conduct which was the subject of charges.

[7] The defence was that the allegations of sexual impropriety were not true. Mr S (who testified) accepted that intercourse and oral sex occurred, but said it was normal sex in the course of a marriage. It was not forced and at times Mrs S initiated sexual activity. Concerning the physical assaults there was a general denial, but in relation to a couple of occasions there was acceptance that something happened (for example a milk container was thrown) but a denial that it was an intentional assault.

[8] Concerning the allegation of perverting the course of justice Mr S denied he was in the prohibited vicinity and said that his associate approached Mrs S of his own volition and not at Mr S's direction.

[9] Mr S's two sons also made allegations that Mr S had assaulted them. They made their complaints by way of recorded interview when they were 12 and six years old respectively. They described specific acts of physical force being used. A, the younger, described being kicked on one occasion. As noted, Mr S was found not guilty on this alleged assault. C described being kicked, but more generally being slapped whilst he sat doing his homework. Mr S denied these allegations.

Summing up

[10] Mr Gill undertook a detailed dissection of the summing up, highlighting various aspects where it was said the Judge made errors, omitted to provide a defence perspective, or indicated endorsement of the Crown case. The overall effect was submitted to be a deficient summing up which was unacceptably unbalanced in favour of the Crown.

[11] The obligations on a judge summing up are well-known and need no general restatement. We highlight only some principles particularly relevant to this appeal. A summing up must be balanced in its treatment of opposing contentions.² That does not prevent a trial judge from indicating a view of the facts so long as it is made clear the jury is the sole decision maker.³ The requirement for balance is not to be misunderstood as an obligation to spend equal time or to artificially create equality between the cases.⁴

[12] The structure of the present summing up was orthodox. The Judge first covered matters common to all trials, including directions on prejudice and sympathy, how to deal with multiple counts, and the respective roles of judge and jury.

[13] The second stage was to go through the elements of the charges. There were eighteen charges in all, involving the need to break down eight different types of offence, and also requiring an explanation of the concept of a representative charge. The Judge distributed a question trail which was of the style that breaks down the

² *R v Keremete* CA247/03, 23 October 2003 at [18].

³ *R v Hall* [1987] 1 NZLR 616 (CA) at 622.

⁴ *Ibbetson v R* [2011] NZCA 228 at [27].

elements of the offence into a series of questions, but otherwise uses the wording of the offence. Thus for rape, the questions (in an abridged form) were:

It is accepted that Mr S on occasions between September 2010 and December 2012 penetrated the genitalia of Mrs S with his penis:

- (a) Has the Crown proved that at least on one of those occasions Mrs S did not consent?
- (b) Has the Crown proved that on that occasion Mr S did not believe on reasonable grounds that Mrs S consented?

[14] For each charge the elements are correctly stated. This style of question trail requires more by way of oral elaboration because, for example, no definition of consent is included. The Judge recognised this and correctly with each charge sought to give the necessary explanation. At the same time the Judge referred to the facts and evidence that were said by the Crown to constitute the offence. It is this section of the summing up which is the subject of challenge.

[15] The Judge then summarised the respective cases. No issue is taken with this and we consider it important to note for the discussion which follows that the Judge spent several pages accurately capturing defence counsel's closing address. In relation to this, the following defence points were highlighted:

- (a) All sex was consensual and the assaults did not happen.
- (b) The complainant was lying and some of the alleged incidents, particularly those in India, were so bizarre and implausible they undermined the complainant's credibility.
- (c) A comment, from the defence perspective, on the nature of the sex between the married couple and on Mrs S's role in that sex.
- (d) A focus on the complainant portraying herself as a down-trodden submissive victim when she was in fact a strong-willed, independent

woman who had followed her husband to New Zealand despite what she said had allegedly happened in India.

- (e) The absence of any corroborating medical evidence which would inevitably have been created if some of the incidents she described had in fact happened.

[16] Against that background we turn to the various challenges which we have grouped, and will address, under type rather than sequentially.

Judge expresses support for the Crown case meaning the summing up lacked balance

[17] Having read the direction as a whole we accept that aspects of the summing up could give the impression the Judge was indicating support for the Crown case. It is not our sense that the Judge was intending to do this but the way matters were summarised, or the words used, could be read as having that effect.

[18] Some occasions where this occurred were, we consider, the product of technique issues. For example, when stating the requirements of an offence, the Judge sometimes prefaced the remark with an expression such as “as the Crown has pointed out to you, consent means ...”. It is preferable when directing on the elements for the judge to be seen to be the person in authority, formally and independent of counsel, instructing the jury on the law. The creation of this impression is aided by avoiding references in these directions to what counsel have said (unless it be to correct some comment). If the judge’s directions are too often linked to what a particular counsel has said, the danger is that it gives the impression the judge is generally endorsing that counsel’s submissions.

[19] Next, on at least two occasions the Judge indicated that a particular direction might be thought by the jury to be relevant to the case. For example, when directing on consent, the Judge observed:

For example ... submission by the person because the person is frightened of what might happen if the person does not give in is not true consent. It may be relevant to this case you might think.

[20] The trial issue in this respect was the nature of any (apparent) consent by the wife. The consent definition being discussed by the Judge is indeed a relevant example of what the Crown were contending for, but as the Judge has expressed it, a jury might see it as being a pointed comment by the Judge indicating he thinks that is the case here. It is preferable rather than saying obliquely, as here, that the jury might find it relevant to instead note that what is being described is a key dispute between the parties. This makes it clear why the Judge is particularly directing the jury to it. Then, if the Judge continues at that time to discuss submissions about the issue, both sides can and should be covered.

[21] A similar complaint is made about the Judge apparently endorsing the credibility of Crown witnesses. Two instances in particular are highlighted. The first concerned the trial issue of whether Mr S punched his wife in the car. The children were present in the car at the time, and gave evidence about the incident. Of one child's testimony his Honour said:⁵

And the elder boy said that he saw his father [punch her] and *he gave a lot of thought about it.*

[22] We consider this was probably intended as a comment about the boy's manner of giving evidence, but it can certainly be read as endorsement of the evidence. Carrying on in that same passage, after describing what the boy said about the punch, his Honour concluded:⁶

But the question is, was there an intention by the accused if you find that the act occurred to injure his wife *when he did that?*

[23] Mr Gill submits that in using the italicised words the Judge is instructing the jury that the punch happened. However, we consider that submission ignores the preceding words – “if you find that the act occurred”.

[24] The second example of endorsing witnesses was in relation to the charges of breaching the protection order by psychological abuse. A trial issue was whether Mr S was in the vicinity at the time. He said he was not, other witnesses said he was. The relevant passage reads:

⁵ Emphasis added.

⁶ Emphasis added.

That psychological abuse is pretty simple. It means trying to affect someone's mind, and I think the Crown case is this. Clearly on the evidence of the other witnesses, although the accused, again, denies it, he was there pacing up and down outside on the footpath...

[25] The appellant emphasises the contrast in the manner in which the competing positions are here put. Mr Gill emphasises the use of “clearly” with the Crown proposition, contrasted with “the accused, again” in relation to the defence case of denial.

[26] It is difficult on appeal to assess the validity of this point. Read neutrally, it is an unobjectionable précis of the Crown case, and there is no basis for us to read it otherwise. We do observe, however, “clearly” is a recurring term in the summing up. The Judge may well be accurately repeating the prosecutor's submission but we accept that the word is overused by the Judge, and is always used in association with the Crown case. However, it is important not to be overly analytical of these matters. The task is not to pick the language apart or critique a summing up paragraph by paragraph.

[27] Finally, on this topic of the Judge expressing a view on the evidence, the appellant refers to the Judge's direction on propensity evidence. The propensity evidence in question was the evidence of Mrs S about what happened to her in India. She described various specific incidents of physical assaults by the appellant as well as a similar claim of sexual oppression along the lines of what allegedly occurred in New Zealand. Mr S denied these allegations. The passage of the summing up which is now the subject of challenge arises, we consider, from an effort by the Judge to give the standard direction that even if the jury accepts the propensity evidence, it should not leap to the conclusion that the charged events occurred.⁷

⁷ This is a less apt direction in the context of a case where the propensity evidence comes from the complainant and alleges that the charged events are just a continuation of the propensity events. See [55]–[56] below.

[28] The Judge said:

Do not reach the conclusion out of a dislike for the accused, which I have talked about prejudice and sympathy, and do not conclude that just because he appears to be a bad man and was a bad man in India that he is going to be a bad man here. You have heard that he might have done some awful things, if you like, before but he is entitled to be judged by you in a manner that does not involve prejudice or sympathy, and I have talked about that.

[29] The direction should have been expressed in a much more conditional sense. The jury should have been reminded of Mr S's denials, and that any negative view they might have of Mr S because of the allegations about what occurred in India was premised on them first accepting that the activity in India had occurred. Instead, by saying "and was a bad man", the Judge has given the impression that the India allegations were made out, that as a result he is a bad man but nevertheless the jury were not to use prejudice against him.

[30] The jury retired for the evening and both counsel concluded overnight that something should be said by the Judge the next morning about this passage. A joint approach was made and the Judge redirected:

I talked yesterday about possible similar matters to what the accused is charged with in New Zealand happening in India. You will of course recall that the accused ... denies that any of those matters occurred in India and so those matters must be looked at in that context. But if you want to take them into account you have to bear in mind that he denies them absolutely.

[31] Mr Gill now contends this was inadequate to cure the earlier direction. We do not agree. The redirection could have been fuller but we consider it to be relevant that no complaint was taken at the time.

The summing up misstated matters

[32] The first misstatement complaint concerns the Judge's summary of the defence position on reasonable belief. Mr S's basic defence was that non-consensual sex did not occur. The sex within the marriage was normal; both parties would at various times initiate activity, and if there was experimentation it was stopped immediately if not liked by either. In closing, counsel for Mr S (Mr Gill) emphasised that consent was the defence. However, he also addressed the reasonable belief in consent option in these terms:

Well we've got a long term sexual relationship here. If you had sex in this way for goodness knows how long, for goodness knows how many years, you are going to assume and I think have reasonable belief that if you have sex again it's all consensual, if you see what I mean. It's not like a one-off situation. This is a sexual relationship over a long period of time and he would be quite entitled, I submit to you, to believe that the sexual activity they were conducting is the same as it has always been, legal, consensual.

[33] Complaint is made of the Judge's encapsulation of this aspect of Mr S's defence. His Honour said:⁸

The accused said "Well I thought it was just normal activity and *I didn't even turn my mind at whether it was consent or not.* It had happened over a long period of time and I had no indication, apart from certain times the complainant had said, 'Well I told him I didn't want to do it,' that there was any issue of consent."

[34] The complaint made is that the Judge's description portrays Mr S as indifferent to the issue of consent whereas his position was that he believed she was consenting, had good reason to so believe, and indeed that Mrs S was consenting.

[35] We consider the passage in isolation is not accurate. Saying that Mr S's position was that "I did not even turn my mind to it" without giving the full explanation for what he meant by that was apt to mislead. It is, however, an error of emphasis rather than getting the defence wrong. The Judge did preface the reference to the appellant not turning his mind to consent with the phrase "I thought it was just normal activity", which indicates the appellant was saying he had no reason to consider the possibility of lack of consent, rather than that he was indifferent to whether there was consent or not. We also observe that this is another matter that was not raised with the Judge either at the time, or the next day when his Honour readdressed the jury. This lack of comment can fairly be taken to reflect counsel's perception of the significance and tone of the direction at the time. If it was a direction that came across as starkly incorrect or as undermining the defence, one would expect counsel to have raised it.

⁸ Emphasis added.

[36] Two other incorrect statements are referred to. Both are trivial and we do not dwell on them. At one stage the Judge said, or at least the transcript indicates the Judge said, the onus is on the “Court” (rather than the Crown) “right from the start”. There can have been no misunderstanding on the part of the jury as to who had the burden and what prejudice is said to have arisen is unclear.

[37] The other matter concerns the representative charge direction. There were three such charges: rape, sexual violation and assault. At one point the Judge said:

To find the accused guilty on count one, for example [count one being rape], and I use that by way of example, you must be satisfied beyond reasonable doubt that the accused either raped, had unlawful sexual connection or assaulted C at least once, on one occasion during those dates.

[38] The untenable proposition advanced on appeal is that the jury may have thought any of those acts satisfied the charge of rape. The jury had a question trail which accurately set out the elements of each offence. The challenged sentence followed on from a correct statement by the Judge of what a representative count entailed. The jury would not have thought that slapping his son constituted proof of Mr S raping his wife.

Other matters

[39] Mr Gill submitted that when setting out the Crown case on each charge, the Judge should have also commented on the defence case in relation to the particular charge. As a general proposition we agree. However, apart from a couple of specific charges, the defence was the same. Mr S said there was normal sexual activity, all of which was both apparently and in fact consensual. We do not accept it was incumbent on the Judge to repeat this on each occasion. Where, however, there was a specific defence, such as that the milk container was not thrown at Mrs S but just in her direction, this was highlighted at the same time.

[40] Next, it is complained that the direction on consent omitted reference to the concept of reluctant or hesitant consent, nevertheless, being consent.⁹ The omission is not material here. The defence was that there was in fact no reluctance or hesitation, and never any sign of such. Accordingly, there was no need in the circumstances for the Judge to comment on it.

Conclusion on summing up

[41] The Judge in summing up was required to address the jury on 18 separate charges in circumstances where the defence was the same in relation to almost all of them. This inevitably meant that this section of the summing up would constitute a lengthy focus on the Crown case and that is what happened. In terms of time on the respective cases, imbalance was inevitable and of itself is not objectionable. We accept, however, that within the discussion some matters are expressed in a way that appears to not only set out the Crown case but to endorse it. This adds to the overall impression created by the inherent structural imbalance.

[42] However, reading the summing up as a whole, we do not accept it has led to an unfair trial. There is some imbalance but not to an extent that requires intervention. It would have been clear to the jury that it was a matter for the jury to decide. In that regard, we consider it is important that the defence case was accurately and comprehensively summarised, that the elements of the offence were correctly stated, and that specific challenges to certain charges were properly identified at the time the charge was discussed. The Judge produced a question trail concerning which no dispute is taken, and the challenged part of his summing up was structured around that question trail. The matter that most concerned counsel (the “bad man” comment) was raised with the Judge and addressed. Nothing else was raised.

[43] This ground of appeal is therefore rejected.

⁹ *R v Chronis* CA40/01, 24 May 2001 at [21].

Propensity evidence

[44] The other ground of conviction appeal concerns the admission of propensity evidence, namely the wife's description of what happened to her in India. The material was contained in a recorded interview which was the means by which Mrs S gave her evidence-in-chief. Deletion of the complainant's statements about what had occurred in India was sought but declined by Judge Adeane.¹⁰

[45] The transcript of the video interview is lengthy (some 115 pages). Mrs S begins with her marriage to Mr S in January 2000. She says it was an arranged marriage. For about eight full pages of free narrative Mrs S describes the initial stage of her relationship, from marriage to when they came to New Zealand. Next comes the description of New Zealand events, given in the same narrative style, which lasts for another 20 pages. At the conclusion of the free narrative, as is common with these forms of interview, the interviewer takes the complainant back through the events in order to clarify times or descriptions, obtain the complainant's views on consent and generally to extract detail. This process occurred only in relation to the New Zealand events. The events in India were not revisited during this phase, and so occupy only eight pages (pages 7 to 14) of the 115 page interview.

[46] In his pre-trial ruling Judge Adeane accepted the evidence came within the propensity rule.¹¹ His Honour noted the close connection between the propensity events and the charged conduct, and that the complainant was really describing an unbroken continuum.¹² The Judge considered there would be little additional prejudice attached to the alleged events in India given they were largely the same conduct as the alleged New Zealand events. His Honour considered the jury would easily appreciate it was necessary background material.¹³

[47] Mr Gill challenges both the admission of this evidence and the direction given by Judge Treston on it. He submits that the conduct in India involves a series of truly extraordinary allegations that were not the subject of charges and which can only have predisposed the jury against the complainant.

¹⁰ *R v [S]* DC Wellington CRI-2012-032-3694, 15 November 2013.

¹¹ Evidence Act 2006, s 40.

¹² At [6].

¹³ At [13].

[48] The alleged events on which Mr Gill focuses are:

- (a) deliberately scaring the complainant by conduct towards their young child such as tossing him in the air or covering the baby's face with his hands;
- (b) when the complainant was three months pregnant, making as if to push her towards a train door;
- (c) throwing things at her;
- (d) assaulting her;
- (e) wanting daily sex;
- (f) hitting her and punching her in the stomach while pregnant; and
- (g) requiring her to commence giving him oral sex when she was unable to have intercourse because of recently giving birth to their second son. And thereafter insisting on this almost daily, despite the complainant not wanting to do so.

[49] First assessing the probative value of the propensity evidence, it is a tale of very similar conduct by the defendant against the same complainant. It was repeated conduct and was proximate in time to the charged conduct. There was no prospect of collusion.

[50] Turning to potential prejudice, there is plainly a risk in the jury hearing of this uncharged conduct. Some of it surrounds the time when Mrs S was either pregnant or had recently given birth. Abuse of her at that point, if the jury accept that is what happened, has particular capacity to engender feelings of antipathy towards the defendant.

[51] In the context of the case, however, little concern arises. First, although it could have been reduced in quantity, some of the evidence inevitably had to be before the jury. It explains the origins, from the complainant's viewpoint, of the oral sex offending and conveys her sense of Mr S's attitude to her. Further, the prosecution case would make less sense without the jury understanding the complainant's view of what had occurred prior to the move to New Zealand. Mrs S was not able to point to any New Zealand event as changing things or triggering the conduct. She needed to be able to explain it was an unchanged course of conduct.

[52] Second, the allegations about conduct in India by no means overwhelm the testimony. The major part of the interview covers the New Zealand events, and both structurally and in terms of impression, the material about India comes across very much as background material.

[53] Third, the propensity evidence is of course sourced in the complainant. It therefore in many ways added little by way of independent probative value or prejudice. An identical credibility assessment was needed about the propensity evidence as was needed about the charges. The evidence about the conduct in India did not bring with it any independent corroboration and depended wholly on an assessment of the complainant's credibility.

[54] Overall we are satisfied the evidence was properly admitted. One can quibble with the extent of it but there is nothing in the circumstances that gives rise to a concern that a miscarriage has thereby been caused. To the contrary it forms part of a necessary narrative, and was not unduly emphasised by the structure of the interview or the prosecution.

[55] As for the adequacy of the Judge's direction to the jury, William Young J in *Mahomed v R* discusses the circumstances where a propensity direction may not be required at all.¹⁴ One example is where, as here, the evidence is not led to invoke ideas about coincidence or probability. It is instead further evidence of "hostility"¹⁵

¹⁴ *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [91]–[92], bearing in mind the reservations expressed by the majority as to William Young J's comments: at [17].

¹⁵ *Mahomed v R*, above n 14, at [93] citing Canadian authorities.

between the defendant and complainant, and has traditionally not been seen as requiring what were previously termed similar fact directions.

[56] The summing up in the present case would not meet the requirements of a true propensity direction but one was not required. The similarities in the propensity evidence and the charged conduct were obvious, and the defence position on the propensity evidence was the same as with the charged conduct – a denial that it occurred. It was not separate independent evidence of different misconduct by the defendant and it is a situation where an attempt to direct in ordinary propensity terms was doomed to fail. There is nothing incorrect in what the Judge said, and we do not consider any miscarriage arises from his direction. Finally, we note that the evidence about what occurred in India was a central plank in the defence’s challenge to the complainant’s credibility. Whilst this factor is irrelevant to the issue of whether the evidence was properly admitted, it is relevant to a post-trial assessment of whether any illegitimate prejudice flowed from its admission. Mr Gill fairly acknowledged it was open to him to have discussed with the Crown the possibility of specific deletions. He did not do so because he could see the potential value for the defence in having before the jury what he could argue to be bizarre allegations.

[57] The conviction appeal is dismissed.

Sentence appeal

[58] Mr S was sentenced to a total term of 15 years’ imprisonment.¹⁶ Judge Treston took a starting point on the representative charges of rape and unlawful sexual connection of 15 years. A one year credit was given for previous good character, leaving a final sentence for these charges of 14 years.

[59] In relation to the other violence charges, the Judge imposed concurrent sentences of:

- (a) six months’ imprisonment for each charge of assault on C;
- (b) 12 months’ imprisonment for each charge of assault on Mrs S;

¹⁶ Sentencing notes, above n 1.

- (c) 15 months' imprisonment for the indecent assault on Mrs S;
- (d) two years' imprisonment for each charge of injury with intent to injure; and
- (e) 18 months' imprisonment for assault with a weapon (milk container).

Finally, turning to the charges of breaching a protection order and attempting to pervert the course of justice, concurrent sentences of one year's imprisonment were imposed on each, these being cumulative on the 14 year term.

[60] The Judge then considered a minimum term of imprisonment. The four bases for such an order were set out,¹⁷ and the Judge concluded that a minimum term of 10 years was appropriate.¹⁸

[61] Mr Gill submits it was incorrect to take a starting point within band three of *R v AM (CA27/2009)* for the sexual violation offending.¹⁹ It is submitted the victim was not particularly vulnerable, the violence was at the lower end of the scale and, as his wife said, was sporadic. Mr Gill contends for a starting point of nine to 11 years.

[62] For the Crown Mr Barr advises he has not found comparable cases in this Court subsequent to *R v AM*. He refers, however, to three High Court decisions which by comparison support the 15 year starting point.²⁰ We consider that there are elements in each which are broadly comparable, although generally the violence was more significant. Starting points in those cases were 16, 15 and 17 years respectively.

[63] As approached by the Judge it needs to be borne in mind that the starting point of 15 years also encompasses culpability for the violent offending against Mrs S and C. Whilst standing alone the violence against C was at the lower end of the scale, in this case it enhances the picture of a bad-tempered bully who subjected

¹⁷ Sentencing Act 2002, s 86(2).

¹⁸ At [52].

¹⁹ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [105].

²⁰ *R v TN* HC Auckland CRI-2009-057-834, 11 November 2011; *R v S* HC Tauranga CRI-2010-070-4081, 23 April 2012; and *R v Pahi* [2012] NZHC 1727.

his family to violence. It is inevitable in these cases that Mr S's domination and offending against his wife, and the impact it would have had on her, will equally have affected the living environment for the whole family.

[64] It is difficult in these cases to gauge the number of occasions on which offending occurred. The charges span just over two years and on the complainant's evidence there would have been hundreds of sexual offences in that time. It is clearly a serious case, but one which in other respects lacks some of the worst features of offending of this kind. Recognising that this is often due only to self-preservation instincts on the part of the victim, it can nevertheless be observed that the force accompanying the sexual offending was minimal, and the independent violence was not as sustained or serious as one often sees. All assault charges against the wife relate to standalone incidents.

[65] That said we have little doubt that band three was the appropriate designation given the extent and duration of the offending. It was a case of sexual domination by Mr S involving subjecting his wife to repeated indignity to meet his sexual appetite. The wife was in a vulnerable situation: she had moved to a new country with two young children and therefore was cut off from established support at home.

[66] The range of band three is 12 to 18 years. The Judge took a starting point in the middle of that band, but we consider that was too high. For the reasons we have identified, and particularly the lesser scale of force and violence, we consider that for a two year duration of this type of offending a point more in line with the band two crossover, namely 13 years, was appropriate.

[67] Mr Gill criticises on a totality basis the one year uplift for the other offending. The validity of that argument is somewhat undermined by the reduction in the lead sentence that we have just made. We also consider that the one year discount for good character was generous given the complainant's evidence about events in India. These factors cause us to conclude the sentencing calculations should otherwise remain as they were. Accordingly, the sentence for the two sexual violation charges is changed to 12 years, and all other sentences remain unchanged, meaning a final term of 13 years' imprisonment.

[68] We finally turn to the minimum period of imprisonment. Adjustment is already required for three reasons. First, the original term of 10 years exceeded two-thirds of the 14 year term and so was longer than is permissible. Second, there was no recognition by the Judge that a term of 10 years' non-parole is the longest permissible in relation to a finite sentence. We do not consider that there are features of the case warranting that. Third, we have adjusted the lead sentence and some comparable adjustment to the length of the minimum period is required.

[69] We agree that eligibility for parole after serving one-third of his sentence would be insufficient to denounce Mr S's conduct and to deter others. The offending involves a large volume of offences captured by a single representative charge. In these circumstances, a lead sentence may often not adequately capture the scale of the offending, and so recognition by way of an increased minimum period of imprisonment can be appropriate. We consider that this is the case here and that, in the circumstances of this case, with its lower level of aggravating features, 50 per cent adequately achieves that.

Conclusion

[70] The sentences of 14 years' imprisonment on the sexual violation counts are quashed, and we substitute concurrent sentences of 12 years on each count.

[71] The minimum period of 10 years' imprisonment is quashed. In its place we substitute a minimum period of six years' imprisonment for the sexual violation offending.

[72] All other sentences are unchanged. The overall term is 13 years' imprisonment.

[73] For the reasons previously given, the appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent