EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-090-001503
[2018] NZDC 2615

THE QUEEN

v

ANITA DEVI

Hearing: 14 February 2018

Appearances: T Hu for the Crown
A Kashyap for the Defendant

Judgment: 14 February 2018

NOTES OF JUDGE J C DOWN ON SENTENCING

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[1] Anita Devi was charged that on 29 November 2016 at Henderson, with intent to injure [the victim], injured her. [Name deleted] is the victim of the charge but was not a witness in the case due to her dementia. The closest relative of hers was her daughter, who gave evidence in the course of the trial with a good deal of passion and strong feelings which are entirely understandable, as to the treatment of her mother. She felt that [her mother], had been let down by the home in which she was resident generally, not just by the specific conduct of Anita Devi.

[2] The trial of this charge took place in October of last year. It commenced on 31 October and concluded on 3 November. The jury, having heard evidence from a number of individuals, including members of staff and, as I say, the daughter of the victim and from a doctor who examined [the victim], came to the conclusion that the Crown had established the charge beyond reasonable doubt and convicted Ms Devi on the indictment.

[3] I then adjourned the matter for sentencing and there has been some delay in reaching this sentencing fixture.

[4] A pre-sentence report was prepared, which I have read. The recommendation of that report is supervision and community work. That, I am afraid, is unrealistic. The charge of injuring with intent to injure carries a maximum penalty of five years' imprisonment.

[5] The allegation was that on an occasion when [the victim] had become difficult and non-compliant, which is not unusual with dementia patients, Ms Devi lost her temper with her, grabbed her, shook her and then punched her in the forehead. The evidence that I heard that related to whether this was a punch or a slap came from several sources. The most direct was by way of hearsay statements repeated by members of staff and by [the victim's daughter], being her account of what had happened to her – that she said very clearly on numerous occasions to several people that she had been punched.

[6] The second aspect of the evidence that Crown say is consistent with her being punched is the nature of the injury itself, which was quite severe bruising to the forehead, although there was an acceptance by the doctor that bruising in elderly people can be more severe than in young and fit individuals and that is a matter of public knowledge which I readily accept. However, it does seem to me that any bruising to the forehead is more likely to have been caused by a hard blow than a simple slap.

[7] The direct evidence of what happened on that day from independent witnesses came from [witness 1], who was a caregiver at [the Rest Home], who was in the room when this incident occurred and who describes a slapping or smacking type sound. She was not sure whether that was consistent with a slap or a punch but that was the sound that she described. Although Ms Devi did not give evidence in the trial, it was the inference that the defence ask me to draw in sentencing her that this was a slap and not a punch.

[8] I must make findings of fact to support any sentence that I impose and I am not obligated to conclude that what happened on that day is a slap rather than a punch. In other words, it is not required of me to simply take the lowest possible reading of the evidence and give the benefit of the doubt to Ms Devi. I must look at all of the evidence, weigh it in the balance and make an assessment as to whether this is more likely to have been a slap or a punch, and I have concluded that it was a punch. It seemed to me, based upon the nature of the injury, what was observed, what was heard, the reaction of [the victim] thereafter and her persistence in saying for many days and weeks thereafter to several people that she had been punched, I conclude that what Ms Devi did was a punch to the face or forehead to [the victim].

[9] I have read submissions from Mr Kashyap for the defendant and also from Ms Hu for the Crown. The Crown propose that an appropriate starting point is 10 months' imprisonment. In support of that start point they have directed me to a particular case which is similar on the facts but somewhat less serious than this case – *R v Koloi* CA447-03 24 August 2004 – and, of course, to the guideline case of *Nuku v R* [2012] NZCA 584. The Crown suggests that this offending falls within the second category of *Nuku v R*, the second band, where a start point of up to three years' imprisonment is appropriate where three or fewer aggravating factors arising from the case of *R v Tawaki* are present.

[10] The aggravating factors to which the Crown point in this case are the extent of the violence; the yelling and grabbing of victim by the shoulders and shaking followed by a punch to the victim's face with a closed fist. The second aggravating feature is the extent of the harm. There was significant bruising to her forehead and this should be considered in the context of a victim who was very elderly, frail and suffering from dementia. Thirdly, this was an attack to the head. Fourthly, the victim was vulnerable and the defendant had abused her position of trust, and fifth, the defendant attempted to cover up the offending.

[11] Although some of those aggravating features overlap, I am satisfied that they are all present to some degree. Those aggravating features that are of particular significance here are the extent of violence and the vulnerability of the victim. I am also very concerned about the defendant's attempts to cover up the offending. The

cover up was in relation to the witness [witness 1]. There was clear evidence to satisfy me that Ms Devi did tell [witness 1] to "stick to the story" at a stage when this incident was being investigated.

[12] I am satisfied that at the time of the incident itself and thereafter, Ms Devi covered up what had happened by creating or fabricating a lie. Her explanation is repeated in the pre-sentence report and maintained by the defendant, despite the conviction, that [the victim] caused this injury to herself by banging her head on the table. The fact that this was a lie is supported by evidence, that I found to be credible, that Ms Devi had subsequently told [witness 1] to, "Stick to the story."

[13] So there are three aggravating features of significance, two of great weight. The extent of the violence and the vulnerability of the witness and abuse of trust, and then this attempt to cover up the offending which, in my judgment, puts the offending squarely within band 2 of *R v Nuku* [2016] NZHC 254 and a start point sentence of up to three years' imprisonment. I am satisfied, however, that the extent of the assault was short in duration. It is more serious than the offending in a similar situation by a nurse dealing with elderly patients in the case of *R v Koloi* CA 447-03*,* where an end sentence of six months and start point of eight and nine months was adopted. I am satisfied that the appropriate start point here is 10 months' imprisonment.

[14] Mr Kashyap, on Ms Devi's behalf, urges me to adopt a start point of eight months' imprisonment. He relies upon a case *R v Kimiora* [2015] NZHC 1940. That was a case of domestic violence on a previous partner and where he entered into her home as a trespasser and strangled her. It is of no direct relevance to the facts of this case and I find it of no assistance at all. I am satisfied, by reference to the guideline case of *R v Nuku* and the authority referred to by the Crown of *Koloi*, that the appropriate start point here is 10 months' imprisonment. I think that that is modest given the factual findings that I have made.

[15] From that start point of 10 months, should any discount be allowed for personal matters of mitigation? Although Mr Kashyap urges the Court to conclude that the defendant is remorseful, that is plainly not the case. There is no remorse expressed in the pre-sentence report other than an expression of sorrow for the consequences of an

injury to [the victim], but Ms Devi continues to deny that she was the cause of that injury. She maintains her position before me today through counsel that she is not guilty and did not cause this injury. Therefore, there cannot be any discount for remorse.

[16] What about her previous character? Well it is true that she has no previous convictions but that is as far as counsel can go because the reality is that Ms Devi, in the context of her employment, does not have an unblemished record. Indeed, I am told by the Crown that there have been a number of warnings and letters for conduct towards patients of a similar type. I do not aggravate the sentence because of that, and indeed I have not seen any direct evidence of it, but at the same time I cannot conclude that she is of entirely good character so any discount for character is problematic. However, the reality is that she does not have any previous convictions; this is the first time she has appeared before the Court. Any sentence will be difficult for her and there have been a number of consequences arising out of this offending which have been very substantial and difficult to bear, including her inability to work in the caring profession. I therefore conclude that an appropriate discount for personal mitigating features is one month, reducing the headline sentence to nine months' imprisonment.

[17] I must then consider, it being a short-term sentence, whether an alternative home detention is appropriate. The authorities are clear that both home detention and imprisonment are capable of denouncing conduct and deterring both from an individual deterrence perspective and general deterrents to others.

[18] Given that she is a first time offender, in the sense that this is the first time she has come before the Courts, I have come to the conclusion by a fairly slim margin that the least restrictive outcome which will meet the needs of deterrence and denunciation, is home detention. The length of home detention that I conclude is appropriate is six months. Some approach the imposition of home detention on a mathematical basis dividing what the sentence of imprisonment might be in half, but that is not the requirement of the Sentencing Act 2002. I must look afresh at what sentence of home detention is appropriate to reflect the gravity of this offending and to denounce Ms Devi's conduct and deter her and others offending in the future. It seems to me that the least period of home detention appropriate is six months.

[19] Ms Devi, stand up please. Taking all of those matters into consideration and giving you the credit that I can for matters of personal mitigation you are convicted and sentenced to home detention for a period of six months. You must reside at your home detention address 24 hours a day, seven days a week unless granted leave of absence by the supervising probation officer or for certain purposes. You will be subject to a 24 hour curfew. Home detention is not an easy sentence, it is very restrictive; it is very difficult to carry out. I anticipate that you will find it challenging.

[20] I order that you attend an assessment for any counselling, treatment or programme as directed by a probation officer and complete any counselling, treatment or programme as directed. During the home detention period you will be subject to the standard home detention conditions which will be explained to you. In addition to that, you must not possess or consume any alcohol or drugs other than those prescribed to you.

[21] I am also going to order that you pay the sum of $2000 reparation to [the victim] or to her family for her benefit. That will be paid through the offices of the Court. That will hopefully at least provide some relief and support to her and her family but will not go a very long way. However, it is a genuine offer, and one which has played a part in my decision to impose home detention rather than imprisonment. I do not consider that that offer is a form of payment to keep you out of prison, as it has been characterised by the Crown.

[22] Home detention for six months.

J C Down
District Court Judge