**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA504/2019**
**[2020] NZCA 167**

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| BETWEEN | DARNELL WILSON LIAI<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing:<br>(via VMR) | 20 April 2020 |
| Court: | French, Dobson and Nation JJ |
| Counsel: | J M Hudson for Appellant<br>Z A Fuhr for Respondent |
| Judgment: | 18 May 2020 at 11 am |

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**JUDGMENT OF THE COURT**

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**The appeal against sentence is dismissed.**

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**REASONS OF THE COURT**

(Given by Dobson J)

[1] Following a jury trial in the District Court at Manukau, the appellant (Mr Liai) was found guilty of serious sexual offending.[1] On 10 September 2019, he was

[1] Namely, one charge of abduction for the purposes of sexual connection (Crimes Act 1961, s 208), one charge of sexual violation by unlawful sexual connection (ss 128(1)(b) and 128B) and one charge of sexual violation by rape (ss 128(1)(a) and 128B).

sentenced by Judge Earwaker to a term of seven years and two months' imprisonment.[2] The sentence was to be served cumulatively after the completion of a sentence of four years and eight months' imprisonment for wounding with intent to cause grievous bodily harm and wounding with reckless disregard committed shortly before the sexual offending to which this appeal relates.[3] Because Mr Liai is subject to the three strikes legislation, both sentences are to be served without parole.

[2] Judge Earwaker was the trial Judge and there is no material challenge to the summary of facts on which he undertook his sentencing analysis.

[3] Mr Liai has appealed the sentence for the sexual offending on the grounds that Judge Earwaker:

- adopted too high a starting point for the sexual offending;
- made insufficient allowance for totality when reducing the combined starting points;
- double-counted the abduction of the victim by counting it as an aggravating feature of the rape and, also imposing an uplift for the separate conviction for abduction; and
- failing to make a reduction for Mr Liai's belated apology to the victim, said to reflect remorse.

**The circumstances of the offending**

[4] In the early hours of Tuesday 19 September 2017, Mr Liai and an associate were driving around Manurewa looking to pick up a sex worker. At that time, the victim of the offending was working as a sex worker, accompanied by her brother and her brother's partner. Mr Liai located the victim in a carpark and a discussion occurred as to the terms for him to pay her for sex.

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2 *R v Liai* [2019] NZDC 18145 [Sentencing Notes].
3 *R v Liai* [2018] NZDC 9414.

[5] The victim got into the back seat of Mr Liai's car. The Judge rejected Mr Liai's claim that he had paid the victim prior to her getting into the car. Shortly after being driven away from the carpark, the victim became concerned that Mr Liai and his associate were gang members or associates and asked them about that. They denied that was the case.

[6] The victim then became sufficiently uneasy to ask to be returned to the carpark where she had been picked up, and told Mr Liai and his associate that she wanted to get out of the car. That request was ignored and she was taken to a dark and secluded carpark. Mr Liai asked his associate to get out of the car, and he took up a position which the victim interpreted as that of a lookout. The Judge found that the victim made it very clear at that point that she did not want to engage in any sexual activity with Mr Liai and wanted to be returned to the pick-up location. That was ignored. Mr Liai implied that a pouch he was wearing contained a gun and he told the victim to be quiet or he would put her in the boot of the car. He also told her that other people were coming to rape her, in the terms "you are going to learn to fuck with some real gangsters". The victim sensed the associate outside the car was on the phone, giving rise to her concern that others were indeed coming to the location to also rape her.

[7] Mr Liai forced the victim to give him oral sex by pulling her head down by her hair onto his penis. She resisted but he overcame that with force. That conduct resulted in the charge of unlawful sexual connection on which he was convicted. Mr Liai then put on a condom and raped the victim, which gave rise to the rape charge on which he was also convicted. After intercourse, the victim managed to escape from the car, running to a house nearby where she was let in by the occupants who telephoned the police. The Judge accepted she had been kept in the car for some 40 to 45 minutes. That conduct resulted in the charge of abduction, on which Mr Liai was convicted.

[8] Mr Liai also faced a second charge of unlawful sexual connection in relation to alleged digital penetration said to have occurred before the rape, on which he was acquitted.

[9] The victim's impact statement reveals she has been left at least semi-permanently mentally scarred by her abduction and rape, which has fundamentally altered her outlook and her lifestyle.

**The sentencing analysis**

[10] The Judge considered and largely endorsed the Crown submissions as to the aggravating features of the offending. The first was planning and pre-meditation, which the Judge considered to be present, at least from very shortly after the victim got into Mr Liai's car and had indicated her wish to be let out. Mr Liai's conduct thereafter reflected a measure of planning and pre-meditation.[4] Despite the absence of significant actual violence, the Judge found that Mr Liai made serious threats to force the victim to comply to an extent that he treated as aggravating the offending.[5] The Judge found that the presence of the accomplice was used by Mr Liai to increase the effectiveness of his threats and thereby the level of fear caused to the victim.[6]

[11] The Judge also saw the detention of the victim as an aggravating factor. He observed:[7]

> Now, as I have said, [the detention] is obviously encompassed in the charge of abduction, but that is a factor which needs to be taken into account as an aggravating factor. It seems the period of detention judging from the evidence was somewhere around 40 to 45 minutes.

[12] The Judge treated the victim as being inherently vulnerable, given the nature of her work, with that vulnerability being increased once Mr Liai refused to let her out of his car and took her to a secluded place of his choosing, where she was unable to obtain the assistance of her brother and partner.[8] The Judge also ranked the extent of harm to the victim as an aggravating factor.[9]

[13] The Judge applied these features in ranking the offending relative to the bands in the guideline judgment of this Court in *R v AM*.[10] On Mr Liai's behalf, Mr Hudson

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4 Sentencing Notes, above n 2, at [25].
5 At [26].
6 At [27].
7 At [28].
8 At [29].
9 At [30].
10 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

accepted at sentencing that the offending was clearly within band two of *R v AM*. That provides a range between seven and 13 years' imprisonment as the starting point,[11] and the Judge placed Mr Liai's offending at the midpoint. The Judge acknowledged cases cited as comparators, and set a starting point of nine and a half years' imprisonment for the lead conviction for rape.[12] The Judge acknowledged but did not quantify the need for uplifts for the additional convictions on which he was sentencing Mr Liai. The Judge also observed, without accepting it, that Mr Hudson had proposed an uplift of six months for the other current offences.

[14] The Judge then decided that the sentences he imposed ought to be cumulative on the sentence already being served, and undertook a totality assessment, concluding that the current offending warranted a final starting point of eight years' imprisonment on the basis it would be cumulative.[13] The Judge considered and rejected the prospect that an adjustment ought to be made because both sentences had to be served without parole under the three strikes legislation. The Judge found that the circumstances did not bring the case within the category contemplated in *Barnes v R* where this might occur.[14]

[15] Mr Hudson had procured a report on Mr Liai from a registered clinical psychologist and neuropsychologist, Dr Visser, which provided a thorough assessment of Mr Liai's mental health and personal background. It revealed a difficult upbringing involving domestic violence and exposure to extensive substance abuse. The Judge said this showed that Mr Liai had been "in and out of methamphetamine and alcohol use much of [his] adult life".[15] The Judge assessed a discount of 10 months as appropriate for these personal factors, leading to the end sentence of seven years and two months' imprisonment.[16] In imposing that sentence cumulative on the existing sentence being served, the Judge remitted outstanding fines of $1,594.12.[17]

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11 At [90] and [98].
12 Sentencing Notes, above n 2, at [33]–[36] citing *R v Kalepo* [2019] NZHC 486 and *Maru v R* [2019] NZCA 223.
13 At [41].
14 At [42]–[43] citing *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49.
15 At [47].
16 At [53].
17 At [55].

[16] The Judge declined to give any discount for Mr Liai's belated apology to the victim. The apology came on the day of sentencing, with the victim present, but only after she had been required to re-live the experience when giving her evidence at the trial. The Judge noted that in the pre-sentence report Mr Liai had continued to deny the offending and contended that the sexual conduct between them had been consensual. Whilst acknowledging the importance to the victim of the apology, the Judge did not recognise it as justifying any additional discount.[18]

**The approach on appeal**

[17] For the sentence appeal to succeed, the Court must be satisfied there was an error in the sentence and that a different sentence should be imposed.[19] It is the end sentence that matters, and criticisms of the reasoning by which the sentencing Judge arrived at the final sentence cannot be determinative.[20]

**Analysis**

[18] In criticising the starting point of nine and a half years as excessive, Mr Hudson argued that the starting point ought to have been that adopted in *R v Sahib*,[21] and certainly no more than that in *R v Kalepo*,[22] both of which he characterised as comparable offending.

[19] In *R v Sahib*, the offender picked up the victim walking home at night after a taxi had dropped her short of her home because she had insufficient money for a fare all the way. Mr Sahib initially indecently assaulted her, grabbing her breast whilst he was driving, then drove past the location of her home to a relatively remote area. He forced the victim to perform oral sex on him and then raped her. The Judge in that case set a starting point of nine years, which appears to have been for all of the offences (namely rape, sexual violation by unlawful sexual connection and indecent assault). That sentencing analysis was upheld in this Court.[23]

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18 At [30]–[31].
19 Criminal Procedure Act 2011, s 250(2).
20 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36]–[39].
21 *R v Sahib* DC Hamilton CRI-2011-019-5616, 17 April 2014.
22 *R v Kalepo*, above n 12.
23 *Sahib v R* [2015] NZCA 112.

[20] In *R v Kalepo*, the defendant was sentenced in the High Court in March 2019 following guilty pleas to offending that had occurred in 1998. The offending arose out of arrangements made with a sex worker. Initially the encounter was consensual but an argument arose after the victim got into Mr Kalepo's vehicle and he drove them to a secluded area. She wanted him to use a condom but he refused. Without using a condom, he then raped the victim in his car and assaulted her relatively seriously, the latter actions giving rise to a charge of injuring with intent to injure. The offending went undetected for 20 years until a DNA match became possible.

[21] Although Mr Kalepo had subsequently offended in a similar way, Lang J was satisfied that his life had taken a different course by the time he was apprehended for the 1998 offending.[24] The Judge treated the offending as falling at the bottom of band two and set a starting point of eight and a half years' imprisonment on the rape charge, with an uplift of six months for the charge of injuring with intent to injure.[25]

[22] We do not accept that the starting points in those two cases render the starting point of nine and a half years for Mr Liai outside the available range. We consider that in his case there are somewhat more sinister features, given the serious threats to which his victim was subjected, and the greater level of fear reasonably apprehended by her, given the presence of the associate and the threat that others were coming to rape her as well.

[23] Mr Hudson criticised the Judge's analysis of the aggravating features of the offending, contending the Judge had double-counted the fact of abduction of the victim by treating it as an aggravating feature of the rape, and then separately imposing an uplift for the conviction for abduction. We have quoted the passage of the sentencing notes that refers to the abduction as an aggravating factor at [11] above.

[24] It is not clear from the sentencing notes that the Judge did indeed go on to double-count the abduction. The Judge did say, after setting a starting point of nine and half years' imprisonment for the rape charge, that "of course there would need to

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24 *R v Kalepo*, above n 12, at [23].
25 At [13]–[14].

be an uplift for the other offending".[26] However, the Judge then moved from acknowledging the prospect of an uplift, to considering whether the sentence should be served cumulatively on the sentence for the existing charges. He never explicitly imposed or quantified any uplift.

[25] If he did double-count, we are not persuaded that any notional uplift resulted in any material error in the end sentence. Bearing in mind that the sentence he was to impose would be served cumulatively on the existing sentence, the Judge made a reduction in the length overall to reflect his totality assessment.[27] Whether the notional combined starting point for the all the offending was nine and a half or 10 years — that is, whether there was an uplift for the abduction charge or not — does not materially affect the Judge's conclusion that a reduction was warranted resulting in an adjusted starting point of eight years.

[26] Our analysis on this point also addresses the related submission advanced by Mr Hudson to the effect that the Judge had made insufficient allowance for totality. We find no error in the adjusted starting point of eight years, having regard to the relative seriousness of all the offending that had to be taken into account.

[27] Mr Hudson also challenged the extent of discount for personal mitigating factors, where the Judge allowed 10 months.[28] He submitted that Mr Liai's apology amounted to a form of remorse which the Court was required to consider when imposing sentence. However, having observed Mr Liai throughout the trial, and considered all the circumstances in preparing for sentencing him, the Judge was perfectly entitled to limit the impact of the apology tendered at sentencing in the way that he did. Standing on its own, it provides scant prospect of recognition of remorse, and we see no error by the Judge in this respect.

**Result**

[28] The end sentence of seven years and two months' imprisonment, knowing that it is to be served cumulatively after another moderately lengthy sentence, may, at first

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26 Sentencing Notes, above n 2, at [36].
27 At [40]–[41].
28 At [53].

sight, appear harsh. However, on an analysis of all the relevant considerations, we can see no error in the end sentence imposed.

[29] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent