

The facts

[2] The offence occurred on 27 April 2008 at Mrs Faasootauloa's home in Manurewa, where she lives with her six children. She had recently separated from her husband. The victim was a 17 year old male who had been invited by Mrs Faasootauloa's daughter to visit her. He went to the house late at night and climbed through a window into the daughter's bedroom. There he remained until about 7am, when Mrs Faasootauloa found him.

[3] Mrs Faasootauloa was deeply offended. She punched the victim in the face about five times and pulled him into the lounge, where other family members joined in the assault, which lasted about ten minutes. She tried to hit him in the head with a salu, a traditional Samoan broom, which left scratches on his arm. She stood on his foot to pin him down as he tried to get up from the chair in which he was lying, causing a deep cut to the bottom of his foot which required several stitches.

[4] Four members of the family faced charges of injuring with intent to injure. The others were an uncle, Lafaele Aokuso, another male, Laumata Tu'u'u, and Mrs Faasootauloa's older daughter Iemaima. All but Mr Tu'u'u pleaded guilty at a callover during the week of a priority standby fixture.

The sentencing

[5] Judge Lovell-Smith considered the male offenders the more culpable; they assaulted the victim with a cellphone charger cord and a dining room chair. The starting point for Mr Aokuso was two years nine months, reflecting the group attack and the use of weapons. Presumably because she did not employ weapons, the starting point for Mrs Faasootauloa was two years imprisonment.

[6] The Judge allowed a 20 per cent deduction for guilty pleas; although the pleas were late, the charges had been amended. In Mrs Faasootauloa's case, the Judge also took into account the traumatic effect of her separation from her husband, her status as a regular church-goer with a very low risk of reoffending, the absence of any previous convictions, and her family circumstances and remorse. These

considerations led the Judge to conclude that she was a suitable candidate for home detention. The Judge did not explain why she selected the term of 12 months, but merely said:

I take as a starting point as I said before, a figure of two years' imprisonment and I impose a final sentence, making the appropriate deductions of 12 months' home detention.

[7] Mr Aokuso was sentenced to 20 months imprisonment, while Iemaima Faasootauloa was sentenced to nine months home detention. In Mr Aokuso's case, the Judge accepted that he had no previous convictions and was remorseful, but concluded that home detention was not appropriate in his circumstances. It appears that he did not have a suitable address. The Judge did not suggest that the need for denunciation and deterrence ruled out home detention.

The appeal

[8] On appeal, Mr Lillico accepts the starting point but submits that the end sentence failed to reflect the downwards adjustment that should have been taken for the mitigating factors that the Judge identified. The two-year starting point would result in a starting point of 12 months home detention. A discount of about 40 per cent ought to have been given for all mitigating factors, resulting in a home detention sentence of 7.3 months before rounding.

[9] Mr La Hood argued that the Judge expressly took mitigating factors into account, albeit without quantifying what credit was given as she ought to have done. Although the starting point alone would normally result in a home detention term of 12 months, the Judge appears to have given credit for mitigation by adopting a form of sentence other than imprisonment. In *R v Hessell*,¹ which had not long been delivered when Mrs Faasootauloa was sentenced, this Court recognised that a sentencing Judge may take that course:

[52] Sometimes it may be appropriate to recognise a guilty plea by imposing one type of sentence rather than another. For example, if an offence otherwise warrants a short term of imprisonment, it may be appropriate to reduce the sentence below the imprisonment threshold to a

¹ *R v Hessell* [2009] NZCA 450.

sentence of home detention or community detention in order to give the guilty plea appropriate recognition. It may also be appropriate to impose a single sentence instead of a combination of sentences (for example, supervision instead of supervision and community work). In cases such as this, a percentage reduction is not possible. The type and length of sentence that gives appropriate effect to the sliding scale set out above is a matter of judgement.

[10] Mr La Hood argued that such course was justified in this case because it was not simply a matter of determining that Mrs Faasootauloa was an appropriate candidate for home detention and arriving at a term by halving the term of imprisonment that would otherwise be imposed. The offending was serious and justified imprisonment, particularly having regard to the sentence imposed on Mr Aokuso, who did not initiate the violence. That being so, appropriate credit for mitigating factors was given by selecting home detention and the term of 50 per cent of the starting point was not manifestly excessive.

Discussion

[11] We accept that a sentencing Judge may recognise not only a guilty plea but also other mitigating factors by adopting one type of sentence rather than another. That may be done by selecting home detention instead of imprisonment. However, the Judge must still identify the sentence that would have been imposed but for mitigating factors and quantify the reduction made, as this Court said in *Hessell*.² That is so because reasons must be given for selecting a given term of home detention.

[12] We also accept that the Judge in this case sought to give credit by adopting home detention. But we are persuaded that insufficient credit was given. Mrs Faasootauloa was plainly a suitable candidate for home detention, which adequately served the needs of deterrence and denunciation in this case, in which there was an element of provocation and the violence administered by her was not especially serious. Parity of treatment with Mr Aokuso did not require imprisonment, since it was his personal circumstances that precluded home detention in his case.

² At [19].

[13] Counsel agreed that the mitigating factors together warranted a reduction of a little less than 40 per cent of the starting point, which would result in a term of approximately 15 months imprisonment.

[14] Having regard to the seriousness of the charge, the group attack, and the use of household items as weapons, however, we think it appropriate to select a home detention term of nine months, which slightly exceeds 50 per cent of the appropriate term of imprisonment. Put another way, we accept that the use of home detention in lieu of imprisonment itself reflects the mitigating factors to some extent.

Decision

[15] The appeal is allowed. The sentence of 12 months home detention is quashed and a sentence of nine months home detention substituted.

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