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

EXTANT ORDER PROHIBITING PUBLICATION OF THE NAME OF THE APPLICANT TO AVOID IDENTIFICATION OF THE COMPLAINANTS

IN THE SUPREME COURT OF NEW ZEALAND

SC 106/2015
[2016] NZSC 31

BETWEEN	A (SC 106/2015) Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	R M Lithgow QC for Applicant M J Lillico for Respondent
Judgment:	23 March 2016

JUDGMENT OF THE COURT

The application for recall is dismissed.

REASONS

(Given by Glazebrook J)

[1] On 17 December 2015 this Court (William Young, Glazebrook and O'Regan JJ) dismissed Mr A's application for leave to appeal to this Court against his conviction and sentence on a series of sexual offences against members of his family.[1]

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1 *A (SC 106/2015) v R* [2015] NZSC 191.

[2] Mr A applies for a recall of the judgment on the basis that two of the three-member panel who dismissed the leave decision also sat on the Court of Appeal's decision in *R v AM*.[2] Mr A says that his application challenged the sentencing guidelines in that judgment insofar as they relate to the treatment of intra-familial sexual abuse. Mr A also says that he wishes this Court to consider issues relating to the underlying process behind *R v AM*, including reliance on the work for the proposed Sentencing Council.

[3] Before dealing with the issue of whether the judges should have recused themselves, we will set out the nature and extent of Mr A's offending and summarise the main features of *R v AM*. Then we deal with some process issues.

The offending

[4] Mr A's most serious offending was against his daughter, including a representative count of indecent assault, a representative rape count and various other counts of sexual violation. This offending started when she was five years old, with the first rape occurring when she was eight years old. There were convictions on further charges when she was 19, including one count of rape.

[5] Mr A was also convicted on a count of penetrative anal sex against his younger brother, who was 14 at the time of the offending. The third victim was his 17 year old niece. In that case, there were convictions on two separate counts of indecent assault and one of attempted sexual connection.

[6] Mr A was sentenced to 18 years imprisonment. The sentencing judge identified,[3] among the aggravating features of the offending, violence and threat of violence, vulnerability of the victims and breach of trust, particularly in relation to his daughter "who was entitled to look to [Mr A] for love and support and safety rather than being a victim of [Mr A's] sexual violence".[4] He also outlined the profound effect the offending had on the daughter and younger brother.[5]

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2 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 (William Young P, Chambers, O'Regan, Robertson and Ellen France JJ) [*R v AM*].

3 Judge Rollo was also the trial judge.

4 *R v A* DC Tauranga CRI-2011-070-002188, 9 July 2013, at [20].

5 At [11]–[12] and [14].

The approach in *R v AM*

[7] The judgment in *R v AM* is designed to provide guidance for judges in sentencing for sexual violation. The approach taken is to set out overlapping sentencing "bands" which identify ranges of starting points reflecting the intrinsic seriousness of the offending. Any sentence is then adjusted up or down to reflect circumstances personal to the offender.[6] The Court of Appeal noted that this structured sentencing approach is now embedded in New Zealand's sentencing practice and that it promotes consistency and transparency in sentencing in conformity with s 8(e) (consistency) and s 31 (the duty to give reasons) of the Sentencing Act 2002.[7]

[8] Two sets of bands are contained in *R v AM*: the first set applies where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects (called the "rape" guidelines for convenience) and the second set deals with sexual violation involving other forms of unlawful sexual connection.[8]

[9] The rape guidelines have four bands:[9]

(a) rape band one: 6-8 years;

(b) rape band two: 7-13 years;

(c) rape band three: 12-18 years;

(d) rape band four: 16-20 years.

[10] The Court of Appeal set out a series of factors relevant to assessing culpability and therefore the proper placement in the bands.[10] It noted, however, that the first point of reference for sentencing judges is the Sentencing Act and that, given the wide variety of circumstances, it is not possible to give an exhaustive list of relevant factors.[11] Factors relating to culpability that are identified in the judgment and that are of relevance in Mr A's case include violence (including threats of

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6 *R v AM*, above n 2, at [14]. That paragraph also explains a modification in that approach in relation to guilty pleas.

7 At [15].

8 At [5].

9 At [90].

10 At [37]–[64].

11 At [35]–[36].

violence),[12] harm to the victim,[13] scale of offending,[14] breach of trust[15] and degree of violation.[16]

[11] The Court emphasised that, in considering the culpability of offending in a particular case, what is required is an evaluative exercise of judgment. Judges have a degree of latitude in this exercise, which must be fact specific.[17]

Process issues

[12] The first process point is that a recusal application should have been made at the time the application for leave to appeal was filed. Counsel knew that Mr A wished to challenge *R v AM* and knew (it being a matter of public record) that three of the five Supreme Court judges had sat on that case. The application should have asked that those judges not be assigned to decide the leave application and set out the reasons why that request was being made. Had this been done, the matter would have been dealt with in accordance with the Supreme Court's *Conflict of Interest Protocol*.[18]

[13] The matter, however, proceeded to judgment without a recusal application. The Protocol does not deal with this situation. Recall applications would normally be dealt with by the panel which decided the application. Where the recall application is made on the basis that a judge who decided the application should have recused him or herself, this may not always be appropriate.

[14] In this case, however, the matters raised relate to the ordinary court work of the relevant judges while they were on the Court of Appeal.[19] There would therefore have been no issue with the recall application being dealt with by the original panel.

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12 At [38]–[39].
13 At [44].
14 At [47]–[49].
15 At [50].
16 At [52].
17 At [79].
18 Supreme Court of New Zealand *Conflict of Interest Protocol* (27 February 2008). This is subject to the judges considering that the threshold in [3] of that protocol was met. The Protocol is available at <http://www.courtsofnz.govt.nz>.
19 There is no suggestion of any inappropriate behaviour with regard to *R v AM*, such as what occurred in *El-Farargy v El-Farargy* [2007] EWCA Civ 1149, [2007] FCR 711.

As this application raises issues relating to recusal that may arise in other cases, however, the whole Court has dealt with the recall application.

[15] There is another process issue. In this case, Mr A wishes to challenge *R v AM*. Where an appellant wishes to challenge a sentencing guideline judgment or aspects of it (rather than its application in the individual circumstances), we would normally expect that to be signalled in the Court of Appeal so that, when an application for leave is made, this Court would have the benefit of the Court of Appeal's view on the matters sought to be raised.

Should William Young and O'Regan JJ have recused themselves?

Test for apparent bias

[16] A judge should disqualify him or herself from hearing a case[20] "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".[21] The fair minded lay observer is presumed to view matters objectively and be reasonably informed about the legal system and the issues in the case.[22] The observer must be taken to understand that a judge is expected to be independent in decision-making and has taken the judicial oath and that judges are also expected to sit on cases allocated to them unless grounds for disqualification exist.[23] Judges should not recuse themselves without sufficient cause.[24]

Was the test met in this case?

[17] It is asserted on behalf of Mr A that a fair-minded observer may consider that, because of their involvement in *R v AM*, William Young and O'Regan JJ may not have been able to bring an impartial mind to the question of whether leave should be

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20 Subject to qualifications relating to waiver or necessity.

21 *Saxmere Company Ltd v Wool Board Disestablishment Company Limited* [2009] NZSC 72, [2010] 1 NZLR 35 (Blanchard, Tipping, McGrath, Gault and Anderson JJ) at [3]; quoting *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

22 At [5].

23 At [8].

24 S Sedby "When should a judge not be a judge" [2011] 33 LRB 1 at 9. See also Shimon Shetreet and Sophie Turenne in *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd ed, Cambridge University Press, Cambridge, 2013) at 214.

granted so that this Court could consider whether *R v AM* deals properly with intra-familial violence. This effectively suggests that a fair-minded observer would apprehend that they would have prejudged the application for leave.

[18] There is no doubt that it would not be appropriate for a judge to sit on an appeal from one of his or her own decisions. Here, however, what is being asserted is that William Young and O'Regan JJ should not have been on the panel which decided Mr A's application because of their earlier involvement in a different case involving different parties.

[19] We do not accept the submission that a judge's involvement in a case involving different parties but similar issues to those arising in another case precludes that judge sitting on the basis of a reasonable apprehension of prejudgment. This applies even where the court is being asked to depart from the principles or approach outlined in the previous case.

[20] The first point is that the doctrine of precedent means that judges are required to be influenced by earlier decisions, including their own. This, by itself, does not constitute grounds for alleging the appearance of prejudgment.[25] Even where a court is not bound by a decision,[26] judges would expect to give due consideration to cases that have been decided on similar points and at all court levels. Again, these may be earlier decisions of their own and may include, where a judge has moved courts, cases decided while he or she sat in a court lower in the hierarchy.

[21] Judges are also asked at times to overrule or reconsider earlier cases (where the doctrine of precedent allows). They will do so in light of the submissions made in and the circumstances of the particular case in front of them. The effect of Mr A's contention is that judges who sat on an earlier case can never sit on a subsequent case involving the same or similar issues where the correctness of the earlier decision is in issue. That position does not accord with caselaw or with relevant judicial conduct guidelines.

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25 See the discussion in John Tarrant, *Disqualification for Bias* (The Federation Press, Annandale (NSW), 2012) at 120–122.

26 Such as where it is a decision of a court lower in the hierarchy.

[22] In *Minister for Immigration and Multicultural Affairs v Jia*, Gleeson CJ and Gummow J said that, in order to be disqualified for bias in the form of prejudgment, a judge's state of mind must be one "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented".[27] They said that natural justice "does not require the absence of any predisposition or inclination for or against an argument or conclusion".

[23] The United States Supreme Court made similar comments in *Liteky v United States*:[28]

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favouritism or antagonism that would make fair judgment impossible.

[24] The Court in *Locabail (UK) Ltd v Bayfield Properties Ltd* said that all cases must be decided on the particular facts but "at any rate ordinarily" no objection could be soundly based on previous judicial decisions or extra-curricular utterances, including in textbooks, lectures, speeches and articles.[29]

[25] The New Zealand *Guidelines for Judicial Conduct*[30] recognise that there may be cases where a judge should disqualify him or herself from hearing a case if it concerns a matter upon which a judge has made public statements of firm opinion.[31] This can include expressions of opinion in an earlier case or in an earlier stage of a proceedings.[32] However, the "expression of opinion would have had to have been

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27 *Minister for Immigration and Multicultural Affairs v Jia* [2001] HC 17, (2001) 205 CLR 507 at 532. See also Kirby J at 546–547; Hayne J at 562–565 and Callinan J at 591.

28 *Liteky v United States* 510 US 540 (1994) at 555. The position in the United States is complicated by the distinction made there between extra-judicial and judicial functions but the comment we quote is still apt to the New Zealand position. For more detail on the position in the United States, see Richard E Flamm *Judical Disqualification* (2nd ed, Banks & Jordan Publishing Co, Berkeley, 2007).

29 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 2 WLR 870 (CA) (Lord Bingham CJ, Lord Woolf MR, Sir Richard Scott VC) at 480. It was also said that the writing of books and articles is not incompatible with the judicial function but judges must exercise care to ensure that they do not express themselves in terms that indicate preconceived views which are so firmly held that it may not be possible to try the case with an open mind: at 495.

30 *Guidelines for Judicial Conduct* (March 2013), available at <http://www.courtsofnz.govt.nz>.

31 At [39].

32 At [40].

extreme and unbalanced before a reasonable observer would think the judge not able to have an open mind."[33]

[26] Similarly the *Guide to Judicial Conduct* in the United Kingdom provides that recusal "will seldom, if ever, arise from what a judge has said in other cases".[34] The Australian *Guide to Judicial Conduct* also states "[w]hat a judge may have said in other cases by way of expression of legal opinion whether as obiter dicta or in dissent can seldom, if ever, be a ground for disqualification".[35]

Some final comments

[27] Even had we considered it appropriate to recall the judgment, we would not have granted the application for leave.

[28] Mr A submits that intra-familial sexual offending should not be in band four in *R v AM*. We note first that all "intra-familial sexual abuse" is not placed in band four. Band four is said in *R v AM* to apply to cases where the lead offence is one engaging the rape guidelines and which involves the same sorts of factors that place offending at the higher end of rape band three.[36] The offending in band four is, however, likely to involve multiple offending over a considerable period of time rather than single instances of rape. Repeated rapes of one or more family members over a period of years was said to be a "paradigm-case" of this type of offending, particularly where the offending involves children and teenagers.[37]

[29] Rape band three includes cases where there are two or more of the factors increasing culpability to a high degree or more than three of those culpability factors to a moderate degree.[38] Mr A's offending engaged at least four of those factors.[39] In

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33 At [39]. See similar comments in Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Oxford, 2009) at 133.

34 Judges' Council *Guide to Judicial Conduct* (March 2013) at [3.10]. The Guide is available at <https://www.judiciary.gov.uk>.

35 Council of Chief Justices of Australia *Guide to Judicial Conduct* (2nd ed, Australian Institute of Judicial Administration, 2002) at [3.4]. The Guide is available at <http://www.aija.org.au>.

36 *R v AM*, above n 2, at [108].

37 At [109].

38 At [105].

39 See at [6] and [10] above.

addition, the offending involved multiple victims, all children and teenagers (one very young) and was over a long period.

[30] This case therefore would not be an appropriate case to reconsider the approach to intra-familial sexual abuse in *R v AM*, even if it were arguable that such reconsideration were warranted. We note that there is flexibility built into the approach in *R v AM*. It is made clear that the rape guidelines apply to set a starting point only. Individual family circumstances can be taken into account when considering the personal mitigating circumstances of an offender.[40] We also note the Court of Appeal's comments that the guidelines are just that and judges must assess the appropriate sentence in light of all the circumstances.[41] The position therefore does not have the rigidity asserted by Mr A.

[31] Further, Mr A's sentence was 18 years. In the Court of Appeal counsel submitted that his sentence should have been 15 years but accepted that the sentence could legitimately have been 17 years.[42] Thus, even on the approach Mr A wishes to submit should have been followed, the sentence may not have been significantly different from the one imposed.

Result

[32] The application for recall is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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40 See at [7] above.
41 See at [11] above.
42 *A (CA37/2014) v R* [2015] NZCA 377 (French, Heath and Mallon JJ) at [61].