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 BY S 140 OF THE CRIMINAL JUSTICE ACT 1985 TO AVOID IDENTIFICATION OF THE COMPLAINANTS

IN THE SUPREME COURT OF NEW ZEALAND

SC 106/2015
[2015] NZSC 191

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

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	R M Lithgow QC for Applicant M J Lillico and F G Biggs for Respondent
Judgment:	17 December 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] Mr A seeks leave to appeal against a Court of Appeal decision[1] dismissing his appeal against conviction on a number of charges relating to sexual offending against his daughter, brother and niece. He also seeks leave to appeal against the dismissal of his appeal against sentence.

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1 *A (CA37/2014) v R* [2015] NZCA 377.

[2] It is submitted that Mr A was deprived of an opportunity to put his defence at trial. In particular, he was not able to put the defence that the allegations were untrue and arose out of the whanau dynamics related to the whanau home. That the allegations were made because of resentment about the family home was put to Crown witnesses and denied. It is also alleged that this defence was effectively taken away from the jury by the trial judge.

[3] Mr A objects to the prosecutor's address in which the jury was told that questions are not evidence. It is submitted this is not correct in the sense that cross examination works by offering a different narrative which the jury should be able to take into account in their assessment of the total dynamics.

[4] It is submitted further that the Judge's summing up was unbalanced and that the tripartite direction was wrong and inadequate. It is accepted that a tripartite direction may not have been necessary but, as it was embarked on, it should have been complete.

[5] As to sentence, it is submitted that, while in general conformity with the Court of Appeal's guideline judgment in *R v AM (CA 27/2009)*,[2] it is nevertheless manifestly excessive. This is on the basis that intra-familial sexual abuse should not be in band four (16 to 20 years' imprisonment), as set out by the Full Court of the Court of Appeal in *R v AM*. Even if *R v AM* is correct, it is submitted that a small adjustment to sentence should be made.

Court of Appeal decision

[6] As to the argument that Mr A's defence that the allegations of sexual offending were motivated by family grievances was taken away from the jury by the trial Judge in his summing-up, the Court of Appeal said that, there was nothing in the evidence to demonstrate any relevant animosity about the ownership of the home and, in any event, it was no more than a suggestion that had been put to witnesses.

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2 *R v AM (CA 27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

Thus, the Court of Appeal said Judge Rollo rightly suggested that the jury focus on other evidence in making their assessments on credibility.[3]

[7] Dealing with Mr A's complaint that the Crown prosecutor had stated that questions are not evidence, the Court of Appeal endorsed the prosecutor's statement that a question is not evidence itself. It said that, instead, a jury is to "consider the answer given to the question and the way in which the witness answered that question, in the context of the other evidence in the trial, to determine whether they accept that the witness's evidence on that point is credible and reliable".[4]

[8] On the argument that the trial Judge's summing up was unbalanced, the Court of Appeal was satisfied that, while the Judge did spend more time on the Crown evidence, this was inevitable given that the nature of the defence and overall there was no error or lack of balance in the summing up.[5] As to the argument that the trial Judge had failed to complete the tripartite direction, the Court of Appeal was satisfied that, despite not using the words "secondly" and "thirdly", the trial Judge had outlined the three possibilities and had adequately conveyed the relevant points to the jury.[6]

[9] Turning to the sentence appeal, the Court of Appeal said that Mr A's offending was "squarely within band four" and the starting point of the trial Judge was "unimpeachable as falling within the middle of that range".[7]

Discussion

[10] The matters raised with regard to the conviction appeal are all particular to the facts and circumstances of this case. No matter of general or public importance arises. All the points Mr A now raises were dealt with in the Court of Appeal. Nothing that has been raised in this Court indicates that there is a risk of a miscarriage of justice.

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3 At [30].
4 At [35].
5 At [45]–[46].
6 At [52].
7 At [62].

[11] As to the sentencing appeal, the sentence is, as the Court of Appeal held, "unimpeachable" in terms of *R v AM*.[8] Mr A seeks to raise matters of broad sentencing policy, many of which are already accommodated in the principles in the Sentencing Act 2002 and by the parole regime, and others which would require legislative change to implement. To the extent it is argued that intra-familial sexual abuse should be treated differently from other similar abuse, the submission is rejected. If anything, the fact that abuse occurs in a familial setting where victims should have been safe may often be an aggravating factor.[9]

[12] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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8 *R v AM*, above n 2, at [62].

9 See for example s 9(f) and (g) of the Sentencing Act which provide that it is an aggravating factor if "the offender was abusing a position of trust or authority in relation to the victim" and that the "victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender". These aggravating factors are often relevant in the familial context.