HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND CALLINAN JJ

GRAHAM HENRY DOGGETT APPELLANT

AND

THE QUEEN RESPONDENT

Doggett v The Queen
[2001] HCA 46
9 August 2001
B54/2000

ORDER

1. *Appeal allowed.*

2. *Order of the Supreme Court of Queensland Court of Appeal of 29 October 1999 set aside and in place thereof, order that:*

   (a) the appellant's appeal to that Court be allowed;

   (b) the appellant's conviction on all counts be quashed; and

   (c) there be a retrial.

On appeal from the Supreme Court of Queensland

Representation:

A J Rafter for the appellant (instructed by Dearden Lawyers)

L J Clare for the respondent (instructed by the Director of Public Prosecutions (Queensland))

CATCHWORDS

Doggett v The Queen

Criminal law – Direction to jury – Events allegedly occurred between 1979 and 1986 – Complaints made to police in 1998 – Taped telephone conversation allegedly corroborating complaints – Whether *Longman* warning required – Whether case suitable for application of proviso.

Criminal Code (Q), s 668E(1A).

1 GLEESON CJ. In our system of criminal justice, a trial is conducted as a contest between the prosecutor (almost always a representative or agency of the executive government) and the accused (almost always an individual citizen). In the case of a trial by jury for an indictable offence, the presiding judge takes no part in the investigation of the alleged crime, or in the framing of the charge or charges, or in the calling of the evidence. Where the accused is represented by counsel, the judge's interventions in the progress of the case are normally minimal. The prosecution and the defence, by the form in which the indictment is framed, and by the manner in which their respective cases are conducted, define the issues which are presented to the jury for consideration. Those include not only the ultimate issue, as to whether the prosecution has established beyond reasonable doubt the accused's guilt of the offence or offences alleged, but also the subsidiary issues which, subject to any directions from the trial judge, are said to be relevant to the determination of the ultimate issue. Such a system, sometimes described as adversarial, reflects values that respect both the autonomy of parties to the trial process and the impartiality of the judge and jury.

2 The manner in which a trial is conducted, and in which the issues are shaped, especially where (as in the present case) an accused is represented by experienced and competent counsel, has a major influence upon the way in which the case is ultimately left to the jury, and upon the directions, comments and warnings, from the trial judge to the jury, that may be appropriate or necessary. Directions are not ritualistic formularies. Their purpose is to assist the jury in the practical task of resolving fairly the issues which have been presented to them by the parties.

3 When an accused person has been convicted, and appeals, there is often an attempt to present the defence case in a new way. This appeal provides an example of the necessity, when evaluating criticisms of a trial judge's directions to a jury, to relate those criticisms to the manner in which the trial was conducted.

4 The facts of the case are set out in the judgment of McHugh J, with which I agree. I would emphasise the following matters.

5 The jury were directed to consider each charge separately, but it was acknowledged in argument in this Court, and it is apparent from the record of the trial, that the defence case was not conducted on the basis that the appellant might be guilty of some of the alleged offences but not others. Counsel said that in "the way the defence case was conducted [it] was an 'all or nothing' contest". That, in turn, had significance as to the effect of the evidence that corroborated the complainant. Having regard to the way the case was fought, the corroborative effect of such evidence could not be confined to particular charges.

6 The conduct of the case was heavily influenced by the recorded telephone conversation between the complainant and the appellant. The appellant and his

lawyers were aware of that evidence in advance of the trial, and it may be inferred that the way in which the defence would seek to deal with that evidence was a major tactical consideration. The contents of the tape made it virtually impossible for the appellant to deny that sexual activity had occurred between him and the complainant. The battle lines were drawn in a different manner. The complainant said that she was the victim of sexual abuse. The appellant said that he was the object of unwanted sexual advances from the complainant, which he did nothing to encourage, and which he consistently and properly rejected.

7 When, in the course of the telephone conversation, the complainant confronted the appellant with the allegation that he molested her as a child, he said he was sorry. In his evidence in chief at the trial, the appellant sought to explain this as meaning that he was sorry he had ever become involved with the complainant and her mother. When he was cross-examined, the appellant could give no explanation, other than that he was "a bit confused". The appellant did not suggest in evidence, and his counsel did not suggest in argument to the jury, and it was not suggested in argument in this Court, that the appellant was expressing regret about inappropriate encounters, initiated by the complainant, to which he had failed to respond in a suitably firm and parental way. Moreover, such a suggestion is inconsistent with the appellant's account of his response to the complainant's alleged advances. Counsel acknowledged in argument in this Court that it was never part of the appellant's case that he was slightly ashamed of his own behaviour.

8 As the case was fought, delay in complaining, and any resulting forensic disadvantage to the appellant, was not an issue of which the defence sought to make substantial capital.

9 These circumstances, in combination, explain why there was no request for the trial judge to give what has been referred to, elliptically, in argument as a *Longman* warning. The appellant must have known that much would depend upon whether he had an acceptable explanation of what he had said in his telephone conversation with the complainant and, in particular, of his apologetic responses to her allegations. The recorded conversation was a central feature of the trial. As McHugh J points out, there was other corroboration as well. If, by a *Longman* warning, is meant a warning that it was unsafe to convict on the uncorroborated evidence of the complainant, in the circumstances of this case such a warning, to be of practical assistance to the jury, would have required the trial judge to go into the matter of corroboration, to direct the attention of the jury to the evidence capable of being regarded as corroborative, and to explain its possible significance. Why would defence counsel invite that? As far as he was concerned, the less said about corroboration the better.

10 *Longman v The Queen*[1] is not authority for the proposition that, in any case where there has been substantial delay in complaining of a sexual offence, it is, on that account alone, imperative to give a warning that it would be "dangerous" or "unsafe" to convict on the uncorroborated evidence of the complainant. Furthermore, in the present case, the jury could not reasonably have found that the evidence of the complainant was uncorroborated.

11 In *Longman* Deane J, referring to the significance of the delay on its own, said:[2]

> "The long effluxion of time (more than twenty years) between alleged offences and complaint and alleged offences and trial is of much greater significance. However, it would not, in my view, suffice of itself to produce the consequence either that it was not open to the learned trial judge to fail to be satisfied that a warning of the kind described in s 36BE(1)(a) was justified or that the verdict was unsafe and unsatisfactory in the absence of such a warning. True it is that such delay can be disadvantageous to an accused. In the context of the criminal onus of proof, it can be even more disadvantageous to the prosecution. Be that as it may, it does not seem to me that those possible disadvantages to an accused necessarily require a warning of the kind described in s 36BE(1)(a). The direction which would ordinarily be appropriate to deal with them would be one aimed at drawing attention to the particular difficulties facing the accused in presenting his case so long after the alleged offences."

12 When Deane J was referring to "a warning of the kind described in s 36BE(1)(a)" he was referring to a warning to the effect that it is unsafe to convict on the uncorroborated evidence of the complainant. Although it was never made completely clear, that is presumably what counsel for the appellant in the present case meant by "a *Longman* warning". Deane J was expressly rejecting the need for that kind of warning as a result of delay alone. He went on to refer to a direction that would be appropriate in a case where it could be suggested that there were particular difficulties facing an accused as a result of delay. That, it may be added, would depend upon the nature of the case and the manner in which it was fought.

13 In the present case, since trial counsel asked for no warning, he did not need to formulate one. The use of the expression "a *Longman* warning" is not particularly enlightening, unless accompanied by an explanation of the terms of

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1 (1989) 168 CLR 79.

2 (1989) 168 CLR 79 at 100.

the warning, and may distract attention from the need to relate all directions to the circumstances of the particular case, and to the issues as they have emerged for resolution by the jury.

14 As was noted above, this is not a case in which it was reasonably open to the jury to conclude that the evidence of the complainant was uncorroborated. And it is not a case which was fought on the basis that the corroborative evidence might realistically have been regarded as having a significance related only to some counts. A warning that it would be unsafe to convict on the uncorroborated evidence of the complainant would have had no practical relationship to the task confronting the jury. That, it may be inferred, was the assessment made not only by the trial judge but also by trial counsel; and the assessment was correct. Even worse, from the point of view of defence counsel, a judge giving such a warning would then have been drawn into the subject of corroboration; a subject on which the defence would have not wished to dwell.

15 If, on the other hand, it were suggested that there should have been a different direction, of the second kind referred to by Deane J in the passage quoted above, it also would have had to be related to the circumstances of the case. However, as the case was fought, it was not one in which importance was said to attach to difficulties for the defence caused by delay. That, again, explains why no such direction was sought.

16 This is a case which, on appeal, has taken on a new complexion, unrelated to that which it bore at trial. The Court of Appeal of Queensland was right to reject it.

17 The appeal should be dismissed.

18 GAUDRON AND CALLINAN JJ. The issue in this appeal is whether the Court of Appeal of Queensland was right to hold that the trial judge did not err in not giving the jury a direction that has come to be called a *Longman*[3] direction.

Case history

19 The appellant was born on 12 January 1943. He was between 36 and 43 years of age over the period from 10 October 1979 to 1 November 1986 during which he was alleged to have committed the seven offences of a sexual nature with which he was charged.

20 The complainant was born on 11 October 1971. She was between 8 and 15 years of age over the period of the alleged offences.

21 The offences with which the appellant was charged were as follows:

Count	**Date**	**Charge**
1	10.10.79 - 12.10.80	Indecent dealing with a girl under 14 years
2	10.10.79 - 12.10.80	Indecent dealing with a girl under 14 years
3	10.10.79 - 12.10.80	Indecent dealing with a girl under 14 years
4	1.1.81 - 1.1.83	Attempted rape
5	1.1.81 - 1.1.83	Attempted rape
6	1.10.85 - 24.11.86	Indecent dealing with a girl under 16 years
7	1.9.86 - 1.11.86	Indecent dealing with a girl under 16 years

The appellant was tried by Britton DCJ with a jury in May 1999 and convicted on 1 June 1999.

The complainant's evidence

22 The complainant's evidence of the seven offences was as follows:

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3 *Longman v The Queen* (1989) 168 CLR 79.

Counts 1 and 2

23 The complainant said that the first offence was committed at her residence in Gladstone beginning just after her eighth birthday. She said that her mother suffered from a faulty valve in her heart and had travelled to Brisbane for treatment. She and her brothers were left in the appellant's care for the two nights that her mother was away. She said that one evening she awoke from a bad dream. She went to the appellant's room and told him she was scared. The appellant told her to get into bed with him, which she did. She awoke later to find the appellant with his hand fondling her inside her underclothing. She told him she did not like what he was doing and he stopped. She was awakened later by similar conduct by the appellant. The complainant said that she asked him what he was doing and he replied, "It's something that daddy's do". The complainant again told the appellant that she did not like what he was doing and said that if he did not stop, she would tell her mother. The appellant replied that if she told anyone, her mother and brothers would be taken away from her.

Count 3

24 The next offence was alleged by the complainant to have occurred 2 to 3 months later. The appellant and the complainant were at home alone. The appellant called the complainant into his bedroom. He was lying on the bed masturbating. He took the complainant's hand and placed it on his body where he had ejaculated.

Counts 4 and 5

25 The complainant was 10 years old. She said that when she came out of the toilet, she saw the appellant. He had a towel around his waist and was not wearing a shirt. He asked the complainant for a cuddle. He rubbed his hands up and down her back and over her buttocks. He then asked her to lie on the floor. He removed her shorts and underclothing. He lay on top of her. The complainant said that he attempted to have intercourse with her. The complainant complained that he was hurting her. The appellant said that he "couldn't fit". The appellant then told her to go into her bedroom and lie on the bed. Again, the appellant lay on top of her and made a further attempt to have intercourse with her. The complainant said that she heard footsteps on the veranda. The appellant, she said, got up, grabbed his towel and left the room. A short time later, her older brother came into her room and asked her what the appellant had been doing there. She said that she yelled at him and told him to go away.

Count 6

26 The complainant said that this offence occurred when she was in grade 9 and was aged 13 or 14. The family had by then moved to a different address. After school one afternoon, the complainant was swimming in the pool at the residence with a friend. She noticed the appellant standing in the sunroom upstairs looking down at the pool. She asked her friend to go home. When she went upstairs, the appellant took her arm and pulled at her bikini shorts with his other arm. The complainant said that she managed to escape and run to the toilet where she waited until she heard her mother return home 15 minutes later.

Count 7

27 The complainant's evidence was that this offence occurred in 1986. She was about 15 years old. She was swimming in the pool with her mother. She went upstairs to get drinks. She opened the door of the refrigerator and was bending over looking into the refrigerator. The appellant approached from behind and pulled the back of her pants down slightly. He slid his hand underneath her buttocks and towards the front of her body.

The complaints

28 The circumstances of the making of the complaints were these. Shortly after the occurrence of the seventh offence and at a time when the appellant was at work, the complainant told her mother that the appellant had been touching her private area since she was a little girl. The complainant's mother said that this complaint was made to her in about September or October 1986. Her mother questioned the complainant who told her that for a period the appellant had ceased to touch her but "now he's started up all over again."

29 In cross-examination, the complainant said that in 1987 she told a former school friend, Ms A, that the appellant had touched her sexually and had attempted to have sexual intercourse with her. Ms A gave evidence in the defence case. She categorically denied that the complainant had told her that the appellant had touched her sexually or attempted to have intercourse with her.

30 In late 1990 the complainant became upset after leaving a night club and seeing a car similar to the one the appellant used to drive. When she saw the car she was "very, very drunk." When she reached her home, she told her mother for the first time of the allegation of attempted sexual intercourse.

31 The complainant made a statement to the police on 12 February 1998. A few weeks later, on 6 March 1998, the complainant, with the assistance of an

investigating police officer, tape recorded a telephone conversation between the appellant and the complainant.

32 The complainant's mother gave evidence at the trial. She said that she and her elder son visited the appellant and confronted him with the complainant's allegations in 1987. She said that the two of them yelled at the appellant and that the son wanted the appellant to "fight it out man to man." She was unable to remember whether the appellant admitted or denied the allegations. Some weeks, or months afterwards, the complainant's mother who by then was separated from the appellant met him at Flinders Park on the waterfront at Gladstone to discuss ownership of the house in which they had been residing. After discussing that matter, she asked, "Why did you do those things to [the complainant]?" She said that the appellant replied "I don't know." She then said that she "… knew [the complainant] wasn't a lying little bitch, as he had continuously called her, and I wanted to know just how did it all start." She said that the appellant responded, "It started as a joke that got out of hand."

33 The tape recording to which we have referred was admitted into evidence. Because of its importance, the relevant parts of the transcript of it should be set out:

> "C: And um, I just need to know why, Graham, to be honest? Why did it happen? Why did you choose me?
>
> A: Oh, [K], I really didn't, did I? It was a terrible - one of those situations.
>
> …
>
> C: Why did it happen?
>
> A: I don't know. I really don't know. It shouldn't have but it did.
>
> C: Are you sorry for it or…?
>
> A: Yes, of course I am.
>
> C: Because you molested me, you know that?
>
> A: Um…
>
> C: What?
>
> A: I heard you. I heard you.
>
> C: [Indistinct] It has made me a bit stuffed in the head for so many years, that's all?

A: Mmm.

C: I just wanted to know why?

A: I don't have a reason. Um, I don't know what you expect me to say, [K].

C: I suppose you're at work, you can't really talk anyway but I just - it's just - I don't know, that's been bugging me for years, just to know why - why it happened to me and I was an eight year old child?

A: Um.

C: [Indistinct] I know years ago you told mum it started as a joke - a bad joke or something like that, you told mum?

A: No. I never really told your mum. Um - mmm.

…

C: I've got to ask, [indistinct] got children?

A: Ah, yes.

C: And this isn't happening to them, is it?

A: No. No, it's not, [K]. I'm surprised you asked that. I really am.

C: Are you? What I've got to ask because it's made me [indistinct]?

A: Mmm. No, it's happening to no one else. It won't happen to anyone else. I - the situation that developed between you and me was unreal. It should never have happened.

C: Well, you're sorry for molesting me as a child?

A: If that's what you want to hear, [K], yes.

C: Well you're not sorry or you are sorry?

A: Yes, of course I am. I'm sorry the whole thing happened. I really am. Okay?"

34 The complainant's brother gave evidence. He was able to recall the occasion upon which the complainant had shouted at him and told him to go away. He also described the confrontation between the appellant and his mother and himself. He did not say that the appellant made any admissions on that occasion.

35 The appellant gave evidence. The effect of it was that the complainant was sexually precocious: that she had eavesdropped on the appellant's and her mother's lovemaking; that the complainant had placed the appellant's hand between her legs and said, "Hurry up while mum's in the shower;" that on occasions the complainant pulled his shorts down; that she once said to the appellant, "Do you have a condom to have sex with me?" and that there were other times when the two engaged in boisterous physical conduct with sexual undertones.

36 There were some unusual features of the appellant's case. The appellant's evidence included that after separating from the complainant's mother, he continued to have an association with the complainant and her mother. For example, the complainant's 15th birthday party was held at the appellant's residence. In January 1987, the appellant, the complainant and her mother went on a holiday together. During the trip, from time to time they all shared the same room.

37 With respect to the two discussions with the complainant's mother, the appellant said that on both occasions the allegations were accompanied by demands, the first for a half interest in a house and the second for payment of money. The appellant accepted, however, that these demands should not be regarded as attempts to blackmail him.

38 His explanation for the contents of the telephone conversation, with respect to his conduct with and towards the complainant, was that this was a reference to the "sexual banter" which had passed between the complainant and himself.

39 At no time before or after the trial judge's summing up was any application made for a direction. Indeed, no applications of any kind were made for redirections.

40 The appellant was convicted on all counts. He appealed to the Court of Appeal of Queensland. The Court of Appeal regarded the contents of the telephone conversation as highly significant. Pincus JA (with whom Ambrose J agreed) said that the statements made by the appellant in the conversation did not suggest that he "had any difficulty in understanding to what conduct the complainant was referring." McPherson JA also pointed out that it was clear that the appellant recollected the events or offences to which reference was being made. Pincus JA was, for those reasons, of the opinion that a *Longman* direction would not have been appropriate. McPherson JA said that it would have been completely mechanical and would have had a potential to confuse the jury.

The appeal to this Court

41 The only ground of appeal to this Court is that the Court of Appeal should have held that a new trial should be ordered by reason of the failure of the trial judge to give a *Longman* direction.

42 The respondent, understandably, places heavy reliance on the responses of the appellant to the complainant's accusations during her telephone conversation with him. It is certainly true that they are well capable of corroborating the complainant's complaint to the extent that the appellant actually "molested" her. That is not to say, however, that the responses are entirely unequivocal. And it is not possible to say precisely what molestation actually occurred and was being accepted as having occurred by the appellant, and whether it fell short of the misconduct alleged in the counts with which he was charged. We will return to these matters a little later. But before doing so we will identify and discuss the features of the case which, the appellant argues, required that a *Longman* direction be given.

43 First, there is the fact that the complainant was only eight years old when the first and second offences are alleged to have been committed. Whilst it may be accepted that, of course, in adulthood people may have vivid and clear recollections of events which occurred when they were children, the evidence in this case itself demonstrates the truism that accounts of events remote in time need to be carefully scrutinised. The complainant's evidence was that the first two offences alleged took place at the residence which her mother, her family, and the appellant were occupying in late 1979 or early 1980 during a period when her mother was in Brisbane for medical treatment. In fact, other material before the court fairly conclusively proved that although her mother was treated in Brisbane in February 1980, the appellant did not move into the family residence until June 1980. In his reasons for judgment, Pincus JA suggested an explanation for the discrepancy, that "the appellant looked after the complainant and her brothers, on the occasion in question, some time before moving into the complainant's mother's house on a permanent basis." That suggestion will need further examination. With respect to the third count, the appellant pointed out that its timing was related by the complainant to the occasions of the first two counts and was, it was argued by the appellant, therefore subject to the same criticisms as the first two counts.

44 The other matters which, the appellant submitted, brought the case within *Longman* were the young age of the complainant when the offences were alleged to have occurred, the long period that elapsed between the first, subsequent and final "complaints", and the conflict between the complainant and Ms A regarding the making of one of them to her.

45 The principal challenge to the reasoning of the Court of Appeal, however, was made in a submission that their Honours (wrongly) regarded the availability of corroboration as extinguishing the need for a *Longman* direction. Although the submission overstates the position that was adopted by the Court of Appeal, Pincus JA did conclude that the nature of the corroboration provided here, the responses in the telephone conversation, made a *Longman* direction inappropriate. McPherson JA, who agreed with Pincus JA, said in addition that the responses of the appellant during the conversation disclosed an awareness of the events of which the complainant was speaking and an ability to recollect them adequately.

46 In our opinion, the corroborative evidence which was led here did not relieve the trial judge of the obligation to give a *Longman* direction for the following reasons.

47 First, the complainant's evidence with respect to the circumstances surrounding the first three counts made the point that the complainant's recollection of some matters was, to say the least, questionable.

48 Secondly, the suggested explanation for the complainant's assertions as to the approximate times of the first two offences is not one, with respect, which strikes us as very likely. It was not suggested as an explanation by the trial judge in his summing up on these counts. If it had been, there and then it would probably have drawn attention to the need for a direction of the very kind for which *Longman* stands.

49 Thirdly, there was evidence from an apparently independent source, Ms A, categorically denying sworn evidence by the complainant that she had told Ms A some years before that she had been sexually touched by the appellant.

50 Fourthly, and inevitably, the respondent was obliged to some extent to shift the basis of the prosecution when the discrepancy as to dates with respect to the first two counts, and consequentially if less significantly, to the third, emerged.

51 Fifthly, the problems with which *Longman* is intended to deal are not confined to difficulties of recollection that the passage of time might cause for an accused. Of equal, and in some cases of which this might be one, or more importance is the denial by the effluxion of time, to an accused of the forensic weapons that a timely complaint might allow an accused to assemble, such as evidence as to where he was or what he was doing, or what other potential witnesses were doing when the offences were alleged to have occurred.

52 This is made clear by the joint judgment (Gaudron, Gummow and Callinan JJ) in *Crampton v The Queen*[4]:

> "The trial judge should have instructed the jury that the appellant was, by reason of the very great delay, unable adequately to test and meet the evidence of the complainant. Her Honour should not have offered the qualification that she did in relation to the remarks she did make about the delay. An accused's defence will frequently be an outright denial of the allegations. That is not a reason for disparaging the relevance and importance of a timely opportunity to test the evidence of a complainant, to locate other witnesses, and to try to recollect precisely what the accused was doing on the occasion in question. In short, the denial to an accused of the forensic weapons that reasonable contemporaneity provides, constitutes a significant disadvantage which a judge must recognise and to which an unmistakable and firm voice must be given by appropriate directions. Almost all of the passage of the majority in *Longman* to which we have referred (with appropriate adaptations to the circumstances of this case, including that because of the passage of so many years, it would be dangerous to convict on the complainant's evidence alone without the closest scrutiny of the complainant's evidence), should have been put to the jury."

53 Sixthly, as we have already indicated, the corroboration was capable of establishing some undefined sexual molestation, probably improper, but not necessarily criminal in the respects alleged in the counts, and therefore not of such a nature as to relieve the trial judge of a duty to direct the jury in terms of *Longman* as explained in the passage from *Crampton* set out above.

54 Seventhly, the approach of the Court of Appeal involved to some extent an inversion of reasoning. The correct approach in our opinion was to examine the evidence relevant to the particular matters with which *Longman* deals to ascertain whether the case called for a *Longman* direction, and not to make a broad assessment of the evidence overall (including the corroborative evidence), and to decide at that point, that the corroboration rendered a *Longman* direction unnecessary. That exercise should more appropriately be carried out in the overall assessment of the case, if and after error has been established, to enable the Court to decide whether the verdict was unsafe and unsatisfactory and whether the proviso should be applied.

55 Having concluded that a *Longman* direction should have been given, the exercise to which we last referred is one which we now must carry out. The case

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4 (2000) 75 ALJR 133 at 141 [45]; 176 ALR 369 at 379.

was in many respects a strong one. Apart from its omission of a *Longman* direction, the summing up of the trial judge was not, and could not be, subjected to criticism of any kind. Furthermore, the experienced counsel who represented the appellant at his trial made no request for a *Longman* direction. And it was suggested that it should be inferred that that was a deliberate decision designed to avoid unfavourable directions with respect to the taped telephone conversation. Nonetheless, this was a case which did call for a *Longman* direction. We would not regard the giving of it as a merely mechanical exercise. It could have had an important bearing here on the appellant's reliability on matters both of detail and real substance. Any reasonable doubt that a *Longman* direction might have engendered in the minds of the jury on the first two counts could well also have influenced their views on the other counts. It could have affected the jury's view, in particular the significance of the evidence of Ms A. These considerations outweigh any forensic disadvantage that may have been suffered, if in consequence of the giving of a *Longman* direction, directions had also been given with respect to the taped telephone conversation. For these reasons, we cannot be satisfied that the appellant has not lost a real chance of an acquittal.

Orders

56 We would uphold the appeal, quash the verdicts on all counts and order a retrial of them.

57 McHUGH J. A jury convicted the appellant of seven offences of sexually assaulting his step-daughter. She was aged eight when the first three offences occurred and 15 when the last offence occurred. The step-daughter's evidence concerning the assaults was corroborated:

- by an admission to her mother,
- by her brother seeing the appellant leave his sister's bedroom naked and holding a towel in front of him, and
- by a recorded telephone conversation between the appellant and the step-daughter.

But no charge was brought against the appellant until over 18 years after the first offence. Should the convictions of the appellant be set aside because the trial judge did not warn the jury that it would be dangerous to convict the appellant having regard to the delay and the effect that it had on his ability to prepare his defence and test the prosecution case? That is the issue that arises in this appeal against an order of the Court of Appeal of Queensland dismissing the appellant's appeal against his convictions. The appellant claims that the decision of this Court in *Longman v The Queen*[5] required the trial judge to give the warning although no direction concerning it was sought at the trial.

58 In my opinion, no direction in accordance with *Longman* was required. Indeed, as an analysis of that case will show, it is not applicable to the present case. Some trial judges, if they had heard this case, might have thought it appropriate to give a direction to the jury concerning the difficulties facing the appellant in defending the charges. But such a direction would have been very different from a *Longman* type direction, was not required as a matter of law, and was never sought. The appeal must be dismissed.

The complainant's evidence

59 The indictment alleged that the seven offences occurred over a period of seven years between October 1979 and November 1986. In support of the first two counts in the indictment, the complainant gave evidence that, on a night when her mother was in Brisbane for a medical examination, she had got into the appellant's bed after having had a bad dream. Later, she awoke to find the appellant with his hands under her underpants rubbing her clitoris. She told him that she did not like it. She went back to sleep. Later, she awoke to find the appellant doing the same thing. The complainant told him that, if he did not stop,

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5 (1989) 168 CLR 79.

she would tell her mother. The appellant said that, if she told anyone, her mother and brothers would be taken away from her.

60 In support of the third count, the complainant said that about two or three months later the appellant called her into his bedroom. He was lying on the bed, masturbating. He ejaculated onto his stomach. He took the complainant's hand and smeared it through the semen on his stomach.

61 In support of the fourth count, the complainant said that, when she was 10 years old, she saw the appellant standing in a hallway with a towel around his waist. He asked her for a cuddle and then rubbed his hands up and down her back and over her buttocks area. He asked her to get on the floor, removed her shorts and underpants and lay on top of her. She said that she could feel something hard trying to penetrate her vagina. When she complained that it was hurting, the appellant said "that he couldn't fit".

62 In support of the fifth count, the complainant gave evidence that the appellant then told her to go into the bedroom and lie on the bed. He got on top of her and she felt a hard object attempting to penetrate her vagina. She believed that it was his penis. The appellant got up, grabbed his towel and left the room when "we heard footsteps" coming up the verandah. She said that her brother then came into the room and asked her what the appellant had been doing in her room.

63 In support of the sixth count, the complainant said that, when she was aged 13 or 14, she was in a swimming costume. The appellant grabbed her by the arm and with his other hand pulled at her "bikini bottoms".

64 In support of the seventh count, the complainant said that, in 1986 when she was about 15 years old, the appellant came up behind her and pulled the back of her pants down slightly. He put his hand underneath her buttocks area and towards her front.

Corroboration

65 An important distinction between this case and *Longman*[6] is that there was no evidence corroborating the complainant's evidence in *Longman*. In this case, there was evidence that strongly corroborated the complainant's evidence.

66 In *R v Kilbourne*[7], Lord Reid pointed out:

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6 (1989) 168 CLR 79.

7 [1973] AC 729 at 750, cited by Brennan CJ in *BRS v The Queen* (1997) 191 CLR 275 at 282.

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

67 No special form of evidence is required to amount to corroboration. It may come from the evidence of other witnesses[8], from admissions by the accused[9] or from inferences drawn from the accused's conduct and statements[10]. Where evidence connects or tends to connect the accused with the crime charged, it corroborates the evidence of a witness directly implicating the accused in that crime because it strengthens the witness's evidence by rendering it more probable[11].

68 In determining whether evidence constitutes corroboration, the question for the judge is whether a reasonable jury could regard the evidence as "increasing the probability that the complainant's entire testimony was truthful"[12]. An admission by the accused that he or she has committed the offence is not only independent evidence of the offence but evidence corroborative of a complainant[13]. However, an admission may be corroboration even if it only refers to one element of the offence. In *R v Massey*[14] the Court of Appeal of Queensland held that, in a case where the accused was convicted of indecently assaulting and raping his step-daughter on several counts, an admission to her mother by the accused that he was the father of the step-daughter's child was corroborative of the step-daughter's evidence. His admission confirmed one of the elements of one of the offences – sexual intercourse. McPherson JA and

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8 *R v Kilbourne* [1973] AC 729.

9 *R v M* [1995] 1 Qd R 213; *R v Massey* [1997] 1 Qd R 404; *R v D* (1998) 71 SASR 99.

10 *Eade v The King* (1924) 34 CLR 154 at 158.

11 *R v Kilbourne* [1973] AC 729 at 758; *Doney v The Queen* (1990) 171 CLR 207 at 211; *BRS v The Queen* (1997) 191 CLR 275 at 283.

12 *R v M* [1995] 1 Qd R 213 at 221 per Davies JA.

13 *R v D* (1998) 71 SASR 99.

14 [1997] 1 Qd R 404.

Demack J said[15] that the admission "tended to confirm, and indeed established, her story that sexual intercourse had taken place, and in that way it corroborated her evidence by 'increasing the probability that [her] entire testimony was truthful'."

69 Similarly a lie or lies by an accused person about a matter relevant to the case may be corroborative of the complainant's evidence. In some cases, the lie may indicate a consciousness of guilt and be an implied admission of the offence as well as corroborative of the evidence of the witness[16]. In other cases, a lie may be corroboration although it is a lie about a fact, innocent in itself. Where such a fact is central to the incriminating witness's evidence, the accused's lie concerning that fact is corroboration because, if the accused has lied about it, the jury "may properly come to the conclusion that his falsehood indicates that the [complainant's] story is true, and that he is telling lies in order to discredit the evidence of the other witnesses because he is unable to account for what they say they saw, in any way consistent with his own innocence.[17]"

70 In the present case, there was powerful evidence of corroboration. The complainant's mother testified that, after the complainant informed her of what the appellant had done to her, she confronted him about the allegations on two occasions. On the second occasion, she asked him, "Why did you do these things to Kym?" She said that the appellant replied "I don't know." The mother said that she said to him that she "wanted to know just how did it all start" and that the appellant replied, "It started as a joke that got out of hand."

71 The complainant's brother also gave evidence that on one occasion he saw the appellant come out of his sister's bedroom, naked, and holding a towel. The appellant walked into his own bedroom and shut the door. He said that he tried to open his sister's door, but she screamed at him to "get away" and pushed the door shut. This corroborated evidence of the complainant describing the incidents which were the subject of the fourth and fifth counts.

72 But the most important evidence corroborating the complainant's evidence was a taped telephone conversation between the complainant and the appellant. In the course of that conversation, the appellant made statements which pointed irresistibly to him having sexually molested the complainant when she was a young child. Some of her questions and his answers were as follows:

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15 [1997] 1 Qd R 404 at 406.

16 *Edwards v The Queen* (1993) 178 CLR 193 at 209 per Deane, Dawson and Gaudron JJ.

17 *Eade v The King* (1924) 34 CLR 154 at 158.

"No, it has and I've just had a really hard time sort of coping with things that did happen when I was younger? - - Oh, right.

And um, I just need to know why, Graham, to be honest? Why did it happen? Why did you choose me? - - Oh, Kym, I really didn't, did I? It was a terrible – one of those situations.

...

Why did it happen? - - I don't know. I really don't know. It shouldn't have but it did.

Are you sorry for it or - - - -? - - Yes, of course I am.

Because you molested me, you know that? - - Um - - - -

What? - - I heard you. I heard you.

...

I just wanted to know why? - - I don't have a reason. Um, I don't know what you expect me to say, Kym.

I suppose you're at work, you can't really talk anyway but I just – it's just – I don't know, that's been bugging me for years, just to know why – why it happened to me and I was an eight year old child? - - Um - - - -

[Indistinct] I know years ago you told mum it started as a joke – a bad joke or something like that, you told mum? - - No. I never really told your mum. Um – mmm.

...

I just thought it might get me out of my misery a bit if I knew why? - - Um, it's a – it's a terrible – terrible hard question to answer. I mean, I don't know how to answer it. I regret it as much as you do. I do.

...

I've got to ask, [indistinct] got children? - - Ah, yes.

And this isn't happening to them, is it? - - No. No, it's not, Kym. I'm surprised you asked that. I really am.

Are you? What I've got to ask because it's made me [indistinct]? - - Mmm. No, it's happening to no one else. It won't happen to anyone else.

> I – the situation that developed between you and me was unreal. It should never have happened.
>
> Well, you're sorry for molesting me as a child? - - If that's what you want to hear, Kym, yes.
>
> Well you're not sorry or you are sorry? - - Yes, of course I am. I'm sorry the whole thing happened. I really am. Okay?
>
> [Indistinct] the phone? - - Well I am. I wish to goodness it had never happened, it wasn't a part of my life but it's happened, there's nothing I can do about it, Kym."

73 The learned trial judge gave the jury a direction on corroboration. But it was a direction that was extraordinarily favourable to the appellant. Although the judge mentioned that the Crown submitted "that there is evidence which corroborates or supports that of the complainant ... in relation to these charges", his Honour confined his directions on corroboration to the fifth count. He made no mention of the appellant's statement to the mother on the second occasion being corroboration of the complainant's evidence. Nor did his Honour tell the jury that the admissions in the taped conversation, if they concluded they were admissions about sexual misconduct, were corroboration of the complainant's evidence. Indeed, the judge did not even tell the jury that the brother's evidence was corroboration of the evidence of the complainant on the fourth count as well as the fifth count.

The appellant's case

74 In evidence, the appellant denied the allegations made by the complainant. But he also alleged that the complainant was a sexually aggressive young woman. He gave evidence that on one occasion the complainant got into bed with him while her mother was in the shower. He said that she took his hand and placed it between her legs, saying "Hurry up, while mum's in the shower". On another occasion, he claimed that the complainant had asked him whether he had "a condom to have sex with me?" He gave evidence of other incidents in which the complainant discussed sexual matters or engaged in conduct that arguably had sexual overtones.

75 The appellant conceded that in 1988 the mother had alleged that he had raped the complainant. The appellant said that, although he could not recall his reply, he would have denied it. He also admitted that on a second occasion the mother had accused him of "fully penetrating Kym sexually". The appellant said that he denied the allegation. In evidence, he sought to explain the incriminating statements in the telephone conversation by reference to "the sexual banter" that had occurred between the complainant and himself.

The *Longman* warning

76 The appellant contended that a *Longman* warning should have been given because there was a delay in bringing the charges. The delay was about 18 years from the date of the first offence and a delay of more than 11 years from the last of the seven offences.

77 In *Longman*, the appellant had been convicted of two offences against a child, the first of them when she was six years old and the second when she was 10 years old. When the complainant in *Longman* gave evidence at the trial, she was 32 years old. She testified that on both occasions she had been asleep when Longman awakened her by touching her genitalia. Her evidence was not corroborated in any respect. In upholding the appeal, Brennan, Dawson and Toohey JJ said[18] that the jury should have been given a direction to the following effect:

> "The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict *on that evidence alone* unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, was satisfied of its truth and accuracy." (emphasis added)

Their Honours went on to say[19]:

> "To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice. The jury were told simply to consider the relative credibility of the complainant and the appellant without either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient."

78 Deane J and I also allowed the appeal. Deane J said[20]:

> "Nonetheless, it appears to me, after carefully reading and rereading the learned trial judge's summing up to the jury, that there is a real risk that, in the absence of any specific warning about the need to scrutinize the complainant's evidence with great care and caution before convicting the applicant *on the basis of it alone*, the jury may have seen the case merely

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18 (1989) 168 CLR 79 at 91.

19 (1989) 168 CLR 79 at 91.

20 (1989) 168 CLR 79 at 102.

> in terms of whether they were satisfied beyond reasonable doubt that the complainant was a truthful witness and that the applicant was not and thereby failed to give proper consideration to the question whether, notwithstanding that the complainant was a truthful witness in the sense that she believed what she said, her evidence provided an inadequate foundation for a finding that the applicant's guilt of the two alleged offences had been proved beyond reasonable doubt." (emphasis added)

79 I said[21]:

> "Accordingly, the present case was one where the requirement of a fair trial required a strong warning to the jury of the potential for error in the complainant's testimony. The jury should have been warned that, in evaluating her evidence, they had to bear in mind that *it was uncorroborated*, that over twenty years had elapsed since the last of the alleged offences occurred, that experience has shown that human recollection, and particularly the recollection of events occurring in childhood, is frequently erroneous and liable to distortion by reason of various factors, that the likelihood of error increases with delay, that the complainant had testified concerning incidents occurring to her as a young child after she had awoken and pretended to be asleep, that no complaint was made to her mother, and that, by reason of the delay and lack of specificity as to the dates, the defence was unable to examine the circumstances of the alleged offences. To what extent these matters needed elaboration or a consequential warning that it would be unsafe to convict on such uncorroborated evidence was very much a matter for the trial judge." (emphasis added)

80 What was critical in *Longman* was that the jury were being asked to convict on *uncorroborated* evidence of events occurring 20-25 years before while the complainant, then a young child, was asleep or waking. It was a reasonable possibility that, although the complainant was an honest witness, her testimony was mistaken or unreliable by reason of her age at the time of the offences, the long delay in complaining and the fact that she was asleep on the occasions when both offences were alleged to have commenced. The Court took the view that the jury may not have appreciated the danger of relying on the evidence of an apparently honest witness concerning events that had allegedly occurred under such circumstances. Thus, the special circumstances of the case required a warning that it was *dangerous* to convict on the *uncorroborated* evidence of the complainant unless her evidence was scrutinised with great care.

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21 (1989) 168 CLR 79 at 108.

A *Longman* warning was not required

81 But the present case is very different. There was no chance of the complainant being mistaken. She was either telling the truth or lying. There was very strong corroborative evidence of her evidence. As a general proposition, it cannot be dangerous to convict on the evidence of a person whose evidence is corroborated. Nor did the jury need to be warned that it was dangerous to convict on her evidence because of delay or the circumstances of the alleged offences. That would be tantamount to introducing a new class of suspect witness into the law. Moreover, the delay in this case was not nearly as long as in *Longman* and the circumstances were very different. The complainant's mother confronted the appellant in 1988, two years after the last offence although nine years after the first offence and there was no chance that the complainant's evidence was honest but erroneous because of the time that had passed.

82 It is true that, in *Longman*, Brennan, Dawson and Toohey JJ said[22]:

> "But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them ... That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay ... and it was imperative that a warning be given to the jury."

83 But the passage has to be read in the light of the material facts in *Longman* including the absence of corroboration of the complainant's evidence in that case. It would be a mistake to think that, in every case where there has been a delay – even a long delay – a trial judge is bound as a matter of law to direct the jury that the accused had lost the opportunity of investigating the circumstances surrounding the offences and that it would be dangerous to convict on the complainant's evidence because of that factor. Jurors don't need judges to tell them that the accused is not in as good a position to defend the charge as he or she would have been if the complaint had been made promptly. Nor do they need to be told that they should scrutinise the evidence of the complainant very

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22 (1989) 168 CLR 79 at 91.

carefully when there has been a long delay in complaining. As it happens in this case, the trial judge told the jury that, because of the lack of complaint in relation to the first six counts, they "should scrutinise her evidence very carefully". But the judge was not bound as a matter of law to give this direction.

84 The appellant also relied on *Crampton v The Queen*[23] as supporting the need for a warning. But *Crampton* was a *Longman* category case. In *Crampton*, where the delay was almost 20 years, Gaudron, Gummow and Callinan JJ said[24] that the jury should have been warned "that because of the passage of so many years, it would be dangerous to convict *on the complainant's evidence alone* without the closest scrutiny of the complainant's evidence". (emphasis added)

85 In some cases, fixed rules of law require a trial judge to give a direction as to the manner in which a jury must or must not reason. From time to time, new warnings or instructions will arise as the result of judges recognising from the collective experience of the judiciary that some factor which undermines the apparent credibility of testimony may not be readily apparent to juries. In *Longman*, Deane J said[25] that the responsibility of giving appropriate directions "includes the giving of an appropriate caution or warning in circumstances where there are potential dangers in acting upon particular evidence which may not, without such a caution or warning, be appreciated by the jury." A comparatively recent example of such a warning being developed by the judiciary is that concerning prison informer evidence[26]. But ordinarily it is not the duty of a trial judge to direct the jury as to how they examine evidence or reason to a verdict.

86 A judge may suggest any line of reasoning to the jury that it may use in its deliberations, as long as he or she tells the jury that they can disregard those comments. A trial judge may even express an opinion as to the verdict that the jury should give[27]. But except in the limited classes of case to which I have referred, judges are not bound to direct juries as to how they should examine the evidence or reason to a verdict.

87 In my opinion, a *Longman* direction was not required. This was not a case of uncorroborated evidence. If the *ratio decidendi* of *Longman* were extended to apply to this case, it would also have required the judge to point to the factors

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23 (2000) 75 ALJR 133; 176 ALR 369.

24 (2000) 75 ALJR 133 at 141 [45]; 176 ALR 369 at 379 [45].

25 (1989) 168 CLR 79 at 95-96.

26 *Pollitt v The Queen* (1992) 174 CLR 558.

27 *R v Tsigos* [1964-5] NSWR 1607; *Dee* (1985) 19 A Crim R 224 at 227.

that corroborated the complainant's evidence. A warning about the dangers of convicting a person where there has been a long delay could not be given without also referring to corroborative factors that pointed to the reliability of the complainant's evidence. So much was conceded by counsel for the appellant in this Court. It may be that it was for that reason that the able and experienced criminal trial lawyer who appeared for the appellant at the trial did not seek any *Longman* direction or any other direction. The brother's evidence that he saw the appellant coming from his sister's bedroom naked and with a towel in front of him was powerful corroboration of her evidence on the fourth and fifth counts. It must have told heavily against the appellant. But, strong though it was, it paled into insignificance when compared to the corroboration afforded by the taped telephone conversation.

88 It was hardly in the interests of the defence case for the trial judge to have directed the jury as to the dangers of convicting on the complainant's evidence if the judge also had to point to the various factors that corroborated her evidence. These factors would have indicated that not only was it safe to convict on her evidence but that the case against the appellant was an overpowering one. As I have pointed out, the learned judge had given a direction on corroboration that was extraordinarily favourable to the appellant. It is scarcely surprising therefore that the experienced senior counsel who appeared for the appellant at the trial did not ask for a direction which would or might have the consequence that the judge would refer in detail to other matters that supported the complainant's evidence.

Was any other warning required?

89 In theory at least, the appellant, if innocent, would have been in a better position to defend himself if the complaints had been made earlier. With more specificity as to the time and dates, in theory he may have been able to show that he was not in the company of the complainant when the incidents were alleged to have occurred. Was the judge required to direct the jury that, in considering the prosecution case, the appellant's defence may have been hampered by reason of the lack of particulars as to dates?

90 As I have indicated, the complainant tied the events that were the subject of the first and second counts to her mother's visit to Brisbane for a medical examination. The mother had medical examinations in Brisbane on 22 February 1980, 20 January 1982 and 18 January 1984. The charges in respect of the first and second offences must have occurred on or about 22 February 1980, if the complainant's evidence about the visit to Brisbane and her age at the time were correct. According to the complainant, these two offences occurred in the appellant's bedroom. But the appellant claimed that he did not commence living with the complainant's mother until June or July 1980. Moreover, the prosecution formally admitted that in September 1988 the complainant's mother had told her solicitor that she commenced living with the appellant in a *de facto*

relationship in June 1980. Thus, it appears to have been common ground at the trial that the appellant was not living at the premises in February 1980.

91 Because of the error, the prosecution sought to explain the discrepancies by reference to the lapse of time and that the two offences simply occurred "when the appellant was minding the children while the mother was in hospital." On this theory, the offence did take place on 22 February 1980, but the complainant had been mistaken in thinking that the appellant was living in the house rather than minding the complainant and her brothers while their mother was away. Obviously, somebody would have been minding the complainant on the night of 22 February 1980 while her mother was away, and other evidence indicated that the appellant was likely to have been the person.

92 The appellant said in evidence that he first met the complainant's mother in late 1979, but that she was then involved with another man. When that relationship ceased he became friendlier with her. He also said that he came to know her children when they came waterskiing during the summer months. That must have been the summer of 1979-1980. The appellant also said that once the association with the mother started they went waterskiing on the majority of weekends. On this evidence, the jury were entitled to be satisfied that the offences had occurred on or about 22 February 1980 while the appellant was minding the complainant. They were entitled to conclude that the complainant was mistaken in so far as she had said that the appellant was then living with her mother, but that this mistake did not mean that she had invented the incidents. Nor did her mistake mean that the offences did not occur on 22 February 1980 when the mother was in Brisbane.

93 In so far as the remaining counts are concerned, they were all alleged to have occurred in the family home. If the complainant had been able to give a date and time for these offences, the appellant at least theoretically may have been able to show that he was not present in the house at the time when the offences were alleged to have occurred. Accordingly, he could only deny these allegations, point to conflicts in the complainant's evidence and claim that she was sexually aggressive.

94 The trial judge would certainly have been entitled to comment to the jury that, if the appellant had been given better particulars, he might have been able to show that he was not at the house on any of the alleged occasions. Some trial judges may have thought it necessary to make such a comment. But the law did not require the judge to give a direction to that effect. I think that it is underestimating the intelligence and the worldly experience of jurors to think that as a class they would not appreciate that, in a case like the present, the accused is not in a position to do much except deny the charge. I suspect that most jurors would see the lack of particulars as damaging the Crown, rather than the defence, case.

95 The trial judge was in the best position to determine whether this jury needed a direction that the delay may have prevented the appellant from testing the prosecution case or preparing his defence. As Windeyer J said of summings up in *Jones v Dunkel*[28]:

> "So much depends upon what counsel said in their addresses; upon incidents in the course of the trial, the significance of which at the time, and their apparent impression upon the jury, the transcript cannot reveal. So much, too, depends upon the judge's view of what guidance the particular jury should have in the particular case; upon how far he may think it unnecessary to go over matters on which counsel addressed; or, on the other hand, on how far he may think he should bring into sharper focus matters which counsel blurred. And much depends on how far he may think it desirable, after advocacy is spent, to redress the balance."

Except where the due administration of justice clearly demands that juries be directed as to particular matters, the contents of summings up are best left to the discretion of those who preside at criminal trials. They are in the best position to determine what needs to be said to the particular jury.

96 The appellant in this case was represented by experienced senior counsel. He did not think it necessary to ask for any direction. That is strong evidence that the trial judge was justified in thinking that there was no need for a comment or direction concerning the appellant's inability to test the prosecution case or prepare his defence. For all we know, counsel for the appellant may have made this point to the jury again and again.

Order

97 The appeal should be dismissed.

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28 (1959) 101 CLR 298 at 314.

98 KIRBY J. The significant question in this appeal[29] is whether this Court should confine or re-express the requirement that trial judges, in cases involving long delays in complaints about sexual offences, must give the jury a warning as required by *Longman v The Queen*[30].

99 In recent years, there has been a significant increase in the number of complaints about sexual offences alleged to have been committed at a time when the complainant was a child[31]. Many cases coming before this Court illustrate this trend[32]. The fact that a complainant did not, when a child, promptly report the sexual misconduct, either to a family member or to the authorities, by no means indicates that the complaint is false. In *Longman* itself, Deane J explained the many reasons why such delays occur, particularly where the offender is a member of the complainant's family[33]. In *Jones v The Queen*[34], I explained why such delays can also arise where the offender is not a family member.

100 Nevertheless, delays in complaint, accusation and formal charge, sometimes involving years and even decades, commonly present serious forensic difficulties for the effective defence and fair trial of the accused. Those difficulties were explained in *Longman*[35]. Because some of the difficulties may not be within the jury's knowledge, *Longman* requires that, when appropriate, the judge must warn the jury about them.

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29 From a judgment of the Supreme Court of Queensland (Court of Appeal): *R v Doggett* [1999] QCA 441.

30 (1989) 168 CLR 79 ("*Longman*").

31 Wood, "Criminal Law Update: Court of Criminal Appeal", (1999) 4 *The Judicial Review* 217 at 227.

32 See eg *Crofts v The Queen* (1996) 186 CLR 427; *Jones v The Queen* (1997) 191 CLR 439; *KBT v The Queen* (1997) 191 CLR 417; *Gipp v The Queen* (1998) 194 CLR 106; *AB v The Queen* (1999) 198 CLR 111; *McL v The Queen* (2000) 74 ALJR 1319; 174 ALR 1; *Dinsdale v The Queen* (2000) 74 ALJR 1538; 175 ALR 315; *Crampton v The Queen* (2000) 75 ALJR 133; 176 ALR 369 ("*Crampton*"); *KRM v The Queen* (2001) 75 ALJR 550; 178 ALR 385; *Ryan v The Queen* (2001) 75 ALJR 815; 179 ALR 193; see also *Re Patterson; Ex parte Taylor*, High Court of Australia, 5-7 December 2000, transcript of proceedings.

33 *Longman* (1989) 168 CLR 79 at 99-100.

34 (1997) 191 CLR 439 at 463-464.

35 (1989) 168 CLR 79 at 91, 108.

101 In the present case, the trial judge gave the jury a warning to "scrutinise [the complainant's] evidence very carefully"[36]. It is conceded that if *Longman* applied, such a warning fell short of what was required. The questions in this appeal are, therefore:

(1) Whether the warning mandated by *Longman* was applicable to this case, in terms of the rule established by that decision;

(2) Whether that rule should be re-expressed to exclude a case such as the present; and

(3) If the rule in *Longman* did apply, whether the appeal should nonetheless be dismissed on the ground that "no substantial miscarriage of justice has actually occurred"[37].

The facts, trial and verdicts

102 Mr Graham Doggett ("the appellant") was tried in May 1999 upon an indictment containing seven counts alleging sexual offences against his former step-daughter ("the complainant"). The facts, and the nature of the evidence and complaints, are set out in the reasons of Gaudron and Callinan JJ. It is sufficient for my purposes to note the following.

103 The incidents referred to in the first and second counts were alleged to have occurred on the same occasions sometime between 10 October 1979 and 12 October 1980. Accordingly, there was a time gap of nearly twenty years between the first two alleged offences and the trial. Because the complainant's first statement to police was not made until 12 February 1998, the delay between these first incidents and notification to the authorities was about eighteen years. The second occurrence, the subject of the third count, allegedly took place some two to three months later. Accordingly, intervals of the same order are involved. The fourth and fifth counts referred to two aspects of attempted sexual penetration alleged to have occurred on a date unknown between January 1981 and January 1983. The sixth count referred to an incident alleged to have occurred on a date unknown between October 1985 and November 1986. The seventh count referred to an alleged incident during September, October or November 1986. The time intervals before the complaint to police and the applicant's trial were correspondingly shorter in respect of these last-mentioned occurrences.

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36 *R v Doggett* unreported, District Court of Queensland, 1 June 1999, summing up of Britton DCJ.

37 *Criminal Code* (Q), s 668E(1A).

104 It was soon after the last-alleged incident that the complainant's mother found the complainant upset and pressed her for an explanation. The mother testified that the first complaint was made in September or October 1986. It allegedly included the accusation by the complainant that "[the appellant] used to touch me when I was little. Then he stopped, but now he's started up all over again". Notwithstanding this report to her mother, the complainant did not specifically mention in 1986 the most serious of the incidents of which she was later to complain, namely the attempted sexual penetration. She only did this in 1990. However, in cross-examination, the complainant said that she had told a former school friend in 1987 that the appellant had touched her sexually and had attempted to have sexual intercourse with her. The school friend was called as a witness in the defence case and gave evidence to the contrary.

105 To this point, the case is not atypical of others of its kind. The offences against the complainant were alleged to have occurred over an interval of about seven years, the earliest at a time when the complainant was eight years of age and the last when she was about fifteen. The complainant fixed the date of the first offences by references to her eighth birthday (which fell on 11 October 1979). She also did so by reference to the fact that her mother had gone to Brisbane for a health check-up leaving the complainant and her brothers in the appellant's care for two nights when she said the offences had occurred.

106 The first incidents complained of bore a certain similarity to the facts of *Longman*. The first two counts here, as there, referred to the accused's touching the genitalia of his domestic partner's young daughter whilst she was asleep in his bed.

107 There was also a long delay in complaint to the mother about the incident involving attempted sexual penetration. On the other hand, the suggestion that something of a sexual character had occurred on that occasion received a measure of confirmation from the evidence of the complainant's brother. He deposed that he had seen the appellant leaving the complainant's bedroom, naked and carrying a towel. The complainant had reacted angrily when her brother demanded to know what the appellant had been doing there.

108 The complaint to the mother of the incident referred to in the seventh count was reasonably prompt. However, the complainant did not become specific about the earlier offences for a further four years. Even then, despite her disclosures to her family, there was no complaint to police, initiating criminal charges against the appellant, until a further eight years had passed.

109 At the close of the trial judge's charge to the jury in the appellant's trial, containing the limited warning set out above[38], no application was made for an elaboration of the warning to ensure that it conformed to *Longman*. It was common ground that counsel who defended the appellant at his trial was experienced and competent. After a retirement of more than eight hours, the jury returned verdicts of guilty on each count. The trial judge imposed substantial sentences of imprisonment.

The decision of the Court of Appeal

110 In the Court of Appeal of Queensland the principal complaint was about the absence of a *Longman* warning. This was met chiefly by reliance on a recording of a contrived telephone conversation that took place between the complainant and the appellant on 6 March 1998[39]. That conversation was apparently initiated on the suggestion of police to whom the complainant had made her accusations.

111 The recording was made without the knowledge of the appellant. No suggestion was advanced at trial, or on appeal, that the recording was illegal under federal or State law or that it should have been excluded from evidence in the trial. Indeed, it was received in evidence without objection. This appeal must therefore be approached on the footing that the recording was properly before the jury. As conceded for the appellant, the recording was capable of being construed as containing admissions by the appellant to sexually molesting the complainant when she was a young child.

112 The Court of Appeal unanimously dismissed the appeal. Pincus JA (with whom Ambrose J agreed) concluded[40]:

> "[I]t is my opinion that a *Longman* direction would not have been appropriate. To suggest to the jury that, despite the strong support given to the complainant by the admissions [in the recorded telephone conversation], it would be dangerous to convict would have seemed to them, rightly, unconvincing. It is my view, also, that this Court is entitled to take into account that the appellant was represented by a senior counsel of very long experience, who did not make any such complaint as is presently put forward, when the trial judge had concluded his directions."

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38 At [101] of these reasons.

39 See the reasons of Gaudron and Callinan JJ at [33].

40 *R v Doggett* [1999] QCA 441 at [22].

113 McPherson JA was of a like opinion. After referring to *Longman*[41], his Honour said[42]:

> "If in this case one thing is clear from the statements in the telephone conversation between the complainant and the appellant in 1998, it is that the appellant recollected the event or events (which were alleged to have taken place between 1979 and 1986) about which she was complaining. He made no suggestion in the course of the telephone conversation that he was unable to do so. That being so, it would have been a completely mechanical application of the requirement stated in *Longman*, as well as potentially confusing to the jury, for the trial judge to have directed them to bear in mind that the [complainant's] recollection in 1998 of those events was, after so long a delay, now incapable of being 'tested' or independently verified."

114 It is from the judgment of the Court of Appeal, dismissing the appeal, that the appellant, by special leave, now appeals to this Court.

The requirements of *Longman*

115 *The essential principle of flexibility*: In a number of recent decisions, this Court has resisted attempts to add needlessly to the duties of judges, presiding in criminal trials held before juries, by insisting on "more, and more complicated, directions than the particular case requires"[43]. The starting point for considering what the law requires in the present case is, therefore, an appreciation of this basic principle. The obligatory components of a judge's directions to a jury should be kept to a minimum[44]. Any directions given must also be comprehensible[45]. They should include basic instructions about the functions of the judge and jury, the onus and burden of proof and the legal elements of the offence or offences charged. However, beyond such essential matters, wide latitude is reserved to the trial judge to provide such warnings and comments as the circumstances of the particular case, and the conduct of the trial, require.

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41 Especially *Longman* (1989) 168 CLR 79 at 91.

42 *R v Doggett* [1999] QCA 441 at [26].

43 *Melbourne v The Queen* (1999) 198 CLR 1 at 52 [142] per Hayne J; see also at 52-53 [143] citing *Alford v Magee* (1952) 85 CLR 437 at 466; *KRM v The Queen* (2001) 75 ALJR 550 at 573 [114]; 178 ALR 385 at 415.

44 See Flatman and Bagaric, "Juries Peers or Puppets - The Need to Curtail Jury Instructions", (1998) 22 *Criminal Law Journal* 207 at 209-211.

45 *Zoneff v The Queen* (2000) 200 CLR 234 at 260 [64]-[65].

116 Where a suggested direction falls outside those which the law holds to be obligatory, the omission of the trial judge to give that warning or comment, later said to have been necessary, will be considered by the appellate court against the touchstone of the "ultimate issue". This is "whether, making due allowance for the advantages enjoyed by the trial judge, the circumstances of the case were such that it was not open to [the judge] to fail to be satisfied that such a warning was justified"[46].

117 It is in the foregoing context that general questions about whether a propounded warning or comment would have been "mechanical" or "artificial", in the circumstances, fall to be considered. Warnings and comments that would be of such a character are not required because, giving them, would involve the judge in "an artificial exercise" rather than the discharge of judicial duties necessary to the lawful conduct of a jury trial[47]. Such warnings would be unrelated to the evidence or the particular circumstances of the case. They might cause puzzlement or confusion for the jury who would ordinarily feel obliged to take seriously what the judge told them about matters of approach, given that the judge speaks from experience which the jurors will usually lack.

118 However, such matters of approach have themselves to be considered in the context of the judge's overriding duty to ensure the fair trial of the accused[48]. That duty is especially important in trials involving accusations likely to arouse strong feelings of prejudice and revulsion. Accusations by a young woman, once a step-daughter of an accused, of sexual molestation when she was as young as eight years and up to the age of fifteen years, are of this kind. Trials involving such allegations impose special burdens on judges. They require the taking of particular care in summing up to the jury. They also impose heavy responsibilities on the representatives of the prosecution and of the accused to assist the judge to avoid legal error which might otherwise cause a trial to miscarry.

119 *The holding in Longman*: Primarily, *Longman* was concerned with the question whether the legislative provision there under consideration[49], relieving a judge of a *general* duty to warn the jury that it would be unsafe to convict an accused on the uncorroborated evidence of a person charged with a sexual

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46 *Longman* (1989) 168 CLR 79 at 98 per Deane J.

47 *Emery* (1999) 110 A Crim R 221 at 230-231 [23] per Slicer J; see *KRM v The Queen* (2001) 75 ALJR 550 at 573 [115]; 178 ALR 385 at 415.

48 *KRM v The Queen* (2001) 75 ALJR 550 at 570 [97]-[98]; 178 ALR 385 at 410.

49 *Evidence Act* 1906 (WA), s 36BE (since repealed).

offence, meant that the judge was not required to give a warning although one was otherwise necessary to avoid the perceptible risk of miscarriage of justice arising from the *particular* circumstances of the case. In *Longman*, this Court unanimously held that the legislation did not relieve the judge of the latter duty. There was a difference of view as to the construction of the legislation and as to the precise warning required. However, all members of this Court were of the opinion that a warning was necessary in the circumstances of that case. The failure of the trial judge to give such a warning left the resulting conviction unsafe in the relevant sense[50]. The conviction was therefore set aside and a new trial was ordered.

120 There were certain differences in the reasoning in *Longman* as to precisely why a warning was necessary, notwithstanding the statutory relief from the obligation to give the warning formerly required by the common law and judicial practice[51]. Yet one common element informed both the joint reasons of Brennan, Dawson and Toohey JJ and the separate reasons of Deane J and McHugh J. This was a recognition of the serious forensic disadvantages suffered by an accused person in a criminal trial in meeting, for the first time, accusations made long after the subject offences were alleged to have occurred. In their separate reasons, Deane J and McHugh J added a reference to a second and related danger, namely the risk that, after such an interval of time, the memory even of an honest witness might become contaminated. A lengthy lapse of time could therefore make acceptance of a witness's testimony dangerous. It was such as to require particular scrutiny and the need for external confirmation of what the witness said.

121 *Loss of forensic advantage*: So far as this first element is concerned, upon which this Court was unanimous, the joint reasons state[52]:

> "[T]here is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them. That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that

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50 *Longman* (1989) 168 CLR 79 at 91.

51 *Hargan v The King* (1919) 27 CLR 13 at 19-20, 22-24.

52 *Longman* (1989) 168 CLR 79 at 91 (footnotes omitted).

> opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay and it was imperative that a warning be given to the jury. The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy."

122 In his reasons, McHugh J made a similar point[53]:

> "[There] must be added the total lack of opportunity for the defence to explore the surrounding circumstances of each alleged offence. By reason of the delay, the absence of any timely complaint, and the lack of specification as to the dates of the alleged offences, the defence was unable to examine the surrounding circumstances to ascertain whether they contradicted or were inconsistent with the complainant's testimony."

123 The foregoing points have been repeated in decisions of this Court since *Longman*. They were most recently restated in *Crampton*[54]. In that case, I drew attention to the distinction drawn in the joint reasons in *Longman* between a "*comment* (which a trial judge may and sometimes should give to ensure the fairness of the trial) and a *warning* (which in circumstances of 'long delay' it is 'imperative', in the sense of obligatory, that the trial judge must give to the jury)"[55]. Whereas a *comment* simply reminds the jury of matters ordinarily within the experience of non-lawyers which they may otherwise overlook, a *warning* derives from the special experience of the law[56]. To the suggestion made in *Crampton* that such matters could properly be left to the good sense of the jury, I said[57]:

> "The passage of time - especially great time - may make it difficult, or impossible, to secure ... weapons for an adequate defence. A jury may not understand this. A judge will. And the law requires that the judge warn the jury in clear and unmistakable terms."

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53 *Longman* (1989) 168 CLR 79 at 108.

54 (2000) 75 ALJR 133; 176 ALR 369.

55 (2000) 75 ALJR 133 at 156 [125]; 176 ALR 369 at 400 (original emphasis).

56 (2000) 75 ALJR 133 at 156 [126]; 176 ALR 369 at 401.

57 (2000) 75 ALJR 133 at 157 [132]; 176 ALR 369 at 402.

124 *Honest but erroneous memory*: This second cause of danger was added to the foregoing considerations in *Longman* both by Deane J and McHugh J. The need for reference to it arose out of a stated conclusion of Deane J that, on the transcript in that case, the evidence of the complainant had read "convincingly"[58]. On such evidence, it was therefore not surprising that the jury had "plainly rejected the applicant as a witness"[59]. It was in such circumstances, in some ways similar to the present, that Deane J proceeded to deal with a special problem that can arise in the case of a convincing witness who honestly believes the truth of his or her testimony. Where an accused is substantially confined to denial of the accusations, or to paltry counter-accusations, many years after the alleged offences, such a complaint can present particular dangers about which jurors may be unaware or insufficiently aware. Deane J said[60]:

> "The possibility of child fantasy about sexual matters, particularly in relation to occurrences when the child is half-asleep or between periods of sleep, cannot be ignored. The borderline between fantasy and reality can be an uncertain one. Contemporaneous questioning of the child may distinguish fantasy from reality. The long passage of time can harden fantasy or semi-fantasy into the absolute conviction of reality. So to say is not to suggest that the allegations of the complainant in the present case arose from fantasy or semi-fantasy. It is simply to explain why ... in the particular circumstances of the case, the complainant's evidence of the alleged offences which was not given until so long after their alleged occurrence required to be scrutinized with very great care indeed. It was not merely a matter of whether the jury was satisfied beyond reasonable doubt that the complainant was an honest witness and that the applicant was not."

125 To the same effect were the reasons of McHugh J[61]:

> "The longer the period between an 'event' and its recall, the greater the margin for error. ... Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine[62]. ...

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58 (1989) 168 CLR 79 at 98.

59 (1989) 168 CLR 79 at 99.

60 (1989) 168 CLR 79 at 101.

61 (1989) 168 CLR 79 at 107-108.

62 Hunter, *Memory*, rev ed (1964) at 269-270.

> The opportunity for error in recalling, twenty years later, two incidents of childhood which are alleged to have occurred as the complainant awoke, and then pretended to be asleep, are obvious. Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be."

126 *Long delays - obligatory warnings*: It would not ordinarily be expected that jurors would be aware of the findings of experimental psychology or of the common experience of forensic contests, and other data supporting the reflections about memory, mentioned in *Longman.* Judges, on the other hand are, or should be, aware of such matters. That is why, in a case of long delay, a warning must be given to a jury. A comment, or reliance on the comments and arguments of counsel, would not, in such cases, be sufficient.

127 The criterion for the provision of a warning as stated in *Longman* is not mathematically precise. For example, in a case involving a comparatively short interval between the alleged offence and a subsequent complaint to family members or to authorities, a warning might not be necessary[63]. However, the longer the delay, the clearer is the obligation to give the warning to the jury along the lines at least of that stated in the joint reasons in *Longman*[64]. In an appropriate case, it would also be as well for the warning to contain reference to the additional consideration mentioned by Deane J and McHugh J in their separate reasons.

128 The present was obviously a case of "long delay". So much was conceded by the prosecution[65]. So much could hardly have been contested given that the warning in *Longman* itself was required in a case involving comparable delays. Similar warnings have been required in this and other Australian courts in circumstances in which the delay was much shorter than it was in the present case[66]. On the face of things, therefore, a "full" *Longman* warning was required in this case.

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63 See *R v Fotou* unreported, Court of Appeal of Victoria, 26 June 1996 as noted in Gutman, "Case and Comment: *Fotou*", (1997) 21 *Criminal Law Journal* 46 at 49 (delays of between 4 months and 2 days).

64 See Freckelton, "Repressed Memory Syndrome: Counterintuitive or Counterproductive?", (1996) 20 *Criminal Law Journal* 7 at 15 and cases there cited.

65 Respondent's submissions at [4].

66 In *Crofts v The Queen* (1996) 186 CLR 427 the delay between the first alleged offence and complaint to police was approximately six years, although offences

(Footnote continues on next page)

129 No argument was advanced that this Court should reconsider its decision in *Longman* with a view to abolishing the warning there required. Had such an argument been mounted the appeal would have taken a different course and the Court would have been differently constituted[67]. Accordingly, the starting point for analysis is the acceptance of the principle for which *Longman* stands. But what is that principle? Should it be re-expressed to confine its application? Does it avail the appellant in this particular case?

The suggested confinement of *Longman* fails

130 *Longman was not confined to its facts*: During argument, it appeared to be suggested that the rule in *Longman* was confined to the particular facts of that case. This is a completely incorrect approach to ascertaining the legal principle for which a judicial decision stands. Except in the very rare case, where no other rule can be extracted, a principle established by a judicial decision is not confined to the peculiar facts of the case in which the principle is stated. To suggest otherwise would run counter to the opinions of all members of the Court in *Longman*. It would be incompatible with the nature of the two dangers that were identified as requiring that a warning be given. Those dangers are of a general character. *Longman* is not, therefore, a decision about either the circumstances of the alleged sexual offences against a sleeping girl in the accused's bed or the precise length of time that elapsed between the offences complained of and the first complaint to family or police. Dangers of general application, rather than particular facts, called forth an appropriate judicial remedy.

131 *Corroboration does not make Longman inapplicable*: The second argument was that a *Longman* warning was only required where there was no corroboration of the testimony of the complainant. As there was some corroboration in this case, so the argument ran, no *Longman* warning was required here.

132 It is true that, taken in isolation, some of the remarks in *Longman* appear to give support to this proposition. However, it must be remembered that, in *Longman*, the Court was primarily concerned with the interpretation of a statute which relieved a judge of the former requirement to warn a jury, in certain circumstances, that "it is unsafe to convict the person on the uncorroborated

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were alleged to have continued until six months before complaint. In *Jones v The Queen* (1997) 191 CLR 439 the delay was more than four years.

67 By convention, submissions to overrule the authority of the High Court are heard by the entire Court.

evidence of the [complainant]"[68]. Having regard to the provisions of the statute, it was unsurprising that specific reference should have been made in the Court's reasons to the issue of corroboration, evidence confirmatory of the complaints being wholly absent from the facts of *Longman*.

133 However, the principal point of the opinion of all members of the Court in *Longman* was that the statute, which relieved the trial judge of the common law duty to warn, did not provide an exemption from any broader, or different, duty to warn which arose otherwise than under the former rule concerning uncorroborated complaints of sexual offences. If, apart from that former rule, other features of the case required that a warning be given, the statutory provision in question was silent. It said nothing about the judicial duty then arising. That duty remained. Its content remained as defined by the common law[69].

134 To ascertain whether, apart from the circumstances of lack of corroboration, warnings of the kind required by *Longman* are necessary, it is therefore essential to address the particular mischief which the judges in *Longman* identified. This was the serious forensic disadvantage involved in responding to accusations made many years after events. And, in the case of long delay, it also included the special danger presented by honest, and apparently convincing, but erroneous testimony. It is the special knowledge which judges have gained through legal experience that needs to be brought to the notice of a jury in such cases.

135 Such special knowledge is not necessarily answered by the existence, in a particular case, of some evidence corroborating some, or all, of the complaints in question. As Gaudron J pointed out in *M v The Queen*[70], "corroboration or lack thereof is only one of many considerations which bear on the evaluation of evidence". Furthermore, where (as here) the corroboration is patchy, in some respects unspecific and in others completely silent on the incidents referred to in the charges, the mere fact that corroborative evidence of some kind exists will not entirely remove the utility, and the necessity, of a *Longman* warning.

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68 *Evidence Act* 1906 (WA), s 36BE.

69 There was no consideration in *Longman* nor argument in this Court in the present appeal, as to whether the Constitution itself requires that a judge of an Australian court must ensure that the conduct of a criminal trial is fair to the accused; cf *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289-290 [80], 295 [115]; 176 ALR 644 at 662, 670.

70 (1994) 181 CLR 487 at 510.

136 In a number of cases in State courts, the existence of some corroborative evidence has been held not to relieve a trial judge of the duty to give a *Longman* warning where the considerations identified in *Longman* are or might still be relevant[71]. In my opinion, this is the correct approach. To the extent that a jury might, in their reasoning, rely on an acceptance of the complainant without taking into account the special forensic dangers mentioned in *Longman*, those dangers will remain. In cases of long delay that fact will impose the duty to give a *Longman* warning so that the jury will take it into account in reaching their verdict.

137 *Longman applies even in strong prosecution cases*: Next it was suggested that a *Longman* warning was only required where, otherwise, it would be dangerous to convict the accused. Because, as it was put, there was no such danger in the present case, *Longman* did not require that a warning be given.

138 The ultimate issue is whether there is a miscarriage of justice or whether the trial resulted in an unsafe conviction[72]. However, this is an issue that can only be answered at the end of analysis, as Deane J's process of reasoning in *Longman* illustrates. The giving of a *Longman* warning is not rendered unnecessary simply because the prosecution's case is strong, or because there are admissions by the accused or some other evidence confirming a complainant's accusations. To reason in that way would be to ignore the particular forensic dangers which *Longman* identified. If, notwithstanding the strength of the prosecution case, the existence of admissions and the presence of evidence confirming that of the complainant, it is still possible that the jury may have reached their conclusion, wholly or mainly reliant on acceptance of the complainant's testimony without benefit of the *Longman* considerations, the requirements stated in *Longman* will not have been complied with. To the extent that the jury's reasoning could take them down such a path, the result may (as in *Longman*) be a trial that is unfair, and a conviction that is unsafe, in the relevant sense.

139 *Legal policy resists confinement of Longman*: Quite apart from consideration of legal authority, there are, in my view, strong reasons of legal principle and policy to restrain this Court from diminishing the ambit of the rule in *Longman*. That decision has been repeatedly affirmed and the rule recently applied[73]. The clearer and simpler the rule, the more likely is it that it will be

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71 eg *R v Aristidis* [1999] 2 Qd R 629 at 632-634 [11]-[16]; cf *R v Eberle* [1999] QCA 58 at [28]-[29].

72 (1989) 168 CLR 79 at 97.

73 eg *Crofts v The Queen* (1996) 186 CLR 427 and *Crampton v The Queen* (2000) 75 ALJR 133; 176 ALR 369; see also *Robinson v The Queen* (1999) 197 CLR 162.

uniformly complied with, thereby avoiding mistakes, the miscarriage of trials and unnecessary appeals.

140 In many overseas jurisdictions, the dangers that can arise for the fair trial of an accused, because of greatly delayed criminal accusations, are resolved by the application of statutes of limitation. Alternatively, they are met by the ready provision of a stay of proceedings where a conclusion is reached that a fair trial could no longer be had[74]. In Australia, there is no applicable statute of limitation. Furthermore, the provision of stays is exceptional[75], although occasionally such orders are made in courts of this kind[76]. One of the reasons why, in this class of case, stays are exceptional, is because judges know that, in *Longman* and the cases since, this Court has required firm judicial instructions to juries about the particular dangers that can be occasioned by lengthy delays in the making of a complaint and the commencement of criminal proceedings.

141 For these reasons, and because the considerations identified in *Longman* remain as true today as when they were first stated, I could not support any re-expression of the requirements of that decision. Nor do I favour the redefinition of the ambit or content of the rule in *Longman* to provide exceptions and exemptions incompatible with the reasons that gave rise to the *Longman* warning in the first place.

142 *Conclusion: the judge's directions were defective*: It follows that the appellant has made out his complaint that the directions given by the trial judge to the jury were inadequate by the *Longman* standard. The delays, particularly in respect of the first five counts, between the alleged events and the first complaint were very great indeed. The delays between the alleged offences and first accusation to the police were extremely long. The warning given by the trial judge to the jury completely omitted reference to the considerations, special to the law's experience, upon which *Longman* places emphasis. Subject to the operation of the proviso, the appellant is therefore entitled to a new trial. But does the "proviso" operate in this otherwise strong prosecution case?

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74 See *Klopfer v North Carolina* 386 US 213 (1967); *Barker v Wingo* 407 US 514 (1972) considered in *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 565-570, 571-572, 583.

75 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 28-29, 49, 62, 72, 77.

76 *Smith* (2000) 117 A Crim R 1.

The operation of the proviso

143 *The prosecution's alternative argument*: The Director of Public Prosecutions ("the Director") submitted that if, contrary to her primary argument, a *Longman* warning was required, the appellant's appeal should be rejected by applying the "proviso"[77]. She pointed, correctly, to the strength of the prosecution case against the appellant. At trial, he did not challenge the accuracy of the recorded telephone conversation. He sought to explain it as containing references to sexual banter between himself and the complainant, not to sexual offences. By inference, it was put, such an interpretation must have been rejected by the jury. The appellant had accused the complainant of repeated conduct towards him involving inappropriate behaviour on her part, by which he suggested that she had been mature beyond her years in sexual matters and had acted towards him in ways that he had rebuffed. It was submitted that, by inference, such allegations must also have been rejected by the jury.

144 The Director also relied on the fact that the complainant's mother gave evidence that the complainant had told her, successively, of the appellant's alleged offences in 1986 and 1990. In 1987, together with her son, she had confronted the appellant from whom she had by then separated, with the complainant's allegations. She was unable to remember whether the appellant had immediately admitted or denied them. However, she said, subsequently he admitted that he did not know why he had done "those things" to the complainant, claiming that "it started as a joke that got out of hand". If believed, these statements amounted to evidence of admissions by the appellant upon which the jury could rely to infer his guilt of the offences charged. To this evidence reference was added to the testimony of the complainant's brother, who described the highly suspicious circumstances, when he returned home, of finding the appellant walking naked out of the complainant's bedroom.

145 In such circumstances, taken as a whole, the Director submitted that the conviction of the appellant on all counts was inevitable[78]. Any *Longman* direction that might have been given to the jury by the judge, concerning the dangers and difficulties presented by delays in complaint and accusation, would have had to include countervailing references to the testimony of the complainant's early complaints to her mother about the 1986 incident; the mother's evidence of admissions by the appellant in response to those complaints; the testimony of the brother as to what he had seen; and the appellant's admissions in the recorded telephone conversation.

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77 *Criminal Code* (Q), s 668E(1A).

78 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Glennon v The Queen* (1994) 179 CLR 1 at 8; *Green v The Queen* (1997) 191 CLR 334 at 346-347; *KBT v The Queen* (1997) 191 CLR 417 at 434-435.

146 *Relevance of the omission to seek redirection*: The Director argued that the omission of experienced counsel to ask for a *Longman* warning by way of redirection could only be understood in the light of a forensic assessment from which the appellant, on appeal, should not be permitted to resile. This was said to be that any benefit gained by a specific judicial reference to the "dangers" accepted in *Longman* could be outweighed by the repetition, in that context, of reference to the facts and circumstances that tended to explain the delay or to minimise its importance in the present case.

147 Clearly, the failure of experienced trial counsel to seek redirection in terms of *Longman* is a consideration relevant to the application of the "proviso". In Queensland, there is no added procedural hurdle for a person in the position of the appellant to overcome, such as exists in other jurisdictions[79]. I accept that sometimes an omission on the part of legal representatives will suggest an informed forensic choice made in the belief that it is in the accused's best interests. At other times, however, even experienced counsel make mistakes or are guilty of oversight and omission that should not redound to the serious disadvantage of an accused[80].

148 The Director did not suggest that the failure of trial counsel to seek a redirection in terms of *Longman* was fatal to the appellant. In this case, it could hardly be so. The trial judge had already mentioned to the jury, as he was entitled to do, all of the foregoing facts that amounted to considerations countervailing dangers possibly occasioned by the serious delays. It is difficult, in such circumstances, to accept the argument that an informed choice could have been made to condone the omission to request the judge to make special reference to the law's experience about the particular dangers of delay mentioned in *Longman*. Most advocates, in cases to which the rule in *Longman* applies, will want the judge to give such a warning. Moreover, if the deprivation of effective forensic weapons and the dangers of apparently truthful but erroneous testimony are real (as *Longman* suggests) in cases where the delays are as long as they were in the present case the overall effect of a proper warning will usually be protective of the accused's position, as indeed it is intended to be.

149 *Analysis of possible jury reasoning*: This Court has pointed out many times that, because appellate courts are necessarily unaware of how a jury has reasoned, they must consider arguments such as the present on a footing that it is possible that the jury accepted some parts of the prosecution's case and rejected

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79 eg Criminal Appeal Rules (NSW), r 4.

80 See *KRM v The Queen* (2001) 75 ALJR 550 at 570-571 [101]; 178 ALR 385 at 412.

others[81]. At least this possibility must be allowed so long as the reasoning propounded is consistent with the jury's verdict.

150 Here, the jury may have ultimately based their conclusion about the guilt of the appellant upon acceptance of the testimony of the complainant in preference to the appellant's denials. In a case such as the present, the powerful effect of the testimony of a person such as the complainant can carry along a jury's reasoning towards a conclusion of guilt that sweeps aside any problems in the prosecution's case. This is why it is ordinarily necessary, in cases of substantial delay, to give the *Longman* warning about the disadvantages that an accused faces. Unless such warnings are given the danger exists that the considerations that would otherwise be mentioned in the warning may not be taken into account at all. The powerful effect of the complainant's testimony may then, alone, produce a conclusion which is ill-considered, or inadequately considered.

151 The essential point in *Longman* about the comparative disadvantages suffered by an accused person in the position of the appellant is borne out by the way in which the appellant's trial unfolded. To the extent that he could do so, the appellant sought to test and challenge the complainant's evidence by reference to specific facts. Thus, in respect of the first two counts, he sought to challenge the complainant's evidence by reference to the fact, admitted by the prosecution at trial, that cohabitation between the appellant and the complainant's mother did not commence until after the date on which it was claimed that the complainant had entered his bed when the mother was in Brisbane. When this point was apparently made good at trial, the prosecution sought to shift its ground and to explain, in part, the confusion in the dates by reference to the long lapse of time. However, whereas that interval of time created a difficulty for the prosecution, it presented the appellant with the dangers that *Longman* identified. The jury should have received a warning about those dangers so that they could be taken into account during deliberation.

152 In respect of those allegations which the appellant could test by reference to objective evidence still available (such as the date of the commencement of cohabitation with the complainant's mother and the allegation that incidents were reported to a school friend) the appellant's case made some headway. It was when the case was confined to no more than accusation and denial that the appellant's case became much less persuasive. For example, by the delay in complaint, the appellant lost the opportunity which prompt examination of the complainant by a medical practitioner soon after the incidents referred to in counts 4 and 5 took place, would have provided. Criminal accusations can be disproved by such evidence. But without it, an accused's case will often be

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81 *Domican v The Queen* (1992) 173 CLR 555 at 570-571.

confined, substantially, to mere denial. Whether that denial is accepted or rejected then depends very much on the sometimes unreliable consideration of the impression made by a person during the trial.

153 To reach the conclusion that no substantial miscarriage of justice has occurred, this Court has to be of opinion that the appellant had not lost a real chance of acquittal because of the failure of the trial judge to give the *Longman* warning[82]. It has to reach an affirmative conclusion that the identified error was immaterial in the particular circumstances. Such a conclusion can be reached. In two recent appeals involving child sexual offences I have favoured application of the "proviso", although on each occasion I was in a minority on the point[83]. In *Whittaker*[84], the Court of Criminal Appeal of New South Wales observed, correctly in my opinion, that it was "fair to say that there is a diminished inclination in recent times to invoke the proviso (even in otherwise very strong Crown cases) where misdirection has been shown upon an important ingredient of the law applicable to the trial"[85]. The authority of this Court[86] was cited in explanation of why this was so. This assessment of the recent approach to applications of the "proviso" was recently approved in this Court by Callinan J[87]. It accords with my own impression and also with my inclination.

154 That the prosecution's case was a strong one is not enough to outweigh the accused's entitlement to a trial in which necessary directions and warnings have been given to the jury. To displace this entitlement, an appellate court must reach the conclusion that, in effect, the conviction of the appellant was inevitable on the evidence. Is this the case here? If the appellant had confessed in the recorded telephone conversation to the specific crimes charged, a court might reach that conclusion. But he did not.

155 *The recorded telephone conversation*: The circumstances of the recorded telephone conversation must be kept in mind when considering what a jury could

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82 *Wilde v The Queen* (1988) 164 CLR 365 at 371-372.

83 *Jones v The Queen* (1997) 191 CLR 439 at 468; *KRM v The Queen* (2001) 75 ALJR 550 at 574-575 [123]-[129]; 178 ALR 385 at 417-418; cf *Crofts v The Queen* (1996) 186 CLR 427 at 452; *Zoneff v The Queen* (2000) 200 CLR 234 at 267-268 [85]-[87].

84 (1993) 68 A Crim R 476.

85 (1993) 68 A Crim R 476 at 484.

86 *Domican v The Queen* (1992) 173 CLR 555 at 570-571.

87 *Gilbert v The Queen* (2000) 201 CLR 414 at 438 [86].

properly make of it. The appellant and the complainant's mother had separated in 1986, although they had taken a holiday together with the complainant in 1987. In 1998, a mutual friend died. The appellant had attended his funeral. The complainant saw him there. However, he did not see her and they did not speak. Soon after, on 6 March 1998, the complainant, with the assistance of police, telephoned the appellant at his place of employment. It was their first contact for many years.

156 After the complainant mentioned her accusations the appellant explained that he was under constraints as to what he could say because of "company". He made it clear that he could not talk freely to the complainant. These circumstances help to explain the appellant's frequent monosyllabic responses to the complainant's accusations and a degree of apparent circumlocution in his responses to her complaints that he had "molested" her including when she was an "eight year old child". The appellant did not expressly deny or qualify those accusations. However, caught off-guard, to do so might possibly have taken him into statements that he may have felt unable to make in the presence of "company". On any view, the conversation concerning the offences became a somewhat stilted and one-sided affair. Deriving the appellant's true version of events from such an exchange involves risks of misinterpretation, error and injustice to him.

157 In expressing regret, sorrow and acknowledgment that "[i]t should never have happened", the appellant may, it is true, have been referring to the precise events contained in the complainant's accusations now reflected in the indictment. But he may not. His answers are scattered with undefined references ("It was a terrible … one of those situations"; "I regret it"; "it won't happen to anyone else"; "it should never have happed"; "I'm sorry the whole 'thing' happened"). A jury could conclude that the "it", the "situation" and the "whole thing" referred to were the offences with which the appellant was charged, including the molestation at the age of eight that the complainant expressly mentioned to him. But, properly instructed, the jury could also have concluded that these were references to the repeated inappropriate sexual encounters initiated by the complainant, which the appellant admitted, and which he now regretted that he had failed to respond to in a suitably firm and parental way.

158 *Conclusion: proviso inapplicable*: Into the equation of the assessment of the evidence of the appellant and of the complainant, including as revealed in the telephone conversation, it was necessary to inject reference to the particular forensic considerations identified in *Longman*. Otherwise, the jury might have completely overlooked such considerations. Preferring the evidence of the complainant to that of the appellant was not sufficient to convict the appellant. Being convinced that the complainant's testimony was honest and had not been significantly dented by a lengthy cross-examination, was also insufficient. Before giving effect to such conclusions, the jury needed to take into account a warning based on particular considerations, derived from the law's experience.

This they did not receive. Because it is impossible to determine "the basis on which the jury founded their verdict"[88], it is impossible to be satisfied that the absence of the warning in this case did not deprive the appellant of a chance of acquittal.

159 Lay people and some lawyers may have unbounded faith in the capacity of jury trial to yield an accurate and just result. Ordinarily it does. But after very long delays in complaint in cases of this kind there are particular dangers of miscarriage of justice. Juries should be warned of such dangers so that, in their deliberations, they take them into account. That is what *Longman* requires. In this case, a jury, warned of these dangers, might indeed still have convicted the appellant. The prosecution case against him was very strong, particularly because of the recorded telephone conversation. But conviction was not inevitable. The judicial warnings to the jury did not comply with the law established by *Longman*. The defect was not immaterial. The appellant therefore lost a real chance of acquittal. The "proviso" does not apply.

Orders

160 It follows that the appeal should be allowed. The judgment of the Supreme Court of Queensland (Court of Appeal) should be set aside. In lieu thereof, it should be ordered that the appeal to that Court be allowed, the appellant's conviction quashed and a new trial ordered.

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88 *Domican v The Queen* (1992) 173 CLR 555 at 570.