HIGH COURT OF AUSTRALIA

KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

RAYMOND DOUGLAS TULLY APPELLANT

AND

THE QUEEN RESPONDENT

Tully v The Queen
[2006] HCA 56
7 December 2006
B12/2006

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

A J Kimmins with K A M Greenwood for the appellant (instructed by Welldon Zande & Reddy)

L J Clare with V A Loury for the respondent (instructed by Director of Public Prosecutions (Q))

CATCHWORDS

Tully v The Queen

Evidence – Criminal trial – Sexual offence – Uncorroborated evidence – Delay in making of complaint – General rule from *Longman v The Queen* (1989) 168 CLR 79 requiring warning of danger of conviction – Whether trial judge bound to give a warning in present case – Duty to make comments in interests of justice – Requirement of fair trial – Conviction depended on evidence of complainant alone – Whether need for warning or comment as referred to in *Robinson v The Queen* (1999) 197 CLR 162.

Evidence – Criminal trial – Sexual offence – Evidence of uncharged acts – Whether admissible as relationship evidence – Whether subject to the constraints imposed for the admissibility of similar fact or propensity evidence.

Words and phrases – "delay", "*Longman* warning", "propensity evidence", "similar fact evidence", "uncharged acts", "uncorroborated evidence".

Criminal Code (Q), ss 229B, 632.
Criminal Law (Sexual Offences) Act 1978 (Q), s 4A.
Evidence Act 1977 (Q), Div 4A, subdiv 3.

1 KIRBY J. This is an appeal from a judgment entered by the Court of Appeal of the Supreme Court of Queensland[1]. By that judgment, the Court of Appeal dismissed the appellant's challenge to his conviction of sexual offences against a young girl ("the complainant"), the daughter of his then domestic partner.

2 Although several issues were raised in the Court of Appeal, to support the challenge to the conviction, in this Court only two grounds remain. The first complains of the failure of the trial judge to give the jury a warning, with reference to features of the evidence, which the appellant said was necessary "to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case"[2]. The second concerns the suggested inadequacies and imperfections of the directions given to the jury on the subject of the standard of proof of uncharged acts which were described by the complainant in giving her evidence.

3 The appellant is entitled to succeed on the first point. The case is not one for the application of the "proviso"[3]. A new trial should be ordered. The circumstances of the case make it unnecessary, and inappropriate, to deal with the issues concerned with the uncharged acts. Those issues are important, but this is not the occasion to decide them.

The facts

4 *Nature and course of the trial*: By an indictment dated 28 June 2004, the appellant was charged with ten counts of sexual conduct involving the complainant. Two of the counts involved the offence of rape[4]; four counts charged that the appellant had unlawfully permitted himself to be indecently dealt with by a child under 16 years of age[5]; and four counts charged that the appellant had unlawfully and indecently dealt with a child under 16 years of age[6].

5 At his trial, in the District Court of Queensland (Richards DCJ), the jury were unable to agree on the two counts of rape. One, count 2, was alleged to have occurred between 31 January 1999 and 1 June 2000; the other, count 10, between 1 January 2000 and 1 June 2000. The jury also disagreed on one of the

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1 *R v TN* (2005) 153 A Crim R 129.

2 *Longman v The Queen* (1989) 168 CLR 79 at 86; see *Robinson v The Queen* (1999) 197 CLR 162 at 168 [19].

3 *Criminal Code* 1889 (Q) ("the Code"), s 668E(1) and (1A).

4 The Code, s 349.

5 The Code, s 210(1)(c).

6 The Code, s 210(1)(a).

counts alleging that the appellant had permitted himself to be indecently dealt with (count 1). That offence was alleged to have occurred between 31 January 1999 and 1 February 2000. On all of the remaining counts, the appellant was found guilty by the jury. He was convicted and sentenced on each count to concurrent sentences of three years' imprisonment. A retrial was ordered on those counts upon which the jury could not reach a verdict. However, no such retrial has occurred.

6 The complainant was born on 11 March 1990. She was thus between the ages of nine and slightly more than 10 years of age when the alleged offences happened. The complainant's mother had begun a personal relationship with the appellant in early 1999 and the couple lived together with the complainant and her brother successively in their respective premises. It was soon after the relationship with the mother began that the complainant alleged that the appellant had begun to act inappropriately. At first this allegedly involved his exposing his penis to her; but later the events allegedly occurred that gave rise to the counts on the indictment[7].

7 The complainant did not tell her mother about any of the appellant's alleged conduct until April 2002. By that time, the mother, the complainant and her brother were living in New South Wales. The police were notified and the complainant underwent two recorded interviews in April 2002 and May 2002. No immediate charges were laid. In October 2003, the appellant's home in Queensland was searched. Hand guns for which he was licensed were found and photographs were taken of the appellant's pubic area. The photographs disclosed the presence of a mole near the appellant's penis to which the complainant had referred in her statement to police. She was 12 years old at the time of the interviews and 14 years of age when the trial took place in July 2004.

8 There was no independent evidence confirming the complainant's allegations against the appellant save for her accurate description of the mole and of a tattoo on each of the appellant's buttocks and evidence of the complainant's mother concerning one occasion (the subject of counts 6 and 7 on which the appellant was found guilty). On that occasion the appellant and the complainant were absent in a carpark for so long that the mother began to look for them. She gave no evidence of having witnessed any sexual conduct. Otherwise, the prosecution case against the appellant depended solely on the complainant's version of the appellant's conduct in relation to her. At his trial the appellant neither gave, nor called, evidence.

9 *Evidence and verdicts on ten counts*: The first count involved an allegation of indecent dealing that allegedly occurred after the complainant, her

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7 (2005) 153 A Crim R 129 at 134 [33].

mother, her brother and the appellant returned home after playing ten pin bowling together. The complainant said that the appellant asked her to touch his penis and testicles and when she refused, he grabbed her left hand and held it on his genitals for about five minutes[8]. In her second interview with police, the complainant said that this was when the appellant had first had sexual intercourse with her. She explained that she did not originally tell police of this fact because she was too embarrassed. She agreed that she had initially told police that after the appellant released her hand from his genitals, he went upstairs. The jury were unable to agree on a verdict on this count.

10 The second count, concerning an alleged rape, involved an incident said to have occurred between 31 January 1999 and 1 June 2000 when the complainant, her mother and brother stayed overnight at the appellant's house. According to the complainant, the appellant woke her whilst her mother was asleep and persuaded her to go to his bedroom, where he pushed her onto his bed asking her to "have sex with me". The complaint said that she had threatened to tell her mother but that the appellant had put his penis in her vagina and pushed it up and down for about six or seven minutes before she left and returned to her own bed. The complainant claimed that she did not call out to her mother because the appellant had told her he would kill her. She stated that the appellant had a cupboard which contained guns and knives and that, on the previous day, she had carried ammunition to the cupboard and knew of its contents.

11 In cross-examination, the complainant was tackled on earlier evidence concerning the very late arrival at the appellant's home on the night of this offence. That evidence appeared to conflict with her being there the previous day. The jury were also unable to reach agreement on a verdict on this count.

12 The third count concerned an event which the complainant said had occurred at Easter 2000 when the appellant was camping with the complainant, her mother and brother and four family friends of the appellant. According to the complainant the appellant "flashed himself" on this occasion. The complainant went to the toilet and was followed by the appellant. She said that he put his finger in her vagina. When the appellant suggested intercourse, the complainant said that she had refused and returned to the camp site. She said that she did not tell her mother of these events because she was scared of the appellant's guns. The appellant was found guilty on this count.

13 The fourth count concerned an event which the complainant described when she and others were returning, in convoy, from the camp at Easter 2000. According to the complainant, because she felt sick while travelling in the family car, she was transferred to the appellant's car where she was able to lie down.

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8 (2005) 153 A Crim R 129 at 131 [7].

However, the complainant said that the appellant pulled her underwear down and touched and squeezed her vagina whilst driving his car. Under cross-examination, the complainant said that the appellant's finger went inside her vagina. The complainant's mother confirmed that the complainant had ridden with the appellant after complaining of feeling sick. She had not wanted to do so but travelled with him for part of the journey. The jury returned a verdict of guilty on this count.

14 The fifth count concerned an incident that allegedly occurred in the appellant's garage in May 2000. The complainant said that, after school, the appellant had asked her to come to the garage and help him with something. When she did, he shut the door, pulled his shorts down and told her to look at his genitals. It was on this occasion that the complainant said that she had noticed the mole on the left side of the appellant's penis. When the complainant threatened to tell her mother of the appellant's conduct, he said that he would kill her if she did. He allegedly tried to put his penis in her vagina but she backed away. Under cross-examination she said that on this occasion, his penis went into her vagina "a little bit". The complainant's mother confirmed that the appellant's house had a garage. The jury found the appellant guilty on this count.

15 The sixth and seventh counts concerned incidents that were alleged to have occurred at a motel where the complainant, her mother, brother and the appellant were temporarily staying after moving home. The appellant said that her mother had gone to the toilet and asked the complainant to fetch a medical bag from the car. The appellant offered to accompany the complainant to the motel carpark. Whilst there, the complainant stated that the appellant had told her to "feel" him. When she refused, he had grabbed her hands and put them on his genitals. He also put his hand on the complainant's vagina and inserted a finger. The complainant secured the medical bag from the car and took it to her mother. The sixth count related to procuring the complainant to touch the appellant's penis. The seventh count related to the digital penetration. The jury found the appellant guilty on both counts.

16 The eighth count concerned an incident that allegedly occurred when the complainant went out at night to look for her dog that had been barking. According to her evidence, her mother and brother were asleep at the time. The appellant was on the porch and exposed his genitals, grabbing the complainant's hand and putting it on them. The complainant said that the appellant then took her down to the garage where he tried to get up against her. She told him to go away, left him and returned to her bedroom. The jury found the appellant guilty on this count.

17 The ninth and tenth counts concerned an incident that was alleged to have occurred in the laundry of the residence in which the complainant, her family and the appellant were then living. The complainant said that she had taken an object to the laundry to wash it. According to her evidence, the appellant came running

down and told her to remember his gun. He also told her to touch his testicles. When she refused, he grabbed her hand and put it on them. The complainant said that the appellant tried to have sex with her again. It was in relation to this incident that the complainant saw the tattoos on the appellant's buttocks which she described. The complainant alleged that the appellant actually penetrated her vagina on this occasion. The appellant was found guilty by the jury of the offence of indecent treatment in the ninth count. However, the jury were unable to agree on the charge of rape contained in the tenth count.

18 *Evidence of uncharged acts*: In addition to the evidence relating to the offences the subject of the ten counts in the indictment, other evidence was given by the complainant concerning sexual acts which were not the subject of specific charges. This evidence included the complainant's description of an occasion when the appellant placed his testicles against her breast and three acts of sexual intercourse that allegedly occurred on a camping trip to Agnes Water, including an event when the appellant took the complainant to get something out of his car. As well as this, the complainant testified that the appellant had penetrated her vagina digitally about a dozen times and had penile vaginal intercourse "over a couple of dozen times", "a real lot", "30 times" and "quite a few times". No objection was raised at the trial to the admission of this evidence of uncharged acts. Indeed, some of the evidence was elicited by cross-examination of the complainant by the appellant's trial counsel.

19 In relation to the incident of rape referred to in the 10th count, the complainant said that the appellant had put his penis "all the way in"; that she had told the police officer that he had put his penis in her "maybe 30 times"; and that he had put his penis in "all the way". She agreed that he had done so "sometimes" and that "sometimes it was a bit". In relation to other occasions, the complainant said that the appellant had put his penis in "part of the way", "far enough" and "just a bit".

20 A medical examination of the complainant, described at the trial, reported that her hymen was still intact. The medical practitioner who deposed to this fact originally reported that her examination of the complainant did not support a history of full penile penetration. Subsequently, however, on the basis of published research, the medical practitioner concluded that "findings of an intact hymen neither supports nor denies the history of full penile penetration of the vagina past the level of the hymen". Nevertheless, it would have been open to the jury to attach significance to the condition of the complainant's hymen. Some members of the jury appeared to have done so. No other fact would seem to explain the inability of the jury to reach a verdict on the two charges of rape and the first count of indecent dealing, being the one in respect of which the complainant had later told police that it was the occasion when the appellant first had sexual intercourse with her.

21 *Features of the defence case*: As in other cases of this kind, the appellant faced difficulties in undermining the evidence of the complainant. Evidence about the residences in which the incidents were said to have occurred; the presence of the complainant's mother and brother on occasions; and details of the camping trips and visit to the motel carpark lent some circumstantial support to the complainant's evidence. Clearly enough, trial counsel elected to place much weight on the intact hymen and the apparent inconsistency between this objective fact and the complainant's allegations of many acts of penile and digital penetration, including occasions where the appellant had "put his penis all the way in".

22 Nevertheless, there were other features of the prosecution case against the appellant that potentially strengthened his argument that the complainant's accusations should not be accepted[9]. First, there was the age of the complainant at the time of the alleged offences (between nine and 10 years) and the circumstances that had brought her into contact with the appellant (her mother's relationship with him that had ceased by May 2000).

23 Secondly, there was the complainant's failure to make any complaint to her mother at the time of the events she described, although in virtually all of them, the mother and brother were immediately at hand and in some cases in an adjacent room. The further delay (of about two years) after the end of the relationship between the mother and the appellant and the complaint to police was not readily explicable by her fear of the appellant's guns. In any case, the delays made it impossible for contemporaneous medical examination to produce any worthwhile results to contradict or cast doubt on the claims of full penile penetration. The move of the complainant and her family to New South Wales put the complainant out of physical contact with the appellant. The additional delay between the complainant's first contact with police and the bringing of charges against the appellant inevitably increased still further his difficulties in contradicting the accusations once made and in remembering any alibis or contradictory evidence that an earlier notification of complaint might have made possible.

24 Thirdly, various features of the accusations, their apparent embellishment with accusations of uncharged acts and unspecified multiple events, described only in general terms, raised questions concerning the reliability of the complainant's evidence. Effectively, if the appellant were to be convicted, it was on the evidence of the complainant alone, unconfirmed except in peripheral, circumstantial ways that might be explained consistently with innocence. Guilty verdicts, virtually inevitably, required the imposition of a significant custodial sentence on the appellant. For such a result, based on the evidence of one

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9 See also reasons of Hayne J at [82]-[86].

witness alone, the law has customarily stressed the need for very careful scrutiny of the accusations[10].

The judge's instructions to the jury

25 *Elements of the judge's instructions*: It is convenient to separate the content of the trial judge's instructions to the jury concerning the way in which they should approach the foregoing aspects of the case and her Honour's later directions to the jury concerning the use they could make of the evidence given by the complainant of the acts of a sexual kind that were not the subject of charges in the indictment. The directions on the latter point are the subject of the second ground of appeal, to be dealt with later.

26 The trial judge gave the jury conventional instructions about the onus and burden of proof. Some of the directions (such as those concerning the resolution of conflicts in the accounts given by different witnesses) appear to derive from a judicial *Bench Book* and not to have been specifically apt to this trial, where, essentially, the question was whether the prosecution had proved its case on the basis of the evidence of the complainant alone concerning the offences charged. Nevertheless, so far as it went, the burden which the prosecution bore to prove the facts necessary to establish each offence was correct and adequate. Repeatedly, the trial judge reminded the jury of the importance of their assessment of the complainant's credibility.

27 After explaining the legal ingredients of the offences charged and reminding the jury of the complainant's evidence in relation to each of the counts in the indictment, the trial judge turned to "the various addresses". She told the jury that the question for them was whether they were "satisfied beyond reasonable doubt that [the conduct allegedly committed by the appellant] happened because the defence basically say that nothing of the sort happened". She went on[11]:

> "… the Crown has to prove to you beyond reasonable doubt essentially through the complainant because she is really the witness that the evidence rises and falls on, that what she says in relation to each of the counts is not only truthful, but is reliable so that you are prepared to accept her evidence beyond reasonable doubt".

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10 *R v Murray* (1987) 11 NSWLR 12 at 19.

11 (2005) 153 A Crim R 129 at 139 [53].

28 *Explaining the defence case*: The judge repeated the prosecutor's submissions, in the address to the jury, concerning the explanation of the failure of the complainant to complain about the appellant's conduct earlier on the basis of her age and the appellant's threats and possession of guns. She referred to the "enormity of what has happened to the child"; the confirmation by her mother of circumstantial facts about the house in which she was sleeping; the photograph of the mole and tattoos on the appellant's body; and the medical evidence which "… the Crown says … does not say one thing one way or the other". Squeezed in between two paragraphs reminding the jury of what the prosecution had said to rebut possible inconsistencies in its case was a short passage setting out the essence of the defence case:

> "The defence, on the other hand, say [the complainant's] evidence is so unreliable that you could not possibly convict. For example, the episode at Agnes Water where she says there was sex three times and the mother says there was only one night that they stayed and in any event, that was before August 1999 when she says the first act of intercourse occurred. The defence say, well, that is an amazing mistake to make if she is telling the truth and if she has got that wrong then how could you possibly rely on the rest of her evidence."

29 A little later comes the following passage[12]:

> "The defence remind you that they do not have to try and show you why she would be untruthful about these things and of course it is not for the defence to prove anything, but she is so inconsistent that you simply could not accept what she says beyond a reasonable doubt or beyond any doubt for that matter for all the sorts of reasons that have been highlighted by the defence in their address."

30 Apart from recounting excerpts of what defence counsel had said in her address, the trial judge gave no directions of her own to the jury concerning the way in which they should approach their task. She did not specifically remind the jury of any elements in the evidence that were of particular importance for the performance of that task; nor did counsel ask for any directions on such matters to be given to the jury.

31 *The jury's verdicts*: The jury retired. After deliberating for more than a day they returned to announce that they could not reach agreement on counts 1, 2 and 10. However, they were agreed on the other counts. Their verdicts of guilty on those counts were taken. The conviction of the appellant followed as did his sentence.

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12 (2005) 153 A Crim R 129 at 139 [53].

The Court of Appeal's decision

32 *Complaint based on Robinson*: The initial notice of appeal to the Court of Appeal challenged the appellant's conviction on the counts on which he had been found guilty on the basis that the conviction was "unsafe and unsatisfactory". However, by the time the appeal was argued, a specific ground of appeal was formulated complaining that the trial judge had erred in failing adequately to direct the jury in relation to the evidence and that this had occasioned a miscarriage of justice[13]. The Court of Appeal rejected this submission. Its reasons were given by Keane JA (with whom Williams JA and Helman J agreed).

33 On the first issue, after noticing the limited content of the trial judge's remarks to the jury on the approach that they should take and the observations of this Court in *RPS v The Queen*[14] about the content of jury instructions, Keane JA turned to address the appellant's complaint that the trial judge had failed to direct the jury "that they needed to scrutinize the complainant's evidence with great care before they could convict the appellant"[15]. His Honour referred to the decision of this Court in *Robinson v The Queen*[16]. However, for two reasons, Keane JA concluded that *Robinson* did not demonstrate any error on the part of the trial judge in this case in failing to give a warning to the jury.

34 The first reason stated by Keane JA was that *Robinson* had held back from requiring a warning to the jury "in every case where a child's complaint of sexual abuse is uncorroborated"[17]. He concluded that, although in the present case there was "no corroboration in the technical sense of evidence tending to confirm one or more of the elements of the offences charged, there was evidence which is capable of providing independent support for the complainant's version of events"[18]. Moreover, he concluded that there was "evidence which explains the complainant's delay in complaining about the appellant's conduct"[19].

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13 (2005) 153 A Crim R 129 at 131 [5].

14 (2000) 199 CLR 620 at 637 [41]-[42].

15 (2005) 153 A Crim R 129 at 139 [53].

16 (1999) 197 CLR 162.

17 (2005) 153 A Crim R 129 at 140 [56].

18 (2005) 153 A Crim R 129 at 140 [56].

19 (2005) 153 A Crim R 129 at 140 [56].

35 The second reason advanced by Keane JA was that *Robinson* was, in his Honour's words, "truly an exceptional case so far as the justification for the warning was concerned"[20]. This, he said, was because aspects of the case involved matters in which "judicial experience may have given the trial judge an advantage in assessing the credibility of the competing versions of events "over and above worldly wisdom and experience of the jury"[21].

36 *Attempt to distinguish Robinson*: It is clear that Keane JA considered that this Court's observations in *Robinson* were special to the factual circumstances of that case; and the "curious" features of the case as revealed by the conflicting evidence of the complainant and the accused in that matter[22]. Whilst he accepted that there were, in this case, "inconsistencies or discrepancies in the complainant's evidence"[23], he was of the opinion that "it was for the jury to decide what to make of those inconsistencies and discrepancies"[24]. Clearly, he was affected by the fact that the accused in *Robinson* had given evidence of denial whilst the appellant here had not done so[25]:

> "The point is that in this case the uncontradicted evidence of the complainant's relationship and the dealings with the appellant was not such as to render improbable her evidence of sexual misconduct on his part. There was not in this case the combination of factors present in *Robinson* which called for a strong warning to ensure that a jury did not accept the complainant's evidence without close scrutiny."

37 It was on this basis that Keane JA considered that the trial judge's instruction to the jury that the prosecution case "rises and falls" on the evidence of the complainant was "perfectly accurate"[26]. The essential issue raised by this appeal is whether the conclusion that there was "no occasion for a stronger

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20 (2005) 153 A Crim R 129 at 140-141 [58].

21 (2005) 153 A Crim R 129 at 141 [58].

22 (2005) 153 A Crim R 129 at 140 [57].

23 (2005) 153 A Crim R 129 at 141 [58].

24 (2005) 153 A Crim R 129 at 141 [58].

25 (2005) 153 A Crim R 129 at 141 [58].

26 (2005) 153 A Crim R 129 at 141 [59].

warning to prevent a perceptible risk of a miscarriage of justice"[27] was a correct statement of the law applicable to the appellant's trial.

The applicable legislation

38 *General duty on directions*: In his reasons, Keane JA, correctly, adverted to the statutory setting in Queensland in which the foregoing issue had to be decided[28].

39 The starting point is s 620 of the *Criminal Code* (Q) ("the Code") concerning the procedure to be observed in a trial:

> "(1) After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make."

40 *Corroboration warnings*: Under the common law, as was explained in *Robinson*[29], certain categories of witnesses were considered to suffer from intrinsic lack of reliability, requiring trial judges to warn the jury of the danger of convicting upon their uncorroborated testimony. The categories concerned included the evidence of accomplices, of victims of a sexual offence and the sworn evidence of children[30]. It was to remove this approach of the common law that legislation was enacted throughout Australia to abolish the categories of evidence presumed to be unreliable. In Queensland, the relevant provisions on corroboration are found in s 632 of the Code[31]. That section reads:

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27 (2005) 153 A Crim R 129 at 141 [59] citing *R v DAH* (2004) 150 A Crim R 14 at 27-28 [62]-[64].

28 (2005) 153 A Crim R 129 at 142 [62]-[65].

29 (1999) 197 CLR 162.

30 *Carr v The Queen* (1988) 165 CLR 314 at 318-319; cf *B v The Queen* (1992) 175 CLR 599 at 615-617; *Link* (1992) 60 A Crim R 264 at 270-271.

31 See also *Evidence Act* 1995 (Cth), s 164; *Evidence Act* 1995 (NSW), s 164; *Evidence Act* 1929 (SA), s 12A; *Evidence Act* 2001 (Tas), s 164; *Crimes Act* 1958 (Vic), s 61; *Evidence Act* 1906 (WA), s 50; *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 69; *Evidence Act* (NT), s 9C.

> "(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

41 This section existed in Queensland, in an earlier form, at the time that *Robinson*, also a Queensland case, was decided. However, inferentially in response to the criticism of the language of s 632, the section has been amended. In response to this Court's comment that some witnesses who formerly required corroboration were not "complainants" (such as accomplices)[32], the word "complainants" was deleted and the word "persons" substituted. Nevertheless, the substance of s 632 remains the same.

42 *Directions in the interests of justice*: Also to be noticed is s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) ("the Sexual Offences Act"). That section relevantly provides[33]:

> "(4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.
>
> (5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice."

43 The effect of ss 632 of the Code and 4A of the Sexual Offences Act was explained in *Robinson*. "Stereotypical assumptions"[34] have been abolished.

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32 *Robinson* (1999) 197 CLR 162 at 170 [23].

33 The entire section is set out in the reasons of Callinan J at [121]. See also reasons of Crennan J at [158] fn 155.

34 *R v Ewanchuk* [1999] 1 SCR 330 at 336 cited in *Robinson* (1999) 197 CLR 162 at 168 [19].

However, the right and duty of the trial judge to make comments on the evidence to the jury, which the interests of justice render appropriate, are preserved[35]. The question, therefore, is what the interests of justice required in the appellant's trial. Was it sufficient for the trial judge to give the brief instruction to the jury that has been quoted? Was it sufficient for her to remind the jury of the submissions of the prosecution and the defence? Did the interests of justice in the case oblige her to give any warning, to make any reference to the evidence and to lend her authority to explaining to the jury the way in which they should, or should not, approach their determination of a case of this character?

Principles for judicial instructions to the jury

44 *Addressing the real issues*: In many recent decisions[36], this Court has observed that the starting point for evaluating the trial judge's directions to the jury is to be found in the reasons of Dixon, Williams, Webb, Fullagar and Kitto JJ in *Alford v Magee*[37]. The passage is well known, but it bears repeating[38]:

> "[I]t may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are. … [L]ooking at the matter from a practical point of view, the *real* issues will generally narrow themselves down to an area readily dealt with in accordance with Sir Leo Cussen's great guiding rule." (emphasis in original)

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35 Reasons of Hayne J at [89].

36 See, eg, *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [143]; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; *Zoneff v The Queen* (2000) 200 CLR 234 at 256 [56]; *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49]; *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115]; *De Gruchy v The Queen* (2002) 211 CLR 85 at 96 [44]; *Murray v The Queen* (2002) 211 CLR 193 at 205 [37], 219 [78].

37 (1952) 85 CLR 437.

38 (1952) 85 CLR 437 at 466.

45 In the explanation of this guiding rule, this Court has repeatedly recognised this "fundamental" duty of the trial judge[39]. It has acknowledged the difficulty which the judge faces, given the great variety of issues, legal and factual, that present for consideration in every trial[40]. It has accepted that there is no fixed form of instruction that will suit every case[41]. To adopt a fixed approach would distort effective oral communication with the jury. Mechanical or artificial formulae are therefore not what are called for[42]. Judicial instructions must be comprehensible to a jury, made up as it is of lay members[43]. It should be addressed to the issues in the trial and evaluated in the context of those issues[44].

46 *Securing a fair trial*: The content of the instruction in a particular trial is ultimately determined by the judicial obligation to ensure that the accused secures a fair trial in accordance with law[45]. This obligation requires the trial judge to put fairly before the jury the case which the accused has made[46] or is entitled to rely upon in the evidence that has been adduced. In particular, where, from the greater experience of the judge in the law and the conduct of trials, certain matters emerge that are relevant to the fair trial of the accused, the judge must explain those matters to the jury, with appropriate reference to the evidence. This point, and the reason for it, was explained by Hayne J in *Melbourne v The Queen*[47]:

> "The trial judge in a criminal trial must instruct the jury about some matters that affect how they set about finding the facts. Thus in some cases the judge must warn the jury of dangers of which they must beware when they are considering the facts. Directions about the dangers of

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39 *De Gruchy* (2002) 211 CLR 85 at 96 [43]. See reasons of Hayne J at [75]-[76].

40 *Melbourne* (1999) 198 CLR 1 at 52 [142].

41 *Zoneff* (2000) 200 CLR 234 at 256 [55].

42 *Melbourne* (1999) 198 CLR 1 at 52 [142]; *Doggett v The Queen* (2001) 208 CLR 343 at 373 [116].

43 *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115].

44 *RPS* (2000) 199 CLR 620 at 637 [41]; *Zoneff* (2000) 200 CLR 234 at 256 [55].

45 *RPS* (2000) 199 CLR 620 at 637 [41].

46 *RPS* (2000) 199 CLR 620 at 637 [41].

47 (1999) 198 CLR 1 at 53-54 [144] (emphasis in original).

> identification evidence[48] or about accepting uncorroborated evidence in some circumstances[49] provide ready examples. But it is always necessary to bear steadily in mind that it is the jury that decides the facts – not the trial judge. Especially is this necessary when the question is … whether a trial judge is *bound* to direct the jury in some matter that touches *how* the jury finds the facts in the case. The warnings about factual issues … are given to the jury not just because they relate to one or more of the issues in the case but because, if they are not given, the jury may omit consideration of important matters (of which they may be unaware) and wrongly conclude that guilt has been demonstrated beyond reasonable doubt."

47 *Comments, warnings and directions*: In deciding whether judicial observations to the jury are necessary in a particular case, this Court has distinguished between comments and directions[50]. Although a judge may comment on the facts generally, by reference to issues in the case, the jury are not bound to comply with such remarks, unless other functions so require[51]. However, directions pertain to the judicial duty to instruct the jury on the law that they must apply, whether in understanding the elements of the offence or in reasoning from the evidence to their verdict.

48 Where a suggested direction falls outside those which the law holds to be obligatory, the omission of the trial judge to give the direction, 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"[52].

49 It may be accepted that this contention presents a somewhat circular test. However, this is no more than a recognition of the need to fashion judicial directions in accordance with the great "guiding rule" stated in *Alford*[53]. The

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48 *Domican v The Queen* (1992) 173 CLR 555.

49 eg, *Longman v The Queen* (1989) 168 CLR 79.

50 *Azzopardi* (2001) 205 CLR 50 at 69 [49]; *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115].

51 *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115].

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

53 (1952) 85 CLR 437 at 466.

judge must identify the real issues and tell the jury, in the light of the law, what those issues are. If those issues necessitate particular warnings, so as to render the trial fair to the accused, it is an error of law on the part of the trial judge to fail to give such warnings.

Application of principles to the present case

50 *Similarities to Robinson*: When the foregoing principles are kept in mind, it is my view that the errors of the trial judge in the present case are clear. The case was analogous to *Robinson*. The Court of Appeal erred in concluding otherwise.

51 It is true that there were peculiarities in the evidence in *Robinson* to which, of necessity, this Court referred in explaining its decision in that case. As this Court said, there were "particular features of the case which demanded a suitable warning"[54]. Nevertheless, each case will contain features that are special. It would be a mistake to treat the decision in *Robinson* as if the warning required in that case was confined to the facts disclosed there or facts that were very similar. The case law on judicial warnings does not progress by perceived similarity amongst the facts of particular cases but by reference to the dangers of miscarriages of justice that particular facts serve to illustrate.

52 In *Robinson*, there were inconsistencies and a "curious feature" of the evidence as well as a "long period that elapsed before complaint"[55]. There was also the approximation of the ages of the complainant and the accused and evidence of the circumstances of schoolboy talk of sexual matters in which the accusation against the accused was first made. Clearly, such features called for a judicial warning to the jury that drew attention to them and of "the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt"[56]. This is why, in *Robinson*, this Court held that it was necessary for the judge to give a warning "in terms which made clear the caution to be exercised in the light of those circumstances"[57].

53 In the present case, however, there were also a number of circumstances that gave rise to dangers similar to those in *Robinson*[58]. The complainants, at the

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54 *Robinson* (1999) 197 CLR 162 at 170 [25]. See also *Longman* (1989) 168 CLR 79 at 91.

55 *Robinson* (1999) 197 CLR 162 at 170 [25].

56 (1999) 197 CLR 162 at 171 [26].

57 (1999) 197 CLR 162 at 171 [26].

58 cf reasons of Hayne J at [87]-[89].

time of the alleged offences, were roughly the same ages (the complainant in *Robinson* was eight years old at the relevant time). The delay between the alleged offences and the first complaint to the child's parent was comparable. In *Robinson*, the delay was three years. This was described by this Court as a "long period"[59]. The delay in the present case extended still further, after the complainant had moved with her mother and brother to another State. In each case, the delay extinguished any opportunity of contemporaneous medical examination of the complainant that might have revealed evidence to inculpate or exculpate the accused. Moreover, in the present case the one objective feature that the jury might have regarded as inconsistent with the accusation of many acts of full penile and digital penetration was the complainant's intact hymen. It would have been open to the jury to accept that this was consistent with the appellant's version of events. I agree with the reasons of Callinan J that a court should focus on the principle stated in *Robinson* and not on factual similarities or differences that inevitably arise. However, it is necessary to refer to the similarities to demonstrate the error of Keane JA in suggesting that *Robinson* was truly exceptional and suggesting that it is only in such a case that a judicial warning need be given. This is not what *Robinson* said and it is not the legal principle for which it stands.

54 The most important similarity between the dangers existing in *Robinson* and in this case, that called forth the need for a warning to scrutinise the complainant's evidence with great care, was the absence of objective, reliable confirmatory evidence to support the complainant's testimony. True, there was evidence from the complainant's mother about circumstantial features of the case. There was also evidence of the complainant about the mole and tattoos which she saw on the appellant's body. But this evidence did not prove the actual offences. It was not inevitably inconsistent with innocence. Essentially, as in *Robinson*, conviction of the appellant depended on acceptance of the evidence of the complainant alone.

55 *Sole witnesses, comments and warnings*: That fact, in *Robinson*, led this Court to refer at some length to the reasons of Lee J in *R v Murray*[60]. The cited passage applies to the dangers of a wrongful conviction in this case, as much as it did to the dangers identified in *Robinson*. His Honour said:

> "The fact that a judge does not comment upon the absence of corroboration of the complainant's evidence cannot, in my view, in the case of those offences to which s 405C [of the *Crimes Act* 1900 (NSW)] applies now be made the basis of a criticism of his summing-up, but again

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59 (1999) 197 CLR 162 at 170 [25].

60 (1987) 11 NSWLR 12 at 19.

> this does not mean that the judge cannot or should not, as is done in all cases of serious crime, stress upon the jury the necessity for the jury to be satisfied beyond reasonable doubt of the truthfulness of the witness who stands alone as proof of the Crown case. In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable."

56 The conclusion so stated in *Murray* applies to a trial where the relevant statute law on corroboration is s 362 of the Code, including as it has been amended since it was considered in *Robinson*. Nothing in the Sexual Offences Act leads to a different conclusion. The interests of justice required the trial judge in the present case to direct the jury that the complainant's evidence was to be scrutinised with great care before a conclusion was arrived at based on the complainant's evidence alone.

57 *Features requiring a warning*: In giving such a direction, it would have been desirable for the judge to remind the jury of the "particular features of the case which demanded a suitable warning". Those features included the very young age of the complainant at the time of the alleged offences; the circumstances of her mother's new and ultimately temporary personal relationship with the appellant which could engender animosity and jealousy on the part of the complainant towards the appellant; the long delay between the alleged offences and of the complainant's statement to her mother (or anyone else) about those offences; the explanations given for such delay, including after the mother's relationship with the appellant ended and the family moved to New South Wales; the inconsistencies that arose between the original statements to police and the evidence under cross-examination in court; and the possible inconsistency of the claim of repeated deep sexual penetration and the intact hymen of the complainant. All of these were matters to be weighed by the jury. But, in accordance with *Robinson*, they needed to be evaluated by them with the assistance of a judicial warning or comment. Against the background of *Alford*, they needed to be drawn to notice as issues for the jury's attention in giving real content and substance to the requirement not to convict the appellant except on proof beyond reasonable doubt.

58 The trial judge gave no such warning or comment. Far from directing attention to these issues, she contented herself with reminding the jury, briefly, of what defence counsel had said in her closing address. Although the setting of the contested issues and counsel's address are important for judging the sufficiency of the judicial instructions to the jury, they cannot substitute for a judicial warning where that is required by law in the circumstances of the case. This was such a case.

59 The appellant primarily contended that a direction should have been given that it would be "dangerous" or "unsafe" to convict him on the basis of the complainant's evidence alone. Having regard to the statutory alteration of the law of corroboration, and the requirements of that law in respect of the evidence of a complainant in respect of sexual offences, a warning in those terms was not required. Nevertheless, a warning or comment along the lines described by Lee J in *Murray*, endorsed by this Court in *Robinson*, was required. It ought to have been given. Judges are aware of the heightened risks of miscarriages of justice when serious crimes, carrying extended custodial sentences, are proved on the evidence of, and impression given by, a single witness. Out of their experience, judges also know of cases where such evidence is retracted before an appeal, necessitating the later substitution of a verdict of acquittal[61].

60 *Inapplicability of Longman warning*: In this appeal, I would not have disturbed the jury's verdicts, or the convictions that followed, on the basis of an omission on the part of the trial judge to give a warning to the jury of the kind required by *Longman v The Queen*[62]. That is a decision that concerns (as many others have[63]) the particular problem, in certain cases of complaints of sexual offences, of very long delays between the time of the alleged offences and the first complaint and subsequent trial. Such was not this case. *Longman* is thus a distracting red herring[64]. Whatever directions were sought at trial, at the hearing of the appeal in this Court the appellant's counsel agreed that the appeal was *not* about a *Longman* warning[65]. Accordingly, *Longman*, as such, was not an issue before this Court.

61 However, the equally important decision of this Court in *Robinson* was material[66]. Distinguishing that decision was a necessity that the Court of Appeal accepted. Its attempt is unconvincing, as Callinan J has himself acknowledged[67]. It does not add to the persuasion on this point to demonstrate that the problem addressed in *Longman* did not arise and that a *Longman* warning was not

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61 *R v Johnston* (1998) 45 NSWLR 362 at 375.

62 (1989) 168 CLR 79.

63 *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343.

64 cf reasons of Crennan J at [156]-[158], [163], [169], [172]-[177].

65 *Tully v The Queen* [2006] HCATrans 343 at 790.

66 (1999) 197 CLR 162.

67 Reasons of Callinan J at [131].

required. On the other hand, the problem dealt with in *Robinson* was clearly presented. And *Robinson* required a warning that was not given.

62 When a warning is required, it should be said loudly and clearly by this Court that it is not enough for the trial judge to tell the jury what defence counsel have said. Juries rightly regard counsel's addresses as partisan. They are entitled to look to the judge, himself or herself, to tell them the true issues for decision and to give them any warnings which the law requires, relevant to those issues. That was not done in the appellant's trial.

63 *Conclusion: retrial required*: The Court of Appeal erred in concluding that no warning was required and that the trial judge's directions were adequate. This was not a case for the application of the "proviso". In the absence of a proper direction, a miscarriage of justice has occurred. On this basis, there should be a retrial.

The direction on uncharged acts

64 *Issues requiring clarification*: In the light of this conclusion, it is strictly unnecessary for me to decide the appellant's second complaint about the directions given at his trial concerning the uncharged acts of which evidence was given by the complainant during the trial, mostly in response to cross-examination. The only basis upon which the Court would ordinarily examine the additional issue would be if doing so were essential for the proper conduct of a second trial.

65 There is no doubt that the issue of judicial directions in respect of evidence concerning uncharged acts that would constitute criminal offences of a sexual character constitutes an important question upon which there have been differences of view in the intermediate appellate courts in Australia[68]. It would be desirable that such differences of view (which are also to some extent reflected in opinions stated in this Court[69]) be settled authoritatively by this Court

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68 See, eg, *R v Gale* [1970] VR 669 at 672; *Karunaratne* (1989) 44 A Crim R 191; *R v Geesing* (1985) 38 SASR 226 at 230; *R v Johnston* (1998) 45 NSWLR 362 at 370, 375; *R v Pearce* [1999] 3 VR 287 at 294-299 [23]-[34]; *R v Nieterink* (1999) 76 SASR 56 at 72-73 [81]-[90]; *BWT* (2002) 129 A Crim R 153 at 194 [110]; *R v Heuston* (2003) 140 A Crim R 422 at 432 [51]; *R v Hagarty* (2004) 145 A Crim R 138 at 141 [15]; *R v DRG* (2004) 150 A Crim R 496 at 506-507 [55]-[58]; *R v BJC* (2005) 154 A Crim R 109 at 114-117 [11]-[20].

69 See, eg, *Gipp v The Queen* (1998) 194 CLR 106 at 133 [78]-[79] per McHugh and Hayne JJ; cf at 156-157 [141] of my own reasons, 164 [173] per Callinan J; *KRM v The Queen* (2001) 206 CLR 221 at 233 [33] per McHugh J; 261 [121] of my own reasons; 264 [134] per Hayne J.

in a suitable case[70]. Not only is there the question as to any direction the trial judge should give concerning the use that a jury may make of evidence of uncharged acts. There is also the question, presented by the judicial directions given in the appellant's trial, as to the standard of proof (if any) that the jury should adopt in judging whether the uncharged acts have been established[71].

66 *Inappropriate case for clarification*: There is a particular reason why this appeal is not a suitable occasion to explore, and clarify, the approach of this Court with respect to the law on uncharged acts[72]. During the hearing of the appeal, the transcripts of the oral arguments of the prosecutor and defence counsel at trial were tendered. These appear to indicate that defence counsel endeavoured to make forensic use of the multiple claims of sexual penetration included in the complainant's answers to cross-examination. This was apparently done following a tactical decision that sought to demonstrate gross exaggeration and unreliability on the complainant's part. Most instances of uncharged acts appear in cases where they are described by the complainant in giving evidence as part of the background and justified in order to help explain the relationship that existed with the accused. To that extent, the present is not a typical case.

67 It would be preferable for this Court to consider the law on the directions appropriate to evidence of uncharged acts in a case that lacks the forensic peculiarity of the present appeal. The second issue in this appeal can therefore await a different case on another day.

Orders

68 The appeal from the Court of Appeal of the Supreme Court of Queensland should be allowed. The orders of that Court should be set aside. In place of those orders, this Court should order that the appeal to that Court be allowed, the appellant's convictions and sentences quashed and a new trial ordered.

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70 See also reasons of Callinan J at [129]-[133].

71 In the present case, the jury were told to consider whether they found the evidence of the uncharged acts to be "reliable". This expressed a standard which the appellant claimed was inadequate; cf *R v Johnston* (1998) 45 NSWLR 362 at 375.

72 cf reasons of Callinan J at [138]; reasons of Heydon J at [153]-[154].

69 HAYNE J. The facts and circumstances giving rise to the appeal are set out in the reasons of Kirby J and I need repeat none of that material. I agree with Kirby J that the appeal should be allowed and consequential orders made in the form he proposes.

70 Argument of the appeal in this Court, quite properly, proceeded by reference to very specific propositions about what directions the trial judge should have given the jury at the appellant's trial. Did the directions given by the trial judge sufficiently satisfy the principles stated in *Robinson v The Queen*[73] and *Longman v The Queen*[74]?

71 Although broader questions of principle, about what directions should be given about uncharged criminal acts allegedly committed by an accused and revealed in evidence at trial, were touched on in argument, those questions need not be considered in this matter. Evidence of alleged uncharged acts of the appellant was admitted without objection at his trial, and at least as to part, was admitted at the instance of the appellant's trial counsel, in aid of an argument that the complainant's evidence should not be accepted by the jury as establishing the appellant's guilt of the offences with which he was charged. These larger questions, about when evidence of uncharged acts is admissible, and what directions should be given about the use of such evidence, should be reserved for another day.

72 The specificity of the particular arguments that were advanced in the appeal to this Court, and that must be considered, should not be permitted to obscure, however, the basic principles that are engaged by the arguments about what directions or warnings the trial judge should have given the jury at the appellant's trial. Although the principles are well known, it is as well to restate them, and then relate them to the particular points that must be decided.

73 A criminal trial is an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt[75]. If an accused person pleads "not guilty", the accused puts the prosecution to proof, beyond reasonable doubt, of every element of the offence or offences charged.

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73 (1999) 197 CLR 162.

74 (1989) 168 CLR 79.

75 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34] per Gaudron, Gummow, Kirby and Hayne JJ.

74 In a trial by judge and jury, the tasks of the trial judge and the jury are different. As the standard directions to juries say, it is the jurors who are the judges of the facts in the case. It is for the jury, and the jury alone, to decide whether the accused is guilty or not guilty of the crime that is charged.

75 The tasks of the trial judge are different. They include those identified in the well known and now oft-repeated passage from the joint reasons of this Court in *Alford v Magee*[76]. It is for the judge to explain to the jury so much of the law as they need to know in deciding the real issue or issues in the case[77]. But no less importantly, it is for the trial judge to *decide* what those real issues are, and to *tell the jury*, in the light of the law, what those issues are[78].

76 It is to be noted that reference is made in *Alford v Magee* to the "real" issues in the case. The word "real" is no mere verbal flourish. It is important. By hypothesis, the accused has pleaded not guilty and, by that plea, has put in issue *every* element of the offence or offences charged. But it by no means follows that there is a "real" issue about every one of those elements. Leaving aside cases in which an accused makes some formal admission of one or more elements of an offence charged, by the time the judge comes to instruct the jury, it will often be apparent that evidence adduced by the prosecution in respect of one or more of the elements of the charge is not challenged, and that there is, therefore, no real issue about that element or those elements. To take a simple example, in a murder trial there will very often be no dispute that the victim is dead. There may be no dispute about how, when or where the victim died. In order to prove the case, the prosecution will lead evidence about those matters but it will be apparent, by the end of the trial (if not much sooner), that there is no "real" issue about those matters.

77 A fundamental part of the task of the trial judge is to decide what are the "real" issues in the case. And another, no less important, part of that task is to tell the jury what those real issues are. It is in respect of those issues (and only those issues) that the judge must instruct the jury about so much of the law as the jury must understand to decide the case.

78 Identifying the real issues in a case will not always be easy. In some jurisdictions, legislative provisions have been made for procedures evidently

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76 (1952) 85 CLR 437 at 466. See also, for example, *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [143]; *De Gruchy v The Queen* (2002) 211 CLR 85 at 96 [44].

77 See, for example, *Azzopardi* (2001) 205 CLR 50 at 69 [49].

78 *Alford v Magee* (1952) 85 CLR 437 at 466.

intended to reveal what are the real issues in a case before the trial begins[79]. But even where there are such procedures, and they are applied, it is inevitable that, at many criminal trials, no positive defence case will be advanced and the accused will go to the jury on the basis only that the prosecution has failed to prove its case beyond reasonable doubt. It must be accepted, therefore, that there will be cases (including, but not only, those in which no positive defence is advanced) in which it may not be at all clear whether there is a real issue about some particular aspects of the matter. The trial judge must nonetheless decide what are the real issues, and must tell the jury what they are.

79 It is of the first importance to the proper administration of criminal justice that trials not be made longer or more elaborate than they need to be. That object is defeated if trial judges do not focus the minds of the jurors upon what are the real issues in the case and confine the instructions that are given to the jury to only so much of the law as the jury needs to decide those issues. Prudence may well be said to suggest that the judge should err on the side of stating more rather than fewer issues. But it is important to recognise that doing that tends to defeat the object of confining the length and complexity of criminal trials to what is necessary for the attainment of justice. The trial judge must, therefore, steer a difficult course between stating only the real issues in the case, and stating too many issues for the jury's consideration, with consequent over-elaboration and prolongation of the trial. As Owen J said in *Commissioner for Road Transport v Prerauer*[80], the first duty of the trial judge is "to explain to a jury in a *simple, understandable* fashion the law which is applicable to the particular case before them" (emphasis added).

80 Because deciding what are the real issues in a case is a matter of judgment to be made in the context of the particular trial, there will be cases where minds may differ about what those issues are. There will, therefore, be cases where, on appeal, it is said that the trial judge failed to recognise that there was a real issue about some aspect of the matter. In that regard it may be that a deal of importance should be attributed by the appellate court to what was done at trial, having regard not only to the advantage a trial judge has in understanding the way in which a trial has been conducted, but also the responsibility of counsel (on both sides of the record) to draw attention to any omission in the trial judge's instructions to the jury. But these are questions that do not now arise and need not be examined here.

81 It is as well to say something more about the way in which a trial judge should identify the real issues in a case.

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79 See, for example, *Crimes (Criminal Trials) Act* 1999 (Vic), ss 6-8.

80 (1950) 50 SR (NSW) 271 at 277.

82 The issues in a case can be described at any of a number of levels of abstraction. The ultimate issue in a criminal trial, stated in its most abstract form, is whether the prosecution has proved, beyond reasonable doubt, the accused's guilt of the *offence* charged. That issue can be restated, but still at a high level of abstraction, as being whether the prosecution has proved all of the stated *elements* of the offence charged, to the requisite standard of proof. Neither statement identifies the "real" issues in a criminal trial.

83 In a case like the present, the central issue at the trial could be described as being whether the evidence of the complainant was to be accepted as establishing the appellant's guilt beyond reasonable doubt. But again, such a statement of the issue is too abstract. It does not direct the minds of the jury to what should properly be identified as the "real" issues in the case. It does not do that because the issues for the jury are both more elaborate and more refined than: "Do you believe the complainant?". They are more elaborate because the complainant's evidence dealt with a number of different subjects; they are more refined because evidence about those subjects must be related to elements of the offences charged. The real issues in the case must be identified in a more elaborate and refined way than by saying *only* that the issue is "Do you believe the complainant?".

84 The point that has just been made can be put in another way – by reference to what one author has said[81] on the subject of issue-framing in legal writing. He distinguishes[82] between what he calls "deep issues" and "surface issues":

> "A 'deep' issue is concrete: it sums up the case in a nutshell – and is therefore difficult to frame but easy to understand. A 'surface' issue is abstract: it requires the reader [or listener] to know everything about the case before it can be truly comprehended – and is therefore easy to frame but hard to understand."

85 "Do you believe the complainant?" and "Has the prosecution proved its case?" are surface issues. They do not reveal the decisional premises. The reader, or listener, must go elsewhere to learn what the real issue is. In particular the reader, or listener, must go to the facts of the case that have been revealed in the evidence led at trial. And that is why, to be useful, a statement of the real issues that are to be decided by the tribunal of fact in a criminal trial must be explicitly related to the facts of the case rather than stated in abstract terms. Doing that will mean that they are stated as "deep issues", not "surface issues".

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81 Garner, *A Dictionary of Modern Legal Usage*, 2nd ed (1995) at 471-473.

82 Garner, *A Dictionary of Modern Legal Usage*, 2nd ed (1995) at 471.

86 In the present case, the issue – "Do you believe the complainant?" – had a number of factual premises. They had been identified in the final addresses of counsel. The complainant had been aged between eight and 10 years at the times of the alleged offences; she was aged 14 years at the time of the trial. At the times the offences were alleged to have occurred, the appellant was in a relationship with the complainant's mother. The complainant had given more than one account of what she alleged had happened, and those accounts were not identical. Trial counsel for the appellant emphasised what she contended were inconsistencies in the complainant's accounts of what the appellant was alleged to have done. These accounts were said to be "so inherently improbable, unlikely, inconsistent within themselves, confusing, changing and presenting so many difficulties" as to require the jury to entertain a reasonable doubt about the complainant's testimony. Trial counsel illustrated her contention by reference to the complainant's evidence about incidents at Agnes Water and her account of an incident said to have occurred while the appellant was driving. More than once, trial counsel for the appellant dwelt upon the improbability of the complainant's suggestion that there had been as many as 30 incidents of penile penetration. Counsel for the prosecution accepted that the complainant had made some mistakes in giving her account of events, but sought to characterise other differences in the accounts she gave, as the complainant's adding details to her account as she became more confident.

87 The issues thus presented for the jury to decide were issues arising from the facts that (a) the complainant was very young at the time of the alleged offences, (b) the complainant was still a young person when she gave evidence, (c) about four to five years had elapsed between the time of the alleged offending and the complainant giving her evidence at trial, (d) because time had elapsed between the alleged offending and medical examination of the complainant, the medical evidence could neither support nor contradict the allegation that there had been sexual penetration and (e) the offences were alleged to have occurred in a family setting that had since broken up but was one in which the complainant alleged that she feared the appellant both during and after the relationship had ended.

88 Stated in abstract terms the factual issue for the jury was – do you accept the complainant's evidence as establishing the elements of each offence beyond reasonable doubt? Stated in more concrete terms, the issue was – do you accept the evidence of a young person about particular events of sexual misconduct, occurring in the family setting described, and said to have occurred, unwitnessed, some years ago, when she was aged between eight and 10 and which medical examination can now neither verify nor falsify? (That statement of the issue is not proffered as a formula that could have been adopted in instructing the jury about the real issues in the trial of the appellant. It is too compressed to be used for that purpose, at least without a deal of amplification and explanation. It is put

forward as no more than a convenient summary of the information that had to be given to the jury by the trial judge.)

89 When the issues in the trial are understood in this way, it is evident that, contrary to what was held in the Court of Appeal[83], the present case was not to be distinguished from *Robinson*. What *Robinson*, and *Longman*, hold is that there are cases where there is a perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinise the evidence of a complainant with care before arriving at a conclusion of guilt[84]. That is not because complainants in sexual cases, as a class, are to be treated as intrinsically untrustworthy. Section 632(1) of the *Criminal Code* (Q) precludes such reasoning. And s 632(2) does away with the former requirement to direct a jury that it would be unsafe to convict an accused on the uncorroborated evidence of the complainant[85]. But those sub-sections do not prevent a judge from making a comment on the evidence given in the trial "that it is appropriate to make in the interests of justice"[86]. It is the interests of justice that dictate whether a warning should be given.

90 Lengthy delay in making a complaint is often an important reason for concluding that a warning should be given. But as *Robinson* shows, delay measured in decades (as it was in *Longman*) is not the only reason for concluding that it is appropriate in the interests of justice to warn a jury of the dangers of acting on the uncorroborated evidence of a complainant. That is why the convenient shorthand description of a warning as a "*Longman* direction" will mislead if it is understood as requiring that a warning be given only if the facts of the instant case are generally similar to those that were considered in *Longman*.

91 It is the nature of the issues that were to be decided by the jury in this case – the real issues in the case – that required a warning. The issues identified earlier in these reasons are not materially different from those that arose and were considered in *Robinson.* It was necessary for the trial judge to point out to the jury the need, when deciding those issues, to scrutinise the complainant's evidence with care before convicting the appellant.

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83 *TN* (2005) 153 A Crim R 129 at 140-141 [56]-[58].

84 *Robinson v The Queen* (1999) 197 CLR 162 at 171 [26]; *Longman v The Queen* (1989) 168 CLR 79 at 86.

85 cf *Evidence Act* 1906 (WA), s 36BE considered in *Longman* (1989) 168 CLR 79 at 87-89.

86 *Criminal Code* (Q), s 632(3).

92 Once it is recognised that the trial judge must decide what are the real issues in the trial, and tell the jury, in concrete terms, what those issues are, the purpose of a judge giving to the jury a warning, like those considered in *Longman* and *Robinson*, is more apparent. It is a warning given to the jury about how they are to decide one or more of the real issues in the case. If the real issues are identified for the jury in concrete terms, as they should be, the warning will evidently relate to one or more of those issues.

93 Because the criminal law has become as complex as it now is, "bench books" of standard forms of instructions to the jury are readily available for the assistance of trial judges. Properly used, such books are invaluable. But there is a risk that the prescription of common forms of instruction, which must necessarily be framed without reference to specific facts, and thus in abstract terms, will be used without relating them to the issues that the jury has to decide. The proper use of standard forms of jury instructions requires the judge first to identify what are the real issues in the case, then to identify the relevant instructions that are to be given to the jury and then, and most importantly, to instruct the jury by relating the standard form of instruction to the real issues in the case. The bare recitation to a jury of the relevant sections of a bench book of standard instructions, unrelated to the real issues in the case, does not fulfil the trial judge's task. In particular, to recite the terms of a form of *Longman* or *Robinson* direction, without relating that direction to the issues that the judge has identified for the jury as the real issues in the case, will ordinarily not suffice.

94 The real issues in the present case required the trial judge to give the jury instructions of the kind described in *Robinson.* The appeal should be allowed.

95 CALLINAN J. The issues in this appeal are whether the trial judge, in a trial of a person charged with serious sexual misconduct, should have given a *Longman*[87] direction, and whether an intermediate court of appeal should have quashed the appellant's convictions on that account, and on account of the way in which evidence of uncharged similar acts was dealt with at the trial.

The facts

96 The complainant was born on 11 March 1990. She alleged, in April 2002, that she was sexually abused by the appellant between January 1999 and June 2000, when she was nine to 10 years of age. The appellant and the complainant's mother had lived together during that period.

97 The appellant was charged with 10 counts of indecently dealing with a child under 16 years of age, which included two charges of rape, and eight charges of indecent treatment. The particulars given of the charges were as follows:

1. *Indecent treatment*. On 19 August 1999, at about 8.30 pm in the office downstairs of the complainant's home, and while the complainant's mother was sewing upstairs, the appellant used the complainant's hand to manipulate his penis.

2. *Rape*. On 22 August 1999, the complainant and her mother and brother were at the appellant's house in Calliope, and while the complainant's mother was asleep on a mattress in another room, the complainant was taken by the appellant to a bedroom where he removed her clothing and engaged in sexual intercourse with her.

3. *Indecent treatment*. During a camping trip on the Easter weekend of 2000, the appellant accosted the complainant in a toilet cubicle and digitally penetrated her.

4. *Indecent treatment*. On the return from the camping trip on the Easter weekend of 2000, the complainant became ill and was sent from her mother's car to the appellant's car. There, while he was driving, the appellant squeezed the complainant's vagina.

5. *Indecent treatment*. In about May 2000, at the appellant's house in Calliope, the appellant induced the complainant to come into his garage on a pretence, exposed himself, and attempted penetration.

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

6. *Indecent treatment*. While staying overnight at the Camelot Motel in Gladstone, the appellant and the complainant went to get a medical bag from a car, and the appellant made the complainant touch his penis.

7. *Indecent treatment*. While staying overnight at the Camelot Motel, the appellant and the complainant went to retrieve a medical bag from a car, and the appellant digitally penetrated the complainant.

8. *Indecent treatment*. The complainant one evening, apparently after returning from the Camelot Motel, went out in the night to see to her barking dog while her mother and brother were asleep, and the appellant, who was on the porch, naked from the waist down and touching his penis, put the complainant's hand on him, took the complainant downstairs and tried to force himself against her.

9. *Indecent treatment*. In about March 2000, the complainant went into the laundry of her house, and there the appellant put the complainant's hand on his testicles, directed her to touch them, and asked her if she liked it.

10. *Rape*. In about March 2000, the complainant was in the laundry in her house. The appellant removed her clothes, pushed her on to a mattress there, and forced his penis fully into the complainant's vagina.

98 Various other circumstantial details surrounding each of these events were given in evidence by the complainant.

99 The complainant first told her mother of the appellant's molestation of her about two years after the last occasion of it, when her mother and the appellant had separated, and had moved away with the complainant and her brother to New South Wales.

The trial

100 The appellant was tried in the District Court of Queensland by a judge (Richards DCJ) and jury. It is necessary to explore in some detail the conduct of the trial, not only on behalf of the appellant but also on behalf of the respondent. But before doing that, it should be noted that counts 1, 3, 4, 5, 6, 7, 8 and 9 were of indecent dealing and the other two (counts 2 and 10) were of rape.

101 The complainant's evidence-in-chief was pre-recorded pursuant to the provisions of Pt 1, Div 4A[88], subdiv 3[89] of the *Evidence Act* 1977 (Q)[90]. The

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88 Evidence of special witnesses.

89 Pre-recording of affected child's evidence.

recordings were of two interviews with police officers. The first interview was conducted on 4 April 2002, and the second on 8 May 2002. The appellant was then 12 years of age. She was 14 by the time of the trial.

102 In cross-examination, which was conducted remotely on video, pursuant also to the *Evidence Act*[91], the complainant explained why she had allowed two years to elapse before making any complaint about the appellant's dealing with her: that the appellant had threatened her with firearms, which he had about him at all times, and, it may be inferred, because he also kept "huge knives". Even after the complainant's mother and the appellant separated, he continued for a time to contact the complainant by telephone and to threaten her.

103 The complainant's evidence included allegations of acts which were criminal but which were not the subject of any of the counts on the indictment. No objection was taken to the admission of evidence of these, and some were either elicited or emphasized in cross-examination, it fairly clearly appears, for tactical purposes. The evidence of the uncharged acts included that the appellant held his genitalia against the complainant's breasts; that he committed three acts of sexual intercourse with her on a camping trip to Agnes Water; that he digitally penetrated her about a dozen times (in addition to the occasions the subject of counts 3, 4 and 7); and, that he raped the appellant "over a couple of dozen times", "a real lot ... 30" times, or, "quite a few times", "more than five or six times".

104 The complainant described, quite accurately as it turned out, one unusual feature of the appellant's genitalia, and tattoos on his buttocks. Her ability to do this was not necessarily inconsistent with her having observed the appellant when he was living with her mother, but it was further, rather persuasive evidence, capable, to some extent at least, of verifying the complainant's accounts of indecent dealing.

105 For reasons which will appear some of the actual evidence given by the complainant with respect to the allegation of 30 uncharged acts of rape, should be set out. This was her evidence in chief on the topic:

> "Q: OK. How many times do you think he put his penis inside your vagina?
>
> A: A lot, a real lot.

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90 See particularly s 21AK(1), see also s 21A(2)(e) but note s 21A(1A).

91 For the purposes of s 21AK, "evidence" includes "cross-examination", see s 21AK(9).

Q: So when you say a real lot, are you able to put a number on it?

A: 30.

Q: 30's a big number?

A: Yeah, it is.

Q: And over what period of time do you think that would've been?

A: Over the time that Mum was going out with him, it was '99 till about 2000, I think it was 2001, 2000, oh, almost the start of 2001."

106 The appellant was represented by counsel at his trial. She took no objection to the reception of the evidence that I have just quoted, or any other evidence contained in the two statements which referred to, or implied that there had been numerous other uncharged acts of indecent dealing and rape from time to time.

107 Other matters damaging to the appellant emerged in evidence. The complainant said in cross-examination that she recorded information about the appellant's molestation of her in a diary which she kept from time to time when he and her mother were cohabiting. At one point the complainant said that every time that the appellant did something indecent or improper to her she made a note in her diary. That she did so was not directly challenged but the diary did not find its way into evidence as it might have done on the basis of the oral references to it during the trial.

108 One rather likely reason why no objection was taken by the appellant to the evidence of 30 or so uncharged acts of rape, as was observed in argument in this Court, is the use to which it could be put for the purposes of the appellant's defence: the more extravagant the allegation, "the bigger the lie". Indeed, counsel for the appellant obviously did seek to make forensic points of this kind. In that regard she had some success for she was able to have the complainant contradict herself in cross-examination by having the latter reduce the claim of rape on 30 occasions, to one of, "quite a few times", "maybe five or six times" and "more than that [five or six]".

109 The forensic points made in cross-examination were repeated in the appellant's counsel's speech to the jury. It was then submitted for the appellant that the complainant's evidence was "inherently improbable, unlikely, inconsistent within [itself], confusing, changing and presenting so many difficulties to you ... [you will] have at least a reasonable doubt if not more".

110 A reading of the whole of the transcript of the trial leads inevitably to the conclusion that the real and substantial issue upon which the prosecution and

defence were joined was the complainant's credibility, to be assessed having regard to some particular matters: the extravagance of the complainant's allegations generally, and in particular with respect to the uncharged acts; her delay in making a complaint; the plausibility or otherwise of her explanation for her delayed complaint; and, the truth or otherwise of her complaints of rape in the light of the medical evidence that her hymen had been found, on medical examination, to be intact. The last had to be weighed with further medical evidence that penetration was not necessarily inconsistent with the maintenance of an entire hymen.

111 The complainant's mother was a witness for the prosecution. All that need be said of her evidence was that it established that there were many opportunities for the appellant to commit the offences with which he was charged, on or about the occasions alleged of them, and, in one instance, that the appellant absented himself unnecessarily with the complainant on a day and at a place where she alleged he indecently dealt with her.

112 The appellant did not give evidence and called no witnesses on his behalf.

113 In her summing-up to the jury, the trial judge said this:

> "Many factors may be considered in deciding what evidence you accept. I'll mention some general considerations that may assist. You have seen how the witnesses presented in the witness box in answering questions. Bear in mind that many witnesses are not used to giving evidence and may find the different environment distracting. Consider also the likelihood of the witness's account. It is important that the evidence of a particular witness seemed reliable when compared with other evidence that you accept. Did you think the witness seemed to have a good memory? You may also consider the ability and the opportunity the witness had to see, hear, or know the things that he or she testified about. Another point may be – has the witness said something different at an earlier time? These are only examples and you may well think that other general considerations apply.
>
> It is, as I have said, up to you to accept the evidence and what weight, if any, you give to a witness's testimony or an exhibit."

114 Her Honour said this of the complainant's evidence:

> "[T]he Crown has to prove to you beyond reasonable doubt essentially through the complainant because she is really the witness that the evidence rises and falls on, that what she says in relation to each of the counts is not only truthful, but is reliable so that you are prepared to accept her evidence beyond reasonable doubt.

> The Crown says when you consider these matters, use your common sense and ask yourself how would a 14 year old react when she is giving her evidence, obviously it is a very stressful situation and how would an even younger child react [if she had] been abused in the way [the complainant] was by the accused. You might think the Crown says that it is perfectly natural that she would not complain, for example, until she got to New South Wales because you have this man who does have guns, the police confirmed that he has guns, and she said she was threatened with the guns and in those circumstances, you might not be surprised that there was no complaint made immediately to the mother or the brother or the teacher or whoever because she knew. She said at one stage in her evidence said he slept with the gun under the pillow and the mother confirmed that he did in fact sleep with a gun under his pillow.
>
> The Crown says to you, by all means, look for inconsistencies in the stories and while there might be some, you would find that generally speaking, she is consistent in what she says between the interview and cross-examination and I have just been through all that with you, ladies and gentlemen, you must form your own view about that."

115 Later, her Honour drew attention to the appellant's contention that the evidence of the complainant was so inconsistent that the jury could not rely upon it:

> "The defence remind you that they do not have to try and show you why she would be untruthful about these things and of course it is not for the defence to prove anything, but she is so inconsistent that you simply could not accept what she says beyond a reasonable doubt or beyond any doubt for that matter for all the sorts of reasons that have been highlighted by the defence in their address."

116 The trial judge dealt with the evidence of the uncharged acts in this way:

> "In this case, ladies and gentlemen, you have also heard evidence from the complainant about a number of offences which haven't been charged. You must remember that the accused is charged only with the 10 offences set out in the indictment and as I have already said to you, you have got to consider those charges separately.
>
> If you find that you have a reasonable doubt about an essential element of the charge, you must find the accused not guilty of the charge, but as I have said, in addition to the 10 offences, you have also heard evidence from the complainant of other incidents in which she says sexual activity involving the accused occurred. She wasn't particularly specific about that activity in her audio-tapes, although there were some more specifics given in cross-examination.

Those incidents are not the subject of any charges before you and you can use the evidence of them for one purpose only, that is, if you accept the evidence, it shows the prosecution says, the real nature of the relationship between the accused and the complainant and it does put the 10 charges in their proper context, but you should really only have regard to the evidence of the incidents, not the subject of the charges, if you find them reliable.

If you accept them, you must not use them to conclude that the accused is someone who has a tendency to commit the type of offence with which he is charged. It would be quite wrong for you to reason that if you are satisfied, for example, that he had sex with the complainant at Agnes Water, he is therefore likely to have committed count 1, 2, 3 or 4, or whatever.

Remember that the evidence of the incidents, not the subject of the charges, comes before you only for the limited purpose mentioned and before you can convict the accused, you must be satisfied beyond reasonable doubt that the charge has been proved by evidence relating to that charge.

However, if you don't accept the complainant's evidence relating to the incidents not the subject of the charges, you can take that into account when considering her evidence relating to the offences that have been charged. For example, if you think, I will use the Agnes Water example again, if you think that she is just making up these episodes of sexual intercourse at Agnes Water, obviously, that is going to significantly affect her credibility and that is going to reflect on whether you accept what she says in relation to counts 1 or 2 or 3 or 4, et cetera.

So, that is just in relation to the offences which are not charged, which generally – I probably will not list them all, but there is the Agnes Water camping trip, there is the testicles against the breasts, there is the fact that she says she was raped up to 30 times by the accused and she says he also inserted his finger in her vagina on up to a dozen occasions. So those things all have not been charged and that I refer to when I say acts that have not been charged."

117 Neither party made any application to the trial judge for any redirections.

118 The jury found the appellant guilty on counts 3, 4, 5, 6, 7, 8 and 9, but was unable to reach agreement on the others, including the charges of rape. That they could not reach agreement on the charges of rape, may well be explained by the medical evidence that the complainant's hymen remained intact.

The Court of Appeal

119 The appellant argued in the Court of Appeal of the Supreme Court of Queensland (Williams and Keane JJA and Helman J) five grounds of appeal. Only those relating to the trial judge's directions, and the evidence of uncharged acts remain live in this Court.

120 The Court of Appeal unanimously dismissed the appellant's appeal[92].

121 It was necessary for the Court of Appeal to construe s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Q), which provides:

> "**Evidence of complaint generally admissible**
>
> (1) This section applies in relation to an examination of witnesses, or a trial, in relation to a sexual offence.
>
> (2) Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.
>
> (3) Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.
>
> (4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.
>
> (5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.
>
> (6) In this section –
>
> complaint includes a disclosure.
>
> preliminary complaint means any complaint other than –

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92 *T v TN* (2005) 153 A Crim R 129 per Keane JA, Williams JA and Helman J agreeing.

(a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or

(b) a complaint made after the complaint mentioned in paragraph (a).

Example –

Soon after the alleged commission of a sexual offence, the complainant discloses the alleged commission of the offence to a parent (complaint 1). Many years later, the complainant makes a complaint to a secondary school teacher and a school guidance officer (complaints 2 and 3). The complainant visits the local police station and makes a complaint to the police officer at the front desk (complaint 4). The complainant subsequently attends an appointment with a police officer and gives a formal witness statement to the police officer in anticipation of a criminal proceeding in relation to the alleged offence (complaint 5). After a criminal proceeding is begun, the complainant gives a further formal witness statement (complaint 6).

Each of complaints 1 to 4 is a preliminary complaint. Complaints 5 and 6 are not preliminary complaints."

122 Keane JA, who wrote the principal judgment, said[93]:

"Properly construed, s 4A(4) proscribes any suggestion by a trial judge that delay in making a complaint is a reason for regarding a complainant's evidence as unreliable. Any warning given by a trial judge must avoid any such suggestion. As *Robinson*[94] shows, delay in making a complaint may, in combination with other circumstances of the case, give rise to an appreciation on the part of the trial judge that the complainant's evidence of sexual abuse is sufficiently implausible to require a strong warning to the jury; but delay *of itself* must not be suggested as a reason for the scepticism which calls for close scrutiny." (Original emphasis)

123 His Honour drew attention[95] to a passage from the judgment of Brennan J in *Carr v The Queen*[96], to identify "[t]hree points of present relevance"[97] to the

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93 (2005) 153 A Crim R 129 at 142 [64].

94 *Robinson v The Queen* (1999) 197 CLR 162.

95 (2005) 153 A Crim R 129 at 143 [68].

giving of a warning to a jury. They were, first, that in most cases a warning is not a necessary aid to a jury's assessment of evidence; secondly, that the basis for a warning is the special knowledge, experience or awareness of the judge, whether it be actual or inherited; and, thirdly, that the purpose of a warning is to avoid a miscarriage of justice[98]. He said[99]:

> "Apart from the issue of the complainant's reliability by reason of delay in making a complaint, the justification for judicial intervention in the fact-finding process of present relevance was identified in *Longman v The Queen*[100] and *Doggett v The Queen*[101] as a judicial concern that the lay mind may not be alert to the forensic disadvantages which may be suffered by an accused by reason of the lapse of time. These disadvantages may involve problems, both in marshalling evidence in his or her defence, and in attacking a prosecution case made more plausible because the lapse of time gives rise to the risk of honest but erroneous memory on the part of a complainant. This latter problem may be especially acute in the case of a complainant who was a young child at the time of offences alleged to have occurred many years before trial.
>
> In this case, the new evidence upon which the appellant seeks to rely does not suggest that the appellant was disadvantaged by the delays of which the appellant complains. Rather, this evidence tends to confirm that a warning of the forensic disadvantage suffered by the appellant by reason of the lapse of time would have been given on a false assumption. That is so because, having regard to the further affidavit material presented on appeal, it would have been quite wrong to suggest that the appellant's ability to marshal evidence in support of his case was adversely affected by the delay on the complainant's part. The learned trial judge cannot fairly be criticized for failing to perceive that delay may have adversely affected the appellant's ability to present his case. No such prejudice was

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96 (1988) 165 CLR 314 at 324-325.

97 (2005) 153 A Crim R 129 at 144 [69].

98 This point was also, as Keane JA noted at par [69] of his Honour's reasons, made by Brennan J in *Bromley v The Queen* (1986) 161 CLR 315 at 324-325.

99 (2005) 153 A Crim R 129 at 144-145 [72]-[75].

100 (1989) 168 CLR 79 at 91.

101 (2001) 208 CLR 343 at 356-357 [51]-[54], 377-378 [126]-[128]. See also *R v Heuston* (2003) 140 A Crim R 422 at 430-432 [43]-[52].

identified to her Honour however; and indeed no such prejudice was identified in the hearing in this Court.

This was not a case where the complainant's age at the time of the occurrence of the offences of which she gave evidence, coupled with the lapse of time before her complaints were brought to the appellant's attention were such as to give rise to a realistic concern that the effects of the long passage of time on child fantasy or semi-fantasy may have created a problem that honest but erroneous memory has given the complainant's evidence a false plausibility.[102]

Finally in relation to this point, there was no application at trial for a *Longman* direction. It is now said that this is another example of the incompetence of those who represented the appellant at trial. The failure of those who represented the appellant at trial to seek a *Longman* direction is, however, reasonably explicable on the footing that the view was reasonably open that this was not a case of 'long delay' of the kind apt to disadvantage the accused in any of the ways discussed above."

124 After setting out some passages from the trial judge's summing-up, Keane JA went on to say[103]:

"Having been so instructed, the jury would have understood that they could not use the evidence of the uncharged acts to reason from acceptance of that evidence to a conclusion of guilt on any of these specific charges. In my view, the directions given by the learned trial judge, in this regard, were adequate.[104] It is significant in this regard, that the jury did not accept the complainant's evidence in relation to the rape counts 2 and 10."

125 Keane JA thought *Robinson v The Queen*[105], upon which the appellant relied, distinguishable. After setting out a key passage from the judgment in that case he said that it did not mandate a warning to the jury in every case in which a child's complaint of sexual abuse is uncorroborated: features important to *Robinson* were absent here. He was also of the view that "although there [was] present here no corroboration in the technical sense ... there was evidence ...

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102 Cf *Longman v The Queen* (1989) 168 CLR 79 at 101 and 107-109; *Doggett v The Queen* (2001) 208 CLR 343 at 376-377 [124]-[152].

103 (2005) 153 A Crim R 129 at 148 [91].

104 See *KRM v The Queen* (2001) 206 CLR 221 at 233 [31], 263-264 [132]-[133].

105 (1999) 197 CLR 162.

capable of providing independent support for the complainant's version ... That evidence confirms a degree of intimate contact between the complainant and the appellant ... Further ... there is evidence which explains the complainant's delay in complaining about the appellant's conduct"[106].

126 His Honour thought it also relevant that, unlike in *Robinson*, this appellant had not given evidence denying the allegations made at trial. The other distinguishing features of *Robinson*, he said, were that there the complainant and the defendant had maintained "a harmonious relationship" and there was no explanation, as here, for the delaying of any complaint. Keane JA was further influenced by the absence of any plausible, innocent explanation in the evidence as to how the complainant would know of the tattoos to which I have referred, and the physical peculiarity, a mole on the appellant's genitalia[107]. As to these last matters, I interpolate, it was not suggested to either the complainant or her mother that the latter had told her daughter about these matters, or that the complainant had had an opportunity of seeing the appellant when he was innocently unclothed, a matter otherwise, as I have already said, of possible inference.

127 Keane JA made[108] what he described as a second point about *Robinson*, that it was "truly an exceptional case so far as the justification for the warning was concerned". The complainant's claims there were, his Honour said, implausible to a serious extent: it was, moreover, because of the combination of factors present there that a strong warning should have been, but was not, as this Court held, given.

The appeal to this Court

128 In support of the submission that the Court of Appeal erred in not holding that the trial judge should have given a specific warning with respect to the possible unreliability of the complainant's evidence, the appellant argued that s 9[109] of the *Evidence Act* provides a rebuttable presumption only as to the

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106 (2005) 153 A Crim R 129 at 140 [56].

107 (2005) 153 A Crim R 129 at 140 [57].

108 (2005) 153 A Crim R 129 at 140-141 [58].

109 Section 9 provides:

"**Presumption as to competency**

(1) Every person, including a child, is presumed to be —

(a) competent to give evidence in a proceeding; and

(b) competent to give evidence in a proceeding on oath.

(Footnote continues on next page)

competency of a child to give evidence, and that if s 632[110] of the *Criminal Code* (Q) proscribed a warning, as, it was contended the Court of Appeal held, then no trial judge could ever make a comment reflecting on the reliability of a witness, regardless of the nature of the case, provided that a child or other witness as the case might be, was a competent witness. This, it was added, was in variance with what has been held by this Court on numerous occasions[111]. The appellant again relied upon *Robinson*, contending that the Court of Appeal failed convincingly to distinguish it, and that it was not an exceptional case in any relevant respect.

129 It is to *Robinson* therefore that I now turn. In order to decide that case the Court had to consider s 632 of the *Criminal Code*, which was in the same form then as it now is except that the word "persons" has been substituted for "complainants" in sub-s (3).

130 With respect to sub-s (2) the Court (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ) said this[112]:

> "Sub-section (2) is to be understood in the light of common law rules which developed by way of qualification to the general principle stated above. Since an accused person could be convicted on the evidence

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(2) Subsection (1) is subject to this division."

110 Section 632 provides:

"**Corroboration**

(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.

(2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.

(3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

111 The appellant cited the following cases on that point: *Kelleher v The Queen* (1974) 131 CLR 534 at 564-569; *Bromley v The Queen* (1986) 161 CLR 315; *Carr v The Queen* (1988) 165 CLR 314; *Longman v The Queen* (1989) 168 CLR 79; *B v The Queen* (1992) 175 CLR 599; *BRS v The Queen* (1997) 191 CLR 275; *Doggett v The Queen* (2001) 208 CLR 343; *MFA v The Queen* (2002) 213 CLR 606.

112 (1999) 197 CLR 162 at 168-169 [19]-[21].

of one witness only, the law was required to address the problem of unreliability. Such unreliability could arise from matters personal to the witness, or from the circumstances of a particular case. The law requires a warning to be given 'whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'[113]. However, as was held in *Longman v The Queen*[114], in relation to a similar Western Australian provision, the sub-section is not directed to such a general requirement. Rather, it is aimed at a more specific rule, by which the common law identified certain classes of case where evidence was considered to suffer from intrinsic lack of reliability. Although the classes were not closed, they included certain well-established categories. Thus, in *Carr v The Queen*[115], reference was made to 'the rules which oblige a trial judge to warn the jury of the danger of convicting upon the uncorroborated evidence of an accomplice, the victim of a sexual offence and the sworn evidence of a child'. It will be noted that the present case fell into both of the second and third categories. The reasons for those categories were discussed in such cases as *Longman v The Queen*[116] and *B v The Queen*[117]. They included what are now rejected as 'stereotypical assumptions'[118].

Once it is understood that s 632(2) is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence, its relationship to the concluding words of s 632(3) becomes clear, although the symmetry between the two provisions is not perfect.

... That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies, or matters relating to the circumstances, which bring into operation

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113 *Longman v The Queen* (1989) 168 CLR 79 at 86. See also *Bromley v The Queen* (1986) 161 CLR 315 at 319, 323-325; *Carr v The Queen* (1988) 165 CLR 314 at 330.

114 (1989) 168 CLR 79.

115 (1988) 165 CLR 314 at 318-319.

116 (1989) 168 CLR 79 at 91-94.

117 (1992) 175 CLR 599 at 616.

118 *R v Ewanchuk* [1999] 1 SCR 330 at 336.

the general requirement considered in *Longman*. Moreover, the very nature of the prosecution's onus of proof may require a judge to advert to the absence of corroboration."

131 It is upon the statements of principle in *Robinson* that a court should focus, rather than upon a comparison of the facts of it with the facts of the case before the Court. The features present in *Robinson* are certainly not a factual catalogue of the particular facts which will require a *Longman* direction in other cases. Nor was it, regrettably, a particularly exceptional case. The Court of Appeal took too narrow a view in this case of the principles for which *Robinson* stands. Furthermore, it was not a valid point of distinction that the appellant in that case had given evidence at his trial, whereas this appellant, had, as he was entitled to do, remained silent.

132 That having been said, I am unable however to find that there were facts or circumstances in this case, or in the conduct of it, and having regard particularly to the appellant's failure to ask for it, that demanded that a *Longman* direction be given. In my opinion Keane JA was right to place some weight on the complainant's evidence of the distinctive marks upon the appellant's lower body, even though the evidence of them from the complainant may arguably have fallen short of corroboration in a strictly legal sense. The jury heard both the complainant's explanation for her delay, an explanation which was plausible, and the appellant's attack upon it. They also heard that it was after the appellant had ceased to contact the complainant and threaten her, albeit some considerable time afterwards, but when the complainant, her mother and brother were living in New South Wales, that the complainant told her mother for the first time, something of the appellant's molestation of her. The complainant's tender age, her likely embarrassment, the pressure upon and threats of the appellant to her, his ability to carry them out, and the shift from Queensland to New South Wales beyond the appellant's immediate reach, together, it seems to me, are capable of explaining much, if not all, of the delay. That the appellant chose not to ask for a *Longman* direction, and that, as has been regarded as relevant by this Court[119] since *Robinson*, such delay as did occur here seems unlikely to be such as to have deprived the appellant of any means or capacity to defend himself, or otherwise to meet the case for the prosecution, taken with the other matters to which I have referred mean that the Court of Appeal was not wrong to conclude that a *Longman* direction was not imperative there.

133 Accordingly I am of the opinion that although the Court of Appeal may have erred in some respects in its distinguishing and analysis of *Robinson*, the trial judge here was not, in the circumstances, bound to give a *Longman* warning.

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119 *Doggett v The Queen* (2001) 208 CLR 343 at 356 [51] per Gaudron and Callinan JJ.

Uncharged acts

134 The appellant submitted that the trial judge erred in two respects in relation to the uncharged acts of the appellant. I have already referred to the contradictory evidence of 30 or fewer rapes. It is also right, as the appellant submits, that there were other allegations by the complainant, of uncharged digital penetration on up to a dozen occasions, and at least one other instance of uncharged indecent behaviour. In his written submissions the appellant submitted that these uncharged acts were inextricably intertwined with charged acts. I do not think that this is so, but if it were, then it might be that on that basis there would have been an argument that the evidence of the uncharged acts was admissible, a matter which I need not decide.

135 The appellant is correct however, in submitting that the authorities of this Court are not as clear as they might be in relation to uncharged acts, most of which have tended to be cases of sexual misconduct.

136 Uncharged acts were considered in *Gipp v The Queen*[120]. The evidence that was adduced there, of a general nature, was of repeated sexual abuse by the accused of the complainant. The trial judge told the jury that the history of that abuse was led to show the "relationship" between the accused and the complainant, and that there was no need for them to be satisfied beyond reasonable doubt of these so-called "background facts". By a majority (Gaudron, Kirby and Callinan JJ, McHugh and Hayne JJ dissenting), the Court decided that the verdicts of guilty were unsafe and unsatisfactory. The reasoning of the Justices in the majority was not all to exactly the same effect. Gaudron J was of the view that general evidence of uncharged sexual abuse is not admissible unless it has a special probative value as similar fact, or propensity evidence, or it becomes an issue by reason of the way in which the defence has been conducted[121]. Her Honour was also of the opinion that the view that history of sexual abuse need not be proved beyond reasonable doubt was erroneous, because it left open the possibility that a jury might reason from a finding, on the balance of probabilities, that if there was a relationship involving sexual abuse then the accused was guilty of the offences charged[122]. Kirby J concluded that the direction with respect to the evidence of uncharged acts was, as the Crown conceded in this Court, undesirable and should not have been given. His Honour's opinion was that evidence of that kind is admissible only if the facts to

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120 (1998) 194 CLR 106.

121 (1998) 194 CLR 106 at 112-113 [11]-[13].

122 (1998) 194 CLR 106 at 113 [14].

which it goes, may constitute "indispensable links in a chain of reasoning towards an inference of guilt"[123]. His Honour was of the further opinion that the evidence was, as it has been described variously, "dispositional", "background", "tendency", "propensity", "relationship", or in some circumstances "similar fact", evidence[124]. Because no consideration had been given to its proper characterization, and therefore its admissibility, and any directions that should have been given regarding it, the trial there had miscarried[125]. I too concluded that the true character of the evidence was of propensity. As with Gaudron J, I expressed my concern about the reception of so called "background" evidence[126]:

> "I do not accept that *non-specific* highly prejudicial evidence may be lead by the prosecution, and juries told that it might provide 'part of the essential background'[127] against which the other evidence is to be evaluated.
>
> I would, with respect, therefore reject the notion that there is a special category of background evidence that may be adduced by the prosecution in a criminal case (absent, that is, any forensic conduct by the defence that may make it admissible). If such evidence is to be received it must owe its admissibility to some, quite specific, other purpose, including for example, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive. There may also be cases in which a relationship between people may be directly relevant to an issue in a trial and in those circumstances admissible as such." (emphasis added)

137 In *KRM v The Queen*[128] McHugh J discussed propensity evidence and the consequences of a tender of it. He said this of *Gipp*[129]:

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123 (1998) 194 CLR 106 at 155 [139], citing *Shepherd v The Queen* (1990) 170 CLR 573 at 579.

124 (1998) 194 CLR 106 at 155-156 [140].

125 (1998) 194 CLR 106 at 156 [141].

126 (1998) 194 CLR 106 at 168-169 [181]-[182].

127 *B v The Queen* (1992) 175 CLR 599 at 610 per Deane J.

128 (2001) 206 CLR 221.

129 (2001) 206 CLR 221 at 233 [31].

> "By reason of the divided reasoning of the majority in *Gipp*, it cannot yet be said that evidence of uncharged acts of sexual conduct is no longer admissible to prove the relationship between the parties. Until this Court decides to the contrary, courts in this country should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused, just as they have done for the best part of a century. But that said, trial judges will sometimes, perhaps often, need to warn juries of the limited use that can be made of such evidence and will have to give a propensity warning concerning it[130]."

138 Hayne J agreed with McHugh J, repeating "that until this Court decides to the contrary, courts should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused, just as they have in the past"[131].

139 Both of their Honours who were in the minority in *Gipp*, as appears from the passage in the judgment of McHugh J in *KRM* that I have just quoted, and from the judgment of Hayne J in the same case, can be seen therefore to have expressed their reservations about non-specific "relationship evidence", and the care with which its characterization, reception, and use must be treated.

140 The judgments of the majority in *Gipp* and subsequent authority accordingly do not, I would emphasize, countenance the reception of evidence simply as relationship evidence "to explain the nature of the relationship". They require as a minimum that evidence of uncharged acts have some actual direct probative value relevant to the issues, that it be carefully scrutinized before it is admitted, that it may need to be characterized as propensity evidence, and that it almost always will require, if admitted over objection, directions appropriate for evidence of that kind.

141 It is because the terms "relationship evidence" and "background evidence" tend, as does so-called "contextual evidence", to elude definition[132], or, equally undesirably, to be referred to by judges and prosecutors imprecisely, that the concepts which these terms are assumed to embrace, need careful examination.

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130 *R v T* (1996) 86 A Crim R 293 at 299.

131 (2001) 206 CLR 221 at 264 [134], quoting McHugh J at 233 [31].

132 See, eg, *R v Beserick* (1993) 30 NSWLR 510 at 515; *R v Josifoski* [1997] 2 VR 68; *R v Vonarx* [1999] 3 VR 618 at 625; *Pearce* (1999) 108 A Crim R 580 at 591 (where *R v Vonarx* was approved).

142 In this case the respondent submitted that the evidence of the uncharged acts was relationship evidence or evidence that put the charged offences "in context". The difficulty for the respondent in this submission was that nothing needed further to have been said or established at the trial regarding the relationship of the appellant with the complainant than the facts of the offences themselves which completely established it, that is, of offender and victim, and all other relevant circumstances, including the times and the particulars of the offences. The same may be said of "the context". The evidence of the uncharged acts neither explained nor added anything to these with respect to any "relationship" or "context", except the possibility of prejudice.

143 Criticisms of *Gipp* have been made but they have not always been well founded. For example in *R v Fraser*[133] the New South Wales Court of Appeal suggested that one or more of the majority in *Gipp* had no regard to *Wilson v The Queen*[134], a case which, it was suggested, propounded an unqualified rule that relationship evidence was admissible as a matter of course. *Wilson* is authority for no such general rule. This is clear from what Barwick CJ said in that case[135]:

> "It is not that *all* evidence of the relationship of the parties is admissible, but only that from which a *relevant inference may logically and reasonably be drawn*." (emphasis added)

The evidence in *Wilson's* case was of a threatening and quarrelsome relationship for a long time before the death. The evidence of the threats showing the bad relationship there did establish a fact genuinely in issue, guilty ill-will towards the victim, as well as motive, a fact over and beyond the facts of the actual offence, just as the evidence of the threats to the complainant here established a different kind of fact in issue: the reason for the complainant's delay in complaining. The reasoning of Menzies J in *Wilson*[136] was to no different an effect as appears from his Honour's adoption of a statement of Kennedy J in *R v Bond*[137], that the relations of the offender to his victim:

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133 New South Wales Court of Criminal Appeal, unreported, 10 August 1998, per Mason P, Wood CJ at CL and Sperling J cited in *Qualtieri v The Queen* [2006] NSWCCA 95 at [77] per McClellan CJ at CL.

134 (1970) 123 CLR 334. See also Heydon, *Cross on Evidence*, 7th Aust ed (2004) at 649 [21050].

135 (1970) 123 CLR 334 at 339.

136 (1970) 123 CLR 334 at 343-344.

137 [1906] 2 KB 389 at 401.

> "so far as they *may reasonably be treated as explanatory of the conduct of the accused as charged* ... are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial". (emphasis added)

Both McTiernan J and Walsh J agreed with Menzies J.

144 *Gipp* and *KRM* establish that it is not enough for an advocate or a judge to treat undefined, non-specific or irrelevant evidence recording what passed between an accused and another at other times as "relationship evidence" and to admit it as such.

145 Nothing that has been said in the cases before *Gipp* and since it, nor any criticism or otherwise of it, serves therefore to allay my very serious concerns about the reception, over objection, of non-specific, potentially prejudicial "relationship" or "contextual" or "background" evidence. Further, the practical reality is that in a case such as this one, in which there are multiple recurrent counts of the same offence or similar offences over a considerable period, any justification for the leading of "relationship", "contextual" or "background" evidence will not be well founded. The position may, for example, be different if there is only one or a small number of offences charged and[138]:

> "a truthful complainant is likely to be disbelieved if relationship evidence is excluded and in consequence the jury derive the impression that the complainant is saying that the accused molested him or her out of the blue".

146 It is important, in my opinion, that both parties and trial judges pay close attention to any attempt to tender evidence of uncharged acts. If it truly is, as I think it was in *Gipp* and may have been, if anything, here, propensity evidence, and it is tendered without adverting to its true character as such, the prosecution may obtain the benefit of its prejudicial effect without the disadvantage of the strictures that apply to evidence of that kind.

147 There is another potential disadvantage to a defendant in the reception of such evidence in a case in which the defendant does give evidence. The prosecution evidence of uncharged acts will have already further darkened the character of the accused, over and above the impact of the nature of the acts charged. He will in all likelihood then enter the witness box as a person of bad character, without necessarily having sought to show his own good character, or to impute bad character to a witness for the prosecution. Section 15 of the *Evidence Act* governs evidence of bad character, and lays down strict rules for its

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138 *R v GAE* (2000) 1 VR 198 at 206 [22], cited in Heydon, *Cross on Evidence*, 7th Aust ed (2004) at 649 [21050].

introduction, rules which do not have any ready application to circumstances of the kind present here. Timely objection to the reception of possibly inadmissible "relationship evidence" will ensure that its actual character is identified, and whether it is truly admissible relationship evidence as such, within the narrow confines accepted by all of the judges in *Wilson*, stressed by the majority, if somewhat differently, in *Gipp*, and accepted in part at least by McHugh J and Hayne J in *KRM*. It may be that once it is established, if such be the case, that the evidence in question is truly relationship evidence, that the proper directions are those which Doyle CJ (Perry J and Mullighan J agreeing) in the Full Court of the Supreme Court of South Australia thought appropriate in *R v Nieterink*[139]. After reviewing the authorities, including *Wilson*, his Honour pointed out that in many cases of sexual offences against children, the evidence of uncharged acts had several potential uses. Almost certainly correctly, in my respectful opinion, his Honour said that the evidence of a particular relationship might be admissible to explain a criminal act, or the circumstances in which it was committed, that might otherwise be surprising, and, on that account, implausible. His Honour pointed out that the evidence may establish a pattern of guilt to explain a child's submission and silence[140]. I certainly agree with his Honour's opinion that there has been a tendency towards an unsatisfactory non-specificity in the use of the term "relationship"[141]. I further think, as did his Honour, that the term "background" is unsatisfactory because of its failure to identify the precise manner in which it is suggested that the evidence of uncharged acts can be used[142].

148 It is not as if in Queensland, and I understand it, elsewhere[143], that the prosecution does not have at hand the means of prosecuting multiple sexual offences against children, who by reason perhaps of tender age, fear, embarrassment, denial, or inexact recall of dates, are unable to be precise about the occasions, but not the fact of molestation over a period. The means are provided by s 229B of the Queensland *Criminal Code*[144], which was the charge under consideration in *KBT v The Queen*[145].

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139 (1999) 76 SASR 56.

140 (1999) 76 SASR 56 at 65 at [43].

141 (1999) 76 SASR 56 at 65 at [45].

142 (1999) 76 SASR 56 at 65 at [46].

143 See, eg, *Crimes Act* 1900 (NSW), s 66EA; *Crimes Act* 1958 (Vic), s 47A; *Criminal Code* (WA), s 321A; *Criminal Law Consolidation Act* 1935 (SA), s 74; and *Criminal Code* (Tas), s 125A.

144 Section 229B(1) of the *Criminal Code* provides:

(Footnote continues on next page)

149 This case is not however one for the final resolution of these questions. No matter what the proper characterization of the evidence of the uncharged acts was here, the fact is the appellant did not object to it, and sought to make forensic capital out of the self-contradictions in it, and generally, its incredibility because of its excessiveness. Furthermore, the appellant sought no redirection as to the way in which the trial judge dealt with it. This was almost certainly because the trial judge emphasized more than once the necessity for the jury to be satisfied beyond reasonable doubt that the complainant's evidence about the offences charged was true, and repeated the submission on the appellant's behalf that there were inconsistencies in the evidence of the complainant. The trial judge's directions were certainly spare, but not quite to the point of insufficiency in the circumstances. It would no doubt have been better if close attention had been paid to the nature and admissibility of the evidence of the uncharged acts, and the possibility of the desirability of different directions concerning them from those which were given. But, as the trial was conducted by the parties, and the issues joined, there was no error which could have led to a miscarriage of justice. It was not insufficient in the circumstances for the trial judge to say, after referring to the evidence as "relationship evidence" that if the jury rejected it, then the credibility of the complainant would be significantly affected, and would reflect upon her evidence of the offences charged.

150 I would therefore dismiss the appeal.

"Any adult who maintains an unlawful sexual relationship with a child under the prescribed age commits a crime."

Sub-section (7) provides:

"An adult may be charged in 1 indictment with:

...

(b) 1 or more other offences of a sexual nature alleged to have been committed by the adult in relation to the child in the course of the alleged unlawful sexual relationship (the '*other offence or offences*')."

145 (1997) 191 CLR 417.

151 HEYDON J. I agree with the reasons of Callinan J for concluding that the trial judge committed no error in relation to uncharged acts which could have led to a miscarriage of justice[146]. In relation to the issue centring on *Longman v The Queen*[147], I agree with Crennan J[148].

152 In the Court of Appeal counsel for the appellant (who did not appear at the trial, but did appear in this Court) made certain particular criticisms of his predecessor's conduct in relation to pre-trial procedure and in relation to the handling of the trial itself. The Court of Appeal rejected these criticisms in a convincing manner[149].

153 In this Court counsel for the appellant accepted that special leave had not been sought in relation to the competence of the appellant's counsel at trial, and that there was no ground of appeal in relation to it. However, on occasion he hinted that counsel for the appellant at the trial had been incompetent in not requesting a *Longman* warning; in not objecting to the tender by the prosecution of evidence as to uncharged acts; in not raising with the trial judge any difficulties about the uncharged acts either before the evidence was called, or before counsel's final addresses, or before the summing up; in introducing into evidence uncharged acts not tendered by the prosecution; and in failing to seek directions and failing to direct misdirections about the uncharged acts.

154 If criticism was intended, it should be rejected. There were objectively reasonable explanations for what counsel for the accused did and did not do. She was dealt very bad cards. She played them very well. Her methods were the reverse of incompetent.

155 I agree with Callinan J and Crennan J that the appeal should be dismissed.

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146 Paragraphs [134]-[149] above.

147 (1989) 168 CLR 79.

148 Paragraphs [172]-[186] below.

149 *R v TN* (2005) 153 A Crim 129 at 137-138 [43]-[50] and 145 [75].

156 CRENNAN J. The issues in this appeal and the relevant facts are set out in the reasons of Callinan J. I agree with the conclusions of Callinan J that the Court of Appeal of Queensland was right to refuse to intervene on the ground that there was a miscarriage of justice[150] because the trial judge did not warn the jury in accordance with *Longman v The Queen*[151] and was also right to decide that there was no error in the trial judge's directions in respect of uncharged acts. I have nothing to add to what Callinan J has said in his reasons in relation to uncharged acts. My reasons for agreeing with Callinan J's conclusion that no warning in accordance with *Longman* was required are as follows.

157 The appellant contended that the trial judge's directions to the jury on the necessity to scrutinise the complainant's evidence were neither adequate nor sufficient to discharge her function. Callinan J has set out relevant passages from the trial judge's summing up to the jury[152] which obviates the need for me to do so.

158 It was not in dispute that it was the duty of the trial judge "to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make"[153] and that a trial judge must give a warning to the jury "whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case"[154]. The appellant contended that the trial judge should have warned the jury in accordance with *Longman* that it would be dangerous to convict the appellant on the complainant's evidence alone, because of the appellant's forensic disadvantage in attempting to marshal a defence as a result of the delay between the dates of the offences alleged and the preliminary complaint[155] made by the complainant to her mother, unless the complainant's evidence was scrutinised

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150 *Criminal Code* (Q), s 668E.

151 (1989) 168 CLR 79.

152 Reasons of Callinan J at [113]-[116].

153 *Criminal Code* (Q), s 620(1). The relevant legislation is set out in the reasons of Callinan J at [121], and footnotes 109 and 110.

154 *Longman v The Queen* (1989) 168 CLR 79 at 86 per Brennan, Dawson and Toohey JJ, citing *Bromley v The Queen* (1986) 161 CLR 315 at 319, 323-325 and *Carr v The Queen* (1988) 165 CLR 314 at 330; followed in *Robinson v The Queen* (1999) 197 CLR 162; *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343.

155 *Criminal Law (Sexual Offences) Act* 1978 (Q), s 4A distinguishes between a "complaint" and a "preliminary complaint".

with great care. No redirection requiring the trial judge to give such a warning was sought at trial by the appellant.

159 It was accepted by the appellant that s 4A(4) of the *Criminal Law (Sexual Offences) Act* 1978 (Q) proscribed a warning due to delay in making a complaint in relation to a sexual offence, if delay were the only reason said to oblige the giving of a warning. It was also conceded at the hearing of the appeal that the delay in question of between two and two and a quarter years between the offences, which were the subject of the appeal against conviction, and complaint in April 2002, was not a delay of the same order as occurred in *Longman* (more than 20 years), *Crampton v The Queen*[156] (19 years), or *Doggett v The Queen*[157] (between 12 and 19 years).

160 The appellant also recognised that s 632(2) of the *Criminal Code* (Q), as amended, removes the former "rule of law or practice" that a trial judge give a corroboration warning[158] by directing a jury that it would be dangerous or unsafe to convict an accused person on a complainant's uncorroborated evidence in a sexual matter. Further, s 632(3) proscribes a warning that a class of persons, such as children or young persons giving evidence in a sexual matter, are inherently unreliable.

161 As explained in *Crofts v The Queen*[159] concerning similar legislation in Victoria[160], this Court in *Longman* dealt with similar legislation in Western Australia[161], and made it clear that such legislation, properly understood "was to reform the balance of jury instruction not to remove the balance" by correcting practices which formerly required trial judges to instruct juries that "complainants of sexual misconduct were specially suspect, those complained against specially vulnerable and delay in complaining invariably critical"[162]. Nevertheless such legislation does not abrogate a general requirement for a trial

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156 (2000) 206 CLR 161.

157 (2001) 208 CLR 343.

158 The history of corroboration warnings can be found in *R v Rosemeyer* [1985] VR 945 at 956-966 per Ormiston J.

159 (1996) 186 CLR 427.

160 *Crimes Act* 1958 (Vic), s 61.

161 *Evidence Act* 1906 (WA), s 36BE. This section was repealed by the *Criminal Law Amendment Act* 1988 (WA), s 39.

162 (1996) 186 CLR 427 at 451 per Toohey, Gaudron, Gummow and Kirby JJ.

judge to give a warning "whenever it is necessary to do so in order to avoid a risk of miscarriage of justice"[163].

162 In reliance on *Robinson v The Queen*[164], concerning the same legislation as here, the appellant submitted that the concatenation of factors here, being the age of the complainant (nine or 10 at the time of the commission of the offences and 14 at the time of testifying), the sexual nature of the complaints, the delay between the commission of the offences and preliminary complaint to the complainant's mother (around two years), and inconsistencies in the complainant's evidence, required that a warning be given in accordance with *Longman*.

The issue

163 The issue on appeal is whether the jury's findings of guilt were unsafe because the trial judge did not give the jury a warning in accordance with *Longman*.

164 At trial, jury members were unable to agree in respect of one count of indecent dealing alleged to have occurred on 19 August 1999 (Count 1) and two counts of rape alleged to have occurred between 31 January 1999 and 1 June 2000 (Count 2) and between 1 January and 1 June 2000 (Count 10).

165 The jury found the appellant guilty of four counts of indecently dealing with a child under 16 years of age, and of three counts of permitting himself to be indecently dealt with by a child under 16 years of age. The seven counts which are the subject of this appeal against conviction involved six occasions between January and May 2000.

The facts

166 The complainant lived with her mother and her brother at all material times and was between the ages of nine and just over 10 when the alleged offences occurred. The appellant was her mother's boyfriend and the four of them lived in a family arrangement from time to time. The complainant's mother ended her relationship with the appellant in about May 2000. For about four or five months thereafter the appellant telephoned the complainant's mother and invariably asked to speak to the complainant.

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163 *Robinson v The Queen* (1999) 197 CLR 162 at 168 [20] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ.

164 (1999) 197 CLR 162.

167 The complainant first complained to her mother in April 2002, (having turned 12 years old on 11 March 2002), and she was interviewed by police shortly thereafter on 4 April and 8 May 2002. The appellant's home was searched by police in October 2002, and guns for which he held a licence were found. The appellant was committed for trial on 19 January 2004 and convicted on 8 July 2004.

The trial

168 The appellant neither called nor gave evidence at trial. There was some independent evidence to support the complainant. She described a mole on the appellant's penis and tattoos on each of his buttocks. It was not suggested to her in cross-examination that she could have observed such details in circumstances other than those of intimate sexual contact. The complainant said she did not tell her mother of the events covered by the indecent dealing charges when they occurred (one in 1999, seven in 2000) because she was afraid of the appellant: he had threatened her to secure her silence, and made her aware that he possessed guns and ammunition. Her mother gave evidence that the appellant owned two hand guns, two revolvers and two rifles at the times in question and slept with a handgun under his pillow. Her mother also supported various matters of detail and circumstance in respect of the complainant's evidence, but she could not corroborate any sexual misconduct by the appellant.

169 As no redirection in accordance with *Longman* was sought by the appellant at trial, the appellant did not identify for the trial judge any forensic disadvantage to him arising from the circumstances that counts of indecent dealing on 19 August 1999 (Count 1) upon which the appellant was not convicted and between January to May 2000 (Counts 3 to 9) upon which the appellant was convicted were not reported until April 2002 or tried until July 2004. In particular, it was not alleged to the trial judge that the appellant had lost the chance to adequately test the evidence.

The Court of Appeal

170 Whilst it was alleged on this appeal that the appellant was forensically disadvantaged in "attempting to mount his defence", it was noted in the Court of Appeal there were ready explanations for the appellant's failure to call any evidence before the trial judge, including the fact that the appellant gained the forensic advantage of having the last word to the jury[165]. It was also noted that the appellant was given an opportunity by the trial judge to file further affidavit material in relation to further medical evidence, but no further evidence from the appellant was forthcoming.

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165 *R v TN* (2005) 153 A Crim R 129 at 137 [44].

171 Before the Court of Appeal affidavit material was filed to show the appellant had been advised by both his counsel and solicitor at the trial not to give or call evidence and new evidence was put forward. It was observed by Keane JA (correctly in my view), that such evidence did not show that the appellant was disadvantaged by the delays now complained about, and the new evidence from witnesses tended to confirm that if the trial judge had given a warning on the assumption that the delay adversely affected the appellant's ability to marshal evidence, it would have been given on a false assumption[166].

Was a warning required?

172 In *Longman* the majority, Brennan, Dawson and Toohey JJ, said it was imperative[167] for a trial judge to warn a jury of the danger of convicting on uncorroborated evidence when an accused lost the means of adequately testing a complainant's allegations by reason of a long delay "of more than twenty years" in prosecution[168]. Harking back to Lord Hailsham's statement in *R v Spencer*[169] that a danger may not be "obvious to a lay mind", it was stated that such a factor "may not have been apparent to the jury"[170]. Deane J considered a warning was necessary because of the danger that over a long time a child's "fantasy about sexual matters" might become a "conviction of reality"[171]. McHugh J considered a warning necessary because of the danger that, over a long time, the recollections of an honest witness can be distorted by "imagination, emotion, prejudice and suggestion"[172]. The recollections in question were of a 32 year old witness of sexual misconduct alleged to have occurred when she was between six and 10 years old and in the twilight state between being fully asleep and fully awake.

173 *Robinson* involved a delay of three years before a complaint was made of an occasion of two anal rapes when the complainant was eight years old; the trial occurred nearly four years after the alleged offence, when the complainant was

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166 *R v TN* (2005) 153 A Crim R 129 at 145 [73].

167 (1989) 168 CLR 79 at 91; see also *Crampton v The Queen* (2000) 206 CLR 161 at 179-180 [39] per Gaudron, Gummow and Callinan JJ.

168 (1989) 168 CLR 79 at 91.

169 [1987] AC 128 at 135, see also Lord Ackner at 141.

170 (1989) 168 CLR 79 at 91.

171 (1989) 168 CLR 79 at 100-101 per Deane J.

172 (1989) 168 CLR 79 at 107 per McHugh J.

11. The identified forensic disadvantage arising out of delay of three years before complaint was made was that medical evidence may have been able to verify or falsify the allegation of two instances of anal rape alleged to have occurred on the one occasion. The facts in *Robinson* also involved the danger Deane J spoke of in *Longman*[173], namely that the complainant said he was asleep when the first act of penetration occurred and woke up while it was going on, and the danger McHugh J spoke of in *Longman*, in that the complainant was suggestible[174]. The present case is unlike *Robinson* in both of those respects. However, I agree with an observation of Kirby J in his Honour's reasons that "the case law on judicial warnings does not progress by perceived similarity amongst the facts of particular cases but by reference to the dangers of miscarriages of justice that particular facts serve to illustrate"[175].

174 The majority in *Longman* required a trial judge to explain to the jury the reason why it would be dangerous to convict on the uncorroborated evidence of the complainant and then to explain to the jury how to avoid the danger[176]:

> "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."

175 In *Crampton v The Queen*[177], Gaudron, Gummow and Callinan JJ said of "the very great delay" that the appellant was "unable adequately to test and meet the evidence of the complainant"[178]. They explained[179]:

> "An accused's defence will frequently be an outright denial of the allegations. That is not a reason for disparaging the relevance and

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173 (1989) 168 CLR 79 at 100-101.

174 (1989) 168 CLR 79 at 107-108; see also *Robinson v The Queen* (1999) 197 CLR 162 at 171.

175 Reasons of Kirby J at [51].

176 (1989) 168 CLR 79 at 91 per Brennan, Dawson and Toohey JJ.

177 (2000) 206 CLR 161.

178 (2000) 206 CLR 161 at 181 [45].

179 (2000) 206 CLR 161 at 181 [45]; see also 212 [142] per Hayne J.

> 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."

176 These observations were repeated by Gaudron and Callinan JJ in *Doggett v The Queen*[180], a case in which Kirby J said that to determine whether warnings in accordance with *Longman* are required it is "essential to address the particular mischief which the judges in *Longman* identified"[181], which he described as follows[182]:

> "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."

177 A delay between the date of offences and prosecution which is more than 20 years (*Longman*), 19 years (*Crampton*), or between 12 and 19 years (*Doggett*) creates a circumstance palpable or obvious to a judge, but which a jury might fail to appreciate. That is, that after such a long period an accused is forensically disadvantaged by losing a chance to adequately test the complainant's evidence[183] or to adequately marshal a defence[184].

178 Here, as already mentioned, no specific or particular forensic disadvantage to the appellant, as a result of delay, was identified to the trial judge: rather it was contended on appeal that the concatenation of factors of age (nine-10 at the date of the offences and 14 at the trial), the sexual nature of the offences (indecent dealing), the delay in complaint (around two years) and inconsistencies in the complainant's evidence, necessitated a warning in accordance with *Longman*, as applied in *Robinson*. It was asserted that those factors together

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180 (2001) 208 CLR 343 at 356 [52].

181 (2001) 208 CLR 343 at 379 [134].

182 (2001) 208 CLR 343 at 379 [134].

183 (1989) 168 CLR 79 at 91.

184 (2000) 206 CLR 161 at 181 [45].

created a forensic disadvantage to the appellant in attempting to mount his defence. It was not explained how this occurred or why a jury might fail to appreciate such an occurrence. A practical and orthodox direction was given by the trial judge in relation to the inconsistencies in the complainant's evidence. Neither *Longman* nor *Robinson* are authority for the proposition that it is imperative to give a warning in accordance with *Longman* when faced with the specific concatenation of circumstances identified by the appellant. The question is whether all of the circumstances gave rise to some forensic disadvantage to the appellant, palpable or obvious to a judge, which may not have been apparent to the jury, thus necessitating a warning so as to avoid a miscarriage of justice. There is a clear distinction between such a case and a case where all the circumstances can be evaluated by a jury in the light of their own experiences[185].

179 Not unnaturally, the practical application of *Longman* in some trial situations has not always proved easy, particularly in respect of clarifying how great a delay might give rise to an imperative to give a warning[186]. As stated in *Doggett* this is not a question purely of mathematical precision[187]. Further, there is a distinction to be made between an inexplicable delay in reporting (as in *Robinson*) and an explicable delay as here, which may elicit comment but not necessarily require a warning (*Longman*). Intermediate courts of appeal have essayed various distillations of the principles to be applied to particular cases at hand[188].

180 As the reasons of the majority in *Longman* make clear, it is not imperative to give a warning because the circumstances include allegations of sexual

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185 *R v Miletic* [1997] 1 VR 593 at 606 per Winneke P, Charles and Callaway JJA.

186 *R v BWT* (2002) 54 NSWLR 241 at 272-273 [95] per Sully J; *R v GTN* (2003) 6 VR 150 at 154 [12] per Callaway JA, 172-174 [90]-[101] per Eames JA.

187 (2001) 208 CLR 343 at 377 [127] per Kirby J.

188 *R v Johnston* (1998) 45 NSWLR 362 at 375 per Spigelman CJ with whom Sully and Ireland JJ agreed; *GPP* (2001) 129 A Crim R 1 at 15-27 [23]-[55] per Heydon JA with whom Wood CJ at CL and Carruthers AJ agreed; *R v BWT* (2002) 54 NSWLR 241 at 263 [75] and 272-275 [95] per Sully J; *R v GTN* (2003) 6 VR 150 at 163 [55] per Eames JA; *R v RWB* (2003) 87 SASR 256 at 262-270 [33]-[55] per Besanko J with whom Bleby J agreed, 272-275 [65]-[80] per Sulan J; *R v BFB* (2003) 87 SASR 278 at 282-284 [34]-[41] per Doyle CJ with whom Perry and Mullighan JJ agreed; *R v MM* (2004) 145 A Crim R 148 at 169-171 [111]-[122] per Howie J; *R v DRG* (2004) 150 A Crim R 496 at 501-503 [30]-[32] per Doyle CJ with whom Bleby and Gray JJ agreed; *JJB v The Queen* (2006) 161 A Crim R 187 at 194-197 [36]-[47] per Kirby J with whom Spigelman CJ and Howie J agreed.

misconduct or because the complainant is young at the time of the events alleged (or at trial) or because there is some delay in complaint to, for example, a mother. While the purpose of a warning in accordance with *Longman* is to ensure a fair trial and to avoid a miscarriage of justice, the purpose of the relevant legislation is to ensure balance in jury instruction, without proscribing warnings when it is in the interests of justice to give them.

Forensic disadvantage

181 The critical issue in relation to the need for a warning in accordance with *Longman* is whether any delay in complaint (and/or prosecution), be it 20 years, or two or three years, creates a forensic disadvantage to an accused in respect of adequately testing allegations[189] or adequately marshalling a defence[190], compared with the position if the complaint were of "reasonable contemporaneity"[191].

182 The shorter the delay, the more difficult it is to assert that an accused has lost the ability to adequately test the evidence of the complainant or to adequately marshal his defence. In circumstances where the delay is short by comparison with the delay in *Longman*, and is explained by an accused's threats, some forensic disadvantage which is palpable and obvious to an experienced judge, but which a jury may fail to appreciate, needs to be identified because a judge must warn of the relevant danger[192] before explaining to the jury how the particular danger is to be avoided. Without that circumstance, a warning in accordance with *Longman* is not imperative because a trial judge is in no position to explain why it would be dangerous to convict on the complainant's uncorroborated evidence.

183 The complainant gave uncontradicted evidence that the appellant threatened her on numerous occasions, often in parallel with the offences, by reference to his guns which he showed her several times. Her evidence was that she "would have told [her mother] but [she] was worried about the guns". The threats were directed not only at her but also involved threats to her mother and brother and were subsequently repeated after the last offence on several occasions, by telephone, during a five month period after the appellant and the complainant's mother ended their relationship. The complainant told her mother of the events very early in April 2002, some two to three weeks after her mother,

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189 (1989) 168 CLR 79 at 91.

190 *Crampton v The Queen* (2000) 206 CLR 161 at 181 [45].

191 (2000) 206 CLR 161 at 181 [45].

192 *R v Glennon (No 2)* (2001) 7 VR 631 at 671 per Winneke P and Ormiston JA.

her brother and she had moved from Queensland to New South Wales. The complainant introduced the revelations of alleged sexual misconduct when alone with her mother by saying she was glad not to live in Gladstone anymore. Gladstone was the place where four of the relevant offences occurred and where she had seen the appellant several times after her mother and the appellant had ended their relationship.

184 No forensic disadvantage of a kind which a jury may not appreciate arises automatically because of delay[193], or because the evidence is uncorroborated evidence of sexual misconduct[194], or because of the complainant's youth[195].

185 Here the appellant did not contend that the warning sought was imperative because events occurred when the complainant was in the twilight state between waking and sleeping. Further, there was no identification before the trial judge of any forensic disadvantage to the appellant arising out of the delay in complaint or prosecution, in respect of the indecent dealing counts. There was medical evidence that the complainant's hymen was intact and no findings of guilt were made in respect of two counts of rape. It was not submitted at trial, before the Court of Appeal or in this appeal, that reasonably contemporaneous medical evidence could have verified or falsified the counts of indecent dealing, which were distinguishable from the counts of rape because they did not involve allegations of successful penile penetration, and the counts of the appellant permitting himself to be dealt with indecently by forcing the complainant to touch his genitalia.

186 There was no forensic disadvantage to the appellant, arising out of the explained delay, which would have been palpable or obvious to the trial judge, but would not have been apparent to the jury. The concatenation of circumstances, being the age of the complainant at the time of the offences and at trial, the sexual nature of the offences, the explained delay between the offences and report, and trial, and inconsistencies in the complainant's evidence, could all be evaluated by the jury in the light of their own experiences. Therefore it was not necessary for the trial judge to give a warning to avoid a miscarriage of justice.

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193 *Criminal Law (Sexual Offences) Act* 1978 (Q), s 4A(4).

194 *Criminal Code* (Q), s 632(1) and (2).

195 *Criminal Code* (Q), s 632(3).

Conclusions

187 I agree with Callinan J that there was nothing in the circumstances of this case which made it imperative for the trial judge to give a warning in accordance with *Longman.* I also agree with his Honour that there were no errors in relation to the trial judge's directions which could have led to a miscarriage of justice and I agree that the appeal should be dismissed.