SUPREME COURT OF QUEENSLAND

CITATION:	*R v C* [2002] QCA 166
PARTIES:	**R** **v** **C** (appellant)
FILE NO:	CA No 267 of 2001 DC No 2219 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2002
JUDGES:	McPherson and Williams JJA and Byrne J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**Appeal allowed. Convictions and verdicts set aside.** **Order that there be a new trial.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – BUGGERY AND INDECENT ASSAULT OR DEALING – PRACTICE AND PROCEDURE – where appellant convicted of four offences of indecently dealing with a child under 12 years of age – where lack of particularity of allegations with respect to each count – where evidence of uncharged acts. CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISDIRECTION AND NON DIRECTION – PARTICULAR CASES – whether grounds for interference with verdict – whether appeal allowed – where offences allegedly occurred between 1980 and 1984 – where extensive delay in making complaint– where evidence was uncorroborated - where failure by trial judge to give adequate *Longman* direction. *Crampton v The Queen* (2000) 75 ALJR 133, followed *Doggett v The Queen* (2001) 75 ALJR 1290, considered *Longman v The Queen* (1989) 168 CLR 79, followed *R v Roberts* (2001) 53 NSWLR 138, distinguished

R v Rogers, CA 445 of 1997, 6 May 1998, considered
R v S [2000] 1 Qd R 445, distinguished
Robinson v The Queen (1999) 197 CLR 162, considered

COUNSEL: Mr N V Weston, for the appellant
Mr B G Campbell, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: I agree with the reasons of Byrne J. The appeal should be allowed. The convictions and verdicts must be set aside. There should be a new trial.

[2] **WILLIAMS JA:** I agree with the reasons for judgment of Byrne J and with the orders proposed.

[3] **BYRNE J:** In August last year, after a trial in the Brisbane District Court, the appellant was convicted of four offences of indecently dealing with a child under 12 years of age. This appeal is against those convictions.

[4] The complainant was the appellant's stepdaughter. She had been born on 19 January 1975 and was 26 when she testified at trial. The offences alleged were old: each was said to have been committed on a date unknown between the complainant's birthdays in 1980 and 1984.

[5] After the jury was empanelled, counsel then appearing for the appellant requested particulars of the incidents charged. The prosecutor's oral response, which consisted of a summary of the evidence the complainant was expected to give, was challenged as insufficient. The judge, instead of ruling on the adequacy of the particulars at that stage, deferred a decision until completion of the complainant's evidence-in-chief.

[6] The complainant gave evidence that the appellant engaged in sexual activity with her from the time she was five or six until aged seven or eight. She told the jury that the first such encounter occurred in her small bedroom, next to the bedroom occupied by the appellant and the complainant's mother, at a house at Indooroopilly. She recalled that the appellant entered her room "to tuck me in" while wearing a brown dressing gown with a "fake velvet" cream trim. The appellant put his hand "down my underpants". Later, he took the complainant's hand and placed it on his penis, moving her hand up and down. This episode was relied on as the offence charged by the first count in the indictment.

[7] The complainant testified that other, "very similar" conduct happened in the same room on a number of occasions when the appellant would tuck her into bed. She could not remember those other incidents "as vividly" as her first encounter, and she could not recall whether on those other occasions the appellant was wearing the dressing gown she had described.

[8] The circumstances giving rise to the second count were also said to have taken place at the Indooroopilly house when the complainant was five or six. The complainant testified that the appellant walked into her bedroom, told her to "come with me", led

her into the adjacent master bedroom, put her onto the bed, and positioned her between the appellant and her mother, who was lying down, suffering from a migraine headache. With the complainant lying on her side facing away from him, the appellant put his right arm over her right hip, rubbed her genitalia, and asked her a few times, "do you like that?" Next, she testified, the appellant rolled her over to face him and had her perform oral sex on him.

[9] Although the "same sort of process" seemed to happen every time her mother had a migraine headache, the complainant told the jury that she could distinguish this incident from others involving similar sexual activity because she remembered that the appellant had said, "come with me" and had led her into the master bedroom.

[10] The third count related to an event said to have taken place when the appellant was seven or eight. The appellant collected her from school in his car and drove her, as he often did, to his glazier's shop. There she asked him for money to make a purchase at a nearby snack bar. The appellant put the money down his pants, challenged her to "come and get it", placed her hand down his blue stubbies, and moved her hand around his genitals.

[11] She "vaguely" remembered another such incident.

[12] The fourth incident which the complainant could specifically recall happened when she was seven or eight. The appellant collected her from school after swimming training. When he stopped his yellow utility car at traffic lights near the Indooroopilly Bridge, he told the complainant to sit closer to him. When she complied, the appellant rubbed her inner thigh "right up" in the region of her underwear.

[13] The complainant said that, although at other times the appellant had rubbed the region of her inner thigh, the event charged as count 4 was "quite vivid" in her memory because it had happened at traffic lights near the bridge.

[14] At the conclusion of the complainant's evidence-in-chief, it was contended on behalf of the appellant that her accounts concerning all four charged incidents lacked, as it was put, the requisite particularisation to ensure that there was a fair trial. Presumably, it was expected that the discharge of the jury and, perhaps, the quashing of the indictment would attend acceptance of the proposition, although the nature of the relief being sought was not expressed. The judge, however, considered that a fair trial was possible. The complainant was then cross-examined, no other evidence was called for the prosecution, and the appellant chose not to adduce any evidence.

[15] That course of proceedings is now said to have amounted to a miscarriage of justice on the footing that an absence of specificity in the complainant's description of the incidents charged does not enable any of them to be identified as a discrete episode. Rather, it is said, the testimony reveals no more than a course of conduct, spread over years, undated, making it near impossible for the appellant to have defended the charges other than by general denial.

[16] Despite the contention that the appellant was at such a disadvantage by the absence of greater specificity in the complainant's allegations as to have been denied a fair trial, no particular prejudice to the defence case was adverted to at the trial or before us. That is to say, it has not been contended that the complainant's inability to

identify more precisely the dates of the incidents alleged to have constituted the offences or her reference to similar, uncharged acts, impeded the investigation or presentation of a defence – as, for example, through prejudicing a possible alibi defence[1] or by diminishing the prospects of finding witnesses whose evidence might have called the complainant's evidence into question. Nor was it said that the effectiveness of her cross-examination was put at risk by the absence of a better identification of the material dates or because the complainant had been invited to mention that similar things, less well remembered, had happened at other times. The absence of specific complaints of that sort is not altogether surprising. For the complainant had testified to occasions on which nominated events occurred, and she described those particular encounters in (what, for such old events, is in several respects) remarkable detail. For every charged incident, she identified the place, the nature of the appellant's conduct, and some feature to distinguish the event from similar misconduct. The complainant's evidence therefore afforded sufficient notice[2] to the appellant of the charges he had to meet. And a fair trial was otherwise possible.

[17] Among the risks that may attend evidence of similar, uncharged acts in a child sex case is that the jury might convict if convinced of nothing more than that the accused engaged in some such illicit sexual activity. No such risk emerged here which could not be addressed adequately by a direction from the judge concerning the use that might be made of the evidence of the uncharged acts. This complainant testified to particular episodes of indecent dealing, and to the circumstances surrounding them. And the judge directed the jury that, in order to convict, they must be persuaded to the requisite standard of proof about the "discrete occasion" on which the offence under consideration was alleged to have been committed.

[18] The absence of appropriate particulars of old charges of sexual abuse of a child where evidence of uncharged acts is adduced in the prosecution case carries substantial risks[3] to the fairness of the trial. In this case, however, the evidence of the uncharged acts and the absence of more precise identification of the dates upon which the offences allegedly occurred has not resulted in a miscarriage of justice.

[19] There is, however, substance in another ground of appeal, which concerns the *Longman*[4] warning.

[20] Trials of charges of old sexual offences committed against a child are very likely to engage a jury's emotions. And we are bound[5] to proceed upon the basis that, in the absence of clear, firm warnings by the judge, a jury may well not grasp either the forensic disadvantages typically encountered by an accused in confronting allegations of old, sexual offences against a child or the risk that the recollection of an apparently honest witness who testifies seemingly convincingly to ancient, illicit sexual activity experienced as a child may be unreliable.

[21] Here the complainant testified to events 20 years earlier, the first of which occurred when she was five or six. Her evidence was uncorroborated. There was no evidence

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1 Cf *R v S* [2000] 1 Qd R 445, 456.

2 It was not suggested that the fairness of the trial had been prejudiced by the postponement of the decision on the adequacy of the particulars until completion of the evidence-in-chief.

3 See the list in *R v Rogers*, CA 445 of 1997, 6 May 1998, at pp 17-18 of Dowsett J's reasons.

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

5 See, for example, *Doggett v The Queen* (2001) 75 ALJR 1290, 1297, 1305, 1309, 1311.

of fresh complaint. In these circumstances, the need to avoid a perceptible risk of a miscarriage of justice required, on the authority of the High Court,[6] a judicial warning, and a statement of the reasons[7] for the warning, sufficient to alert the jury to the dangers of wrongful conviction.

[22] The judge began his directions concerning the risks to the reliability of the complainant's testimony by speaking of a "possible danger" of convicting an accused person upon uncorroborated evidence. Describing this as a general danger, the judge said that a conviction was only possible if, "despite that warning and other matters that I will need to impress upon you in a moment," the jury was satisfied of guilt beyond reasonable doubt.

[23] His Honour next drew attention to the possibility of memory distortion with the passing of the years, saying that "sometimes memory plays tricks" and that "witnesses can remember things" in a way that is inaccurate. The judge reminded the jury that the complainant's evidence amounted to an account from an adult of events said to have taken place when she was a child – things which would "perhaps" have been impressed upon her memory in a way affected by what his Honour called the "immature appreciation of a child".

[24] Turning to the difficulties for the accused posed by the significant lapse of time between incidents and trial, his Honour said that it may be difficult for an accused to prepare for "a trial like this" for two reasons: first, the long period that had elapsed since the incidents were alleged to have occurred; and, secondly, because of "such imprecision as there may be" about when the charged incidents happened. In elaborating on these concerns, the judge spoke of the possibility that, if the complainant had nominated particular dates, the accused might have been able to discover that he was "overseas or something like that" at the time, adding that the imprecision about dates meant that the accused was put "into an invidious position, and you need to keep that in mind in the balance of things when you decide what you make of this case. So those are the things that you need to keep in mind carefully … in this delicate balancing process".

[25] The directions therefore touched upon the two main areas of concern that called for a warning. Unfortunately, however, the warning did not satisfy the minimum requirements authoritatively prescribed.

[26] In *Longman*, also a case involving old allegations of sexual offences committed against a child, Brennan, Dawson and Toohey JJ said:[8]

> "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."

And in *Crampton*,[9] Gaudron, Gummow and Callinan JJ said[10]:

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6 *Crampton v The Queen* (2000) 75 ALJR 133, *Doggett supra*.
7 Cf *R v Roberts* (2001) 53 NSWLR 138, 143.
8 (1989) 168 CLR 79, 91.
9 (2000) 75 ALJR 133.

> "… 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."

[27] This, however, was not the effect of the judge's directions on the impact of delay on the accused's capacity to defend the charges. Instead, to speak, as the judge did, of the age of the offences as giving rise to considerations that merely fell to be weighed in the balance was to fail to warn the jury appropriately about that matter.[11]

[28] As in the circumstances it cannot be concluded that the absence of the necessary warning did not deprive the appellant of a fair chance of acquittal, there is no scope for the application of the proviso.

[29] Other criticisms were made of directions in the summing up, but it is unnecessary to consider them.

[30] The appeal should be allowed, the convictions and verdicts set aside, and a new trial ordered.

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[10] At 141.

[11] The reasons for the warning which deserved emphasis were not restricted to the notion that, by the passage of so many years, the accused had lost the means of testing the complainant's allegations that would otherwise have been available. Here there were also factors concerned with the risks to the reliability of the complainant's testimony which, on the authority of *Robinson v The Queen* (1999) 197 CLR 162, 170-171, *Crampton* and *Doggett*, ought to have been stated as reasons supporting the warning about the danger of conviction, not all of which were adequately dealt with by the judge: the complainant's age at the time of the offences; that the likelihood of error in recollection can be expected to increase with time; that experience has shown that recollection of events occurring in childhood is often erroneous and liable to distortion over time; and the absence of other evidence to support the complainant's testimony.