SUPREME COURT OF QUEENSLAND

CITATION:	*R v Holdsworth* [2002] QCA 432
PARTIES:	**R** **v** **HOLDSWORTH, Anthony James** (appellant)
FILE NO/S:	CA No 167 of 2002 DC No 55 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EXTEMPORE ON:	16 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2002
JUDGES:	McMurdo P, Davies JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS –MISDIRECTION AND NON-DIRECTION - where appellant convicted of one count of rape – where appellant contends learned trial judge erred in failing to direct jury regarding inconsistencies in the complainant's evidence – where appellant contends learned trial judge erred in failing to properly direct the jury in accordance with *Longman v R* – whether verdict unsafe and unsatisfactory *Crampton v R* (2000) 117 A CrimR 222, referred to *Doggett v R* (2001) 182 ALR 1, referred to *Driscoll v R* (1977) 137 CLR 517, referred to *Longman v R* (1989) 168 CLR 79, considered *Morris v R* (1987) 163 CLR 454, referred to *R v C* [2002] QCA 166, CA No 267 of 2001, 14 May 2002, referred to
COUNSEL:	N V Weston for the appellant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The appellant was convicted of committing rape upon his stepdaughter on an unknown date between 31 December 1990 and 1 October 1992. The appellant appeals against that conviction. The amended grounds of his appeal are that the verdict is unsafe and unsatisfactory, the learned trial Judge erred in failing to direct the jury regarding inconsistencies in the complainant's evidence and that the learned trial Judge erred in failing to properly direct the jury in accordance with Longman v R (1989) 168 CLR 79.

The case against the appellant turned primarily on the complainant's evidence which was as follows. The complainant was 22 years old at the trial. She knew the appellant as her stepfather since she was about four years old when he formed a de facto relationship with her mother. The complainant, her mother and her younger siblings moved from Sydney to Queensland. They eventually settled in a large provincial town in South-East Queensland where the complainant lived with her mother and four siblings. The appellant lived at a property about 30 kilometres away. He was the natural father of her three siblings. The three older children, including the complainant, visited him regularly on weekends.

On one such visit the appellant showed her "a picture of Victorian erotica" and made comments about it not being right in most cultures that a father cannot initiate his daughter. That night she put on her nightie and was reading a book on the mattress in the walk-in wardrobe where she was to sleep. The appellant lifted her nightie and rubbed her clitoris and

labia externally. He told her that her clitoris was very small and hidden. He continued rubbing that area, stroked her thigh and told her that whilst most women liked that contact, her mother did not.

The complainant said the appellant was wearing a condom but she could not remember how that came about. Somehow she ended up lying on the mattress and the appellant knelt over her and inserted his penis into her vagina. She said it "really, really, really hurt". As his penis penetrated her she remembered complaining that it was hurting and he said there was a fine line between pleasure and pain. She began to cry.

When he stopped he took off the condom and went to bed. This incident occurred after her 12th birthday.

The next day she went home but made no complaint to her mother. She said that often the appellant would walk in whilst she was in the shower, feel her breasts and comment about how well she was developing.

About a week after the rape she requested that she no longer visit her stepfather and her mother acceded to her request. After this she was continually abominably rude to the appellant. In July 1998 she made a complaint to police. She said she did not consent to any of the appellant's sexual approaches.

In cross-examination she said she thought the rape occurred when she was in grade 8 in 1991, the year she was 11 turning 12, but she was not 100 per cent sure. The touching of the breasts in the shower commenced about a year before the rape and ceased a few months after. She made no complaint to her mother about these touchings.

In her statement to police in July 1998 she made no mention of any book of Victorian erotica. She said she had forgotten this until sitting outside the Courtroom that day reviewing her statement. She had tried to put the whole incident out of her mind and remembered it now for the first time. Her recollection of the erotic book was, however, clear and she would recognise it if she saw it again.

In her statement she said the appellant's words, that he thought it was wrong that a father could not teach his daughter about sex, were said in the walk-in wardrobe at the time of the rape. In cross-examination she said there were two conversations to this effect, one at that time and one earlier when he was showing her the erotic book.

In her evidence-in-chief she did not mention that the appellant asked her to put his condom on and she refused, whereas this was what she said in her statement. In cross-examination she said that she forgot that detail despite refreshing her memory from the statement before giving evidence.

In cross-examination she said the appellant was kneeling in front of her at all relevant times prior to the act of intercourse, whilst in her statement she said that when she refused to put the condom on him he was sitting beside her. She explained this confusion as caused by her emotional state both at the time of making the statement to police and in Court.

Her evidence in Court was that the improper touching in the shower ended shortly after her 12th birthday whilst in her statement she said these things continued until she was about 13 years old; nor did she mention in her statement that these touchings occurred prior to the incident. She again attributed this inconsistency to her emotional state.

She said the appellant did not rape or attempt to rape her on any other occasion and that she did not tell her mother in 1995 that the appellant had tried to rape her on a visit to Lake Borumba.

The complainant's mother gave evidence that the complainant visited the appellant with her half-siblings at his property 30 kilometres away from the home where she lived with the complainant and her other three young children. At one time the complainant stopped visiting him and the other children, apart from the baby, continued to visit him. In cross-examination she said that in 1995 the complainant said there was an occasion when the appellant tried to rape her when they

were at Lake Borumba. This was not explored in re-examination.

The appellant did not give or call evidence.

I will deal firstly with the second ground of appeal, the directions as to inconsistencies in the complainant's evidence. The appellant contends that although the inconsistencies which emerge in my summary of the relevant facts were brought before the jury in the Judge's summing-up of the defence counsel address, these directions lacked judicial authority; in a finely balanced case such as this the Judge should have specifically referred to the inconsistencies as an additional reason for scrutinising the complainant's evidence with care; the added authority of such a judicial direction was required here.

Such a direction is not always necessary, see Driscoll v R (1977) 137 CLR 517 at 536 and Morris v R (1987) 163 CLR 454, 469-470. This was not a case where there was an inconsistent statement about whether or not the rape itself occurred. The Judge directed the jury to scrutinise the complainant's evidence with care because of the delay and the lack of other supporting evidence. Although a Judge may have mentioned the inconsistencies as yet a further reason for scrutinising the complainant's evidence with care, the inconsistencies here which did not go to the heart of the allegations, did not require such a warning. There was no application for a

redirection from the experienced defence counsel at trial. This ground of appeal, in my view, must fail.

The third ground of appeal is the Judge's direction as to delay. The appellant contends the learned trial Judge's direction as to delay was inadequate, relying on the following passage from Longman v R (1989) 168 CLR 79 at 91:

> "The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than 20 years, it would be dangerous to convict on that evidence alone unless the jury, scrutinising 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."

Here the Judge gave a careful and lengthy direction as to the dangers of delay, emphasising that there was no complaint for many years after the alleged offence. Her Honour stated that this delay disadvantages the appellant in not being able to test the complainant's allegations in the way in which he could have done had he had timely notice of them. The Judge pointed out that the complainant is now giving evidence of an incident which occurred 10 years ago when she was only 12 years of age and the jury must consider the possibility that, although truthful, her evidence may not be accurate and may be influenced by imagination, emotion, prejudice and suggestion. The Judge also emphasised that delay may detrimentally affect reliable recollection. Her Honour stated there was no independent evidence to support the complainant's evidence, which should be scrutinised with great care and another reason why the complainant's evidence should be scrutinised with great care is that the delay in the case

makes it more difficult for the appellant to instruct his lawyers to explore the details of the circumstances relating to the incident.

It is true the Judge did not say, in accordance with the incantation in Longman set out earlier, that it was dangerous or unsafe to act on the complainant's testimony but her Honour did strongly emphasise the importance of scrutinising her evidence with great care before acting upon it because of the delay and the reasons for this warning. The Judge's direction sufficiently alerted the jury to the dangers of wrongful conviction as a result of the delay and the reasons for the warning. Compare R v C [2002] QCA 166, CA No 267 of 2001, 14 May 2002, Crampton v R (2000) 117 A Crim R 222 and Doggett v R (2001) 182 ALR 1. This ground of appeal also fails.

I turn finally to the first ground of appeal, that the verdict was unsafe and unsatisfactory. My summary of the evidence discloses a number of inconsistencies in the complainant's evidence and a direct conflict between the complainant and her mother as to whether in 1995 the complainant made an allegation that the appellant attempted to rape her at Lake Borumba.

The learned primary Judge identified for the jury the real question in this case, namely, whether they could accept beyond reasonable doubt that the appellant raped the complainant. Her Honour also directed the jury that because of the delay and lack of supporting evidence in this case the jury should scrutinise the complainant's evidence with great

care. In summing-up the defence case, her Honour referred to many of the inconsistencies between the complainant's evidence and her statement to police and the inconsistency between her evidence and her mother's evidence as to whether there was a complaint in 1995 about the appellant's attempted rape of the complainant at Lake Borumba and that, for these reasons, the defence contended the jury could not act on the complainant's evidence.

The matters relied on by the appellant as making the jury verdict unsafe were fully canvassed before the jury. The jury were entitled to reject as unreliable the mother's evidence about the complaint at Lake Barambah and to treat the inconsistencies between the complainant's evidence in Court and her statement to police as not significantly affecting the consistency of her complaint that she was raped by the appellant. The jury were entitled to accept the prosecution contention that these inconsistencies could be expected when the complainant gave her statement to police four years earlier and was describing the incidents that occurred 10 years earlier. The complainant did not falter in her consistent claim that the appellant raped her. Her evidence as to this essential claim was uncontradicted by any other sworn evidence. The jury was entitled on the whole of the evidence to be satisfied beyond reasonable doubt of the guilt of the appellant, Jones v R (1997) 191 CLR 439, M v The Queen (1994) 181 CLR 487, 493 to 494. This ground of appeal also fails.

It follows that I would dismiss the appeal against conviction.

DAVIES JA: I agree.

CULLINANE J: I also agree.

THE PRESIDENT: That is the order of the Court.
