SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAT* [2005] QCA 82
PARTIES:	**R** v **BAT** (appellant/applicant)
FILE NO/S:	CA No 415 of 2004 DC No 329 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	1 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2005
JUDGES:	McPherson and Keane JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - appellant convicted of indecent treatment of a child under 16 years under care, carnal knowledge of a child under care and maintaining a sexual relationship with a child with a circumstance of aggravation - inconsistencies and discrepancies in complainant's evidence - where pretext telephone call between appellant and complainant provided support for complainant's evidence - whether verdict could not be supported by the evidence CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE GROUNDS FOR INTERFERENCE WITH VERDICT - PARTICULAR CASES - WHERE APPEAL DISMISSED - delay of eight years between first offence and trial - defence counsel at trial said before summing up that *Longman* warning unnecessary -

whether *Longman* warning required - whether miscarriage of justice due to failure to give *Longman* warning

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - MISCARRIAGE OF JUSTICE - PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE - OTHER IRREGULARITIES - where jury allowed to take exhibit which was letter written by complainant outlining various offences into the jury room - where no objection to exhibit being taken to the jury room - whether exhibit should have been withheld from jury

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AGAINST SENTENCE - applicant sentenced to effective term of six years imprisonment - whether sentence was manifestly excessive

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A(4)
Evidence Act 1977 (Qld), s 99

Crampton v The Queen (2000) 206 CLR 161, considered
Doggett v The Queen (2001) 208 CLR 343, distinguished
Howe v The Queen (1981) 55 ALJR 5, cited
Longman v The Queen (1989) 168 CLR 79, distinguished
M v The Queen (1994) 181 CLR 487, considered
R v BWT (2002) 54 NSWLR 241, discussed
R v C [2002] QCA 166; CA No 267 of 2001, 14 May 2002, cited
R v FI [2004] QCA 400; CA No 204 of 2004, 29 October 2004, cited

COUNSEL: M J Byrne QC for appellant/applicant
C W Heaton for respondent

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

[1] **McPHERSON JA:** For the reasons given by Keane JA, which I have read, this appeal against conviction, and the associated application for leave to appeal against sentence, should be dismissed.

[2] **KEANE JA:** The appellant was convicted on 8 November 2004, in the District Court at Beenleigh, of five counts of indecent treatment of a child under 16 years under care, three counts of carnal knowledge of a child under care and one count of maintaining a sexual relationship with a circumstance of aggravation.

[3] The complainant was the stepdaughter of the appellant. The conduct the subject of the various counts was said to have occurred between 1996 and 1999. The complainant was born on 16 January 1984. She was between 12 and 15 years of age at the time of the alleged offences. She resided with the appellant and her mother from four years of age. She moved out of home in 1998 when she was 14 years of age. She was twenty years of age at the time of the trial.

[4] The first four grounds of the appellant's notice of appeal against conviction express, in various ways, the contention that the inconsistencies in, and the inherent improbability of, the complainant's evidence were such that the convictions should not be allowed to stand. The appellant points to discrepancies in the accounts given by the complainant, the absence of corroboration, and the delay in the matters coming to trial, and submits that these aspects of the case mean inevitably that no reasonable jury could have returned verdicts of guilty. Accordingly, it is submitted that the conviction should be quashed.

[5] The appellant sought leave to add two further grounds to his notice of appeal. Leave was granted. The first of these grounds involves the contention that the learned trial judge failed to direct the jury adequately in relation to the circumstances of delay which attended the prosecution. The second further ground of appeal is that exhibit 4, which contained both the narrative of some of the alleged incidents and other allegations, should not have been taken into the jury room having regard to the inappropriate weight which may have been afforded to it by the jury.

[6] The appellant also seeks leave to appeal against the severity of his sentence.

[7] I shall consider the appellant's argument in relation to the unreasonableness of the verdict before turning to consider the two further grounds. I shall then turn to the application for leave to appeal against sentence.

An unreasonable verdict?

[8] The complainant gave evidence of a number of specific occasions that she was able particularly to recall. These were the occasions of counts of indecent dealing and unlawful carnal knowledge. It was also alleged that, during the period 1996 - 1999, the appellant engaged in many acts of sexual intercourse with the complainant. This was the basis for count 9 of the indictment, that of maintaining a sexual relationship.

[9] There are, it may be acknowledged, numerous and significant discrepancies in the complainant's evidence. Principally these discrepancies relate to differences in the accounts given by her over time; but it is also contended that her accounts of sexual abuse by the appellant are inherently improbable having regard to the circumstances in which they were said to have occurred.

[10] As to inconsistency the learned trial judge directed the jury generally:

> "You weigh up the evidence and you ask yourself 'Has the witness been sufficiently inconsistent in the versions she has told on the various occasions, on a number of issues, that would cause me to conclude that I have a reasonable doubt in respect of her evidence, and on those issues which make-up the elements of each charge which the accused faces'."

[11] His Honour then reminded the jury in detail of those various discrepancies and inconsistencies.

[12] The counts of indecent dealing were counts 1, 2, 3, 5 and 7. The counts of unlawful carnal knowledge were counts 4, 6, and 8. These counts together were alleged to have occurred on five separate occasions. These were referred to at the trial as follows:

Count 1	"The TV incident" or "The Grease Occasion"
Counts 2, 3 and 4	"The Coffee incident"
Counts 5 and 6	"The Car incident" or "The Bushland incident"
Count 7	"The lounge room incident"
Count 8	"The doctor's appointment incident".

[13] In relation to the TV incident, the complainant's evidence-in-chief at trial was that the appellant invited her into a waterbed from which the appellant was watching the movie "Grease" on the TV in the bedroom. The complainant said that she got into bed between her mother and the appellant, and with her mother being asleep, the appellant indecently dealt with her until the bed started to move, at which point she returned to her own bed.

[14] In cross-examination it emerged that on a previous occasion the complainant had said that her mother was awake and also watching the movie before she fell asleep. Further, in exhibit 4, the complainant said that the waterbed incident was followed by sex with the appellant in the lounge room.

[15] In relation to the Coffee incident, the complainant's evidence-in-chief at trial was that this incident occurred when she came home from a certain primary school after being suspended for fighting in "mid Year 7".

[16] In cross-examination, it emerged that the complainant had previously given sworn evidence that this incident occurred on Orientation Day at high school. In exhibit 4, this incident was said to have included a request by the appellant for a "head job". This was not mentioned in her evidence-in-chief.

[17] It is further submitted on behalf of the appellant that the complainant's evidence of this incident is inherently implausible on the basis of the complainant's concession that this incident, which included sexual intercourse while the appellant and complainant were standing up, took place in an open area of the house readily visible to others.

[18] In relation to the Car incident, the complainant's evidence-in-chief was that the appellant was driving her to the home of her friend, when he drove to bushland, parked the car, and then had sexual intercourse with her after walking around to the passenger side of the car and swinging her legs around so that she was sitting on the passenger seat with her legs outside the car while he was kneeling on the ground or car ledge.

[19] In exhibit 4, the complainant had mentioned an occasion when she was being given a lift to the house of her friend when the appellant had sexual intercourse with her after putting down the seats of the car.

[20] The lounge room incident, according to the complainant's evidence-in-chief, began in the bedroom which the complainant shared with her sisters. The complainant's evidence was that the appellant entered the bedroom and got the complainant down from the top bunk, without disturbing the others, and told her to go with him into the lounge room where he pulled his pants down and pulled her head down onto his penis and forced her to suck his penis until he ejaculated.

[21] This incident was not mentioned in exhibit 4.

[22] The doctor's appointment incident occurred when the complainant had been sent home from school for not wearing the appropriate uniform. The appellant drove the complainant's mother to her doctor. The complainant had accompanied them; and the complainant and the appellant returned home together. When they got home the appellant ordered her into the bedroom and then had sexual intercourse with her.

[23] It may be acknowledged that the inconsistencies and improbabilities set out above were significant. On the other hand, the complainant's account of the various incidents was not contradicted. The evidence was that she made her first complaints of sexual abuse by the appellant after leaving home in 1998. A motive for the complainant deliberately to fabricate her complaints against the appellant was suggested to her by the appellant's counsel at trial as being a desire to assist her mother in custody proceedings against the appellant. She rejected the suggestion, and the point was taken no further. No evidence was adduced to suggest that her personal history had been such as to suggest that she was an unreliable historian. The complainant was not so young at the time of the incidents of which she complained that it could be submitted with any force that her evidence was unreliable on that ground alone.[1]

[24] Insofar as the thesis advanced for the appellant is that a conviction of sexual molestation of a child is unreasonable or unsafe in any case where the details of the story told on different occasions exhibit a degree of inconsistency, that thesis has no support in authority nor, it might also be said, in human experience. A young woman, who has been subjected to the sort of treatment of which she gave evidence over a period of years, may explain what has happened to her in different ways, and she may be uncertain as to the sequence of events without being, ipso facto, stigmatized by judges as unworthy of belief.

[25] That the abuse of which the complainant gave evidence may have occurred in circumstances in which, on occasion, the appellant risked discovery, may well not have been regarded as rendering the complainant's account of the TV incident and the lounge room incident as implausible.

[26] The points made by the appellant are not such in my view, as would lead to a characterization of the jury's acceptance of the core of the complainant's testimony in relation to each count in the indictment as unreasonable. Her evidence was uncontradicted. The weighing up of the significance of these inconsistencies and "implausibilities" in her evidence was, in my opinion, a matter for the jury by reference to their assessment of the complainant in the light of their experience of the world.

[27] The appellant advanced the proposition that the discrepancies and implausibilities in the complainant's evidence were such that they must cause this Court to entertain a reasonable doubt about the guilt of the appellant. Therefore, so the argument goes, the jury acting reasonably, should also have entertained such a doubt. The appellant relied upon the decision of the High Court in *M v The Queen*[2] in this regard. Two things may be said in relation to this argument. First, *M v The Queen* was not a case in which the reasonable doubt which the majority of the High Court considered should have been entertained by the jury was based solely on discrepancies and

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

2 (1994) 181 CLR 487.

implausibilities in the evidence of the complainant. The complainant's evidence in that case was directly contradicted by the evidence of the accused, who was not shaken in cross-examination, and the complainant's evidence was also undermined by the evidence of a medical practitioner who examined her.

[28] Secondly, in *M v The Queen*, the majority[3] recognized that the advantage enjoyed by a jury in seeing and hearing the evidence may be capable of resolving a doubt that might arise as to whether a court of criminal appeal can feel confident in holding that a verdict is not unsafe or unreasonable. Since *M v The Queen*, it has been consistently held by this Court that inconsistencies and deficiencies in a complainant's evidence may reasonably be regarded as of little moment by the jury who has seen the complainant and enjoyed the advantage of observing her reactions and responses when tested with these inconsistencies and discrepancies.[4]

[29] It was accepted by the Crown at trial that there was no corroboration of the complainant's account of "these incidents". This concession does not appear to have been limited to the incidents reflected in counts 1 to 8 inclusive, and appears to apply as well to the charge of maintaining a sexual relationship which is the subject of count 9. Corroboration was not, of course, essential to the Crown case.

[30] In this case, there is little scope for an argument that the complainant's evidence was honestly given but unreliable, by reason, for example, of particularly tender years at the time of the occurrence of the matters complained of, or, because of the lapse of time between the incidents and her first complaint which occurred in 1998. In my view, the appellant's first ground of appeal should not succeed in relation to any of the counts.

[31] There is a further point to be made. As I have said, the Crown accepted that there was no corroboration of the complainant's account of "these incidents"; and this concession related as well to count 9. The Crown did rely, however, on Exhibit 5, a recorded telephone conversation between the complainant and the appellant which occurred on 21 March 2003. After some introductory exchanges (which might have been taken by the jury as indicating that the appellant's suspicions were aroused) the following is recorded:

"[Complainant]:	Do you, um, remember back a couple of years?
[Appellant]:	What?
[Complainant]:	When we were living at - at [suburb]?
[Appellant]:	What about?
[Complainant]:	I was just - it's just like eating me away.
[Appellant]:	What?
[Complainant]:	About all those things.
[Appellant]:	Yeah.
[Complainant]:	And um, I was actually thinking about, I don't know, letting someone know.
[Appellant]:	Why?
[Complainant]:	'Cause it's just eating and eating at me.
[Appellant]:	Well, nothing happened anyway. Nothing happened.

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3 (1994) 181 CLR 487 at 494.

4 See *R v Crosby* [2002] QCA 213 at [16] - [21]; *R v F1* [2004] QCA 400 at [10] - [19].

[Complainant]:	What do you mean nothing happened?
[Appellant]:	Well, nothing happened. Nothing happened, [Complainant].
[Complainant]:	But it did.
[Appellant]:	Nothing happened. I never had sex with you or nothing. You there?"

[32] This evidence, and particularly the last sentence in the passage cited, was capable of providing significant support for the complainant's evidence. It was the accused who first addressed the topic of his having sex with the complainant; and there was no suggestion put to the complainant that the appellant's statement was made as some sort of delayed response to an earlier assertion by the complainant.

The absence of a *Longman* direction

[33] In *Longman v The Queen*[5] in the joint judgment of Brennan, Dawson and Toohey JJ, the following passage appears:

> "But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them: see *Reg v Spencer* ([1987] AC 128 at p 141). That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay (see *Jago v District Court (NSW)* ((1989) 168 CLR 23 at pp 31 - 32, 42 - 44, 56 - 57, 71 - 72)) and it was imperative that a warning be given to the jury. **The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice.** The jury were told simply to consider the relative credibility of the complainant and the appellant without either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient." (Emphasis added)

In what follows, I shall refer to the direction reflected in the passage which I have emphasized as a "full *Longman* warning".

[34] It would not be correct to say that the jury in the present case were given no direction at all in relation to the lapse of time between the events and complaint to the authorities. The learned trial judge directed the jury as follows:

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5 (1989) 168 CLR 79 at 91.

> "Now, you should also take into account that there are difficulties in both proving and defending allegations that go back a number of years. Because of the passage of time, means of proof or disproof may be lost. So, in considering the evidence in this trial, you should be conscious of those matters when you are considering the evidence. That is, delay can be a source of prejudice to an accused person, making it difficult for him to respond. But you must assess the evidence as a whole, making allowances where you deem necessary in respect of those matters. That's important to remember as well."

[35] Earlier counsel for the appellant at trial made the following submission to the learned trial judge:

> "… I was also wondering whether it may be appropriate, as part of your general summing-up, to note the delay that has taken place in getting this complaint to the legal system. It doesn't warrant a *Longman* direction obviously but it's only a matter of the first preliminary complaint is in 1998, which is two years after the first incident is alleged to have happened. But actually coming forward it's a little longer and it does create some difficulties for my client in terms of being able to pin down specific times; what he was actually doing. I suppose I come from the point of view that the delay, in concurrence with the non specific dates - the dates are very broad on the charges, and the prejudice that he suffers from that might, perhaps, be addressed in your summing-up."

[36] The appellant now complains, not only of the absence of the *Longman* warning, but also in relation to the comment that the lapse of time may also cause difficulties of proof for the prosecution. As to this latter point, the learned trial judge's observation was unlikely adversely to affect the appellant's prospects of a fair verdict.[6] The absence of the *Longman* warning is a more substantial concern.

[37] In order to address this concern it is necessary to refer first to the recent authorities which have explained the nature of the trial judge's duty in relation to the giving of a full *Longman* warning.

[38] In *Doggett v The Queen*,[7] Gaudron and Callinan JJ explained the need for the *Longman* direction in that case by reference to some of the particular circumstances there (including the circumstance that the complainant's evidence had been contradicted in a material particular by an independent witness) seen in the light of some general considerations of principle. As to these considerations of principle, their Honours said:[8]

> "[51] Fifthly, the problems with which *Longman* is intended to deal are not confined to difficulties of recollection that the passage of time might cause for an accused. Of equal, and in some cases of which this might be one, or more importance is the denial by the effluxion of time, to an accused of the forensic weapons that a timely complaint might allow an accused to assemble, such as evidence as

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6 Cf *Longman v The Queen* (1989) 168 CLR 79 at 100.

7 (2001) 208 CLR 343 at 355 - 357.

8 At 356 - 357 [51] - [54].

to where he was or what he was doing, or what other potential witnesses were doing when the offences were alleged to have occurred.

[52] This is made clear by the joint judgment (Gaudron, Gummow and Callinan JJ) in *Crampton v The Queen* ((2000) 206 CLR 161 at 181 at 181 [45]):

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

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

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

[39] In *Doggett v The Queen*,[9] Kirby J, the other member of the majority, explained the reasons for the requirement of a *Longman* direction and the nature of that

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9 (2001) 208 CLR 343 at 374 - 378 [119] - [129].

requirement. His Honour pointed out[10] that the *Longman* warning is concerned with the duty of the judge at a trial to give a warning "to avoid the perceptible risk of miscarriage of justice arising from the *particular* circumstances of the case". (His Honour's emphasis.)

[40] For his Honour, the basal consideration informing this concern[11] is the recognition of "the serious forensic disadvantages suffered by an accused person in a criminal trial in meeting, for the first time, accusations made long after the subject offences were alleged to have occurred … [and of] a second and related danger, namely the risk that, after such an interval of time, the memory of even an honest witness might become contaminated. A lengthy lapse of time could therefore make acceptance of a witness's testimony dangerous. It was such as to require particular scrutiny and the need for external confirmation of what the witness said". His Honour's consideration of these matters concluded:[12]

> "[126] *Long delays - obligatory warnings*: It would not ordinarily be expected that jurors would be aware of the findings of experimental psychology or of the common experience of forensic contests, and other data supporting the reflections about memory, mentioned in *Longman*. Judges, on the other hand are, or should be, aware of such matters. That is why, in a case of long delay, a warning must be given to a jury. A comment, or reliance on the comments and arguments of counsel, would not, in such cases, be sufficient.
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> [127] The criterion for the provision of a warning as stated in *Longman* is not mathematically precise. For example, in a case involving a comparatively short interval between the alleged offence and a subsequent complaint to family members or to authorities, a warning might not be necessary (See *R v Fotou* (unreported; Court of Appeal (Vict); 26 June 1996), as noted in Gutman, 'Case and Comment: *Fotou', Criminal Law Journal*, vol 21 (1997) 46, at p 49 (delays of between four months and two days).). However, the longer the delay, the clearer is the obligation to give the warning to the jury along the lines at least of that stated in the joint reasons in *Longman* (See Freckelton, 'Repressed Memory Syndrome: Counterintuitive or Counterproductive?', *Criminal Law Journal*, vol 20 (1996) 7, at p 15 and cases there cited.). In an appropriate case, it would also be as well for the warning to contain reference to the additional consideration mentioned by Deane J and McHugh J in their separate reasons.
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> [128] The present was obviously a case of 'long delay'. So much was conceded by the prosecution (Respondent's submissions at [4].). So much could hardly have been contested given that the warning in *Longman* itself was required in a case involving comparable delays. Similar warnings have been required in this and other Australian courts in circumstances in which the delay was much shorter than it was in the present case (In *Crofts v The Queen* (1996) 186 CLR 427 the delay between the first alleged offence and complaint to police was approximately six years, although offences were alleged to have

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10 (2001) 208 CLR 343 at 374 [119].
11 (2001) 208 CLR 343 at 375 [120].
12 (2001) 208 CLR 343 at 377 - 378 [126] - [128].

continued until six months before complaint. In *Jones v The Queen* (1997) 191 CLR 439 the delay was more than four years.). On the face of things, therefore, a 'full' *Longman* warning was required in this case."

[41] The decisions of the High Court in *Longman*, *Crampton* and *Doggett* have been discussed by this Court in *R v C*[13] and, more recently, in *R v FI*.[14] In the latter case, Davies JA, with whom de Jersey CJ and Chesterman J agreed, said:[15]

"[24] In *Longman*, Brennan, Dawson and Toohey JJ said:

'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.' (at 91)

To similar effect is the statement of Gaudron, Gummow and Callinan JJ in *Crampton*. (at 180 - 182)

[25] In *R v C*, Byrne J, with whose reasons the other members of this Court agreed, said:

'[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 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 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, a judicial warning, and a statement of the reasons for the warning, sufficient to alert the jury to the dangers of wrongful conviction.'

In those passages his Honour referred to *Longman*, *Doggett* and *Crampton*.

[26] In *BWT* Wood CJ at CL (at 249 and following) and Sully J (at 279) pointed to the apparent illogicality of requiring such a direction in all cases of substantial delay in prosecuting whether or not the accused is in fact prejudiced by the delay. But until that question is revisited by the High Court I think, like their Honours

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13 [2002] QCA 166.

14 [2004] QCA 400.

15 [2004] QCA 400 at [24] - [26].

> and Byrne J in *R v C*, that judges are bound to give such a warning in all such cases."

[42] This Court must, therefore, hold that the duty of a trial judge is relevantly that, "in a case of long delay, a warning must be given to a jury", whether or not the reasons which justify[16] the warning are shown to be present in a particular case. Further, it appears that in cases of delay which is not so long as to call for the mandatory warning, the circumstances of particular cases may call for a direction or comment where there is a perceptible risk of a miscarriage of justice because the accused suffers actual disadvantage by reason of the delay which has occurred.[17]

[43] The discharge of the learned trial judge's duty in this case required first the identification of a long delay such as to call for a full *Longman* warning. If the case was not one of long delay, then the trial judge remained duty-bound to give the jury a realistic appreciation of the possible prejudice which the appellant may have suffered, in the particular circumstances of this case.

[44] In relation to the delay which may be characterized for present purposes as a long delay, one must bear in mind what Kirby J said in *Doggett v The Queen*:[18]

> "The criterion for the provision of a warning as stated in *Longman* is not mathematically precise. For example, in a case involving a comparatively short interval between the alleged offence and a subsequent complaint to family members or to authorities, a warning might not be necessary."

[45] It might be thought that any warning by a trial judge should be tailored to meet prejudice actually caused by delay so that a direction would be required in any case where delay has been apt to prejudice the accused. On this view, it would not be necessary to come to a conclusion about whether delay qualifies as "long delay"; and the trial judge would simply fashion his or her direction to the jury so as to meet the disadvantage suffered in any particular case. However this may be, the law which this Court is bound to apply by the decisions of the High Court in *Longman*, *Crampton* and *Doggett* is that the *Longman* warning is required in a case of long delay, irrespective of whether the accused has suffered actual prejudice by reason of the delay.

[46] There is in my opinion, a real difficulty in maintaining in the circumstances of the present case, the proposition that the learned trial judge was duty-bound to treat the case as one of long delay so as to give rise to the necessity for the *Longman* warning.

[47] The essential question here, to paraphrase the reasons of the High Court in *Howe v The Queen*[19] is "whether the trial judge should have perceived" that an issue as to long delay was "fairly raised on the evidence". It is difficult, if not impossible, for this Court to conclude that the position taken by the appellant's counsel at trial in relation to the *Longman* direction did not reflect acceptance of the position that it could not fairly be asserted that there had been a long delay in the complaints coming to the attention of the appellant, or indeed any delay the significance of

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16 *Doggett v The Queen* (2001) 208 CLR 343 at 377 [126] and 356 [52].
17 *Doggett v The Queen* (2001) 208 CLR 343 at 358 [58], 373 [115] - [116].
18 (2001) 208 CLR 343 at 377 [127].
19 (1981) 55 ALJR 5 at 7.

which could not be adequately addressed by a direction in terms of that which she sought from the learned trial judge. There is no reason to suppose that the acceptance of that position was not soundly based. In this regard, as Gleeson CJ said in *Crampton v The Queen*:[20]

> "… [I]t is usually difficult, and frequently impossible, for a court of appeal to know why trial counsel did, or failed to do, something in the conduct of the case. Decisions as to the conduct of a trial are often based upon confidential information, and an appreciation of tactical considerations, that may never be available to an appellate court. The material upon which a judge, either at trial or on appeal, may form an opinion as to the wisdom of a course taken by counsel can be dangerously inadequate, and, when it is, the judge may have no way of knowing that. Ordinarily, a barrister knows more about the strengths and weaknesses of his or her client's position than will appear to a judge, whose knowledge of the case is largely confined to the evidence."

[48] The duty of the trial judge to ensure that there is no perceptible miscarriage of justice by reason of the effects of delay does not extend to giving a full *Longman* warning when it is not apparent that the case is one of long delay in the complaints coming to the notice of the accused. The appellant's counsel at trial did not seek to establish any relevant delay beyond that to which she referred. Even though that delay might not itself have been the relevant delay for present purposes, there was no suggestion of any additional delay in the complaints coming to the attention of the appellant. To say this is not merely to say that the appellant is bound by his counsel's conduct of the trial. Nor is it to say that the accused bears an onus of proof in relation to delay. It is not even to say that the present case was not shown to be a case of long delay. Rather, it is a case where it was common ground that it was not a case of long delay. The point is that, if the criterion for the provision of the *Longman* warning, ie long delay, is not perceptible, then a failure to give a warning the necessity for which is predicated on long delay cannot give rise to a reasonable perception of a possible miscarriage of justice. The very "warning or comment" spoken of in the passage from *Longman* cited above requires the trial judge to begin by adverting to the extent of the relevant delay between the occurrence of the events; and it is nonsensical to speak of the judge being duty-bound to warn against the consequences of long delay which was not perceptible as such.

[49] The judgments in *Doggett v The Queen*[21] do not encourage a departure from the position that it is fundamental to the institution of trial by jury that the trial judge's intrusion into the province of the jury as the arbiters of issues of fact should not exceed that which is necessary to ensure that the accused is given, and is seen to be given, a fair trial according to law.

[50] On appeal, counsel for the appellant was disposed to submit that the relevant period of delay is prima facie the period between the date of the indictment and the date of the offence charged. That contention seems to me, with respect, to be quite artificial having regard to what was common ground at trial that this case was not one of long

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20 (2000) 206 CLR 161 at 172 - 173 [17].

21 (2001) 208 CLR 343 at 346 [1], 357 [55], 364 [79] - [80], 365 - 366 [83] - [86], 368 - 369 [94] - [95], 373 [115] - [116].

delay in the relevant sense. For the same reason, the appellant's reliance on *Crofts*[22] and *Jones*[23] appears to me to be inapposite.

[51] In summary to this point, in my opinion, the learned trial judge was not duty-bound to give a full *Longman* direction. I turn then to consider the adequacy of the direction which he gave having regard to the actual forensic disadvantage suffered by the appellant.

[52] The appellant now points to the circumstance that the complainant's mother had died before the trial and, accordingly, could not give evidence in relation to the incidents in question. In this regard, it may be said that no redirection was sought by the appellant's counsel at trial, in terms of *Longman*, either generally, or specifically in relation to the loss of potentially useful evidence from the complainant's mother. The appellant's counsel at trial may have eschewed any request for a full *Longman* direction for the good forensic reason that the only motive suggested by the appellant for the complainant's willingness to fabricate her complaints about the appellant was the wish to aid her mother in her custody battle with the appellant. A suggestion by the appellant's counsel that the death of the complainant's mother meant the loss of a witness who might have assisted the appellant may well have been regarded by the jury as fatuous, and a sign of desperation on the part of the defence.

[53] The lapse of time had demonstrably not prevented the appellant from identifying the inconsistency identified in [16] or the so called "improbability" identified in [17] above. On appeal the appellant, through his counsel, submitted that there may have been disadvantage to the appellant in terms of the evidence of the physical layout of the house and whether there was a TV in the bedroom. How it was that the lapse of time may have actually disadvantaged the appellant in adducing evidence of such matters, had he been disposed to attempt to do so, was not made clear.

[54] The next point to be made here is that this was not a case in which the jury were concerned with the relative credibility of the complainant and the appellant. It may be noted, in this regard, that *Longman*, *Crampton*, *Doggett* and *Jones* were all cases in which the accused gave evidence, and where the demands of fairness can sensibly be seen to require that the trial judge warn the jury of the disadvantage suffered by an accused in such circumstances, where because of delay, the evidence of the accused may of necessity consist of little more than bare denials.

[55] There were no circumstances in this case which may have given rise to a realistic concern that the complainant's evidence may have been honest but mistaken because of the lapse of time. The problem of honest but erroneous memory is one which has been said to arise from the effects of the long passage of time on child fantasy or semi-fantasy. This was explained by Kirby J in *Doggett v The Queen*[24] as follows:

> "[124] *Honest but erroneous memory:* This second cause of danger was added to the foregoing considerations in *Longman* both by Deane J and McHugh J. The need for reference to it arose out of a stated conclusion of Deane J that, on the transcript in that case, the evidence of the complainant had read 'convincingly' (*Longman*

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22 (1996) 186 CLR 427.

23 (1997) 191 CLR 439.

24 (2001) 208 CLR 343 at 376 - 377 [124] - [125].

(1989) 168 CLR 79 at 98). On such evidence, it was therefore not surprising that the jury had 'plainly rejected the applicant as a witness' (*Longman* (1989) 168 CLR 79 at 99). It was in such circumstances, in some ways similar to the present, that Deane J proceeded to deal with a special problem that can arise in the case of a convincing witness who honestly believes the truth of his or her testimony. Where an accused is substantially confined to denial of the accusations, or to paltry counter-accusations, many years after the alleged offences, such a complaint can present particular dangers about which jurors may be unaware or insufficiently aware. Deane J said (*Longman* (1989) 168 CLR 79 at 101):

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

[125] To the same effect were the reasons of McHugh J (*Longman* (1989) 168 CLR 79 at 107 - 109):

> 'The longer the period between an 'event' and its recall, the greater the margin for error … Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine (Hunter, *Memory*, rev ed (1964), pp 269 - 270). …
>
> The opportunity for error in recalling, twenty years later, two incidents of childhood which are alleged to have occurred as the complainant awoke, and then pretended to be asleep, are obvious. Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be.' "

[56] As is apparent from the reasons of Gaudron and Callinan JJ[25] in *Doggett v The Queen*, that was a case where it was of particular importance that the complainant was only eight years of age when some of the offences charged were said to have been committed almost 20 years before the trial. There was, in the present case, no

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25 (2001) 208 CLR 349 at 343 - 350 [19] - [21], 354 - 355 [43].

reason apparent from the evidence which should have led the learned trial judge to warn the jury that this was a "problem" in this case.

[57] Finally, I note that, by reason of the terms of s 4A(4) of the *Criminal Law (Sexual Offences) Act* 1978 (Qld), which applies to trials which commenced after 5 January 2004, the trial judge was obliged not to "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".

[58] In summary on this segment of the appeal, the learned trial judge did direct the jury, albeit in general terms, as to the problems of proof which the lapse of time may cause an accused person. There was no reason for the learned trial judge to proceed on the footing that this was a case of long delay. A more stringent warning than that given by the learned trial judge was not, in my view, necessary in the particular circumstances of the case. For these reasons, I am of opinion that the absence of a more elaborate or particularized direction or of a stringent warning of the kind discussed in *Longman*, did not give rise to a perceptible risk of a miscarriage of justice.[26]

Exhibit 4

[59] Exhibit 4 was an account of a number of the incidents in question written by the complainant in March 2002 and given to her sister K. There was no statutory prohibition on exhibit 4 being made available to the jury. There was a discretion in the trial judge under s 99 of the *Evidence Act* 1977 (Qld) to withhold the document; but the learned trial judge was not asked to exercise that discretion.

[60] In some respects exhibit 4 was, as has been mentioned, significantly inconsistent with the complainant's evidence at trial. No complaint was made by the appellant's counsel at trial in relation to the provision of copies of exhibit 4 to the jury.

[61] The absence of any complaint in this regard is wholly explicable as a tactical decision made by appellant's counsel at trial to allow the jury to have with them the complainant's March 2002 account as a graphic reminder of those inconsistencies.

[62] In summary, it cannot be said that the presence of exhibit 4 in the jury room deprived the appellant of a fair chance of an acquittal.

Sentence

[63] In respect of the four counts of indecent treatment of a child under 16 years of age under care, a sentence of four years imprisonment was imposed. In respect of the three counts of carnal knowledge of a child under 16 years of age under care, a term of four years of imprisonment was imposed. In respect of the count of maintaining a sexual relationship with a child with a circumstance of aggravation, a period of imprisonment of six years was imposed.

[64] The appellant was born on 8 January 1968. He was thus 28 to 31 years of age at the time of the incidents; and is now 37 years of age. He has a prior criminal history involving convictions for minor matters between 1986 and 1991 which resulted in probation and fines.

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[26] Cf *Doggett v The Queen* (2001) 208 CLR 343 at [55]; *TKWJ v The Queen* (2002) 212 CLR 214 at 132 [25] - [31].

[65] The maximum penalty to which the appellant was exposed in relation to count 9 was life imprisonment.

[66] The appellant submits that the sentence which should have been imposed is in the range of between four to five years of imprisonment with the period of imprisonment being suspended after 20 months.

[67] The appellant cruelly exploited the complainant's vulnerability. She suffered greatly for years as a result. For this the appellant has shown no remorse.

[68] Having regard to the circumstances of the appellant's gross abuse of his position as the complainant's stepfather and his mistreatment of her over a period of years, the sentence imposed cannot be said to be excessive;[27] nor is any good reason identified for suspending any part of that sentence.

Conclusion

[69] I would dismiss the appeal against conviction, and refuse the application for leave to appeal against sentence.

[70] **DOUGLAS J**: I also agree with the reasons of Keane JA. I wish to add two brief comments.

[71] The first relates to the submission for the appellant that the learned trial judge's reference to the difficulties in both proving and defending allegations that go back a number of years gave emphasis to the difficulties facing the Crown, as well as the defence, when the purpose of the direction in *Longman v The Queen*[28] was to point out to a jury, and warn them of, the difficulties facing a *defendant* charged with offences that go back a long time. The second issue I wish to discuss arises from a passage of the decision of the New South Wales Court of Appeal in *R v BWT*.[29]

[72] That the lapse of time may cause difficulties of proof for the prosecution as well as the defence is an obvious truth recognised by Deane J in *Longman* at 100 and referred to by McHugh J in *Doggett v The Queen*.[30] If this were a case that required a *Longman* direction, then his Honour's reference to difficulties in proving and defending allegations that go back a number of years and to the potential loss of "means of proof or disproof" would not have addressed the need to instruct the jury that "the appellant was, by reason of the very great delay, unable adequately to test and meet the evidence of the complainant ... to locate other witnesses, and to try to recollect precisely what the accused was doing on the occasion in question."[31] However, on the assumption that the delay and other circumstances have not been enough to require the *Longman* direction, I do not believe that his Honour's even-handed comments have affected the fairness of the appellant's trial detrimentally.

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27 See *R v C* [1993] QCA 344; CA No 153 of 1993, 20 September 1993. In the later case of *R v R* [1998] QCA 268; CA No 152 of 1998, 24 July 1998, a term of five and a half years was held to be appropriate in relation to an offender for whom seven years was the maximum period of imprisonment for maintaining a sexual relationship with his stepdaughter, but which did not include sexual intercourse.

28 (1989) 168 CLR 179 at 91.

29 (2002) 54 NSWLR 241.

30 (2001) 208 CLR 343 at 368 [94].

31 *Crampton v The Queen* (2000) 206 CLR 161, 181 at [45]; see also *Doggett* at [51]-[52].

[73] The imprecision of the extent of the period of delay after which a *Longman* direction should be given was addressed by Sully J in *BWT*[32] in these terms:

> "It is, I think, clear enough that a delay in the order of 20 years would require, imperatively in the view of the current majority opinion in the High Court, a *Longman* direction, and a strong one at that. What is not clear is whether there is any, and if so what, time lapse that would be generally regarded by current majority opinion in the High Court as not calling for the giving of a *Longman* direction.
>
> While that state of affairs continues, it seems to me that the only prudent approach of a trial judge is one that regards any delay between offence and complaint as sufficient to raise for consideration the need for a *Longman* direction. That consideration should concentrate upon two related factors, namely, the actual lapse of time involved in the particular case; and the actual risk of relevant forensic disadvantage in the particular case. It seems to me that, as matters stand, a trial judge would be well advised to give a *Longman* direction unless it is possible to conclude reasonably: *first*, that the particular time lapse is so small that any reasonable mind would regard it as, in context, trifling; *and secondly*, that the risk of relevant forensic disadvantage would be seen by any reasonable mind as, (to borrow from Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47), 'far-fetched or fanciful'."

[74] That approach is one dictated by prudence rather than the law. Such a "prudential" approach to the giving of the direction may also be influenced by the lack of clarity attending the circumstances in which the existence of other corroborative evidence will influence the need to give the *Longman* direction.[33]

[75] Using the approach in *BWT*, one is left with the situation here where, first, the case proceeded on the basis that that there was no relevant long delay. Secondly, Keane JA's analysis deals convincingly with the alleged forensic disadvantage suffered by the appellant. It was not a case where the defendant had no previous connexion with the complainant and would have been dependent solely on the evidence of others to buttress what might otherwise have been a bare denial of the charges. Based on the cross-examination, he was demonstrably familiar with the places where and periods when the offences were alleged to have occurred and with the people who may have been able to provide other relevant evidence. In my view, the learned trial judge's direction was appropriate to deal with the perceptible risk of miscarriage of justice from the delay said to be relevant in this case.[34]

[76] I agree also with the orders proposed.

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32 At 275 [95].

33 See *Doggett* at 356-357 [54] per Gaudron and Callinan JJ and cf. Kirby J, the other member of the majority, at 379 [134]-[135] with Gleeson CJ at 348 [10] and McHugh J at 364-365 [80]-[83].

34 See *Longman* at 86.