SUPREME COURT OF QUEENSLAND

CITATION:	*R v FL* [2005] QCA 104
PARTIES:	**R** **v** **FL** (appellant)
FILE NOS:	CA No 426 of 2004 DC No 230 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction and sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	15 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2005
JUDGES:	Williams and Keane JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Particular grounds – Unreasonable or insupportable verdict – Where appeal dismissed – Indecent dealing and rape – Credibility of complainant is matter for the jury – Uncorroborated evidence of complainant — *Longman* direction – Where judge wrongly instructed the jury – Whether appealable error *Doggett v The Queen* (2001) 208 CLR 343, cited *Longman v The Queen* (1989) 168 CLR 79, cited
COUNSEL:	A Glynn SC for the appellant D Meredith for the respondent
SOLICITORS:	Ryan & Bosscher for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA**: The relevant facts are set out in the reasons for judgment of Fryberg J which I have had the advantage of reading. The real issue at the trial was the credibility of the complainant. The only challenge to the summing up was with respect to the *Longman* direction (see *Longman v The Queen* (1989) 168 CLR 79).

I agree with Fryberg J that, subject to one matter, the direction in that regard was adequate.

[2] As Fryberg J has pointed out it was unfortunate that the words used by the learned trial judge with respect to "other evidence" could have led the jury to conclude that if there was corroboration the *Longman* caution was irrelevant. That would have infringed the reasoning in *Doggett v The Queen* (2001) 208 CLR 343. However, as that error would only have affected one count, and the jury convicted on the other counts, the error had no practical effect.

[3] I am persuaded that generally the summing up was adequate on the issue of the complainant's credibility and there was ample evidence supporting findings beyond reasonable doubt that the appellant was guilty.

[4] The remaining ground of appeal is that the "trial was unfair due to comments made by the complainant and other evidence then led in the trial." The alleged offending passages are set out in the reasons of Fryberg J. Whilst it is unfortunate that some of the matters particularised got before the jury I am not persuaded that in the circumstances that resulted in a miscarriage of justice.

[5] I agree that the appeal should be dismissed.

[6] **KEANE JA**: I have had the advantage of reading the reasons for judgment of Fryberg J. I agree with his Honour's reasons and the order which his Honour proposes.

[7] **FRYBERG J**: The appellant was convicted in the District Court at Townsville of three counts of indecent dealing and one count of attempted rape. The victim was the daughter by an earlier relationship of his de facto wife. At the time of the offences she was aged 11. He was aged 40. The offences were alleged to have occurred in 1971. At the time of trial the appellant was aged 73.

[8] The offences were alleged to have taken place at Bowen where the complainant was living with her mother, the appellant, one of her three older sisters and her two half siblings who were infants. At that time the appellant was a professional fishermen and he owned a small trawler. Three of the offences (including the attempted rape) were alleged to have been committed on that vessel and one at their home. In each case no-one apart from the complainant and the appellant was present at the scene. The offences were alleged to be samples of a sustained course of abusive conducted by the appellant toward the complainant. The complainant was the only witness who gave direct evidence of the events in question. The appellant neither called nor gave evidence. The prosecution case was entirely dependent upon the jury's accepting the complainant as a witness of truth and being satisfied to the necessary standard by that evidence.

[9] For the circumstances I respectfully adopt the summary of the complainant's evidence given by the trial judge to the jury. As to count one his Honour said:

> "The evidence in relation to count 1 of the complainant was that there was an incident when he took her to a boat,…; they rode out on a dinghy and the boat was about 30 metres off shore; that they had been doing some things on the boat and then he asked her to get a

spanner out of the motor. She gave some evidence about the motor and said:

> 'He dropped a spanner in there and he couldn't fit his arm down to get it so he asked me to put my arm down to get the spanner out. I put my hand down to get the spanner. I was bending over to put my arm right down as far as I could get it. I was kneeling down. I had a skirt or a dress on. I was wearing underwear'.

And you will recall that later she said that in that position she had her 'bum stuck up in the air'. She said:

> 'I felt his hand go up my leg to inside my pants and he touched me on my vagina. He was almost just directly behind me on my right side. It burnt me. It felt like a burning, like petrol or something like that, on my vagina. I pulled my hand out and flung my right hand across and hit him. I told him to stop, then I felt so sick in my stomach I vomited over the side of the deck.'

And she said she subsequently swam to shore."

[10] In relation to count two he said:

> "This is the occasion at the house itself, she described as the first occasion which she said elsewhere that it happened the day after the incident in count 1. She said:
>
> > 'My mum went shopping. She always went shopping on Saturdays and he had asked me to rub his feet, which we all used to do from time to time. Sometimes he'd pay us to do it – rub his feet, that is. And he was sitting in the lounge room. He always used to wear these horrible leopard skin jocks with no shorts around the house and he asked me to come and rub his feet on the couch. I was rubbing them for – you know, 20 minutes, half an hour, and then he sat up and he started touching me. He put his hands on my breasts underneath my shirt, put his hand up inside my knickers, touched the outside of my vagina.'
>
> So the relevant dealing alleged there is touching the breasts under the shirt and touching the outside of her vagina – that again, reference would be to the genitalia – inside her underwear."

[11] As to the third count he said:

> "This was again on the boat. He was cleaning a little motor. She had gone to the boat with him again and he asked her to come down to see how it cleaned. There had been evidence that he had been cleaning some parts with some petrol with a brush, and she enlarged on that under cross-examination. 'He then asked me to sit on the

bunk with him. He put the motor away and he started touching my leg.' She said she was wearing culottes. 'He then started touching my crutch' with his fingers on the outside of her vagina, that he was doing something to himself at the time. She did not understand then, of course, but he was masturbating himself. He took his shorts off.

> 'He rubbed himself on the underpants first, then he took off the underpants 'cause he wanted to show me something. I turned my head away. He grabbed my chin and made me watch him. He asked me to watch because there's a surprise at the end. He had a handkerchief. He ejaculated into the hanky. I just kept turning my head away and he just kept grabbing my chin with his other hand and just kept making me look at what he was doing. And then I told him I wanted to go home. He got dressed and took me home.'"

[12] Count four was the count of attempted rape. His Honour said:

> "She said that she was back on the boat about a week later.
>
> > 'He called me below deck again. He only had his underwear on, he didn't have his shorts on. He started me on his thigh again and moved up and started touching my crutch area as well. He told me to lay down on the bed. He said he wanted to kiss me. I didn't understand what he meant but then he removed my underwear and put his lips on my vagina and I screamed and told him to stop and then he said, 'Well, how about just a cuddle then?', and he laid on top of me. He had taken his underpants off and he tried to put his penis inside me.
> >
> > What did you feel? – Pressure and pain but it didn't penetrate. I screamed really loud. He had pushed my knees apart. I was very distressed. I can't remember exactly the exact details.'
>
> She said she felt pain and pressure of him 'trying to go inside me. That's when I screamed because the pain was really awful. He said, 'Bugger you', and he got off me and said, 'Oh, I'll take you home', or something and I said, 'I want to go home.'"

[13] Although there was no evidence directly supporting the complainant's version of events, in relation to count three her evidence was corroborated by evidence from the appellant's son that the appellant had subsequently admitted to him that he had given the complainant a shock when she was young by masturbating in front of her on the boat.

[14] The appellant's case, put in cross-examination of the complainant by his counsel, was that she was making it all up and that nothing improper ever happened. The complainant's credibility was therefore the central issue at the trial.

[15] The grounds of appeal which remain alive are:

"1. That the conviction was unreasonable in all the circumstances.

3. The trial was unfair and due to comments made by the complainant and other evidence then led in the trial.

4. In the circumstances of this case the *Longman* directions were erroneous and were not sufficiently elaborate."

Ground one

[16] Ground one as developed on behalf of the appellant related directly to the complainant's credibility. In essence the appellant submitted that the jury should not have believed her. A number of reasons were advanced for that conclusion:

1. The events in question occurred some 33 years before the trial;

2. At the time the complainant was 11 to 12 years old;

3. No contemporaneous complaint was made to anyone within her large family;

4. The complainant had been an alcoholic since the age of 11 or 12;

   (a) while the complainant denied that she suffered hallucinations she admitted that it was possible that she told doctors at the Mackay hospital in April 2001 that she would experience hallucinations and voices from time to time;

   (b) she claimed she could not remember what she had said to the doctors because she was too drunk at the time;

5. For the four years prior to trial she had been on medication for depression and alcoholism;

6. The complainant said she had nightmares "all the time" of the appellant on the other end of a big monster coming to get her in a sandpit, even when she had not been drinking;

7. The complainant said that there were "lots of times" (other than those charged) when the appellant would touch her in the crotch or on the breasts while teaching her to drive in the car, whereas her sister D testified that the complainant was only ever with the appellant in the car "on limited occasions";

8. The complainant said that she recalled "one time D and I both told her [their mother]" about the four incidents charged, whereas D testified that she did not tell her mother (the mother had died by the time of the trial);

9. The complainant in evidence said she was "sure" that the "couch" incident (count two) occurred on the Saturday following the "spanner incident" (count one), whereas in her statement it was said to have been on the next day;

10. On one occasion the complainant was demonstrated to have been willing to say anything to support her charges.

[17] A few of those submissions did not fairly or completely represent the state of the evidence. In relation to paragraph 3, all of her older siblings except D had left home at the relevant time. In relation to paragraph 8 D's evidence was not that the complainant was only ever with the appellant in the car on limited occasions, but that she only saw the complainant in the car with the appellant on limited occasions. There is no inconsistency between her evidence and that of the complainant on this point. In relation to paragraph 9, there is a degree of ambiguity in the evidence. The complaint to which D was referring probably related to an incident which the complainant alleged took place at Tennant Creek some three years after the events charged (the complainant alleged that the appellant had given her beer and raped her). Others of the submissions might be thought to carry little or no weight: for example, it is difficult to see how the fact that the complainant had been on medication for depression and alcoholism impinged on her credibility; and confusion as to the precise timing of the events constituting count two was hardly surprising. Finally, whether the complainant was demonstrated to have been willing to say anything to support her charges was a matter of impression.

[18] Nonetheless the points referred to in the submission certainly provided solid ammunition for an attack on the complainant's reliability. Further, in giving her evidence the complainant was dogmatic and careless as to matters of detail, and displayed antagonism toward the appellant; at least, that is the impression one gains from the transcript. The question is whether all of this demonstrates appealable error.

[19] In my judgment it does not. Credibility of witnesses, more than any other issue, is a matter for the jury. Even with the assistance of a transcript an appellate court can gain no more than a partial and potentially misleading impression of a witness. It is no doubt true that a witness's demeanour is not always a reliable guide to his or her credibility; but I have no doubt that a transcript is an even less reliable guide. With the greatest respect to those, psychologists and others, who have expressed a contrary view, I also have no doubt that the jury is in the best position to make a judgment on this issue. There is no doubt that that is the law as it presently stands. Whether it will be appropriate to change that law when appellate courts have the benefit of a complete video record of the trial can await determination at an appropriate time. In the present case the issues in relation to the complainant's credibility were central to the defence and were referred to by the trial judge in his summing up. The complainant's evidence was uncontradicted by any evidence from the appellant. It was a matter for the jury to assess what weight it should be given. We cannot second-guess the jury's assessment.

[20] Ground one should be rejected.

Ground three

[21] The appellant's submission in relation to unfair comments focused on three answers given by the complainant during both evidence in chief and cross-examination which it was submitted were unresponsive. The passages of evidence in question were as follows:

"[PROSECUTOR]: Whom did you live with in Tennant Creek?-- My mother and FL..

Do you recall anything occurring while you were in Tennant Creek?-- Yes. My mother got sick and had to go to Alice Springs for some tests. And I was working at the time, at a supermarket. And I took a couple of days off work to look after B and L. Because Mum wasn't there, obviously. And he was very drunk one night and I had also had a couple of beers myself. *And he actually raped me that night.*[1]

How old were you when that occurred?-- I was 15.

HIS HONOUR: Yes. Well, I think this is getting a bit out of the relevant period, Mr Greggery."

Second:

"[PROSECUTOR]: Did anything else occur on the boat that you can recall?-- Yes, there was another time. That was the - probably the worst time.

Can you tell the Court about that time?-- *I'm not exactly sure what I'm allowed to say.* [1]

HIS HONOUR: Well, go through it systematically. There was another time you - you recall. Do you recall about how long after the earlier time it was?-- About a week later."

Third:

"MR HONCHIN: Well, I am putting it to you that it didn't happen. You're just making it up?-- Well, you wouldn't know 'cause you weren't there. And that's a lie that you say that because this happened. This is why I've turned out like I am. You don't know.

So-----?-- You have no idea.

So - and I put it to you also that you didn't jump over the side of the boat and swim back to shore?-- Well, I did.

This is all simply just fabrication, isn't it?-- No, it's not and you shouldn't say that to me.

It's just made up-----?-- No.

-----as a consequence of your alcoholic state?-- *Excuse me? So, all my sisters are alcoholics too, are they?*[1]

I'm just talking about you at the moment?-- No.

Do you agree with that or you don't agree?-- I completely disagree with you and I wish you wouldn't talk to me like that 'cause it's not very nice."

---

[1] My emphasis.

[22] The appellant submitted that the impermissible inference arising was that the jury was only allowed to hear part of the story which included more serious sexual misconduct and also such conduct against other daughters. He submitted that this influence would have been reinforced by evidence led from one of the sisters, DA:

> "[PROSECUTOR]: Do you ever recall any of your brothers or sisters going on to the boat?-- Yes, *he used to take the younger ones down to the boat with him at different times*.[1]
>
> You mean FL took them down?-- Yes.
>
> How many children at a time would he take to the boat?-- *One at a time, usually*."[1]

and also:

> "[PROSECUTOR]: Could you describe to the court how FL treated H?-- *The same way he treated us all*.[1]
>
> How was that?-- Terrible. He used to bash us and hit us and abuse us the whole time."

[23] I have some doubt as to whether the prosecutor ought to have led the evidence of the alleged rape some three or four years after the events charged. So, evidently, did the trial judge. However the force of that point is diminished by the fact that counsel for the appellant elicited evidence of a complaint of the same event from the complainant's sister D; the judge gave extensive and careful directions on the use that could be made of such evidence; and no redirections were sought. The other passages of which complaint is now made were in my judgment of little significance when read in context, and in the light of the directions given could not have affected the outcome of the trial.

[24] Ground three should be rejected.

Ground four

[25] The trial judge warned the jury in accordance with the decision of the majority of the High Court of Australia in *Longman v The Queen*[2]. Two criticisms were made of that aspect of the summing up. The appellant submitted that, although the warning which the judge gave the jury conformed with *Longman*, in the context of the case four additional specific matters were required to be brought to the attention of the jury:

(a) The delay was some 33 years;

(b) The mother of the complainant had since died and was unable to give evidence either way; and in particular this allowed the complainant to say, for example, that she had complained to her mother (which evidence was in any event inconsistent with the denial earlier in her evidence that she had told her mother);

---

2 (1989) 168 CLR 79.

(c) The investigating police had "done nothing about chasing up" a witness to whom the complainant claimed to have made an earlier complaint;

(d) The complainant's long history of alcoholism, together with depression and reported hallucinations.

Counsel also submitted that in relation to count three (for which there was corroboration) the judge wrongly instructed the jury that if they found corroboration they could disregard the warning.

[26] As to the need for more elaborate directions, there is no substance in point (a). The judge told the jury that the events were said by the complainant to have happened in 1971. They were capable of doing the subtraction themselves. They must have been aware that the delay was some 33 years.

[27] There is more substance in point (b). The complainant's mother died in 1998. The complainant first went to the police in 1999. (The relationship between these two events was not explored in the evidence. The complainant said that the trigger for her to go to the police was a telephone conversation which she had with the appellant.) It was therefore not possible to investigate what light the complainant's mother might have thrown on the allegations. It would in my judgment have been preferable for the judge to have mentioned the mother's death as a possible specific disadvantage accruing to the appellant as a result of the delay. On the other hand, that much was fairly obvious and was unlikely to have been overlooked by the jury. It is not easy to see what else his Honour ought to have said in this context. The complainant did not claim to have mentioned the subject matter of the charges or any other matter of impropriety involving the appellant to her mother until 1989. This, she said under cross-examination, was some time after her mother "kicked [the appellant] out". By then she was 29 years of age and married, with a child of her own. Evidence that she told her mother of the incidents the subject of the charges was deliberately elicited in cross-examination. At best for the appellant (and assuming the complainant's mother was called as a witness and that the topic was not excluded under s 4A(3) of the *Criminal Law (Sexual Offences)* Act 1978), the mother would have denied the 1989 conversation. Such a denial would have been relevant to the complainant's credibility. But there is a large element of speculation in all this. Importantly, defence counsel did not ask his Honour for a direction that as a result of the delay the defence might have been denied the opportunity to test the complainant's credibility by checking her allegations of conversations in 1989. All in all, the further direction was not in my judgment mandatory in the circumstances.

[28] As to point (c) I see no connection between the omission of the police to "chase up" a witness and the *Longman* direction. The witness in question was a school friend of the complainant to whom the complainant alleged she had made complaint in the year when the offences were committed. The complainant said in evidence that she last saw that witness about three, maybe four years before the trial, when the witness was living in Bowen. By then the matter had been reported to the police. The failure to follow up had nothing to do with the delay in reporting the matter. For what it was worth it was a point in favour of the defence, and the judge referred to it as such in his summing up. He made no error in that regard.

[29] Finally, point (d): whether the judge should have referred to the complainant's history of alcoholism "together with depression and reported hallucinations" in this context. The complainant's alcoholism was a two-edged sword for the defence. On the one hand it cast doubt on her capacity to remember events from her childhood. On the other there was evidence from the complainant that she blamed her condition on the appellant's abuse. To have emphasised that history might have been thought disadvantageous to the defence case. In the context of the trial the defence sought no direction (or redirection) on the matter; the point was obvious; and the evidence was fresh in the minds of the jurors. Even fresher, if the point was mentioned in it, was the closing speech of defence counsel. In the circumstances it has not been demonstrated that the judge made any error in not referring to it. As to depression and hallucinations: there was no evidence that depression impaired credibility. That would have been the only reason to have referred to it. There was also no evidence that the complainant had ever reported suffering hallucinations. All she said was that it was possible that she had so reported, but she could not remember. The hospital records were in court, but neither side tendered them. The judge was right not to refer to depression or hallucinations in this context.

[30] The appellant's final submission arises out of the last two paragraphs of the *Longman* direction. His Honour said:

> "I will direct you tomorrow in relation to one count there is some evidence which provides some independent support of the complainant's testimony, but in respect of the other three counts the Crown have to rely on the complainant's testimony alone in relation to the particular crucial matters, the elements of the offence.
>
> And so that applies at least to those three counts, and it is always a matter for you whether or not you treat that other evidence as amounting to evidence tending to support the complainant. If you do not, then you have to have regard to that warning in relation to the fourth count, as well."

[31] The last sentence of that passage is in my judgment unfortunate, because it seems to imply that if the jury does accept the "other evidence" as tending to support the complainant it need not have regard to the *Longman* warning in relation to count three (in the context there was no ambiguity in the use of the expression "the fourth count"). Such an implication would have been wrong: *Doggett v The Queen*[3]. However that error could have affected only count three. Given the convictions on the other counts, it is inconceivable that the error could have had any practical impact on the jury's verdict.

[32] In my judgment the appeal should be dismissed.

---

3 (2001) 208 CLR 343.