SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBO* [2017] QCA 18
PARTIES:	**R** **v** **HBO** (appellant)
FILE NO/S:	CA No 79 of 2016 DC No 501 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Hervey Bay – Date of Conviction: 11 March 2016
DELIVERED ON:	24 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2016
JUDGES:	Fraser and Philip McMurdo JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Appellant's convictions of 11 March 2016 quashed.** **3. Retrial ordered.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CORROBORATION – WARNING REQUIRED OR ADVISABLE – WHERE SUBSTANTIAL DELAY IN COMPLAINT: LONGMAN WARNING – where sexual offences against the appellant's stepdaughter were alleged to have occurred between 1989 and 1994 – where there was a delay of 25 years between the alleged conduct and the making of the complaint – where the complaint was largely uncorroborated – where the complaint was contemporaneous with the complainant learning of the appellant's extramarital affair – where a *Longman* direction was given but failed to specify the aspects of the complainant's testimony requiring additional scrutiny – where the defendant's counsel had agreed with the direction proposed to be given by the trial judge – whether the *Longman* direction in general terms was sufficient – whether the trial judge was required to alert the jury to the specific circumstances of the case which required careful scrutiny *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60,

considered
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, considered
R v GAQ [2013] QCA 309, cited

COUNSEL: D R MacKenzie for the appellant
D Nardone for the respondent

SOLICITORS: Suthers Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Philip McMurdo JA and the orders proposed by his Honour.

[2] **PHILIP McMURDO JA:** After a three day trial before a jury in the District Court, the appellant was convicted of seven counts of sexual offending against his stepdaughter. The most serious offence was an attempted rape for which he was sentenced to four and a half years' imprisonment. He was sentenced to concurrent terms of three years and two years' imprisonment on other counts each of which was an offence of the indecent treatment of a child under the age of 12 years and (in some instances) a child under his care.

[3] He appeals against his convictions upon two grounds. The first is that the trial judge did not give an adequate warning, according to *Longman v The Queen*,[1] as to the consequences in this case of the complainant's delay in the reporting of these incidents. The second is that the trial judge did not warn the jury about specific features of this case which affected the complainant's reliability and required a judicial warning in accordance with *Robinson v The Queen*.[2] The appellant's original ground of appeal, which was that the verdicts were unreasonable, was abandoned.

The prosecution case at the trial

[4] The complainant was born in March 1983. The appellant became her stepfather when he and her mother began to live together after meeting, her mother said, in October 1989. At that stage the household consisted of the complainant, her twin brother, their mother and the appellant. The mother and the appellant married and there were children from that marriage.

[5] The offences were allegedly committed in certain broadly defined periods, the earliest commencing in 1989 and the latest ending in 1994.

[6] The complainant related the event the subject of the first count as follows. The appellant went fishing taking the complainant but no one else with him. She was then at school in grade one. Whilst he fished at a riverbank she was asleep on the back seat of her mother's car, before she awoke to find that the appellant had wrapped her legs around his waist and, with his penis protruding above his shorts, was simulating sexual intercourse with her. This continued for about 10 minutes, during which she pretended to be asleep. She said that there followed similar incidents, on about a monthly basis.

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1 (1989) 168 CLR 79 ("*Longman*").
2 (1999) 197 CLR 162 ("*Robinson*").

[7] She said that on another occasion, again when she was with him on a fishing trip, she was in the front seat of the car when he asked her to touch his exposed uncircumcised penis. She did so for a few seconds after which the appellant masturbated and ejaculated. That incident was the subject of count 2.

[8] Count 3 occurred when she accompanied the appellant overnight in a trip in his truck in the course of his work as a removalist. She was then in grade three at school. She said that she and the appellant slept on blankets in the back of the truck. She awoke to find that she was naked and the appellant was "on top" and kissing her. She said that he later told her that he had removed her clothes because it was hot. In this incident, she said, he rubbed her vagina for about 15 minutes with his penis which she said was "a little hard".

[9] When she was in grade four, the family had moved house and she was at a different school. She recalls that at this time she was playing with the family dog, which was called "Biscuit", in the back yard of the family house when the appellant grabbed her legs, spun her around to a "wheelbarrow" position, removed his penis from his shorts and commenced to slap it against her legs for about 10 seconds. That incident was the subject of count 4.

[10] The next incident was said to have occurred on a camping trip to her grandmother's rural property where she said, she and the appellant arrived one night ahead of the rest of the family. She said that she was then aged nine. She and the appellant were sleeping that night in a tent. She woke up to find that the appellant was removing her underwear and licking her vagina which she said continued for about 15 to 20 minutes. That was the subject of count 5. In the same incident, she said, he placed his erect penis against her vagina and some penetration occurred. That was the subject of count 6 on the indictment which was a charge of rape. The jury acquitted him of that charge but convicted on the alternative charge (count 7) of attempted rape.

[11] The final count was upon the basis of an incident which she said occurred when she was in grade five. She said that the appellant was driving her home one afternoon after a sleepover at a friend's house when, in the course of the journey, he removed his penis from his shorts and masturbated to ejaculation.

[12] The complainant told no one of any of this conduct until August 2014, by which time she was aged 31. She had moved from the family home at aged 16. When cross-examined she was shown a number of photographs, taken at family functions over the 20 years to 2014 where she and the appellant were present, which suggested that she and the appellant were on good terms. She explained these photographs on the basis that on each of the occasions which they recorded, she was intoxicated. However, she agreed that over the years she had occasionally given the appellant a birthday present and that on one occasion he had secured a job for her.

[13] In cross-examination the complainant agreed that in August 2014 her mother told her that the appellant had had an extra-marital affair, making her mother then very upset and the complainant angry with the appellant. It was on 12 August 2014 that the complainant went to the police and first complained of the appellant's sexual misconduct. She denied that she made the complaint because of her anger over the extra-marital affair. When in re-examination she was asked why she had gone to the police at that time, she answered:

> "I got pregnant. I was very afraid and I didn't – I wanted – I needed – I needed to protect my child … I had to protect my child. I didn't want to be looking over my shoulder."

[14] When asked in cross-examination why she had never told her mother of this misconduct, she said that she had been afraid of the appellant, although she agreed that she had not been threatened by him. She agreed that she had had close relationships with her mother and twin brother.

[15] In cross-examination there was a particular challenge to her evidence about count 4, which she said had occurred when she was playing with the family dog. She rejected a suggestion that the dog had not joined the family until after what was, according to the indictment, the relevant period. She said that she there was photographic proof to the contrary.

[16] In relation to count 8, in evidence-in-chief she named the school friend with whom she had been sleeping over ahead of the incident. In cross-examination she was shown a photograph of her class at school at the time which, she agreed, did not show this child. But she added that the friend "did not go to the school for a great period of time [and that] possibly around the time that the school photos were taken, she may not have been attending that school."

[17] The other witnesses in the prosecution case were the complainant's twin brother, her mother and her stepsister.

[18] Her brother gave evidence of the various places where the family lived and the schools which he and the complainant attended at relevant times. He said that the dog called Biscuit was there from when he was about five and therefore at a relevant time. He said that the complainant would sometimes go on trips with the appellant and at one point in his cross-examination, he recalled that the complainant travelled alone with the appellant in his truck.

[19] The complainant's mother, who was still married to the appellant, gave evidence that the complainant had not been on any trips alone with the appellant in his truck or alone with him on a fishing trip. She said that there were several children of their marriage the oldest then being a girl whom I will call C and who was born in September 1991.

[20] The complainant's mother said that she had never seen anything untoward between the appellant and the complainant. Until she and the complainant became estranged shortly after the complainant went to the police, she and the complainant had been close and would speak confidentially, such as when she told the complainant of the appellant's extra-marital affair. Her evidence suggested that there was no family dog at the time of the incident which was the subject of count 4. The complainant's mother also recalled a conversation with the complainant and C in which the mother had said that the appellant had not been circumcised. The prosecution then called C to say that whilst the complainant's mother and C had discussed circumcision (in the context of C's expecting a male child), the complainant had not been a party to that conversation.

[21] The appellant elected not to call or give evidence.

The directions to the jury

[22] Before commencing her summing up, the trial judge discussed with counsel the directions which she was proposing to give. Her Honour distributed a document that seems to have been a draft of at least part of her summing up. In the course of

discussing that draft her Honour noted that there was a "*Longman* direction pretty much as per the Benchbook" and asked whether counsel was content with that direction. The appellant's then counsel answered "yes". But there was some further discussion on the question. Her Honour raised whether this was a case, as described in the Benchbook, where some more detailed direction might be required because of "specific difficulties" (for the defendant) from the delay. Neither counsel suggested that there were such specific difficulties in this case.

[23] Her Honour then referred to another footnote in the Benchbook's *Longman* direction, which referred to the potential necessity for the circumstances relevant to the evaluation of a complainant's evidence to be identified by the judge to the jury.[3] The prosecutor then said that there were no such circumstances which had to be stated by the judge. The prosecutor added that although the complainant "was young" she was "very accurate". Her Honour said that it was also her view that no circumstances had to be identified and asked defence counsel whether he agreed, to which he answered "Yes, your Honour. I do."

[24] Consequently, the *Longman* direction which was given was as follows:

> "Now, because of the circumstances of this case, where the alleged events are said to have happened between 1989 and 1994, and no complaint was made until August 2014, I need to say something to you about that delay. The complainant's long delay in reporting the incident she says happened between 1989 and 1994 has an important consequence: her evidence can't be adequately tested or met after the passage of so many years, the defendant having lost by reason of that delay means of testing, and meeting, her allegations that would otherwise have been available.
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> By the delay, the defendant has been denied the chance to assemble, soon after the incidents are alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incidents happened. Had the complaint instead been made known to the defendant soon after the alleged event, it would have been possible then to explore the pertinent circumstances in detail, perhaps to gather, and to look to call at a trial, evidence throwing doubt on P's story, or confirming the defendant's denial – opportunities lost by the delay.
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> Now, the fairness of the trial – the trial being the proper way to prove or challenge an accusation – has necessarily been impaired by the long delay. So I need to warn you that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinising it with great care, *considering the circumstances relevant to its evaluation*, and paying heed to this warning that I'm giving you, you are satisfied beyond reasonable doubt of its truth and accuracy."
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> (my emphasis)

The appellant's arguments

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[3] For which the Benchbook cited *R v C* [2002] QCA 166; *Crampton v The Queen* (2000) 206 CLR 161 ("*Crampton*"); *Doggett v The Queen* (2009) 208 CLR 343 and *Robinson* (1999) 197 CLR 162.

[25] The first ground of appeal is that her Honour should have identified circumstances which are said to have been "unique to this case", which the jury had to consider in evaluating the complainant's evidence. Counsel cited this passage from the judgment of McHugh J in *Longman*,[4] where it was said that on the facts of that case:

> "The jury should have been warned that, in evaluating her evidence, they had to bear in mind that it was uncorroborated, that over twenty years had elapsed since the last of the alleged offences occurred, that experience has shown that human recollection and particularly the recollection of events occurring in childhood, is frequently erroneous and liable to distortion by reason of various factors, that the likelihood of error increases with delay, that the complainant had testified concerning incidents occurring to her as a young child after she had awoken and pretended to be asleep, that no complaint was made to her mother, and that, by reason of the delay and lack of specificity as to the dates, the defence was unable to examine the circumstances of the alleged offences."

It may be noted that each of those circumstances was relevant to the jury's evaluation of the complainant's evidence in the present case. It may also be noted that in *Longman* there was no majority view that those circumstances had to be set out in the trial judge's warning. In the joint judgment of Brennan, Dawson and Toohey JJ, their Honours said:[5]

> "There were several significant circumstances in the case: the delay in prosecution, the nature of the allegations, the age of the complainant at the time of the events alleged in the two counts in the indictment, the alleged awakening of a sleeping child by indecent acts and the absence of complaint either to the applicant or to the complainant's mother. It would not have been surprising if these circumstances had elicited some comment from the trial judge, for it would have been proper to remind the jury of considerations relevant to the evaluation of the evidence. Of course, any comment must be fairly balanced. For example, any comment on the complainant's failure to complain should include (as indeed s 36BD requires) that there may be 'good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence'. 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*. 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 has 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*

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4 (1989) 168 CLR 79 at 108-109.

5 (1989) 168 CLR 79 at 90-91.

> *District Court (NSW)* 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."
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> (footnotes omitted)

[26] Referring to that passage in *Crampton*,[6] Gaudron, Gummow and Callinan JJ said it "distinguishes between two different sets of circumstances: those which might well invite, and, we would interpolate, will generally require, comment; and those in respect of which a warning is imperative."[7] They referred to differences, "of degree only perhaps", between that joint judgment in *Longman* and those of Deane J and McHugh J in the same case, in that "the former would confine the affirmative obligation to give a warning to the matter of delay and the difficulties of testing and disproving allegations by reason of the passage of time, and of the danger of convicting on the complainant's evidence alone."[8] In that joint judgment in *Crampton*, their Honours held that in that case there were circumstances which had to be identified within the trial judge's warning about delay namely "the abstention, by the prosecutor, from questioning each co-complainant about the respective charges, the fragility of youthful recollection, the absence of a timely complaint (subject to any reasonable explanation therefor) and the possibility of distortion."[9]

[27] The appellant's argument also cites a decision of this court, *R v GAQ*[10] where the President (with whom Muir JA and Atkinson J agreed) said of a like argument:

> "There were worrying aspects about this case: the delay; the inconsistencies in J's account; the absence of timely complaint and the way J's ultimate complaint to her mother and family came about in circumstances where her mother was calling on J to justify her self-harming; her admitted uncertainties; that the alleged offences occurred when J was awoken from or in between periods of sleep; that she was remembering events which occurred when she was aged between three and six; and the risk of false reconstruction arising out of inadvertent empathy with her mother's history of sexual abuse at age six and subsequent self-harming. All these factors were matters which the judge should have identified for the jury as particular factors, as well as the general delay in making the complaint, that required the jury to scrutinise J's evidence with great care before acting on it."

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6 (2000) 206 CLR 161.
7 *Crampton* (2000) 206 CLR 161 at 180 [39].
8 *Crampton* (2000) 206 CLR 161 at 180 [42].
9 *Crampton* (2000) 206 CLR 161 at 181-182 [45].
10 [2013] QCA 309, [68].

[28] The appellant's argument identifies the features of the case which should have been specified by the trial judge in the *Longman* direction as follows:

(1) the lack of specificity as to the dates of the offences, which were alleged to have occurred within extensive periods of time;

(2) the passing of some 25 years between the dates of the offending and the complaint to police;

(3) the complainant's explanation for not complaining earlier and for her ultimate decision to make the complaint;

(4) the complainant's young age at the time of the alleged offences.

[29] The second ground of appeal is that the trial judge failed to "caution the jury about matters specifically relevant to the complainant's reliability". As the appellant's argument acknowledges, this ground is in part a duplication of the first ground. It is argued, by reference to *Robinson v The Queen*, that there were circumstances in this case which affected the reliability of the complainant's evidence which had to be identified not only by the address by defence counsel to the jury but also with the authority of the trial judge in her summing up. It was necessary to warn the jury of these circumstances in order to avoid the risk of a miscarriage of justice. The circumstances identified for this ground of appeal are:

(1) the age of the complainant at the time of the alleged offending;

(2) the absence of any independent supporting evidence;

(3) the harmonious relationship between the appellant and the complainant after the alleged commission of the offences, as evidenced by the photographs and family events;

(4) the absence of any preliminary complaint;

(5) the fact that the timing of the complaint coincided with the complainant learning of the appellant's extra-marital affair;

(6) the contradictory evidence of the complainant's mother;

(7) the assertion by the complainant that there was photographic evidence to support the presence of the dog at a relevant time but the absence of such evidence then being produced.

[30] It is submitted for the appellant that these grounds of appeal are not precluded by the appellant's trial counsel agreeing that the directions which were given were sufficient. It is said that there was no forensic advantage in seeking those further directions and the failure of the trial counsel to do so should not affect the outcome if there has been a substantial miscarriage of justice.

The respondent's submissions

[31] On the first ground, the respondent submits that the direction was sufficient because it clearly identified the forensic disadvantages from the delay in the making of a complaint, namely the inability to adequately test the allegations of the complainant or to adequately marshal a defence. It is further submitted that any particular difficulties for the appellant in those respects, although not described in the direction which was given, would have been apparent to the jury. And the

concurrence of the appellant's trial counsel with the proposed direction is relied upon as an indication that the direction was adequate.

[32] As to the second ground, the respondent argues that none of the circumstances which were said to have required a *Robinson* direction was exceptional or not apparent to the jury, in the absence of such a direction.

Consideration

[33] There is no issue that a *Longman* direction was required in the present case. The trial judge was obliged to inform the jury that the delay in the making of the complaint had disadvantaged the defendant because the evidence of the complainant could not be adequately challenged, either by cross-examination or by contradictory evidence, after the passage of about 25 years. It was necessary for the jury to be given an explanation of the effects of this delay because they were matters which may not have been apparent to the jury.[11] The respondent argues that these effects were well explained by the trial judge. But that is not the appellant's criticism of the direction: rather, what is criticised is in what was said, or not said, about the evaluation of the complainant's testimony.

[34] Having identified those effects of the delay on the fairness of the trial, the trial judge was required to warn of the danger in convicting in this case without the jury scrutinising the complainant's testimony with great care and considering the circumstances which were relevant to that evaluation of her testimony. What was said in that respect could not be criticised. The question is whether a warning in those general terms was sufficient in the present case because of a risk that, unassisted by the trial judge's instruction as to what were those circumstances, the jury might convict without that required scrutiny of the evidence.

[35] Of course the jury had heard the addresses of counsel as to whether to accept or reject the complainant's evidence. But they were arguments which, as the trial judge told the jury in the usual way, the jury was not bound to accept.

[36] The jury was bound to follow the trial judge's instructions and, in particular, to heed the warning within this instruction about the complainant's testimony. Unless "the circumstances relevant to its evaluation" must have been plain to the jury, the warning could have been sufficient only if those circumstances were identified by the trial judge. By doing so, the trial judge would not have been endorsing any of the arguments to the jury as to why the complainant's testimony should not be accepted. Rather the trial judge was to identify what had to be considered before that testimony could be accepted. In my view this was not a case where the circumstances relevant to the evaluation of that testimony were so obvious that they could not be overlooked.

[37] The relevant circumstances were the passage of 20 to 25 years from the alleged events, the young age of the complainant at the time, the absence of any complaint notwithstanding the complainant's close relationship with her mother and twin brother, the circumstance that many of the events were said to have occurred as she slept or after she had awoken, the antipathy of the complainant towards the appellant from his having been unfaithful to her mother, the coincidence of the timing of her learning of that fact and her complaint to police and the complainant's explanation for going to the police when she did. Without those circumstances

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11 *Longman* (1989) 168 CLR 79 at 90.

being identified by the trial judge as necessary considerations, what was said was insufficient to instruct the jury of the required scrutiny of the complainant's testimony. Consequently there was a risk that the jury might overlook necessary considerations and consequently there was a miscarriage of justice.

[38] There was a miscarriage of justice notwithstanding the concurrence of the appellant's trial counsel. There was no forensic advantage the appellant could have enjoyed from his counsel agreeing to the direction in the terms in which it was given.

[39] Had those circumstances been identified within the *Longman* direction, there would have been no need for the jury to be given a second warning which effectively identified the same circumstances but without reference to the disadvantages to the defence case from the delay. It is the first ground upon which this appeal should be allowed.

Orders

[40] I would order that the appeal be allowed, the appellant's convictions of 11 March 2016 be quashed and that there be a retrial.

[41] **MULLINS J:** I agree with Philip McMurdo JA.