SUPREME COURT OF QUEENSLAND

CITATION:	*R v AB* [2000] QCA 520
PARTIES:	**R** **v** **AB** (appellant)
FILE NO/S:	CA No 118 of 2000 DC No 830 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2000
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2000
JUDGES:	Pincus JA, Chesterman and Atkinson JJ Separate reasons for judgment of each member of the Court; Pincus JA and Atkinson J concurring as to the orders made, Chesterman J dissenting
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – VERDICT – INCONSISTENT, AMBIGUOUS AND MEANINGLESS VERDICTS – PARTICULAR CASES – OFFENCES AGAINST THE PERSON – whether verdicts inconsistent – whether explainable by manner and content of complainant's evidence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – evidence of uncharged acts admitted at trial – not objected to by defence on basis of tactical advantage – whether admission can be used by defence as ground to quash convictions on appeal

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – whether jury misdirected as to use that could be made of evidence of uncharged acts – basis for admission of evidence of uncharged acts – as direct evidence of offence – as evidence of general relationship between accused and complainant

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – whether *Longman* direction appropriate in circumstances of case – circumstances in which *Longman* direction should be given

Criminal Code, s 24, s 632

B v The Queen (1992) 175 CLR 599, considered
BRS v The Queen (1997) 191 CLR 275, considered
Crampton v R [2000] HCA 60, 23 November 2000, considered
Crofts v The Queen (1996) 186 CLR 427, considered
Gipp v The Queen (1998) 194 CLR 106, considered
Harriman v The Queen (1989) 167 CLR 590, considered
Hoch v The Queen (1988) 165 CLR 292, considered
Jones v The Queen (1997) 191 CLR 439, considered
Kilby v R (1973) 129 CLR 460, considered
Longman v The Queen (1989) 168 CLR 79, considered
R v Pearce (1999) 108 A Crim R 580, considered
Pfennig v The Queen (1994 – 1995) 182 CLR 461, considered
R v Ball [1911] AC 47, considered
R v Beserick (1993) 30 NSWLR 510, considered
R v Kemp [1997] 1 Qd R 383, considered
R v Kiellerup CA No 168 of 1998, 14 August 1998, considered
R v P [1999] QCA 411; CA No 130 of 1999, 28 September 1999, followed
R v TJW ex parte The Attorney General [1988] 2 Qd R 456, followed
R v W [1998] 2 Qd R 531, considered
R v Wackerow [1998] 1 Qd R 197, considered
R v Witham [1962] Qd R 49, considered
RPS v R (2000) 74 ALJR 449, considered
S v The Queen (1989) 168 CLR 266, considered
Kailis v R [1999] WSCA 29; CA No 175 of 1998 & No 5 of 1999, 24 May 1999, considered
KBT v The Queen (1997) 191 CLR 417, followed
M v The Queen (1973) 129 CLR 460, considered
MacKenzie v The Queen (1996) 190 CLR 348, considered

R v AH (1997) 42 NSWLR 702, considered
R v Aristidis [1999] 2 Qd R 629, followed
R v Arundell [1998] VSCA 102; CA No 263 of 1997, 9 November 1998, considered
R v Aston-Brien [2000] QCA 211; CA No 439 of 1999, 2 June 2000, considered
R v C [2000] QCA 385; CA No 131 of 2000, 22 September 2000, considered
R v Crooks [1999] QCA 194; CA No 483 of 1998, 28 May 1999, followed
R v D [1999] VSCA 148; CA No 245 of 1998, 23 September 1999, considered
R v Doggett 1999] QCA 441; CA No 227 of 1999, 29 October 1999, followed
R v Ewanchuk [1999] 1 SCR 330, followed
R v Fraser NSW SC No 60441 of 1997, 10 August 1998, followed
R v JFP NSW CCA No 60685 of 1994, 22 July 1996, followed
R v Knuth CA No 64 of 1998, 23 June 1998, considered
R v L NSW Court of Criminal Appeal, 6 April 1992, followed
R v Logurancio [2000] VSCA 33; No 321 of 1998, 24 March 2000, considered
R v Murray (1987) 11 NSWLR 12, followed
R v Pearce (1999) 108 A Crim R 580, followed
R v R H McL [1998] VSCA 61; CA No 156 of 1997, 9 October 1998, followed
R v Rankin [2000] QCA 54; CA No 322 of 1999, 3 March 2000, considered
R v Schneider CA No 128 of 1998, 2 October 1998, considered
R v S CA No 428 of 1997, 28 April 1998, followed
R v Vinh Le [2000] NSW CCA 49; No 60556 of 1998, 7 March 2000, considered
R v Vonarx [1999] 3 VR 618, reported
R v W [2000] QCA 321; CA No 141 of 2000, 8 August 2000, considered
R v Young [1998] 1 VR 402, considered
Robinson v The Queen (1999) 197 CLR 162, distinguished
Robinson v R (1999) 73 ALJR 1314, considered
Suresh v The Queen (1998) 72 ALJR 769, followed
Wilson v The Queen (1970) 123 CLR 334, considered

COUNSEL: A J Rafter for the appellant
D Meredith for the respondent

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

[1] **PINCUS JA:** This is an appeal against conviction, the issues in which appear from the reasons of Chesterman J which I have had the advantage of reading. I agree with his Honour that the argument that the verdicts are inconsistent must be rejected and I do so for the reasons given by Chesterman J.

[2] **Longman**
Mr Rafter, for the appellant, argued that a direction of the kind given in *Longman* (1989) 168 CLR 79, should have been, but was not, given. It is evident that a long delay between the commission of an offence and the alleged offender being charged with it can create difficulty for the defence when the matter comes to trial. What is not quite so evident is that juries have in the past demonstrated a tendency to give insufficient weight to such delay.

[3] But authority binds this Court to act on the basis that it is not enough, where the delay is long, to rely on the defence's persuading the jury that this is a good reason to acquit. The judge must give the authority of his office to the sorts of arguments based on delay which the defence might advance and, it appears, refrain from diminishing the effect of such directions by any such observation as was made by the trial judge in *Crampton* [2000] HCA 60, 23 November 2000 at par [44]. There, after giving a direction intended to conform to what *Longman* required – a direction held to be too little and too unemphatic – the trial judge had remarked:

> "Also, the capacity of the complainants to be accurate is probably reduced and that may raise some greater difficulty in cross-examination of them. It may also, of course, explain some errors in the recollection". [32]

[4] In *Crampton* the principal judgment relating to *Longman* was that of Gaudron, Gummow and Callinan JJ. Their Honours held that almost all of a certain passage in *Longman*, with appropriate adaptations, should have been put to the jury, as should additional considerations mentioned by other judges in *Longman* – par [45], referring to pars [39], [40] and [41]. It should particularly be noted that the Court held that "the fragility of youthful recollection" should have been the subject of a direction. Such a direction does not infringe the statutory requirement that the judge not suggest, in any way, to the jury that the law regards any class of complainants as unreliable witnesses (s 632 of the Code); see *Robinson* (1999) 73 ALJR 1314. It was there held that one of the features which "demanded a suitable warning" – indeed, the first mentioned – was the age of the complainant at the time of the alleged offences (par [25]).

[5] Although, as is illustrated by a number of authorities, such as *Longman* itself, the length of the delay is not the sole criterion in determining whether a *Longman* direction is to be given, it appears to me to be the principal factor. The most recent consideration of the point in the High Court appears to have been in the reasons for dismissal of an application for special leave in *Kiellerup* (CA No 168 of 1998, 14 August 1998). There the gap in time was 9 to 12 years and, in dismissing Kiellerup's application for special leave on 24 June 1999, the judges hearing the application expressed the view that the case before them did not appear to be one requiring a *Longman* direction.

[6] On the other hand, as Chesterman J points out, in *Crofts* (1996) 186 CLR 427, the delay between the offences alleged and complaint about them was within the range of 6 months to 6 years. It was held, without discriminating between the 6 months

and the 6 year delay, that a direction in accordance with *Kilby* (1973) 129 CLR 460 should have been given; it should be noted, however, that the directions approved in *Kilby* did not go as far as those required by *Longman* and *Crampton*.

[7] One can understand the difficulty trial judges have in determining whether or not a *Longman* direction should be given. The safest course, in view of this uncertainty, would be to give a *Longman* direction where there is any reason to think that the delay might have disadvantaged the defence; otherwise the risk that the verdict may be vitiated must exist.

[8] In the present case the precise length of the delay is not absolutely clear, but it appears to be about 1 year and 6 months to a little over 3 years. To hold that such a modest delay should require, as a matter of law, a volley of judicial animadversions on the Crown case appears to me to be going too far.

[9] I would reject the appellant's argument based on the decision in *Longman*.

[10] I should not leave this point without referring to *RPS* [2000] HCA 3, 74 ALJR 449. In the principal judgment in that case, observations were made in pars [41]-[43] which support the view that the judge may properly "warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence" but should not "attempt to instruct the jury about how they may reason towards a verdict of guilt (as distinct from warning the jury about impermissible forms of reasoning)". This is consistent with the implication in *Crampton* par [44], that a jury should be told about disadvantages to the defence consequent on delay, but not about any disadvantages to the prosecution which might ensue.

[11] **Uncharged acts**

Mr Rafter contended that the learned primary judge gave inadequate directions with respect to uncharged acts relied on by the Crown as supporting its case; Mr Rafter laid particular emphasis upon the judge's directions concerning acts which he characterised as non-sexual.

[12] The relevant parts of the trial judge's directions are set out in par 30 of the reasons of Chesterman J. Her Honour instructed the jury that the evidence "is called guilty passion evidence", that it "may establish the existence of a relationship of a sexual kind ... or a guilty passion". It was also said that the evidence was led "to establish the true nature of the relationship between the accused and the complainant" and that it was a matter for the jury "whether the uncharged acts establish a background situation which would render it less improbable that the offences charged would have been committed". Her Honour said in effect that there is a distinction between the way the evidence of uncharged acts could be used in proof of the maintaining count and its use with respect to other counts.

[13] Mr Rafter argued that the nature of some at least of the categories of uncharged acts relied on by the Crown was not such as to establish the existence of a guilty passion or render the occurrence of the offences less improbable. Rather surprisingly, no objection was raised to the admission of evidence of the uncharged acts; that remark applies particularly to the evidence given by the complainant's mother as to an event which she described as follows (67):

> "Another incident was [the complainant] woke me up one night with bad sunburn and I'd already put cream on her back and I said there was nothing much I could do for her until the morning, that she'd ad (sic) have to wait, so she went back to bed. About 10 minutes later I got up to go and check on her and [the appellant] was in her room. She was laying on the bed with her shirt up around her neck lying on her stomach and he was rubbing cream on her back.
>
> Was there any conversation?-- I told [the appellant] he shouldn't be in there, that he had no right to be in there and told him to leave the room".

An explanation for the failure to object emerges from a discussion between the judge and counsel at the end of the Crown case. The defence sought to raise mistake of fact under s 24 of the Code, counsel observing that:

> "... if the jury find there was sexual intercourse and there was a sexual relationship or a guilty passion that mistake of fact is fairly raised". (74)

A little later defence counsel said of the jury:

> "They might find that there was a sexual relationship between them and that this was a continuation of that". (78)

[14] Since the charge of rape was the most serious charge, the inference appears to be open that counsel took the view that any evidence which might help to show a relationship between the complainant and the appellant should be let in, in the hope of using it in support of a defence of mistake as to consent. On the whole, I think that inference should be drawn, as the most reasonable explanation of the failure of the defence to object. In the end, the judge did not leave mistake to the jury and no complaint is made about that. It would, perhaps, have been awkward for defence counsel, having let evidence go without objection for his own purposes, to invite the judge to tell the jury that it or some of it was irrelevant.

[15] One must add, to the consideration just mentioned, that the defence made no complaint about the directions given with respect to the uncharged acts. I note that the jury was invited to retire and consider its verdict at 11.36am on 29 March, but returned for further directions at 11.43am. At that time the judge summed-up further with respect to the uncharged acts, raising the possibility that there was some unrecorded discussion of that subject, with counsel, after the jury first retired. However, no suggestion is made to us that at any stage of the trial the judge's directions with respect to the uncharged acts were said to be faulty.

[16] It appears to me likely that the evidence of the uncharged acts now said not to be probative of any relevant relationship was let in by the defence because it was thought that, on the whole, it might be advantageous to the appellant to have it in. That circumstance, coupled with the absence of any objection to the directions given, bring to mind the recent observations of the Chief Justice in *Crampton* (above), in discussing the circumstances in which an appellate court will entertain a point not raised at trial. The Chief Justice remarked:

> "[15] First, there is what was referred to by L'Heureux-Dubé J in the Supreme Court of Canada as 'the overarching societal interest in the finality of litigation in criminal matters' when she said: 'Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases'.
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> [16] Secondly, it is common for appellants in criminal appeals to retain counsel different from the counsel who (by hypothesis, unsuccessfully) conducted the trial. This increases the tendency to look for a new approach to the case, and carries the danger that trial by jury will come to be regarded as a preliminary skirmish in a battle destined to reach finality before a group of appellate judges.
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> [17] Thirdly, it 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.
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> [18] Fourthly, as a general rule, litigants are bound by the conduct of their counsel. This principle, which is an aspect of the adversarial system, forms part of the practical content of the idea of justice as applied to the outcome of a particular case. For that reason, courts have been cautious in expounding the circumstances in which an appellant will be permitted to blame trial counsel for what is said to be a miscarriage of justice".

[17] It appears to me that, consistently with these remarks, this Court should hesitate to give effect to the criticisms now made of the learned primary judge's directions with respect to uncharged acts. The principal point taken is that at least the "sunburn" incident, and probably others, were of too little significance to be left to the jury as relevant evidence; that is, as it appears to me, inconsistent with the tactics followed at trial.

[18] I would dismiss the appeal.

[19] **CHESTERMAN J:** After a trial lasting four days in the District Court, on 30 March 2000, the appellant was convicted of:

i. maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years between 31 December 1993 and 1 January 1996;
ii. unlawfully and indecently dealing with a child under the age of 16 years between 31 December 1993 and 31 December 1994;
iii. unlawfully and indecently dealing with a child under the age of 16 years between 31 December 1994 and 1 January 1996;
iv. entering a dwelling house with intent to commit an indictable offence between 31 December 1994 and 1 January 1996;
v. attempting to unlawfully and indecently deal with a child under the age of 16 years between 31 December 1994 and 1 January 1996;
vi. entering a dwelling house with intent to commit an indictable offence on or about 30 November 1995;
vii. unlawfully permitted himself to be indecently dealt with by a child under the age of 16 on or about 30 November 1995;
viii. rape on or about 30 November 1995;

The complainant child in each count, including that of rape, was KC. The appellant had been indicted with other offences involving the same child but was acquitted. They were:

ix. indecently dealing with her between 31 December 1993 and 1 July 1995;
x. entering a dwelling house with intent to commit an indictable offence between 31 December 1994 and 1 January 1996;
xi. indecently dealing with her between 31 December 1994 and 1 January 1996.

A further charge, indecently dealing with the girl between 31 December 1993 and 1 January 1996 was withdrawn from the jury when the complainant was unable to provide sufficient evidence of the offence.

[20] The complainant was born on 31 December 1982 and was aged between 11 and 13 when the offences of which the appellant was convicted were committed. At the time the appellant was a young man in his mid-twenties. He lived with his parents who were neighbours of the complainant's family in Gunalda, a hamlet north of Gympie. Between March 1994 and May 1995 when they returned to Gunalda the complainant's family lived at three addresses in or near Maryborough. Two convictions were in respect of offences committed in this period. On those occasions the complainant had travelled to the complainant's home to visit, and stayed over. The first offence, maintaining an unlawful sexual relationship, occurred at all the locations where the complainant child lived during the period specified.

[21] Charge ii occurred when the complainant was asleep in her bedroom. Late one night, she woke to find the appellant standing next to her bed. The blankets had been removed and her nightie lifted up. The appellant was rubbing her underpants in the area of the vulva. He continued the action for a few moments but left when he heard movement in the house.

The next offence, charge ix, occurred in the house near Maryborough where the complainant shared a bedroom with her sister. Her account was that the appellant came into her bedroom when she was asleep. She woke to find the blankets removed and the appellant sitting next to the bed again rubbing her on her underpants. The appellant was acquitted of this charge.

Charge iii concerned another occasion in the house near Maryborough when the complainant was woken from her sleep. The appellant was crouching or standing near her bed. Her underwear had been pulled down to her knees. The appellant "sort of looped one of his fingers", licked it, and inserted it "a couple of times" into her vagina.

Charges x and xi relate to the same occasion. It occurred shortly after the complainant and her family returned to Gunalda. The appellant entered her bedroom through the window. He "put two fingers in (her) vagina". The complainant gave no more detail of the offences. The appellant was acquitted.

Charges iv and v also relate to a single occasion which again occurred at Gunalda. The complainant had been asleep but awoke to see the appellant outside her bedroom window. He "opened it from the outside and came in through the window and he just stood there for awhile". He then approached the complainant's bed and "tried to undo the buttons on (her) shorts". In fact he undid two buttons. The complainant then "rolled over". Presumably nothing more happened because the complainant gave no more evidence about the incident.

Charges vi, vii and viii also concern a single incident. This was the "last time" the appellant "did anything" to the complainant. She was able to fix the date, 30 November 1995, because it was after their return to Gunalda, two weeks after her brother's birthday and a month before hers. The appellant came into her bedroom through the window and approached her bed where he crouched. He put the complainant's hand on his penis which he had removed from his clothing. He then "grabbed" the complainant and "pulled (her) around" until her legs dangled over the side of the bed. The appellant took hold of the complainant's hips and attempted penile penetration. After initial resistance he forced her. He then withdrew and apologised. He said he was "sorry". The complainant had been wearing a nightdress and underwear but could not remember what had happened to her underwear in the attack.

[22] The appellant's first ground of appeal is that the verdicts returned by the jury are inconsistent, and, consequently unsafe and unsatisfactory. Reliance is also placed upon the withdrawal of the count in respect of which the appellant could provide no meaningful detail. The appellant accepts that the effect of the authorities was summarised in *R v P* (CA No 130 of 1999, 28 September 1999).

> " . . . it is only where a reasonable jury, who had applied its mind properly to the facts of the case, could not have arrived at the verdicts that there will be inconsistency".

The respondent points out, relying upon *Jones v The Queen* (1997) 191 CLR 439 at 453 that this is not a case in which:

> "There is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her

> evidence was more reliable in relation to those counts than it was in relation (to the others)".

and submits that the trial judge directed the jury that each count, and the evidence in support of it, was to be considered separately and that the complainant's demeanour in giving her testimony was an important factor in their deliberations.

[23] It is apparent that the complainant had difficulty in testifying. An earlier trial had to be abandoned because she was unable to speak about the relevant events. She had difficulty in describing the subject matter of the indictment at the second trial. It appears from the transcript that there were frequent pauses and short adjournments were necessary to allow her to regain composure. The trial judge noted that the complainant found the occasion very stressful. It does appear that the complainant was able to recall more detail of some offences than others.

[24] The appellant did not testify. The only evidence in relation to the incidents came from the complainant. The case is different from *Jones* where there was apparently equally credible evidence from both prosecution and defence and the jury accepted the complainant's evidence in relation to two counts but not a third.

[25] Here the respondent urges that there being no such evidentiary contest the verdicts are explicable by the manner in which the complainant gave evidence and the different content of what she said with respect to the various counts. The appellant had no real answer to the submission and, in the end, did not press the ground with any enthusiasm. In my opinion it has not been made out.

[26] The second ground of appeal is that the trial judge misdirected the jury about the use they could make of what has been called "uncharged acts". As the point was developed in argument it became twofold: (a) the trial judge should have warned the jury that two of the acts were by their nature so equivocal as to be incapable of having any probative value and (b) the jury was not told what was the function of the evidence.

[27] The acts fell into four components. Two of them were observed by the complainant's mother, Mrs P. Once when the appellant visited her family near Maryborough there was an evening barbecue. The complainant went into the house to make a cup of coffee and "was gone for quite awhile". Her parents wondered what detained her. Mrs P went into the house. She saw the complainant sitting on the kitchen bench with the appellant "standing in between her legs with (his) arms around her". The appellant was told to go down stairs and he obeyed. The second event occurred when the complainant had been badly sunburnt. Her mother had applied cream to her back before she went to bed but she could not sleep. She woke her mother who said nothing more could be done until morning and told her to go back to bed. About 10 minutes later Mrs P went to check on the complainant and found the appellant in her room. The complainant was lying on her bed on her stomach with her shirt pulled up to her neck. The appellant was rubbing cream onto her sunburn. Mrs P told the appellant, rather shortly, that he should not be in the girl's bedroom and to leave.

[28] The third component was described by the complainant's sister C. On an occasion when they were living near Maryborough she and the complainant were both in bed. She "rolled over and (the appellant) was crouching over (the complainant)". She could not see "what was happening or what he was doing".

[29] The complainant herself gave evidence that there were other incidents, apparently of the appellant rubbing between her legs on her underpants, but she could not "remember them in full detail".

[30] The trial judge directed the jury:

> ". . . This type of evidence is called guilty passion evidence. Its relevance is that it may establish the existence of whether a relationship of a sexual kind between the accused and the complainant or a guilty passion existing between them, as it has historically been described. Our law says that in cases involving sexual activity between two persons, the whole history of their sexual relationship may be relevant. Acts of sexual activity other than those charged may be part of the background of the relationship between them. This evidence is led . . . to establish the true nature of the relationship between the accused and the complainant, and for this purpose only . . (it) is a matter for you . . . whether the uncharged acts establish a background situation which would render it less improbable that the offences charged would have been committed. It is not allowed into evidence to buttress or support the case for the Crown. It is not open . . . to say . . . if he did these other things, then he must have done the things . . . in the indictment."

Later in summing up her Honour said:

> "There is a difference between how you use (the evidence) for counts 2 to 13 and count 1 and I did not explain that to you . . . everything I said to you before about how you use the evidence of uncharged acts applies to counts 2 to 13 but not count 1 . . . so far as counts 2 to 13 are concerned, you use them in the way I said before, to establish a background as to whether it renders less improbable that the matters charged have been committed. . . . count 1, maintaining, is a different . . . category. . . . the Crown alleges that there was a relationship of a sexual nature . . . and it was constituted . . . by the acts which are particularised in counts 2 to 13 and the other acts . . ."

[31] The trial judge was clearly correct in differentiating between the use to which the evidence of uncharged acts could be put. With respect to charge i, the count of maintaining an unlawful sexual relationship, the evidence was directly relevant and probative of an element of the offence, the existence of a relationship between the appellant and the complainant. I do not understand the appellant to complain about the reception of the evidence to support that charge or the direction given about it. Complaint focuses upon the use of the evidence in relation to the other counts. ("other charges").

[32] The evidence was admitted without objection and without a debate which might have clarified the purpose (if any) for which the evidence could properly be led with respect to the other charges. No attention was directed to any such relevance until the summing up. I should note that counsel who argued the appeal did not appear at the trial.

[33] Two themes are apparent in the directions given about the purpose of the evidence for the other charges. They are:

(a) It tended to establish the existence of a relationship of "guilty passion" as part of the background of the relationship and to establish its true nature.

(b) The evidence rendered the commission of the offences less improbable.

[34] The appellant submits that the evidence was admissible for the limited purpose of showing "the true nature of the relationship so as to enable the evidence to be assessed in a realistic context". The authority relied upon is a decision of the Court of Appeal in Victoria, *R v Pearce* (1999) 108 A Crim R 580. In that case Tadgell JA (with whom Phillips CJ and Buchanan JA agreed) said (at 589):

> "It is to be remembered that evidence of uncharged sexual acts of a criminal character is to be used by a jury in a case like this:
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> > " . . . only if they are satisfied that it occurred and only for the limited purpose of determining whether a sexual relationship existed between the complainant and the accused, thereby enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting": *Vonarx* [1999] 3 VR 618.

At 591 his Honour went on:

> "There are . . . obvious dangers in admitting evidence of an accused's criminal conduct not the subject of specific charges. Evidence of that kind has in recent years produced a number of practical problems and it continues to occupy, I venture to say, a ticklish area of the criminal law. The potential difficulties, as well as the dangers, should always be the subject of anxious consideration before it is admitted. In the decision of the Queensland Court of Appeal in *S* (1998) 103 A Crim R 101 Pincus JA expressed the opinion . . . that:
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> > " . . . juries should ordinarily be told . . . where evidence of uncharged instances of sexual contact between the complainant and the accused is let in, that its relevance is to show the existence of a sexual passion or relationship . . ."
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> So too, in this State it should be accepted, unless and until the High Court decides otherwise that the *only* purpose (there being no more than one) for which evidence of uncharged criminal sexual acts by an accused may be used by a jury is that expressed in the passage in *Vonarx* that I have quoted . . ."

[35] Tadgell JA noted that a decision of the High Court, *Gipp v The Queen* (1998) 194 CLR 106, had produced a number of divergent views, including differing views between the judges who constituted the majority, as to the purpose or purposes to which such evidence can be put. His Honour quoted from the judgment of Callinan J in *Gipp* (at 168) who declined to accept:

> " . . . that non-specific highly prejudicial evidence may be led by the prosecution, and juries told that it might provide "part of the essential background" against which other evidence is to be evaluated. I

> would . . . therefore reject the notion that there is a special category of background evidence that may be adduced by the prosecution in a criminal case (absent . . . any forensic conduct by the defence that may make it admissible). If such evidence is to be received it must owe its admissibility to some, quite specific, other purpose, including for example, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive. There may also be cases in which a relationship between people may be directly relevant to an issue in a trial and in those circumstances admissible as such".

Tadgell JA went on (at 590):

> "the passage I have quoted from the judgment of Callinan J does not, however, appear . . .to be inconsistent with any of the other judgments in the case, and in particular I do not understand it to be at odds with the judgment of Deane J in *B* (1992) 175 CLR 599 at 610 . . . that evidence of uncharged acts can be used by the jury as a key to an assessment of the relationship between accused and victim and, *as such*, constitute "part of the essential background" against which the other evidence is to be evaluated."

[36] The opinions expressed in *Gipp* were, as I mentioned, quite divergent. Gaudron J said (112–3):

> "General evidence of sexual abuse on occasions other than those charged does not have that special probative value which renders evidence admissible as "similar fact" or "propensity" evidence. And in this case, there was no feature of the kind . . . that made it directly relevant to the question whether the appellant was guilty of the offences charged. Thus, unless there was some subsidiary issue in the trial to which it was relevant, the evidence of general sexual abuse was not admissible. In cases of child sexual abuse, the defence case may be conducted in such a way as to raise an issue to which prior abuse is relevant . . . evidence of prior sexual abuse may explain lack of surprise or failure to complain. If they are issues in the trial, evidence of general sexual abuse is relevant . . . but they can only be made issues by the way in which the defence case is conducted."

The judges in the minority, McHugh and Hayne JJ said (130-131):

> " . . . this evidence . . . was admissible to show the relationship which existed between the parties and to explain why the complainant so readily complied with the various demands of the appellant. Without evidence of the background and the continuing nature of the conduct of the appellant, the evidence of the complainant may have seemed "unreal and unintelligible". Without knowing the course of the relationship, the jury may have had great difficulty in accepting that the incidents could have occurred in the way that the complainant described."

Kirby J said (155-156):

> "This type of evidence has been classified in various ways . . . my own preference . . . is to use the term "tendency" evidence. Evidence of this kind is only admissible if its probative value out-weighs its prejudicial effect. This court has repeatedly warned of the dangers of allowing such evidence . . . without immediate warnings as to the limited basis upon which it may be considered . . . I accept what was recently said . . .by the Court of Appeal of Victoria in *R v Vonarx* . . ."

[37] As I understand the reasons of the majority, Gaudron J allowed the appeal because the evidence was inadmissible, not satisfying the "similar fact" test, and the jury was not told they could not act upon it. Kirby J was of the opinion that the evidence was only admissible to allow proper evaluation of a relationship, and only if its probative value outweighed its prejudice. The trial judge was obliged to give a clear explanation of its purpose and a clear warning that it was not to be used to reason that the accused was "the kind of person likely to commit the offence charged". As neither the explanation nor the warning had been given the trial had miscarried. Callinan J thought that the evidence was (just) admissible as "similar fact" or propensity evidence (p. 164) but that the trial judge had not explained the significance of such evidence to the jury or warned them about its use.

[38] A perusal of the authorities referred to in *Gipp* reveals a number of circumstances in which evidence of this kind has been admitted and a similar variety of explanations given for its acceptance. In *Hoch v The Queen* (1988) 165 CLR 292 charges of sexual offences against three boys were heard together. The joinder of the charges was said to be justified on the basis that the evidence relevant on each charge was admissible in the others because of its striking similarity. It was held that the charges should not have been heard jointly because the evidence admissible on each was not admissible on the others. The argument was rejected because of the distinct possibility that concoction between the complainants could account for the similarities in evidence. The court approached the case on the basis that unless the evidence satisfied the requirements for the admission of evidence of similar fact it was not admissible.

[39] In *Harriman v The Queen* (1989) 167 CLR 590 (a case not involving sexual offences) McHugh J (at 630-633) thought that "the proper classification of relationship evidence . . . is ordinarily that of circumstantial evidence". His Honour said:

> "Likewise in sexual cases, evidence of previous acts of misconduct by the accused in relation to the complainant will usually be admissible because it tends to prove why or how on the occasion in question the offence occurred in the circumstances alleged. In *Reg v Etherington* evidence of previous acts of sexual intercourse and indecent assault . . . was rightly admitted because it served "to explain why she continued to submit to him and why he was able to commit his indecent acts upon her on the occasion charged". It was circumstantial evidence tending to prove a fact in issue."

His Honour went on to note that the admissibility of circumstantial evidence consisting of similar fact evidence depends upon the "stringent rule" that its probative value must clearly transcend its prejudicial effect, and that admissibility will vary with the nature of the evidence involved, the issue to which it goes and the other evidence in the case. I would understand his Honour's judgment to mean that such evidence will have to satisfy the test subsequently propounded in *Pfennig*.

[40] In *S v The Queen* (1989) 168 CLR 266 reference was made to both "relationship" and "propensity" as bases for the admission into evidence of uncharged sexual acts. Dawson J said (275):

> ". . . evidence of acts of intercourse other than those charged may have been admissible as similar facts of sufficient probative force to warrant their admission in evidence . . . when such evidence is admitted . . . its relevance is said to lie in establishing the relationship between the two persons involved in the commission of the offence, or the guilty passion existing between them, but it is in truth nothing more than evidence of a propensity on the part of the accused of a sufficiently high degree of relevance as to justify its admission."

Toohey J said (279):

> "However, evidence which bears on the relationship between an accused and a complainant over a period of time may not in truth be similar fact evidence where it is admitted, not to show propensity but rather the relationship between the parties . . .".

Gaudron and McHugh JJ said in their joint judgment (287):

> "The rule as to the admissibility of evidence of offences, not being the offences charged, is clear. Such evidence, whether identified as similar fact evidence or by some other description, is only admissible if it has probative value such that it raises the objective improbability of some event having occurred other than as alleged by the prosecution."

[41] This last passage is said to be the basis for the trial judge's direction in the present case that the evidence could be used by the jury for the purpose of "rendering less improbable" the complainant's account of the offences. So understood the trial judge was giving a direction with respect to the use of "similar fact", or propensity evidence.

[42] In *B v The Queen* (1992) 175 CLR 599 the prior conviction for incest of an accused with his daughter was held potentially admissible on a charge of subsequently committing incest with the same child on the basis (a) that the prior acts were similar acts or evidence of an unnatural and abnormal passion by a father for his daughter or as corroboration (*per* Mason CJ at 602); (b) as corroboration by Brennan J (604-5); (c) as "the key to an assessment of the relationship between the (father) and the daughter" (*per* Deane J at 610). (This is the passage referred to in (*Pearce*).

[43] *Pfennig v The Queen* (1994-1995) 182 CLR 461 has authoritatively pronounced that propensity, or similar fact, evidence is not admissible if it shows only that an accused has a disposition to commit a crime. Such evidence is only admissible if it possesses a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the guilt of the accused in the offence charged. There must be "no reasonable view of it other than a supporting an inference that the accused is guilty." It may have that character by reason of "striking similarities", "unusual features", an "underlying unity", or "system" or "pattern".

[44] *BRS v The Queen* (1997) 191 CLR 275 establishes that evidence of sexual misconduct involving a person other than the complainant may be admissible if it corroborates some aspect or aspects of the complainant's evidence. In that case evidence that the accused kept a lubricant and a towel under his bed in a boarding

school for the purposes of masturbation with a pupil other than the complainant was admitted as corroboration of the complainant's evidence to like effect.

[45] Although there may be some uncertainty about the use to which evidence of uncharged acts may be put it is, I think, clear, at least since *Pfennig*, that such evidence cannot be used to prove propensity, or a likelihood that an accused committed the acts charged, unless it satisfies the test described in that case. Neither *BRS* not *Gipp* provides an exception. In the former the evidence was accepted as corroboration, not as proving propensity. In the latter, though there was disagreement about whether the evidence satisfied the test, there was no criticism of the test. Accordingly in my opinion evidence of uncharged acts will only be admissible to prove propensity where it has the characteristics required by *Pfennig*. That does not mean, of course, that such evidence may not be admissible for another purpose.

[46] Some cases have tended to blur the requirement that to be admissible to prove propensity the evidence must have a particular cogency. In *R v Beserick* (1993) 30 NSWLR 510 Hunt J (with whom Finlay and Levine JJ agreed) said (at 515):

> "The evidence is admissible, first, in order to establish a sexual relationship which makes the complainant's allegation more likely to be true. The "guilty passion" of the adult for the child which such conduct shows may well make more credible the complainant's evidence that the sexual activity took place upon the particular occasion which is the subject of the charge. In other words, it makes it more likely that the offence charged was in fact committed . . . secondly, the evidence is admissible in order to place the evidence of the offence charged into a true and realistic context, in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act occurring without any apparent reason."

The description of the first basis appearing in the quote makes it clear, in my opinion, that what is being talked about is evidence of an accused's propensity to commit the type of offence with which he is charged. The complainant's evidence is more credible, the likelihood that the accused committed the offence is greater, *because* the accused behaved in a similar fashion on other occasions. This, I think, is a separate and quite distinct basis for the admission of evidence of uncharged acts to that which is afforded by the second basis: to provide a context to assist the jury to appreciate the full significance of what would otherwise appear as isolated and aberrant behaviour. In my view because evidence is admissible on one of these bases it is not necessarily admissible on both though, depending on the circumstances, it may be. *Beserick*, it will be noted, was decided before *Pfennig*. If the true purpose for which the evidence is led is to prove propensity it must, it seems to me, be of the type described in *Pfennig*.

[47] The authority relied upon in *Beserick* for the proposition that evidence of uncharged acts is admissible to show a greater likelihood that the offence charged was committed is *R v Ball* [1911] AC 47. *Ball* was a propensity case. The accused were brother and sister charged with incest on a date subsequent to the enactment of legislation prohibiting incest between siblings. Before the change to the law the accused had lived together as man and wife and the sister had given birth to a child of which the brother was the acknowledged father. On the occasion in question the

accused were seen together at night in a house which contained only one furnished bedroom. It had a double bed which showed signs of occupation by two people. The question was whether the evidence of the earlier cohabitation and intercourse was admissible on the charge that subsequently they had committed incest.

[48] Lord Hoffman, in an article "Similar Facts after *Boardman*" (1975) 91 LQR 193 wrote (p. 198):

> "In *Ball* the evidence was relevant solely because it showed that the accused were the sort of people likely to commit incest . . ."

At p. 202 he said:

> "On the facts of the case this evidence was highly relevant because it dispelled any doubt as to whether the Balls slept together for the purpose of having sexual relations. But what if the facts had been slightly different? If the police . . . found that two bedrooms were in use, would the evidence of their previous incest have been admissible? Almost certainly not. The Court would have said that it was merely prejudicial; there was nothing to show that the Balls had not given up their incestuous relationship after it was made illegal. It would no longer be a question of using the similar fact evidence to dispel a mere doubt; the evidence would have to bear the whole weight of proving that an outwardly normal relationship was in fact incestuous. And for this purpose its probative value was too weak. It was the evidence of the bedroom, pointing so strongly to the Balls' relationship having remained the same, which made the similar fact evidence sufficiently relevant to be admissible."

So understood *Ball* is not authority for the proposition that evidence of sexual activity or misconduct between an accused and a complainant will always, or even generally, be admissible, and certainly not as similar facts. I would therefore, respectfully, decline to accept that *Beserick* states the law with complete accuracy.

[49] It seems to have been established in this state that such evidence is admissible on the separate basis that it is explanatory of the relationship. In *R v TJW ex parte The Attorney General* [1988] 2 Qd R 456 Thomas J (with whom Andrews CJ agreed) referred to some cases in the High Court, decided before *Pfennig*, concerned with the admissibility of similar fact evidence and said (p. 457-459):

> "The above cases have . . . clarified . . . the limits of admissibility of similar fact evidence. None of those cases however was concerned with excluding proof of the true relationship between the accused and a complainant. None of those cases was concerned to exclude evidence of association over an extended period, from which the true relationship could be more accurately inferred. . . . the term "guilty passion" is perhaps outmoded, and may in any event be inappropriate to describe the extended seduction by a parent of his young daughter, but I do not think that it has ever been doubted that in cases involving sexual activity between two persons the whole history of their sexual relationship may be relevant . . .
>
> In my view there is no need to have recourse to the principles of similar fact evidence. All the evidence which the Crown wish to

> lead was a series of events which should be considered as a connected series of events which are relevant to one another . . . there are situations in which the true story will be unintelligible or lopsided without introductory details, and that such details may be thereby relevant to proof of the incident in question".

The decision reaffirmed the authority of *R v Witham* [1962] Qd R 49 in which Stable J had said (82):

> "If the Crown were restricted in this case to the evidence of Elizabeth, with nothing of the history of her father's relations with her, so that all the jury were given was the bald account of what she said happened on the one occasion, who could blame them for saying, "Most improbable – incredible", and for acting accordingly. But, given the full story, would not one expect the jury to say, "Now we understand" . . ."

[50] In more recent years this court has differed on the point whether such "relationship" evidence should only be admitted where it satisfies the *Pfennig* requirements. See eg *R v Kemp* [1997] 1 Qd R 383 at 398, and *R v Wackerow* [1998] 1 Qd R 197 in which the Court appears to have proceeded on the basis that evidence of the kind in question had to satisfy the *Pfennig* test. By contrast in *R v W* [1998] 2 Qd R 531 Pincus JA and Muir J (at 534) thought that "evidence of the *Witham* kind" was admissible even though it did not satisfy the *Pfennig* test "principally because of the weight of authority".

[51] According to Smith and Holdenson, the authors of "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions – Part I" (1999) 73 ALJ 432 the Court of Appeal subsequently "appears to have followed *R v W*." The cases are collected in footnote 74.

[52] The court in *W* did not, of course, question the authority of *Pfennig*. What it held was that where evidence of uncharged acts is led for the purpose of proving the true relationship between accused and complainant it need not have the cogency required for propensity evidence. It would seem to follow that where the evidence *is* lead for the purpose of proving propensity it must, if it is to be admissible, satisfy the *Pfennig* requirements. It also follows that there is a separate basis on which the evidence of uncharged acts can be admitted. That purpose is described in *Pearce* as well as in *Witham* and *TJW*. The basis is recognised in some of the judgments in the High Court which are mentioned earlier.

[53] No doubt the distinction between using the evidence to elucidate the nature of the relationship and using it to prove propensity is subtle. The former deems the evidence relevant because by revealing further sexual activity beyond what is the subject of the charge or charges the complainant's evidence is made more credible. The account is more likely to be believed if it is made to appear that the accused misbehaved on other occasions. This comes very close to using the evidence to show propensity. The subtlety of the distinction has, in my opinion, two consequences. Where the evidence is relied upon not to prove propensity but the relationship:

> (a) The evidence should not be admitted unless it is genuinely required to provide contextual elucidation of the relationship.

(b) There is a need for a careful direction to the jury of the use to which the evidence can be put and the use to which it cannot.

[54] It does not seem right to say that the *only* purpose of such evidence is to allow a realistic or intelligible assessment of the complainant's evidence to be made in relation to the offences charged. The authorities reviewed show, in my opinion, that there are many reasons why evidence of "uncharged" sexual conduct may be admissible. The reasons will vary from case to case depending upon the nature of the prosecution and, in particular, the evidence sought to be utilised as "uncharged acts". In some cases the evidence may be properly regarded as "similar facts" in which case to be admissible it must accord with the principle found in *Pfennig*. In other cases it will be for the purpose described in *Witham* in which case I would hold that it is admissible only where the complainant's evidence about the offences might appear unintelligible or incredible unless put in context. (In a case such as the present where a number of offences occurring over a long time are charged on the one indictment so that the complainant's evidence in support of each offence will reveal the relevant factual context there does not seem any legitimate scope for adducing further evidence of "uncharged acts".) Sometimes such evidence may be led as corroborating part of a complainant's testimony, or as providing a circumstance from which an inference of guilt may be drawn. The evidence may become relevant by the conduct of the defence as the examples given in *Gipp* show. It may explain lack of complaint or an otherwise inexplicable acquiescence.

[55] It does not seem possible to pronounce any *a priori* rules to designate when or for what purpose evidence of "uncharged acts" will be admissible. Admissibility will depend upon the particular case and the particular evidence sought to be adduced. In my opinion unless the evidence fulfils some specific function such as those mentioned above which can be expressly articulated and for which it can be seen to be apposite the evidence should not be admitted.

[56] The purpose for which it is sought to be tendered should be identified before or at the time it is adduced. This point is made repeatedly in the cases: *Pearce* at 591, *Gipp* at para 184 *per* Callinan J, and *W per* Pincus JA and Muir J at 532. Often such evidence will be inadmissible, either because it does not fulfil a legitimate role or because, as a matter of discretion, prejudice outweighs probative value. It seems to me that, ordinarily, an accused should object to the reception of such evidence which ought not to be admitted unless and until its purpose is identified and it can be seen to be appropriate for that purpose.

[57] Nothing like this process occurred at the appellant's trial. The evidence, as I have noted, was relevant to charge i and any relevance it may have had to the other charges appears to have been overlooked until the summing up. Nothing was said about the evidence when it was adduced, or in the argument preceding the summing up. A fair reading of the record lends no support to the conclusion that it was not objected to in order to gain a forensic advantage, thereby making it unfair now for the appellant to complain that his trial was prejudiced by its reception. The postulated advantage is that the appellant could use the evidence to support an argument that he honestly and reasonably believed the complainant consented to the act of intercourse which constituted the charge of rape.

[58] There are a number of reasons why this is so. The first is that the evidence could not have been the subject of objection: it was admissible to prove the existence of a relationship which was an element of the first charge. All that defence counsel might have done when the evidence was led was ask the trial judge to indicate to the jury that the evidence was relevant only to charge i. As the explanation could have been given in the summing up it does not seem reasonable to conclude that counsel's inactivity at that point in time was tactical and deliberate.

[59] The second reason is that there is nothing in the recorded argument (R74.45; 77.55; 78.5-28) that gives even a hint that the evidence was allowed in to provide a factual basis for the existence of an honest and reasonable belief as to consent.

[60] There is a more fundamental consideration. The factual basis for any such belief was the existence of a sexual relationship between the appellant and the complainant of such a character as to make consensual intercourse a reasonable possibility. The evidence in question, that of the uncharged acts, was directly relevant to the existence of such a relationship. As noted, it could not have been objected to. If the relationship were proved the basis for the belief was arguably made out irrespective of the admissibility of the evidence on the other charges. The reception of the evidence was not something with respect to which defence counsel needed to, or indeed could, exercise a tactical choice.

[61] The trial judge was, I think, obliged to assess what use could properly be made of the evidence and to explain that use clearly to the jury. That obligation would include telling the jury, if it were appropriate to do so, that the evidence could not be used when considering the other charges.

[62] The episode involving the application of sunburn cream is equivocal. It points neither to something obviously innocent nor to something manifestly sinister. The same is true of the sister's ambiguous account of seeing the appellant "crouching" near the complainant's bed. The jury should have been told these incidents were irrelevant to a consideration of guilt on the other charges.

[63] The incident at the barbecue is more problematic. The appellant's behaviour was suspicious but that is not enough to make the evidence admissible. It was not necessary to make the complaint's evidence intelligible. That had been done by her overall account of the offences. It does not offer corroboration of any of the other offences save in the sense of showing a propensity to fondle the complainant. On that score the evidence would have to be of the *Pfennig* type to be admissible: bearing no reasonable explanation other than the inculpation of the appellant in one of the other charges. It does not do that.

[64] The fourth component, the complainant's own assertion that the appellant had touched her in circumstances she could not recall did not satisfy any criterion for admissibility. The jury should have been given a similar warning as with respect to the first two incidents.

[65] It follows that the trial judge did not properly direct the jury as to the use to be made of the evidence. It should have been told the evidence was relevant only to the first count. Having not given that direction her Honour made a further error in describing what use could be made of the evidence. She appears to have intended to instruct the jury in accordance with *TJW*, but what was said was inapposite for that task. The jury was not told that the only function of the evidence was to better

equip them to evaluate the complainant's evidence. Instead they were told it was "called guilty passion evidence" the purpose of which was to establish "a background . . . which would render it less improbable that the offences . . . would have been committed." This term, "guilty passion", is pure cant. Apart from the usual objection to jargon the use of the phrase is obnoxious because of its obvious connotations. It is unhelpful to use it with respect to evidence which is merely explanatory of a relationship and is not offered as proof of propensity.

[66] It was erroneous to instruct the jury in the terms quoted. It is clear from the authorities that evidence of this type cannot be admitted merely because it forms a "background". It must have some other specific purpose. More important the notion that the evidence renders it "less improbable", ie, more probable, that the offences were committed belongs to evidence which properly satisfies the "similar fact" test. The evidence was not of that kind and the jury should not have been encouraged to think it was. The trial judge did say that the jury should not infer guilt from the evidence of uncharged acts but the warning following on an erroneous direction to the opposite effect was insufficient to undo the damage.

[67] It is impossible to be confident that the jury may not have misused this evidence to reason, impermissibly, that the appellant committed the offences charged because of his proclivity for touching and fondling the complainant in the manner described. The direction that should have been given was not. The direction that was given was confusing and invited the jury to reason wrongly to a conviction.

[68] The appellant's third point is that the trial judge failed to give a direction in accordance with what was said in *Longman v The Queen* (1989) 168 CLR 79, that the complainant's delay in making her allegations against the appellant deprived him of the means of testing the complaint which would have been open to him had they been made promptly. The trial judge was asked to give such a direction but declined because there were no "aspects of the case which warrant (ed) it".

[69] The reasons for the delay in complaining were not precisely brought out in the evidence though there is a suggestion that the complainant had an understandable reluctance, because of her tender age, to tell anyone about what had happened. Nor is much more known about the length of the delay. The earliest offence in point of time appears to have been committed when the complainant's family was in or near Maryborough. That places it no earlier than March 1994. The latest offence was November 1995. It appears, though it is not clear, that the complainant first mentioned the appellant's conduct in June 1997 when she was living with a foster family. If that be right the length of delay varies between 3 years and 3 months and 19 months.

[70] In *Longman* the delay was 20 years and the lost opportunity to investigate and test the veracity of the complaint was obvious. However in *Jones v The Queen* (1997) 191 CLR 439 at 446 Brennan CJ thought that the principle in *Longman* was applicable to a delay of 5 years where the complainant, at the time of the alleged offences, was 11. A similar view appears to be taken in *Crofts v The Queen* (1996) 186 CLR 427 where the delay in making complaint of some 13 counts of sexual misconduct against a child aged between 10 and 16 varied between 6 months and 6 years. Toohey, Gaudron, Gummow and Kirby JJ described the delay as "substantial" and noted that the jury "were entitled to accurate assistance by the trial judge concerning the legal significance of the absence of complaint soon after the alleged incidents". (p. 442). The legal significance is that "the absence of early complaint

could be used by (the jury) in their assessment of the credibility of the complainant."

[71] According to the joint judgment of Brennan, Dawson and Toohey JJ in *Longman* (p. 91)

> "the jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy."

It is, I think, apparent from the remarks in that case, as well as *Crofts* and *Jones* that what is significant is not the length of years but the fact that the complaint was not made promptly. Whatever time frame may be encompassed by the word "prompt" it is I think clear that a period in excess of 3 years is a significant time when considering whether an accused has been disadvantaged in providing an answer to allegations. For that reason, as well as the point that in the absence of explanation, lateness of complaint may give rise to doubts about its credibility, there was an obligation to provide the jury with a warning of the type described.

[72] It follows that in two important respects the summing up was deficient. It is impossible to say that there is not a perceptible risk that there has been a miscarriage of justice. A jury properly instructed with respect to the evidence of uncharged acts and the delay in complaining may have entertained a reasonable doubt as to the appellant's guilt.

[73] The errors in the summing up in relation to uncharged acts is limited to the other charges but if the convictions on those charges are set aside it necessarily follows that there can be no conviction on the count of maintaining a sexual relationship. The failure to warn the jury about the effect of delay is relevant to all counts in the indictment.

[74] The prospect of a third trial is disturbing. The complainant has suffered a great deal of anxiety and stress and it is of concern that she should again have to undergo the experience. Regrettably in view of the errors which have affected the trial there is no option but to quash the convictions and order a retrial.

[75] **ATKINSON J:** The appellant appeals against convictions on one count of maintaining an unlawful relationship of a sexual nature with a child under 16 with a circumstance of aggravation being rape,[1] one count of indecent treatment of a child under 12,[2] one count of indecent treatment of a child under 16,[3] one count of attempted indecent treatment of a child under 16,[4] two counts of entering a dwelling house with intent,[5] one count of permitting himself to be indecently dealt with by a child under 16[6] and one count of rape.[7]

[76] The grounds of appeal are:

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1 *Criminal Code* s 229B.
2 *Criminal Code* s 210(1)(a), (3).
3 *Criminal Code* s 210(1)(a), (2).
4 *Criminal Code* s 4, s 210(1)(a), (2).
5 *Criminal Code* s 421.
6 *Criminal Code* s 210(1)(c), (2).
7 *Criminal Code* s 347.

(1) that the convictions were inconsistent with the verdicts of acquittal returned on three of the charges;
(2) that the direction given by the learned trial judge with regard to uncharged acts was incorrect; and
(3) that there was no direction given by the trial judge with respect to delay in the making of the complaint.

[77] The complainant was born on 31 December 1982 and was 17 years old at the time of the trial. She was aged 11 and 12 at the time of the offences for which the appellant was convicted at trial. The trial was the second trial of the matters as the first trial aborted because the complainant was so anxious she could not proceed with her evidence. During the second trial the court was closed and a support person was present. Nevertheless the complainant broke down on a number of occasions causing short adjournments of the trial. During the sentence, which took place two and half months after the trial, the learned trial judge said that she recalled that this girl in particular was very traumatised by the trial procedure.

[78] The appellant was born on 1 December 1968 making him 31 at the time of the trial and 25 and 26 at the time of the offences. He was 14 years older than the complainant. It appears from a report tendered on his sentence that he suffered from a significant residual brain injury as a result of an assault upon him in 1988 in which he had suffered frontal lobe damage which tended to lead to disinhibited behaviour. This information was not known to the jury as he did not give evidence at his trial. The complainant's account was therefore not challenged by the word of the appellant.[8]

[79] The appellant pleaded not guilty to each of the 13 counts on the indictment. It is convenient to leave the first count on the indictment, that of maintaining a sexual relationship with a child under 16 years with a circumstance of aggravation, until last. The other counts on the indictment fall into three groups. Count two relates to events that occurred while the complainant was living in Maryborough, counts three, four and five to events that occurred when the complainant was living at Maaroom and counts six to 12 to events that occurred when the complainant was living at Gunalda.

[80] Until 23 March 1994 the complainant lived four kilometres outside the small town of Gunalda which is 35 to 40 kilometres north of Gympie. She lived there with her mother, sometimes her father, her two brothers, one who was three years older and one who was two years younger than her, and a sister who was three years younger. The appellant lived next door with his mother.

[81] On about 25 March 1994 the complainant, together with her mother and brothers and sister, moved to Maryborough where she attended school. She was then in grade six and was 11 years old. Her evidence was that the appellant used to come and stay at their home most Thursday nights and sometimes looked after her whilst her mother was out.

[82] One night when the appellant was staying over, late at night when everyone was asleep, she said that she woke up and found him standing next to her bed. She gave evidence that the blankets were off her and her nightie was lifted up and he was "rubbing [her] vagina on top of [her] underwear". Nothing was said between them.

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8 *R v Rankin* [2000] QCA 54; CA No 322 of 1999, 3 March 2000 at [11].

[83] Although it was put to the complainant by the appellant's counsel that the events had not occurred, it was not put to her that the appellant did not stay over most Thursday nights. The defence case was that the appellant did stay at the complainant's house and sometimes looked after her and her brothers and sister while her parents were out and that he occasionally, as she agreed, came into her and her brother's room because of that. She agreed that at that time some of the children were still wetting the bed but denied that because of that reason he checked her bed. In other words the defence case was not that he did not stay over on numerous occasions but rather that there was an innocent explanation for what occurred. The jury did not accept that explanation and convicted him on that count.

[84] Counts three, four and five related to events that were alleged to have occurred at Maaroom. On 1 August 1994 the complainant, her mother, brothers and sister went to live at Maaroom outside Maryborough. While living at Maroom, they moved to a different house in the same street. They left Maaroom on 22 May 1995 when they went back to live at Gunalda. The school records were able to confirm this information. At both of the houses the complainant shared a bedroom with her younger sister. The evidence again was that the appellant used to come and stay at the house on most Thursday nights.

[85] The three counts alleged to have occurred at Maaroom are all counts of indecent dealing. The appellant was found not guilty on count three, the Crown entered a *nolle prosequi* in relation to count four and the appellant was found guilty with respect to count five.

[86] The evidence relevant to count three was that when the complainant was living at the first house at Maaroom the appellant sat next to the bed rubbing her vagina through her underpants. In cross-examination she gave evidence that she thought he was standing next to the bed. She had obvious difficulty in giving her evidence. After they had retired, the jury asked the trial judge to read a transcript of the evidence relevant to this count. They found the appellant not guilty on this count.

[87] There was insufficient evidence to substantiate a particular incident constituting count four and the Crown entered a *nolle prosequi* on this count.

[88] Count five concerned incidents that occurred at the second house at Maaroom. The complainant's evidence was that she was asleep in her room and woke up to find the appellant next to her bed. Her underwear was down at her knees and he inserted his finger inside her vagina a couple of times. Her evidence was that afterwards she went to the toilet and then back to sleep. In cross-examination, it was put to her that it did not happen. The jury accepted the complainant's evidence and the appellant was convicted on count five.

[89] The complainant's mother gave evidence at the trial that, at the second house in which they lived at Maaroom, there were some incidents that she was not happy about. She said that the complainant woke her one night with bad sunburn. As she had already put cream on her back she said that there was nothing she could do for her until morning and went back to bed. About ten minutes later she got up because she saw the appellant walk up the hallway. She thought that he had been going to the toilet but as he did not come back she got up to investigate. She found the appellant in the complainant's bedroom. The complainant was on the bed with her shirt up around her neck lying on her stomach and the appellant was rubbing cream on her back. The complainant's mother told the appellant that he had no right to be

there and told him to leave the room. There was no objection to this evidence being led and more details were brought out in cross-examination than had been led in examination in chief. It was not put to the complainant's mother that this did not happen.

[90] The second occasion, which the complainant's mother thought occurred subsequently at the second house at Maaroom, happened one night when the family was having a barbecue. The complainant went upstairs to make coffee for the family. Her mother said that the complainant was gone for quite a while so she went upstairs and found the complainant sitting on a bench with the appellant standing between her legs with his arms around her. The complainant's mother asked the appellant what he was doing and he said that he was doing nothing. The complainant's mother told him to go downstairs. In cross-examination it was put to her that the appellant was reaching to grab some cups of coffee which she denied. Her evidence in cross-examination was that she thought she would keep an eye on the appellant and went downstairs with him and spoke to her daughter later.

[91] The complainant's younger sister gave evidence that at the second house in which they lived at Maaroom she saw the appellant in the bedroom which she shared with the complainant. It was night time and both sisters were in bed. She rolled over and saw the appellant crouching over the complainant. It was not put to her that this event did not occur but rather that the appellant came into their room when he was babysitting them "to get [them] off to bed".

[92] The remainder of the counts, counts six to 12, concerned events that occurred at Gunalda. After May 1995 the complainant, her mother, brothers and sister went back to Gunalda to live. This was confirmed by records showing that she attended Gunalda State School from May 1995 until the end of the year. In this year she was in grade seven and was aged 12.

[93] The evidence of the complainant and her mother was that at Gunalda she had her own room with big sliding windows. The complainant said that the appellant usually came into her bedroom through the windows as he was not allowed through the door and that he came through the window more than once. The evidence of the complainant's mother was that the complainant's bedroom was on the side facing the house in which the appellant lived.

[94] Counts six and seven concerned a charge of unlawful entry with intent to commit an indictable offence and indecent dealing with a child under 16. The only evidence given by the complainant in relation to this offence was that the appellant came into her bedroom through the window just after they moved to Gunalda and that he had inserted two fingers into her vagina. No more details of this occasion were given. The jury asked in redirection for the transcript of evidence relevant to count seven be read to them. They found the appellant not guilty of count six and count seven.

[95] Counts eight and nine concerned another occasion at Gunalda where the complainant alleged that the appellant entered her bedroom through the window and attempted to indecently deal with her. It was late at night. She woke up and he was outside her window. She saw him open it from the outside and come in through the window and then over to her bed. He undid two of the buttons on her cut-off denim jeans but then she rolled over. Her evidence was that on that occasion nothing else occurred. The appellant was convicted of entering with intent and attempting to indecently deal with a child under the age of 16 in respect of these counts.

[96] Counts 10, 11 and 12 relate to circumstances which are alleged to have occurred on 30 November 1995 when the complainant was 12. She gave evidence that she was able to recall the date because it was two weeks after her younger brother's birthday and one month before her thirteenth birthday. The complainant's evidence was that the appellant came through the window over to her bed and crouched beside it. She said he put her hand on his penis outside his clothes and said to her "you like that, don't you". She moved her hand away. He then grabbed her and then pulled her around so that she was lying sideways on her bed with her legs hanging over the side. He grabbed her by the hips. She said she had worn a nightie and underwear to bed but was no longer wearing underwear although she couldn't recall what had happened to it. Her evidence was that he tried to put his penis into her vagina a few times and, when he could not, he forced it in. He left his penis inside her vagina without moving for a while and then removed it and apologized to her. Her evidence was that the sexual intercourse was without her consent.

[97] In cross-examination it was put to her that she had been inconsistent in her evidence in that the statement she had formerly given to the police was that her first memory of him was of him standing outside the window and that he had put his hands on her bed rather than continuing to hold her hips when he was forcing his penis inside her. It was put to her that the event did not happen which she denied. She said in cross-examination that after it occurred she got up, had a shower, patted the dogs and took one to bed with her. Her evidence was that this was the last occasion on which anything happened.

[98] In respect of those events relating to counts ten, 11 and 12, the jury convicted the appellant on one count of entering the dwelling house with intent (count ten), permitting himself to be indecently dealt with by a child under 16 (count 11) and one count of rape (count 12).

[99] The jury also convicted the appellant on the first count in the indictment of maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years with a circumstance of aggravation of rape.

[100] The learned trial judge sentenced the appellant after receiving a psychiatric report containing the information about his brain injury referred to earlier. The appellant was sentenced to eight years imprisonment on count one, two years imprisonment on count nine, three years imprisonment on counts two, five and 11, four years imprisonment on counts eight and ten, and seven years imprisonment on count 12 all to be served concurrently. There was no appeal against sentence.

Inconsistency of verdicts

[101] The appellant's first ground of appeal was that there was no logical or rational basis upon which the jury could have arrived at different verdicts, and that in those circumstances the conviction should be set aside.

[102] In this case the trial judge carefully instructed the jury of the necessity for them to consider each count separately. Her Honour gave the jury copies of the indictment at the commencement of the trial and instructed them then that they would have to consider each count separately. At the end of the evidence, before the addresses by counsel, the judge again reminded the jury that this was not an "all or nothing thing". Her Honour instructed them that they would have to go through each count, understand what the charge was and what the evidence was and then reach a verdict on it and do that for each individual charge. In Her Honour's address to the jury she

went through each charge individually. At the end of her summing up she again emphasised this point.

[103] In the usual case, if a jury convicts on some charges and acquits on others it is likely to show that the jury has performed their functions as required.[9] However, as the High Court also held in *MacKenzie v The Queen*:[10]

> "[A] residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside."

[104] The test properly to be applied to such a case was set out by the Court of Appeal in *R v P*[11] by Thomas JA and Chesterman J who held that:

> "The effect of the authorities on this point was summarised by this Court in *The Queen v Maddox* (CA No 299 of 1998, 4 December 1998) by saying that it is only where a reasonable jury, who had applied its mind properly to the facts of the case, could not have arrived at the verdicts that there will be inconsistency. This will be so only if there is no rational basis for distinguishing between verdicts."

[105] The verdicts by the jury in this case show that they properly applied their minds to the task of considering each count separately and weighing the strength of the evidence of each before determining whether they were satisfied that the appellant was guilty on that count beyond reasonable doubt.

[106] There was a logical and rational basis for the different verdicts in that with regard to the counts where the appellant was found not guilty the evidence was either vague or very hesitantly given. This is a case where the discrimination in the verdicts shows that the jury properly addressed the task carefully given to them by the trial judge of considering each count separately and applying to each count the requirement that all of the elements must be proved beyond reasonable doubt. This ground of appeal must fail.

Direction with regard to uncharged acts

[107] The appellant complained not about the admission of the evidence as to uncharged acts but to the direction given by the judge to the jury with regard to that evidence.

[108] The uncharged acts fell into three categories. The first was evidence given by the complainant that there were other incidents both in Maryborough and at Maaroom that she could not remember in full detail. The second was evidence by her mother that the appellant used to spend more time with the complainant than any of the other children and she related the two particular incidents which occurred at the

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9 See *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

10 (supra) at 368.

11 [1999] QCA 411; CA No 130 of 1999, 28 September 1999 at [11].

second house at Maaroom referred to earlier in this judgment. The third category of evidence was the evidence of the complainant's younger sister.

[109] It should be noted that there was no objection from the defence to this evidence at trial. Rather there seems to have been a forensic decision to allow this evidence in. The reason defence counsel gave for this was that the evidence suggested, in his submission, that s 24 of the *Criminal Code*, that is honest and reasonable mistake of fact, was fairly raised. Defence counsel submitted to the trial judge that, when the jury came to consider count 12 which contained alternate counts of rape or unlawful carnal knowledge, the jury would have to consider the question of consent. If the complainant had consented to the sexual intercourse, then the appellant would be guilty of the less serious offence of unlawful carnal knowledge. Defence counsel submitted that if the jury found there was a sexual relationship or what he referred to as a "guilty passion" and they found that sexual intercourse had occurred, then the prior sexual relationship between the two fairly raised the question of mistake of fact. The defence therefore accepted that the evidence was admissible and relevant to the question of whether or not there was a sexual relationship or guilty passion between the appellant and the child complainant.

[110] The trial judge agreed with the submission that it was open to the defence to say to the jury that they might infer a sexual relationship and therefore consent by the complainant to sexual intercourse which would mean that the jury could not be satisfied beyond reasonable doubt of rape. However, her Honour also ruled that the defence had not discharged its burden of proof that honest and reasonable, but mistaken, belief as to consent was a live issue. In addition, her Honour also ruled that consent remained an issue because it was an element of the offence of rape and summed up on that issue.

[111] There is no reason to think that competent defence counsel could not have decided to allow the evidence in without objection in order to increase the chance that the appellant would be acquitted on the most serious of the counts that he faced: of rape and of maintenance of a sexual relationship with a circumstance of aggravation being rape. This no doubt explains why the evidence was allowed in without objection. In those circumstances the question of whether or not the evidence was technically admissible is not the point. As McHugh J observed in *Suresh v The Queen*:[12]

> "It would undermine the system of adversarial criminal justice if the admission of technically inadmissible evidence, not objected to for rational forensic reasons, could result in the quashing of a conviction because the forensic tactics had failed to bring about the accused's acquittal."

[112] If the defence decides not to object to technically inadmissible evidence because of a perceived forensic advantage to the defence case, then, unless there is no such forensic advantage, the Court of Appeal should not interfere with such a decision.[13] It is no doubt for this reason that the grounds of appeal and the appellant's counsel in the Court of Appeal in his written submissions objected not to the admission of the evidence but to the direction given by the judge with regard to the evidence.

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12 (1998) 72 ALJR 769 at 774, and per Hayne J at 781. See also *Crampton v The Queen* [2000] HCA 60; No 233 of 1999, 23 November 2000 at [15] – [19].

13 See *BRS v The Queen* (1997) 191 CLR 275 at 294 per Toohey J; *R v C* [2000] QCA 385; CA No 131 of 2000, 22 September 2000 at [31]-[32]; *R v Arundell* [1998] VSCA 102; CA No 263 of 1997, 9 November 1998 at [53] per Callaway JA.

[113] When summing up to the jury, her Honour said with regard to this evidence:

> "These are uncharged acts. They are not in any of the counts. What is the relevance of this evidence? This type of evidence is called guilty passion evidence. Its relevance is that it may establish the existence of a relationship of a sexual kind between the accused and the complainant or a guilty passion existing between them, as it has historically been described.
>
> Our law says that in cases involving sexual activity between two persons, the whole history of their sexual relationship may be relevant. Acts of sexual activity other than those charged may be part of the background of the relationship between them. This evidence is led by the Crown to establish the true nature of the relationship between the accused and the complainant, and for this purpose only. It is a matter for you, members of the jury, whether the uncharged acts establish a background situation which would render it less improbable that the offences charged would have been committed.
>
> It is not allowed into evidence to buttress or support the case for the Crown. It is not open here to say, Well, if he did these other things, then he must have done the things that are in the indictment. If you find on the evidence you are not satisfied beyond reasonable doubt of the offence charged, then you must acquit in respect of the offences charged. If you are satisfied beyond reasonable doubt of the offences charged, then you must convict."

[114] Later in her summing up the trial judge distinguished between the way the jury could use the evidence of the uncharged acts for counts two to 13 and for count one. The direction given with regard to counts two to 13 was as follows:

> "So far as counts 2 to 13 are concerned, you use them in the way I said before, to establish a background as to whether it renders less improbable that the matters charged have been committed. But for each of those offences, 2 to 13, the Crown is limited to its particulars of the charge and each of those has been limited in a particular way. There is a particular incident that constitutes the offence."

[115] The trial judge warned the jury that with respect to each of these charges they had to reach the verdict on the basis of the particular incident alleged and in the way described by the complainant. Her Honour told the jury that they had to be satisfied beyond reasonable doubt that the incident happened in the way that the complainant said and that each of the legal elements had been satisfied with regard to each count on the indictment.

[116] With regard to count one, the maintaining charge, the trial judge said that the uncharged acts did not disclose the particulars required for criminal offences but that the Crown relied upon them, along with other evidence, for the maintaining charge. The Crown alleged that there was a relationship of a sexual nature during the period charged in count one, which was constituted by the acts particularised in counts two to 13 and the other acts of which the jury had heard evidence. Her Honour directed the jury that the Crown was entitled to ask and did ask them to take

that other evidence into account. The appellant did not object to that direction in this appeal.[14]

[117] The appellant's only objection to the judge's direction to the jury was that her Honour said it was a matter for the jury as to whether the uncharged acts established a background which would render it less improbable that the offences had been committed. The appellant submitted that the evidence of uncharged acts was admitted for the limited purpose of showing the true nature of the relationship so as to enable the evidence to be assessed in a realistic context.[15]

[118] In his oral submissions, counsel for the appellant submitted that whilst as a general proposition it could be true that evidence of uncharged acts could provide a proper context in which to evaluate the evidence relating to the charges, and it could even in some cases render the complainant's account of events so far as the charges were concerned less improbable, this was not such a case because of the "precise nature of the uncharged acts". He submitted that the uncharged acts did not necessarily have a sexual connotation. He submitted that the evidence of uncharged acts did not have the sufficient degree of probative value to establish a guilty passion and did not render the charges less improbable.

[119] It must be kept in mind, however, that defence counsel did not object to the admission of this evidence and expressly adopted the submission that the uncharged acts were capable of constituting evidence of guilty passion. The appellant's grounds of appeal did not include an objection to the admission of the evidence as evidence of guilty passion or otherwise. In oral argument, the appellant's counsel suggested that the evidence of suncream being applied to the complainant's back and the evidence of the complainant's sister should not have been admitted, but this is clearly unsustainable in view of the forensic decisions taken at trial.

[120] The question then remains that, as this evidence was admitted without objection, what use was the jury entitled to make of it and therefore what directions should have been given by the trial judge as to its use. The appropriate directions will depend, at least in part, on the basis for the admission of the evidence.

[121] The Crown submitted that the direction given by the trial judge, which was the subject of the appeal, that the jury could consider whether the uncharged acts established a background situation that would render it less improbable that the offences would have been committed, was supported by a passage in the judgment of Gaudron and McHugh JJ in *S v The Queen*:[16]

> "The rule as to the admissibility of evidence of offences, not being the offences charged, is clear. Such evidence, whether identified as similar fact evidence or by some other description, is only admissible if it has probative value *such that it raises the objective improbability of some event having occurred other than as alleged by the prosecution*." (emphasis added)

[122] Other criminal acts or reprehensible uncharged conduct may be probative because it is similar fact,[17] *res gestae*,[18] corroborative, circumstantial,[19] relationship,[20] identity

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14 See *Criminal Code* s 229B(2); cf *KBT v The Queen* (1997) 191 CLR 417; see also *R v S* CA No 428 of 1997, 28 April 1998.

15 See *R v Pearce* (1999) 108 A Crim R 580.

16 (1989) 168 CLR 266 at 287.

17 *Hoch v The Queen* (1988) 165 CLR 292.

18 *Harriman v The Queen* (1989) 167 CLR 590 at 594.

19 *Harriman v The Queen* (supra) at 628, 630.

20 *Wilson v The Queen* (1970) 123 CLR 334.

or propensity[21] evidence. These categories are not exhaustive and not necessarily exclusive.[22] That it is so able to be characterised, is not the rationale for its admission. Its admission must be relevant to proof beyond reasonable doubt that the accused is guilty of the offence or offences with which he or she is charged. The rationale for its admissibility, however the evidence is characterised, is because it is relevant to proof of the offences in that it supports an inference of guilt because it is objectively improbable that there is an innocent explanation for the evidence in all of the circumstances. This was described by Gaudron J in *BRS v The Queen*[23] as follows:

> "In some circumstances, evidence that an accused has committed other offences on other occasions is admissible because it is of particular probative force or has particular cogency. Its probative force or cogency lies in the fact that it discloses some feature which raises, as a matter of common sense and experience, the objective improbability of its bearing an explanation consistent with the accused's innocence of the offence charged. (See *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482, per Mason CJ, Deane and Dawson JJ. See also *Hoch v The Queen* (1988) 165 CLR 292 at 294-295, per Mason CJ, Wilson and Gaudron JJ; *Harriman v The Queen* (1989) 167 CLR 590 at 600, per Dawson J.) Its probative value or cogency may derive from its disclosure of strikingly similar facts, some unusual feature common to the events in question or some underlying unity, system or pattern. (See, generally, *Hoch v The Queen* (1988) 165 CLR 292 at 294-295, per Mason CJ, Wilson and Gaudron JJ; *Pfennig v The Queen* (1995) 182 CLR 461 at 482, per Mason CJ and Deane and Dawson JJ.) However, that is not an exhaustive description of evidence that has that special probative value. (See *Pfennig v The Queen* (1995) 182 CLR 461 at 482, 484, per Mason CJ, Deane and Dawson JJ.) Nor is it a statement of the underlying rationale for its admissibility.
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> Evidence of criminal or reprehensible conduct on other occasions is admissible because, when considered in conjunction with other evidence in the case, it supports an inference of guilt, in the sense that that is the only reasonable inference available. (See, generally, *Hoch v The Queen* (1988) 165 CLR 292 at 294, per Mason CJ, Wilson and Gaudron JJ; *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483, per Mason CJ and Deane and Dawson JJ. See also *Martin v Osborne* (1936) 55 CLR 367 at 375, per Dixon J; at 385, per Evatt J.) Ordinarily, that inference is based on a more immediate inference, namely, that it is objectively improbable "that a person other than the accused committed the act in question, that the . . . act was unintended, or . . . occurred innocently or fortuitously" (*Hoch v The Queen* (1988) 165 CLR 292 at 295, per Mason CJ, Wilson and Gaudron JJ), or that the charge was concocted."

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21 *Harriman v The Queen* (supra) at 598-599.

22 *Pfennig v The Queen* (1995) 182 CLR 461 at 464-465.

23 (supra) at 298-299.

[123] In *Wilson v The Queen*,[24] for example, the High Court held that statements made by a woman, who was later shot, to her husband that he wanted to kill her were relevant to the question of whether she was murdered by him or killed by accident. The statements were evidence of the relationship between them. As Menzies J held at 344:

> "Any jury called upon to decide whether they were convinced beyond reasonable doubt that the applicant killed his wife would require to know what was the relationship between the deceased and the accused. Were they an ordinary married couple with a good relationship despite differences and disagreements, or was their relationship one of enmity and distrust? It seems to me that nothing spoke more eloquently of the bitter relationship between them than that the wife, in the course of a quarrel, should charge her husband with the desire to kill her. The evidence is admissible not because the wife's statements were causally connected with her death but to assist the jury in deciding whether the wife was murdered in cold blood or was the victim of mischance. To shut the jury off from any event throwing light upon the relationship between this husband and wife would be to require them to decide the issue as if it happened in a vacuum . . ."

Evidence of the nature and incidents of the relationship between an accused and his or her alleged victim may therefore be relevant to the guilt or innocence of the accused.[25]

[124] In *R v Vonarx*,[26] the Court of Appeal of the Supreme Court of Victoria did not intervene to quash a conviction on the basis that evidence was allowed of uncharged serious criminal acts between the appellant and his son. The accused was charged with several counts of sexual penetration of his son who was then nine years old. The complainant also gave evidence of other sexual assaults where he said his father had unnaturally interfered with him. Referring to a misconception in the submissions on behalf of the appellant as to its admissibility, the Court examined the proper basis for its admission:[27]

> "It was not being led to establish the identity of the offender, as was the case in *Pfennig v The Queen* (1995) 69 ALJR 147 at 160, or to negative some defence of accident or mistake. It was being led for the purpose of proving an improper sexual relationship or guilty passion which existed between the accused and the victim, *tending to make it more likely that the offence charged in the indictment was in fact committed* (see *R v Ball* [1911] AC 47; *R v Beserick* (1993) 30 NSWLR 510; *S v The Queen* (1989) 168 CLR 566; *Harriman v The Queen* (1989) 167 CLR 590) . . ." (emphasis added).

[125] The uncharged acts may be evidence of sexual activity other than that charged and is evidence which is usually given by the complainant.[28] Such evidence is often of acts of which the complainant is unable to give sufficient particulars for specific charges to be laid but which the complainant says are part of a history of persistent

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24 (supra).
25 See also *R v Logurancio* [2000] VSCA 33; No 321 of 1998, 24 March 2000 at [15], [18] – [20].
26 *Vonarx* [1999] 3 VR 618.
27 (supra) at 6; see also *R v Young* [1998] 1 VR 402 at 410.
28 *R v JFP* NSW CCA No 60685 of 1994, 22 July 1996 at 4.

sexual interference.[29] The Crown may also lead evidence of uncharged acts from others who have observed it.[30] In cases involving sexual activity between an adult and child, the whole history of their relationship may be relevant[31] but only in circumstances where an appropriate warning is given as to how the jury may and may not use the evidence.[32]

[126] In this case the evidence of uncharged acts was relevant to whether or not the appellant had a sexual relationship with the complainant.[33] Whether or not the appellant had a sexual relationship with the complainant was itself relevant in two ways. It was relevant to whether the appellant was guilty of maintaining a sexual relationship with the complainant and secondly to whether or not he was guilty of the various counts of indecent dealing and rape. It was relevant to whether or not, as the defence submitted, there was consent to sexual intercourse meaning that the appellant was not guilty of rape.

[127] In addition, with regard to counts 2 to 13, the jury had to decide whether the complainant's account should be believed. This was relevant because of the defence case that the complainant was lying about the activities of the appellant towards her and that the allegations she made about the matters the subject of the charges were concocted. The evidence that her mother and sister observed behaviour by the appellant towards the complainant consistent with an unnatural or unusual interest in her was relevant to the question of whether it was improbable that she had concocted the story,[34] in other words whether the uncharged acts established a background which would render it less improbable[35] that the offences constituting counts 2 to 13 were committed. As Ireland J held in *R v AH*,[36] the evidence, once admitted for any reason, "will also necessarily make the complainant's evidence more credible in relation to the events upon which the charges were based."[37]

[128] Whether the evidence is relevant and admissible for more than one reason depends on the facts of each case and on the counts on the indictment.[38] While the evidence is admissible to show whether or not there was a sexual relationship between the appellant and the complainant,[39] the use to which that evidence could be put depends on the circumstances of the case and the different counts to which it is

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29 See *R v W* [1998] 2 QdR 531 at 532.

30 *R v JFP* (supra) citing *R v L* NSW Court of Criminal Appeal, 6 April 1992 at 6.

31 Viz *R v TJW; Ex parte Attorney-General* [1988] 2 QdR 456 at 457; *Kailis v R* [1999] WSCA 29; CA No 175 of 1998 & No 5 of 1999, 24 May 1999 at [215] per Anderson J.

32 *Kailis v R* (supra) at [201]; *R v Schneider* CA No 128 of 1998, 2 October 1998 at [31] per Thomas JA.

33 See *R v Schneider* (supra) at [2] per Pincus JA and [31] per Thomas JA; *R v Knuth* CA No 64 of 1998, 23 June 1998 per Pincus JA.

34 *R v Kemp* [1997] 1 QdR 383 at 398.

35 In *R v Young* (supra) at 411, the Court of Appeal of the Supreme Court of Victoria held that: "The 'passion' or relationship for this purpose must be of the kind and duration which would make it relevant to explain some other event or events which form the subject of the presentment and tend to make it more likely that one or more of them occurred."; see also *R v Fletcher* [1953] 53 SR (NSW) 70 at 76.

36 (1997) 42 NSWLR 702 at 708.

37 See also *Harriman v The Queen* (supra) at 632 per McHugh J; *R v Wackerow* [1998] 1 Qd R 197 at 209; *R v Beserick* (1993) 30 NSWLR 510 at 515; *R v Vinh Le* [2000] NSW CCA 49; No 60556 of 1998, 7 March 2000 at [55] – [56]; *R v D* [1999] VSCA 148; CA No 245 of 1998, 23 September 1999 at [41].

38 *B v The Queen* (1992) 175 CLR 599 at 602, 607, 611.

39 *Pearce* (supra) at 590, 591.

relevant. Evidence of uncharged acts is admitted if it tends to prove the specific crimes charged and not just a propensity to commit crimes of this nature.[40]

[129] When analysed in this light, there can be no proper objection to the directions that were given by the learned trial judge:

(1) The evidence should be considered separately and differently with regard to the maintaining count and the other particularised counts;

(2) the evidence of uncharged acts was directly relevant to the question of whether or not the jury were satisfied beyond reasonable doubt that the appellant had maintained a sexual relationship with the complainant child;

(3) the evidence of uncharged acts provided evidence not merely of the background[41] of the relationship but was relevant to whether there was a sexual relationship or guilty passion[42] between them, and so could be used by the jury to determine whether it was less improbable that the offences had been committed; and

(4) the evidence of uncharged acts could not impermissibly be used by the jury as propensity evidence.

This ground of appeal must also fail.

Effect of Delay

[130] The appellant submitted that the warning given by the trial judge, with regard to the caution with which the jury should approach the complainant's evidence, was inadequate.

[131] The evidence which was brought out in cross-examination of the complainant was that during and after each incident she did not scream out or run off to her parents' room or talk to anyone immediately about what had happened. It appears that at the end of 1996 she left home and lived in foster care. She told her foster father in about the middle of 1997 about the sexual offences against her by the appellant. At that time she was 14 years old. This was about three years after the first offence and less than two years after the last offence.

[132] Defence counsel put to her a number of questions about motives she might have had for making up a story, all of which she denied. After she told her foster father what had happened to her, she was taken to the police but her evidence was that she was not emotionally ready to talk to the police about it because of her age. When defence counsel put to her that she made these complaints simply to get attention she said:

> "No, I didn't make these statements to gain attention, apart from the fact that I would rather that people don't know about this. I want to be treated normally at least. If my friends knew that the reason why

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40 *R v Wackerow* (supra) at 208*; Crofts v The Queen* (1996) 186 CLR 427.

41 This on its own would not be sufficient to justify admission of the evidence: *Gipp v The Queen* (1998) 194 CLR 106 at 166 per Callinan J. I respectfully agree, however, with the New South Wales Court of Criminal Appeal in *R v Fraser* NSW SC No 60441 of 1997, 10 August 1998 at 17-18 that it is difficult, if not impossible, to extract any clear ratio from *Gipp v The Queen* (supra); see also *R v W* [2000] QCA 321; CA No 141 of 2000, 8 August 2000 at [12].

42 To use the term used by McHugh and Hayne JJ in *Gipp v The Queen* (supra) at 132. The term is perhaps an outmoded term which describes a sexual relationship between an adult and a child: *R v Witham* [1962] Qd R 49 at 76, 77; *R v TJW; Ex parte Attorney-General I* (supra) at 457; *R v R H McL* [1998] VSCA 61; CA No 156 of 1997, 9 October 1998 at [70] per Batt JA.

> I'm in Court today was because of this they would treat me differently. They wouldn't treat me like I'm normal."

[133] Although defence counsel's address to the jury was not transcribed, it appears that he addressed the jury on the delay by the complainant in complaining. Debate ensued at the trial as to whether or not the length of delay and whether or not the Crown case was corroborated, required a direction.

[134] The appellant submitted that the trial judge should have given a direction in accordance with the decision of the High Court in *Longman v The Queen*[43] where Brennan, Dawson and Toohey JJ said:

> "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 I* ([1987] AC at 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)*) 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."

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43 (1989) 168 CLR 79 at 90-91.

[135] The appellant submitted in this Court that the necessity for warnings in accordance with *R v Longman* is not limited to cases involving very lengthy delay: *Jones v The Queen*[44]; *Crofts v The Queen*.[45]

[136] The argument at the trial about corroboration proceeded because of the Court of Appeal decision in *R v Doggett*[46] that, even after a lengthy delay, where the Crown case is corroborated, there is no reason for the judge to give a direction that it is dangerous to convict because of the delay. This case has been granted special leave to appeal by the High Court. It is, however, not relevant to the determination of this appeal since the trial judge determined that this was not a case where there was corroboration. Her Honour ruled however that, presumably because the delay was not very lengthy, a direction was not necessary. Her Honour did not direct the jury either that they could take into account the complainant's delay in complaining in assessing her credibility or, on the other hand, that delay in complaining did not necessarily mean that the allegations were false, and that there may be good reasons why victims of sexual assaults hesitate in making complaints about them.

[137] Her Honour did, however, direct the jury that they should exercise caution when considering the evidence of the child and to consider any motive she might have for fabricating her story. The judge's direction was as follows:

> "The other thing as a matter of law I should say to you is that remember her age. She is still a child. When I say a child, she is under 18.
>
> You know from your own experience, and indeed commonsense will tell you, that children can imagine things. They can make things up. They can exaggerate. They can invent untrue stories; sometimes to get attention, sometimes for particular reasons, and there have been some suggestions to you in this trial – I will come to those in a moment – sometimes inexplicably. You know they may be under the influence of others. They may be inclined to agree to suggestions put to them by others, or, indeed, by barristers in the courtroom. So because she is a child, because of her age, it is necessary for you to consider her evidence carefully, to scrutinise it, and to be satisfied that you have approached the central question you come back to all the time, Am I satisfied beyond a reasonable doubt that the offences occurred as she said?
>
> You can accept her evidence in whole or in part, but at the end of the day in order to support a conviction you must be satisfied that the Crown has discharged its onus of proof beyond reasonable doubt."

[138] The appellant submitted in this Court that this direction was inadequate. Section 632 of the *Criminal Code*, he submitted, does not abrogate the requirement to give the jury appropriate warnings when it is necessary to do so to avoid a risk of miscarriage of justice.[47]

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44 (1997) 191 CLR 439 per Brennan CJ at 445-446.

45 (1996) 186 CLR 427 at 448-449.

46 [1999] QCA 441; CA No 227 of 1999, 29 October 1999.

47 *Robinson v The Queen* (1999) 197 CLR 162 at 168; *R v Aristidis* [1999] 2 Qd R 629.

[139] The Crown submitted that the delay between the alleged events and the first complaint was approximately two and a half years to five years which was insufficient in itself to require a special warning against too ready acceptance of the complainant's story. It should be noted that this submission was not accurate as the delay was in fact only approximately one and a half years to three years. Delay was merely one of a collection of circumstances which the High Court has held were enough to require such a warning.[48] The Crown submitted that in the present case there was no question as to the opportunity the appellant had to commit the offences being a next door neighbour of the complainant and a regular visitor to the house. There was evidence in this case, not present in *Robinson v The Queen*[49] of guilty passion. As there was a maintaining charge there were clearly allegations of numerous offences.

[140] The Crown submitted that the direction to the jury with regard to their consideration of the evidence of children as a group offended the prohibition in s 632(3) of the *Criminal Code* and was overly favourable to the appellant. While the direction did not specifically refer to delay, it directed the jury to carefully scrutinise the complainant's evidence because she was a child and because of her age at the time of trial. The Crown submitted that while it might have been preferable that there was a specific reference to delay it was not in breach of the law not to give a warning in this case. The evidence taken as a whole meant there was not a perceptible risk of miscarriage of justice if a warning was not given.

[141] Section 632 of the Criminal Code provides:

> "**Corroboration**
>
> **632**(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of complainants as unreliable witnesses."

[142] As a result of s 632(3), a judge should not suggest, as the trial judge did in this case, that children as complainants are unreliable witnesses as a class. To do so is contrary to law,[50] is likely to rely on myths and stereotypes[51] about children and is not in accordance with the research literature[52] which has shown that there is no correlation between age and honesty, that children are not more likely than adults to lie in court, that the immature tendency to mix fact and fantasy does not apply to children after the age of about six, and that abuse by an adult is not likely to be a

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48 *Robinson v The Queen* (supra) at 170; *R v Doggett* (supra) at [15] – [16] per Pincus JA.

49 (supra).

50 Criminal Code s 632(3).

51 See *R v Ewanchuk* [1999] 1 SCR 330 at [95]; *R v Crooks* [1999] QCA 194; CA No 483 of 1998, 28 May 1999 at [7].

52 Dixon, M. "The Credibility of Children as Witnesses: Memory, Suggestibility, Fact and Fantasy" (1993) 20(4) *Brief* 34; Fivush, R. "Developmental Perspectives on Autobiographical Recall" (1993) in Goodman and Bottoms (ed*) Child Victims, Child Witnesses.* New York: The Guildford Press at 18.

theme of childish fantasy.[53] In other words, a child is no more likely than any other witness to be mistaken or deliberately untruthful.[54]

[143] The prohibition found in s 632(3) does not relieve a judge from the duty to comment on the evidence as necessary or appropriate in the interests of justice[55] but the judge should be careful to ensure that in doing so he or she does not suggest that any class of witness is unreliable. The judge should be assiduous to avoid the suggestion, whether directly or by implication, in giving any direction or making any comment about delay, that any delay in complaining suggests that the complainant falls into an unreliable class of complainants. That prohibition was transgressed in this case but not in such a way as to disadvantage the appellant.[56]

[144] There is no time limitation on the prosecution of most criminal offences. Some crimes may take a long time to investigate, evidence critical to the decision to prosecute may be obtained some time after the offence whether because of improvements in forensic techniques or because of witnesses' or complainants' overcoming a reluctance to speak, or because a person suspected of the crime cannot be located. In any such case, there is likely to be a dimming of memory and difficulties for an accused in establishing alibi evidence that might otherwise be available, but the significance of those matters will depend on the circumstances of each case such as the reasons for the delay, the length of the delay[57] and the nature of the defence case.

[145] The directions required to be given will depend on the particular circumstances of the case.[58] Specific matters that may have to be adverted to are listed in the judgment of Brennan, Dawson and Toohey JJ in *Longman v The Queen*.[59] The judge may direct the jury that the delay in complaining may be taken into account in assessing the complainant's credibility and in some cases it may have harmed the ability of an accused to adduce evidence throwing doubt on the complainant's story or confirming the appellant's denial. Any comment on the delay in complaining must be balanced by including a comment that there may be good reasons why a victim of such an offence may hesitate in making or may refrain from making a complaint of that offence. Such a comment is a statutory requirement in some states[60] but is now also a requirement of the common law[61] and accords with empirical research[62] and common sense[63]. A reluctance to complain is not unrealistic as it has been posited that the investigation and prosecution processes

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53 cf *Longman v The Queen* (supra) at 101.

54 This may be subject to the exception that children appear more likely to falsely deny that sexual abuse occurred than to falsely allege its occurrence: Bussey, Lee and Grimbeek "Lies and Secrets: Implications for Children's Reporting of Sexual Abuse" (1993) in Goodman and Bottoms (ed), *Child Victims, Child Witnesses* (supra) at 148, 152.

55 *Robinson v The Queen* (supra).

56 *B v The Queen* (supra) at 603 per Brennan J.

57 See *Crampton v The Queen* (supra) where there was a delay of 19 years between the alleged offences and a complaint being made.

58 *R v Young* (supra) at 408-409.

59 (supra) at 90.

60 *Evidence Act* 1906 (WA) s 36 BD; *Crimes Act* 1958 (Vic) s 61; *Evidence Act* 1929 (SA) s 34I (6a); formerly *Crimes Act* 1900 (NSW) s 405C.

61 *Longman v The Queen* (supra) at 90 per Deane J; *R v Aston-Brien* [2000] QCA 211; CA No 439 of 1999, 2 June 2000 at [8].

62 Independent Commission Against Corruption (1994*) Interim Report on Investigation into Alleged Police Protection of Paedophiles* NSW ICAC Reports at 9, 13; *Jones v The Queen* (supra) at 463 per Kirby J.

63 *Suresh v The Queen* (supra) at 770, 778.

may be as traumatic for the child and family as the original offence.[64] Delay in reporting may actually be a symptom of the sexual abuse itself,[65] although a jury not familiar with the symptoms of child sexual abuse may infer that this is an indication that the allegations are false and that the abuse did not occur.[66]

[146] In *Longman v The Queen*,[67] there was 25 years delay between the time of the first alleged sexual offence and a complaint to the police and 21 years between the last alleged sexual offence and complaint. The accused was charged with two counts of indecent dealing with his step-daughter. She was six years old at the time of the events alleged in the first count and ten years old at the time of those alleged in the second. At the time of the trial before the District Court at Perth the complainant was 32 years old. The majority in the High Court took the view that such a delay impeded the fair trial of the accused. As previously noted their Honours observed:[68]

> "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."

After such a long delay, the Court held that it was necessary that a warning in the following terms 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, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy."

It was the long delay rather than the lack of contemporaneous complaint that required such a warning.[69]

[147] The reason that a judge must be astute not to breach the prohibition in s 632(3) not to warn or suggest in any way to the jury that the law regards any class of complainants as unreliable witnesses, in the situation where there is a delay in complaining, is found in the presumption which underlies a direction about failure

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64 *Longman v The Queen* (supra) at 94 per Deane J. Haase, Kempe and Grosz (1990) "Non-familial Sexual Abuse: Working with Children and their Families" in Oates RK (ed) *Understanding and Managing Child Sexual Abuse*. Sydney: Harcourt Brace Jovanovich at 194; Furniss, T (1990) "Common Mistakes and How to Avoid Them" in Oates RK (ed) *Understanding and Managing Child Sexual Abuse* (supra) at 95, 98; Besharov DJ (1987) "Child Abuse: Arrest and Prosecution Decision-Making" 24 *American Criminal Law Review* 315; Cashmore and Bussey "Disclosure of Child Sexual Abuse: Issues from a Child-Oriented Perspective" (1988) 23 *Aust J Social Issues* 13 at 23.

65 de Young, M (1986) "A Conceptual Model for Judging the Truthfulness of a Young Child's Allegation of Sexual Abuse" 56 *American Journal of Orthopsychiatry* 550 at 554; Toth PA and Whalen MP (eds) (1987) *Investigation and Prosecution of Child Abuse*. Virginia: American Prosecutors Research Institute, National Center for the Prosecution of Child Abuse at I-14; *R v Kemp* (supra) at 393.

66 Massaro (1985) at 469 cited in Cacciola, ER (1986) "The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases" 34(1) *UCLA Law Review* 175 at 196.

67 (supra).

68 (supra) at 91.

69 *Longman v The Queen* (supra) at 100.

to complain. In *Kilby v The Queen*[70] for example, Barwick CJ refers with approval to a passage from Hawkins' *Pleas of the Crown*[71] that "[i]t is a strong, but not conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact." As Gaudron J observed in *M v The Queen*:[72]

> "The presumption discussed in Hawkins' *Pleas of the Crown* is not a presumption of law but an assumption of fact (see *Kilby v The Queen* (1973) 129 CLR 460 at 469, per Barwick CJ). And it is an assumption which has embedded in it a questionable suggestion, namely, that people are more likely to lie about sexual offences than about other matters. And of course – though this need hardly be said – there is no basis for thinking that females are less reliable in these matters than males. (See generally, McDonald (1994) "Gender Bias and the Law of Evidence: The Link Between Sexuality and Credibility" 24 *Victoria University of Wellington Law Review* 175). As well, the presumption is no longer generally seen as conclusive. This last matter is conveniently illustrated by the requirement in s. 405B(2) of the *Crimes Act* that, where a question is raised as to failure to complain, a direction is to be given to the jury to the effect that the absence of complaint does not necessarily indicate that the allegation is false and that there may be good reasons why no complaint was made. Even so, the assumption is still accorded considerable respect and it was held by the Court of Criminal Appeal of the Supreme Court of New South Wales in *Reg. v Davies* ((1985) 3 NSWLR 276 at 278) that, notwithstanding s.405B(2), a trial judge should, at least as a general rule, direct the jury that absence of complaint or delay in complaining may be taken into account in evaluating the evidence of the complainant. However, this is not a hard and fast rule and a conviction will not be set aside simply because there has not been a direction of that kind." (See *R v Preval* [1984] 3 NSWLR 647; *R v Murray* (1987) 11 NSWLR 12).

Her Honour was of the opinion that cases of a sexual assault on a child by a person who had the child's trust and confidence were cases in which the assumption of fact of the kind discussed in Hawkins' *Pleas of the Crown* had no place.[73]

[148] In *Crofts v The Queen*[74] the appellant was charged with 13 counts of offences of a sexual nature said to have been committed over a six year period between 1 March 1987 and 31 January 1993. The joint judgment of the majority in the High Court[75] said that the complainant was aged between 13 and 16 years at the time of the alleged offences but, given the six year period covered by the alleged offences, this must be incorrect. The complainant was aged between 10 and 16 years at the time of the alleged offences. She complained to her mother six months after the last alleged offence and six years after the first. The trial was unsatisfactory in that evidence of uncharged acts which had been held to be inadmissible was, it appears, nevertheless deliberately led by the Crown Prosecutor in re-examination of the

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70 (1973) 129 CLR 460 at 469.
71 1716-1721 London: Professional Books Ltd, 1973, Vol I, Chap 41, s 3.
72 (1994) 181 CLR 487 at 514
73 (supra) at 515.
74 (supra).
75 (supra) at 436.

complainant at the close of the Crown case and immediately prior to the weekend adjournment.

[149] The trial judge directed the jury with regard to delay.[76] His Honour gave the jury a "formal direction" which he said the law required him to give but which he said also accorded with common sense and human experience:

> "Delay in complaining in sexual abuse cases does not necessarily mean the allegations are false; there may be good reasons why victims of sexual assaults hesitate in making complaints about them. The experience of the law confirms that complaints are often not made immediately after sexual assaults. [The prosecutor], in his address to you, suggested that she was young, confused, [had] feelings of guilt, fear of disbelief, fear of family upheaval, fear of accusation against a family friend. [These] were all suggestions that were put forward that may explain such a delay, and there may well be others. Experience has shown that it is not uncommon for such a delay and the law requires me to say that it does not necessarily mean the allegations are false."

[150] This direction was by itself unexceptionable but the judge had previously told the jury that they would not be entitled to draw an inference that the offences did not happen because the complainant did not complain about them immediately after they occurred. This is of course different from and contradictory to the directions that delay did not *necessarily* mean that the allegations were false. The direction set out in full was unbalanced because it did not go on to instruct the jury that absence of early complaint *could* be used by them in their assessment of the credibility of the complainant.

[151] The jury in *Crofts v The Queen*[77] was therefore given the erroneous direction that they could not as a matter of law draw an inference from delay that the events did not happen. The judge had a clear duty to correct this misdirection. This meant that the direction given was unbalanced and clearly weighed in favour of the prosecution.[78] In such a circumstance it was imperative for the trial judge to give a direction that absence of timely complaint was relevant to the credibility of the complainant.

[152] The High Court held that there were two qualifications to this duty to provide a warning. The first is where the particular facts of the case and the conduct of the trial do not suggest the need for such a warning.[79] The second is that the warning should not be expressed in such terms as to undermine the purpose of s 632(3) of the *Criminal Code* by "suggesting a stereotyped view that complainants in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false".

[153] In *Jones v The Queen*,[80] the High Court held that a direction similar to that in *Longman* was required in the circumstances of the case even though the lapse of time was shorter than in *Longman*. The facts in *Jones* were that the appellant was tried on

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76 *Crofts v The Queen* (supra) at 433-434.
77 (supra).
78 *Crofts v The Queen* (supra) at 445.
79 *R v Murray* (1987) 11 NSWLR 12 at 18; *M v The Queen* (supra) at 514-515; *Crofts v The Queen* (supra) at 451.
80 (supra) at 446.

three counts of sexual intercourse with a child under his authority who was aged between ten and sixteen years. The complainant was eleven years old during the period specified in the first and second counts of the indictment and twelve years old during the period specified in the third count. The appellant was her gymnastics coach. The complainant made no allegation against the accused until more than four years after the first alleged act of sexual intercourse.

[154] The appellant was convicted by the jury on counts one and three but acquitted on the second count. The complainant's evidence was that she attended gymnastics classes conducted by the appellant, after school on Tuesdays and Thursdays, and sometimes on Saturday mornings. The offence the subject of the first count was at first alleged to have occurred at the completion of one of the weeknight classes when they were alone together at the gymnasium. The second offence was alleged to have occurred at the gymnasium after a Saturday class. The complainant changed her testimony under cross-examination to accord with an earlier statement given to the police that the first offence occurred after a Saturday class and the second, on a Tuesday or Thursday. The third offence was alleged to have occurred at the appellant's home.

[155] The appellant gave evidence denying the offences and saying that he had no opportunity of committing the offences the subject of counts one and two as his wife and daughter were always present during weeknight training sessions which were never held on a Tuesday night and that they invariably went home with him. He said that his assistant coach, Ms Darvall, was always present for Saturday morning training sessions and he had always driven her home at the conclusion of each session. The appellant's wife and daughter gave evidence which supported his evidence about his lack of opportunity to commit an offence during weeknights and the complainant herself conceded that his family attended weeknight gym classes "all the time".

[156] With regard to Saturday mornings, the assistant coach, Ms Darvall, gave evidence that the appellant usually picked her up for Saturday morning classes and that she travelled home with him after Saturday classes "most of the time". She conceded it was possible that she had travelled home by train at the relevant time although she could not recall having done so. The complainant gave evidence that she was not sure whether Ms Darvall was present on Saturdays, but she claimed that, if she had been there on the Saturday in question, she "must have" left before the sexual assault occurred.

[157] The complainant's detailed version of events with regard to count two was rejected by the jury but accepted with regard to count one. The problem arises that having rejected the complainant's version with regard to count two there was no material difference from her version on count one, except that the appellant was unable to prove positively that it could not have occurred.[81] As the majority in the High Court observed:[82]

> "There is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her evidence was more reliable in relation to those counts than it was in relation to the second count."

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81 This might tend to suggest that the jury misunderstood the onus of proof.

82 *Jones v The Queen* (supra) at 453.

[158] Such a verdict must have been unsafe and unsatisfactory because it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of counts one and three if they were not so satisfied with regard to count two. This was because that verdict necessarily entailed a rejection of the complainant's account with an inevitable negative impact on her credibility.[83]

[159] The lapse of time in that case was critical. Because of the five years between the alleged events and the trial, the defence witness was unable to be certain about her movements which she had no other reason to remember and the appellant therefore lost a real chance of acquittal. Given the nature of the defence case, a *Longman* direction was necessary to avoid a miscarriage of justice.

[160] The High Court also reiterated that in sexual offence cases, recent complaint, or its absence, is a factor which is ordinarily of limited significance.[84] Promptness or delay in complaint is itself relevant only to the credibility of the complainant.[85] As Gaudron J held in *M v The Queen,*[86] the failure to give a direction that delay in complaining may be taken into account in evaluating the evidence of the complainant, will not necessarily lead to the setting aside of the verdict.

[161] In assessing this ground of appeal, one must look at the whole of the conduct of the trial as well as all the directions given by the judge.

[162] The trial judge in this case gave a direction which impermissibly reflected a stereotype about the reliability of children's evidence. It was, however, a direction which was extremely favourable to the defence. Her Honour did not warn the jury that the delay meant the appellant had lost means of throwing doubt on the complainant's story. However, in this case there was no suggestion that the appellant was not at the complainant's house on a regular basis at night and at times the only adult, and therefore no ordinary means of throwing doubt on the complainant's story was lost.

[163] The trial judge did not suggest to the jury that they could use the delay in assessing the complainant's credibility but then if her Honour had done so, she would have had to balance this with a direction that delay did not necessarily mean that the complaints were false and there may be many reasons why a complainant does not complain. This direction, which balances the interests of the complainant and the accused, is a direction within the discretion of the trial judge. Ordinarily one would expect it to be given but, as the Court of Appeal held in *R v Rankin*[87] and the High Court held in *M v The Queen*,[88] failure to do so is not an error of law particularly when a direction was given to the jury that it was necessary for them to scrutinise the complainant's evidence carefully before being satisfied beyond reasonable doubt that the offences occurred as the complainant said they did.

[164] The question is whether it was obligatory to give a warning to the jury, that, as the evidence of the complainant could not be adequately tested after the passage of time between the alleged offences and the complaint made, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the

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83 *Jones v The Queen* (supra) at 453.
84 *Jones v The Queen* (supra) at 453.
85 *Jones v The Queen* (supra) at 454; *Sparks v The Queen* [1964] AC 964 at 979.
86 (supra) at 514.
87 (supra) at [14]-[18].
88 (supra) at 514.

warning, were satisfied of its truth and accuracy. It would be obligatory if the failure to give such a warning gave rise to a perceptible miscarriage of justice. Where, as here, the "concatenation of circumstances" was within the capacity of the jury to evaluate in the light of their own experience and with the benefit of counsel's addresses, such a warning was unnecessary.[89]

[165] Given the unwarranted warning by the trial judge as to the care with which the evidence of children should be approached, the failure to warn of the effect of such a relatively short delay, which would have been balanced by a direction that a delay did not mean that the allegations were false and there may be good reasons why the victims of sexual assaults hesitate in making complaints about them, could not in my view give rise to a perceptible miscarriage of justice. The appeal should be dismissed.

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89 *R v Arundell* (supra) at [43] per Callaway JA.