

SUPREME COURT OF QUEENSLAND

CITATION: *R v David* [2008] QCA 311

PARTIES: **R**
v
DAVID, Jimmy Aprim
(appellant)

FILE NO/S: CA No 363 of 2007
DC No 1903 of 2006

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 7 October 2008

DELIVERED AT: Brisbane

HEARING DATE: 30 September 2008

JUDGES: Keane JA, Jones and Daubney JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Appeal against conviction allowed**
2. Convictions set aside and a new trial ordered on all counts save count 6

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – where the case against the appellant was brought to trial over 15 years after the date of offending – where a key witness had passed away by the time the trial was heard – where the learned trial judge gave the jury a general warning concerning the danger of relying upon evidence given by a complainant after such a long delay – whether the warning given by the learned trial judge concerning the prejudice suffered by the appellant by reason of the delay was sufficient – whether the case calls for the application of the proviso under s 668E(1A) of the *Criminal Code Act 1899* (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – CONDUCT OF LEGAL PRACTITIONERS – where the appellant did not give

evidence at trial – where the appellant claims to have instructed his former legal representatives that he wished to give evidence at trial – whether there was any misconduct on the part of the appellant's legal representatives at trial capable of giving rise to a miscarriage of justice

Criminal Code Act 1899 (Qld), s 668E(1A)

Blatch v Archer (1774) 98 ER 969, applied

Cullen v Welsbach Light Co of Australasia Ltd (1907) 4 CLR 990; [1907] HCA 3, cited

Doggett v The Queen (2001) 208 CLR 343; [2001] HCA 46, applied

Joyce v Director of Public Prosecutions [1946] AC 347, cited

Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, applied

R v Burdett (1820) 106 ER 873, cited

COUNSEL: The appellant appeared on his own behalf
M R Byrne for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

- [1] **KEANE JA:** On 6 December 2007 the appellant was convicted, upon the verdict of a jury, of one count of maintaining an unlawful sexual relationship with the child complainant, AG, with a circumstance of aggravation and 10 counts of aggravated indecent treatment of AG. He was also convicted of four counts of aggravated indecent treatment of the complainant, SG, AG's twin sister. The jury acquitted the appellant of one count of aggravated indecent treatment of SG.
- [2] The appellant was sentenced to five years imprisonment in respect of the offence of maintaining a sexual relationship with a child, and to concurrent terms of three years imprisonment in respect of the other offences.
- [3] The appellant, who was obliged to represent himself on his appeal, seeks to set aside his convictions on a number of grounds. Some of these grounds involve allegations of incompetence or misconduct on the part of his Counsel and solicitor at trial; others relate to the directions given to the jury by the learned trial judge. I shall discuss them in due course.
- [4] The appellant also sought leave to appeal against his sentence on the ground that it was manifestly excessive, but in view of the conclusion I have reached in relation to the convictions, it is unnecessary to deal with the issue as to sentence.
- [5] I will discuss the grounds of appeal against conviction after summarising the case at trial.

The Crown case at trial

- [6] The complainants were six years of age at the time of the offences alleged against the appellant. They were 21 years old when they gave evidence at trial.

- [7] The period during which the sexual abuse of the complainants by the appellant allegedly occurred was stated in the indictment to be between 2 March 1992 and 4 March 1993.
- [8] At this point, for the purposes of discussing the arguments agitated on the appeal, it is sufficient to summarise the complainants' evidence in brief terms. I will return to consider some of the detail of the complainants' evidence in due course.
- [9] The complainants, AG and SG, each gave evidence that by the time of their birthday in March 1992, their mother had commenced a sexual relationship with Albert, the cousin of the appellant. The complainants seem to have come to regard Albert as their step-father. During the school holidays in 1992, the appellant babysat AG and SG because their mother worked during the day.
- [10] AG gave evidence that one day she and SG were sitting in the lounge room of their mother's house. The appellant was lying on the floor. He asked them if they had ever seen a man's penis before. They said they had not, and he asked if they would like to touch him. AG said that both she and SG then touched his penis by touching him on the outside of his clothes (counts 2 and 3 – indecent treatment).
- [11] AG said that the appellant then got up and asked if one of them wanted to go to the bathroom with him. AG agreed. They went into the bathroom where he shut the door and took off his clothes but left his thongs on. She said that he told her that he did not want to get germs in the bathroom. He got into the shower and asked AG if she wanted to touch him on the penis. He grabbed her hand and made her touch him. She recalled that eventually there was a sticky substance on her hand (count 4 – indecent treatment).
- [12] AG said that she recalled SG knocking on the door and asking to come in. The appellant told AG not to tell her mother about what had happened, and that it was her fault because she had touched him. AG then opened the door and left, and, as she did so, SG came in.
- [13] AG said that there were occasions when both she and SG stood outside the shower, and the appellant would have each of them touch his penis in turn. She said that the first time that this occurred she was wearing a pink skirt with black polka dots. She said that the appellant was wearing his thongs while otherwise naked as she and SG took turns touching his penis (counts 5 and 6 – indecent treatment). It may be noted here that the jury acquitted the appellant on count 6. This count alleged indecent treatment of SG.
- [14] AG gave evidence of an occasion when the appellant entered her bedroom, sat down next to her and touched and rubbed her vagina. She recalled that at the time she was not wearing a skirt or underwear although her top was on (count 7 – indecent treatment).
- [15] On another occasion, AG said, the appellant came into her bedroom and touched her vagina, putting his finger into her vagina and hurting her. Once again she recalled that she was not wearing underwear (count 8 – indecent treatment).
- [16] AG gave evidence of another occasion when the appellant came into her bedroom, took her hand, put it inside his pants and made her rub his penis. Eventually she felt

- a sticky substance on her hand and saw that his shorts were wet (count 9 – indecent treatment).
- [17] AG gave evidence that when her mother was hosting a party at her house, the appellant asked AG if she would like to see some money from his country. He had AG sit on his knee. He put his hand under her skirt, moved her underwear to one side and rubbed her vagina.
- [18] In her evidence AG spoke for the first time of an occasion when the appellant must have stayed over at her mother's house. He came into her room and touched her on the vagina. She recalled that on this occasion his breath smelt of beer.
- [19] AG said that this kind of conduct occurred regularly and persisted beyond her seventh birthday which occurred in March 1993. AG said that she did not see the appellant again after the end of 1993. She identified the appellant as the person who had abused her from a family photograph taken at the back of her house in 1992. She also gave a physical description of her abuser in which she described him as having a "pot belly". This description was not appropriate to the appellant, but it did apply to another relative of Albert, Jimmy Simon.
- [20] AG said that when she was about nine years old she told her friend, CD, that someone had been touching her. CD's mother, S, then asked AG where she had been touched, and AG told her that she had been touched "down bottom" and that she had touched him. S told AG's mother of what AG had said, but AG's mother told her not to be silly.
- [21] AG said that when she was 12 years old, a teacher at school, Ms R, asked her if what had happened to SG had happened to her, and she said that it had.
- [22] AG said that when she was 14 years old, she told her teacher, Ms M, about it. She also told a psychologist that she was sexually abused when she was little.
- [23] AG said that when she was 15, a friend, AP, asked her if what had happened to SG had also happened to her. She said that it had.
- [24] AG's friend, CD, gave evidence that AG complained to her when they were about eight years old that she had been sexually assaulted when she was six. CD could not remember the name of the person identified by AG as her abuser. CD's mother, S, confirmed that she had taken AG home and told AG's mother of the complaint, but the complainant's mother had said AG was being silly and looking for attention.
- [25] The complainant, SG, said that the appellant babysat her and AG during the school holidays towards the end of 1992. She thought that this occurred after her family had been on holiday to Tasmania. Other evidence showed that the visit to Tasmania occurred between 7 and 18 August 1992.
- [26] SG gave evidence that she recalled an occasion when she was in the hallway of her mother's house and the appellant came out of the shower with a towel wrapped around him. He told her to go into the bedroom. AG was already there. The appellant sat on the bed and took the towel off. His penis was wet. He told them to touch it, and they both did. He explained to them how they should go about pulling his penis and they both did so (counts 12 and 13 – indecent treatment).

- [27] SG said that she recalled another occasion when she and AG were in SG's bedroom with the appellant. SG stood up, and the appellant told her to widen her stance. He then put his hand inside her underwear and put his fingers into her vagina. He made AG watch while he did this (counts 14 and 15 – indecent treatment).
- [28] SG said that the appellant then did the same thing to AG and made SG watch. SG said that she saw the appellant's hand go into AG's underwear and his fingers go into her vagina (counts 16 and 17 – indecent treatment).
- [29] SG's evidence was that the appellant used to give AG and her lollies after acts of sexual abuse. On one occasion he told SG that he would kill her mother if she told her what he had been doing.
- [30] SG said that the appellant used to make her touch his penis on occasions when AG was not present. Sometimes AG was present and he would make AG touch his penis too. In her evidence, SG identified the appellant from the same family photograph shown to AG as the person who had abused her.
- [31] SG first complained of this conduct to her teacher, Ms R, when she was 12 years old.
- [32] When SG was 15 years old she told her then teacher, Mr B, that her mother's boyfriend's cousin had done some "bad stuff" to her when she was little. Mr B arranged for SG to see a counsellor. SG told the counsellor that Jimmy, her mother's boyfriend's cousin, had touched her. SG also told her friend, AP, that these things had happened. This was said on an occasion when she and AP had been drunk.
- [33] Ms R confirmed that in 1998 when SG was in grade 7, SG had complained of being sexually abused, but Ms R said that SG had said that it was her step-father who had sexually abused her.
- [34] SG's friend, Ms AP, gave evidence that when she and SG were about 14 years old, SG told her that a person named Jimmy had molested her when she was five or six years old. SG told AP that Jimmy used to force her and her sister to play with his genitals and he would do the same to them, and that this happened while he was babysitting them when their mother was out. Ms AP said SG told her that she was not sure if she had dreamed these things, but she asked AG and AG said that they had occurred. Ms AP said that AG had told her that their mother's boyfriend's friend or cousin had made SG and her play with his genitals and he had done the same to them.
- [35] Mr B said that, in 2000, SG told him that when she was five or six she had been abused by a man, whom she described as her mother's boyfriend or partner. On 22 October 2001 SG repeated her complaint in these terms to the counsellor arranged by Mr B.
- [36] It appears that the complainants first complained to police of sexual abuse by the appellant some four years before the trial.
- [37] The complainants' mother gave evidence that she recalled that her relationship with Albert began in 1992. She recalled that the appellant did babysit the complainants, but she thought that this occurred in either the Easter or winter holidays of 1993. In

re-examination, however, she said that the photograph of the appellant by which the complainants identified the appellant had been taken at the back of her house before extensions were carried out. These extensions were carried out in 1992.

[38] The complainants' mother said that she was not aware of their complaints that they had been sexually abused until the girls were 12 years old.

[39] Albert said that the appellant stayed at the complainants' mother's home on one occasion for about two to three weeks. He said that he had no knowledge of any babysitting arrangements. Albert said that another man, Joe Oshana, was living with them when the appellant arrived.

[40] Jimmy Simon gave evidence. It was not suggested to him that he was the person who had abused the complainants.

The appellant's case at trial

[41] The appellant's case consisted of a denial of any wrongdoing on his part. It was suggested on his behalf that some person may have sexually abused the complainants at about the time in question, and that they mistakenly recalled the appellant as the perpetrator.

[42] The appellant did not give or call evidence, but, in the course of cross-examination of the complainants and their mother, the appellant's Counsel at trial established that when the appellant visited the complainants' house he was accompanied by his friend "Joe". The following passage of cross-examination is relevant:

"Well, you told the police this, do you accept you told the police this, I should put it that way, paragraph 8 of your second statement, 'Jimmy never visited the house alone, he was only at my home when he was caring for the girls.'?-- I don't know how that question was put to me in the beginning.

All right. Well, whenever Jimmy was over was there a person called Joe-----?-- Yes.

-----with him?-- Yes.

And you would never have seen Jimmy at your place without Joe being there; that would be correct, wouldn't it?-- Yeah, that would be right because they used to share a car."

[43] The appellant's Counsel at trial could profitably have ceased this line of cross-examination at this point. The evidence which Counsel had elicited from the complainants' mother to the effect that Joe Oshana was with the appellant whenever the appellant was at her house tended to cast doubt on the complainants' accounts of being molested by the appellant while they were left alone with him. But the appellant's Counsel pressed on. As a result, the position became somewhat less clear:

"All right. But still your recollection is that any time Jimmy was there Joe was there?-- Most of the time.

Well, you told the police Jimmy never visited the house alone; do you accept that you told the police that?-- I am just – it was just the context of the question being put to me, that's all. I mean, yes, he was

left alone with the children, but I'm just saying whether the context of the question was whether he had come over, you know, just on a social visit by himself with, you know, and that was probably where I – you know, when I gave that answer.

All right. Well, what I'm suggesting to you, and I have just suggested to you, and you can comment on it, agree with it, or disagree with it, that every time Jimmy came to your place he had Joe with him, or Joe was present?-- Well, sometimes Joe would help out at the service station as well, they all sort of helped Albert out at the service station, they took turns.

What I'm suggesting to you is that when Jimmy came to your place Joe either came - Joe was there, whether he was already there, or he came with him?-- Yes, but then, you know, he would have left as well so he-----

No, just - do you recall an occasion then when Jimmy was at your home without Joe being there?-- Yes, I do.

When were those occasions?-- Well, they were just, they were there and then they would go, and then they would come back and go again because they were helping at the service station.

Who is 'they'?-- Joe and the defendant.

So both of them would go and both of them would come back?-- Yes.

Is that what you are saying?-- Yes, and then he would be by himself as well with the girls."

[44] At this point it must be said that the evidence of the complainants' mother as to how the appellant could have been at home alone with the complainants makes little sense. The cross-examination went on:

"All right. Well, how long of a period was he looking after your girls; can you remember?-- Less than two weeks, and I can't remember, I had an RDO, and my mother would also look after them, so it would have been probably a couple of days during each week if it was a two week holiday period.

All right. So what are we looking at, about five days that he looked after them over that two week period?-- Maybe.

...

Right. Well, well, just hang on for a moment. Did Joe look after your children during the same period that Jimmy was looking after your children at all?-- He was around, he was definitely around at that time.

Well, did you give him the care and control of your children at any time - this is Joe?-- No.

All right. That statement we were talking about that the police asked you - where the police asked you to obtain the details of the photograph, do you recall telling them this, that, 'During the same period that Jimmy looked after my daughters another Assyrian gentleman by the name of Jo spelt J-O also looked after them on a couple of occasions. Jo, to the best of my recollection, was a friend of Albert and Jimmy?-- But not by himself.

So the best----?-- And the girls have got, you know, they remember, they remember the two people, they remember the person.

Well, wait, you are the girls' mother, aren't you?-- Yes.

You were responsible for them?-- Yes.

You asked Jimmy to look after them, didn't you?-- Yes.

Did you ask Jo to look after them as well?-- No.

But you are saying that Jo was with Jimmy from time to time?-- Yes, because they both helped Albert out and they would come over and then go, they would work at the service station.

Jimmy never worked at the service station, did he?-- He might have just helped out."

[45] It is apparent that the complainants' mother resiled, albeit in an uncertain way, from her concession that she had never seen the appellant at her house without Joe also being in attendance. Nevertheless, it was still the general effect of the complainants' mother's evidence that Joe Oshana was at her house at about the times when the complainants were allegedly abused by the appellant.

[46] The appellant's Counsel established in cross-examination of the complainants' former step-father that Joe died in 2002. Thus Joe was not available to resolve the question mark over the Crown case which had been raised by the cross-examination of the complainants' mother.

Directions to the jury

[47] The learned trial judge, in his directions to the jury, reminded them of the inconsistencies between the complaints and the testimony of the complainants.

[48] His Honour also gave the jury a warning in general terms of the difficulties which confronted the appellant in defending himself against charges of this kind brought after so long a delay. His Honour said:

"Now, members of the jury, I warn you that in evaluating the evidence of each complainant in this case, you have to bear in mind that over 15 years has elapsed since the last of the alleged offences occurred, that experience has shown that human recollection and particularly the recollection of events occurring in childhood is frequently erroneous and liable to distortion by reason of various factors; that the likelihood of error increases with delay; that the complainants have testified concerning incidents occurring to them as young children; that no complaint was made by them to their

mother at the time, or soon after; that by reason of the delay and lack of specificity as to the dates, the defence has been unable to examine the circumstances of the alleged offences; that there are these inconsistencies that I have identified for you that do arise in this case; the complainants' long delay in reporting the incidents they say happened more than 15 years ago has an important consequence because after this length of time their evidence cannot be adequately tested or met, the defendant having lost by reason of that delay the means of testing and meeting their allegations that might otherwise have been available.

By the delay the defendant has been denied the chance to assemble, soon after the incident is alleged to have occurred, evidence as to what he and other potential witnesses were doing when according to the particular complainant a particular incident happened. Had the complaint instead been made known to the defendant soon after the alleged event, it would have been possible then to explore the pertinent circumstances in detail and perhaps to gather and to look to call at trial evidence throwing doubt on the particular complainant's evidence. Opportunities lost by the delay.

So I warn you that it would be dangerous to convict upon the particular complainant's evidence alone unless after scrutinising it with great care, considering the circumstances relevant to its evaluation and paying heed to this warning you are satisfied beyond reasonable doubt of its truth and accuracy."

[49] The appellant's Counsel at trial did not seek any modification of this direction.

The appeal against conviction

[50] The appellant argues that he was denied a fair trial because his legal representatives were incompetent. In particular, he asserts that, as a result of their insistence contrary to his instructions that he not give evidence, he lost the opportunity to tell "his side of the story". He also contends that his command of English was so poor that fairness required that he be provided with an interpreter.

[51] The appellant has filed an affidavit sworn on 10 September 2008 in which he swears that he instructed his former legal representatives that he wished to give evidence at trial.

[52] The appellant also swears that he wished to give evidence that he was in New South Wales from 7 October 1992 to 10 September 1993, and so could not have committed the offences in question. He contends that evidence of his credit card transactions during that period is available to confirm his testimony in that regard. He swears that his legal respondents at trial refused to act upon his instructions that he wished to give evidence in his defence.

[53] The appellant's complaints about the conduct of the trial by his legal representatives prompted a response on their behalf from Legal Aid Queensland. In that regard, an affidavit by Anita Campbell, the solicitor employed by Legal Aid Queensland who acted for the appellant at his trial, was filed in this Court. That affidavit exhibited documents signed by the appellant dated 5 December 2007 and 20 April 2007. The

former document confirmed that the appellant instructed his legal representatives that he did not want to give evidence at trial. That was also the wish expressed in the latter document.

- [54] Ms Campbell also deposed that bank records relating to the appellant's whereabouts in 1992 were subpoenaed on his behalf. These records, together with a calendar on which the school holidays for the year 1992 were marked, were tendered as an exhibit in the Crown case at trial. Insofar as the period of school holidays from September to the beginning of October 1992 seemed to be likely to be the holiday period referred to by the complainants, this evidence was not apt to exclude the possibility that the appellant had the opportunity to commit the offences.
- [55] I am unable to accept that the appellant's complaints about the conduct of the trial by his legal representatives warrant a concern that a miscarriage of justice has occurred because of any misconduct on their part.
- [56] Of more substance is the argument that the learned trial judge's direction to the jury concerning the prejudice suffered by him by reason of the delay in bringing the matter to trial was deficient. It is convenient to deal with this point now.
- [57] The unavailability of the witness, Joe Oshana, is a matter which cannot lightly be dismissed. The unavailability of this witness was a consequence of the delay in bringing charges against the appellant. His evidence was likely to be important. On the evidence of the complainants' mother, there was a real possibility that Joe accompanied the appellant on the occasions when the appellant was alleged to have sexually abused the complainants. While it may be said that the complainants' mother's evidence left some room for the possibility that the appellant may have been alone with the complainants on some occasions, her evidence was not particularly compelling in this regard. The evidence adduced by the Crown as to when the offences occurred was general as to the period when the offences occurred, and distinctly vague in relation to the actual occasions of the acts of indecent treatment. That the evidence of the complainants' mother as to the occasions Joe accompanied the appellant when he babysat the complainants slid into vagueness, and even incoherence, under the pressure of prolonged cross-examination does not dispel the concern that material evidence has been lost.
- [58] The unavailability of testimony from Joe as a result of the delay which has occurred raises a real concern as to the fairness of the trial in the sense that there was a real possibility that the unavailability of Joe Oshana's testimony served to prejudice the defence case. The question of immediate concern is whether this unfairness was alleviated by the direction given by the learned trial judge.
- [59] In *Longman v The Queen*,¹ Deane J, in speaking of the significance of the long effluxion of time between alleged offences and complaint and between complaint and trial in terms of disadvantage to an accused, said:
"The direction which would ordinarily be appropriate to deal with them would be one aimed at drawing attention to the **particular** difficulties facing the accused in presenting his case so long after the alleged offences." (emphasis added)

¹ (1989) 168 CLR 79 at 100.

- [60] In *Doggett v The Queen*,² Gleeson CJ referred to this statement of Deane J, and noted that:
- "a direction that would be appropriate in a case where it could be suggested that there were **particular difficulties** facing an accused as a result of delay ... would depend upon the nature of the case and the manner in which it was fought." (emphasis added)
- [61] In *Doggett v The Queen*,³ Kirby J also emphasised the duty of the trial judge, where a warning to the jury is required in relation to the significance of delay, to make the warning to the jury meaningful by ensuring that the warning is related "to the evidence or **particular circumstances of the case.**" (emphasis added)
- [62] In this case there can be no question that a warning to the jury of the kind discussed in *Longman v The Queen* was necessary to ensure that the appellant received a fair trial. The learned trial judge clearly appreciated the necessity for such a warning: that is why he gave the warning which he did. The issue which must be faced on appeal is whether the warning was sufficiently related in the circumstances of the case to the particular disadvantage to the accused resulting from the death of Joe. As Lord Mansfield CJ said in *Blatch v Archer*:⁴ "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."
- [63] In my respectful opinion, the *Longman* warning which was given to the jury was deficient. His Honour failed to instruct the jury that a witness who might have been expected to be able to give evidence was no longer available to the appellant because of the delay which had occurred in bringing the complaints against him. Of course, it cannot be assumed that Joe Oshana's testimony would have assisted the defence, but the jury should have been alerted specifically to consider whether the absence of such evidence by reason of the delay in bringing charges was a real disadvantage for the appellant in mounting his defence. In this regard, the jury should have been instructed that, on the complainants' mother's evidence, there was a real possibility that the complainants were left with the appellant only when he was accompanied by Joe Oshana, and that they should turn their mind to whether the evidence of the complainants satisfied them that the possible presence of Mr Oshana in the house on the occasions of alleged indecent treatment was not a reason to doubt whether the appellant had the opportunity to engage in the mistreatment alleged against him.
- [64] In this latter regard, when AG gave her evidence-in-chief she mentioned that another of her mother's boyfriend's "cousin[s] called Joe who used to come around too ..." She was asked in chief: "What sort of contact did you have with Joe?" The following exchange ensued:
- "He used to come around sometimes and I think we went fishing. I don't know who, but someone had a boat and we used to go out fishing and he would come along.

² (2001) 208 CLR 343 at 348 – 349 [12].

³ (2001) 208 CLR 343 at 373 – 374 [117].

⁴ (1774) 98 ER 969 at 970. See also *R v Burdett* (1820) 106 ER 873 at 890; *Joyce v Director of Public Prosecutions* [1946] AC 347 at 380; *Cullen v Welsbach Light Co of Australasia Ltd* (1907) 4 CLR 990 at 1013 – 1014.

Is that the limit of the contact that you had with Joe?-- Like, he was there when we had like a barbecue or a party or something, but he might have come over and seen us, like babysat us as well, I think, but not really by himself. I think he was always like part of a group or something.

Do you recall whether Joe ever babysat you and [SG] by himself?-- I don't remember him ever babysitting us by himself."

[65] From this passage it is apparent that AG accepted that Joe Oshana was with the appellant on occasions when the latter babysat the complainants. There was no suggestion that Joe was in any way involved in molesting the complainants. The jury should have been directed to consider the possibility that Joe was present in the house on some or all of the occasions when the complainants said that they were molested by the appellant and whether the appellant could or would have molested the complainants when another adult was present in the house. If the jury's attention had been drawn to these points, they may have been disposed to put more weight on the possibility that the complainants were mistaken as to the identity of their abuser.

[66] The following passages from the cross-examination of AG are also of some relevance in this regard:

"How many periods of time were there in the school holidays when your mum had to work and Jimmy was looking after you?-- I don't know. I just remember that specific time, I think it might have been a two-week holiday where it was just him and I think around Christmas time I think mum took some time off as well, but I think - I know we stayed with grandma and granddad as well too, so I don't know - I just remember he was around a lot.

These events you've told us about, did they happen during this period of time when he was babysitting you or at other times?-- The first incident that I described were the first time when he was baby-sitting us by himself in our house during the holidays. There were other times as well after that where he would babysit, come over and just - he used to stay at the house as well sometimes, or maybe like a weekend or something he would come over and look after us if mum wanted to go out with Albert.

So the first time was during this period that he was babysitting for you?-- Yes.

Most of the offences were - were most of the touchings in that period?-- Most of the specific stuff I remember happened during then.

Do you recall telling the police this: you told the police about your trip to Tasmania. You say that Albert went to Tasmania with you. Sorry, I'll go back a bit. You say that, 'I remember that Jimmy would watch us during the day whilst my mum was at work. He would normally stay at our house and watch us. I remember there was a time Jimmy was living in our house. It was during the time that we took a trip to Tasmania.'?-- When we went to Tasmania Joe was also

staying in the house as well and I just remember when we came back from Tasmania that mum was getting up - I think Jimmy was there at the time and she was getting up both of them because one of them had been smoking in the house; I think it was [SG's] room.

So nothing had happened - untoward had happened before the trip to Tasmania?-- I don't think so.

You then go on to say, 'When we got back from the trip I remember mum getting up Jimmy for smoking in [SG's] room.'

You've just told us about that?-- Yeah.

You then say, 'During this time Jimmy would babysit for us. I remember the summer of 1992. I remember that school had finished and Jimmy would watch us. I remember an incident that occurred during one of the times that Jimmy was watching us.' And you go on to talk about an incident in the lounge room. Do you remember telling that to the police?-- She asked me about three or four years ago now and I was 18 and she was trying to prompt me and I said I couldn't remember. She said, 'Did you think it was just the summer holidays?' I said, 'Well, maybe', because I just remember it being a long period of time, like the holidays. Like I said, I can't specifically remember it being Christmas when it first started. I think it was before then.

You think it was before Christmas?-- Yes.

It was holidays before Christmas?-- Yes.

When you say, 'I remember the summer of 1992 school finished and Jimmy would watch us.', did he watch over you or babysit you in those summer holidays?-- Yes, he was still around then. He used to still watch us.

So when you tell the police you remember the summer of 1992, '[the appellant] would watch us', you remember an incident, and you would start talking about an incident in the lounge room, that's not quite correct, is it, in timing terms?-- Probably not - I think it was before Christmas time.

But after Tasmania?-- After Tasmania.

It was while your mum was at work, you were on school holidays and Jimmy was looking after you?-- Yes.

...

All right. You remember - you gave evidence-in-chief about a person called Joe?-- Yes.

All right. He was a friend of Jimmy?-- I'm pretty sure he was his cousin.

And do you remember Joe living at your house in Glasgow Street?-- I remember he used to stay over sometimes. I remember he stayed there when we went to Tasmania.

All right. Other than when you were in Tasmania?-- I remember he used to stay over sometimes, but whether he was actually living there - I don't think he was, like, living-----

All right. Is it possible that he was living there for about three months before Jimmy came to stay?-- I don't know. I remember he used to stay over, but I don't know, he might have stayed there sometimes, but he wouldn't have stayed there, like, all the time.

Do you remember how long Jimmy stayed at your place for any one particular length of time other than an overnight stay or a weekend?-- I don't know. It's such a long time ago, it all blurs into one. I just remember he was around a lot, so I know he stayed - he definitely stayed over.

Did he have a room that he stayed in when Jimmy stayed over?-- I can't remember where he stayed. I think he might have stayed in [SG's] room because a lot of the time [SG] used to come in and sleep in my bed. I remember she used to do that a lot. So he might - we only had three bedrooms in the house.

[67] The complainant, AG, gave evidence of an occasion when the appellant molested her at a party. She was cross-examined about this. The following exchange is relevant:

"MR HARRISON: This incident that you say happened at the party, I'm just interested in the time that it happened. Was the party in one of those periods where you were being looked after during the day by Jimmy when your mum was at work?-- No, I think it was during - when I was at school.

All right. Was it a week night or a weekend?-- No, it was a weekend.

And you think that Jimmy may have stayed over?-- I think so. I can't specifically remember. He didn't do anything to me the rest of the night, but I think he might have stayed over. I think a few of them stayed over.

And you say he offered to show you some money?-- Yes, he used to have - he had this thing - it was like a red pouch, and he just had coins in it from his country, and I just remember he asked me if I wanted to see it and I said yes, because it was interesting. He had these different coins from his country.

Did he ask you to sit on his lap?-- Yes. He said, 'Come and sit on my lap', so I sat on his lap because he was going to show me these coins.

And there were people around?-- Yes.

Within a metre or two of you?-- They were around us. They weren't like - because we were sitting in the lounge room. There was our kitchen - it's like an open space and there was people in the kitchen and there was people in the lounge room, but there wasn't really anyone sort of in this like really close sort of vicinity.

I'm not suggesting they were standing right up against the lounge or up against you or Jimmy, but there were other people in the lounge room?-- Yes, there was.

So within a few metres?-- Yes.

And you say he put his hand up your skirt while you were sitting on his lap?-- I was sitting directly on top of him. He just - I just remember - because I was only really little, and he just put his hand underneath, but no-one else could see. No-one said anything. I don't think anyone could see what he was doing.

All right. And who else was there?-- Mum was there, I remember. I think Joe was there. Albert was there. I think - I think some of the kids were there as well, but it was mainly just adults.

You didn't cry out when this happened?-- I just froze. I was just - I just remember I just felt completely helpless. Like something horrible was happening to me, I was just sitting there and no-one could see anything and I didn't know what to say.

How long did this rubbing on your vagina go on for?-- I don't remember it being particularly that long. I think it was just a couple of minutes."

- [68] The complainant, SG, made no mention of Joe at all in her evidence-in-chief. She was not asked about him in cross-examination.
- [69] In my respectful opinion, the failure by the learned trial judge to warn the jury specifically of the disadvantage to the appellant of the loss of the testimony of Joe by reason of the delay in bringing the complaints against the appellant to trial was a failure to give the warning required by *Longman v The Queen*.
- [70] The appellant's Counsel at trial did not seek a more specific warning from the learned trial judge. It is not possible to attribute this failure to a legitimate or reasonable forensic choice by Counsel. The appellant could have gained no forensic advantage by refraining from seeking a more specific *Longman* direction. That being so, this Court cannot ignore the uncorrected deficiency in the trial judge's warning to the jury on the basis that it was a deliberate forensic choice by the appellant's Counsel.
- [71] It cannot be said that this Court could, pursuant to s 668E(1A) of the *Criminal Code*, uphold the conviction, notwithstanding the insufficiency of the *Longman* direction, on the basis that this Court can be satisfied that no substantial miscarriage of justice occurred. It cannot be said convictions were inevitable on the evidence. There are aspects of the evidence in the Crown case which could have been viewed differently had the jury been given an adequate *Longman* warning.

Orders

- [72] The appeal against conviction should be allowed. The convictions should be set aside and there should be an order for a new trial on all counts save count 6.
- [73] **JONES J:** I have had the opportunity of reading the draft reasons of Keane JA in this matter. I agree with his Honour's reasons and with the orders proposed.
- [74] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Keane JA, and with the orders he proposes.