SUPREME COURT OF QUEENSLAND

CITATION:	*R v Douglas* [2019] QCA 215
PARTIES:	**R** **v** **DOUGLAS, Dennis Norman** (applicant)
FILE NO/S:	CA No 213 of 2018 DC No 1646 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 26 July 2018 (Rafter SC DCJ)
DELIVERED ON:	15 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2019
JUDGES:	Fraser and Philippides and McMurdo JJA
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of eight counts of child sexual offences – where the appellant appeals his convictions on the ground that the trial judge failed to give an adequate *Longman* direction – where the offending conduct dated back to when the complainant was ten years old – where the complaint was first made when the complainant was almost 17 – where the trial judge acknowledged the passing of time and directed the jury that they should "carefully scrutinise the complainant's evidence before arriving at a conclusion of guilt" – where the trial judge did not use the words "dangerous to convict" in accordance with the *Longman* direction articulated in the Benchbook – whether the direction given by the trial judge was inadequate such that it caused a miscarriage of justice *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60, applied *R v MBX* [2014] 1 Qd R 438; [2013] QCA 214, considered *R v MCD* [2014] QCA 326, considered *R v MCN* [2018] QCA 101, considered *R v Said* [2009] VSCA 244, considered

COUNSEL: P J Callaghan SC for the appellant
C N Marco for the respondent

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

[1] **FRASER JA:** I agree with my colleagues' conclusion that the appellant has not established his contention that a miscarriage of justice was occasioned by the absence from the trial judge's "*Longman*[1] warning" of the expression "dangerous to convict".

[2] The appellants' core proposition of law is that, where circumstances of the general kind described in *Longman* exist, a trial judge's omission to use the expression "dangerous to convict" is a misdirection unless the trial judge articulates the compelling circumstances which justify that expression not being used. That proposition is based upon a statement by Morrison JA (with whose reasons the President and Atkinson J agreed) in *R v MCN*[2] that "the Bench Book directions should be followed unless there are compelling reasons not to do so". That this is merely a counsel of prudence, rather than a proposition of law, is demonstrated by two matters. First, although the expression "dangerous to convict" was not used by the trial judge in *MCN*, Morrison JA held that, "[b]earing in mind that there is no set formula for the words required, and each depends upon the case, the direction was sufficient in the circumstances of the particular case."[3] Secondly, the proposition is irreconcilable with the purpose of the Bench Books, expressed in various places including the foreword, of providing guidance and assistance to trial judges in devising a summing up appropriate in a particular case, rather than establishing any inflexible or mandatory regime.

[3] Otherwise I agree with the reasons given by Philippides JA for concluding that the appellant has not established his ground of appeal, and I also agree with the reasons given by McMurdo JA.

[4] **PHILIPPIDES JA:** On 26 July 2018, following a trial, the appellant was convicted, by jury, of eight counts of child sexual offences against the complainant, who was born on 26 August 1996. They comprised one count of indecent treatment of a child under 16 (count 1), six counts of indecent treatment of a child under 16 under care (counts 2-7) and one count of attempted indecent treatment of a child under 16 (count 8).

[5] The appellant appeals his convictions on the sole ground that the trial judge failed to adequately direct the jury in terms of the *Longman* direction[4] and, specifically, that his Honour did not use the words "dangerous to convict" in directing the jury.

Evidence

The complainant's evidence

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1 *Longman v The Queen* (1989) 168 CLR 79.
2 [2018] QCA 101 at [62].
3 [2018] QCA 101 at [61].
4 *Longman v The Queen* (1989) 168 CLR 79.

[6] The complainant came to know the appellant because his mother was a close friend of the appellant's sister. The appellant would visit his family from time to time with his sister.[5] There would be general catch ups and events such as Riverfire or New Year's Eve.[6] Until the complainant was 11, his family lived at Albany Creek, after which they moved to a house with a pool at The Gap.[7]

[7] There were many visits to the Albany Creek residence by the appellant, who showed an increasing interest in the complainant. This began with expressions of general interest in the complainant's life and progressed to the point where the appellant would come over to the then 10 year old complainant, when his was on the couch watching television, and place a blanket over both of them, then rub the complainant's leg and progressed to touching his genitalia, which happened "a fair few" times.[8] The complainant described the appellant "slipping his hand underneath my pants and underwear and resting his hand on my genitalia". He could not recall the clothing he was wearing when the touching occurred.[9] Over the following five years, there were "many occasions where [the appellant] would come over and engage ... in matters such as that".[10]

[8] After the family moved to The Gap, the appellant's conduct "escalated" to masturbating the complainant and performing oral sex. The masturbation occurred on a "very, very large amount" of occasions, a "minimum once a fortnight", including times when the appellant would be asked to babysit.[11] It would occur in the bedroom, the living room and "sometimes even the pool". The complainant said that the appellant performed oral sex on him on "[a]t least 15" different occasions.[12] There were "many instances" of the appellant continuing such conduct.[13]

[9] The first occasion upon which the complainant made these allegations against the appellant was at a school retreat in July 2013. They arose during a session at which students were encouraged to talk about personal issues.[14]

[10] The following eight counts were identified.

Count 1

[11] Count 1 related to "[o]ne overwhelming memory"[15] of conduct of a sexual nature. It concerned the complainant's memory of the first time the appellant touched his genitalia.[16] This occurred at the Albany Creek home when the complainant was around 10 years old. The appellant sat on the couch beside the complainant. The appellant slipped his hands underneath his clothing and cupped his penis with his hands. The complainant could not recall how long the appellant did that. The complainant felt "a little confronted" but the appellant assured him that it was

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5 AB at 435.11-13.
6 AB at 434.7-10.
7 AB at 224.
8 AB at 434.24-47.
9 AB at 435.
10 AB at 436.45-437.1.
11 AB at 437.
12 AB at 438.
13 AB at 444.
14 AB at 319.25-31.
15 AB at 461.11-12.
16 AB at 435.4-10.

"completely normal". The complainant did not say anything to anyone about that incident because he was somewhat embarrassed and had been assured it was normal.[17] Conduct of this kind continued for about five years.

Counts 2, 3 and 4

[12] Counts 2, 3 and 4 concerned an occasion when the appellant was babysitting the complainant and his siblings. The complainant was about 12 years old and his parents had gone away for their wedding anniversary. The complainant said that he recalled the appellant had taken them to Mount Coot-tha for dinner. That detail was not included in the complainant's police interview but was first mentioned in his pre-recorded evidence in 2018.[18] The complainant said that after returning from Mt Coot-tha, the appellant masturbated him twice and then performed oral sex upon him.

[13] The complainant said that after they returned home, he sat on a couch with the appellant, while his siblings sat on a different couch. The appellant put a blanket over the complainant because he was cold. While the complainant was playing video games, the appellant slid his hand down the top of the complainant's shorts and masturbated his penis. The complainant's brother and sister were in the room watching the video game. The complainant was not sure if the lights were off the entire time. After a while, the appellant put his siblings to bed and then returned to the lounge room and continued masturbating the complainant's penis.

[14] The appellant then suggested that the complainant should also go to bed and took the complainant upstairs. The complainant said that the appellant unscrewed the doorknob to his room so that entry could not be gained. The appellant removed the complainant's shorts and started masturbating his penis again. The complainant was sitting on his bed. The appellant then performed oral sex on the complainant for about five to 10 minutes. The appellant told him, "I would like you to try and ejaculate this time".[19] The appellant was masturbating himself at the same time. The appellant continued until the complainant ejaculated. The appellant told the complainant that he was "proud" of him for ejaculating.

[15] The complainant said that after he ejaculated, the complainant said that the appellant gave him "a bottle of KY lubrication"[20] which was about the size of a Dettol hand sanitiser bottle and told him to use it while he masturbated. The complainant put the lubricant in the top drawer of his dresser and did not retrieve it ever again. The complainant thought he was about 12 years of age when that incident occurred.

[16] The complainant said that the appellant continued to masturbate him and perform oral sex upon him "[a]t least 10 times"[21] after this occasion. He said that the appellant would "act in a sexual manner" when swimming in the pool with the complainant, grabbing pool toys and acting as if they were his own penis, and

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17 AB at 435-436.
18 AB at 478.14-17.
19 AB at 440.
20 AB at 441.18-19.
21 AB at 442.39.

asking the complainant to go under the water to watch him masturbating with a pool toy.[22]

Count 5

[17] Count 5 related to an occasion when the complainant said he was "around 12 or 13 years old" and was taken, with his brother, by the appellant to a public swimming pool on the Sunshine Coast. After they had been swimming and were on their way out, they went into the change rooms because the appellant had decided to get changed. The two boys remained in their board shorts. The complainant said that the appellant "dried himself but he seemed he was putting a lot of emphasis on drying his genitals"[23] which could be easily seen and were exposed for two or three minutes. The appellant also said that this was "a men's change room" and that you are supposed to get changed and dry yourself "in the full nude". That was the only occasion that the appellant took the complainant to a public pool.[24]

[18] Evidence was also given by the complainant's brother of being with the appellant in the change rooms of a public swimming pool. His evidence was that after the appellant dried himself he pulled his pants down and, by moving his body, caused his penis to swing around for a couple of seconds and then got dressed.[25]

Counts 6 and 7

[19] Counts 6 and 7 related to an occasion, when the complainant was alone with the appellant in the swimming pool at The Gap, when he was "around 12 or 13". The complainant said that his brother and sister had been in the pool earlier in the day but they had gone in the car with their mother "to go do something". He was left alone in the pool with the appellant who masturbated the complainant under the water.[26] Then the appellant said that he was going to do something that would feel good and be new and performed oral sex on him. The appellant did that for four or five minutes, coming up for air as he needed to. The complainant ejaculated and the appellant told him that he was proud of him. This was the only occasion that the appellant masturbated and performed oral sex on the complainant in the pool.[27]

[20] The complainant said that after that occasion there were many instances of the appellant doing things like that (masturbating and performing oral sex) on different occasions but that he did not recall the details because he tried to not remember them.[28]

Count 8

[21] Count 8 concerned an occasion that occurred during a function at the house of the appellant's mother when the complainant said he was about 14 years old. The appellant asked the complainant to follow him to the garage under the house and had begun unfastening his shorts when the complainant said, "I don't want to do this any more". The appellant said, "No, yes, you do" to which the complainant

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22 AB at 442.24-30.
23 AB at 443.7-9.
24 AB at 442-443.
25 AB at 497.36-42; 501.7-24.
26 AB at 444.21-24.
27 AB at 443-444.
28 AB at 444-445.

responded, "No, I don't" and punched the appellant in the head.[29] The complainant said he was wearing his school shorts.[30]

The complainant's cross examination evidence

[22] In cross examination, the complainant admitted that he had told lies as a child, these concerned not getting into trouble with his parents over minor things, like not opening the Milo jar. He has not told lies to people in authority.[31] He accepted that he had been required to undertake community service at high school for not abiding by teachers' instructions. The complainant did not remember lying to a teacher about leaving the school during school hours but accepted that the school kept accurate records.[32] The complainant agreed that his parents often argued and that he had contact with the Department of Child Safety. The complainant had received sexual education at school and was aware of "stranger danger". He was aware that he should report any sexual impropriety.[33] The complainant said he felt was comfortable with the appellant's sister who was like an aunt to him and that he treated the appellant like an uncle.[34]

[23] The complainant agreed he went on a school camp at the end of July 2013 and that he later made a complaint to his school who contacted the police who took a statement from him on 8 August 2013. He was then in Grade 12. The complainant received counselling from a child psychologist for the remainder of the year. The complainant accepted that he had told the child psychologist that there had been problems at home as a result of family dynamics, in addition to the sexual abuse.[35]

[24] The complainant was asked about a photo of the living room at the Albany Creek house, which he accepted showed the furniture as the same at the time when he was first touched on the penis by the appellant. The complainant agreed the photo was taken from inside the kitchen and that a person in the kitchen had a clear view to the TV and TV room. The complainant agreed that his mother, father and the appellant's sister were in the kitchen when the appellant was touching him. He said he was on the couch furthest to the left and that he and the appellant were lying down.[36] He accepted that, while he stated in his evidence that there was a blanket covering him, he did not mention that in his police statement, but maintained that he had no concern about his memory not being accurate as he had a clear recollection of being covered by a blanket.[37] The complainant also maintained that the appellant told him that what was happening was "normal", even if he had not mentioned that in his statement. The complainant maintained that, given the appellant's reassurances that it was normal, and with others close by, it seemed quite safe and normal.[38] The complainant agreed that following count eight, he chose not to see the appellant again and did not see him.[39]

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29 AB at 445.39-42.
30 AB at 446.8.
31 AB at 452.47.
32 AB at 453-454.
33 AB at 455-456.
34 AB at 458.
35 AB at 459-460.
36 AB at 463.
37 AB at 463-464.
38 AB at 464-465.
39 AB at 467.35-36.

[25] The complainant was shown a video recording which he agreed depicted him, his brother and sister and the appellant's daughter. The complainant agreed that it had been taken at the appellant's mother's house but did not specifically recall the occasion, but said, "It's probably just one of the occasions that we were there".[40] The complainant could not recall whether the last occasion that he was at the appellant's mother's place was for Riverfire 2011 but accepted that could be the case, although he did not have any recollection of it.[41]

[26] In relation to counts 2 to 4, which concerned the complaint that the appellant molested him for 10 to 15 minutes, the complainant said he had not yet come to the conclusion that that was not the correct thing to do. The complainant could provide no reason as to why he did not get up as he had done on the first occasion other than how the appellant was sitting close to the exit and the appellant's stature.[42] The complainant said that his siblings did not have a turn of the video game. The complainant did not mention the trip to Mount Coot-tha to police in his statement as he had only realised it occurred at this time a couple of years ago.[43] The complainant said that that was the first time the appellant removed the door handle but he would remove the door handle every time. The complainant rejected that the appellant did not on any occasion dissemble the door handle.[44] The complainant maintained that the appellant had removed the lubricant from his pocket. He said that his parents found the lubricant years later when cleaning out his drawers but he did not know whether that was when he was still at school. He agreed he told them that he did not know from where he got the lubricant.[45] The complainant was not sure if he saw the appellant after his parents discovered the lubricant.[46]

[27] In relation to count 5, which the complainant said occurred when he was in grade 8 or 9 and the appellant took him and his brother to public pool, the complainant could not say how long after counts 2 to 4 that this occurred, other than it occurred on a weekday while they were on holidays. The complainant did not recall his sister attending with them. The complainant said that he entered the change room with the appellant because the appellant had told him to.[47]

[28] The complainant accepted that, in respect of counts 6 and 7, his brother and father may have remained at the house while his mother and sister left the house, but did not accept that the appellant's sister's friends were present that day. The complainant rejected the proposition that he had never been alone with the appellant in the pool at the house.[48] The complainant said that the photo of the pool he was shown did not fully represent the pool surroundings.[49]

[29] The complainant agreed that, after recounting counts 6 and 7, he said in his police statement, "There had been other occasions where [the appellant] had made other advances towards me while I was studying alone in my bedroom, although I may

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40 AB at 468-469.
41 AB at 470.
42 AB at 476-477.
43 AB at 477-478.
44 AB at 482.
45 AB at 483.29-30.
46 AB at 482-484.
47 AB at 473-474.
48 AB at 471-473.
49 AB at 476.

not have been completely aware as I was concentrating on other matters".[50] The complainant agreed that the first time he provided estimates of the number of occasions that the appellant abused him was in evidence in chief. He had been thinking about the number of times since he provided his police statement.[51] The complainant did not accept that his parents did not go out much at all together when he was in school. The complainant said that the appellant babysat him on more than two occasions.[52] The complainant did not agree that the appellant's sister would also babysit.

The evidence of the complainant's brother

[30] The complainant's brother gave evidence in relation to count 5. He stated that there was only one occasion when he and his brother and the appellant went to a public pool. The appellant drove them there. He described going into change room after swimming and that he and his brother went into separate cubicles to get changed and that when they came out he "basically saw [the appellant] expose himself after a fellow patron had walked out".[53] He said that the appellant acted "Pretty weird". He said that the appellant started 'swinging his penis around, sort of thing",[54] which he maintained in cross examination. He was unable to recall the time the incident occurred, other than that it was either between school holidays or on a weekend.[55]

The evidence of the complainant's mother

[31] The complainant's mother was married in 1992. In mid-2007, the family moved from Albany Creek to The Gap.[56] From about 2005 until 2011, the family would go to the house of the appellant's family and spend Riverfire with them. When they lived at Albany Creek, the appellant would also stop in to have dinner. The complainant's mother recalled seeing the appellant every couple of weeks. The appellant would sit on the couch in the lounge room with the complainant talking.[57] When they moved to The Gap, the appellant visited more frequently. He collected the complainant from school about four or five times when she had appointments with the other children. He would swim in the pool with the children. She particularly recalled that frequently occurring over the summer of 2009-2010. She described the appellant as very attentive of the complainant and said they would often play video games in the rumpus room.[58]

[32] The complainant's mother recalled an occasion on her wedding anniversary, in September 2009, when the appellant looked after the children overnight so that the complainant's mother and father could travel to the Gold Coast to spend a weekend together. The appellant told her that he had taken the children to a public pool at Caboolture.[59]

[33] The complainant's mother said she found a bottle of KY lubricant in one of the appellant's drawers around Christmas 2009,[60] which differed from her statement

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50 AB at 474.44-46.
51 AB at 480-481.
52 AB at 481.
53 AB at 497.4-5.
54 AB at 497.37.
55 AB at 502.
56 AB at 223-224.
57 AB at 226-227.
58 AB at 230.
59 AB at 231-232 and 310.
60 AB at 231.

that it was at the end of 2008.[61] In cross examination, she said that the complainant told her that the appellant had given it to him, but she conceded that her statement said that the complainant told her that he had found it in the appellant's car[62] and that that was likely to be accurate. She told the appellant's sister about it.[63]

[34] In cross examination, the complainant's mother denied that she had read the complainant's police statement.[64] She said that they moved to the Albany Creek residence on 2 July 1993. She was shown some photographs and identified where they were taken and who was depicted. The photographs were tendered by the appellant.[65] The complainant's mother did not accept that the appellant would not visit their home without his sister when they lived at Albany Creek.[66]

[35] The complainant's mother said she was a very hands on mother and maintained that on the only occasion that the appellant looked after the children overnight, she was in frequent contact with the appellant and the children.[67] The complainant's mother rejected that the appellant was an infrequent swimmer in their pool.[68] She viewed a video recording which she said could have been taken from Riverfire 2011. The section of the Riverwalk outside their house was washed away in the 2011 floods and it cannot be seen in the footage.

[36] The complainant's mother accepted that as a result of an allegation made on 1 September 2004 of potential physical abuse involving the complainant's brother, the Department of Child Safety became involved with her family.[69] There was then regular contact between the Department and her family, including the complainant, until 6 July 2007.[70] There was a further interview with the complainant on 21 July 2010.[71] The complainant finished at his junior school in 2008 and started at his senior school in 2009.[72]

The evidence of the complainant's father

[37] The evidence of the complainant's father was that in the year before moving to The Gap they would see the appellant about once a month when they lived at Albany Creek.[73] The appellant's visits were more frequent at the house at The Gap. The appellant would interact with the children more than he did with him or the appellant's mother. The appellant babysat the children when they were living at both houses on more than one occasion, including on the occasion of his 14th wedding anniversary.[74]

[38] In cross examination, the complainant's father did not agree that the appellant's sister attended the house at Albany Creek as frequently as the appellant. He accepted that he told police that the appellant had babysat his children only one time and that in May 2011 he told police that he had asked all of his children if the

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61 AB at 248-249.
62 AB at 249.14-18.
63 AB 249-250.
64 AB at 232.
65 AB at 233-234, 236-239, 244 and 271-273.
66 AB at 235.
67 AB at 246-247.
68 AB at 251.
69 AB at 256, 260.
70 AB at 261-263.
71 AB at 264-265.
72 AB at 312.
73 AB at 275.
74 AB at 276.

appellant had touched them inappropriately and they made no disclosures.[75] He accepted that, at some stage, at the Albany Creek house he found out that the appellant had "cowlicked" the complainant's brother.[76]

[39] In re-examination, the complainant's father said he had no specific recollection of what he told police in May 2011 and no specific recollection of having a conversation with the complainant about the appellant touching him.[77] An addendum statement from the complainant was tendered in which the complainant said that he had no specific memory of his father talking to him about good touches and bad touches or questioning him about the appellant touching him prior to May 2011.[78]

The evidence of Senior Constable Cleal

[40] Detective Senior Constable Cleal was questioned about inconsistencies in the complainant's police statement, including that the complainant told police that between the first time he was molested and the second time, he knew that what the appellant was doing was wrong[79] and that, in relation to counts 2 to 4, the complainant did not state that, after his siblings went to bed, the appellant returned to masturbate him on the couch.[80] In respect of counts 6 and 7, the complainant said he was 13 years old at the time of that offending. He said that his sister had her friends at their house.[81]

Admissions

[41] A series of admissions were tendered as part of the Crown case, which included that the complainant disclosed the appellant's offending on 28 July 2013, that he said it occurred from grade 6 to grade 9 and that the complainant then made a statement to police on 8 August 2013.[82]

Evidence called by the appellant

[42] The appellant did not give evidence but called his sister to give evidence.[83]

[43] The evidence of the appellant's sister was that the appellant and his wife had a daughter in 2006. They separated in 2009 and divorced in 2010. The appellant moved from Mt Isa to Maleny in 2007.[84] In 2010, he commenced another relationship and from that relationship had another child in 2011.[85] The appellant's sister stated that the appellant and their family celebrated Christmas 2009 in Longreach.[86] Prior to that, every Christmas between 2004 and 2007 was celebrated at Longreach. The appellant's sister said she only visited the complainant's house at Albany Creek with the appellant twice.[87]

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75 AB at 279.
76 AB at 280.
77 AB at 308-309.
78 AB at 418.
79 AB at 316.
80 AB at 317.
81 AB at 317.
82 AB at 319-320 and 419-420.
83 AB at 321.
84 AB at 324-325.
85 AB at 325.
86 AB at 327.
87 AB at 331.

[44] In cross examination, the appellant's sister did not accept that the appellant travelled to Brisbane from Mt Isa prior to 2007. She said she had control of their finances and that the appellant would not have purchased his own aeroplane tickets to travel to Brisbane from Mt Isa without her knowledge.[88]

Adequacy of the *Longman* direction

The appellant's submissions

[45] The appellant argued that this was a case where, by reason of the delay in bringing a prosecution, the appellant lost the means of testing the allegations made against him and the fairness of a criminal trial was necessarily impaired such that it was imperative that a specific warning be given. A warning was required to be given in the form of the direction in *Longman v The Queen*[89] to avoid the perceptible risk of a miscarriage of justice. It was submitted that the circumstances the appellant found himself in were made acute because the complainant made many assertions about the repetitive nature of the alleged conduct which were led in proof of the Crown case with the jury being invited, if satisfied to the requisite standard, to reason from them that it was more likely that the appellant had committed the charged offences.[90]

[46] It was submitted that, had the assertions and the specific allegations distilled from them been made soon after the alleged events, the appellant would have been able to explore in detail the proposition that he was able to offend so often. Evidence of alibi relating to any one (or more) of those occasions may have had a significant impact upon the credibility of the complainant. Further, while the complainant gave evidence of sustained offending, he only asserted "one overwhelming" memory of an incident that occurred at Albany Creek. Although a person in the appellant's situation "always faces the special challenge of 'proving a negative'", when allegations are specific and dates are fixed it may be possible to do that. It was impossible to test the recollection of such a witness, who did not purport (beyond stating his age) to provide any temporal reference for the offending. Nor was it possible, after the time that had passed, to test the plausibility of the allegations by reference to the whereabouts of others who might have been present.[91] The delay in making the allegations created a hopeless situation, particularly since the evidence that the complainant's mother might have been able to provide about the timing of counts 2 to 5 was disturbed within the course of her own evidence in chief.[92]

[47] It was accepted that the trial judge directed the jury in terms that acknowledged the unfairness of this situation and that he explained why this was so and warned the jury that they should "carefully scrutinise the complainant's evidence before arriving at a conclusion of guilt".[93] However, complaint was made that the trial judge did not, in accordance with the *Longman* direction as articulated in the Benchbook,[94] include the words that it would be "dangerous to convict" on the complainant's evidence alone unless, after scrutinising the evidence with great care,

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88 AB at 331-332.
89 (1989) 168 CLR 79.
90 AB at 89.34-41.
91 AB at 461.13-14; 463.3-4.
92 AB at 231.4-6 cf 310.44-45.
93 AB at 93-94.
94 Direction No 63.

considering the circumstances relevant to its evaluation and paying heed to this very warning, they were satisfied of its truth and accuracy. It was acknowledged that, in certain comparable situations, the failure by a trial judge to use the phrase "dangerous to convict" has been found not to have resulted in error but, it was submitted, such cases were decided by reference to their own circumstances and the language used in the relevant directions.

[48] Further, and importantly, it was argued that those cases were decided prior to the decision in *R v MCN*[95] and that the statement therein of Morrison JA[96] that the *Longman* direction, as formulated in the Benchbook, should be followed "unless there are compelling reasons not to do so" did not permit flexible interpretation. Although the comment of Morrison JA should not be read as if it was a statute, nonetheless, it was argued that the words used by Morrison JA conveyed a need for something "forceful and therefore convincing".

[49] Moreover, it was said that, "Trial judges are not free to move out from their position in the judicial hierarchy on terms of their own choosing".[97] In that regard, it was submitted that in *MCN*, "Morrison JA, with agreement, had just reminded all those who preside in the trial division that the words 'dangerous to convict' are, in this context, of 'particular' importance".[98] Their use was self-evidently necessary in order to ensure a "full appreciation" that there is in fact a "danger". To leave a jury without that "full appreciation" was to risk a miscarriage of justice,[99] which was what occurred in the present case.

[50] Relying on the said admonition in *MCN*, it was contended that the trial judge was bound to follow the Benchbook direction in the absence of "compelling reasons" not to do so. It was submitted that the trial judge "did not formally articulate reasons for this conspicuous preterition"[100] and to the extent that there was explanation for the course taken, it rested only in his Honour's exchanges with counsel. It was not found at the point where the Crown prosecutor gave a fairly compelling (and unqualified) account of the reasons why the *Longman* direction should have been given.[101] His Honour expressed concern about the extent of the delay as compared with that which affected Mr Longman himself,[102] but seemed satisfied with the authorities that suggested the question was not to be approached as if it was an arithmetic exercise.[103] His Honour also countenanced the possibility of the requisite direction being "subsumed into a *Robinson* warning".[104] It was submitted that this approach was never likely to be helpful, particularly in circumstances where defence counsel had explicitly disavowed[105] the need for any direction that might be formulated as a result of anything written in *Robinson v The Queen*.[106] It was submitted that none of this could really matter, because despite

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95 [2018] QCA 101.
96 [2018] QCA 101 at [62] (with whom Sofronoff P and Atkinson J agreed).
97 See *BRS v The Queen* (1997) 191 CLR 275 per McHugh J at 306.
98 Appellant's submissions at [40].
99 *Longman* at 91.
100 Appellant's submissions at [33]; cf AB at 408.42.
101 AB at 334.l0-20.
102 AB at 361.
103 AB at 370-371.
104 AB at 361.45.
105 AB at 338.16; 368.19-22.
106 (1999) 197 CLR 162.

querying whether it was "really ... a *Longman*-type case at all",[107] the direction ultimately given by the trial judge reveals that his Honour acknowledged that it was. The conclusion was irresistible, as his Honour told the jury, that the appellant had been prejudiced by the delay and the fairness of the trial had necessarily been impaired. These are precisely the circumstances addressed in *Longman*.

[51] His Honour was therefore obliged to heed the admonition contained in *MCN* and that, if the Benchbook is to be regarded as a "living document",[108] as it had been in other jurisdictions, that authority left no ambiguity as to that which was required of his Honour by this Court.

The respondent's submissions

[52] The respondent submitted that, while there was "some debate" during discussion between the trial judge and counsel about the requirement to direct the jury in accordance with *Longman* and the terms of any such direction,[109] the trial judge in fact directed the jury in accordance with *Longman*.[110] His Honour told the jury that there had been delay in disclosing the offences. The trial judge told the jury that the delay had the consequence of forensically disadvantaging the appellant and how that was so. The trial judge said that the fairness of the trial had also been impaired. The trial judge warned the jury that they "must carefully scrutinise the complainant's evidence before arriving at a conclusion of guilt". The trial judge said that the complainant's evidence must be scrutinised "paying attention to this warning". The trial judge explained that the need for scrutiny arose because of the delay between the date of the alleged offences and the time the appellant become aware of the allegations, the lost opportunity to test the evidence and call evidence casting doubt upon it and the inconsistencies and contradictions in the evidence.

[53] Further, while the trial judge may not have "formally" provided reasons as to why he declined as part of that direction to tell the jury that it would be "dangerous to convict", proper consideration of the discussion with counsel indicated the factors that the trial judge had regard to in so concluding. They included that:

- The forensic disadvantage to the appellant was not in the nature of loss of DNA evidence, but identification of date, assembly of witnesses and alibi.[111]
- The circumstances that pertained in *Longman* were very different to the circumstances in this case, in that in *Longman* there was a 20 year delay involving a child complainant who was six years old at the time of the first count and 10 years old at the time of the last count and there was no corroboration.[112] In the present case, the delay between the end of the offending to the first complaint is only two years. The complainant was 10 to 14 years old at the time of the offending and 15 when he made his complaint.[113]
- The trial judge queried what the forensic disadvantage to the appellant was in relation to count 1, given that the detailed record keeping the appellant's

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107 AB at 398.28-30.
108 *The Queen v Said* [2009] VSCA 244 at [30].
109 Appellant's submissions at [30] and [33] and AB at 334-341, 351, 357, 359-371, 378, 387-399 and 405-410.
110 AB at 193.32-194.37.
111 AB at 335.22-23.
112 AB at 360.7-13.
113 AB at 360.45-361.4.

sister maintained identified only one occasion when the offending could have occurred.[114]

- It was not challenged for counts 2 to 4 that there had been an occasion when the appellant babysat the complainant and they went for dinner at Mount Coot-tha.[115]
- The case had not been conducted in such a way that there would seem to be an issue with alibi in relation to counts 1 to 5.[116]
- There was no dispute that there had been a trip to a public swimming pool.[117]
- There was evidence that provided support for the complainant's evidence for counts 3 to 5.[118]
- The trial judge doubted whether the case was really a "*Longman*-type case at all" but he was content to direct the jury about the potential forensic disadvantages.[119]
- A warning in accordance with *Robinson* contemplated delay as a relevant consideration and encompasses lost opportunities.[120]
- "There is no case saying that the dangerous to convict warning is required in all cases of delay".[121]

[54] The respondent submitted that there was ample authority to support the proposition that a trial judge does not need to direct a jury that it would be "dangerous to convict" in all cases where a *Longman* direction is given. The authorities suggest that relevant considerations include the existence of corroboration or support for the complainant's evidence, the length of the delay, the age of the complainant at the time of the offending and the compliance of the warning otherwise given by the trial judge with *Longman* independent of the failure to use the words "dangerous to convict".

Consideration

[55] The risk of a miscarriage of justice identified in *Longman* is that the consequence of delay in prosecution in testing adequately the complainant's allegations may not be apparent to a jury. The *Longman* direction addresses that risk by means of a warning to which the jury are told to pay heed, rather than a mere comment. The risk of which the jury is required to be warned is the loss of the means of testing the allegations which would otherwise have been open. These include adequately testing the complainant's recollection through the possibility of exploring in detail the alleged circumstances of the offending and adducing evidence against the complainant's account or confirming the accused's denial.

[56] In *Longman*, it was held by Brennan, Dawson and Toohey JJ that the jury should have been told that:[122]

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114 AB at 388.30-36.
115 AB at 390.13-392.23.
116 AB at 393.20-22.
117 AB at 393.39-47.
118 AB at 399.1-24.
119 AB at 398.28-30.
120 AB at 405.14-43.
121 AB at 406.1-3.
122 (1989) 168 CLR 79 at 91.

> "…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."

[57] The *Longman* direction drafted in Direction No 69 of the Benchbook is as follows:

> "The complainant's long delay in reporting the incident she says happened on (insert date) has an important consequence: her evidence cannot be adequately tested or met after the passage of so many years, the defendant having lost by reason of that delay means of testing, and meeting, her allegations that would otherwise have been available.
>
> 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 complainant, the 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 a trial, evidence throwing doubt on the complainant's story [or confirming the defendant's denial] – opportunities lost by the delay.
>
> The fairness of the trial (as the proper way to prove or challenge the accusation) has necessarily been impaired by the long delay.
>
> So I warn you that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy." (footnotes omitted)

[58] It is apparent from the summing up, that the trial judge, having directed the jury that he was giving "a warning required by law", which they "must follow", did give a *Longman* direction in accordance with paras 1, 2 and 3 of the draft Benchbook direction, stating:[123]

> "The complainant's delay in reporting the incidents has the important consequence that his evidence cannot be adequately tested or met after the passage of such time. The [appellant] has lost, by reason of the delay, the means of testing and meeting the allegations that would otherwise have been available.
>
> By that delay, [the appellant] has been denied the chance to assemble, soon after the incidents are alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant the incidents happened. When I refer to incidents, members of the jury, this encompasses not just the charged acts, but the uncharged acts upon which the prosecution rely. So there are multiple acts that fall into this category. And the delay

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123 AB at 93.35-94.7.

> has had the consequence that the [appellant] has been denied the opportunity of assembling, soon after the alleged incidents, evidence as to what he and other potential witnesses were doing when these incidents occurred.
>
> Had the complaints instead been made known to the [appellant] soon after the alleged events, it would have been possible then to explore the pertinent circumstances in detail and, perhaps gather and to look to call at the trial, evidence throwing doubt on the complainant's evidence. That opportunity has been affected by the delay. The fairness of the trial as the proper way to prove or challenge the accusations has necessarily been impaired by that delay."

[59] His Honour did not direct in the exact terms of the last para of the draft Benchbook direction, rather his Honour said:[124]

> "I therefore warn you that you must carefully scrutinise the complainant's evidence before arriving at a conclusion of guilt. You must carefully evaluate and scrutinise the complainant's evidence paying attention to this warning.
>
> The need for careful scrutiny of the complainant's evidence arises because of the following factors. First, as I have already explained, the delay between the dates of the alleged offences and the time when the [appellant] would have been made aware of the allegations, and the consequent lost opportunity to test the evidence and call evidence casting doubt upon it. And, secondly, any inconsistencies and/or contradictions that you find exist in the evidence."[125]

[60] The trial judge did not include in that passage the words that "it would be dangerous to convict". I agree with the respondent's submission that his Honour was not required as a matter of law to include in his direction to the jury in this case that it would be "dangerous to convict".

[61] It is to be noted that in *Longman* itself, Brennan, Dawson and Toohey JJ stated, "there are no set words and the terms of the warning are to be adapted to the circumstances"[126] and Deane J also found support for the use of phrases other than "dangerous" or "safe" such as "should hesitate long" and "to scrutinise with very special care".[127] The statement of Brennan, Dawson and Toohey JJ was referred to by McPherson JA and Demack J in *R v Massey*[128] in rejecting the proposition that the omission of the words "dangerous to convict" in the *Longman* direction given in that case was fatal to any conviction that followed and that the wording of the direction actually given could have left the jury in no doubt of the character and extent of their duty and function in assessing the reliability and accuracy of the complainant's evidence after the lapse of time that had passed. The position was

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124 AB at 94.9-18.

125 The trial judge then identified factors that the jury consider including the differences in the evidence from the complainant's mother as to when the KY lubricant was found and the description of the container and the inconsistencies contended for in respect of count 5 between the complainant's evidence and that of his brother. The trial judge also summarised the defence case pointing out that it was argued that it depended almost entirely on the complainant's evidence, the delay involved and the weaknesses the defence contended for in the complainant's evidence.

126 (1989) 168 CLR 79 at 86.

127 (1989) 168 CLR 79 at 93-94.

128 [1997] 1 Qd R 404 at 405-406.

held to be otherwise where the direction merely refers to the frailty of recollections and the reliability of people after long delays[129] or where reference is made to the age of the offences as giving rise to considerations that merely fell to be weighed in the balance.[130] The question to be considered is whether the judge's direction sufficiently alerted the jury to the dangers of wrongful conviction as a result of the delay and the reasons for the warning.[131] The strength of the warning required in any case will depend on its facts.[132]

[62] In *R v MCD*,[133] the appellant contended, relying on the principles stated by Applegarth J in *R v MBX*,[134] that an inadequate *Longman* direction was given in the absence of the use of the words "dangerous to convict". Gotterson JA[135] (with whom the other members of the Court agreed), after reviewing the authorities, stated that the summary of principles in *MBX* was not prescriptive of the precise words to be used in a *Longman* direction and that the words "dangerous to convict" were not essential for an effective *Longman* direction. (Nor were the words "warn" or "warning", what was essential was that the words actually used must convey to the jury a real sense of warning in what they are being told.) The decision accords with New South Wales[136] and Western Australian[137] authorities.

[63] The position in Queensland was not altered by *MCN*[138] where the Court also rejected the submission that the omission of the words "dangerous to convict" in the direction to the jury in that case rendered the *Longman* direction inadequate. Morrison JA (with whom the other members of the Court agreed) cited passages from *MBX*, but without reference being made to the analysis of that decision in *MCD*.[139] The conclusion reached, however, reflected that in *MCD*. Morrison JA held that, while the jury were not warned, in terms, that it would be "dangerous" to convict, they were told the equivalent; that because the case depended on the complainant's evidence, they could not convict on the complainant's evidence unless it was scrutinised with great care, in part because the delay had denied the appellant the chance to properly test and meet the allegations, and that they could only convict if, after doing that, they were convinced of the truth and accuracy of the complainant's evidence. Those matters were the essential elements of the *Longman* direction. Bearing in mind what was said in *Longman* that there is no set formula for the words required, and each depends upon the case, the direction was sufficient in the circumstances of the particular case.

[64] Having concluded that the omission of the words "warn" and "dangerous to convict" did not lead to a misdirection or miscarriage of justice, Morrison JA added that the decision should not be taken to signify a relaxation of what is required by *Longman* as reflected in the Benchbook direction. His Honour commented that the

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129 *R v E* [1999] QCA 58 at [27]-[37].
130 *R v C* [2002] QCA 166 at [19]-[27].
131 *R v Holdsworth* [2002] QCA 432 at 8.
132 *R v HBH* [2013] QCA 35 at [29]-[32].
133 [2014] QCA 326 at [24]-[30].
134 [2013] QCA 214 at [105]; [2014] 1 Qd R 438.
135 *R v MCD* [2014] QCA 326 at [24]-[30].
136 *R v WSP* [2005] NSWCCA 427 at [4]-[26], [75]-[93], [176]-[185]; *Sepulveda v The Queen* (2006) 167 A Crim R 108 at [177]-[188].
137 *Gaulard v R* [2000] WASCA 218 at [7]-[14]; *Attorney- General's Reference No. 1 of 2001* [2001] WASCA 316 at [10]-[12]; *Crisafio v The Queen* (2003) 27 WAR 169 at [11]-[36]; *Kemp v The State of Western Australia* [2006] WASCA 6 at [2]-[3], [9]-[11], [16], [20]-[24].
138 [2018] QCA 101 at [58]-[62].
139 [2014] QCA 326, on which Morrison JA also sat.

Benchbook directions "should be followed unless there are compelling reasons not to do so" and that the use of the words "warn" and "dangerous to convict", in particular, are important to deliver the relevant warning that *Longman* requires. The appellant seeks to elevate those comments to, in effect, mandating the use of the words "dangerous to convict" except where compelling reasons are given to depart from their use. It does so by referring to the observation of Maxwell P in *R v Said*,[140] who described the Victorian counterpart of the Benchbook as a "living document", providing relevant decisions and guidance so as to minimise appellable error and, as such, one in respect of which there is "every reason to think that judges can – and should – avail themselves of the assistance it provides". Similar observations were made by, the then, Chief Justice de Jersey when highlighting the critical importance of the Benchbook when it was introduced:[141]

> "Before the jury delivers its verdict, the most important task of the Judge who presides at a criminal trial is to sum up the case to the jury. Every summing up is different, being tailored to the circumstances of the case. But many directions are commonly given to juries: for example, those that describe the jury's task, explain the law to be applied, and warn about matters the jury must consider to avoid a perceptible risk of a miscarriage of justice.
>
> The summing-up has to be prepared during trial and is delivered immediately at the conclusion of the addresses of the lawyers. So it must often be prepared in haste, even in complicated cases.
>
> Errors in a summing-up can lead to successful appeals resulting in re-trials. A re-trial always involves additional expense and inconvenience to those involved. And if the re-trial is of a long case, the cost can be very substantial."

[65] While the Benchbook is not to be approached as a statute prescribing mandatory conditions,[142] very careful consideration should be given before departing from the guideline directions so as to minimise appellable error and any departure or modification should be discussed with counsel, as occurred in this case, to ensure avoidance of a miscarriage of justice.

[66] I do not read the comments of Morrison JA in *MCN*, referred to above, as indicating otherwise or advocating a new approach as to the adequacy of a *Longman* direction, or the adoption of Benchbook directions. Rather, his Honour's comments serve to emphasise the importance of the Benchbook as a critical resource in avoiding appellable error, a matter this Court has reiterated on many occasions. Since its introduction in 2001, the Queensland Benchbook has provided succinct guidance to trial judges. It is available online with relevant authorities able to be accessed directly. As with its Victorian counterpart, it can properly be said to be a "living document". It is the product of sitting judges well experienced in criminal trials from the District and Supreme Courts and the Court of Appeal, and has been reviewed on an annual basis and more promptly when the circumstances require it. It is available publicly and is the vital source of reference in every criminal trial in the State's higher courts.

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140 [2009] VSCA 244 at [29]-[30].

141 Supreme Court Annual Report 2000-2001 at 32.

142 *R v Robinson* [2010] QCA 377 at [51]; *R v Tahiraj* [2014] QCA 353 at [87]. See also *R v Clarke* [2005] QCA 483 at [53].

[67] In the present case, the trial judge clearly had close regard to the Benchbook direction and raised and discussed with counsel the modification he intended to make. While the use of the words "dangerous to convict" used in the Benchbook direction would have served to emphasise the seriousness and nature of the risk of which the jury were required to be appraised, the wording of the direction by the trial judge taken as a whole was, in the circumstances of this case, adequate and does not reveal appellable error.

Order

[68] I would order that the appeal be dismissed.

[69] **McMURDO JA:** The facts of this case, and the relevant parts of the judge's summing up, are set out in the judgment of Philippides JA and I need not repeat them.

[70] The question in this appeal is whether, in the terms of s 668E(1) of the *Criminal Code* (Qld), there was a miscarriage of justice, in that the appellant lost the chance of an acquittal, by the jury not being appropriately warned according to *Longman v The Queen*.[143] Substantially for the reasons given by Philippides JA, the warning which was given was sufficient, and it was not made insufficient by the fact that the judge did not use the words "dangerous to convict".

[71] I would not wish to diminish the relevance of the Benchbook in saying that the question in this Court is not whether there was some substantial deviation from the Benchbook, but rather whether there is a demonstrated basis for setting aside the conviction, according to s 668E(1).

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

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[143] (1989) 168 CLR 79; [1989] HCA 60.