SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCN* [2018] QCA 101
PARTIES:	**R** **v** **MCN** (appellant)
FILE NO/S:	CA No 49 of 2018 DC No 380 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 1 March 2018 (Sheridan DCJ)
DELIVERED ON:	1 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2018
JUDGES:	Sofronoff P and Morrison JA and Atkinson J
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CORROBORATION – WARNING REQUIRED OR ADVISABLE – WHERE SUBSTANTIAL DELAY IN COMPLAINT: LONGMAN WARNING – where the appellant was convicted of two counts of sexual offences against his daughter – where there was a three year period between when the offences occurred and the appellant was brought to trial – where the matter involved a child complainant – where both counsel agreed that a *Longman* direction should be given– where counsel for the appellant submitted on appeal that the direction given appeared to be an amalgamation of a *Longman* direction and a *Robinson* direction – where the trial judge did not warn the jury that it would be "dangerous" to convict – whether the direction was adequate or occasioned a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – where some formal admissions were made at the trial – where the jury were expressly told the location of the offences and the specific time period in which they occurred – whether the jury were directed that in addition to being satisfied of the elements of the offence they must also be satisfied of these particulars before they could convict *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60,

cited
R v MBX [2014] 1 Qd R 438; [2013] QCA 214, applied
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited
Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56, cited

COUNSEL: R A East for the appellant
T A Fuller QC for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and the order proposed by his Honour.

[2] **MORRISON JA:** The appellant was charged on three counts of sexual offences against his daughter, who was under the age of 12 at the time. After a three day trial he was acquitted on count 1 and convicted on counts 2 and 3. Each of counts 2 and 3 was framed as follows:

> "… on a date unknown between the 15th of March, 2012 and the 15th day of February 2013 at Zillmere in the State of Queensland [the appellant] unlawfully permitted himself to be indecently dealt with by [the complainant, his daughter] … ."

[3] The factual scenario for each of counts 2 and 3 was the same. While staying with her father in his house at Zillmere, the appellant got his daughter to massage his stomach with baby oil. As that happened he gradually pulled his pants down until his penis was revealed. He got his daughter to rub his penis, wrapping her hands around it. She alternated between rubbing his belly and rubbing his penis. At the time the appellant was on his bed.

[4] The facts for count 1, on which the appellant was acquitted, were quite distinct. That occasion was said to have occurred in a pool, when both the appellant and his daughter were naked[1] and whilst hugging her, his penis came in contact with her genital region.

[5] The amended notice of appeal challenges the verdicts on counts 2 and 3, on two grounds:[2]

(a) ground one – the failure of the trial judge to adequately direct the jury in terms of the *Longman* direction amounted to a miscarriage of justice; and

(b) ground two – the trial judge ought to have directed the jury that on the way the Crown case was particularised, in addition to being satisfied as to the elements of the offence, the jury has to be satisfied beyond reasonable doubt that the offences occurred at the time and place alleged.

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1 In her case, her board shorts were off.
2 The previous ground, unsafe and unsatisfactory verdict, was abandoned.

Relevant factual matters

[6] Some formal admissions were made at the trial, the relevant ones being that the appellant's daughter was born on 9 February 2002, the appellant lived at a particular address in Zillmere between 15 March 2012 and 15 February 2013, and that property backed on to a creek.

[7] As can be seen, the period of time during which the appellant lived at the Zillmere house defined the time period within which counts 2 and 3 were alleged to have occurred. During that period the appellant's daughter was 10 years old, turning 11 on 9 February 2013.

[8] On 10 July 2013, the daughter was first interviewed by police. During that interview she referred to a number of occasions where "inappropriate" conduct occurred on the part of the appellant. In every case it was the appellant putting his hand down his pants and, according to what the daughter observed and believed, masturbating. The daughter did not refer to any other conduct and did not mention anything to do with the pool or massaging with baby oil. She said that she had told her mother about the matters referred to in that interview.

[9] On 9 May 2016, when the daughter was 13, she was again interviewed by the police. During the course of that interview she gave evidence about all counts.

The daughter's evidence

[10] She commenced by saying she had massaged her father's belly with baby oil and "then eventually I would be massaging his … penis".[3] She said that it occurred "in the same house with the creek", which had an electric fence.[4] Her description was:

> "I used to massage his stomach and then gradually he'd start pulling his pants down lower and lower … until eventually … his … penis was sticking out of his pants … I guess I didn't understand anything so I … [w]ould just massage that as well. I would … rub his stomach and then … I would um just like rub his penis thinking, I didn't know. … I would hold it, like wrap my hands around it, I guess, … I didn't know though. … I would only like hold it for like two seconds and I'd go rub his belly again then rub that, his penis again and [rub] his belly."[5]

[11] She explained that her father said she could get the baby oil out of the cupboard and asked her to massage his belly.[6] She also explained that she did not understand if she was meant to be doing that or not. She clarified that as meaning "I had no idea … should I be doing this …".[7] She described the incident as happening "probably about … 8 o'clock, before … I'd go to bed … and it'd be … on a weekend".[8] She said that it had happened twice and each time "it was just the same routine".[9]

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3 Appeal Book (**AB**) 249 line 43.
4 AB 260 line 20.
5 AB 260-261.
6 AB 261 line 40.
7 AB 262 line 10.
8 AB 261 line 34.
9 AB 263 line 27.

[12] When asked how old she was when the massaging occurred the first time, she said "about … nine, 10, 'cause … when it happened it all … happened in about the same year."[10]

[13] She said that she got the baby oil from the bathroom, in a mirrored cupboard.[11] She also got a towel, which she put underneath the appellant so oil would not drip on the bed.[12] After it was over, she said the appellant would pull his pants up and have a shower, she would wash her hands to remove the oil, and she went to bed, in the appellant's bed. She said she slept in his bed because she was scared during the night.[13]

[14] She said that the appellant didn't speak during those occasions but on the second occasion she made some noises:

> "No, he didn't talk at all. Ah, just, well, I didn't, I would just go, I'd like make noises like "rub, rub, rub".[14] … I think I was just, I used to just like say what I was doing like "rub"[15], it was just "rub, rub, wheee; rub, rub, wheee".[16] I used to … do that … As I'd go round, 'cause I use to pretend like I was, like my fingers were kinda like skateboarding.[17] I don't really remember."[18]

[15] After having detailed what she said about the incident in the pool, she said that she believed that all of the events had happened within the one year "at the creek house".[19] She said that she was guessing that it was about six months after they moved into that house.

[16] She said that she told her mother about the masturbation occasions at a point when her mother was going to go on holiday and she (the daughter) was supposed to stay with her father for 10 days. She said that she "started to say that I didn't wanna go over there and told her that he, I don't remember using the word, masturbation, but I remember telling her that he … was rubbing his penis next to me …".[20] She thought she was 10 or 11 when she told her mother and pinpointed that by saying she was just finishing grade five at a particular school.[21] She explained why she had not mentioned the baby oil incident at the first interview, referring to what she did say at that interview:

> "… I can't remember what I told her [the detective], but probably about the same thing I told my mum. … [A]t the time I told her about the masturbation, I am pretty sure I remembered about the baby oil incident as well … [b]ut I … didn't wanna tell her and I hadn't told the detective and I kinda forgot about it until mum said this year, at the start of the year, that I was gonna be seeing him again, visitation, 'cause they had been in court and discussed, he can't drink, he can't do like

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10 AB 263 line 54.
11 AB 264.
12 AB 264.
13 AB 265.
14 Speaking the word, and using her right hand at this point to demonstrate a circular movement.
15 Using her right hand at this point to demonstrate the movement.
16 Speaking the words.
17 At this point she used her right hand and two fingers to demonstrate a figure skateboarding.
18 AB 265 line 49 to AB 266 line 3.
19 AB 270.
20 AB 272 line 55 to AB 273 line 2.
21 AB 273.

> the [indistinct] thing so … that's when I started remembering again."[22]

[17] In her oral evidence given pursuant to s 21AK of the *Evidence Act* 1977 (Qld) she explained that after the first police interview she had no contact with her father until about two years later, when she started seeing him again. Then in 2016 she told her mother about what had happened, and her mother organised another police interview. She explained that she did not verbally speak to her mother about what had happened, but wrote on a piece of paper. That became exhibit 1. When explaining how she came to write the hand written note to her mother, revealing the various events, she said that at the time she wrote it she wasn't sure about what house was involved, but that she now knew it was "definitely in the house with the creek".[23]

[18] In the handwritten note she revealed that the appellant would get baby oil and she would rub his tummy, that he wouldn't force her but he would "slowly lift down his pants lower & lower and eventually I would be rubbing his you know what. I think it happened only twice. I was only like 8. I didn't know I promise".[24] The note went on to refer to the swimming pool incident which she said happened when she was "7 – 8".[25]

[19] She said both incidents of rubbing baby oil "happened at the house with the creek out the back".[26]

[20] In cross-examination she was asked how old she was when those events occurred and she answered: "Nine, 10 – somewhere in that period, because it was the same time as … when we were living in the house with the creek out the back".[27]

[21] She was cross-examined about where she got the baby oil from, and she answered "one of the cupboards with the mirror on the front and you'd open up the mirror".[28] She could also remember getting the towel. She was confronted by the fact that her note said that the appellant would get the baby oil, and she explained that the discrepancy was that "when I was writing it down, I wrote it really quickly, and … I … didn't want to put images in my head, so I wrote it down as fast as I could".[29]

[22] She was cross-examined about whether anything was said, when it occurred (she said the evening), how dark it was in the room and whether the lights were on, and for how long she touched him.[30] She said she first realised it was wrong when she started to remember the events in 2016.

[23] She was asked again in cross-examination when the events occurred, and again she said it was "definitely in the house with the creek out the back, in his room".[31]

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22 AB 273 line 55 to AB 274 line 13.
23 AB 277 line 7.
24 AB 217. Emphasis in original.
25 AB 218-219.
26 AB 24 line 15.
27 AB 39 lines 29, 42.
28 AB 40 line 11.
29 AB 42 line 23.
30 AB 43.
31 AB 44 line 23.

[24] It was put to her that the allegations of using baby oil and touching the appellant's penis did not occur as she had described, and that the only time she had rubbed the appellant's body was when he had sunburn, and she rubbed his back with vitamin E cream.[32] She denied that was the case, and said that she had never rubbed her father's back with vitamin E cream.

[25] Later it was suggested that she had made up the complaints because she did not want to see him again.[33] Those suggestions were denied.

The direction

[26] In this case the Crown and Defence Counsel were agreed that a *Longman* direction should be given, and that was accepted by the learned trial judge. A combined *Robinson* and *Longman* direction was suggested by both the Crown and Defence Counsel.[34]

[27] However, Defence Counsel submitted that it should include language to the effect that it would be dangerous to convict, so that it had the full force of judicial warning, but ultimately left it to the learned trial judge.[35] The learned trial judge demurred to using the word "dangerous", but indicated that she would consider the position. The Crown submitted that the use of the word "dangerous" was not warranted in the particular circumstances.[36]

[28] In the summing up by the learned trial judge, after dealing with various inconsistencies in the evidence, including the preliminary complaint evidence, her Honour said this:

> "Here, you will be considering those inconsistencies as part of your overall assessment of the complainant, … remembering the Crown case rises or falls on your assessment of her evidence. You will need to assess both the truthfulness and the reliability of her evidence. For that reason, you will need to scrutinise her evidence with great care before you could arrive at a conclusion of guilt. This is because of the following: (1) the delay between the time of the alleged incidents and the time the defendant was told of the complaint and by the fact of that delay, the defendant has been denied the chance to assemble evidence as to what he and other potential witnesses were doing when the alleged incidents happened. By the delay, he has lost the opportunity to prove or disprove the allegation by speaking to other possible witnesses, by examining the alleged locations or by establishing an alibi."[37]

[29] The learned trial judge then identified additional reasons why there was a need to scrutinise the complainant's evidence with great care. These included the fact that she did not tell the police about those incidents in her first interview, discrepancies between her written note and her pre-recorded evidence, discrepancies with the preliminary complaint evidence, inconsistencies in her evidence about her age at the

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32 AB 47 lines 22-29.
33 AB 52-53.
34 AB 134 lines 13-18.
35 AB 147 lines 25-30.
36 AB 149 lines 4-6.
37 AB 204 lines 20-31.

time of the pool incident, and the preliminary complaint evidence pointing to the fact that she was unsure, uncertain or doubtful that certain incidents had happened.[38]

[30] The learned trial judge then said:

> "You should only act on [the complainant's] evidence if – after considering if, bearing in mind that you need to scrutinise the evidence with great care and consider it and all the other evidence and, having done that, you are convinced of its truth and accuracy."[39]

[31] Shortly thereafter the learned trial judge dealt with each of the counts and the elements of those charges. The jury were told that on counts 2 and 3 the particulars of each charge were that "the defendant allowed himself, on separate occasions, at the house with a creek at the back – the house at Zillmere to be dealt with by the complainant by allowing her to touch his penis as he lay on a bed".[40]

[32] Then, having dealt with the meaning of the phrases within the offence her Honour said:

> "So, here, once again, in terms of the proof of the elements of these charges, the Crown case will rise or fall on whether you accept the evidence of the complainant. You must accept beyond a reasonable doubt her evidence that the defendant allowed, on separate occasions at the house at Zillmere, the complainant to touch his penis as he lay on a bed."[41]

[33] The jury were then reminded that the Crown's case "rises or falls on whether you accept the evidence of [the complainant] as being both reliable and credible beyond a reasonable doubt".[42]

[34] No further redirection was sought in respect of the *Longman* direction.

Submissions

[35] Mr East, appearing for the appellant, submitted that the direction given appeared to be an amalgamation of a *Longman* direction and a *Robinson* direction. The purpose of a *Longman* direction was a warning intended to bring the jury's attention to the danger that an accused faces in dealing with an account given long after the event alleged. The significant lapse of time meant that the accused could not adequately test the complainant's evidence, including not being able to explore in cross-examination matters of detail. That inability to test or meet the complainant's evidence may ultimately cause the complainant's evidence to become more plausible, rather than less so.

[36] He submitted that the direction given to the jury did no more than to identify that because of the delay between the time of the alleged incidents and the time that he was made aware of the complaint, he was denied the chance to assemble evidence as to what he and other potential witnesses were doing when the alleged incidents happened. The reference to a lost opportunity to prove or disprove the allegation by speaking to other possible witnesses, examining alleged locations or establishing an

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38 AB 204-205.
39 AB 205 lines 18-20.
40 AB 207 lines 1-3.
41 AB 207 lines 23-27.
42 AB 207 line 36.

alibi, was simply a repetition of the difficulty in assembling evidence outlined above.

[37] Further, there was difficulty for the jury in that even though the Crown had alleged that counts 2 and 3 occurred in a period between two particular dates, the evidence suggested that some of the events may have occurred long before that, making an effective defence even more problematic.

[38] Finally, it was submitted that the jury should have been instructed, because of the way the Crown particularised its case, that they needed to be satisfied beyond reasonable doubt of the time and the place of each of counts 2 and 3.

[39] Mr Fuller QC for the Crown, submitted that the directions given about the elements of counts 2 and 3 contained specific reference to them as having occurred at the Zillmere house, and the jury were directed that they had to be satisfied beyond reasonable doubt on the daughter's evidence, that the appellant allowed her to touch his penis on two separate occasions at the Zillmere house, as he lay on the bed. That had to occur in the dates alleged in the indictment and the subject of admissions. No further direction was warranted.

[40] As for the *Longman* direction, it was submitted that such a direction depends upon the specific facts of the case and the real issues in it. Relying on *Tully v The Queen*,[43] it was submitted that it was unnecessary to direct a jury on circumstances which can be evaluated by the jury in the light of their own experience. The direction told the jury that the daughter's evidence needed to be scrutinised with great care, and identified a number of specific matters that needed to be taken into account, and the reason why. It identified the forensic disadvantage the appellant faced, and the fact that he had lost an opportunity to prove or disprove allegations against him. The warning is not to be given in a formulaic way, and it was implicit in the direction given that the appellant had lost a means of testing or meeting the allegations because of the delay.

[41] Further, the delay in this case was only some four years, unlike the delay in *Longman v The Queen*[44] and other like cases. The length of the delay is of less importance than the actual disadvantage occasioned by it, and whether that disadvantage is not evident to the jury. In this case, the daughter was able to particularise a time frame by reference to a location and nominated other persons and events that occurred within that time frame. It was unnecessary to identify further specific matters to be considered by the jury and the appellant was not disadvantaged.

Discussion

[42] The principles concerning giving or the requirement to give a *Longman* direction were recently rehearsed in *R v MBX*[45]:

> "[68] Neither *Longman* nor *Robinson* is authority for the proposition that it is imperative to give a warning that it is dangerous to convict because the prosecution case depends on the testimony

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43 (2006) 230 CLR 234 at 287 per Crennan J.

44 (1989) 168 CLR 79.

45 [2013] QCA 214 at [68]-[69] per Applegarth J, Fraser JA and Jackson J concurring.

of a child complainant whose evidence is uncorroborated. Nor is the subsequent decision of the High Court in *Tully*.

[69] The justices in the majority in *Tully*, in considering *Robinson*, emphasised that the need for a judicial warning that it would be dangerous or unsafe to convict had to be found in the perception of the risk of a miscarriage of justice where the risk arose for reasons apparent to the judge, but not the jury, beyond the mere fact that the prosecution case depended on the uncorroborated evidence of a child complainant. As Crennan J stated in *Tully*:

> 'The question is whether all of the circumstances gave rise to some forensic disadvantage to the appellant, palpable or obvious to a judge, which may not have been apparent to the jury, thus necessitating a warning so as to avoid a miscarriage of justice. There is a clear distinction between such a case and a case where all the circumstances can be evaluated by a jury in light of their own experiences.'"

[43] In *R v Tichowitsch*,[46] this Court identified the occasion for, and the content of, a *Longman* warning as being as it is described in the joint judgment of Brennan, Dawson and Toohey JJ in *Longman v The Queen*:[47]

> "But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them: see *Reg. v Spencer* ([1987] AC 128 at p141). That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay … and it was imperative that a warning be given to the jury. The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice. The jury were told simply to consider the relative credibility of the complainant and the appellant without

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46 [2007] 2 Qd R 462 at 482-483, [60]; [2006] QCA 569.

47 *Longman v The Queen* at 91.

> either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient."[48]

[44] As was said by Applegarth J in *MBX*,[49] the content of a *Longman* direction starts with the joint judgment in *Longman's* case. Its essence is that delay, especially if lengthy, may create a forensic disadvantage to an accused in adequately testing allegations or adequately marshalling a defence. It is the forensic disadvantage to which the warning is directed.[50]

[45] Applegarth J summarised the relevant principles relating to a *Longman* direction in *MBX*:[51]

> "2. … the "*Longman* direction" is not a statute, and no particular form of words is required. But authority requires it to be in the form of a warning. The warning must be given the imprint of the Court's own authority.
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> 3. The warning relates to the matters stated in the joint judgment in *Longman*, namely that after the passage of many years, the evidence of the complainant cannot be adequately tested or met.
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> 4. The identified danger, which is based on the accumulated experience of courts, should be explained to the jury. In essence, it is that an accused can only forensically test whether the complainant's account is untruthful or unreliable after he or she is informed of the allegation. Because of the lapse of time the accused cannot adequately test the complainant's evidence, including not being able to explore in cross-examination matters of detail. The inability to adequately test or meet the complainant's evidence may make it more plausible. The difficulties encountered in adequately testing or meeting the evidence may require some elaboration.
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> 5. The jury is to be warned 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 the warning, it is satisfied beyond reasonable doubt of its truth and accuracy."[52]

[46] The full *Longman* direction as contained in the Bench Book is in the following terms:

> "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.

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48 *Longman v The Queen* at 91.
49 *MBX* at [77].
50 Citing *R v WSP* [2005] NSWCCA 427 at [30].
51 *MBX* at [105].
52 Internal citations omitted.

> 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 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 accusations) has necessarily been impaired by the long delay.
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> 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."[53]

[47] There are a number of elements contained within the direction actually given (see paragraphs [28] to [30] above), which include:

(a) that the Crown case rose or fell on the assessment of the complainant's evidence;

(b) that her evidence had to be assessed for its truthfulness as well as its reliability;

(c) because of the need to test both of those things, the jury had to scrutinise the complainant's evidence with great care before they could arrive at a conclusion of guilt;

(d) one reason for that was because of the delay between the time of the alleged incident and the time the defendant was told of the complaint;

(e) because of that delay the defendant had been denied the chance to assemble evidence as to what he and other potential witnesses were doing when the alleged incidents happened;

(f) because of the delay the defendant had lost the opportunity to prove or disprove the allegation; that opportunity may have included speaking to other possible witnesses, examining where the events were supposed to have happened or by establishing an alibi;

(g) the jury should only act on the complainant's evidence if, after considering it, bearing in mind that they need to scrutinise it with great care, and to consider it and all the other evidence they are convinced of its truth and accuracy; and

(h) since the Crown case rose or fell on the complainant's evidence, the jury could not convict unless, after scrutinising her evidence with great care, and considering it and all the other evidence, they were convinced of its truth and accuracy.

[48] It is true to say that the direction given by the learned trial judge does not use some of the precise words in the Bench Book direction, particularly that it would

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53 Supreme Court and District Court Bench Book No 69.

"dangerous to convict upon the complainant's testimony alone" unless it was scrutinised with great care.

[49] Further, the direction does not contain the precise words that the appellant had lost, by reasons of the delay, "means of testing, and meeting, her allegations". However, there were words which, it is contended, amounted to the same thing, namely that the appellant had "lost the opportunity to prove or disprove the allegation".

[50] The jury had been directed specifically, and could not have misunderstood, that there was no burden of proof upon the appellant.[54] Therefore when they were told that the appellant had "lost the opportunity to prove or disprove the allegation", I do not consider that they would have understood that to mean that the appellant had assumed some sort of burden of proof. That burden, as they were told clearly, always lay on the Crown.

[51] In *Robinson v The Queen*[55] the factor which demanded a suitable warning derived from delay was expressed this way:

> "… the long period that elapsed before complaint, which in turn meant that it was impossible for a medical examination **to verify or falsify the complaint,** and the inconsistency in some aspects of the complainant's evidence as to whether penetration occurred."

[52] In the Bench Book the suggested *Robinson* direction uses the phrase "prove or disprove" in a way which is synonymous with the ability to verify or falsify the complaint, or to test and meet an allegation:[56]

> "the delay between the time of (each) (the) alleged incident and the time the defendant was told of the complaint, and the lack of any opportunity to prove or disprove the allegation by, for example, a timely medical examination;".

[53] In *Longman v The Queen*, the passage referred to in paragraph [43] above also uses phraseology which suggests that "prove or disprove are synonymous with "test and meet":[57]

> "Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to **adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial**. After more than twenty years **that opportunity was gone and the applicant's recollection of them could not be adequately tested**."

[54] It therefore seems to me that the jury in this case were being told by the words used that the delay had caused the appellant to lose the opportunity to test and meet the allegations. Several ways of that occurring were then referred to, but in context I do not consider that they limited the nature of the direction the jury were being given.

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54 AB 199 lines 21-26; AB 200 lines 38-41.
55 (1999) 197 CLR 162 at [25]; emphasis added.
56 Bench Book Direction No. 63.
57 Emphasis added.

[55] For these reasons I do not consider that the direction was deficient by omitting that the appellant had by reason of the delay, lost the means of testing or meeting the allegations.

[56] The essential aspect of the *Longman* direction is that the jury are warned about something that they may not have realised from their own experience, namely that the defendant may not have been able to amass the evidence or response he could have otherwise, because of the delay between the event and the complaint being brought to his attention. It is that which is referred to in the first two sentences of the passage in paragraph [43] above. But the fact that there was a delay was clear. Further, that the delay had denied the appellant the chance to gather all that he needed to challenge the allegations was made clear to the jury. Defence Counsel, in his address, emphasised the delay and the appellant's disadvantageous position in these passages:

> "Being accused of indecently treating a child in circumstances like this, years after the alleged incident has occurred. What does someone do when they're excused (sic) of that and maintaining their innocence? All my client can do … is plead not guilty and come to a trial as this and ask a jury, like yourselves, to decide the matter."[58]
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> "She describes what's inappropriate in 2013 in the 2013 interview. So the borderline between thinking something happened and the reality can be an uncertain one. Contemporaneous questioning of [the complainant] about these charges in 2013, or around that time, could have distinguished that. But my client doesn't have the advantage of that because it was so long after before the complaints were made. He can't go back and then mount a defence about these things, go and find out from someone else who might have been at the house on the day that she says, the exact day she says these things happened. Can't go back and say, "Well, at 6 o'clock on this night, I was swimming in the pool. Were the neighbours home? Were they looking? Did they see anything suspicious?" He can't go back and do that."[59]
>
> "So the danger here – and the problem is once again the disadvantage that my client can't now – a defence by talking with other people: the neighbours; the people that you've heard moved into the granny flat that were living there with him. [X and Y] living there during some of that period as well, they can't be brought in here now because of the delay that was made in making these allegations at a late stage."[60]

[57] Those statements about the appellant's position because of the delay were made just before the summing up. If the jury was not aware before that address that the appellant suffered those disadvantages, and that the evidence he might have had available was deficient, they were by the time the summing up took place. And, as mentioned above the direction actually given would have reminded the jury of what they had just been told.

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58 AB 178 lines 29-33.
59 AB 181 lines 9-18.
60 AB 190 lines 20-25; referring to the pool incident in count 1.

[58] Whilst the words "warn" and the word "dangerous" did not appear in the direction actually given, the jury were told that there was one task which they must perform before they could arrive at a conclusion of guilt. That was this: given that the Crown case rose or fell on the complainant's evidence, they needed to scrutinise the complainant's evidence with great care before they could convict. The reason for doing so was given to the jury, namely because they had to test both the truthfulness and the reliability of the complainant's evidence. One of the reasons for the need to give that great care in scrutinising her evidence was because the delay had denied the appellant the chance to test and meet the allegations.

[59] By what was said to them the jury, in my respectful view, would have understood that there was a danger if they did not exercise great care in scrutinising the complainant's evidence, given the forensic deficiencies which the appellant confronted, namely the denial or the opportunity to test and meet the allegations (or, as it was put, to prove or disprove the allegation).

[60] Having heard that, and the several instances of reasons why that great care and scrutiny was required, the jury were again warned about the way in which they could act upon the complainant's evidence. They were told they could only act upon that evidence if, in considering it and scrutinising it with great care, and putting it together with the other evidence, they were convinced of the truth and accuracy of it.

[61] True it is that the jury were not warned, in terms, that it would be "dangerous" to convict, but in my respectful view the jury were told the equivalent. In essence they were told 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 her evidence. They are the essential elements of the *Longman* direction. Bearing 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.

[62] That said, the Bench Book directions should be followed unless there are compelling reasons not to do so. In particular, the use of the words "warn" and "dangerous to convict" are important to deliver the relevant warning that *Longman v The Queen* requires. Whilst I have concluded that their absence here did not lead to a misdirection or miscarriage of justice, that should not be taken to signify a relaxation of what is required by *Longman v The Queen* and reflected in the Bench Book direction.

Ground two

[63] This ground may be shortly dealt with. The learned trial judge's directions about the elements of counts 2 and 3 are referred to in paragraphs [31] and [32] above. The jury were expressly told that counts 2 and 3 occurred at the Zillmere house and within the time period in the indictment. The jury were also told that they had to accept beyond reasonable doubt the complainant's evidence that the appellant allowed her, on separate occasions at that house, to touch his penis as he lay on the bed. There could have been no doubt in the jury's minds that they were required to

be satisfied that the acts occurred within the time frame set by the indictment, and at the place specified by the complainant in her evidence.

[64] I do not consider that there was any deficiency in the directions concerning the jury's consideration of counts 2 and 3. This ground fails.

Disposition

[65] For the reasons given above I would dismiss the appeal.

[66] **ATKINSON J:** I agree that the appeal should be dismissed for the reasons given by Morrison JA.