46 The Crown prosecutor told the jury that he was not seeking to inflame their emotions but rather he reminded them that they are duty bound to act impartially upon the evidence (T 29/8/02 553.4 and following). The Crown submitted that the remarks of the Crown prosecutor were not inappropriate.

47 I disagree. As the learned Crown who appeared on the appeal (not being the prosecutor at trial) remarked, he had not seen a transcription of any such observations by a Crown prosecutor before. They are unfortunate, unnecessary and uncalled for. Whilst the jury is, amongst other things, there to reflect current community standards, it also brings to bear its collective commonsense. I do not agree with the proposition that anything the Crown said was inflammatory, but merely repeat my observation that it was unnecessary.

48 This is not a case of seeking a direction from the judge by reason of something the judge had done or failed to do, but by reason of seeking to have his Honour correct what is asserted to have been the impropriety of the conduct of the Crown prosecutor.

49 It may well be, of course, but we are not in a position to know, that an experienced trial judge such as the present trial judge, if concerned about this aspect, might have taken the view that a forensic stance by one counsel had successfully been dealt with and appropriately dealt with by the forensic stance of opposing counsel, and there the matter should be allowed to rest.

50 Otherwise, whilst reiterating my view that the remarks of the Crown prosecutor were unfortunate, even if there may be some basis for saying they were provoked by an opening remark some days before by defence counsel, it is apparent that sight was lost of the limitations upon defence counsel's opening address: see s 159 of the *Criminal Procedure Act*. Further, as Howie J remarks in his separate judgment with which I agree, the Crown prosecutor's closing address where he purports to deal with anticipated directions of law, constituted a serious transgression and one which could have derogated from the authority of the learned trial judge in charging the jury on those very matters of law. None of these regrettable incidents in my view constitute a miscarriage. The ground, in my view, is without merit and leave should be refused.

51 Ground 4 has been abandoned. If there is any question about that I would simply remark that I am persuaded by nothing in the written submissions for the appellant in support of them and would adopt what the Crown said in opposition.

Ground 5: His Honour failed to warn the jury that the prosecution witnesses HH and SP may have been unreliable because their recollections of events may have been adversely affected by the passage of time

52 The witnesses were former students of the school. His Honour gave no express and specific warnings about the fallibility of their individual memories. Both of the witnesses gave evidence which departed from their original statements taken in 1999. In SP's case he was able to remember that the complainant had shared a tent with the appellant one night at a camp at the Kangaroo Valley campsite. This, it is argued for the appellant, was despite the fact that he had never previously mentioned that.

53 HH added what is said to have been a significant new feature to his evidence at the trial. He claimed that he had seen the appellant in a motor vehicle with another man, M, both of whom picked up the complainant and took him away

some time in 1982. In 1999 HH in his statement said that M was driving that vehicle when the complainant was picked up but made no mention at all of the appellant being in the vehicle.

54 As stated above, the trial judge gave a warning to the jury concerning the fallibility of human memory. It was incorporated in the *Longman* direction, however, as the Crown submits, on my reading of the summing-up it did not limit the ambit of the use of the direction to particular witnesses.

55 The jury had been in a position and understood that direction to be applicable to all witnesses who gave evidence in the trial especially those such as the two fellow students whose evidence concerned events said to have taken place in 1982-3.

56 No application was made for a direction in relation to the witnesses generally or under to s 165 of the *Evidence Act 1995* (NSW). As the Crown submits, it would appear that there was a sound tactical reason for not making any such application: the appellant relied upon the evidence and its deficiencies seriously to undermine the credibility of the complainant.

57 The contrast between the account given by the complainant of the SP episode, particularly concerning skinny-dipping on the third trip to Kangaroo Valley, his statement on the one hand and the evidence that he gave and SP's evidence on the other, provided a significant divergence in the complainant's accounts that created a basis for potentially significant damage being occasioned to the credibility of the complainant. Defence counsel relied upon it in his address to the jury for that purpose.

58 As to HH, the complainant had given evidence that the appellant would often take him to the appellant's apartment after school. Often this occurred by the appellant picking up the complainant in his car around the corner from the school. Defence counsel relied upon this in his address, relying upon the evidence of HH to undermine the credibility of the complainant generally concerning circumstances being clandestine by the observation made by the witness of the complainant being in a car with the appellant and another person. On that occasion the complainant called attention to himself in the car and actually offered HH a lift.

59 I am persuaded that the appellant's counsel at trial clearly took very significant advantage of these features of the evidence of these two witnesses vis-à-vis the complainant. No warning under s 165 would have had any utility for the appellant apart possibly from resulting in the jury devaluing the evidence that was relied upon to undermine the credibility of the complainant.

60 I would refuse leave under r 4; if the position was otherwise, no miscarriage occurred by reason of this purported defect in the trial or the summing-up.

Ground 6: The verdicts of the jury should be set aside on the ground that they are unreasonable, or cannot be supported, having regard to the evidence

61 The "preceding grounds" which the appellant refers to as "not the only reasons why the verdicts were unsafe" have been dealt with.

62 The jury acquitted the appellant on count 6 which alleged that he had indecently assaulted the complainant on the second of three trips that the appellant had allegedly taken with the complainant to the Kangaroo Valley campsite. In his evidence the complainant contended that he attended the campsite with the appellant's sister and her two children, one male and one female.

63 The appellant has two sisters, both of whom gave evidence. Each denied having attended any camp with the complainant at Kangaroo Valley. KM has one son, J, born in 1982; her son was not one of the children described by the complainant as having attended the camp.

64 MLM, the other sister of the appellant, has a son who was aged 8½ in 1982. It thus seems unlikely that that child was one of the children described by the complainant as having attended the camp.

65 It is contended that the jury obviously had a reasonable doubt about the circumstances of count 6. The nature and quality of the complainant's evidence concerning the incident the subject of the count, it was submitted, was not demonstrably different from the evidence concerning the nature and quality of the acts constituting the other counts in the indictment of which he was found guilty. Therefore it is likely that the evidence of the appellant and his sisters was such as caused the jury to doubt the complainant's evidence about the second trip to Kangaroo Valley.

66 The third component of the appellant's submissions on ground 6 was made up of approximately five features of the complainant's evidence said to be "unsatisfactory" and in circumstances where the credibility of the complainant was markedly affected by a successful cross-examination. To these I will return.

67 In relation to the substantial component of this ground, the acquittal on count 6, the Crown submits that the evidence given by the complainant concerning all the counts except count 6 was characterised by detail and precision. The only matter of any real imprecision common to all counts was the precise timing of the commission of the various offences. In contrast to the evidence given on the other counts, the evidence of the complainant concerning count 6 was marked by imprecision, uncertainty and ambiguity in relation to the acts constituting the offence itself and most of the surrounding circumstances.

68 As to those circumstances, the complainant related that this offence occurred on the second of the three camping trips to Kangaroo Valley. He said that the sister of the appellant had been present with her two children, a boy of about three years of age and a girl, somewhat older. The evidence given by the complainant concerning the appellant's sister was later controverted in the appellant's case by the appellant's evidence and that of both of his sisters.

69 The Crown submits that the nature and quality of the evidence given by the complainant on count 6 differed significantly to the evidence in the other counts.

70 The evidence of the complainant in relation to count 6, upon reading the transcript, can be characterised as having been punctuated by a series of patent memory lapses or partial memory lapses which he acknowledged in giving his evidence in chief. The evidence had about it the "spectre" that the complainant was relating the particular sexual activity based upon a reconstruction from his recollection of the manner in which such activities had "usually started", rather than a recollection of the specific incident founding the count. That impression was further enhanced by reference to a variety of matters arising in cross-examination on count 6 including the dichotomy in the evidence in relation to the presence on the second camping trip of the sister of the appellant and her two "children", the boy aged about two or three years old and the daughter a couple of years older. As stated above, the appellant's sisters both gave evidence: neither had been on the second camping trip with the complainant, neither had a daughter. KM had a son born in January 1982: he was aged 1 year or thereabouts at the time of the second camping trip. MLM had a son aged about 8½ years at that time. Thus, the Crown submits, the nature and quality of the evidence given by the complainant in relation to count 6 was therefore substantially different, and would have been noticeably so to that which he gave in relation to the other counts.

71 I agree with this analysis. Additionally, of course, the learned trial judge directed the jury that they were to give separate consideration to the evidence available on each count and to the status of any doubt they might have on the reliability of the complainant on any one count vis-à-vis any other count as is referred to in the extract above. His Honour, however, did add that "the converse is not so".

72 I am of the view that it is apparent that the jury assessed the complainant on each count separately in accordance with the directions given to it. The verdict on each of the other counts disclose that the jury accepted the complainant as a reliable witness, being both truthful and accurate. The equivalent count 6 demonstrates that despite accepting the complainant as a truthful witness on other counts, the jury applied the direction to consider the evidence on each count separately, hence in view of the state of the evidence available to the Crown on count 6, a verdict of acquittal was returned.

73 Thus, by itself, it cannot be argued that there was something perverse or inconsistent in the conduct of the jury in acquitting the appellant on count 6 with the consequence the convictions on the other counts must be impugned.

74 As mentioned above, the appellant also relies upon other features of the complainant's evidence described as "unsatisfactory". These were:

(i) His original description of the Kings Cross hotel as "the Kings Cross Hotel".

(ii) His inability to be able to specify with any degree of exactitude the timing of any of these alleged offences.

(iii) His apparently mistaken evidence about the type of vehicle that the appellant was driving in 1983.

(iv) The complainant's regular resort to excusing himself for lack of particularity based on the effluxion of time.

(v) The possibility that he misled the investigating police officers about the whereabouts of a potentially important witness, DD.

75 With respect to these matters, these were but, in my view, incidents of the progress of the litigation of this prosecution and the course of the evidence therein. Each were matters that were highlighted in the course of the trial before the jury and they are features of the evidence that would have been taken into account by the jury just as they did matters pertinent to an assessment of the reliability of the complainant on count 6.

76 The credibility of the complainant certainly was central to the Crown case; there is nothing unusual about that. That credibility appears to have been assessed by the jury in circumstances of considerable advantage over those prevailing in this Court on the usual basis, namely their ability to assess the complainant in the giving of his testimony and there thus firsthand what weight the evidence was to be given in the light of all the other evidence and the directions given by the trial judge. I am persuaded that the acquittal on count 6 demonstrates that the jury did employ an appropriately critical approach to the performance of its duty consequent upon appropriate directions having been given to it by the learned trial judge. I am satisfied that there was due discrimination between the requisite assessments of truthfulness and accuracy to

provide an appropriate basis for reasoned and reliable verdicts in relation to all the counts. The other features, as I have said, were but incidents and cannot be elevated higher than that. The other grounds constituting the first part of the appellant's three-pronged attack under ground 6 have not been made out and the last ground based upon these incidents and the matter of credibility of the complainant generally have not persuaded me that ground 6 has been made out.

77 Accordingly, the appeal against conviction fails.

Appeal against sentence

78 The appellant seeks leave to appeal against the sentences imposed upon him.

79 Those sentences were:

Count 1: two years fixed term from 3 September 2002.

Count 2: two years fixed term from 3 September 2003.

Count 3: two years fixed term from 3 September 2004.

Count 4: eight years imprisonment from 3 September 2002 with a non-parole period of six years also to date from 3 September 2002.

Count 5: two years fixed term from 3 September 2005.

Count 7: two years fixed term from 3 September 2006.

Count 8: eight years imprisonment from 3 September 2002 with a non-parole period of six years also to date from 3 September 2002.

Count 9: two years fixed term from 3 September 2006.

80 The first error to which the applicant points is the characterisation of the seriousness of the offending conduct. It is unquestionably the fact that his Honour made an error of fact in his remarks on sentence. He said, "The evidence covers the years 1982 and 1983. The victim, as I recollect, left school at the end of that period, as did the prisoner" (ROS p 2). The complainant left the school at the end of the academic year in December 1983 but the applicant left the school at the end of the school year in 1982.

81 The effect is that counts 7, 8 and 9 were all committed after the end of the school year in December 1983. Each of the incidents which were the subject of those three counts occurred at a time when the applicant was no longer a teacher at the school. From the applicant's point of view it was important to note that the complainant had turned 16 years of age (in which context our attention has been drawn to the recent amendments to the law in relation to the age of consent for males). It is contended in relation to those counts that the offences occurred when the victim was 16, when neither the victim nor the applicant had any connection to the school, when there was no teacher/pupil relationship and in circumstances that could only be described as consensual.

82 The counts other than 7, 8 and 9 related to offences committed earlier in time when the applicant was in fact a teacher at the victim's school, the victim's tutor master and in charge of the naval cadets, and thus had aggravating features which increased the objective criminality of the incident offences.

83 It is argued for the applicant that the error of characterisation is reflected in not only what his Honour said but in what his Honour did in terms of the sentences imposed for counts 7, 8 and 9, namely fixed terms of 2 years, mirroring the sentences that were imposed in relation to counts 1, 2, 3 and 5, which also were related to charges of indecent assault. Similarly, in relation to count 8, his Honour imposed a sentence of 8 years with a non-parole period of 6 years, reflecting the 8-year sentence and the same non-parole period in relation to count 4. In short, it is argued that there was no discrimination between what I will call the "pre-end of school relationship" offences and the "post-end of school relationship" offences and taking into account the consensual nature of the latter especially.

84 There is no question that the offences giving rise to counts 1, 2, 3, 4 and 5 occurred during the "school relationship", if I might describe it as such. The Crown submits, however, that whilst it may be that the school relationship had ended at the time the offences constituting counts 7, 8 and 9 had occurred, those offences were committed during a relationship which the applicant had been able to commence with the complainant, and thereafter orchestrate, between himself and his victim. Despite the applicant working in Melbourne in 1983, he had perpetuated the relationship with the complainant, such perpetuation ultimately providing the circumstances within which the offences in counts 7, 8 and 9 were committed. The "residual effects", as the Crown describes them, of the association between the applicant and complainant during the pre-end of school relationship was relevant to the appropriate assessment of the objective seriousness of the counts 7, 8 and 9 offences, the more so since the residual effects relied upon by the applicant to create the circumstances in which the association with the complainant was continued and in which thereby those offences were committed.

85 Accordingly, notwithstanding the one error of fact, the overall characterisation by his Honour was correct and reflects no error.

86 The Crown's arguments are persuasive. Nonetheless, surprisingly in my view, the Crown submitted that any "adjustment" would be slight.

87 Any "adjustment" must represent a sentence otherwise "warranted in law" (s 6(3) of the *Criminal Appeal Act 1912* (NSW): see *R v Simpson* (2001) 53 NSWLR 704; 126 A Crim R 525 at [79] per Spigelman CJ and (at [99]-[100]) per Sully J). My view is that the error was not such as to bring about the requirement of any adjustment because I am not persuaded that any other sentence, on this basis alone, was warranted in law.

88 The second basis upon which the sentences are attacked is that his Honour gave insufficient weight to the applicant's favourable subjective features. His Honour said (ROS pp 4-5):

> The further aspect to which I should refer is that the prisoner, as was his right, pleaded not guilty to these matters, and he currently maintains that situation. That is his right. I make no criticism of him for that. But, as is tacitly admitted by Mr Hanley on his behalf, the consequences of that are that it is difficult, if not impossible, to find any subjective features favourable to the prisoner. I should say, and make it clear now, that there is nothing before me to justify me in concluding that there is anything here that could be called special circumstances justifying my altering the normal ratio of three quarters between the head sentence and the non-parole periods for the various offences.

89 This Court was reminded of what McHugh J said in *Ryan v The Queen*

(2001) 206 CLR 267; 118 A Crim R 538 at [38] and certain observations of Slicer J in the Supreme Court of Tasmania in *R v F* (1998) 8 Tas R 88 at 95-96; 101 A Crim R 578 at 583 and of Dunn J in *R v Bell* [1982] Qd R 216 at 220; (1981) 5 A Crim R 347 at 351.

90 It is clear that here the learned sentencing judge made no mention of the applicant's rehabilitation nor risk of re-offending. Nearly 20 years without any evidence of re-offending was a significant factor, it is said, which should have led his Honour to conclude that the applicant was rehabilitated and unlikely to re-offend, and such a finding would have worked in his favour so as to reduce by "a significant margin" the head sentence and the non-parole period.

91 I am of the view that the learned sentencing judge did not proceed on the basis that because the applicant had refused to admit his guilt it was difficult, if not impossible to find any favourable subjective circumstances. Nor did the learned sentencing judge proceed on the basis that the applicant had demonstrated a lack of contrition.

92 The remarks by the learned sentencing judge disclosed that his Honour was acutely conscious that the denial of guilt by the applicant could not be held against him and was also sensitive to that situation precluding any consideration for reduction of sentence in recognition of an admission of guilt. Such an admission being relevant, of course, both on the utilitarian basis and as evidence of remorse and contrition.

93 It is also equally clear to me, as was submitted by the Crown, when one reads the remarks in context, his Honour was paying heed to the availability of the finding of special circumstances within s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

94 Further, his Honour made a specific finding that the applicant had no relevant prior criminal history. The applicant was afforded the full benefit of a clear criminal record. He thus was afforded the benefit of his prior good character and the fact that he had not re-offended in the period between the subject offences and the sentencing proceedings.

95 Except for 3 drug offences in 1996 and 1997 the applicant has no criminal antecedents apart from the present sentences; apart from those drug offences he has not re-offended at all in the 20 years since the present crimes were committed.

96 The allowance by the sentencing judge of a period of 2 years non-parole are, in my view, sufficient to meet the needs of rehabilitation.

97 Whilst the applicant's subjective circumstances were quite favourable, the offences for which he was to be sentenced were objectively extremely serious. As mentioned above, those offences for counts 1-5 are attended by the particularly aggravating circumstances that they were committed by the applicant in breach of his position of trust as a teacher/tutor of the complainant. The offences in counts 7, 8 and 9 were committed by the applicant in circumstances where he relied, as the Crown has said, on the presence of the residual effects of that relationship.

98 I am not persuaded, in view of the available maximum sentences and the totality of the criminality for which the applicant was to be sentenced, that those sentences are manifestly excessive allowing appropriate weight for the subjective circumstances of the applicant.

99 The third basis is that his Honour gave insufficient weight to the fact that the applicant will be required to serve his sentence in protective custody.

100 The applicant gave evidence on 25 October 2002 as to what had befallen him after his conviction and when he was classified to be in protective custody. He also gave evidence as to the limitations, severe that they are, placed upon him by reason of that status and of a constant regime of abuse from fellow prisoners. His Honour said (ROS p 4):

> I have heard the prisoner's evidence about the problems he faces in custody. It is a regrettable fact that although everybody tries to keep matters confidential, somehow others become aware of it. And it is, as I understand it, acknowledged by the courts that the sentence, most of it, if not all of it, will be served in strict confinement or protective custody. As I understand it, that factor is acknowledged in the various authorities from the Court of Criminal Appeal, where they have to deal with matters such as these in considering appropriate sentences.
>
> I refer to it to show that I have acknowledged it, but I am not, as far as I am aware, justified by any particular authority of giving any particular discount in respect of that. I just state that I have taken that into account in arriving at the appropriate sentence for these matters.

101 These remarks were understood by the applicant to indicate that his Honour had factored the strict confinement of the offender in protective custody into the sentences that he was about to impose, and that the Court of Criminal Appeal did not, by any of its authority, require him to stipulate a particular discount for this factor — which is acknowledged to be correct. Yet given the length of the sentences that were imposed and the fact that his Honour found that there were no special circumstances under s 44(2) of the *Crimes (Sentencing Procedure) Act*, it seems that his Honour, so it is said, gave insufficient weight to the fact of strict protection. Well known passages were thereafter cited by the applicant from *AB v The Queen* (1999) 198 CLR 111 at 152 per Kirby J and from *R v Davies* (1978) 68 Cr App R 319 and remarks of the English Court of Appeal in that regard. See also *R v Perez-Vargas* (1986) 8 NSWLR 559; 25 A Crim R 194; *R v Cartwright* (1989) 17 NSWLR 243; *R v Gallagher* (1991) 23 NSWLR 220; 53 A Crim R 248 and *R v AB (No 2)* (2000) 117 A Crim R 473 at 477-479 per O'Keefe J. The principles are well known.

102 It is clear that the learned sentencing judge did acknowledge the requirement for the sentence to be served in protective custody. He took that feature of the matter "into account in arriving at the appropriate sentence for these matters". As even the applicant appears to acknowledge, such an approach was correct. That acknowledgement for the applicant was appropriate as it was inevitable in the light of such decisions of this Court as *R v Wahabzadah* [2001] NSWCCA 253, *R v Scott* [2003] NSWCCA 28 at [26] per Bell J; *R v Totten* [2003] NSWCCA 207; *R v Durocher-Yvon* [2003] NSWCCA 299 and now see, for example, *Stockdale v The Queen* [2004] NSWCCA 1 again per Bell J (at [22]). I add that this Court is frequently provided with the publication *Protective Custody and Hardship in Prison* by Lynne A Barnes, a publication of the Judicial Commission of New South Wales in its *Sentencing Trends* series (No 21, February 2001). This valuable analysis, however, is no substitute for actual evidence before a sentencing judge. In the instant appeal, as I have remarked above, his Honour had heard of the applicant's situation and properly took it into account

103 The Crown submits that in view of the objective seriousness of the offences committed by the applicant and the available maximum sentences, the sentences imposed demonstrate a significant degree of leniency consistent with this aspect of the matter having been given appropriate weight by the learned sentencing

judge. In relation to counts 1, 2, 3, 5, 7 and 9 the maximum sentence available was 5 years imprisonment: each attracted a fixed term of 2 years. In relation to counts 4 and 8 the maximum sentence was 14 years and each attracted a sentence of 8 years with a non-parole period of 6 years. Partial cumulation was ordered for the sentences on counts 1, 2, 3, 5, 7 and 9 and the total effective sentence of all those sentences was a term of 6 years.

104 The sentences on counts 4 and 8 were structured so that they were to be served concurrently with each other and those other sentences and the Crown submits that the resulting total effective sentence of 8 years with a total effective non-parole period of 6 years does not demonstrate any failure on the part of the learned sentencing judge to give appropriate weight to the protective custody aspect.

105 Nor, at this point might I speak for myself by saying, does the ultimate sentencing reflect any error warranting intervention.

106 The above remark is made in anticipation of the fourth ground on which the severity of the sentence is attacked, namely special circumstances pursuant to s 44(2) of the *Crimes (Sentencing Procedure) Act*. All that the applicant really asserts in relation to this ground on a discrete basis is that the head sentence should be reduced by "a substantial margin" and that non-parole period should also be reduced in a way which demonstrates that there are special circumstances within the meaning of the legislation. It should be clear from my views expressed in relation to the several grounds hitherto dealt with that the learned sentencing judge could only have allowed a reduction in the total effective non-parole period provided that such a reduced total effective non-parole period would have appropriately reflected the criminality of the applicant. As I have said, the sentencing judge made an allowance for the appellant being kept in protective custody when determining the terms of the individual sentences to be served. Accordingly, the total effective sentence was reduced below that which would otherwise have been imposed. Consequent upon that reduction to the total effective term of the sentence there was a commensurate reduction to the total effective non-parole period that would otherwise have been applied.

107 Any reduction of the total effective non-parole period below 6 years would have led to circumstances in which the period ceased to have appropriately reflected the applicant's criminality.

108 In the end, even if error can be identified, even if a different view could be formed as to the nature of the weight given to the protective custody aspect or to the otherwise apparent good character of the applicant, I am not persuaded that any other sentence was warranted in law.

109 Accordingly, the orders I propose are:

(1) That the appeal against conviction be dismissed.

(2) That leave to appeal against sentence be granted; but

(3) That the appeal against sentence be dismissed.

Howie J.

110 In this matter I have received the very substantial benefit of having read in draft the judgment of Levine J. I agree with the orders proposed by the Presiding Judge and substantially with his reasons. I wish to add some remarks about two of the grounds of appeal.

Ground 1

111 In *Longman v The Queen* (1989) 168 CLR 79 at 91; 43 A Crim R 463 at 471, the following passage occurs:

> 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.

This is the genesis of the warning that a trial judge should give in cases such as the present. The warning is of the danger of convicting on the evidence of the complainant after a period of lengthy delay between the alleged offence and complaint.

112 That is substantially the warning that was given by the trial judge in the present case.

113 Of course any warning to be efficient must explain why the warning is necessary so that the jury understands its import and can evaluate the evidence appropriately to determine whether they should convict the accused notwithstanding the danger in doing so. Hence the bare warning derived from the passage above is not sufficient to overcome the possibility of a miscarriage if it is not accompanied by an explanation of the need for the warning and with sufficient information for the jury to be able to assess the evidence in light of the warning given.

114 In *R v Stewart* (2001) 52 NSWLR 301; 124 A Crim R 371 I referred to the analogy of a road sign in considering what the contents of a warning should be. The sign can give the warning alone, or carry with it the reasons for the warning and in addition the response to the warning: for example, "Danger, falling rocks, do not stop". In a *Longman* situation the warning has these three component parts; the warning (it is dangerous to convict); the reasons for the warning (because the accused has been prejudiced by delay) and the response to the warning (to carefully scrutinise the evidence before convicting upon it). Section 165(2) of the *Evidence Act 1995* (NSW) requires that a warning have these three component parts, unless there is a good reason for not doing so. See *Stewart* (at [122]).

115 To ensure that the warning is effective the trial judge must relate the danger to the specific difficulties faced by the defence by reason of the delay: *R v Johnston* (1998) 45 NSWLR 362 at 375. Where there is extensive delay, it is presumed that the accused has been prejudiced by that delay even though no specific detriment can be identified; *R v BWT* (2002) 54 NSWLR 241; 129 A Crim R 153 at [14] per Wood CJ at CL.

116 It should be noted that there is a difference between a warning and a comment. See *Stewart* (at [82]-[83]). After indicating the difference between these two types of judicial statements made in a summing up, Kirby J in *Crampton v The Queen* (2000) 206 CLR 161; 117 A Crim R 222 at [129] stated:

> [129] The *warning* in a case involving a long delay between an alleged offence and a complaint is, in part, an element in the balance required by the law in such matters. In overseas jurisdictions courts have been more willing than they appear to have been in Australia to provide a permanent stay of proceedings to protect accused persons from the injustices that can arise in attempting to mount a defence to such charges years, or even Decades, after an alleged offence occurred. But this has been so, in part, because Australian courts know that *Longman* obliges trial

judges, in cases such as the present, not only to *comment* about the difficulties which the long delay in complaint presents but specifically to *warn* the jury, in clear and emphatic terms, of the dangers that may be inherent in such a trial.

117 Hayne J (at [142]) referred to the distinction between a warning and comment (footnotes omitted):

> [142] The trial judge did comment about the fact that the complainant made no complaint about the appellant until long after the incident was alleged to have occurred. As the trial judge said to the jury, this deprived the appellant of an opportunity to "look at matters which were happening at about [the time of the alleged incident] and to raise them in evidence" and it probably reduced the capacity of the complainant to be accurate. As the joint judgment in *Longman* points out, it was proper to remind the jury of considerations relevant to the evaluation of the evidence and these were considerations of that kind. But what has come to be known as a "*Longman* warning" is not just a judicial *comment* of this kind, proper and appropriate as it may be. It is a *warning* to the jury that, because the evidence of the complainant could not be adequately tested after the passage of so many years, it would be *dangerous to convict* on that evidence alone unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. That warning was not given.

118 In *Doggett v The Queen* (2001) 208 CLR 343; 119 A Crim R 416 at [126] Kirby J stated the following proposition:

> [126] *Long delays — obligatory warnings*: It would not ordinarily be expected that jurors would be aware of the findings of experimental psychology or of the common experience of forensic contests, and other data supporting the reflections about memory, mentioned in *Longman*. Judges, on the other hand are, or should be, aware of such matters. That is why, in a case of long delay, a warning must be given to a jury. A comment, or reliance on the comments or arguments of counsel, would not, in such cases, be sufficient.

119 The warning, therefore, is that contained in the passage from *Longman* set out at the commencement of these reasons. The matters in amplification of the warning, which point out the general and particular difficulties confronting the accused, are comments. It may be that, if the comments are so perfunctory or couched in such terms as to undermine their effectiveness in alerting the jury to the defects in the Crown's evidence or the prejudice to the defence case, the warning will fail to perform its function so that a miscarriage of justice has occurred. See *Crampton* (at [44]) and *R v DBG* (2002) 133 A Crim R 227 at [39]. But it does not seem to me to be the case that any defect in the comments made in conjunction with the warning must result in the quashing of the conviction. Some comments are quite unnecessary because they do not inform the jury of any matter that they would not themselves appreciate from commonsense and experience. See *Doggett* (at [83]) per McHugh J. I do not believe that the law has reached the stage that a trial can miscarry simply because of the failure of a judge to remind the jury of a fact that would be obvious to any reasonable juror. See *R v Kesisyan* [2003] NSWCCA 259.

120 I accept that a *Longman* warning is a fundamental requirement of a trial where there has been extensive delay, so that the absence of an effective warning will itself lead to a miscarriage regardless of the attitude taken by the parties at the trial. But I am not persuaded that it is so with the comments that are attached to the warning.

121 The need for, and content of, a *Longman* direction was extensively examined

and critically analysed by this Court in *R v BWT*. It is unnecessary to further consider the duty imposed upon a trial judge to warn the jury of the effects of delay and the inflexibility of approach that the members of that Court found had been imposed upon trial judges by the decisions of the High Court. That inflexibility, however, seems to me, with respect, to attach to the warning rather than to the additional comments to be made in explaining the warning in terms of the evidence before the jury. I have considerable difficulty in accepting the proposition that the mere failure of a trial judge to comment on one particular aspect of the complainant's evidence, and one that is a matter of common experience, will automatically result in a miscarriage of justice notwithstanding that every other aspect of the warning and the accompanying comments were impeccable; cf *R v JBV* [2002] NSWCCA 212.

122 *R v BWT*, however, can be distinguished from the present case because there a warning in terms of the passage in *Longman* that I have quoted above was not given to the jury. The defect in the comments made to the jury, which were identified by the Court in *R v BWT*, was that they did not indicate to the jury that the accused *was* prejudiced by the delay. Rather they erroneously referred only to the possibility of prejudice both generally and in particular respects. Whether that defect alone would have been sufficient to require the quashing of the convictions is a moot point. But it might be reasoned that these comments misled the jury by not making it clear that the accused was prejudiced even though that prejudice might not have been identified by any practical difficulty encountered by the accused in defending himself.

123 In the present case the warning given by the trial judge was unexceptional. His Honour told the jury that:

> Because of the lapse of time here, I am bound to warn you that *it will be dangerous* to convict the accused on the evidence of [the complainant] unless you, scrutinising the evidence with great care and considering the circumstances relevant to its evaluation and paying heed to that warning which I have given, were satisfied of its truth and accuracy.

It is important to note that the warning is in positive terms; "it will be dangerous". There is no suggestion that the danger may not be present in the trial before the jury or that they can simply disregard it. Whatever is said later about the warning in the summing up has to be viewed in the light of this uncompromising assertion.

124 Immediately before this warning, his Honour told the jury that "it is very important" that they realise there was a delay before the accused was informed of the allegations and that the passage of time, "can cause, and in this particular case is said to have caused, significant difficulties to the accused in preparing and mounting his defence to these allegations". Two criticisms are made of this statement. The first is that his Honour did not make a positive assertion that the accused had suffered prejudice by reason of the delay but merely recognised the possibility. The second is that the positive assertion of prejudice is merely attributed to a defence submission and does not carry with it the judicial imprimatur of an undisputed fact.

125 If these statements had stood alone, the criticism may have been justified. But his Honour went on immediately to say to the jury, "the law recognises this [the possibility of prejudice] and it is necessary for me to give you some very specific warnings about it". The warning then given, as I have already noted,

was in emphatic terms. The existence of the danger in convicting the accused was put neither as a mere possibility nor as a reference to a defence submission. It carried with it the force of law.

126 Immediately following the giving of the warning the trial judge said:

> The reasons for *it* [convicting the accused on the evidence of the complainant] *being dangerous* include the following considerations. First of all it is said that the evidence of the complainant, [ ], cannot be adequately tested after the passage of so much time and in particular, in this case, a lot of surrounding aspects cannot be fully or, in some cases, investigated at all. I shall give some example of those, they have been referred to in the submissions of counsel. It may be that others have occurred to you.

127 Again it should be noted that what his Honour says about the reasons for the warning is premised on an acceptance of the danger of conviction as an existing fact in the trial before the jury. Although his Honour does not assert in positive and emphatic terms that the complaint could not be adequately tested, I do not believe that this undermined the emphatic nature of the warning. The examples that his Honour gave of the particular disadvantages caused by the delay are stated in terms of undisputed facts. So his Honour told the jury:

> There were some aspects of [the complainant's] evidence that *could have been* investigated by way of a search warrant or other evidence there and then at the time.

128 After giving an example of what evidence may or may not have been discovered had the police been able to search the appellant's premises, such as photographs of the complainant naked and pornographic videos, the trial judge stated:

> The search, and *this is [an] illustration of the way the law looks at the effects of delay*, if, for example, the search had established that, in that it failed to discover any of these things, then that would be significant assistance to the accused in contradicting the evidence of [the complainant]. He would be able to say, well look, where are they? Here are the police, they have had a look, cannot find them ...

129 In that passage and in the further examples his Honour gave of matters that could not be investigated because of delay, the jury were being effectively alerted to actual prejudice suffered by the accused in the trial before them. The jury could not have thought that his Honour was merely repeating a defence argument or submission: they must have understood that the law recognised an actual prejudice had been occasioned to the accused by the delay.

130 In giving numerous examples of the type of prejudice suffered by the accused, the trial judge often used expressions such as "the defence say", "the accused says", and "they complain that". But his Honour also reminded the jury that the prejudice was a matter recognised by the law and a factor that had to be taken into account in their assessment of the evidence of the complainant. At the end of these examples of the prejudice actually suffered by the appellant, his Honour said:

> That is a series of illustrations. More may occur to you but it is my duty to remind you of those because they have been referred to in the evidence, in particular, which are raised and are one of the aspects why I am obliged, by the law, to tell you that *it is dangerous* to act on the complainant's evidence on that aspect.

His Honour then went on to warn the jury of the frailties of human recollection.

131 In my opinion, although the warning may not have been perfect so far as the comments associated with the warning were concerned, the warning as a whole adequately brought home to the jury; the danger of convicting on the evidence of the complainant; why that danger existed; and how the jury should assess the evidence because of that danger. The warning itself was clear and emphatic. The jury were alerted to the real and existing danger of convicting on the complainant's evidence. They were informed that the warning was given as a matter of law and it was necessary because of the prejudice actually suffered by the accused in defending himself. The jury were told that the trial judge was duty bound to repeat the examples of the difficulties faced by the accused because they were raised in the evidence.

132 In my opinion the warning as a whole was not so defective as to have given rise to a fundamental flaw in the trial. I do not believe that, when read as a whole, anything his Honour said, or did not say, had the practical effect of watering down the warning such that a miscarriage of justice may have occurred. In particular, I am not persuaded that the jury were not sufficiently alerted to the inability to properly test the complainant's evidence or had any lack of understanding of the difficulties actually faced by the defence in investigating whether there was evidence in existence at the time of the complaint that might have rebutted the complainant's account.

133 In any event this is a matter where r 4 should apply. Defence counsel is in the best position to know what prejudice the defence has suffered as a result of the delay and what matters are of such significance that the trial judge should refer to them in order to secure the accused a fair trial. In the present case defence counsel asked for a Murray warning on the basis that the complainant's evidence was uncorroborated and such a direction was given. In making that request counsel expressly acknowledged that the trial judge had given a *Longman* warning. If counsel believed that the warning, when taken as a whole, did not comply with the requirements of *Longman* as set out in *BWT*, he should have said so. Any defect could have been easily remedied by further comment, if the trial judge thought it necessary to do so.

134 The fact that there may have been no tactical reason for the failure of counsel to take the point does not overcome the strictures of r 4 or the need for the appellant to satisfy the court that a miscarriage may have occurred. See *R v Moussa* (2001) 125 A Crim R 505 at [60] and *R v Mitton* (2002) 132 A Crim R 123.

Ground 3

135 It is apposite in relation to this ground to draw attention to the fact that defence counsel is not at liberty to open to the jury in any way he or she thinks fit. The right of defence counsel to open immediately after the Crown opening is found in s 159 of the *Criminal Procedure Act 1986* (NSW). The section provides:

> 159 Opening address to jury by accused person
>
> (1) An accused person or his or her counsel may address the jury immediately after the opening address of the prosecutor.
>
> (2) Any such opening address is to be limited generally to an address on:
>
> (a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and

(b) the matters to be raised by the accused person.

(3) If the accused person intends to give evidence or to call any witness in support of the defence, the accused person or his or her counsel is entitled to open the case for the defence before calling evidence, whether or not an address has been made to the jury.

136 The section was introduced into Parliament as one of a number of provisions concerned with procedure in criminal trials in the District and Supreme Courts and contained in the *Crimes Legislation Amendment (Procedure) Bill 1997* (NSW). The Minister for Police, Mr Whelan, gave the Second Reading Speech in the Assembly. In his summary of the provisions of the bill he described the provisions as introducing "a means of clarifying at an early stage the real issues to be placed before the jury", *Hansard*, 14 May 1997, p 8572.

137 Later in the Speech the Minister dealt with the provision as follows:

> The next aspect of the bill constitutes a very significant step forward in trial procedure. The accused is given ... the option of making an early opening address on trial issues. Counsel for the accused — or the accused if unrepresented — may exercise that option immediately after the opening of the Crown case by the prosecutor. The address of the accused is to be limited generally to all or any of the matters disclosed in the prosecutor's opening address that are or are not in dispute and to the matters to be raised by the defence. The idea is to give the accused the option of identifying, right at the start of the trial, the real issues in the trial. That will be of value to all concerned, not least the jury, who will be able to observe all of the evidence from the very beginning, with the real issues of dispute firmly in mind.
>
> It is important to grasp that it is entirely at the accused's discretion whether or not to make the new address, just as it is currently entirely at his or her discretion to decide whether or not to open his or her case if calling evidence, and whether or not to address the jury at the end of the trial. Furthermore, the making of the new address does not preclude the accused from opening his or her case if calling evidence for the defence. That is appropriate for two reasons. First, the two addresses are rather different in their general natures, though there may be some overlap in practice. One foreshadows the issues in the whole trial; the other foreshadows the evidence to be called by the accused. Second, the exercise of the option of making the new address, bearing in mind that it will be to the benefit of all, should be encouraged, rather than made into something that would only be done by the accused after a tactical cost-benefit analysis.
>
> The opportunity has also been taken to simplify the layout of the provisions in the *Crimes Act* relating to addresses by the accused. An opening address by the accused on trial issues will help to crystallise which issues are in dispute. It will enable the jury to be in a better position to appreciate the significance of the evidence as it is given throughout the trial, and particularly in the prosecution case. Furthermore, it will allow the prosecution and judge to focus upon those matters which are genuinely in dispute.

The Attorney-General introduced the Bill into the Council in a Second Reading Speech that did not differ significantly from that given in the Assembly.

138 The genesis of the reform can be found in the Report of the New South Wales Law Reform Commission entitled "The Jury in a Criminal Trial" (LRC48 1986). In Chapter IV of that report the following recommendation and commentary is found:

> *The Defence Opening*
>
> *Recommendation 43: The Crimes Act 1900 should be amended to permit the accused person or defence counsel, immediately after the Crown's opening address, to announce any matters of fact which are not in issue and outline briefly the issues in the defence case.*
>
> 6.26 It is the practice in the United States for the defence to open immediately after the Crown opening. We do not suggest that the defence be entitled to open at this stage, rather they could make a short announcement briefly outlining the issues to be contested but not referring to evidence proposed to be called. The purpose of such an announcement, where defence counsel chooses to make it, would be to alert the jury at an early stage of the trial as to the nature of the accused person's defence. In this way the issues in the case could be narrowed and defined. To avoid the disadvantage to the Crown which could arise if the Crown opening were to be substantially separated from the Crown case, the defence outline (or outlines in the case of multiple accused) should not be lengthy or argumentative. Rather this opening should simply outline the issues and identify those matters not in contention. Time could be saved in some cases where this option was exercised because the number of disputed matters could be reduced. It is likely that the jury's understanding of the case would be increased. Their efforts can be concentrated on the issues rather than on assessing evidence that is not in dispute. We emphasise that this procedure should naturally be an optional one as there is no obligation on the accused person to put forward a defence to a criminal charge.

139 The purpose of the defence opening address under s 159(2), therefore, is to define, for the jury's benefit, the real issues in the trial and what the accused might say in answer to the Crown's allegation. It is not an opportunity for defence counsel to embark upon a dissertation on the onus and standard of proof, or the functions of judge and jury, or to anticipate the directions or warnings to be given by the trial judge, or to urge upon the jury the way that they should assess the evidence of a witness to be called in the Crown case. It behoves trial judges to ensure that the addresses of counsel are not open to abuse, particularly in a case where the contents of the address is circumscribed by a provision of an Act. To permit counsel to ignore such a limitation is not in the interests of justice, either generally or in the particular case. It may be appropriate for a trial judge to ensure, before the defence opens and in the absence of the jury, that defence counsel is aware of the limited basis of an opening under s 159 and that the address will comply with it.

140 The present is a good example of how defence counsel's address far exceeded the legitimate bounds of an opening under s 159 and almost caused the trial to miscarry. There was little of the address that complied with the section and a significant part of it was completely inappropriate, even if it had been contained in a closing address to the jury.

141 Defence counsel seemed to believe that, because the Crown, in a moderate and appropriate opening to which no criticism could attach, referred to the extensive delay in the complaint and the fact that one offence was referred to as "buggery", he was justified in making an opening address which included that part which is set out in the judgment of Levine J.

142 Even making allowance for apparent transcription errors, I have difficulty understanding the point that counsel was seeking to make in that passage of his address by referring to "stepping back in time ... to the law that existed then" or to "the sort of morality that existed then even in relation to this offence". If he were concerned at the use of the term "buggery" to describe the offence, the proper way to approach the matter was to ask the trial judge to say something to the jury about the use of that term in the charge. But, in my opinion, it was completely inappropriate to introduce the topics of morality or a change in the

law into the jury's considerations of the issue before them. The defence case was that the allegations were untrue. Questions of morality, of the nature of the offence, or of the differences between the current law and as it existed at some earlier time were completely irrelevant. In any event, it was not a legitimate matter to be canvassed in the defence opening. With respect, the trial judge should have taken the matter up with defence counsel to see what, if any, legitimate purpose there was in making comments which, so it seem to me, could only serve to distract the jury.

143 They resulted in the comments made by the Crown prosecutor which have in part been set out in the judgment of the Presiding Judge and which gave rise to this ground of appeal. With respect, I agree that they were inappropriate and, in my view, to a very marked degree. But these were not the limits of the Crown prosecutor's transgressions during his address.

144 The prosecutor addressed the jury at some length about the warnings to be given by the trial judge about the effect of delay. This in my opinion had no place in the Crown prosecutor's address, especially where, as here, the Crown sought to explain to the jury why those warnings were required and how the jury were to use them. The Crown was at pains to point out to the jury that the trial judge was not going to indicate his personal opinion about the evidence of the complainant, nor was he going to invite the jury to acquit the accused, but rather that these warnings were always given in criminal trials and were in effect "just common sense".

145 In my opinion it is no business of the Crown to seek to explain the reasons for the giving of directions or warnings by the trial judge or what they mean or how the jury is to use them. This is a matter for the trial judge: not the Crown prosecutor. Counsel should understand that their principal function is to address on the facts and not to anticipate directions and warnings to be given by the trial judge and to put a gloss on them to assist the case they are presenting to the jury. In particular, the Crown should not use the consequences of delay in an attempt to explain or excuse the unreliability of the complainant as was done in *DBG* and to some extent in the present case.

146 The Crown must recognise, as the jury is required to do, that the defence has been prejudiced by the delay because of the inability to test the complainant, because of the vagueness and inconsistency in accounts where these occur, and because of the inability to carry out those investigations that might have raised a doubt about the truth of the complainant's account. There is no point in the Crown addressing the jury on some basis other than that which the law accepts is the consequence of long delay, and it is dangerous for the Crown to do so. The law not only binds the judge and the jury, but also the Crown prosecutor in the submissions and arguments that can be put to the jury.

147 This does not mean that the Crown cannot seek by legitimate means to persuade the jury to accept the account of the complainant notwithstanding the delay and consequential dangers involved in doing so. It can of course counter what it anticipates will be any specific matter of prejudice which the defence will raise, by a reference to the evidence in the particular case. But it cannot attempt to attack or undermine the basic principles upon which such trials are conducted and which are manifest in the *Longman* warning.

148 This ground has troubled me, but I have ultimately formed the view that, in the absence of any complaint by defence counsel and in light of the summing up as a whole, it has not been made out.

149 This is yet another instance of a trial which has been in real jeopardy of miscarrying because of the conduct of counsel, in particular the Crown, both in the manner in which counsel addressed the jury and in their failure to provide the trial judge with the assistance necessary in carrying out the difficult task in summing up to a jury on such a matter. The fact that they must have known that it was a second trial makes their conduct even more irresponsible.

150 Since writing the above, I have become aware of a decision of the Court of Criminal Appeal of South Australia which touches upon the content of a defence opening and to which I should make reference. It supports the view that I had independently formed that the defence opening address in the present case was inappropriate and that the trial judge should have either intervened during it or taken steps after it to disabuse the jury of the false issues raised by the address.

151 In *R v Hansen* (2002) 84 SASR 54; 134 A Crim R 227, the Court considered what was said to be an opening by defence counsel in a joint trial following the Crown's opening. The statements made by that Court have to be viewed against the statutory basis for a defence opening in that jurisdiction which, unlike the position in this State, does not give the defence a right to open before the end of the Crown case. But it was accepted by the Court that, with leave, defence counsel could make a statement indicating the matters in issue after the Crown opening.

152 Defence counsel for one accused addressed the jury pointing out to them the following matters: the jury is to provide "checks and balances to make sure that an individual hasn't been wrongly accused"; that people are sometimes wrongly accused for reasons that are never disclosed; the jury was to scrutinise the evidence of the complainant with great care; the jury should not be prejudiced by the nature of the allegations; the presumption of innocence.

153 Counsel for the co-accused adopted what had been said by his co-counsel and added that it was a case of oath against oath and that this was why the jury had to carefully scrutinise the evidence of the complainant.

154 The statements made were criticised by the Court of Criminal Appeal as being inappropriate and inconsistent with an "opening" of a party's case, the only procedure provided by the relevant section, being s 288 of the *Criminal Law Consolidation Act 1935* (SA). Lander J, with whom the other members of the Court agreed, stated:

> [97] The purpose of statements made by counsel was to highlight in advance of the prosecution case the weaknesses in it. That was inappropriate. That amounted to argument.

Perry J stated that, where defence counsel was permitted to make a statement after the Crown opening, "the trial judge should be astute to ensure that the situation is not abused by counsel for the defendant attempting to give an advance instalment of his or her final address".

155 Although leave is not required for defence counsel to give an opening address to the jury under s 159, defence counsel should similarly not abuse the right given under the section by embarking upon arguments and submissions that are only appropriately made in closing address. As an opening address by the Crown should not contain any argument or submission to the jury as to the validity of its case, so the "matters disclosed in the prosecutor's address" referred to in the section, cannot be arguments or submissions arising from the nature of the evidence to be called by the Crown. Nor should "matters to be

raised by the accused person" be taken to include defence arguments and submissions based upon the Crown evidence or evidence which may be called in the defence case.

Smart AJ.

156 I have had the advantage of reading the judgment of Levine J and that of Howie J in which the facts and the issues are set out. I turn directly to the grounds of appeal.

Ground 1

157 I appreciate the distinction emphasised by Howie J between a warning and comments. In some instances for the warning to have any real meaning a judge has to set out the circumstances and the reasons underlying the warning.

158 In the present case the judge adequately explained to the jury how the appellant was prejudiced by the failure to be able to obtain, despite his best efforts, important material which may have assisted in rebutting the Crown case. He repeated some seven examples advanced by the appellant.

159 However, other important matters were omitted. The judge did not adequately explain that the delay gave rise to imprecision in the evidence of the complainant, a lack of detail which could be checked and an inability both by the complainant and the appellant to recollect all that had happened.

160 Nor did the judge explain that because of the imprecision, the lack of detail and the inability to recollect matters it was extremely difficult to cross examine the complainant effectively. Frequently, cross-examination as to the details surrounding the alleged offence and the surrounding circumstances provides a major opportunity and sometimes the only opportunity to test the complainant's evidence and assess his or her truthfulness and reliability.

161 The matter was put powerfully by Buddin J in *R v GS* [2003] NSWCCA 73 at [143]:

> The method of cross examination is an attack upon detail, exposing contradictions and unreliability. If the trial is undertaken within a reasonable time, the excuse for unreliability of fading memory is unlikely to be persuasive. However, where the trial is delayed, the accused is disadvantaged in two ways. First, the testimony is likely to be more vague, bereft of the detail which may be used to expose unreliability. Secondly, that absence of detail, and any contradiction that may happen to emerge can the more easily be explained by reference to the passage of time. The jury therefore is more likely to be forgiving of shortcomings in the complainant's evidence, especially in the context of charges which arouse strong feelings of prejudice or revulsion.

162 The High Court in *Longman v The Queen* (1989) 168 CLR 79 at 91; 43 A Crim R 463 at 471 sets out the relevant warning, which reads in part:

> as the evidence could not be adequately tested after the passage of [many] years, it would be dangerous to convict on that evidence alone ...

163 The warning specified by the High Court is an important statement of principle necessarily in somewhat general terms. Trial judges have to relate that warning to the facts of the case and make it meaningful to all 12 lay persons. While it is possible that some of the lay jurors may understand sufficiently what is meant by the words "could not be adequately tested" it is improbable that all of them would. Some explanation is necessary to explain what is envisaged by the words quoted. That explanation should cover not only that evidence that could not be obtained, but the important matters which were omitted and are

outlined earlier. It should also be pointed out to the jury with lengthy delay an accused will not know all the evidence that could not be obtained or challenged.

164 Initially the judge told the jury that as the Crown case depended on the evidence of the complainant they should examine and scrutinise his evidence with great care and that the Crown had to establish that he was honest and reliable in giving his evidence. The judge told the jury that it was very important to realise that it was not until 1999 that the appellant was made aware of the allegations against him and alerted them that such delays can cause significant difficulties to the accused in defending himself against the allegations

165 The judge stated:

> Because of the lapse of time here, I am bound to warn you that it will be dangerous to convict the accused on the evidence of [the complainant] unless you, scrutinising the evidence with great care and considering the circumstances relevant to its evaluation and paying heed to that warning which I have given you, were satisfied of its truth and accuracy.

166 After that warning the judge continued:

> The reasons for it being dangerous include the following considerations. First of all it is said that the evidence of the complainant ... cannot be adequately tested after the passage of so much time and in particular, in this case, a lot of surrounding aspects cannot be fully, or, in some cases, at all investigated.

167 He then recapitulated the examples referred to by counsel, reminding the jury that others may occur to them. As the judge went through each example he reminded the jury of the appellant's contentions and the problems caused by the lapse of time.

168 After setting out the examples and commenting upon them and the effect of delay the judge stated that the difficulties of investigation and obtaining evidence because of the delay were "one of the aspects why I am obliged by the law to tell you that it is dangerous to act on the complainant's evidence on that aspect."

169 The judge then gave a warning as to the fallibility of human recollection and associated factors. The judge concluded by reminding the jury that the appellant said that his ability to obtain evidence had ben severely curtailed, as illustrated by the examples and that there was also the effect upon human recollection of the passage of time.

170 During the course of summarising the arguments of counsel for the appellant and his comments, the judge said:

> Then the comments, they are all tied in with the situation I have reminded you about the effect of delay on being able to deal with these surrounding facts ...

171 The judge also gave a direction under s 165 of the *Evidence Act 1995* (NSW), saying:

> What [counsel for the appellant] has been asking is that I specifically tell you that [the complainant's] evidence may be unreliable and he is entitled to ask that and the reasons that it is unreliable or may be unreliable are all the reasons I have already covered with you, in particular, when I told you that it would be dangerous to convict. But, we have the lapse of time, the absence of what is called corroboration ... There is nothing of that nature here and all the criticisms which I have been going through as to differences in the evidence and contradictions

> from the various witnesses relating to that given by [the complainant]. So I have to direct you, and I do, that for those reasons as well, to the others I have already told you about, his evidence may be unreliable.

172 The jury were directed more than once that before they could convict they had to be satisfied of the honesty and reliability of the complainant. Everything de[pended on his credibility. They were warned that his evidence may be unreliable.

173 In his summing-up the judge used words of allegation and complaint, for example:

> SU8.7 "is said to have caused significant difficulties"
> SU9.2 "First of all it is said"
> SU12.8 "... they say"
> SU13.8 "But they complain"
> SU14.4 "... the defence say"
> SU15.4 "They say"

174 While I regard the use of such words of allegation or complaint as both undesirable and incorrect, in the present case, when the summing-up is taken as a whole I think that the jury were sufficiently alerted to the difficulties faced by an accused in obtaining evidence demonstrating that the complainant's version was incorrect or unreliable when there has been a long delay between the alleged offence and the accused being told that he is to be charged.

175 No objection was raised by counsel for the appellant to the summing-up about the omissions now complained of. Nor were further directions sought.

176 The Crown prosecutor in his closing speech referred to the complainant being cross-examined for two days about the surrounding details, that is, events relating to the establishment of the relationship between the complainant and the appellant, the continuance of their association and those leading up to and surrounding the alleged offences. They included meetings after school, arriving home late, the boat used in conjunction with the naval cadets, boating trips and access to the rowing shed, the pornography, the complainant's alleged telephone calls to contact the appellant, their playing squash at Rushcutters Bay, the first camping trip to Kangaroo Valley and the King's Cross Hotel. The prosecutor pointed out that there had been no cross-examination about the sexual events except it was put to the complainant that they had not happened. The prosecutor urged the jury not to be diverted by the cross-examination on the surrounding circumstances and suggestions that the complainant had made mistakes of importance indicating unreliability and to concentrate on the sexual events. The prosecutor relied on the lapse of time accounting for any discrepancies or unsatisfactory passages of evidence.

177 Counsel for the appellant defended the length of his cross-examination stating that it was long because the complainant made many long unresponsive statements and did not address the question he was asked. Counsel explained to the jury that he cross-examined on matters that the jury might use to assess the complainant's reliability. The address did not contain a clear exposition of the matters now relied upon. A little later counsel pointed out, with examples, that because of the delay evidence which might otherwise be available to refute the complainant's allegations was not available. Counsel did not adequately explain to the jury the difficulties involved in cross-examining where the complainant's

evidence lacked precision and he declined to specify with some precision when the alleged events happened and all the surrounding circumstances or at least the major surrounding circumstances.

178 Counsel for the appellant said (T575):

> I suppose I could have cross-examined [the complainant] about these particular sexual episodes he says took place and developed. What I'd say to you is there is not much need to in relation to some aspects of it and I'm going to rely on your commonsense on your experience of life.

I doubt if the jury understood the import of that obscure passage. I am not sure what counsel was trying to say. Perhaps there have been transcription difficulties.

179 Counsel addressed at considerable length on the difficulties faced by an accused in trying to meet charges relating to events which allegedly occurred so long ago, that is in 1982-1984. Counsel also referred to alleged improbabilities in the evidence of the complainant.

180 Close to the end of his address (T594) the appellant's counsel asked the jury to consider what he had put. This passage follows:

> and those matters, as has primarily cross-examine (sic) been directed towards assisting you to the reliability you can place on the complainant. And the only way it can be tested is by looking at the surrounding circumstances, facts, documents that still exist ... if you don't accept his reliability on these other issues ... how can I convict a man of a serious offence.

181 While that passage contains a reference to the point counsel was trying to make, it is not well expressed and it would not have been easy for the jury to follow.

182 In my opinion, given the lack of precision in the complainant's evidence, his reluctance to be tied down, the Crown's reliance on the lapse of time to explain the lack of precision, the defects in the complainant's evidence and the Crown's attack on the cross-examination of counsel for the appellant, it was incumbent upon the judge to give the directions omitted. He had to adequately explain to the jury the difficulty in cross-examining on the complainant's evidence, with its lack of precision and details which could be tested in cross-examination and that in these circumstances the appellant was largely confined to cross-examining on the surrounding circumstances showing that his evidence as to some of these was unreliable.

183 The absence of any request for the omitted directions by counsel for the appellant at the trial is troubling. Notwithstanding this, I regard the omitted directions in the circumstances of this trial, especially in the light of the prosecutor's attack on the cross-examination of counsel for the appellant as fundamental to a fair trial. No jury would appreciate, unless clearly explained by the judge, the major difficulties in cross examining the complainant and the disadvantages which flowed from those difficulties and the delay.

184 There has been a miscarriage of justice. Ground 1 should be upheld. Leave to appeal should be granted, the appeal allowed and a new trial ordered.

Ground 2

185 I am in substantial agreement with the reasons of Levine J for rejecting this ground.

Ground 3

186 In his opening speech the prosecutor pointed out that the first six charges alleged offences occurring between 1 January 1982 and 31 December 1982 (later amended to 31 January 1983) and that the remaining charges alleged offences between 1 January 1983 and 31 December 1983. It was stated that this was not uncommon. The prosecutor continued:

> Now the reason why offences of that nature [sexual assaults] are charged in this fashion is really just common sense Given the passage of time, it would be unrealistic to expect [the complainant] to nominate a precise date on which it occurred. It's just commonsense.

187 It is not common sense that such lengthy periods should be specified. They flow from the alleged lack of memory of when the alleged incidents occurred.

188 Counsel for the appellant made an opening speech following that of the prosecutor and before any evidence was led. I agree with Howie J that the speech of counsel for the appellant exceeded the bounds permitted by s 159 of the *Criminal Procedure Act 1986* (NSW) and that it is important that those bounds be observed.

189 This impermissible passage appeared:

> Reference has been made by the learned Crown to the fact that these matters are very old, 19 or 20 years ago. In many respects we are stepping back in time, not only in relation to the events that occurred, but to the law that existed then. You have heard the term buggery used. They referred to them as an abominable crime of buggery you might think that represented the sort of morality that existed then even in relation to this offence. It is not referred to in that term any more. So looking back the time as events that occurred, but looking back in time in relation to the law that was applied then and that has a number of effects and I would ask you to keep that in the forefront of your mind when you are considering the evidence, because you have to assess this evidence to that degree of your being satisfied beyond reasonable doubt.

190 Counsel for the appellant pointed to the difficulties of remembering what happened 19 to 20 years previously and the difficulties which the appellant faced in trying to meet the allegations made.

191 In his closing speech the prosecutor said:

> There was a time, not too long ago, when people thought things like this simply didn't happen. When such things were swept under the carpet. When young people were thought not to be believed. And when cases like this were rarely prosecuted for a number of reasons, including that the offences occurred many years before. Now as a community we hope that attitudes have changed.

192 The prosecutor next quoted the impermissible passage from the speech of the appellant's counsel set out earlier. The prosecutor referred to the changes to the law in 1983 and said:

> And it demonstrates how, as a community, how far we've come. We've changed the point where once upon a time, '82, '83 there was no other offence, other than the general law of buggery, which was capable of specifically dealing with the unlawful sexual intercourse with a child. That's how far we have come in nearly 20 years.

193 The prosecutor continued:

> Perhaps over the past 20 years we've come to understand amongst other things how important an uncorrupted youth is to our ability to live as healthy adults. But this trial is an example of how enlightened a community we have become. As a community we have confronted the reality of the exploitation of children by those in positions of trust, and we no longer hide from that reality. It is no longer acceptable to take the view that because the abuse took place many years ago that it's not worth pursuing, or that it didn't happen at all We've come to recognise that the sexual exploitation of children occurs in cities and towns. It occurs in the most respectable quarters of our community. It occurs in places we would expect a child would be safe. Our churches, family homes, and our schools. Sometimes the offending continues for quite some time. People around the place don't see what they don't expect to see. But more often than not in cases such as this there are no witnesses, because sexual offences, by their very nature, invariably occur in private, away from prying eyes.
>
> Mr Hanley said it himself, in his opening, when he said this. "And these are the sorts of cases whether they be committed last week or 20 years ago usually there are no other witnesses." And that's true.
>
> The purpose of me saying all of this to you is not to inject an emotional element to what your task is. It is not to ask you to avenge the wrongs of the past, or engage in moral judgments. Ultimately you must act according to the evidence without fear or favour.
>
> The purpose of all this is to bring me to say something about the law in this case. As I said to you over a week ago in my opening to you, the primary witness in this case is [the complainant]. There is other evidence which supports what [he] has told you, and I'll return to that later. However in cases where there is only one witness to an event, the law requires in every case that a judge must direct a jury that the evidence of that witness must be scrutinised with great care, before a conclusion is arrived at, that a verdict of guilty should be brought in. Must be scrutinised with great care. It is not a direction which is custom made for this case, specifically for this trial. His Honour will sum up the case after both myself and Mr Hanley have addressed you. But by giving that direction you are not being told by anyone to acquit the accused. It is not an expression of anyone's view of the evidence. If that were so then when this direction is given no-one would be convicted, and that would be absurd. What you are being told is just plain common sense. Nobody should be convicted of a criminal offence without the evidence being scrutinised with great care.

194 Despite the prosecutor's disavowal, he was in fact making a sustained emotional pitch designed to, and having the effect of, encouraging the jury to think that the community had entered an enlightened era in which the jury should convict.

195 This part of the speech was designed to nullify the effect of the *Murray* direction and the special care which the jury should take when dealing with charges where the Crown case depended substantially on one witness.

196 The prosecutor then attempted to neutralise the direction the judge would give in respect of the lengthy delay which had occurred between the time of the alleged offences and the reporting of the matter to the police, including the notification to the appellant of the complaint. The prosecutor said:

> The passage of time I anticipate will be something [the appellant] will rely upon heavily in attempting to persuade you that he should be found not guilty. And I will return to the merits of that argument in a moment.
>
> But again the law requires a judge to give directions to every jury if there is a delay. The law requires that where there is delay the direction must be given by a judge that it would be unsafe or dangerous to convict on the uncorroborated evidence of a complainant alone, unless the jury have scrutinised the evidence with great care and satisfied of its truth and accuracy. Well again that is not a

direction custom made for this trial. It's a direction which has been formulated out of the law's experience and plain common sense. And it's given in every such trial. Common sense because again it is just common sense that nobody should be convicted of a criminal offence without scrutinising the evidence with great care. And I notice by reading the notes that you've sent out over the past few days that you are doing just that, looking at the evidence. It's all this direction asks you to do. It's common sense that to do other than what you are doing is a dangerous course. And I think you are already engaged in the type of approach that is not a dangerous one, and that is scrutinising the evidence.

Again the directions given to you are to guide you in the right direction. No-one is expressing their view about this case. It is just a direction you must accept, follow and apply as you have been already. The law can guide you, but together the twelve of you bring together your collective common sense and experiences in life, and that is why we have juries. You are the judges of the facts, and in that arena nobody can tell you what to do. Your deliberations remain in the privacy of the jury room, and your verdicts are between you and your conscience.

197 The prosecutor has not reproduced the *Longman* warning in its entirety. Of more importance is that the prosecutor has attempted to emasculate the *Longman* warning. It is more than the application of common sense. It comes out of the long experience of the courts and the need for additional care to be taken where there has been a long delay.

198 It is impermissible for a prosecutor to seek to lessen the impact of the directions of law which the judge is required to give. The prosecutor should not have made the statements set out in the passages extracted from his final speech. It is for the judge to give the directions of law. They are not a matter on which the prosecutor should address and comment.

199 There were further objectionable passages in the prosecutor's address. After the prosecutor had reminded the jury that consent was irrelevant he continued:

> That is the law ... we don't need the law to tell us that really do we? Because how can a boy of tender years and maturity not experienced in the ways of the world, truly understand what it means to consent to the advances of a man more than twice his age. We know the law prescribed an age of consent. It does that for two reasons. One to protect young people from the predatory sexual motives of others, adults, and secondly to protect them from themselves.

200 This was not a subject for address by the Crown in the present case. All the jury needed to be told was that consent was irrelevant and that was a matter best left to the judge. What the prosecutor said had the effect of stirring up illicit prejudice.

201 Later in his address the prosecutor said:

> Well ladies and gentlemen another direction given by judges to juries, when there's been a delay before the matter is brought to Court requires the judge to point out the disadvantages the accused may suffer because evidence is lost in the meantime, evidence which may have supported his case. That is a direction given, and does not diminish the fact that the Crown bears the burden of proving the charges beyond reasonable doubt at all. But it is a direction given, but it places the defence at a disadvantage in meeting the allegations. Well that is a matter you must take into account, bearing in mind that the accused does not have to prove anything. But as you will observe during the course of this trial, it is a disadvantage also suffered by [the complainant]. As I told you in my opening it would be ridiculous to expect a witness to give evidence of the precise dates upon which certain identifiable acts are alleged to have occurred. That is why the indictment is framed in the way it is. The amendments I made to the indictment at the close of the Crown case, occurred as a result of [the complainant] conceding, not arguing with, but conceding with the defence that the events concerned might have spilled over early into the following year.

202 This again has the effect of weakening the effect of the *Longman* warning. It is not the function of the prosecutor to mount a commentary on the directions which the judge is expected to give.

203 Again, counsel for the appellant did not ask for the jury to be discharged or for directions to be given telling the jury to disregard the objectionable remarks of the prosecutor and specifying them.

204 In my opinion the impermissible comments of the prosecutor had the effect of neutralising the judge's directions and warnings and went into matters which fell within the province of the judge. It is a little surprising that the judge did not stop the prosecutor and restrict his closing address.

205 Ground 3 has been established. The prosecutor's closing speech resulted in a trial which was fundamentally flawed. There has been a miscarriage of justice.

206 When Grounds 1 and 3 are combined the need for a new trial is compelling.

Ground 5

207 I am in substantial agreement with what Levine J has written.

Ground 6

208 I disagree with Levin and Howie JJ as to the outcome in respect of grounds 1 and 3. These are new trial points.

209 I agree with Levine J that there was a rational basis for the jury to convict on counts 1 to 5 and 7 to 9 and acquit on count 6 substantially for the reasons he has given.

210 I also agree with Levine J that the five features of the complainant's evidence described as unsatisfactory and set out in his Honour's judgment do not warrant the conclusion that the verdicts of guilty were not sufficiently supported by the evidence. While there was no evidence directly corroborating that the appellant committed the offences of which he was convicted, there was other supporting evidence which went to support the complainant's evidence. It was open to a jury acting reasonably to be satisfied of the appellant's guilt beyond reasonable doubt. I decline to uphold ground 6.

211 Because of the conclusion I have reached, the question of sentence does not arise.

212 I propose the following orders:

1. Appeal allowed, convictions quashed.
2. A new trial of counts 1 to 7 and 7 to 9 be held.

Appeal against conviction dismissed
Application for leave to appeal against sentence granted but appeal dismissed

Solicitor for the appellant: *SE O'Connor.*

DAVID THIERING

HIS HONOUR: Mr Coorey, perhaps for my benefit you can tell me the relevance now as to the questions of whether there had been allegations or complaints of intimidation against Detective Cheers on other occasions?

COOREY: It would go to propensity towards violence if the answer was affirmative.

HIS HONOUR: It would go to propensity--

COOREY: Towards violence.

HIS HONOUR: Towards intimidation, I would have thought.

COOREY: And violence.

HIS HONOUR: There is no allegation of intimidation made.

COOREY: With respect, your Honour, there is.

HIS HONOUR: Yes, okay.

SHORT ADJOURNMENT

IN THE ABSENCE OF THE JURY

COOREY: It is my application that the jury be discharged. It is based upon your Honour's behaviour in shouting at counsel in the presence of the jury, and your Honour making facial expressions in the presence of the jury, which could have--

HIS HONOUR: Could you describe them please?

COOREY: Yes; your Honour twisting your face on occasions, sighing heavy long sighs, swivelling on the chair during cross-examination and continually interrupting through cross-examination by me and, your Honour, it seems to me that the only way to remedy the picture is to discharge the jury because the effect can't be remedied by direction.

HIS HONOUR: When did you first observe this behaviour that you allude to me?

COOREY: From the voir dire on 14 February and continually throughout. From the voir dire through Monday, Tuesday, Wednesday, Thursday, the behaviour, your Honour, has never really changed and, your Honour, the problem with it is I have no personal problem but the danger is that the jury, which has only been here since Monday, might try to interpret the facial expressions as being some sort of judgement in a trial.

HIS HONOUR: Yes Mr Coorey?

COOREY: If your Honour can just pardon me--

HIS HONOUR: It is your application, isn't it?

COOREY: Yes, it is my application.

HIS HONOUR: Then you don't need assistance from Mr Gelbert.

COOREY: I have just been reminded of something.

HIS HONOUR: Yes, carry on.

COOREY: Could your Honour pardon for a second?

HIS HONOUR: No, you told me before the you had an application to make, and I don't want you talking to Mr Gelbert or reading the note that he is now writing when you are supposed to be addressing me.

COOREY: I thought Mr Gelbert was trying to assist me.

HIS HONOUR: Continue with your submissions, you have his note now.

COOREY: The danger of the interruption is that it may show a reflection upon the value of counsel's questions, and the problem is that as a barrister it is always difficult appearing for an accused, but if one loses credibility in the trial, then when one comes to address the jury the jury has no faith in what counsel is saying.

Here, what has happened is, your Honour has diminished my credibility by your Honour's behaviour in the trial. With respect, that can't be remedied by direction and, your Honour, if you are against me on the application for a discharge then I request that you give the jury a direction along the lines that they ignore your Honour when you shout and that they not try to interpret anything from your facial expresses. Thank you.

HIS HONOUR: Might I just know, Mr Coorey, why it is if this conduct that you attribute to me has continued throughout and never really changed, Monday, Tuesday, Wednesday and Thursday you, on Monday, Tuesday, Wednesday, and Thursday, until some little time ago did not consider that it called for either any comment or request to me or any application of this nature?

COOREY: Because I did not want to offend you, and it is a difficult application to make and I hate making it, because I don't want to say anything that would offend your Honour, and that is the reason why it's only, at the position of a last resort, that I feel compelled to make it.

Your Honour is correct in those observations in that I should have raised the matter I suppose on 14 February, because even on 14 February your Honour was shouting at counsel at the bar table, but I can't justify the delay other than on that basis, your Honour. Thank you your Honour. Could I add something to what I have said?

HIS HONOUR: I am sure you could.

COOREY: Your Honour asked me why I didn't raise the matter before. Could I say this; it really is something that your Honour should raise. Your Honour should have raised it and not have to wait for me to raise it. It is, with respect, it is as much your Honour's function to keep a pleasant atmosphere in the court room and, your Honour, if there is an unpleasant

atmosphere in the Court room the danger is the accused will not receive a fair trial, because there will be an atmosphere of harshness and cynicism and in my submission it is imperative that your Honour takes the lead and ensures the calmness and decorum in the Court room. It should not have to be an application from me, ever.

HIS HONOUR: I am not concerned with who should control the Court, Mr Coorey, that is something about which different people in this courtroom obviously have very different views. I was concerned with your duty to your client. If I believe what you say I certainly will discharge the jury. My difficulties in accepting the position can be as you have said, and that you conscientiously have allowed that situation to continue throughout Monday, Tuesday, Wednesday and part of today, without either endeavouring to alter it or making any application. That was the purpose of my observations, Mr Coorey. I don't really need a lecture from you in my responsibilities. Thank you. You may sit down.

HEALEY: Would your Honour hear me?

HIS HONOUR: No Mr Healey.

(Application to discharge the jury granted. For judgment see separate transcript.)

IN THE PRESENCE OF THE JURY.

HIS HONOUR: Thank you members of the jury. Something has just transpired in your absence which I am afraid is going to bring this trial to an abrupt end. All that is necessary for me to say to you is that the manner in which the matter was raised, that was raised in your absence, in the presence of the three accused, is such that I believe it is not possible to ensure that the accused will be satisfied that they have received a fair trial, if the trial is allowed to proceed.

It is, as you will appreciate, imperative that accused persons in criminal trials have confidence in the system by which they are tried. A number of people are under an obligation to contribute to and ensure that confidence. Sometimes they fail to fulfil that obligation. That has occurred here and in the circumstances I feel that I have no alternative but to discharge you without verdict, as I now do.

I thank you for your attendance and attention during the trial, and if you are wondering what will happen so far as this matter is concerned, the likelihood is that there will be another trial at another time of the same issues. Thank you members of the jury, I release you now and the officers will explain any further formalities to you.

(Jury discharged without verdict.)

(Matter put into the next call-over.)

HIS HONOUR: In all the circumstances, I don't think it appropriate for me to consider the question of bail in the meantime. It is imperative that any bail application be

considered by a Judge the accuseds are confident will give them justice rather than me. I allow them at liberty until 4 pm today on the understanding that they make an appropriate application on the question of their bail determined by a competent authority.

ADJOURNED.

New South Wales
Court of Criminal Appeal

CITATION :	**Regina v Ayoub [2004] NSWCCA 209 revised - 06/07/2004**
HEARING DATE(S) :	7/5/04
JUDGMENT DATE :	28 June 2004
JUDGMENT OF :	Grove J at 1; Howie J at 2; Newman AJ at 20;
DECISION :	1. Appeal upheld; 2. Conviction quashed ; 3. New trial ordered
CATCHWORDS :	Criminal Law - appeal - identification - standard of proof - negative identification - rule in Browne v Dunn - judicial intervention - warning concerning potential unreliability of defence witnesses
LEGISLATION CITED :	Evidence Act 1995 - S165 (1) (e)
CASES CITED :	Mule v The Queen [2002] WASCA 101 Pollitt v R (1990) 51 ACR 227 R v Stewart (2001) 52 NSWLR 301 R v Fowler [2003] NSWCCA 321 R v Baker [2001] NSWCCA 151 R v OGD (1997) 45 NSWLR 744 R v Rose (2002) 55 NSWLR 701
PARTIES :	Regina Brian Nicholas Ayoub
FILE NUMBER(S) :	**CCA** 60022/04
COUNSEL :	Crown: D. Woodburne Ayoub: P. Hamill
SOLICITORS :	Crown: C.K. Smith Ayoub: S. O'Connor
LOWER COURT JURISDICTION :	District Court
LOWER COURT FILE NUMBER(S) :	03/51/0024
LOWER COURT JUDICIAL OFFICER :	Ducker ADCJ

IN THE COURT OF

CRIMINAL APPEAL

60022/04

GROVE J
HOWIE J
NEWMAN AJ

Monday 28 June 2004

R v AYOUB

Judgment

1 **GROVE J**: I have had the advantage of reading the judgments of Howie J and Newman AJ in draft form and I agree with their Honours and the orders which are proposed.

2 **HOWIE J**: In this matter the facts and circumstances giving rise to the appeal are set out in the judgment of Newman AJ. He would allow the appeal on grounds 1 and 4. I agree with the orders he proposes. However I wish to make some brief comments on these grounds and the reasons given by his Honour for allowing the appeal. I also believe it appropriate to consider aspects of one other ground of appeal.

3 There can be no doubt that Judge Ducker's interjection in defence counsel's address, as set out in the judgment of Newman AJ, was unwarranted. The simple fact that his Honour intervened in the way that he did would not carry the ground of appeal. The significance of the interjection is in the timing of it and the subject matter to which it was directed.

4 There is nothing wrong with a submission to the jury that, if there is a reasonable or real possibility that the Crown case had not been made out, they should acquit the accused. That submission is merely a different formulation of the standard direction that the jury cannot convict the accused unless they are satisfied of the offence beyond reasonable doubt. If a real or reasonable possibility exists that, for whatever reason, the Crown's contention in support of the charge is not true, it follows that the jury cannot be satisfied beyond reasonable doubt that the Crown has made its case.

5 With respect, it does not seem to me to matter whether the Crown case is one of identification of the accused as the offender or not. It is not uncommon for self-defence to be put to a jury in terms of whether there is any reasonable possibility that the accused acted in self-defence. That is because the jury might have difficulty in understanding that before the Crown has proved its case, it has to disprove either a positive assertion by the accused or an inference arising on the evidence that the accused was acting in self-defence. It is also not uncommon, in my experience, where the accused has given an exculpatory account in evidence or in a recorded interview, for the jury to be told that, if there is a reasonable possibility that the account given by the accused is true, they should acquit.

6 The only possible danger with putting the standard of proof in this way is that it might suggest that the accused has an onus of raising the possible scenario that is inconsistent with the Crown case. But I do not believe that a jury would have the slightest difficulty understanding that it is not for the accused to prove that such a possibility exists, especially where it is made clear that the accused has to prove nothing by way of defence to the charge. But in any event, if defence counsel sees some forensic advantage in putting the defence in that way, there is no reason why

the trial judge should interfere and suggest that what is being said is erroneous or inappropriate.

7 If the difficulty that his Honour had with defence counsel's submission was that he did not use the words "real" or "reasonable" before the word "possibility", then such a fault simply did not warrant the trial judge's intervention. I understand that the proper formulation of the standard of proof stresses that the jury is concerned with a "reasonable doubt" or a "real possibility" but I believe that the concern that a jury will act upon a possible scenario that is unreasonable or fanciful is without foundation. In any event, as Newman AJ notes, the absence of the word "reasonable" or "real" from counsel's submission could easily have been addressed in the summing up.

8 The second part of this ground is to the effect that the trial judge failed properly to direct the jury as to the standard of proof and the possibility that Walsh or some other person stabbed the victim. The argument is that his Honour ought to have directed the jury in the way that defence counsel had sought to do in his address: that the jury should acquit the accused if there was a reasonable possibility that the victim was stabbed by some other person.

9 I do not believe that there is any general requirement for a trial judge to use this formulation as part of the directions on the onus and standard of proof whatever be the nature of the Crown case or the evidence tending to exculpate the accused. In my view ***Mule v The Queen*** [2002] WASCA 101 and ***Pollitt*** (1990) 51 A Crim R 227 should not be considered as authorities requiring some special form of direction to be given in a case of "negative identification", that is where there is evidence to suggest that the accused was not the person who committed the crime. Provided that the judge makes it clear to the jury that, if they accept the evidence exculpating the accused or could not exclude it beyond reasonable doubt, they should acquit, it does not matter how that proposition is expressed. In a case where there was evidence of "negative identification" I can understand that many judges would, at some stage in the summing up, use the formulation commended in those decisions and that defence counsel attempted to use in the present case. But that is a matter of personal choice. There are enough restrictions and requirements placed on trial judges as it is without creating another.

10 I agree with Newman AJ that in the present case the trial miscarried. But that is not because there would have been any defect in the directions in the summing up on the onus and standard of proof, absent the interjection by the trial judge in defence counsel's address. In my view, the defect in the present case is that, having interjected in the way that he did, his Honour could well have left the jury with the understanding that the fundamental issue in the trial could not be determined in the way that counsel had expressed it; that is that they should acquit the appellant if there was a possibility that the victim was stabbed by Walsh or some other person. If that understanding was left with the jury, there is a very real risk that they were at least confused as to how they should resolve the issue before them. The summing up would not have adequately dispelled any confusion or misunderstanding arising from his Honour's interjection occurring as it did at the very end of defence counsel's address.

11 I agree with Newman AJ that success on this ground is enough to dispose of the appeal and that the verdict must be quashed. I also agree that ground 4 has been made out for the reasons given by Newman AJ and I have nothing to add in that regard. However I do wish to say something about Ground 2.

12 This ground complains of directions given by his Honour during the summing up in relation to the witnesses generally and three witnesses in particular: Geoffrey MacDonald; Dylan Walsh; and the appellant. In my view the complaints in respect to the evidence of Walsh and the appellant are not made out and there is no need to refer to that part of the summing up dealing with these witnesses as the appeal is being allowed in any event. However, the warnings given in

respect of MacDonald were unwarranted and, in my opinion, resulted in an unfairness to the defence case.

13 Geoffrey MacDonald was a witness called in the defence case who gave evidence of an admission to the stabbing of the victim allegedly made by Dylan Walsh while the two were in prison together. It must be acknowledged at the outset that there was a substantial problem with his credibility arising from his evidence to how it was that he came to give evidence at the trial. However, it is unnecessary to give any detail about his account in order to understand the ground of appeal and the complaint made about what his Honour said to the jury about his evidence.

14 The nub of the criticism of the summing up in this regard is that his Honour treated MacDonald as if he were a prison informer in respect of whom a warning was required under s 165(1)(e) of the ***Evidence Act***, yet he was giving evidence for the defence. On at least two occasions his Honour directed the jury that his evidence needed to be scrutinised very carefully. He advised the jury that:

> Sometimes people in custody do make confessions to other inmates on the belief that they will not be passed on. Sometimes it has been shown that false claims have been made of prisoners that a fellow prisoner has made a confession of some kind.

At one stage his Honour went so far as to inform the jury that giving evidence of a confession by an inmate "could help the person who gave that evidence to an earlier parole or possibly a better time in gaol". His Honour later withdrew that observation, but the fact that it was said indicates the flavour of the comments made in relation to the evidence of MacDonald. In any event even when redirecting the jury his Honour told the jury that "he was a witness of a type whose evidence really needs to be scrutinised". Unfortunately none of these comments were apposite to a witness who was not a prison informer as that class of witness was regarded in ***Pollitt v The Queen*** (1992) 174 CLR 558 or in s 165: he was not giving evidence on behalf of the prosecution.

15 In my view, it will rarely be appropriate for a jury to be warned to scrutinise the evidence of a defence witness with care regardless of how unreliable the witness might be. Warnings and cautions in relation to the potential unreliability of witnesses usually arise because the court has some knowledge of particular aspects of the evidence which might undermine its reliability and which might not be readily apparent to a juror. See generally ***R v Stewart*** (2001) 52 NSWLR 301; ***R v Fowler*** [2003] NSWCCA 321 at [125]. The matter or matters that call for a warning under s 165 will rarely be applicable to a witness who is not giving evidence implicating an accused person of the offence for which the accused stands trial.

16 So, for example, where a witness falls within the class of witness mentioned in s 165(1)(d), often referred to as an accomplice, but is giving evidence for the defence exculpating the accused, no warning under the section would be appropriate at least so far as the evidence is in favour of the accused; ***R v Baker*** [2001] NSWCCA 151 applying ***R v OGD*** (1997) 45 NSWLR 744. This is because the aspect of the witness's status that gives rise to the possibility of unreliability is no longer relevant: the potential of the witness to falsely implicate the accused in order to diminish his own culpability ceases to exist.

17 In ***Fowler***, above, the Court was at pains to point out that whether a warning is required under s 165 and the content of the warning if one is necessary will depend upon the issues raised

in the trial. Judges should avoid routinely giving warnings under the section without a request being made by counsel or without at least raising the matter with counsel so that the issue can be addressed by the parties and the content of the warning settled. The Crown made no request for a warning about the evidence of MacDonald and his Honour did not forecast that he intended to give the jury a warning about his evidence. Once the warning is given, it is difficult to effectively withdraw it where it proves inappropriate.

18 There are some classes or types of evidence that are potentially unreliable no matter whether they exculpate or inculpate an accused. Identification evidence is the most obvious. In ***R v Rose*** (2002) 55 NSWLR 701 it was held by a majority of this Court that identification evidence is so notoriously unreliable that some warning should be given where such evidence plays any part in the trial even if it tends to exculpate the accused. That was a case where evidence was given of the identification of the deceased at a time and place inconsistent with the Crown case against the accused for her murder. In the joint judgment of Wood CJ at CL and myself at [297], we held that in such a case some warning should be given about the unreliability of identification in general, but that "there would be good reason for the trial judge to temper the warning and information given to the jury in respect of that evidence".

19 I can see nothing in the evidence of MacDonald that called for any warning of the type envisaged by s 165. It was open for his Honour to make comment upon the aspects of the evidence of MacDonald that might indicate he was an unreliable witness other than that he was giving evidence of a gaol confession allegedly made by a fellow prisoner. But the Crown's cross-examination of the witness was to suggest that Dylan Walsh's confession was a result of him "big noting himself". It was never put to the witness that he was untruthful or unreliable but rather that the confession by Walsh might have been unreliable. That being so there was no occasion for the trial judge to make any comment about the reliability of MacDonald let alone to give a warning about it. The trial miscarried as a result of the unnecessary warnings and comments made about MacDonald's evidence.

20 **NEWMAN AJ**: The Appellant appeals against his conviction for maliciously inflicting grievous bodily harm with intent upon Shane Anthony Jones at Lismore on 8 September 2002. He relies upon the following grounds of appeal:

> 1(a) The learned trial judges intervention in defences counsel's address.
> (b) His Honour's failure thereafter properly to direct the jury in relation to the standard of proof and the possibility that one Dylan Walsh or another person committed the stabbing.
> 2(a) The trial judge erred in his directions as to the evidence of Geoffrey McDonald.
> (b) The trial judge erred in his directions as to the evidence of Dylan Walsh.
> (c) The trial judge erred in his directions as to the evidence of the Appellant.
> (d) The trial judge erred in his directions as to the evidence of the witnesses.
> 3. The trial judge erred in directing the jury that the accused may have attempted to set up a false alibi and failed to withdraw those directions adequately or at all.
> 4. The trial miscarried as a result of the trial judges intervention in the evidence of the witness Austin Irvine; and
> 5. A miscarriage of justice resulted from a combination of the matters in the preceding grounds.

21 These grounds of appeal can only be fully appreciated against the factual background of the relevant circumstances of the case.

22 The Crown case was that the wounding of Shane Jones occurred in a flat at Lismore some time shortly after 7am on 8 September 2002. At the time the Crown alleged some six persons were present in the flat. They were Shane Jones, Austin Irvine, Rachel Edwards, John Green, the appellant and Dylan Walsh. The first four persons nominated were in the flat at all relevant times. The appellant and Dylan Walsh came to the flat some time shortly after 7o'clock. It was the Crown case that when the appellant and Walsh arrived at the flat they banged loudly at the door. Jones told them in florid terms to go away. Surprisingly, Jones then opened the door which resulted in a scuffle ensuing. The scuffle involved Jones, Walsh and the appellant. Sometime shortly thereafter Jones went to the bathroom to relieve himself and there became involved in a fight with Walsh. It was the Crown case that the Appellant became involved in that scuffle and that, during it, he stabbed Jones. The appellant then left the flat and shortly thereafter Walsh also left.

23 There was no issue that Jones had infact been stabbed and that the extent of the injuries he suffered were sufficient to ground the subject charge. An issue arose in the course of the trial as to who it was that had stabbed Jones. Jones and Irvine identified the appellant as being the assailant. The witnesses Green and Edwards while they overheard the altercation taking place in the bathroom did not see what happened.

24 Walsh's evidence was somewhat diffuse. Having been declared unfavourable pursuant to s38 of the Evidence Act his evidence in chief took the form of cross examination on statements he had made to police. Furthermore he was granted a certificate pursuant to s128 of the Evidence Act that his evidence could not be used against him in criminal proceedings. He had given a number of statements to police. His first statement did not inculpate the appellant in any way. However in the statement given shortly before the trial commenced he said that he had been in the bathroom with Jones and the appellant and had seen a knife during the course of the scuffle which took place between the three of them. He said that the knife was not in his hands or in Jones but did not specifically say that he saw the knife in the appellant's hands. Hence my description of his evidence being somewhat diffuse.

25 The suggestion that it was Walsh and not the appellant who had been the assailant came from the evidence of one Geoffrey McDonald. McDonald, of course, was not present during the relevant events. However, while incarcerated in the same prison as Walsh MacDonald stated that Walsh had confessed to him that he had been responsible for the assault upon Jones.

26 I turn then to the grounds of appeal.

27 **Ground 1: The trial miscarried as a result of (a) the learned trial Judge's intervention in defence counsel's address and (b) his Honour's failure thereafter properly to direct the jury in relation to the standard of proof and the possibility that Dylan Walsh or another person committed the stabbing.**

28 Near the end of defence counsel's closing address the following exchange is recorded in the trial transcript:-

> "POLACK: ...I ask you to consider those things, but primarily it's a situation if you think there's a possibility that Dylan [Walsh] has done it or that any of the other person's have actually done the stabbing, you should find the defendant.
> HIS HONOUR: No, no. That is not a proper submission. That confuses the question of reasonable doubt. Don't do that."

29 Earlier in his submissions defence counsel is recorded as saying "you may find there is a real possibility that it was someone other than Dylan or my client." That was in the context of counsel submitting that it could be somebody other than the appellant who stabbed Jones.

30 It is in my view trite law that where there is identification of evidence which exculpates an accused a trial judge should instruct the jury that while there is no onus of proof upon an accused, it is sufficient in exculpation if upon the evidence adduced, a reasonable possibility exists or arises consistent with the innocence of the accused (see **Pollitt v R** (1990) 51 ACR 227; **Mule v The Queen** 2002 WASCA 101)

31 In the light of defence counsel's use of the phrase "reasonable possibility" earlier in his address his Honours intervention was in my view unwarranted. By intervening as he did his Honour in my view cast defence counsel in a light which might have encouraged the jury to believe that defence counsel could not be relied upon. As the issue of negative identification had been squarely raised through the evidence of McDonald it was in fact entirely proper for defence counsel to raise the matter in the way he did. If his Honour wished to remove any concept of remote possibility from the jury's minds he could have done so by way of clear direction. In fact his Honour's directions in relation to this topic are as follows:

> HIS HONOUR: " You might think that the defence case essentially is that you cannot be satisfied beyond reasonable doubt that it was not the young man, Dylan Walsh who stabbed Jones. Jones says it was not. Irvine says it was not and there were the earlier events..."
>
> And at page 81:
> HIS HONOUR: "The defence case is, that, for reasons that cannot be known to him, the people downstairs have put their heads together to inculpate him and to an extent Walsh, instead of one of them. Or alternatively, that Walsh is the fly in the ointment and it was really Walsh who had the knife and that you should not believe Walsh and that you should not believe Irvine, who says that he saw the knife actually in the hand of the accused and when he was recalled, said that he had actually seen the last stabbing. Remember the onus rests on the prosecution and only the prosecution. There is no onus resting on the Accused and if you have any reasonable doubt as to the guilt of the accused he must be given the benefit of that doubt and found not guilty."

32 In my view these directions do not state the law in relation to negative identification. In essence the directions compound the problem caused by his Honour's intervention in defence counsel's address. It follows that in my view the appellant has made out this ground.

33 This of itself would be sufficient to dispose of the appeal. I should say that in relation to Ground 2 in my view his Honour erred particularly in relation to the matters raised by Grounds 2(a) and 2(b) of appeal. However in view of the conclusion I have reached as to Ground 1 I do not believe that it is necessary for this court to explore the matters raised in support of that ground.

34 In my view similar considerations apply to Ground 3.

35 However the extraordinary events which found Ground 4 of the appeal do call for this court in its supervisory role to deal with the matter raised.

36 **Ground 4: The trial miscarried as a result of the trial judge's intervention in the**

evidence of the witness Austin Irvine.

37 As I have already indicated earlier in these reasons Irvine was a witness who deposed that he had seen the scuffle in the bathroom involving the accused, Jones and Walsh. At the completion of Irvine's evidence (there being no re-examination) his Honour permitted Irvine to stand down. His Honour then remarked as follows:-

> HIS HONOUR: "Just a moment, stop that witness please. Has this witness been asked the question that – the direct question that he did not see Mr Ayoub stab Mr Jones."

38 At that stage Irvine had not specifically stated that he had seen the appellant stab Jones. His Honour then went on to say to counsel for the accused as follows:-

> HIS HONOUR: "Yes but if it's your case that this man could not have seen that happen, because it didn't happen, then it must be put to him in that form."

39 After counsel for the accused had asked a number of questions discussions ensued in the absence of the jury as to Irvine's recollection as to whether he saw the accused with the knife. When the jury returned his Honour is recorded as saying as follows:-

> HIS HONOUR:- "Bring the witness back please. As you would know, the alternative is that if the Browne and Dunn rule is not followed then it creates an extremely difficult situation, because the court is put in a situation where it's either got to reject the question or reject the evidence that might be led, where there hasn't been a compliance with the rule, that's why it is so important to ignore it, those are two possibilities...".

The accused's counsel then took part in the following exchange with the witness and his Honour.

> POLLACK:- Q. "All I have to put to you is that you did not see Mr Ayoub holding the knife?
> A. You put to me that I didn't see him holding the knife, is that what you said?
> Q. Yes?
> A. Well you're wrong.
> HIS HONOUR:- All right, next question.
> POLACK:- Q. I put it to you that you did not see Mr Ayoub using the knife?
> A. The same answer.
> HIS HONOUR:- Well that - -
> Witness:- If there hadn't been involved I wouldn't have stepped in and stopped it.
> HIS HONOUR:- Q. Yes, but did you actually see the motion of his body that was, in your view, the movement of his hand with a knife in it and the knife coming into contact with the body of Mr Jones?
> A. He stabbed him, what else can I say, you know.
> Q. Well stabbing consists of holding a knife in your hand?
> A. Yeah
> Q. And then by some movement, causing the knife to enter the person – the body of another person?

A. Yeah.
Q. At any time did you see the knife action – what you realised at the time to be a knife, actually strike Mr Jones body?
A. Yes I did, the last blow that hit him in the stomach."

40 His Honour's action in effectively forcing counsel for the accused to ask questions purportedly to comply with the rule in Browne v Dunn, in a situation where the witness up to that point had not given direct evidence that he had seen the accused stab Jones, was incorrect. The adversarial system does not require a judge to take such an action in the course of a trial – particularly where in fact no contravention of the subject rule had occurred. In other words his Honour's action resulted in the accused being subjected to procedural unfairness. In short I find that this ground is also made out.

41 As is the case with Grounds 2 and 3 it is not necessary for me to deal with the matter raised by Ground 5.

42 Counsel for the appellant rightly conceded that this was not a case where he could successfully advance an argument that in the light of his client's appeal being successful he could seek a verdict of acquittal from this court. This being so I am of the view that the following orders should be made:-

1. Appeal upheld.
2. Conviction quashed.
3. New trial ordered.

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