Public Defenders conference, 27 March 2010

Opening and closing addresses

by

Peter Hamill SC

Written materials

1. Scheme of talk.

2. Transcript of Tony Parker's complaint in Livermore.

3. *R v Livermore* (2006) 67 NSWLR 659

4. List of cases on Crown Prosecutor's misconduct

5. Section 159 Criminal Procedure Act 1986

6. *R v MM* (2004) 145 A Crim R 148

7. Transcript of Kevin Coorey's application for discharge due to trial Judge's interjections.

8. R v Ayoub [2004] NSWCCA 209.

Opening and closing addresses by Peter Hamill SC

Scheme of talk

1. Misconduct by Prosecutors in their address

   Making complaint

   What conduct constitutes improper conduct?

   Case law: *Livermore v R* (2006) 67 NSWLR 659

2. General propositions for defence addresses

   You gotta be a believer

   Whoever tells the best story wins

   Dealing with interjections from trial judge

   Be Yourself

   Treat the jury as if they were intelligent.

3. Opening statements

   Limitations on the opening statement

      Sectiom 159 Criminal Procedure Act

      R v MM (2004) 145 A Crim R 148

Do's and don'ts

Don't overplay beyond reasonable doubt

Don't pitch the case to high

Use spaced repetition

Tantalise

Clearly define the issues

4. Closing address

Preparation is everything

Dealing with the onus and standard of proof

Reasonable possibilities

Anticipating the Judge's directions

What a verdict of not guilty means

-oOo-

commence your address at 2 o'clock Mr Parker.

IN THE ABSENCE OF THE JURY

LUNCHEON ADJOURNMENT

PARKER: Your Honour there are a number of matters in my friend's address that in my submission require at least correction if they can be corrected. There's one particular one that the thing that's causing me concern is that much of the long address we've just heard from the Crown took the form of expressions and repeated expressions of his personal opinions conveyed as such rather than as invitations to the jury to regard them as arguments. Repeated expressions of the Crown's personal experiences. Repeated expressions of interpretations, a significant number of them misleading, personal interpretations by the Crown of parts of the evidence, punctuated your Honour would have seen repeatedly by deep sighs of apparent personal sadness from the Crown. On top of that, specifically, your Honour heard the personal attack that the Crown launched on the witness Mr Seymour in terms that he, the Crown, after considering it had come to the personal view that Mr Seymour's an idiot. Using the expression of Mr Seymour "how thick do you have to be", "What an idiot", what happened at that part of the Crown's address was that the Crown, here clothed in the authority of the office of the Crown, presenting himself as representing the community and presenting his case fairly, repeatedly expressed disparaging personal views of a prosecution witness. Matters that were, on points that were never put to the witness. If the Crown wanted to have Mr Seymour regarded as such an imbecile as not being worthy of any credit, there would have been courses, maybe requiring your Honour's leave, open for the Crown to try to take that approach to him and the Crown is doing it of a witness who the Crown clearly perceives to have offered material adverse to his case and offering some support to the defence.

My submission is that they are all matters that require - they are all matters that the Crown should not properly have put in an address and they are matters that, if they could be corrected, require the clearest correction from your Honour.

HIS HONOUR: In what form?

PARKER: In the form--

HIS HONOUR: In what form?

PARKER: Well in the form--

HIS HONOUR: I will tell the jury that they should disregard any expression of personal opinion they think they have picked up from the Crown, just the same as I will tell them the same about you and me. What else?

PARKER: What your Honour should do actually is to discharge the jury, that's my application. My submission is that in terms of expression of personal opinion, in terms of the improper attack on the witness Seymour, the Crown's taken his address to the point where nothing that your Honour could do could properly correct it. See the jury's been - the jury's just had two hours or more harangue from the Crown Prosecutor, much of which was improper, and it can't be corrected, is in my submission the position with him.

Certainly the Crown's attack on Seymour clears for - calls for the clearest possible correction in terms that make it clear that the Crown shouldn't have been putting his personal views of that nature to them. That's the application I make.

HIS HONOUR: Yes, all right. I assume you don't agree, Mr Crown?

CROWN PROSECUTOR: No, your Honour.

HIS HONOUR: No.

CROWN PROSECUTOR: I oppose the application.

HIS HONOUR: Yes. I will not discharge the jury, but I will give the directions that I have already indicated I will and I will give specific directions in relation to the assessment of Mr Seymour. All right, 2 o'clock.

LUNCHEON ADJOURNMENT

HIS HONOUR: Yes, ready?

CROWN PROSECUTOR: Yes, your Honour.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Yes, Mr Parker.

PARKER: Ladies and gentlemen, what I am here for at this stage of the trial is to put forward for your consideration as the jury, as to the only judges of fact here in the room, arguments on Mr Livermore's part based on the evidence in the case, because, as you've already been told and as his Honour will tell you again, the evidence in the case is all that you have got to go on. That's what you've got to base your eventual decision on.

129 Furthermore, at the time that these provisions were first placed in the legislative scheme the double actionability rule was applicable in most of the common law world, including Australia. The New Zealand Parliament would have had no doubt that in the common law world a statutory provision preventing proceedings in a court in New Zealand would be effective to prevent proceedings in any such foreign jurisdiction of which, by reason of the close interrelationship between the countries, Australia would be the most prominent. The fact that the High Court has subsequently determined that the common law of Australia does not require double actionability should not detract from the context in which the legislation under consideration was originally enacted.

130 When an Australian court comes to apply the substantive law of New Zealand in accordance with *Regie Nationale des Usines Renault SA v Zhang*, the words in the statute which refer to "proceedings in any court in New Zealand" should be understood as terminology adopted on the basis that the New Zealand Parliament was not able to issue a directive to foreign courts that would be enforceable in the foreign jurisdiction. The substantive law of New Zealand to be applied in Australia, under our choice of law rule, should be understood to prohibit the institution of proceedings, without giving separate effect to the reference in the sections to New Zealand courts.

Conclusion

131 It was not suggested that, if the Court allowed the appeal and rejected the cross-appeal, there was anything to remit to the Tribunal.

132 I propose the following orders:

1. The appeal is allowed with costs;
2. The cross-appeal is dismissed with costs;
3. Set aside the orders of Judge Curtis of 17 August 2005;
4. Proceedings 407/2002 in the Dust Diseases Tribunal of New South Wales are dismissed with costs.

133 **SANTOW JA.** I agree with Spigelman CJ.

134 **McCOLL JA.** I agree with Spigelman CJ.

Appeal allowed & cross-appeal dismissed

Solicitors for the appellant/cross respondent: *Allens Arthur Robinson.*
Solicitors for the respondent/cross appellant: *Turner Freeman.*

DR R J DESIATNIK,
Barrister.

R v LIVERMORE
[2006] NSWCCA 334

Court of Criminal Appeal: McClellan CJ at CL, Johnson J and Latham J

5 June, 20 October 2006

Criminal Law — Juries — Crown address — Unfairness to accused — Role of Crown Prosecutor to expose truth which may or may not result in a conviction — Significant denial of procedural fairness.

Practice — Trial — Denial of procedural fairness — Role of Crown Prosecutor to expose truth which may or may not result in a conviction — Significant denial of procedural fairness.

Held: (1) A number of features of a Crown address have, either alone or in combination, consistently been held to justify the censure of the Court of Criminal Appeal being:

(a) a submission to the jury based upon material which is not in evidence;
(b) intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury;
(c) comments which belittle or ridicule any part of an accused's case;
(d) the impugning of the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit; and
(e) the conveying to the jury of the Crown Prosecutor's personal opinions. (667 [31])

R v McCullough (1982) Tas R 43; *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Callaghan* [1994] 2 Qd R 300; *R v MRW* (1999) 113 A Crim R 308; *R v Kennedy* (2000) 118 A Crim R 34; *R v Liristis* (2004) 146 A Crim R 547; *R v Rugari* (2001) 122 A Crim R 1, referred to.

(2) In distilling these features, a formulaic approach should not be taken in assessing whether or not a Crown address exceeds the proper boundaries. However, where a number of these features are present in a Crown address, there is a very real risk that a ground of appeal based upon the unfairness occasioned to an accused by such an address will succeed. (667 [32])

(3) The Crown address displayed all the above features with the exception of (d). The combination of these features represented a serious departure from the standards of fairness required of a Crown Prosecutor and the trial judge should have acceded to the jury discharge application. (667 [33], 668 [41], 669 [43])

(4) The role of the Crown Prosecutor must be performed without any concern as to whether the case is won or lost. The purpose of the Crown Prosecutor is to expose the truth which may or may not result in a conviction. (669 [48])

CASES CITED

The following cases are cited in the reported judgment:

R v Atallah [2005] NSWCCA 277
R v Callaghan [1994] 2 Qd R 300
R v Janceski (2005) 64 NSWLR 10

R v Kennedy (2000) 118 A Crim R 34
R v K.N.P. (2006) 67 NSWLR 227
R v Liristis (2004) 146 A Crim R 547
R v McCullough (1982) Tas R 43
R v MRW (1999) 113 A Crim R 308
R v Rugari (2001) 122 A Crim R 1
Subramaniam v The Queen (2004) 79 ALJR 116; 211 ALR 1
Weiss v The Queen (2005) 80 ALJR 444; 223 ALR 662
Whitehorn v The Queen (1983) 152 CLR 657

APPEAL

This was the hearing of an appeal against conviction on three counts of sexual intercourse without consent and one count of assault with an act of indecency.

P M Strickland SC, for the appellant.

J R Dwyer, for the respondent.

Cur adv vult

20 October 2006

1 **THE COURT.** The appellant, Dean John Livermore, appeals against his conviction at Tamworth District Court on 3 June 2005, after a trial lasting four days, on three counts of sexual intercourse without consent and one count of assault with an act of indecency.

2 The three grounds of appeal all arise out of the Crown Prosecutor's closing address. In particular, those grounds turn upon the Crown Prosecutor's treatment in that address of a Crown witness, the complainant's boyfriend, in a manner that is alleged to have caused a miscarriage of justice. There are no issues relating to the admissibility of the evidence at trial, nor the directions of the trial judge, other than those touching directly upon that portion of the Crown's address that is impugned. It is not necessary therefore, for the purposes of this appeal, to canvass the evidence in the trial in great detail. The summary of the evidence that follows concentrates on the events immediately surrounding the commission of the alleged offences.

The evidence at trial

3 During the late afternoon of 15 April 2003, the complainant was in her flat studying. She was waiting for her boyfriend, Mick, to arrive when she heard a knock at her kitchen door. She opened the door and saw the appellant, whom she recognised as an acquaintance of her boyfriend. The appellant said that he was looking for her boyfriend so the complainant agreed to let the appellant wait inside her premises. Once inside the flat, the appellant acknowledged that he had come to see the complainant, not her boyfriend. The appellant closed the door, approached the complainant and started biting her ear and kissing her neck. She pushed him away and told him to stop. However, he took her pants off and pulled her by the hands to the bedroom, turning the lights off as he did so.

4 Once inside the bedroom, the appellant removed his clothes and forced the complainant onto the bed. The complainant continued to struggle, including yelling and screaming throughout the attack. The appellant pinned her down

and inserted his penis into her vagina, then licked and bit her genitalia. The appellant also tried to insert his penis into her mouth. He later inserted his penis into her vagina a second time.

5 The complainant managed to get off the bed and attempted to retrieve her pants. The appellant grappled with her, placing her on top of the dressing table where he attempted to insert his penis into her vagina again. The complainant pushed him away and fell to the ground. He took her hands and was trying to lift her up when a knock was heard at the door. The complainant asked "who is it?" to which a voice responded "Mick". The complainant tried to put her pants on but the appellant, who was also looking for his pants, prevented her from doing so. The complainant went to the door, naked from the waist down, and opened it. As she did so, the appellant ran, naked, to the back door.

6 The complainant's boyfriend gave evidence that he arrived at the complainant's flat at about 7.00pm. He noticed that there were no lights on and that there was a BMX bike at the front door. He leaned his bike against the wall and walked around to the bedroom window. He listened but did not hear anything. He then walked to the backdoor which opened directly onto the complainant's bedroom. Whilst listening at that door, he heard the complainant say "no, stop". The voice was very soft and frightened. He then knocked firmly on the door and called the complainant's name. He heard the complainant say "who is it?" and he answered. He yelled her name a second time before the complainant opened the door.

7 When the complainant opened the door a minute or so later, she fell to the floor where she curled up and cried. He heard footsteps retreating and went around the side of the flat towards the kitchen door. He saw that the kitchen door was now open and saw the appellant in the shadows. He grabbed the appellant and asked him why he was there and to whom the BMX belonged. The appellant denied doing anything and said that the bike belonged to "Stretch". The appellant smelt of alcohol, had no shirt on and was engaged in pulling up his pants when the complainant's boyfriend first saw him. The appellant said that Stretch was still inside. The complainant's boyfriend let the appellant go and went back inside to investigate. He took the BMX pushbike into the kitchen.

[Their Honours then set out further facts not calling for report and continued:]

14 The appellant did not give evidence at trial, nor was evidence called on his behalf. It was put to the complainant in cross-examination that the sexual activity with the appellant was consensual, that she was not screaming and yelling throughout the sexual activity, that she called out "Who's there?" when she first heard the knock on the door because she didn't want it to be Mick and that she had falsely accused the appellant of rape because Mick was angry with her for her betrayal. Those suggestions were denied.

The grounds of appeal

15 Three grounds of appeal are pressed, namely:

(i) The address to the jury by the Crown Prosecutor gave rise to a miscarriage of justice.

(ii) The trial judge erred in failing to discharge the jury at the close of the Crown Prosecutor's address.

(iii) The trial judge erred in that he failed to give appropriate directions to the jury to cure inappropriate and unfair comments by the Crown Prosecutor in his address to the jury.

16 The submission in support of the first and second grounds is that an examination of the whole of the Crown address reveals a degree of unfairness and prejudice that could not be cured by directions to the jury. Specifically, the appellant took the Court to a number of passages in the transcript of the Crown's address that were said to improperly disparage a Crown witness, improperly disparage and dismiss the appellant's case at trial and undermine the role of the appellant's counsel. Ground three was argued in the alternative to ground two.

The closing addresses

17 The salient features of the Crown Prosecutor's closing address are set out below. The bulk of the Crown's address summarised the evidence given by the various Crown witnesses, about which no complaint is made. The appellant's principal complaint, both at trial and on appeal, concerns the injection of the Crown Prosecutor's personal opinion into the submissions which arose from the evidence and the denigration of the defence case by those submissions. In that context, it is relevant to the appeal to refer to the preliminary remarks in the address, namely:

> "I ask you to keep in mind that *no matter how strongly arguments or opinions are put before you, and whether or not you think counsel believe the arguments they're putting before you*, it's your job to decide the case, not ours. I ask you to keep in mind that no matter how strongly those arguments are put, they're just that, arguments advanced for your consideration. You're asked to decide this case in accordance with the promise you gave at the beginning of the trial, on the basis of the evidence, on the basis of your combined wisdom, and your experience of the world and your combined reasoning power [of] which there are 12 of you, is very considerable, probably three or four hundred years of experience between you. ... *What I may or may [not] think, or what my opinion may or may not be is completely irrelevant.*" (Emphasis added)

18 This passage, and in particular the words appearing in italics above and below, assume particular significance in the context of the issues at trial and on this appeal, given the flavour of the following aspects of the Crown's address:

> "[The complainant] told you that she asked who it was when [Mick] arrived because she was fearful that it may have been some of the accused's friends. I suggest to you that is perfectly fair. And in fact, they turned up later. The suggestion was put to [the complainant] that she asked 'who's there' because she knew Mick would be angry. *Well, the truth is I am pretty slow. I don't understand that. You say 'who's there' because you knew Mick would be angry. I don't understand that. How does that help or hinder, or do anything — it is bizarre.*
>
> ...
>
> [Referring to the complainant's initial reluctance to press the complaint] Well if all this is to stop Mick being angry, it still did not stop her saying no to the police on that night did it. I will remind you of the whole of what she said to Detective Donovan a bit later when I come to Detective Donovan's evidence. On the one hand, she has got to do something cause she's worried about Mick. On the other hand, worrying about Mick did not stop her doing what the accused claims according to the defence. *It is all silly. This is a real person we are talking about. I have not seen a plot this bad even on that 'Desperate Housewives'.*
>
> ...

> It was suggested to her in cross-examination that she showered and that that had something to do with her having consented. *Once again, I don't understand. She told she showered because she felt dirty. Well it seems to me it would be within your knowledge that in almost every movie I've ever seen, where a woman is raped, she has a shower or if there is no shower available, bathes somehow.*
>
> ...
>
> It was suggested to [the complainant] that her uncertainty when she did the photo ID was not genuine. *I don't understand that either. ... But it was suggested to her that her uncertainty when she did that, wasn't genuine — I just don't understand.*
>
> ...
>
> But these things that were raised in cross-examination that I have just been talking about, they are crumbs. They are crumbs that the Crown expects Mr Parker is going to try to pile up and suggest to you that that is the basis of a reasonable doubt. And the Crown says no way. *As far as I can tell, the ones I told you I didn't understand, just don't even make sense.*
>
> ...
>
> The next witness ... after [the complainant] was [Mick]. *Now it is not part of my job to judge people. It is my job to present the evidence fairly and to the best of my ability. However, I have got to say after careful consideration I have come to the realisation that one of the witnesses in this trial is an idiot.* [Mick] was in a relationship with [the complainant]. He had only recently rung [her]. He asked about, and was invited to come around and see [her]. He told her what he was going to do, which obviously was not going to take long. He arrived within about 45 minutes, time to have a shower, get petrol and have a short visit with a friend. And [Mick] knew that [the complainant] was expecting him. [Mick] told you the words he heard from inside, before he announced his presence, were in a frightened voice, 'no, stop'. That is what he heard, 'no, stop'. I will just turn aside from that for a moment. If you suppose for a moment, that there was any truth at all in this defence case, and I'd agree that you might find that hard to imagine, but if you suppose that for a moment, if it were true, what would that mean.
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> ...
>
> [Mick] told you he heard with his own ears someone run from the premises. [Mick] told you he saw with his own eyes the accused trying to hide and getting dressed. *Obviously [Mick] put one and one together, and came up with some number between one and 100. Goodness knows what.* [Mick] has this conversation with the accused, 'who is it, what the fuck are you up to', gets the answer 'it's me'. [Mick] says 'what are you doing, you just come out of [the complainant's] flat' and the accused very honest, very forthright, says 'no that's bull shit'. [Mick] says 'who owns the bike' the accused says 'it's Stretch's bike'. [Mick] says 'well where's he then?'. The accused once again very honest, very helpful, says 'he is still inside'.
>
> [Mick] has heard the accused run out. [Mick] has seen the accused hiding, getting dressed. And the conversation I have just recited is all it took to trick [Mick] into letting the accused escape and going back inside. To make it worse, he goes back inside and says to his girlfriend who's so recently been lying on the ground at his feet half naked crying, 'what's going on ...., are you cheating on me'. ...
>
> *Like I said, after thinking about it long and hard, it does seem that one of the Crown witnesses is an idiot. The Crown says that you can't hold [Mick's] way of looking at things against [the complainant]. You can't hold [Mick's] thinking or apparent lack of it, his thinking or apparent lack of thought and compassion, against [the complainant]. It is not her fault that he says the things he does.*" (Emphasis added)

19 Immediately after the Crown's address, the appellant's counsel at trial sought a discharge of the jury on the basis that the Crown Prosecutor's expressions of personal opinion, and in particular what was said to be an "improper attack" on the Crown witness Mick, could not be corrected by directions from the trial judge. The appellant's counsel's submissions referred to "the Crown, clothed in the authority of the office of the Crown, presenting himself as representing the community and presenting his case fairly, repeatedly [expressing] disparaging personal views of a prosecution witness". In the alternative, counsel sought directions in the clearest and strongest terms in the hope that the jury might disregard those views. The discharge application was refused, but the trial judge indicated he would give appropriate directions in the summing up.

20 Not surprisingly, the appellant's counsel at trial used the opportunity afforded by his closing address to attempt to redress the most damaging of the Crown Prosecutor's "submissions". The centrality of Mick's evidence to the defence case was highlighted in the following terms:

> "In this case, ladies and gentlemen, we have important evidence, you might think it was very important evidence, from Mick ..., the witness who the Crown wants to characterise as an idiot, but whose evidence when you think about it in a fair way, as you're obliged to as [the accused's] judges, detracts from the idea that you can accept [the complainant's] evidence without any criticism, or confidently, and gives some support to the idea that with the sexual activity that was happening there between the accused and [the complainant] was activity at which she was a willing participant, to which she consented.
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> [Counsel then referred to the detail of Mick's evidence, including the fact that Mick was listening at the complainant's bedroom window at about the same time as the accused was allegedly assaulting her on the dressing table and whilst, according to the complainant, she was yelling and screaming. Mick's failure to hear anything other than a soft frightened voice and the complainant's response to the knock on the door was contrasted with the circumstances surrounding a violent sexual assault.]
>
> It's okay for the Crown to call [Mick] an idiot, but you're the judges of the facts. You might think that ... the observations that he made ... [are] likely to be an accurate reflection. It doesn't matter if the Crown doesn't like [Mick]. We are here to evaluate his evidence and you're here to work out whether at the end of the day, I suggest to you, to work out whether you think aren't there big problems in accepting the complainant's evidence ... as being a sufficient basis for you all to be able to say, 'the Crown's convinced us beyond reasonable doubt'."

21 Following defence counsel's address, the trial judge said, "I have to say, Mr Crown, I thought it was an address rather more enthusiastic and laced with personal observation than I have usually encountered in trials of this nature". In response to this criticism, the Crown Prosecutor said that he was attempting to submit that Mick's opinions, or rather the conclusions that he had reached, were not the proper conclusions and that those conclusions were in any event irrelevant.

The directions

22 When dealing with the obligation upon the jury to disregard any opinions about the evidence that he might express in the course of the summing up, the trial judge said:

> "The same observations are true about the speeches of counsel. You are not limited by the arguments they raised. You are not limited by their references to the evidence and you treat any expression of personal opinion you may think you have picked up from either of them in just the way I have told you to treat mine, that is ignore them.
>
> Indeed, in this case I have to say that the Crown Prosecutor in his final address sought to categorise [Mick] as — and I quote — 'an idiot'. Now that may be the view you have yourselves formed about [Mick], it may not. It is a matter entirely for you. I did not understand the Crown to be saying that [Mick] was not to be accepted in terms of what he says he saw and heard. The attack being made by the Crown, as I understood it, was on the conclusions which it appeared [Mick] may have drawn from what he saw and heard.
>
> The Crown was suggesting those conclusions were not well founded and to the extent that he described [Mick] as an idiot in his considered — that is the Crown's considered view — *I think that was probably not appropriate.* The Crown should not convey his personal opinion of witnesses and their intellectual capacities to juries in quite such florid terms. So I have said, in any event, that is a personal opinion, you ignore personal opinions expressed by the barristers or by myself." (Emphasis added)

23 This direction represents the entirety of what the trial judge had to say about the identified excesses of the Crown's address. We turn to a consideration of the extent to which these features of the Crown's address transgressed the principles underpinning the role of the Crown Prosecutor in a criminal trial.

The role of the Crown Prosecutor and the limits of trial advocacy

24 This Court recently had occasion to repeat those aspects of the decision in *R v McCullough* (1982) Tas R 43 at 57, touching upon the duties of a Crown Prosecutor, in *R v K.N.P.* (2006) 67 NSWLR 227 at 232 [32]. *R v McCullough* has also been referred to, with approval, in the course of this Court's decisions in *R v Attallah* [2005] NSWCCA 277, *R v Liristis* (2004) 146 A Crim R 547 at 563ff and *R v Rugari* (2001) 122 A Crim R 1 at 10. For present purposes, it is necessary to set out the following aspects of the dicta in *R v McCullough* (at 57–58):

> "... 'It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury.' ... However, it should also be said that the observance of those canons of conduct is not incompatible with the adoption of an advocate's role. Counsel for the Crown is obliged to put the Crown case to the jury and, when appropriate, *he is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, to attack that advanced on behalf of the accused. But he must always do so temperately and with restraint,* bearing constantly in mind that his primary function is to aid in the attainment of justice, not the securing of convictions. As the New Zealand Court of Appeal said in *R v Roulston* [1976] 2 NZLR 644 at p 654 ... 'it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon the accused.'
>
> ...
>
> The feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another. Nevertheless, it is wrong for Crown counsel to become so much the advocate that he is fighting for a conviction and *quite impermissible to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to follow the safe course and order a new trial.*" (Emphasis added)

25 A seminal statement of the responsibilities of a Crown Prosecutor in a criminal trial appears in *Whitehorn v The Queen* (1983) 152 CLR 657 at 663–664, per Deane J:

> "Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, *the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with a consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered.*" (Emphasis added)

26 In *R v Callaghan* [1994] 2 Qd R 300 at 306, the Queensland Court of Appeal held that it was not appropriate that Crown Prosecutors use the dignity of their office to tell a jury something that is not in evidence and that counsel's role is to make submissions, not express personal opinions or enter the fray as a contestant.

27 In *R v Kennedy* (2000) 118 A Crim R 34 at 41, Studdert J, with whom Heydon JA and James J agreed, found submissions by the Crown Prosecutor, which were critical of a Crown witness who was not sought to be declared unfavourable, improper. It was held that the submissions may well have influenced the jury to reject evidence that the witness gave which was favourable to the accused's case and which impacted on the credibility of the complainant. This was said to be a "serious irregularity" resulting in a miscarriage of justice.

28 In *R v Rugari*, Carruthers AJ, with whom Spigelman CJ and Sperling J agreed, explored a number of breaches by the Crown Prosecutor of the "reasonable restraints" imposed upon him. In particular, an expression by the Crown Prosecutor of his own view of the quality of the evidence was said to be inappropriate. There were other inappropriate comments, which when taken together, gave rise to the prospect that in convicting the accused, the jury was "... actuated, partly at least, by the inappropriate and prejudicial remarks made by the Crown Prosecutor" (at 12).

29 In *R v Liristis*, the description by the Crown Prosecutor of the accused's evidence as "pathetic" and comments in the course of the Crown's address which included his own reaction to the evidence given by the accused were said not to exhibit the fairness and detachment which a Crown Prosecutor is expected to have, in accordance with Deane J's statement in *Whitehorn*.

30 Similarly, in *R v K.N.P.*, the introduction in the closing address of the Crown Prosecutor's personal thoughts was said to be "... a gross breach of his duty to present the Crown case in an impartial and fair manner. By imposing his own view on the jury there was a risk that they might believe that they were required to decide whether the prosecutor was correct in his personal views rather than assessing for themselves whether the evidence proved the Crown

case" (per McClellan CJ at CL at [53] (omitted from the NSWLR report of the case)).

31 This brief review of the authorities relevant to the disposition of this appeal disclose a number of features of a Crown address that have, either alone or in combination, consistently been held to justify the censure of this Court. They are:

(i) A submission to the jury based upon material which is not in evidence.
(ii) Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.
(iii) Comments which belittle or ridicule any part of an accused's case.
(iv) Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.
(v) Conveying to the jury the Crown Prosecutor's personal opinions.

32 In distilling these features, it is not suggested that a formulaic approach may be taken in assessing whether or not a Crown address exceeds the proper boundaries. On occasions, it may be that the overall tenor or impression made upon a jury by a Crown address which exhibits few, if any, of these features nonetheless gives rise to the prospect that an accused has not received a fair trial. However, where a number of these features are present in a Crown address, there is a very real risk that a ground of appeal based upon the unfairness occasioned to an accused by such an address will succeed.

33 The Crown address in the instant case displayed all of the above features with the exception of (iv). The Crown made a submission to the effect that women who are raped will invariably have a shower or bathe because they feel "dirty" in the aftermath of the assault. This submission was without any foundation in the evidence at trial. No doubt the Crown Prosecutor anticipated that the appellant's counsel at trial would place some reliance on this aspect of the complainant's behaviour, it being consistent with consensual sexual intercourse. The complainant was not asked why she had showered. Rather, the Crown Prosecutor professed some personal knowledge of this characteristic of rape victims as depicted in movies. The jury was then invited to rely upon their own experience of such films, which may or may not have accorded with the Crown Prosecutor's opinions.

34 The interpretation of the behaviour of a victim of rape in popular films is hardly a reliable basis upon which to found such a submission. Apart from asking the complainant directly, it would have been permissible for the Crown Prosecutor to ask the examining doctor (who was no doubt appropriately qualified) whether it was within her experience that victims of rape complained of feeling sullied and "dirty" and often showered after the assault, despite the likelihood that valuable forensic material would thereby be destroyed. However, no such course was taken.

35 The repeated characterisation of the complainant's boyfriend as an "idiot" was highly improper. The trial judge was correct in suggesting to the jury that the Crown Prosecutor was not asking the jury to disregard what the witness had heard and seen on the night in question. In that sense, the Crown Prosecutor's submissions were not strictly speaking an attack upon the credit of the complainant's boyfriend.

36 However, the vice in the submission was much more insidious. It was an intemperate attack that was inclined to arouse the jury's prejudice towards a Crown witness who was integral to the defence case theory. It was also a

submission that was designed to ridicule and belittle that case theory. By conveying to the jury in no uncertain terms that counsel representing the interests of the community and of the State regarded a witness as a fool to entertain for one moment the thought that the complainant may have had consensual sexual intercourse with the accused, the jury were in effect being told that they were also fools if they were to reach the same conclusion. Such a submission represents a significant departure from the responsibilities and obligations of a Crown Prosecutor to persuade a jury of an accused's guilt by way of balanced and rational argument based upon the evidence in the trial.

37 It was always open to the Crown Prosecutor to simply make the submission that the conclusions initially reached by Mick were perhaps founded upon an instinctive jealous reaction, rather than a calm, rational appraisal of what the complainant had said and done. It was also true that those conclusions were entirely irrelevant for the purposes of the trial. However, it is noteworthy that the Crown Prosecutor did not object at any stage to a long series of questions in cross-examination of the complainant's boyfriend, that elicited his thoughts and feelings at the relevant time.

38 The Crown Prosecutor made a number of comments that could have had no effect other than to ridicule the defence case. References to the defence case as "bizarre", "silly" and reminiscent of a plot worse than "*Desperate Housewives*" disparaged and dismissed the accused's case. The objective features surrounding the alleged assaults upon the complainant provided the appellant with ample material capable of raising a reasonable doubt in the minds of the jury as to the alleged non-consensual nature of the sexual activity. It was the critical issue in the trial and was worthy of serious consideration. The Crown Prosecutor's comments may well have deflected the jury from that task.

39 On a significant number of occasions the Crown Prosecutor conveyed his personal opinions in relation to the evidence and the arguments he anticipated from the appellant's counsel at trial. In telling the jury a number of times that he did not understand some aspect of the defence case, or that he must be "slow", these submissions potentially dissuaded the jury from devoting proper care and attention to a consideration of defence counsel's arguments. The jury was implicitly told that the defence case was beyond comprehension.

40 The Crown Prosecutor's pre-emptive attempt at neutralising the submissions, of which legitimate complaint has been made, did nothing to reduce or remove the prejudice to the appellant's case at trial. Declaring to the jury that his opinions were "completely irrelevant" simply highlights the error in conveying them to the jury at all. Once conveyed, they were designed to have an effect, that is, influencing the jury to peremptorily reject the appellant's defence. The authority of the Crown Prosecutor's office was abused in that respect.

41 The combination of these features of the Crown address represents a serious departure from the standards of fairness required of a Crown Prosecutor. Moreover, we would be inclined to that view solely on the basis of the Crown Prosecutor's disparagement of a Crown witness whose evidence was partly favourable to the appellant (see *R v Kennedy*). That aspect of the Crown address was particularly damaging, and the trial judge's somewhat qualified reproof ("probably not appropriate") was insufficient in the circumstances.

42 We acknowledge that the trial judge was placed in an invidious position when the application for discharge was made. No doubt, his Honour expected a measure of redress by way of defence counsel's address. Yet defence counsel's address could not counter the abuse of the Crown Prosecutor's role. His Honour was required to lend his authority to an unambiguous denunciation of the Crown Prosecutor's conduct. That was not done.

43 In any event, it would be difficult, if not impossible, to formulate directions which one could confidently assert were capable of restoring the appropriate balance to the trial. Having regard to the fact that the only issue for the jury was whether the Crown had proved beyond reasonable doubt that the complainant did not consent to sexual intercourse with the appellant, and having regard to the extent to which the Crown address deflected the jury from that issue, the trial judge should have acceded to the discharge application.

44 This Court might be forgiven for thinking that repeated condemnation of similar Crown addresses appears to have fallen on deaf ears. This is the latest in a series of appeals before this Court where a ground of appeal has alleged extravagant and improper submissions being advanced by a Crown Prosecutor during the closing address to a jury. In the present case, the Crown Prosecutor addressed the jury on 2 June 2005. By that time, a number of emphatic statements had been made by this Court in *R v MRW* (1999) 113 A Crim R 308 (10 December 1999); *R v Kennedy* (23 November 2000); *R v Rugari* (9 March 2001) and *R v Liristis* (27 August 2004). Since then, the Court has been required, once again, in *R v Attallah* (25 August 2005) and *R v K.N.P.* (20 July 2006) to emphasise the obligations of a Crown Prosecutor in addressing a jury.

45 The statements made by this Court in those decisions are not novel. They emphasise the traditional role and duties of a prosecutor. In this State, Crown Prosecutors are appointed under the *Crown Prosecutors Act* 1986. A Crown Prosecutor is responsible to the Director of Public Prosecutions for the due exercise of the Crown Prosecutor's functions: s 4(4) of the *Crown Prosecutors Act*. The functions of Crown Prosecutors include appearing as counsel in proceedings on behalf of the Director: s 5(1)(a) of the *Crown Prosecutors Act*. Crown Prosecutors perform their functions on behalf, and under the control, of the Director: *R v Janceski* (2005) 64 NSWLR 10 at 50 [253].

46 The Director may furnish written guidelines to Crown Prosecutors with respect to the prosecution of offences: s 13(1) of the *Director of Public Prosecutions Act* 1986. Pursuant to this power, the Director has issued Prosecution Guidelines (available at <http.www.odpp.nsw.gov.au>). Chapter 2 of those Guidelines relates to the role and duties of the prosecutor.

47 Recent statements of the High Court of Australia emphasise the contemporary and continuing obligation of a prosecutor to present a case fairly and completely: *Subramaniam v The Queen* (2004) 79 ALJR 116 at 127 [54]; 211 ALR 1 at 16 [54]. In that case, the High Court referred to the well-known propositions that prosecutors "are to regard themselves as ministers of justice and not struggle for a conviction" and that although "the duty of a prosecutor is to prosecute and not to defend, nevertheless it has long been established that a prosecution must be conducted with fairness towards the accused and with the single view to determining and establishing the truth".

48 We would add, with emphasis, that the role of the prosecutor must be performed without any concern as to whether the case is won or lost. As the High Court makes plain, the purpose of the prosecutor is to expose the truth which may or may not result in a conviction.

49 Chapter 2 of the Prosecution Guidelines of the Director of Public Prosecutions echoes these principles. Chapter 2 states with respect to the role and duties of a prosecutor (at 3):

> "It is a specialised and demanding role, the features of which need to be clearly recognised and understood. It is a role that is not easily assimilated by all legal practitioners schooled in an adversarial environment. It is essential that it be carried out with the confidence of the community in whose name it is performed.
>
> '*It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.*'
>
> (per Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263 at p 270).
>
> In this State that role must be discharged in the environment of an adversarial approach to litigation. The observance of those canons of conduct is not incompatible with the adoption of an advocate's role. The advocacy must be conducted, however, temperately and with restraint.
>
> The prosecutor represents the community generally at the trial of an accused person.
>
> [The passage from the judgment of Deane J in *Whitehorn* (set out at 666 [25] supra), is reproduced at this point in the Guidelines]
>
> Nevertheless, there will be occasions when the prosecutor will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged."

50 Rule 62 to r 65 of the *New South Wales Barristers' Rules* are incorporated as Appendix B to the Prosecution Guidelines. These apply equally to solicitor advocates by operation of r A.62–r A.65 of the *Law Society of New South Wales Solicitors Rules*. Those Rules provide as follows:

> **"Prosecutor's duties**
>
> 62. A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
>
> 63. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
>
> 64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
>
> 65. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight."

51 In *R v MRW* (at 317 [40]–[41]) and *R v Rugari* (at 9 [45]), reference was made to Bar Rule 63 and r 64 and the Prosecution Guidelines of the Director of Public Prosecutions. In *R v Rugari* (at 9 [46]), Carruthers AJ (Spigelman CJ and Sperling J agreeing) observed that these rules were not intended to inhibit a prosecutor presenting the Crown case in a firm and positive manner.

52 A Code of Conduct was issued by the Director of Public Prosecutions in May 2005. The Code applies to, amongst others, Crown Prosecutors (cl 9). The Code of Conduct requires compliance with the Director's Prosecution Guidelines and the professional conduct and practice rules of applicable professional associations.

53 A consequence of the Crown Prosecutor's conduct in the present appeal (as in *R v MRW*, *R v Kennedy*, *R v Rugari* and *R v Liristis*) is that the appeal must be allowed. There has been a significant denial of procedural fairness that does not allow for the application of the proviso: *Weiss v The Queen* (2005) 80 ALJR 444 at 455 [45]; 223 ALR 662 at 675 [45]. The conviction should be quashed and there should be a new trial.

54 The adverse impact upon the administration of justice, in these circumstances, is clear. It is expected that Crown Prosecutors will comply with professional ethical rules and statutory guidelines issued by the Director of Public Prosecutions which are consistent with judicial statements emphasising the duties of a prosecutor in a criminal trial.

55 We would uphold the first and second grounds of appeal.

56 Accordingly, the orders are:

1. The appeal is allowed.
2. The convictions and the sentences imposed on the appellant on 5 August 2005 are quashed.
3. Order a new trial.

Orders accordingly

Solicitors for the appellant: *Legal Aid Commission of NSW.*

Solicitors for the respondent: *Solicitor for Director of Public Prosecutions (NSW).*

I M NEWBRUN,
Barrister.

Opening and closing addresses by Peter Hamill SC

Some cases on the Prosecutor's role and misconduct

R v McCullough **(1982) 6 A Crim R 274.**

Whitehorn v The Queen **(1983) 152 CLR 657**

Cannon & Rochford v Tahche & Ors **[2002] VSCA 84**

KNP v R **[2006] NSWCCA 213**

Livermore v R **(2006) 67 NSWLR 659**

MG v R **[2007] NSWCCA 57**

Causevic v R **[2008] NSWCCA 238**

Gersbach v R **[2009] NSWCCA 132**

Doherty and NC v R *- decision pending in the New South Wales Court of Criminal Appeal*

New South Wales Consolidated Acts

CRIMINAL PROCEDURE ACT 1986 - SECT 159

Opening address to jury by accused person

159 Opening address to jury by accused person

(1) An accused person or his or her Australian legal practitioner 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 Australian legal practitioner is entitled to open the case for the defence before calling evidence, whether or not an address has been made to the jury.

SUPREME COURT OF NEW SOUTH WALES (COURT OF CRIMINAL APPEAL)

R v MM

[2004] NSWCCA 81

Levine and Howie JJ, and Smart AJ

10 October 2003, 31 March 2004

Practice and Procedure — Longman direction — Sufficiency — Warning — Comment — Counsel's addresses — Propriety — Criminal Procedure Act 1986 (NSW), ss 159, 291, 292 — Criminal Appeal Act 1912 (NSW), s 6(3) — Crimes (Sentencing Procedure) Act 1999 (NSW), s 44(2) — Evidence Act 1995 (NSW), s 165(2).

Following trial, the appellant was convicted of sexual assault on eight counts and acquitted on one. The complainant was the same in all counts. He appealed, submitting that the direction as to delayed complaint was inadequate; the Crown prosecutor's address undermined the effect of the directions as to delay; there was a failure to direct the jury as to unreliability of witnesses caused by delay; and the verdicts were unreasonable. He was sentenced to an effective sentence of eight years with a six year non-parole period. He appealed, submitting the judge overestimated the objective seriousness of the offence, gave insufficient weight to his subjective circumstances, and insufficient weight was given to the necessity of serving his sentence in protection.

Held: (per Levine J, Howie J agreeing, Smart AJ dissenting) (dismissing the appeal) (1) The direction as to delay and its effect was adequate. No redirection was sought. It would be regrettable if there developed a practice of silence on the part of counsel on the basis that r 4 was never applied.

Longman v The Queen (1989) 168 CLR 79; 43 A Crim R 463, discussed.

Crampton v The Queen (2000) 206 CLR 161; 117 A Crim R 222; *Doggett v The Queen* (2001) 208 CLR 343; 119 A Crim R 416; *R v Johnston* (1998) 45 NSWLR 362; *R v MM* [2001] NSWCCA 286; *R v DBG* (2002) 133 A Crim R 227; *R v GS* [2003] NSWCCA 73; *R v WRC* (2002) 130 A Crim R 89; *R v BWT* (2002) 54 NSWLR 241; 129 A Crim R 153; *R v ITA* (2003) 139 A Crim R 340, considered.

(2) The direction on assessing the credibility of the complainant due to delay was adequate.

(3) The Crown's comments, while not inflammatory, were unnecessary, but did not constitute a miscarriage.

(4) No warning about unreliability of witnesses was sought for sound tactical reasons. Leave should be refused.

(5) The verdicts were not inconsistent, but rather showed due discrimination by the jury of the evidence.

(6) There was no error in the characterising of the offences, and appropriate weight was given to his subjective circumstances.

(7) The judge properly acknowledged that the sentence would be served in protection but was not required to stipulate any particular discount.

R v Davies (1978) 68 Cr App R 319; *AB v The Queen* (1999) 198 CLR 111; *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; *R v AB (No 2)* (2000) 117 A Crim R 473; *R v Wahabzadah* [2001] NSWCCA 253; *R v Scott* [2003] NSWCCA 28; *R v Totten* [2003] NSWCCA 207; *R v Durocher-Yvon* [2003] NSWCCA 299; *Stockdale v The Queen* [2004] NSWCCA 1, referred to.

Appeal against conviction and sentence

R Hulme SC, for the appellant.

P Ingram, for the respondent.

Cur adv vult

31 March 2004

Levine J.

The appellant has been afforded anonymity in this judgment by reason of orders made by his Honour the trial judge on 21 August 2002 purportedly in pursuance of ss 118 and 119 of the *Criminal Procedure Act 1986* (NSW) as it was then in force (now see ss 291 and 292 of the *Criminal Procedure Act*). Upon a reading of the transcript of the proceedings before his Honour at the time those orders were made, it is clear that both the complainant and the accused desired the benefit of such anonymity as was afforded by the orders his Honour purported to make. It must not be taken, however, that in every case an accused person or an appellant will necessarily be afforded anonymity consequent upon the making of a lawful order that protects the identity of a complainant in a case such as this. Further, it is incumbent upon the appellant or the Crown when an appeal is called, immediately to inform the Court of Criminal Appeal of any orders that have been made in relation to anonymity, hearing in camera and the like.

The appellant, who was tried by jury before his Honour Judge Black QC in the District Court from 21 August 2002 to 3 September 2002, appeals against conviction and seeks leave to appeal against sentence.

The indictment contained nine counts. Counts 1, 2, 3, 5 and 6 were each offences of indecent assault upon a male person committed between 1 January 1982 and 31 December 1982 (s 81 of the *Crimes Act 1900* (NSW); maximum sentence: imprisonment for 5 years). Count 4 was an offence of buggery committed between 1 January 1982 and 31 December 1982 (s 79 of the *Crimes Act*; maximum sentence: imprisonment for 14 years). Counts 7 and 9 were each offences of indecent assault upon a male committed between 1 January 1983 and 1 January 1984 (s 81). Count 8 was an offence of buggery committed between 1 January 1983 and 1 January 1984 (s 79).

On 3 September 2002 the jury found the appellant guilty on counts 1, 2, 3, 4, 5, 7, 8 and 9. The appellant was acquitted on count 6.

The conviction appeal

Six grounds of appeal have been notified.

Ground 1 is that the learned trial judge erred by failing to adequately warn the jury about the difficulties occasioned to the appellant by the lengthy delay in complaint.

Ground 2: His Honour erred by failing to adequately warn the jury about the use the jury could make of the lengthy delay in complaint in assessing the complainant's credibility.

Ground 3: The trial miscarried because the Crown prosecutor addressed the jury in a manner that undermined the effect of the directions his Honour gave concerning the need to scrutinise the complainant's evidence with great care and the problems caused by the very lengthy delay in complaint.

Ground 4: The trial miscarried because the Crown failed to call DD, CM and SM1. This ground of appeal was abandoned.

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.

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.

Outline of facts

7 The appellant was a teacher at the school from 1 June 1981 until the end of the school year in 1982. From early in 1983 until 1986 the appellant lived and worked in Victoria. The complainant was a pupil at the school from Year 6 until he left at the end of Year 10 at the end of 1983. He was born on 7 April 1967 and thus was aged between 14 and 16 years at the time of the offences. The appellant was the complainant's tutor master for one period in 1982 and was also in charge of the school naval cadets.

8 The complainant first spoke to the police about the allegations in January 1999. From 3 February to 20 April 1999 a "comprehensive statement" was taken from the complainant by the police. The appellant was charged on 16 September 1999.

Ground 1: His Honour erred by failing to adequately warn the jury about the difficulties occasioned to the appellant by the lengthy delay in complaint

9 At the outset it is to be observed that no steps were taken by trial counsel to have his Honour cure what, on appeal, were submitted to be defects going to the heart of the matter in the learned trial judge's summing-up. Thus this case is one more in what it seems to me to be a continuing series of appeals founded upon an asserted inadequacy of "*Longman* directions" in the context of silence by the appellant's legal representatives at the conclusion of the summing-up. Be that as it may, if it is a "heart of the matter" point, leave should be granted under r 4.

10 Relevant parts of his Honour's summing-up are as follows:

> It is very important, however, that whether there was no complaint or whether there was a complaint, it is very important that you realise that it was not until 1999 that the accused was aware that these allegations were being made against him because 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 and the law recognises this and it is necessary for me to give you some very specific warnings about it. 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.
>
> The reasons for it being dangerous include the following considerations. First of all it is said that the evidence of the complainant, that is [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. I shall give you some examples of those, they have been referred to in the submissions of counsel. It may be that others have occurred to you.

(Emphasis added.)

His Honour thereafter sets out seven particular aspects of the evidence illustrative of the ways in which the appellant was in fact prejudiced in the preparation for and presentation of his case in answer to that of the Crown.

It will be seen that the substance of the direction followed the wording of the joint judgment of Brennan, Dawson and Toohey JJ in *Longman v The Queen* (1989) 168 CLR 79 at 91; 43 A Crim R 463 at 471. I have emphasised the phrase above as it played some special role in submissions generally on this ground.

It was contended that the terms of his Honour's directions in relation to problems arising from delay in complaint did not "clearly and emphatically warn the jury that the appellant could not adequately test the evidence of the complainant" after the passage of more than 17 years; there was lack of sufficient "emphasis". Submissions spoke of his Honour not delivering the warning (it clearly, on any view of the summing-up, can only be described as a warning) as is required, ie in an "unmistakeable and firm judicial voice". His Honour regularly referred to matters presented in argument and submissions on behalf of the appellant by his trial counsel, thus undermining, so it is submitted, the force of the undoubted warning. The appellant goes so far as to suggest that the approach taken by his Honour reduced the directions to a mere recitation of the appellant's argument. At this point, in my view, a fair reading of his Honour's summing-up cannot simply be so characterised.

A further complaint is made in terms of the impact of the address of counsel for the Crown (the subject of ground 3). To that I will return. Shortly stated, such was the Crown's approach in his address that there was the greater reason, it was submitted, for the learned trial judge to give his own judicial imprimatur to the warnings that are now clearly required by reason of the decisions of the High Court in *Longman*; *Crampton v The Queen* (2000) 206 CLR 161; 117 A Crim R 222 and *Doggett v The Queen* (2001) 208 CLR 343; 119 A Crim R 416.

It is desirable at this point to set out the matters to which his Honour referred:

(a) The absence of any evidence concerning the claim by the complainant that there had been pornographic magazines, videos, photographs and a Polaroid camera (SU9.5).

(b) The absence of any evidence concerning the claim by the complainant that he had gone with the appellant to play squash (SU10.3).

(c) The absence of any evidence concerning the claim by the complainant that telephone calls were made by the appellant to the home of the complainant and some by the complainant to the flat of the appellant (SU10.6).

(d) The absence of records and/or other evidence concerning whether the appellant owned or had access to a particular blue Datsun motor car at times pertinent to the counts (SU11.7).

(e) The inability (by either party) to obtain a copy of a 1982 Year Book for the school to demonstrate whether the appellant might have obtained from that source the telephone number of the complainant (SU12.8).

(f) The inability of the appellant to raise alibi given the delay and imprecision of the dates of the offences (SU13.4).

(g) The absence of any record of the layout of buildings at Kangaroo Valley, particularly since the one relevant to the proceedings (the "farm cottage") was said to have been destroyed by fire prior to the time of the relevant offence (SU14.1).

16 As mentioned above, his Honour gave examples of the way in which, in fact, the appellant had been prejudiced in the preparation of his trial. It is true that in so doing his Honour did make reference to what the defence "said" or what the defence "complained" about and used similar phraseology in that part of his summing-up.

17 What was argued is that his Honour did not give "content" to so much of the warning as is encapsulated by the emphasised phrase above ("the circumstances relevant to its evaluation"). Failure to give content also represented, so it was submitted, a failure on the part of the learned trial judge to explain why it was dangerous to convict as is referred to by Spigelman CJ in *R v Johnston* (1998) 45 NSWLR 362 at 371C. Complaint was made to this Court that dealing with only some of the reasons was insufficient.

18 The next complaint in relation to the first ground related to that part of the summing-up where his Honour (SU15) quotes from the judgment of McHugh J in *Longman*, and informs the jury that he is quoting a judge of the High Court of Australia. What his Honour said was:

> The other aspect or other broad reason for giving you that warning relates to the fallibility of human recollection and, in that context, the best thing to do, in my judgment, is to read out something that was said by a judge of the High Court in Australia in respect of this.
>
> > The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to remember is well documented. The longer the period between an "event" and its recall, the greater the margin for error. Interference with a person's ability to remember may also arise from talking or reading about [or] experiencing other events of a similar nature or from the person's own thinking or recalling. Recollection of events which occurred in childhood ... is particularly susceptible to error and is also subject to the possibility that it may not even be genuine.

19 That extract is taken from the judgment of McHugh J (at 107-108; 483-484) of *Longman*. The appellant acknowledges that his Honour fairly and correctly alerted the jury to the dangers implicit in the fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to remember. However, it was said to have been a continuing theme of the complainant's evidence that he was completely incapable of any precision as to dates or periods of time: one example is provided by the necessity to extend the terminal dates of count 6 — of which he was acquitted — and of counts 7, 8 and 9. Further, it was often the case that he could not be precise as to the activity that occurred surrounding that which was the subject of particular counts. A reading of the evidence of the complainant in chief and in cross-examination certainly confirms the availability of such a description.

20 It was submitted by reference to the Crown prosecutor's address that the Crown prosecutor sought to persuade the jury "against" taking an adverse view of the complainant's reliability "because" of imprecision. In his opening address to the jury the Crown prosecutor had said:

> Now that offences are charged within such a period is not uncommon in a case such as this. You might have already calculated that these offences are alleged to have occurred some nineteen, twenty years ago. Now the reason why offences of that nature are charged in this fashion is really just commonsense. Given the passage of time, it would be unrealistic to expect [the complainant] to nominate a precise date on which an event occurred. It's just commonsense.
>
> And the Crown does not have to prove, in order to discharge its burden of proof, on which particular dates these events occurred.

In his closing address the Crown prosecutor had said:

> 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.

In this context the appellant relies upon statements of Adams J in *R v MM* [2001] NSWCCA 286. That was an appeal by the present appellant in relation to a different set of allegations. The appeal was heard on 4 July 2001 and judgment was handed down on 27 July 2001. I would assume that that Court of Criminal Appeal's judgment in relation to this appellant would have been in the hands of his legal advisors at the time of the trial under this appeal. Although nothing of substance really turns on the matter, it is interesting to note, notwithstanding the connection between this appellant and presumably his legal advisors in that appeal, there was again silence at the conclusion of the summing-up in relation to that part of the first Court of Criminal Appeal decision on which the appellant now seeks to rely, being [18]-[20], [27] and [28] of Adams J's judgment. What his Honour said on that occasion was:

> [18] The appellant submitted that the learned trial judge's directions on the impact of delay were inadequate. Before dealing with the question of delay, his Honour pointed out that there was no independent support for the complainant's evidence of a sexual assault and directed the jury that they could not convict the appellant unless they were satisfied beyond reasonable doubt that this evidence was both honest and reliable. His Honour then directed the jury, as to the evidence of all three principal Crown witnesses, that its reliability may have been adversely affected by the passage of time. His Honour directed the jury as follows —
>
> > [Finally], in relation to this aspect of the passage of time or delay, as you would appreciate, it can operate unfairly to an accused where there has been a delay in the authorities being notified of an allegation. As I say, the delay here is in the order of 25 years, that is, a quarter of a century. That sort of delay can operate unfairly to an accused because he or she has lost the opportunity of fully testing or challenging the complainant's account and credibility and has lost the opportunity of presenting material to a jury to rebut the allegations or raise a reasonable doubt about the complainant's veracity.
> >
> > In this case, you have heard about the incomplete nature of RTA records relating to the registration of motor vehicles as far back as 1972, the absence of school records and the fact that the accused says that he destroyed his own diaries for that period.
>
> [19] His Honour then went on to deal with the reasons that might suggest that the evidence of the three witnesses was unreliable, dealing with the history of communications that might have caused contamination of their recollections and the risk of unconscious confabulation.
>
> [20] These directions concluded with the following —

> As I have said, the two features that I have been discussing, the passage of time and the possibility of contamination mean that the evidence of the complainant, TF and MC may be unreliable. I warn you that it would be dangerous to accept the evidence of any of these three witnesses unless and until you have scrutinised it with the utmost care, bearing in mind the warning I am giving you and the reason for it. You would need to satisfy yourself that their evidence was both honest and reliable and you would need to satisfy yourself that you could, beyond a reasonable doubt, exclude the possibility that their evidence is the product of mistake or contamination before you accept it.
>
> Do not think, members of the jury, that I have given you this warning in order to send you some coded message about what my views are concerning the credibility of these witnesses. In all cases with features of this type that I have identified, all judges are required by an Act of Parliament to give the warning that I have given you in order to guard against miscarriages of justice and innocent people being convicted. They are not intended and you should not treat it as being an attempt by me to convey a view I might or might not have about the credibility of the witnesses.

...

[27] The learned trial judge's directions in this case, as set out above, certainly warned the jury about the possibility that the delay in this case operated unfairly to the accused for the reasons that he mentioned. With unfeigned respect, I consider that these directions fell significantly short of a positive warning in unqualified terms of the crucial point that the defence was in fact unable adequately to test the complainant's — or, for that matter, the other witness' — evidence, so that the disadvantage to the defence and the danger of convicting in the circumstances was not merely potential but real. This was especially important because the jury might have mistakenly thought that, because of the cross-examination that did occur, the evidence for the prosecution had been fairly and adequately tested. Moreover, it is necessary to consider the impact of delay on any positive case that the accused might wish to raise. The jury would very likely have gathered from his Honour's direction that the only respects in which the appellant had been prejudiced by delay was the loss of the car registration and school records and the appellant's diary. But, of course, the appellant had lost much more than the records in question. The circumstantial network of his working and social life, which may have confirmed the change of ownership of his car at the crucial time or accounted for his movements in the winter of 1972, would have obviously long since dissolved. The same is true of the Crown witnesses. This problem was exacerbated by the inability of the prosecution to be precise about the date and place of the offence, a difficulty made all the more significant because the defence case, essentially, was that the accused had never attended such a camp. The inability of the complainant to identify the campsite may have reflected on his reliability as a witness, an argument of which his Honour reminded the jury, although it is likely that this was explained away in the manner pressed on this Court by the Crown prosecutor, namely, it would not be surprising if, after all these years, the site could not be found. However, this is to demonstrate the problem rather than resolve it. Part of the problem with assessing the significance of imprecision and inconsistency in cases such as this is the strong temptation to explain them away by the passing of time. Imprecision and inconsistency, which in the ordinary case, would be significant, are discounted in favour of the prosecution. The extent to which these matters may have assisted the defence or the prosecution is necessarily uncertain, but that very uncertainty gives rise to the danger about which the jury must be warned. The risk that the jury will not appreciate that the case it is hearing may well be, to a greater or lesser extent, an artefact, which has

> been shaped, as it were, by the corrosive effects of time, is a very real one, requiring emphatic directions. With unfeigned respect for the learned trial judge, I consider that his Honour's directions fell significantly short of the warnings required by *Longman* and *Crampton*.
>
> [28] To my mind, the reference by his Honour to the obligation to give the warning as arising by Act of Parliament was, with respect, likely to have qualified its force. It is of the essence of the extracts that I have cited above from the various judgments in the High Court of Australia that the warning must be expressed as arising from the experience of the Courts. Juries are not likely to think that Members of Parliament know very much about the evaluation of evidence in a criminal trial. It also seems to me that the concluding words of his Honour may have been taken by the jury to mean that, in the circumstances it was considering, the warning may not apply and the danger might not be present, when the opposite was the case.

23 The appellant also relies upon, as authority that facilitates the resolution in his favour of ground 1, the following statements of Howie J in *R v DBG* (2002) 133 A Crim R 227:

> [37] But significant delay does not merely affect the ability of the accused to defend himself by depriving him of the opportunity to gather evidence which might at least place a doubt upon the Crown case. It can also prejudice the accused in a more subtle way, as occurred in the present case. By reason of the delay, the complainant was necessarily vague as to the specific occasion upon which she alleged that the first act of intercourse occurred. She was also unable to supply any particularity to the history of sexual assaults that she alleged had been committed upon her except by relating them to the place where they occurred.
>
> [38] The difficulty for an accused person in rebutting that evidence is obvious, at least to the legal mind. On the other hand, a jury might readily accept that, even if the complainant were telling the truth about her allegations, she would, by reason of her young age, the delay and the number of incidents of sexual abuse alleged by her, have difficulty giving any but the barest detail of the circumstances surrounding them. Such a situation might even engender some sympathy for the complainant when those defending the accused require particularity and consistency in her evidence and criticise her when it is not forthcoming. Where such a possibility arises, it is necessary for the trial judge to bring home to the jury the consequences of delay upon the accused's ability to test the Crown's case. It may even be necessary for the trial judge to make it clear to the jury that the delay may have caused the Crown witnesses to become unreliable or in some other way have weakened the Crown case rather than to allow the jury to act on the basis that the delay might excuse or explain apparent defects in the evidence of those witnesses.

24 The appellant also seeks to have exposed the difficulties confronting his legal representative in effectively cross-examining the complainant as a consequence of the delay in complaint and by way of highlighting the incapacity in the complainant to bring any precision to his testimony with the result referred to above in relation to the changing of the dates of certain counts (*R v GS* [2003] NSWCCA 73 at [24] per Buddin J, where his Honour referred to statements of Kirby in *R v WRC* (2002) 130 A Crim R 89 at [142] and [143]).

25 The appellant acknowledges that leave is required pursuant to r 4 and asserts that there could have been no possible tactical advantage for the point not to have been raised by the appellant's counsel at trial. It is a matter, it was argued, in which the trial judge should have received the assistance of both counsel — I am not quite sure what that means. It is certainly unarguable that a trial judge

should receive assistance from counsel. However, the two statements relating to the absence of tactical advantage and the necessity for counsel to assist the trial judge in the context of the particular submission are irreconcilable in my respectful view. The appellant acknowledges that the failure to presumably assist the judge by taking a point brought about "an unfortunate state of affairs" but that the deficiencies, nonetheless, caused the trial to miscarry.

26 The Crown, especially in reliance upon *R v BWT* (2002) 54 NSWLR 241; 129 A Crim R 153 particularly at [95] per Sully J submits that the requirements for appropriate proper direction were met by the learned trial judge. There can be no question, the Crown submits, that his Honour did in fact "clearly and emphatically warn the jury" when one reads what his Honour said in the extracted part of the summing-up and elsewhere, which could only be understood as stressing that the jury was being "warned" that it would be dangerous to convict.

27 Contrary to the submissions of the appellant the Crown argued that there was no dilution of the warning by the use of the language his Honour employed by reference to actual submissions made on the evidence in the case as to prejudice in fact having been sustained by the appellant by reason of the delay.

28 After referring to the delay between the offences and the complaint, the learned trial judge directed the jury 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 and the law recognises this and it is necessary for me to give you some very specific warnings about it" (SU8.6-8.8). His Honour thereafter gave reasons for it being dangerous. He referred to the specific features of the case that could not properly be investigated, being the seven matters to which reference has been made, above.

29 I am persuaded that the Crown's submissions in this regard must be, and in fact are, correct. His Honour did not dilute the warning but rather reinforced it by reference to matters which the body of evidence in the trial over which he presided in fact exposed the peril to the appellant by reason of the delay: see Wood CJ at CL in *R v BWT* (at 247-248; 158-159). In such an appeal as this where the evidence disclosed in fact that delay had caused prejudice, the trial judge can, and indeed should, as his Honour did in this case, refer to those matters. His Honour, in my view, referred to more by reference to the matters of DD, the Kings Cross Hotel and the ex-girlfriend Julie, which had been the subject of submissions to the jury by defence counsel and were reiterated by the learned trial judge (SU 23-28) in circumstances where the jury would have understood that the earlier direction would have incorporated those three further illustrations.

30 As to the appellant's criticism of his Honour's summing-up relating to the "fallibility of human recollection", it is pointed out by the Crown that his Honour quoted verbatim from *Longman* (at 107-108; 483-484) per McHugh J: see summing-up page 15. In the circumstances of this trial it was a sufficient mechanism for applying the appropriate judicial imprimatur to that aspect of the directions pertinent to the effect of delay upon the case.

31 Whilst, for myself, I would have reservations as to a trial judge saying to a jury that he is quoting from a judge of the High Court (the trial judge by reason of his/her position is in a position to give sufficient judicial imprimatur to a direction) by so doing, and the language of the extract being clear and obviously

favourable to the appellant, in context and by reason of the overall structure and specific references made by him, that aspect of the summing-up cannot be impugned.

32 I have hitherto not dealt with so much of the appellant's case in relation to ground 1 that is concerned with the conduct of the Crown prosecutor. That is more specifically dealt with under ground 3. However I can now indicate that as part of ground 1 that conduct plays and can play no part in derogation from the effectiveness of his Honour's summing-up for the purposes of ground 1 and otherwise is incapable of making ground 3, I will not further comment upon it at this stage.

33 The Crown, not surprisingly, and appropriately, distinguishes the directions with which this appellant's first appeal was concerned and, in relation to which the observations of Adams J were made. The same considerations apply, in my respectful view, to the judgment of Howie J in *DBG* and Buddin J in *GS*. In this extraordinarily fragile area of the law great attention must be payed to the particular case in hand and statements made by appellate judges in relation to one "*Longman* appeal" might be indisputably correct in the context of that appeal, but need not necessarily constitute authority for the disposition of another appeal.

34 The Crown also referred to the observations of the Court of Criminal Appeal in *R v ITA* (2003) 139 A Crim R 340 at [92]-[98] per Ipp JA in relation to r 4.

35 In this appeal we have nothing, of course, other than the statement from one side, namely the appellant, that there could have been no conceivable tactical reason for experienced trial counsel's silence at the end of the summing-up on the relevant issues, and on the other, the submission for the Crown that trial counsel did form the view that the incorporation into the warning of reference to the defence submissions was advantageous to the appellant, otherwise no doubt directions would have sought. All of this is really unhelpful.

36 It would be regrettable to the administration of criminal justice if there was evolving some "forensic culture" in sexual offence trials in which *Longman* directions are concerned, for there to evolve a practice of silence on the part of counsel at the conclusion of the summingup on the basis that r 4 would never be applied because any post-trial asserted deficiency in *Longman* directions would go to the heart of the matter, and if made out would amount to a miscarriage of justice.

37 In relation to ground 1, whilst I would reluctantly grant leave, I am of the view that no case has been made out in support of it, that there has been no miscarriage and that the ground fails.

Ground 2: His Honour erred by failing to adequately warn the jury about the use the jury could make of the lengthy delay in complaint in assessing the complainant's credibility

38 The appellant's position, in my view, is even more weak in relation to ground 2. On the appellant's own admission it is clear that a significant delay was said to be apparent and in relation to ground 1 it was dealt with satisfactorily by the trial judge. The appellant refers to his Honour saying to the jury in relation to the girlfriend "Julie", "It may be that you think that it is better to take the view that there is no real evidence of any complaint having been made to anybody at all in this case" (SU7) — apart, of course, than made in

1999 to the police. This was a very favourable "observation" on the part of the trial judge to the jury from the point of view of the appellant. What his Honour said was:

> It may be that you think it is better to take the view that there is no real evidence here of any complaint having been made to anybody at all in this case. On the other hand you may think he said something to this girl and that may well have been a complaint and you would say all right, in 1999 sometime shortly before the police came [sic] involved he raised it with a girl that he was associated with. The position either way is either there was not a complaint or if there was it was in 1999 and we are dealing here with matters alleged to have occurred in 1982 and 1983 and possibly the beginning 1984.
>
> It is said, very broadly, on behalf of the accused, that given that it is quite inconsistent with somebody who actually has had offences of that nature alleged here or any such offence committed against them. What I have to tell you first of all about the absence or significant delay in making a complaint is this. It is a matter which, of course, you consider. But I have to warn you, that the mere absence of a complaint does not necessarily indicate that the evidence of the complainant is false. It may indicate fabrication on the part of the complainant but it does not necessarily do so. There may be good reasons why a person who has been sexually assaulted does not complain to anyone.
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> In relation to the good reasons, you heard some evidence from SM2 that at the time when he was at the school he was not going to raise what was happening because he did not want anybody to know. You may think there is not much evidence before you as to the succeeding years except his evidence, "I tried to blot it out, put it behind me and just, as it were, obliterate it". So there is the explanation, it is a matter for you to take into account when you way [sic] up the weight and credibility to attach to his evidence. It is a criticism which is appropriate to make but where it gets the maker of the point is up to you.

39 It is also to be noted that his Honour gave the following direction (SU16) in relation to the separate counts:

> Just be you reach one conclusion on one count, you do not say, well that is it, that applies to all of them. Each one relates to a separate allegation and you have to consider the evidence in relation to each one separately save in this respect: as each count depends entirely upon what you make of [the complainant], if you were doubtful about his reliability in relation to one count, then you must take that into account when you are considering the other counts. So doubtfulness about his reliability is relevant to considering the other counts. The converse is not so.

Compare *R v Markuleski* (2001) 52 NSWLR 82; 125 A Crim R 186; see also *MFA v The Queen* (2002) 213 CLR 606; 135 A Crim R 361.

40 The appellant's submissions in relation to this ground are, in my view, rhetorical, for example, where for him it is said that the trial judge by reason of the use of the phrase "where it gets the maker of the point is up to you" must necessarily have been regarded by the jury as almost dismissive of the appellant's argument. The appellant repeats the obligation upon the trial judge to give a meaningful direction very carefully to consider the issue of credibility.

41 I am satisfied from the particular extracts above, and from the overall summing-up in the context of the trial over which his Honour was presiding, that his Honour's directions were sufficient in this regard. In effect, his Honour commenced the relevant part with a favourable direction to the jury so far as the appellant is concerned in terms of the reference to the girlfriend. Otherwise, the directions were sufficient to alert the jury to the competing considerations concerning the absence of any complaint until 1999. His Honour highlighted the

effect on the credibility of the complainant occasioned by matters referred to above and particularly the second extract to which I have referred. There was neither any "passing reference" nor any "dismissive" component of his Honour's summing-up.

42 In relation to this ground I would refuse leave. On the other hand, if leave was granted, there would be no basis for a finding that there had been any miscarriage.

Ground 3: The trial miscarried because the Crown prosecutor addressed the jury in a manner that undermined the effect of the directions his Honour gave concerning the need to scrutinise the complainant's evidence with great care and the problems caused by the very lengthy delay in complaint

43 Regrettably, in my view, the written submissions for the appellant, of which appeal counsel was not the author, are rhetorical and tendentious. It is of no assistance to this Court to refer to "the prosecutor having made an emotional pitch to irrelevant and generalised policy considerations".

44 What the learned Crown prosecutor said in his closing address to the jury was:

> 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.

45 In the overall context of this trial it can be understood, in my view, that what the learned Crown prosecutor was doing was referring to remarks made by defence counsel in his opening to the jury. It is desirable to add some context. What the Crown prosecutor said was part of a series of remarks (T 29/8/02 552.5 and following) that referred back to the observation by defence counsel in his opening address to the jury. What had been said was:

> 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 [sic] as events that occurred, but looking back in time in relation at 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 asses this evidence to that degree of your being satisfied beyond reasonable doubt.