PY v The Queen [1999] NTCCA 44

PARTIES:	**PY**
	V
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 23 of 1997
DELIVERED:	28 April 1999
HEARING DATES:	18 March 1999
JUDGMENT OF:	MILDREN, THOMAS & RILEY JJ

CATCHWORDS:

Appeal - leave to appeal - failure to seek redirection
Appeal - new trial - criminal law - miscarriage of justice - long delay between alleged offences and trial
Appeal - criminal law - inability to fully test the evidence - failure to administer Longman direction - overriding responsibility of trial judge to ensure fair trial by full directions

Statutes:
1. *Sexual Offences (Evidence and Procedure) Act 1983:* s4(5)a
2. *Supreme Court Rules:* 86.08

Cases:
1. *Latcha v The Queen* (1998) 127 NTR 1, referred.
2. *Longman v The Queen* (1989) 168 CLR 79, discussed.
3. *R v Johnston* (Court of Criminal Appeal, NSW, 31.7.98, Butterworths Unreported Judgments No. BC9803517) Spigelman J, referred.
4. *R v K* (1997) 68 SASR 405, discussed.
5. *The Queen v Kenny* (Court of Criminal Appeal, NSW, Unreported, 29 August 1997) discussed.
6. *R v Aristidis* (1998) QCA 422, discussed.
7. *R v Robertson* (1984) 4 VR 30, discussed.

REPRESENTATION:

Counsel:

Appellant:	S. Cox
Respondent:	R. Wild Q.C. and J. Whitbread

Solicitors:

Appellant:	N.T. Legal Aid Commission
Respondent:	D.P.P.

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

PY v The Queen [1999] NTCCA 44
No. CA 23 of 1997

BETWEEN:

PY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, THOMAS and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 28 April 1999)

THE COURT:

[1] The appellant, who was aged sixty-seven at the time of his trial, was charged with one count of rape, one count of indecent assault, and five counts of incest, one of which was an alternative to the count of rape. The prosecutrix in respect of each count was his daughter. The offences were alleged to have occurred between 1976 and 1981, when the prosecutrix was aged between twelve and seventeen years of age,

although the prosecutrix alleged that sexual abuse had begun when she was approximately five years of age. The prosecutrix first complained in 1978 to an older woman with whom she was working at a supermarket. No other action was then taken. The prosecutrix left home in 1981. No complaint to the police was made until 1994. Accordingly, the complaint to the police was eighteen years, approximately, after the first count on the indictment, (the rape count) and thirteen years after the last count on the indictment.

[2] The Crown alleged that, from the age of five to ten years, the complainant was visited by the appellant in her bedroom at night, who touched her on the genitalia. From the ages of ten to thirteen years, the Crown alleged that the appellant had entered her bedroom and inserted a finger into the complainant's vagina. These matters were not the subject of any count on the indictment, but were admitted as relationship evidence.

[3] Count one, which is the rape charge, is alleged to have occurred between January and December 1976 at the family home. Count two, is the alternative charge of incest to count one. Count three, the indecent assault, is alleged to have occurred, after the family had moved to another suburb, and at some time between 1 January 1978 and 31 December 1979. This offence is alleged to have occurred in the applicant's bed one Saturday morning. The complainant was then aged fifteen. Her younger sister, who was then aged five, is alleged to have seen the assault for a "split second", although she never mentioned this to anybody until after

her sister had complained to the police years afterwards. Count four is alleged to have occurred when the complainant and her younger sister stayed in a hotel in Katherine overnight in 1978 or 1979, whilst accompanying the applicant on a work-related journey. Counts five and six are alleged to have occurred at a motel in Darwin in 1981, at a time when the applicant had left home for a period of a week. It was alleged that the applicant had telephoned the complainant at her work and had asked her to visit him at the hotel. She did so, and had sexual intercourse with the applicant on two occasions. The complainant was then seventeen and a half years old. Count seven was alleged to have occurred at home at some time in 1981 on the night before the complainant left home.

[4] The jury returned verdicts of not guilty in relation to counts six and seven and verdicts of guilty in relation to counts one, three, four and five, and the applicant was sentenced to twelve years imprisonment with a non-parole period of six years.

[5] The sole ground of appeal sought to be argued related to the learned trial judge's charge to the jury as to the significance of the delay in not making any complaint to the police until the end of 1994. In fact the applicant was not spoken to by the police until March 1996, thereby extending the period between the date of the alleged offences and the appellant's knowledge of the making of the complaints by a further fifteen months.

[6] Apart from the evidence of the complainant's sister in relation to count three, there was no corroboration of any of the other complaints.

[7] The learned trial judge warned the jury, in the usual terms, consistent with the provisions of section 4 (5)(a) of the *Sexual Offences (Evidence and Procedure) Act 1983* and the decision of this Court in *Latcha v The Queen* (1998) 127 NTR 1 at 4 - 5, to the general effect that it was dangerous to convict in the absence of corroboration, but that the jury may convict solely on the evidence of the prosecutrix if, having regard to the warning just given, they are satisfied as to the truth and accuracy of it. His Honour also gave directions as to the relevance of the delay in making any complaint, in so far as this may have affected the complainant's credit. No complaint is made about that. Ms Cox, for the applicant, submitted however that the warning given was inadequate because it did not draw to the jury's attention the applicant's loss of means of testing the complainant's allegations due to the delay in prosecuting the complainant's allegations and that this delay adversely affected the ability of the applicant to defend himself. Reliance was placed on a number of authorities, including *Longman v The Queen* (1989) 168 CLR 79.

[8] It was common ground that counsel for the applicant at the trial did not ask the learned trial judge to redirect the jury; accordingly leave to appeal is required: Rule 86.08. Evidence was tendered before us to show that trial counsel's failure to seek a redirection on this point was not a tactical

decision, but due to inexperience and a failure by him to apply his mind to the question.

[9] The Director of Public Prosecutions, Mr Wild QC, submitted that on the facts and circumstances of this case, no additional warning of the kind suggested by Ms Cox was required.

[10] After hearing submissions the Court was unanimously of the view that leave to appeal should be granted, that the appeal against the convictions on counts one, three, four and five should be allowed, that these convictions should be set aside, and that there should be a new trial in relation to counts one, two, three, four and five, and orders were made accordingly. The Court said that it would provide reasons at a later time; we now do so.

[11] In *Longman v The Queen* (1989) 168 CLR 79, Brennan Dawson and Toohey JJ said, at 91:

> But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them: see *Reg v Spencer*. That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay (see *Jago v District Court (NSW)*) and it was imperative that a warning be given to the jury. The jury should have been told that, as the evidence of the

> complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice. The jury were told simply to consider the relative credibility of the complainant and the appellant without either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient.

[12] It is important to emphasise, as Mr Wild QC submitted, that what is required by way of direction is always a matter which depends upon the whole of the circumstances. There is no fixed formula, or body of rules; the summing up must be tailor-made to fit the circumstances of the case. These circumstances include, in an adversarial system of justice, the boundaries of the dispute chosen by the advocates. Nevertheless, the trial judge has an overriding responsibility to ensure that a trial is fair; if there are circumstances which warrant the giving of a specific kind of warning it should be given although neither counsel has sought it. So far as this Court is concerned, what the appellant must demonstrate is that a miscarriage of justice occurred by the failure to give the suggested direction. Support for each of these propositions may be found in *R v Johnston* (Court of Criminal Appeal of New South Wales, 31/7/98, Butterworths Unreported Judgements No BC9803517) per Spigelman CJ at 9 ff (with whom Sully and Ireland JJ agreed) where most of the relevant authorities are reviewed.

[13] In *R v K* (1997) 68 SASR 405, Doyle CJ said, (in a case where the delay was six years) at p 410:

> It is true, as counsel for the Director of Public Prosecutions argued, that this was a short trial and that the issues should have been clear. It is also true that the delay was self-evident. The delay will be self-evident in most cases, but the law still requires a warning in appropriate circumstances, and in my opinion these were appropriate circumstances for a warning. It is also true that there was no request for a further direction on this matter. In some cases that will be significant because the absence of any complaint or request for a further direction will indicate that, in the context of the trial, what might seem on appeal to be an error or omission, did not in fact have the significance that it appears to have. However, in the present case in my opinion there was a clear need for a warning to ensure a fair trial, and the omission by counsel at the trial to seek a warning cannot alter that fact.
>
> In my opinion the lack of a warning was compounded by two other matters. First, in my opinion the trial judge did not direct the jury adequately about the significance of certain difficulties in the prosecution case, and the fact that the jury might consider that those difficulties reflected adversely on the credibility of B. If it did, then it might adversely affect the jury's attitude to the evidence of B not just on the particular count in relation to which the difficulty arose, but more generally. The second compounding factor is the failure of the trial judge to explain to the jury adequately the difficulty caused for the defence by the delay in the making of the complaint.
>
> I will deal with the second of these points first.
>
> In the passage set out above, the trial judge did allude to the problem of a belated allegation. But he did so only in a very general way. I consider that more, although not much more, was called for. In my opinion the trial judge should again have given the point his own authority. He should have brought home to the jury more clearly the difficulty which may face an accused person in providing details or background circumstances to events which have occurred some years in the past. It was important to bring home to the jury that the delay in the making of the complaint may have put the accused in the position that he was unable to grapple fully with the prosecution case.

[14] Long delay in the bringing of a complaint to the notice of a defendant will very often make it difficult for an accused to defend himself, regardless of the type of charge which is brought. The effect of long delay on any trial can take many forms. Witnesses may have disappeared or died; documentary evidence may have become incomplete or lost; the accused's ability to remember the details of events or conversations alleged to have occurred, may be lost or impaired. Due to the delay, the complainant may be unable to specify with accuracy the date and time of the alleged crime, and this may prevent the accused from establishing an alibi. In many cases where the prosecution case is principally that of the word of one witness against the word of the accused, the accused will often be able to do little more than deny the charges, and test the credibility of the Crown's principal witness on what may appear to be peripheral issues. In cases involving long delay, the ability of the accused to test the Crown's principal witness on credibility issues is likely to be affected by the inability of the accused to recall events or conversations, or to gather evidence, including documentary evidence which may be of assistance to his defence. The full significance of such delay is not likely to be appreciated by jurors without instruction by the trial judge.

[15] The delay in this case is very long. It is not difficult to imagine that it must have affected the ability of the accused to defend himself. Mr Wild QC submitted that this inference should not be drawn. He pointed to the absence of any missing potential witnesses, the fact that the offences in

relation to counts one and three took place in the applicant's home, so that it could not be suggested that he was not familiar with the layout of the *locus in quo*; the evidence showed that the applicant admitted to having the opportunity to commit the offences in the circumstances alleged; there was no lost opportunity of an alibi; there was no lost or destroyed material, documents or records which would have affected the applicant's ability to present his case; and that the fact that his counsel made no complaint of this, either to the judge or jury in his final address, supported the conclusion that there was no miscarriage of justice in this case.

[16] In our opinion, the delay in this case is so long that it must be inferred that the fairness of the trial had necessarily been impaired, requiring the giving of an appropriate instruction to the jury even in the absence of any matter to which counsel for the applicant could specifically point. However, there were such matters. First, two of the counts on which the applicant was convicted related to alleged offences which occurred in motels or hotels. The motel, in relation to count five, no longer exists. There was a dispute, on the evidence, as to whether the applicant had stayed in this motel for one night, as the applicant maintained , or a week, as the complainant maintained. The complainant's evidence was that the applicant had telephoned her at work, presumably from the motel, and asked her to visit him, which she did. The applicant denied this. According to the complainant's evidence, they had intercourse on two

separate occasions during this period. The delay has prevented the applicant from obtaining records from the motel to show that he stayed in the motel for one night. It has prevented any meaningful cross-examination about the *locus in quo*. It has prevented the applicant from pursuing telephone records to see if it could be shown that no telephone call was made from the motel to the complainant's place of work. As to count three, the applicant's evidence was that he had stopped at Katherine on the way back to Darwin from Timber Creek. The complainant denied ever going to Timber Creek. The absence of records due to the long delay may have prejudiced the applicant in obtaining some support for his story. In cases like this, although objectively the support might be small, it could assume significance in the minds of a reasonable jury. Again the *locus in quo* could not be adequately described. Thus areas of potential cross-examination upon which the complainant's evidence might have been tested, no longer existed. As to counts one and three, the evidence of the complainant was unable to fix the date of the alleged offence except to say that it occurred in 1976 or, in the case of count three in 1978 or 1979. There was no other event as a point of reference from which the complainant could associate the date of the alleged offences, for example, by reference to a birthday or the like. The applicant may have had an alibi if the dates had been more precise.

[17] It is well established that the failure of counsel to raise this with the trial judge does not necessarily preclude the applicant from seeking leave to

raise the issue in this Court. In one case, *The Queen v Kenny* (Court of Criminal Appeal of New South Wales, unreported, 29 August 1997), the applicant had been represented at his trial by a very experienced senior counsel who had not cross-examined the complainant as to why earlier complaint had not been made, had not focussed on delay in his address to the jury, and had not asked the trial judge to direct the jury along the lines suggested in the passage from *Longman* cited above. The delay in that case was nine years. The appellant in that case was able to muster a considerable body of evidence to address the Crown case, but nevertheless the Court felt that the appellant was disadvantaged by the passage of time. In *R v Aristidis* [1998] QCA 422, the delay was twenty years, and the Court said at p 7 that:

> … the length of delay was so great that a direction should have been given unequivocally emphasising to the jury, as a factor against acceptance of the Crown case, the difficulties created by (sic) the defence by the delay …

even though it would appear that there was no particular matter of prejudice to which the accused could point. There is no suggestion that the trial judge had been asked to give a re-direction. In *R v K* (supra), the delay was only five to six years, and no request for a redirection had been sought. In *R v Roberston* [1998] 4 VR 30, the delay had been between nine and twelve years. No request for a redirection was made. Like this case, the Crown led evidence of a number of allegations of uncharged criminal conduct on the part of the accused. Winneke P said, at 35 – 36:

> For the reasons which I have already stated the fairness of the applicant's trial in this case required that a clear warning be given to the jury of the type contemplated in *Longman's* case. Indeed, as it seems to me, a warning was required not only because of the long delay which had elapsed between the events complained of and the time when the applicant was charged, but also because the complainant's evidence contained a number of allegations of uncharged criminal conduct on the part of the accused which, although not directly probative of the charges, was potentially seductive to the jury and prejudicial to the accused.

Although no request for a redirection was sought, the Court considered the misdirections sufficiently critical as to render the application of the proviso inappropriate.

[18] There are many other similar examples, but it is not necessary to refer to them. The question is whether there has been a substantial or perceptible risk of miscarriage of justice. We considered that this has been demonstrated for the reasons given above.

[19] Accordingly, the appeal was allowed, the convictions set aside and a new trial was ordered in relation to counts one, two, three, four and five on the indictment.